State of regulation of plastics in Canada: The basics

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Introduction

Plastics have become part of the fiber of daily life in Canada. Their low cost, durability and utility make them an attractive material. Over the last 70 years, the production of plastics globally has increased more than any other manufactured material.[1] Plastic resin and plastic product manufacturing in Canada accounts for more than five per cent of sales in the Canadian manufacturing sector.[2] If the trend continues in this regard, current forecasts predict little change in the current management of the plastics economy.[3]

However, as highlighted by The Honourable Jonathan Wilkinson, Canada's minister of Environment and Climate Change, in a news release dated Oct. 7, 2020, the government recognises that Canadians expect them to take action in order to improve environmental protections and reduce plastic pollution across the country:

> "Plastic is polluting our rivers, lakes, and oceans, harming wildlife, and generating microplastics in the water we use and drink. Every year, Canadians throw away 3 million tonnes of plastic waste, only 9% of which is recycled, meaning the vast majority of plastics end up in landfills and about 29,000 tonnes finds its way into our natural environment."[4]

Environment and Climate Change Canada reached the same conclusion in its 2018 report, stating that the current ways of dealing with plastic are a threat to "ecosystems, human health and livelihoods, and costing billions of dollars a year in lost economic value and other damages."[5] These conclusions in themselves are quite worrying. Where, then, does that leave us?

On one hand, plastics are incredibly useful, functional and versatile. On the other, waste from plastic has been seen to have harmful effects throughout the lifecycle of plastics products, packaging and other materials with plastic additives. To support the efforts of stakeholders across Canada in tackling this, there is value in understanding the challenges and opportunities presented by various proposed commercial and regulatory solutions that are emerging domestically and internationally.

In this first installment of the BLG Plastics Series, we start with the basics by looking at the economics of plastics and the range of plastic products available, as well as current state of plastics regulation across Canada. By establishing a clear framework around the allocation of responsibility for managing plastics, as well as a baseline of current plastics regulation, new initiatives around plastics and their waste can be better understood.

Defining plastics

Plastics as a general term encompasses a variety of products and can be classified into sub-categories. These can, in turn, be traced throughout the plastics value chain, from raw material production and product manufacturing to use and end-of-life.

A plastic is fundamentally a material made of a polymer.[6] Types of plastics can be subcategorized according to their chemical make-up and use. In Canada, plastics are classified according to the *North American Industry Classification System* (NAICS). These classifications are based on the technical properties of the product. Given their related technical properties, plastics and rubber manufacturing products are in the same category.[7] Within plastics, subcategories are applied by industry groups and product types.[8]

While the chemical composition of plastics is a scientific question, how regulations define types of plastic products can have a real impact on manufacturers and the market.[9]

For example, the recent EU Single Use Plastics (SUP) Directive[10] defines not only plastics, but also biodegradable plastics, oxo-degradable plastics and packaging.[11] The directive also excludes from its application "natural polymers that have not been chemically modified."[12] As a result, uncertainty remains as to whether lyocell and viscose, polymers used in products such as rayon, are covered by the EU SUP Directive.[13] This is one example of how the application of certain rules or legislation is often a question of thresholds, definitions and exclusions. These classification and definitions of plastics and plastic products in turn shape industry standards and market patterns.[14] As the body of regulation and policies surrounding plastics grows, so to may the number of legal questions and issues.

Single-use plastics and plastic alternatives

Single-use plastics, including straws, bags and cutlery pose a particular challenge and have been the focus of recent attention. These plastic items are often found in the environment, are not recycled and can easily be replaced.[15] This has led to the development of alternatives, as well as policies targeting these products.

Driven by concern for the waste and environmental impacts produced by single-use plastics, the EU adopted, in 2019, a Single-Use Plastic Directive, mentioned above.[16] This directive is part of a larger long-term initiative by the EU to move towards a circular economy and to focus on plastics production and use.[17] In Canada, recent legislative action at the municipal, provincial and federal levels has focused on single-use plastics specially.[18] Following the approach set out in the EU's 2018 Plastics Strategy, the Canadian government recently announced its intention to ban single-use plastics,[19]

which has been the subject to legal challenge on a number of policy and jurisdictional grounds.

