A second chance for Canada's single-use plastics regulations

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The Canadian government's ban on single-use plastics is still in effect—for now. In *Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)*, 2023 FC 1511, the Federal Court invalidated an order adopted by the Governor in Council that enabled the government to pass regulations banning the use, manufacture, and sale of single-use plastics (the Order) on the basis that it was both unreasonable and unconstitutional. However, the Federal Court of Appeal recently stayed that decision in *Canada v. Responsible Plastic Use Coalition*, 2024 FCA 18, which will allow the Order and the regulations it enables to continue in force pending the outcome of an appeal to the Federal Court of Appeal, which is expected to be heard later this year.

Background

Schedule 1 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (CEPA) is a List of Toxic Substances. The Governor in Council may add a substance to the List of Toxic Substances by order, on the recommendation of the Minister of the Environment and Climate Change and the Minister of Health (the Ministers), if satisfied that the substance is "toxic", a defined term under the CEPA. When a substance is added to the List of Toxic Substances, the Governor in Council is authorized to regulate the substance's use, manufacture, sale, import or export, storage, and release into the environment.

On May 12, 2021, the Governor in Council published an Order adding "plastic manufactured items" (PMI) to the List of Toxic Substances. The Order was part of Canada's countrywide commitment to "zero plastic waste" by 2030, and was based on various studies suggesting that PMI had the potential to create pollution and cause environmental harm, including a report published by the Ministers recommending action "to reduce macroplastics and microplastics that end[ed] up in the environment", and a Discussion Paper published by the Minister of the Environment and Climate Change identifying certain plastic products that met the requirements of a ban.[1]

In October 2020, the government of Canada circulated the proposed Order and a preliminary Regulatory Impact Analysis Statement in the *Canada Gazette* for comment. While many supported the proposal, various plastics industry associations and companies, two provincial governments and one foreign government opposed the

proposed order, and 52 parties requested that the Ministers establish a Board of Review to assess the risks of PMI. The Ministers denied the request for a Board of Review and registered the Order.

The Responsible Plastic Use Coalition, a coalition of several plastic industry participants, brought an application for judicial review, challenging the Order on both administrative and constitutional grounds and challenging the decision to refuse a Board of Review. The Coalition was joined in its application by other companies that manufacture and distribute plastics or petrochemicals. Numerous interveners participated in the proceeding before the Federal Court. The attorneys general of Alberta and Saskatchewan also intervened in the Federal Court, making submissions on the constitutional issue raised in the Notice of Constitutional Question. Pursuant to s. 57(5) of the *Federal Courts Act*, RSC 1985, c F-7, both attorney generals are now automatically parties on appeal on the constitutional question.

The addition of PMI to the List of Toxic Substances engages additional regulatory powers under the CEPA that has allowed Canada to act on its policy goals to reduce the use of plastic. Specifically, the Governor in Council subsequently adopted the *Single-use Plastics Prohibition Regulations*, SOR/2022-138 which banned the manufacture, import, and sale of single-use plastics such as straws, checkout bags, cutlery, food service ware, stir sticks, and packaging rings. Several provisions have already come into force. A separate challenge to the *Single-use Plastics Prohibition Regulations* was commenced in Federal Court File T-1468-22.

Federal Court decision

In a decision by Furlanetto J., the Federal Court agreed with the Applicants that PMI could not be added to the List of Toxic Substances. It invalidated the Order for being unreasonable and beyond the federal government's constitutional authority over criminal law matters. It also found that the refusal to establish a Board of Review was unreasonable.

Reasonableness standard of review applies

The Federal Court found that reasonableness review applied to both the Order and the Ministers' decision to refuse a Board of Review based on the approach set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65. The Federal Court noted that when considering the regulation-making power of the Governor in Council, reasonableness review will focus on the limiting statutory language. In doing so, the Federal Court referred to prior Federal Court of Appeal jurisprudence adopting the reasonableness review for regulations rather than the higher threshold of whether the regulations are "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose under *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (see *Portnov v. Canada (Attorney General)*, 2021 FCA 171).

