

Stick a (plastic) fork in it: Canadian federal plastics designation declared unlawful

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On November 16, 2023, the Federal Court of Canada (Court) released its decision in ***Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)***. The Court declared that the federal government's Order (Order) adding "plastic-manufactured items" (PMI) to the Toxic Substances List in the *Canadian Environmental Protection Act, 1999* (CEPA) was invalid and unlawful. The ruling raises questions about the federal government's ability to broadly regulate plastic substances and reinforces some concerns about the risk of federal overreach when relying on the criminal law power in the Constitution.

CEPA – Toxic Substances Framework

CEPA is Canadian federal legislation that aims to contribute to sustainable development through pollution prevention. As part of this core purpose, CEPA creates a framework that allows the federal government to regulate substances it deems to be toxic. The CEPA framework first requires federal Cabinet to be satisfied that a substance or class of substances is "toxic" and to issue an order adding it to the Toxic Substances List. According to CEPA, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that:

1. have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
2. constitute or may constitute a danger to the environment on which life depends; or
3. constitute or may constitute a danger in Canada to human life or health.

Once added to the list, Cabinet can take the further step of creating regulations for that substance.

The Order

As part of the government's efforts to develop a zero plastic waste strategy, the federal Ministers of Health and Environment and Climate Change published a report in 2020 summarizing the science on potential impacts of plastic pollution (Science Assessment) for public comment. Later that same year, the federal government published a draft of the Order along with a preliminary Regulatory Impact Analysis Statement (RIAS) explaining the basis for the Order. The RIAS defined PMI as:

"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."

The RIAS concluded that all PMI had the potential to become plastic pollution and that such pollution posed an ecological hazard. That was the basis for the designation of all PMI as being toxic substances.

The government's decisions and the resulting order were challenged by a number of companies from the plastics

industry, major chemical and plastic resin manufacturers and distributors and a manufacturer of petrochemicals from which plastic resins are made. They were supported by a number of intervenors including plastic industry associations and the governments of Alberta and Saskatchewan doing business in Canada, supported by the provinces of Alberta and Saskatchewan, challenged the Order. They argued that the Order was unreasonable because the listing for PMI was too broad and that the federal government did not have the proper evidence to demonstrate that PMI are "toxic" for the purposes of CEPA. The applicants also argued that the Order was unconstitutional because it went beyond the federal government's criminal law power. A number of environmental NGOs intervened in support of the federal government's defence of its actions.

The Order was unreasonable

When deciding whether the Order adding PMI to the Toxic Substances List was reasonable, the Court examined whether the Ministers and the federal Cabinet complied with the requirements of CEPA. Doing so required the Court to examine the reasoning provided in the Science Assessment and the RIAS to understand whether it was reasonable for federal Cabinet to designate PMI as "toxic."

Fundamentally, the Court took issue with the breadth of the Order and what it found to be the lack of evidentiary support for such a broad designation. While the RIAS concluded that "all plastic manufactured items have the potential to become plastic pollution," the RIAS and Science Assessment did not provide the evidence to "bridge the gap" between that statement and the decision to list all PMI on the Toxic Substances List. The evidence presented in the Science Assessment and summarized in the RIAS only considered a small number of specific items (e.g., ropes, nets, cable ties, plastic bags, packaging rings) which exhibited adverse effects on some animals as a result of entanglement or ingestion. According to the Court, Cabinet failed to consider the high degree of variability of environmental impacts that the various shapes and types of plastic have. The Court found that because the evidence disclosed there were forms of PMI that were not known or suspected to cause environmental harm, the Cabinet's decision to add all PMI to the Toxic Substances List fell outside their authority and was unreasonable.

The Order exceeded the federal government's constitutional authority

The Applicants also challenged the Order as being unconstitutional as exceeding the bounds of the federal criminal law power under the Constitution. A valid use of the criminal law power requires (1) a criminal law purpose; (2) a prohibition; and (3) a penalty. The Court focused on whether the Order had a valid criminal law purpose.

The Court emphasized that the substance being restricted had to "actually be dangerous." The intention of CEPA is that only substances that are "toxic in the real sense" should be included on the Toxic Substances List. Otherwise, virtually any substance could be added to that list, making that part of the framework a general regulatory power, rather than an exercise of the federal criminal law power.

The parties challenging the validity of the Order and the corresponding listing of PMI on the Toxic Substances List asserted that the Order did not seek to restrict toxic substances, but rather was aimed at managing plastics in the economy. They also argued that the breadth of the Order extended outside the constitutional limitations established by the Supreme Court of Canada and the underlying statutory scheme.

In this case, the Court found that the "broad and all-encompassing nature" of PMI as a category did not restrict regulation to materials that truly have a potential to cause harm to the environment. Because of that overreach, the Court found that the order was beyond the scope of the federal criminal law power and, accordingly, unconstitutional.

The Court retroactively quashed the Order and declared it to be invalid as of April 23, 2021 (the date the Order was registered).

Significance

The federal government has confirmed that it intends to **appeal** the decision. The exact implications of the decision may therefore depend on the outcome of that appeal.

While this case did not itself deal with the validity of the federal government's single-use plastics ban – which is the subject of a separate legal challenge – the finding that the Order was unreasonable and unconstitutional raises significant questions about the federal government's ability to regulate single use plastics. If the federal government is unable to declare a broad category of substances such as PMI to be toxic, it would instead need to produce evidence that individual items are "toxic in the real sense" in order to ground federal jurisdiction. Whether the finding of the Order was unconstitutional and invalid means that the regulations which rely on the Order to be valid can no longer stand.

This decision has implications for the approach being taken by the federal government to regulate other substances under the CEPA toxic substance provisions. In particular, the recent steps to propose risk management measures for PFAS (the so-called "forever chemicals") brings into play similar issues to the plastics case as the government is proposing to treat a group of over 10,000 substances as a single class of toxic substances.

The Court's emphasis, drawn from prior Supreme Court of Canada decisions, on preserving the "delicate balance" when assessing constitutionality under the criminal law power is also significant. Other federal environmental policies made pursuant to the criminal law power including the proposed Clean Electricity Regulations must be scrutinized to determine whether they also disrupt that "delicate balance."

We wish to thank Jesse Dias, Articling Student, for his contributions to this article.

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