Alongside these legislative initiatives, alternatives to plastics have also garnered some traction. Alternatives to single-use plastics include reusable and durable products, as well as “biodegradable” and “compostable” plastics. The development of these products is still ongoing, and their degree of acceptability is not uniform. For example, acceptance and treatment of compostable plastic bags vary across Canada.[20]

Opportunities for compostable plastic are being researched across the country.[21] A number of certifications and standards have also been developed, both in Canada and worldwide.[22] These developments highlight the growing importance of both compostable and biodegradable plastics, and the importance given to the environmental impacts associated with these products.[23] Understanding how different types of plastics are regulated or restricted is crucial in decisions regarding product development and distribution.

Plastics in a circular economy

While plastics bans and product innovation are important steps forward, they also point to the need to rethink the structure of our linear economy to a circular one. Canada has taken a first step in this direction through the Canadian Council of Ministers of the Environment *Strategy on Zero Plastic Waste 2018,* which encourages the adoption of circular economy laws for plastics across Canada.[24] This plan also proposes improvements to recover and recycle plastic, so that it stays in our economy and out of the environment.[25]

A circular economy model is one where materials are reused in a closed loop. Value is returned to the system rather than wasted outside it.[26] If properly implemented, a circular economy would retain value, reduce costs and reduce waste.[27]

The concept of the circular economy is currently being used in different provincial jurisdictions as an incentive to better manage costs associated with end-of-life waste. More specifically, the implementation of the Extended Producer Responsibility (EPR) for product producers who are responsible for these costs[28] will, based on a business point of view, redesign their products and technologies to address these additional costs.

Such structural changes cannot be achieved without concurrent and strategic action by governments, industry and the public.[29] In Canada, the manufacturing, use and end-of-life of plastics are regulated by each level of government, from the federal and provincial down to the municipal and community level. A solid understanding of the state of this regulation is required to understand where we stand, and how we can change it.

How plastics are regulated in Canada: Different levels of government, different responsibilities

Plastics are not uniformly regulated in Canada. While the federal government is responsible for them to some degree, include for product regulatory matters, it is the provinces, territories and municipalities who regulate many environmental protection

matters, including most waste management.[30] This results in a patchwork model of regulation, with some jurisdictions having much stricter plastic regulations than others.

Federal

At the federal level, plastics are primarily regulated under the *Canadian Environmental Protection Act,* SC 1999, c 33 (CEPA). Section 90(1) of CEPA allows Environment and Climate Change Canada to regulate plastics deemed to be toxic by placing them on the List of Toxic Substances, which is Schedule 1 to CEPA.

The CEPA provides the federal government with several mechanisms to manage and restrict substances on the List of Toxic Substances, including the power to implement regulations.[31]

In 2016, the federal government first used the mechanism provided by the CEPA to regulate plastic by adding plastic microbeads of less than five mm to the List of Toxic Substances.[32] This allowed for the enactment of the *Microbeads in Toiletries Regulations*, SOR/2017-111, which prohibits manufacturing or importing toiletries containing microbeads, which were found to contribute to the volume of plastic litter in the environment.[33]

This is the same legal mechanism the federal government plans to use to enact the ban on single-use plastics.[34] While the Ministry of Environment and Climate Change has laid out the mechanisms of the ban in a fairly comprehensive manner in its discussion paper,[35] it is important to note that the approach proposed by Environment and Climate Change Canada was subject to a wide consultation including businesses, civil society groups, jurisdictions, Indigenous peoples, and all Canadians. The consultation process closed on Dec. 9, 2020.

The federal government is also responsible for regulating the international and interprovincial movement of hazardous waste and hazardous recyclable materials, including plastic. For example, if passed, Bill C-204 would amend CEPA to ban Canadian exports of plastic waste that is non-recyclable “for final disposal.” The bill contains a list of 31 types of plastic waste and a clause allowing the government to add or remove plastics from the list.[36]

Provincial

Given the provinces’ exclusive jurisdiction over municipal institutions under s. 92(8) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, waste management and recycling are primarily regulated at the municipal, provincial and territorial level.[37] Generally, municipal governments oversee the collection, recycling, composting, and disposal of household waste, and provincial and territorial authorities authorize and monitor waste management facilities and operations and implement waste reduction policies and programs.[38] The main exception to this is the federal government’s power to regulate waste management on federal land, including national parks and First Nations reserves.[39]

According to our review of provincial legislation, it is clear that there is a lack of harmony between the provinces when it comes to defining and regulating plastic as a waste, particularly in terms of the approaches to EPR programs.[40] This can be problematic for

companies distributing products nationally, such as online distributors, as it requires such companies to perform a regulatory analysis both by province and product in order to ensure they understand and can meet the various regulatory requirements established by each province. For example, a distributor of food product packaged in polyethylene terephthalate (PET) or high-density polyethylene (HDPE) will face different legislative requirements in Québec, where there is a precise tariff charter listing all material subject to a fee/royalty and which quantities are subjected to such regulation, than they will in other provinces.