The continued application of the *Katz* framework post-*Vavilov* has not yet been definitively resolved by the Supreme Court of Canada, though two appeals scheduled to be heard on April 25, 2024 are likely to shed light on the issue (see *Roland Nikolaus Auer v. Aysel Igorevna Auer, et al*., 2022 ABCA 375 (40582); *TransAlta Generation Partnership, et al. v. His Majesty the King in Right of the Province of Alberta, et al*., 2022

ABCA 381 (40570)). In these cases, the Alberta Court of Appeal distinguishes Governor in Council regulations from the administrative decisions that *Vavilov* is intended to apply to. Unlike *Portnov*, these decisions uphold the use of the *Katz* framework when Governor in Council regulations are judicially reviewed.

The Order is unreasonable because it is not supported by the evidence

Applying the reasonableness review, the Federal Court found that the government's decision to add PMI to the List of Toxic Substances was unreasonable. In considering the authorizing provisions, the Federal Court highlighted that the Governor in Council can only add a substance or class of substances to Schedule 1 of the CEPA if the Governor in Council is satisfied that it is "toxic"—this requirement is not discretionary. The Federal Court noted that this was not a policy or "quintessentially executive" type of decision.

The Federal Court then reviewed the evidence before the Governor in Council and concluded that it could not support a finding by the Governor in Council that all PMI were "toxic". The Order assumed that all PMI were toxic because any plastic manufactured item has the potential to become plastic pollution, but this was a form of "reverse logic" not supported by the evidence. The evidence available was that specific kinds of PMI actively caused environmental harm, such as plastic bags, and packaging rings which can harm animals because of entanglement or ingestion. However, the Federal Court took issue with extrapolating this evidence to conclude that all PMI were toxic, noting the extreme variability in the shape, form and potential harms of different kinds of plastic materials and items. Indeed, some of the evidence indicated that certain types of PMI included in the "toxic" category were not considered environmentally problematic. Ultimately, the Federal Court concluded the Governor in Council had acted outside their authority in listing the broad category of PMI in the List of Toxic Substances.

The refusal to establish a Board of Review was unreasonable because it did not address the central argument about the sufficiency of evidence

The Federal Court also determined that the Ministers' refusal to establish a Board of Review to conduct a risk assessment of PMI was unreasonable. This is a discretionary decision for the Ministers to make based primarily on the sufficiency of the science in support of a proposed order. Of the 60 written notices of objection filed with respect to the proposed Order, 52 included a request for a Board of Review. The Federal Court found that the Ministers' written response rejecting the Applicants' request for a Board of Review did not meet the standard of justification and transparency set out in *Vavilov* and *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, which requires the decision-maker to meaningfully grapple with key issues and central arguments raised by the parties. The Ministers' decision failed to refer to the central argument challenging the sufficiency of the science behind the breadth of the Order, rendering it unreasonable.

The Order is unconstitutional because it was not limited to environmental harm

The Federal Court also concluded that the Order to add PMI to the List of Toxic Substances was unconstitutional under the division of powers under the *Constitution Act, 1867* because it went beyond the federal government's criminal law power to regulate environmental issues.

The Federal Court noted that to be validly enacted under the criminal law power under s. 91(27) of the *Constitution Act, 1867*, a law must have three elements: (1) a criminal law purpose; (2) a prohibition; and (3) a penalty.

The Federal Court found that the dominant purpose or pith and substance of the Order was "to list PMI on the List of Toxic Substances so that PMI could be regulated to manage the potential environmental harm associated with their becoming plastic pollution." It noted that protecting the environment by prohibiting toxic substances is recognized as a legitimate public objective under the federal criminal law power. However, the Order was not limited to this purpose because not every type of PMI has the potential to create a reasonable apprehension of environmental harm. The Federal Court did not accept the government's argument that its sweeping delegation of regulatory power over PMI was constitutionally valid since any regulations enacted under this power will be subject to administrative constraints that would limit its use to environmental objectives.

The Federal Court also noted that the ubiquity of plastics in society meant that the use and management of PMI also falls under provincial regulatory jurisdiction. In this sense, the Federal Court concluded that the broad category of PMI poses a threat to the balance of federalism because it does not restrict regulation to only those PMI that truly have the potential to cause harm to the environment.

Appeal before Federal Court of Appeal and stay decision

Canada appealed the Federal Court's decision invalidating the Governor in Council's Order adding PMI to the List of Toxic Substances. It also asked the Federal Court of Appeal to stay the Federal Court's decision until after the outcome of the appeal. The Motion Judge, Gleason J.A., found that the three criteria for a stay were met, namely (1) the appeal raises a serious issue; (2) Canada would suffer irreparable harm if the stay were not granted; and (3) the balance of convenience favoured granting the stay.

