# Canada forges ahead with single-use plastics ban despite legal challenges

**December 23, 2021**

Despite opposition from industry groups and provinces, the Government of Canada is moving forward with a comprehensive plan to address plastic pollution in the long term.

On Dec. 21, 2021, the Minister of Environment and Climate Change and the Minister of Health announced draft regulations under the *Canadian Environmental Protection Act, 1999* (CEPA) banning certain single-use plastics deemed to be harmful.

## From “toxic” to banned

The proposed regulations follow Canada’s publication of the Order in May 2021 to add “plastic manufactured items” (PMI) to Schedule 1, the Toxic Substances List, of CEPA in the Canada Gazette. The Order itself contained no substantive measures to reduce or otherwise regulate PMIs. The “toxic” designation was, however, necessary to provide the legislative basis for the introduction of the ban through the proposed regulations.

The proposed regulations are also grounded in the findings of the Science Assessment of Plastic Pollution (Science Assessment) finalized by the government in October 2020. The Science Assessment examined hundreds of scientific studies on the harmful impacts of plastic pollution in the environment. Questions have been raised, however, as to the sufficiency of the Science Assessment in grounding restrictions under CEPA upon PMIs.

## The proposed regulations

The proposed regulations would ban the manufacture, import and sale of checkout bags, cutlery, foodservice ware, ring carriers, stir sticks as well as straws. The regulations do not apply with respect to PMI that are manufactured, imported or sold for the purposes of exporting although it requires that records be kept on those items.

Recognizing the use of single-use flexible plastic straws by medical patients and people with certain disabilities, the proposed regulations provide exceptions for these straws to ensure that they remain available, under certain conditions. Prohibitions on manufacture and import do not apply to single-use flexible plastic straws, and sales of these items

are allowed in non-commercial, industrial and institutional settings (IC&I), in packages of 20 or more items at retail, or within care institutions.

The government proposes a one-year transition between the final publication of the regulations and their coming into force. The transition period would allow businesses time to transition away from single-use plastics and deplete current stocks of the items to be banned. The government is also expected to publish draft guidance to help businesses adapt to the proposed regulations.

## The industry legal challenge

An industry coalition lawsuit against Canada launched on May 18, 2021, shortly after the publication of the government's order adding PMIs to the List of Toxic Substances under CEPA in the Canada Gazette.

The lawsuit argues that the federal government is attempting to extend federal regulatory powers to areas within the jurisdiction of the provinces – particularly, waste management. It likewise takes issue with the sufficiency of the Science Assessment, which is a literature review rather than a scientific, risk-based assessment that includes testing of whether plastics are toxic under CEPA. The lawsuit also argues that the definition of "toxic substance" under CEPA is limited to singular items rather than broad, descriptive categories like "plastic manufactured items".

On November 12, 2021, a number of plastics industry organizations as well as public interest environmental groups were granted intervener status in this lawsuit. The federal government has stated that it will not allow the lawsuit to interfere with its regulatory process, just as it did not allow the lawsuit on carbon pricing to affect its implementation of that policy.

## Provinces oppose a federal plastics ban

On April 28, 2021, the Ministers of the Environment of Ontario, Alberta, Saskatchewan, Manitoba, and Québec, wrote to the then federal Minister of Environment and Climate Change and expressed their concerns with what they deemed to be the federal government's over-extension into the provincial arena of waste management. They claimed that the management of waste is within provincial jurisdiction and that each of their provinces is taking action to reduce plastic waste in the environment in their own way.

The federal government has responded to these concerns by relying on the Canada-wide Strategy on Zero Plastic Waste for its proposed regulations. The Strategy was agreed to by the provincial and territorial governments on November 2018. It lays out a vision for circular economy for plastics in Canada and phases in an action plan that Canada will implement jointly with partners.

## Municipalities favour the federal plastics ban

Despite introducing the new regulations, Canada has indicated that other levels of government also have important roles to play in addressing the challenge of plastic

pollution. This includes municipalities such as Vancouver and Toronto that are implementing strategies to reduce single-use plastic. Toronto, for example, has put in place a Voluntary Measures Program to reduce single-use plastic in the city in part to allow the city time to better understand the federal government's plan to ban or restrict single-use plastic items.

# Conclusion

According to the federal government, the proposed regulations are part of a broader comprehensive approach to address the entire plastics lifecycle, which will also include plans to introduce regulated standards to increase the use of recycled content in certain plastic products.

It remains to be seen, however, whether the proposed regulations will survive the mounting legal challenges, including over the potential over-extension of federal powers into provincial jurisdiction over waste management. The environmental outcomes from the proposed regulations also remain to be seen.

The public consultation for the proposed regulations opens on December 25, 2021 and will close on **March 5, 2022**.

*The authors want to acknowledge the contribution of Brett Davis, Articling Student.*

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