This creates challenges for businesses, jurisdictional fragmentation amongst the provinces, and territories adopting widely differing regulatory approaches, definitions, standards, and requirements also act as barriers to developing large-scale solutions to processing and recycling collected plastics.[41] This impedes the development of an efficient, harmonized resource recovery infrastructure.[42]

Greater pan-Canadian coherence, including a harmonized Canadian approach to EPR and recycling regulations, is much needed, both to provide clarity and consistency of requirements for all companies putting plastic products on the Canadian market and to and move towards a circular economy. What is still not clear in Canada is how much federal and provincial governments will exert oversight in ensuring that plastics resource recovery and circular economy are achieved. Different models are being tried in various provinces and no clear preferred approach has emerged.

Municipalities

The lack of consistency amongst municipalities' approaches to regulating plastic poses similar challenges to businesses, as does the fragmented nature of provincial and territorial regulation. For example, a grocery chain in Alberta is permitted to provide customers with plastic checkout bags in most of the province, but not in the municipalities of Fort McMurray,[43] Devon,[44] Wetaskawin[45] or Jasper.[46] In those municipalities, the store would be required to provide customers with an alternative, such as a paper bag. This requires that even businesses operating within a single province become familiar with all the various municipalities' bylaws regarding single-use plastic, and that they develop practices and products which conform to those various bylaws.

As mentioned, for the most part provinces and territories have delegated waste management and recycling responsibilities to municipalities. Because of this, many of the most innovative solutions to plastic waste have come from municipalities, many which introduced bylaws aimed at curbing or even eliminating the use of single-use plastics, especially plastic grocery bags. For example, cities such as Vancouver, Thompson, Manitoba and Montréal, Quebec, introduced municipal bylaws banning certain single-use plastics.[47]

The power of municipalities is largely limited to enacting bylaws, which can be constrained by provincial regulations. For example, Victoria recently wanted to enact a bylaw that would prohibit business from providing or selling plastic bags to customers. However, British Columbia's Minister of Environment was required to approve any bylaws related to protecting the natural environment. As Victoria had not obtained the Minister's approval, the ban was quashed by a B.C. court.[48] While the Minister

subsequently approved the ban,[49] this demonstrates the limits on municipal powers when it comes to regulating plastics use.

That a proposed ban in Toronto was defeated by the simple threat of a legal challenge further demonstrates the hurdles municipalities face if they do try implementing bans on single-use plastics. In June 2012, a motion to ban all plastic bags in Toronto won enough votes to pass at a City Council meeting.[50] The proposed ban was met with at least one legal challenge from stakeholders, specifically the Ontario Convenience Stores Association.[51] As a result, in November 2012, City Council rejected the draft bylaw to enforce a plastic bag ban on all disposable plastic bags in Toronto.[52] Although there have been some discussions about reviving the ban,[53] as of now Toronto has yet to ban disposable plastic bags.

Interestingly, Toronto City Council repealed a municipal code provision which required retail businesses to charge a five-cent fee for plastic shopping bags in 2012, making it entirely up to retailers to decide if they would continue to charge, and if so, how much.[54]

The mandatory fee was repealed, despite the city seeing a noticeable reduction in the number of bags distributed:[55] a city report, used as evidence in Council, noted that plastic bag use had dropped by 53 per cent between 2008 and 2012.[56] Many major retailers continued to charge the fee without the bylaw,[57] despite the bag fee's initial unpopularity. This suggests that municipal regulations such as mandatory fees for plastic bags may end up shaping stakeholders' behaviour, even where they are ultimately struck down or repealed.

Our next articles in the BLG Plastics Series will cover recycling regulations across Canada in more details, regulation of bioplastics, green washing, and COVID-19 and single-use plastics.

In this series, we will explore the current state of recycling regulations across Canada in greater detail, and examine the various jurisdictions' approach to the burgeoning bioplastics industry. We will also tackle claims of "green washing" — the practice of making sustainability claims in order to distract the public from a problematic environmental record[58] — and the implications of the COVID-19 pandemic on the regulation of single-use plastics.