The Motion Judge determined that it was in the public interest to stay the Federal Court's decision in part because of the link between the Order and the *Single-use Plastics Prohibition Regulations*, which had already come into force prompting businesses and organizations across the country to change their practices involving plastics. If the stay were refused, irreparable harm would be done to the orderly roll-out of the regulations and confusion would arise for the businesses who have already moved to comply with the provisions. As such, the regulation of single-use plastics under the CEPA remains in effect pending the outcome of the government's appeal. The Motion Judge also ordered an expedited appeal, though the hearing date has not yet been set.

Since then, numerous groups have filed motions for leave to intervene on the appeal, including the Canadian Constitution Foundation and the Canadian Association of

Physicians for the Environment. The Court will therefore be called upon to apply its recent case law with respect to the criteria for granting leave to intervene, which has been perceived as being more stringent than that of others courts (see *Le-Vel Brands v. Canada (Attorney General)*, 2023 FCA 66 where the Federal Court of Appeal provided guidance on its test to determine a motion to intervene, confirming that proposed interveners must ensure the usefulness and rigour of their submissions).

Key issues for the Federal Court of Appeal

The Federal Court of Appeal will likely have to consider the following key issues raised by the Federal Court's decision:

- ***Standard of review***: Relying on the Federal Court of Appeal's reasons in *Portnov*, the Federal Court determined that post-*Vavilov*, a reasonableness standard of review applies to challenges of a Governor in Council's decision to make regulations. The Federal Court of Appeal will need to determine whether the higher threshold proposed in *Katz* still plays a role when reviewing regulations; an issue that has not yet been resolved by the Supreme Court of Canada. In doing so, it may need to reflect on other appellate jurisprudence which upholds the *Katz* framework when reviewing Governor in Council regulations, rather than *Vavilov*'s reasonableness framework.
- ***Evidence of harm required***: The Federal Court decision still permits the government to regulate certain types of plastics. But to be reasonable, only plastic items which are harmful can be regulated. The broad and all-encompassing nature of PMI factored into the evidentiary gap the Court identified – between the evidence that showed the potential for all PMI to become a pollutant, and the government's addition of all PMI to the List of Toxic Substances – which ultimately rendered the decision unreasonable. Interestingly, the decision seems to require the government to provide evidence that it was reasonable for the PMI to be listed under Schedule I, when the burden rightly falls on the applicant to show that the government's Order was unreasonable. The Federal Court of Appeal will need to comment on the evidentiary threshold required of an applicant following the Supreme Court of Canada's guidance in *Vavilov* and *Mason*. It will also need to grapple with the precision required to list a substance on Schedule 1, in contrast with the CEPA's aim to provide the government with robust, efficient and timely tools to prevent pollution.
- ***"Guardrails" required when relying on criminal law powers****:* The Federal Court found that to have a valid criminal law purpose, laws and regulations must have sufficient limitations (or "guardrails") to stay within the constitutional bounds of this power, which requires proof of a reasonable apprehension of harm. It also agreed with the Applicants that the criminal law power does not allow the Governor in Council to assume control over all PMI on the trust that regulations will be restricted to regulating only those which create a real risk to the environment. This raises interesting constitutionality issues on the scope of the federal criminal law power and how to properly exercise it.

BLG is acting for the Canadian Constitution Foundation, one of the proposed interveners on the appeal to the Federal Court of Appeal, with a team that includes Rick Williams, Pierre Gemson and Brett Carlson.

For more information on the issue of limited interventions at the Federal Court of Appeal, see our previous article.

For more information on the government of Canada's regulation of plastics, check out these articles:

- Canada forges ahead with single-use plastics ban despite legal challenges
- State of regulation of plastics in Canada: The basics

[1] See *e.g.* Environment and Climate Change Canada, "Economic Study of the Canadian Plastic Industry, Markets and Waste", 2019; "Science Assessment of Plastic Pollution", 2020, Canada Gazette Part I, Vol 154, No 41; and Environment and Climate Change Canada, "Discussion paper: A proposed integrated management approach to plastic products to prevent waste and pollution".

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