

PLAN FOR THE BAN: PLASTICS CLASSIFIED AS “TOXIC SUBSTANCE” UNDER CANADIAN ENVIRONMENTAL PROTECTION ACT

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Last fall, the Minister of Environment and Climate Change announced the federal government’s next steps towards achieving a plastic waste-free Canada. Since then, several notable changes in plastic regulation have occurred on the federal front. Plastics have now been classified under the [Canadian Environmental Protection Act, 1999](#)^[1] (“CEPA”) as a “toxic substance”. In addition, there are proposed amendments to CEPA currently being considered by the federal government that would prohibit the export of plastics to foreign jurisdictions for final disposal.

This is the third bulletin in our “Plan for the Ban” series regarding prohibitions and increased regulation regarding single-use plastics.^[2] This bulletin focuses on the potential impacts to businesses arising from these recent and proposed amendments to CEPA.

Plastics as a “Toxic Substance”

On April 23, 2021, [Canada's Administrator in Council ordered that](#) “plastic manufactured items” immediately be added as a toxic substance under Schedule 1 of CEPA (the “**Order**”), which amendment came into force that day.^[3] The Order arose from growing concerns surrounding the amount of plastic that is not recycled, but rather discarded in landfills, incinerated, or otherwise entering the environment as plastic pollution. In its Order, the Administrator in Council noted that of the estimated 3,268 kilotonnes of plastic generated in Canada in 2016, only 305 kilotonnes, or 9%, was recycled. The presence of plastic pollution poses detrimental risks to the environment, including harm to animals, disrupting ecosystems and transporting disease.

The Order was issued following consultations with stakeholders between April 2018 and May 2020 focused on exploring solutions, barriers and options to help Canada achieve zero plastic waste. While the classification of plastics, a product used by all Canadians in their daily life, as “toxic” has been met with criticism, CEPA in its current form requires products, materials and compounds to be classified as a toxic substance before limitations on its use and disposal in Canada can be regulated.

While not defined in CEPA itself, the Regulatory Impact Analysis Statement published with the Order defined plastic manufactured items as follows, which is broad enough to classify virtually all plastic products as a toxic substance:[\[4\]](#)

Plastic manufactured items are any items made of plastic formed into a specific physical shape or design during manufacture, and have, for their intended use, a function or functions dependent in whole or in part on their shape or design. They can include final products, as well as components of products. All plastic manufactured items have the potential to become plastic pollution.

By classifying plastics as a toxic substance under CEPA, Environment and Climate Change Canada (“**ECCC**”) now has broad authority to take risk management actions to mitigate any adverse ecological effects of plastics. Such actions may comprise enacting regulations to ban or limit the use of certain plastic products including those identified as subject to the federal ban [announced by the Minister on October 7, 2020](#), as well as pollution prevention plans and environmental codes of practice.

Given the broad and sweeping powers given to ECCC pursuant to its toxic substance management authority under CEPA, businesses should be mindful that additional regulations or governmental guidance on plastic management, production and end-of-life obligations are likely to come following this amendment, particularly in light of [ECCC’s anticipated ban on certain single-use plastics by late 2021](#).[\[5\]](#)

Prohibition on Plastic Waste Exports

On June 2, 2021, [Bill C-204, An Act to Amend the Canadian Environmental Protection Act, 1999](#), was adopted by the House of Commons and, as of the date of this, it is before the Senate Committee for approval.[\[6\]](#) The Bill would prohibit the export of “plastic waste” to foreign countries, such as the United States and China, for final disposal.

Bill C-204 finds its roots in concerns over Canada’s approach to exporting its waste products for disposal in foreign countries. As Member of Parliament Scott Davidson commented when introducing the bill in the House of Commons, “Canada has been treating the rest of the world as its dumping ground” for too long.[\[7\]](#) Canada is a signatory to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the “**Basel Convention**”), which requires an importing country to have prior informed consent when accepting hazardous or non-hazardous waste from an exporting country.[\[8\]](#)

Canada ratified the Basel Convention on August 28, 1992 and [amendments to the Basel Convention recently came into effect on January 1, 2021](#).[\[9\]](#) These amendments require exporting countries to seek written prior informed consent from an importing country before shipping plastic waste that has limited recycling options or is otherwise difficult to recycle, such as contaminated or multi-polymer plastics. As the Basel Convention has

been law in Canada since 1992, these amendments are binding on Canada.^[10]

