

Wait, is Plastic Still Banned?

The State & Future of Plastic Regulation in Canada

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Canada's Single-Use Plastic Ban

Under Canada's G7 presidency in 2018, Canada championed the development of the Ocean Plastics Charter

In November 2018, through the Canadian Council of Ministers of the Environment, the federal, provincial and territorial governments adopted the *Canada-wide Strategy on Zero Plastic Waste*

- *Phase 1 of the Action Plan (2019) - actions to improve the circularity of plastics and make the systems change needed to reduce plastic waste*
- *Phase 2 of the Action Plan (2020) - actions to reduce plastic pollution, raise awareness, strengthen science and take global action*

Order in May 2021 to add "plastic manufactured items" (PMI) to Schedule 1, the Toxic Substances List, of the *Canadian Environmental Protection Act, 1999*



The Road to Ban Single-Use Plastics

1. Deloitte Study (2019): "Economic Study of the Canadian Plastic Industry, Markets and Waste"

- 29 kilotonnes of plastic waste (1% of all plastic waste generated) released into the environment in Canada in 2016, 86% was in landfills

2. Science Assessment

- A review of over 600 scientific publications on the current state of the science on the potential impacts of plastic pollution on the environment and human health
- Looked at the effects of both macroplastics (plastics greater than 5mm) and microplastics (plastic particles less than or equal to 5mm in size) on the environment and on human health

3. Discussion Paper: "A proposed integrated management approach to plastic products to prevent waste and pollution"

- Published to propose other changes to regulating plastic products including:
 - banning or restricting certain single-use plastics;
 - establishing recycled-content requirements for plastic products and packaging
 - developing consistent national targets, standards and regulations in concert with provincial and territorial governments to mandate extended producer responsibility for plastic products



Order Adding Plastics as a Toxic Substance (Schedule 1)

- On May 12, 2021, the federal government added “**plastic manufactured items**” to the List of Toxic Substances (Schedule 1) of *CEPA*:

“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”

- The **Minister of the Environment** and the **Minister of Health** were satisfied that PMI met the criteria for a **toxic substance** under the *CEPA* (s. 64):
 - “a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that
 - (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
 - (b) constitute or may constitute a danger to the environment on which life depends; or
 - (c) constitute or may constitute a danger in Canada to human life or health.

Canadian Environmental Protection Act, 1999 (CEPA)

- The federal government's primary environmental statute
- Allows the federal government to regulate the following:
 - Quantities or concentration of a substance released in the environment
 - Commercial, manufacturing or processing activities
 - Import quantities
 - Advertising or sale of products
 - Packaging and labelling of substances
 - Requiring pollution prevention plans, etc.



Consequences of Order

- **Not a ban!**
- The Order grants the Ministers the authority to, among other things:
 - develop risk management measures under *CEPA* to address the potential ecological risks associated with certain plastic manufactured items; and
 - regulate how these products are to be processed, exported, stored, transported, and packaged
- But led to the ban: *Single-Use Plastics Prohibition Regulations*
 - Prohibitions on six categories of single-use plastics: checkout bags, cutlery, foodservice ware made from or containing “problematic plastics”, ring carriers, stir sticks, straws (excludes flexible straws for health and accessibility reasons)
 - Came into force on Dec. 20, 2022
- Will be key in the implementation of regulations on recycling and labelling rules and the federal plastic registry under the *CEPA*

Legal Challenge of the Order

- On May 18, 2021, the Responsible Plastics Use Coalition launched a legal challenge of the Order arguing that the Order is:
 1. **Scientifically Inaccurate:** the designation is not supported by scientific evidence that plastics are toxic
 2. **Unrelated:** “plastic manufactured items” do not meet *CEPA*’s definitions of substance and toxic
 3. **Unconstitutional:** the designation intrudes on provincial jurisdiction over waste management under Section 92 of the *Constitution*
 4. **Unreasonable:** will result in far-reaching and unintended consequences
- On July 15, 2022, the RPUC, Petro Plastics Corporation Ltd., and other groups launched another lawsuit with respect to the *Single-Use Plastic Prohibition Regulations*



Federal Court: *Order was both Unreasonable and Unconstitutional*

- PMI too broad to be listed on toxic substances list in Schedule 1 – have to be toxic within meanings prescribed by Act
- Discussion Paper indicated not all PMI are harmful
- No finding in the Science Assessment that all manner of plastic items cause harm when released into the environment regardless of their shape, size, or purpose at the time of release
- GIC, knowing that certain PMI included in scope of listing were not toxic, acted outside their authority in listing broad category of PMI on Schedule 1