[1] Canada, Environment and Climate Change, *Economic Study of the Canadian Plastic Industry, Markets and Waste* (Summary Report) (Gatineau: ECC, 2019), at 1 [ECC Summary Report]

[2] *ibid.*

[3] *ibid.,* at ii.

[4] Environment and Climate Change Canada, News Release, "Canada one step closer to zero plastic waste by 2030" (Oct. 7, 2020) [ECC News Release]

[5] *ibid.,* at 1.

[6] European Parliament and Council (2019) Directive (EU) 2019/ of the European Parliament and of the Council of June 5, 2019 on the reduction of the impact of certain

plastic products on the environment, *Official Journal of the European Union*, art. 3(1) [EU SUP Directive].

[7] North American Industry Classification System (NAICS), Version 1.0 (2017) [NAICS].

[8] *ibid.*

[9] See for example discussion in Eunomia Research & Consulting, *What is a Plastic? A summary report exploring the potential for certain materials to be exempted from the Single-Use Plastics Directive,* (Reloop Platform: Jan. 21, 2020) [Eunomia Report].

[10] EU SUP Directive, *supra* note 6.

[11] *ibid.,* at 3.

[12] EU SUP Directive, *supra* note 6, art. 3 (1); Eunomia Report, *supra* note 9 at 1.

[13] Eunomia Report, *supra* note 9 at 9.

[14] See discussion in Eunomia Report, *supra* note 9 at 8 and following.

[15] ECC News Release, *supra* note 4.

[16] EU SUP Directive, *supra* note 6 ; Eunomia Report, *supra* note 9 at 2.

[17] The European Economic and Social Committee, *A European Strategy for Plastics in a Circular Economy,* COM/2018/028(Brussels: European Commission, 2018); The European Economic and Social Committee, *Closing the loop – An EU Action Plan for the Circular Economy,* COM/2015/0614 (Brussels: European Commission, 2015).

[18] Canadian Council of Ministers of the Environment, *Canada-wide Action Plan on Zero Plastic Waste,* PN 1289, (Winnipeg: CCME, 2019) [CCME Canada-wide Action Plan]; See also section below on provincial regulation.

[19] The six items the Government proposes to ban are plastic checkout bags, straws, stir sticks, six-pack rings, cutlery, and food ware made from hard-to-recycle plastics: ECC News Release, *supra* note 4; See also CCME Canada-wide Action Plan, *supra* note 18.

[20] Policies on compostable bags are municipal. Certain province also provide general guidelines. See, for example: City of Calgary. Acceptable compostable bags and liners (Consulted on Nov. 18, 2020); Province of Ontario. Guideline for the production of compost in Ontario; Quebec Ministry of environment and fight against climate change. « Lignes directrices pour l'encadrement des activités de compostage » (Consulted on Nov. 18, 2020). Compostable. « Certified Products: BNQ 9011-911 Compostable Plastic Bags », [Online]), while in British Columbia.

[21] See for example: Ottawa, « Bioplastics and their management », (Consulted on Nov. 19, 2020); Ontario Ministry of Agriculture, food and rural affairs, « Ontario's Bio Advantage Sector Profile »; University of Guelph, « Ontario government invests in bioplastics, AD research » (Consulted on Nov. 19, 2020).; Alberta Innovates. « New

investment boosts bioplastics product development capacity at TerraVerdae » (Consulted on Nov. 18, 2020).

[22] Examples of such composting standards in Canada include: CAN/BNQ 0017-088, BNQ 0017-988 and BNQ 9011-911/2007. International standards include ISO 17088, and EN 13432, which is the most widespread European standard.

[23] Canada, Competition Bureau, *Environmental Claims: A Guide for Industry and Advertisers*, (Guide) PLUS 14021 (Mississauga: Canada Competition Bureau, 2008).

[24] CCME Canada-wide Action Plan, *supra* note 18.

[25] ECC News Release, *supra* note 4.

[26] Smart Prosperity Institute, *A Vision for a Circular Economy for Plastics in Canada: The Benefits of Plastics without the Water and How we can Get it Right* (Report), by Usman Valiante (Ottawa: SPI, Feb. 14, 2019) at 10 [SPI Report].

[27] *ibid.*

[28] As for example here, consult the website of Eco Entreprise Quebec and their views on EPR and Packaging Ecodesign

[29] ECC Summary Report, *supra* note 1, at v.

[30] Jonathan Cocker and Peter Hargrave, “What Power Does Canada Have to Restrict Single-Use Plastics?” (March 10, 2020).