Canada has, on several occasions, failed to adhere to its commitments under the Basel Convention. For example, in 2013 and 2014, Ontario-based plastics exporter, Chronic Inc., shipped 1,500 tonnes of supposedly recyclable plastics to the Philippines. However, these shipments also contained metals, papers and household garbage. This failing under the Basel Convention [prompted public outcry and even threats of war from Philippines' President Rodrigo Duterte](#) in the event that Canada did not take back its trash.^[11] Bill C-204 was born as a means of preventing this and other similar incidents from occurring in the future.

However, during the House of Commons debates on Bill C-204, some Members of Parliament raised concerns over the bill's application in light of Canada's commitments under the Basel Convention. The prior informed consent requirement of the Basel Convention alongside Bill C-204 would create two sources of legislation regulating waste export in Canada, potentially creating confusion for stakeholders regarding which regime applies to their waste products and particular circumstances.

Bill C-204 specifically defines "plastic wastes" to include certain plastics such as ethylene, styrene, and polypropylene, among others; these would be a prohibited export pursuant to the bill. However, plastics that are not "plastic wastes" under Bill C-204 could be exported pursuant to the Basel Convention's prior informed consent provisions. Due to this potential for two concurrent regimes, stakeholders should ensure they understand and adhere to their regulatory duties relating to export of plastic waste depending on the nature of the products they are producing and/or managing.^[12]

Takeaways

Currently, Bill C-204 is still working its way through the Senate and may or may not become law. However, businesses whose activities involve the use and/or disposal of plastics or other waste exports should consider how such a law could impact them and their modes of operation. For example, businesses that use waste handlers with export operations could find themselves facing uncertainty in their current arrangements depending on how Bill C-204 impacts their existing operations. Further, in the event that Bill C-204 does not become law, Canada may still table alternative legislation regulating plastic waste exports to avoid similar situations like that with the Philippines.

Canada's approach to plastic production and waste management is still developing, and further changes are likely imminent. McMillan LLP's Regulatory lawyers will continue to report on these, and other changes, in this landscape as they unfold.

^[1][\[ps2id id='1' target=''\]](#) [Canadian Environmental Protection Act, 1999](#), SC 1999, c 33.

^[2][\[ps2id id='2' target=''\]](#) Talia Gordner and Cody Foggin, ["Plan for the Ban: Single-Use Plastic Bans are Rolling](#)

[Out Across Canada – Are You Ready?](#) (September 2020); Talia Gordner and Cody Foggin, [“Plan for the Ban: Canada Announces Plan to Tackle Single-Use Plastics”](#) (October 2020).

[3][ps2id id='3' target=''] [Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999: SOR/2021-86](#), (23 April 2021) C Gaz II.

[4][ps2id id='4' target=''] *Ibid.*

[5][ps2id id='5' target=''] ECCC, [“Portfolio Accomplishments: Appearance before the Standing Committee”](#) (10 March 2021).

[6][ps2id id='6' target=''] [Bill C-204, An Act to Amend the Canadian Environmental Protection Act, 1999](#), 2nd Sess, 43rd Parl, 2020-2021 (as passed by the House of Commons 2 June 2021).

[7][ps2id id='7' target=''] Canada, Parliament, [House of Commons Debates](#), (7 February 2020) at 1205.

[8][ps2id id='8' target=''] Environment & Climate Change Canada, [“Transboundary movement of hazardous waste: Basel Convention”](#) (27 April 2020).

[9][ps2id id='9' target=''] Environment & Climate Change Canada, [“Basel Convention plastic waste amendments: Impacts on Canadian recycling industry”](#) (26 January 2021).

[10][ps2id id='10' target=''] Environment & Climate Change Canada, [“Transboundary movement of hazardous waste: Basel Convention”](#) (27 April 2020).

[11][ps2id id='11' target=''] Katie Dangerfield, [“The Philippines is shipping back Canada’s heaping garbage. What’s Ottawa going to do with the trash?”](#) (30 May 2019).

[12][ps2id id='12' target=''] Canada, Parliament, [House of Commons Debates](#), (14 May 2021) at 1409-1410.

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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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