The Canadian Environmental Protection Act, 1999, is criminal Law

- *R v. Hydro-Quebec*: the protection of the environment through prohibitions against toxic substances, is a “wholly legitimate public objective in the exercise of the criminal law power”
- To use criminal law, what is being restricted has to actually be dangerous i.e., has to be a harm:
 - *There was no intention that the Act should bar the use, importation or manufacture of all chemical products, but rather that it should affect only those substances that are dangerous to the environment, and then only if they are not regulated by law.*
- No reasonable apprehension that all listed PMI were harmful
- Broad and all-encompassing nature of category of PMI posed threat to balance of federalism as did not restrict regulation to only PMI that truly had potential to cause harm to environment



What now? Are plastics still banned?

YES!!

- On January 25, 2024, Federal Court of Appeal granted a stay of the decision meaning that the regulation of single-use plastics under CEPA remains in effect or else:

"irreparable harm would be done to the orderly roll-out of the Single-use Plastics Prohibition Regulations and considerable confusion would arise for the many businesses that have moved to comply with their provisions"

- But the saga continues: FCA directed that the appeal be expedited and that it may be heard no later than June 7, 2024
- Ban likely to be in effect until final decision is issued by the Supreme Court of Canada – might take a few more years



What else is at risk?

- **Recycled Content and Labelling for Plastic Products Regulations:**

- Recycled content requirements - minimum levels of recycled post-consumer plastics in packaging, reaching 50% recycled content by 2030
- Recyclability labelling rules requiring accurate information on whether packaging or SUPs are recyclable
- Compostability labelling rules prohibiting the terms “biodegradable” or “degradable” on plastic packaging and SUPs and limiting the use of the term “compostable”
- **The Federal Plastics Registry** - to improve knowledge of plastic waste, value recovery, and pollution across Canada including by making such data accessible to all Canadians



Governments & the Constitution



Federal

Criminal Law:
Canadian Environmental Protection Act, 1999

Seacoast and Inland Fisheries:
Fisheries Act

Federal Lands: *Impact Assessment Act*

Peace, Order and Good Government: *Greenhouse Gas Pollution Pricing Act*

Empire Treaty: *Migratory Birds Convention Act, 1994*



Provinces

Property and Civil Rights in the Province:
Environmental Protection Act, Ontario Water Resources Act, Lakes and Rivers Improvement Act, Endangered Species Act, etc.

Municipal Institutions in the Province: *Municipalities Act, 2001*

Management of Provincial Crown Lands: *Public Lands Act*

All Matters of a Merely Local or Private Nature in the Province



Municipalities

No direct constitutional authority

Provincially-delegated responsibilities

Federal Agenda:

Zero Plastic Waste by 2030

- Single-use Plastic Ban
- All plastic packaging to contain at least 50% recycled content by 2030
- Accelerate zero plastic waste action plan with provinces and territories
- Implement and enforce recycling target of 90 per cent – aligned with Quebec and EU – for plastic beverage containers
- Introduce labelling rules that prohibit the use of the chasing-arrows symbol unless 80 per cent of Canada's recycling facilities accept, and have reliable end markets for, these products
- Support provincial and territorial producer responsibility efforts by establishing a federal public registry with annual reporting on plastics in the Canadian economy.

Others:

- New infrastructure and innovation fund to scale-up and commercialize made-in-Canada technologies and solutions for reuse and recycling of plastics.
- Build on the Ocean Plastics Charter by working with leading countries on a new global agreement on plastics.



Global Plastic Pollution Treaty

The Agreement to End Plastic Pollution

2 March 2022, Nairobi – 175 nations agreed to develop a legally binding agreement on plastic pollution **by 2024**

Treaty draft covers:

- All stages of the plastic value chain, from primary plastic polymers to waste management
- Promoting better product design to reduce plastic use and improve recycling
- The need to limit the types of additives and plastics
- Provisions on extended producer responsibility

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Supreme Court of Canada: *R v. Hydro-Quebec*

“In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. **I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power.** Great sensitivity is required in this area since, as Professor Lederman has rightly observed, environmental pollution “is no limited subject or theme, [it] is a sweeping subject or theme virtually all-pervasive in its legislative implications”

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