[31] Environment and Climate Change Canada, *A proposed integrated management approach to plastic products to prevent waste and pollution*: Discussion Paper (Ottawa: Environment and Climate Change Canada) at 1 and 3 [Discussion Paper]. See also Canada Gazette, Part I, Volume 154, Number 41: Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999, Oct. 10, 2020.

[32] *Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999,* SOR/2016-150.

[33] *ibid.*

[34] Justin Trudeau, Prime Minister of Canada, News Release, "Canada to ban harmful single-use plastics and hold companies responsible for plastic waste" (June 10, 2019).

[35] Discussion Paper, *supra* note 31, at 6, 8-9.

[36] Bill C-204, *An Act to amend the Canadian Environmental Protection Act, 1999 (final disposal of plastic waste)* 1st Sess, 43th Parl, 2019-2020 (second reading and referral to committee Feb. 3, 2021).

[37] Penny Becklumb, “Federal and Provincial Jurisdiction to Regulate Environmental Issues” (Library of Parliament, 2013), [Becklumb].

[38] Government of Canada, "Municipal solid waste: a shared responsibility,".

[39] Becklumb, *supra* note 37.

[40] The extent of EPR programmes vary greatly across provinces. See, for example: Éco Entreprise Québec; B.C. Recycle Packaging & Paper Product; Saskatchewan Waste Recycling; Manitoba Waste Wise Product Stewardship; Nova Scotia Resolution to Extended Producer Responsibility for Printed Paper and Packaging; New Brunswick Extended Producer Responsibility; Ontario is transitioning to an EPR model: Producer responsibility for Ontario's waste diversion programs" (Aug. 23, 2019); Alberta has no EPR programme in place, however there is support in the province for such a programme: Eunomia, Extended Producer Responsibility for Residential Packaging and Paper Products: Alberta Collaborative Extended Producer Responsibility Study, by Dr. Dominic Hogg (New York: Eunomia, Dec. 6, 2019).

[41] SPI Report, *supra* note 26 at 36.

[42] *ibid.,* at 16.

[43] Regional Municipality of Wood Buffalo, by-law No 12/007, *Bylaw to Regulate the Use and Distribution of Bags by Retail Establishments Operating Within the Boundaries of the Regional Municipality of Wood Buffalo* (March 27, 2012).

[44] Town of Devon, Bylaw 935/2019, *Single-Use Plastic Retail Bag Bylaw,*.

[45] City of Wetaskawin, By-law 1913-18, *A Bylaw In The City Of Wetaskiwin, In The Province Of Alberta, Being A Bylaw Prohibiting The Distribution Of Plastic Checkout Bags For The Purpose Of Reducing The Presence Of Plastic Bags In The Community*.

[46] Municipality of Jasper, Bylaw 215*, Being A Bylaw Of The Municipality Of Jasper In The Province Of Alberta To Regulate The Business Use Of Single-Use Items To Reduce The Creation Of Waste And Associated Municipal Costs,*.

[47] City of Vancouver "Single-Use Item Reduction Strategy," ; City of Thompson, "Plastic Bag Ban," ; City of Montreal, "Plastic bags: Let's do the right thin".

[48] *Canadian Plastic Bag Association v. Victoria (City),* 2019 BCCA 254.

[49] Jon Hernandez, "B.C. approves civic bylaws banning single-use plastics, province-wide bans on the way", *CBC News* (Sept. 12, 2020).

[50] "Toronto faces legal challenge over plastic bag ban," *CBC News* (Nov. 15, 2012).

[51] *Ibid.*

[52] City of Toronto, "Plastic retail shopping bags - 5 cent charge - plastic bag ban," [City of Toronto, Plastic retail shopping bags].

[53] Ryan Patrick Jones, "City of Toronto prepares to revisit the single-use plastic debate," *CBC News* (June 6, 2018).

[54] City of Toronto, Plastic retail shopping bags, *supra* note 52.

[55] Muriel Draaisma, "And they said it wouldn't catch on," *CBC News* (June 3, 2010).

[56] Sunny Dhillon, "Rob Ford bangs the 'final nail in the coffin' in Toronto's plastic bag debate," *The Globe and Mail* (June 19, 2013).

[57] "Some grocery stores still charging 5-cent bag fee," *CityNews* (July 2, 2012).

[58] Bruce Watson, "The troubling evolution of corporate greenwashing," *The Guardian* (20 August 2016).

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