Plastics ban survives (for now): FCA clarifies Cabinet's role in the regulation of toxic substances

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On January 30, 2026, the Federal Court of Appeal (FCA) released its decision in *Attorney General of Canada v Responsible Plastic Use Coalition*, unanimously allowing the appeal and upholding the Governor in Council's (GIC) Order listing "plastic manufactured items" (PMI) as a toxic substance under Schedule 1 of the *Canadian Environmental Protection Act, 1999* (CEPA).

The Order enabled the Federal Government to enact regulations banning the use, manufacture, and sale of single-use plastics.[1] In a 2023 decision, the Federal Court struck down the Order, finding that PMI were not a "substance" under CEPA, that the listing decision and the Minister's refusal to convene a Board of Review were unreasonable, and that the Order was an unconstitutional use of Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867*.

On appeal, the FCA treated the Order as an enabling measure rather than a substantive regulatory action, finding that it was a reasonable exercise of statutory authority and did not engage the criminal law power. In doing so, the Court emphasized that both administrative and constitutional challenges must respect the discretion assigned to Cabinet within CEPA's statutory architecture, which grants the government broad latitude at the initial listing stage.

Key takeaways

- The ruling keeps in place the ban on six categories of single-use plastics from the *Single-use Plastics Prohibition Regulations* – checkout bags, cutlery, straws, stir sticks, ring carriers, and certain take-out containers – and may pave the way for expansion to additional single-use plastics.
- The decision is one of the first major applications of the *Vavilov* framework to delegated legislation following *Auer v Auer*, confirming that Cabinet's implementation of laws, such as CEPA listing orders, is reviewed under the same contextual reasonableness framework governing administrative decisions.
- At the centre of the decision was the two-stage scheme under the CEPA that allows the GIC to designate matters for potential regulation before substantive

regulations are passed. The FCA's analysis suggests that enabling measures like the Order, which do not themselves create binding legal obligations, will be subject to fewer constraints under administrative law, and will not be considered an exercise of the federal criminal law power for the purposes of constitutional analysis.

For background on the Order, the Federal Court's decision, and the *Single-use Plastics Prohibition Regulations*, see our previous article.

The FCA's findings

Whether the decision to list PMI as a "toxic substance" was reasonable

Noting the Supreme Court of Canada's guidance from *Vavilov*, *Auer*, and the continuing principles from *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, the FCA applied the reasonableness standard to determine whether the Order was *ultra vires* its enabling statute. While *Auer* modified aspects of the *Katz* framework, the FCA reiterated that subordinate legislation enjoys a presumption of validity, must be interpreted purposively, and is not subject to judicial review on the basis of policy disagreement.

The FCA held that the Federal Court erred by demanding too much specificity at the listing stage and by collapsing CEPA's two-stage structure, which differentiates the preliminary act of listing a substance under s. 90 from the later – and, in the Court's view, more consequential – act of regulating it under s. 93. On the evidence before the GIC, the FCA found that macroplastic pollution is widespread, persistent, and potentially harmful in various ways, and that CEPA permits both significant ministerial discretion and reliance on the precautionary principle when determining whether a substance *may* cause harm in reference to the criteria for "toxic substance" in s. 64. The Court also emphasized that CEPA's language, as revised through its 1999 amendment, supports a "ecologically comprehensive" conception of harm broader than that considered in *R v* Hydro-Québec.

The Court also found that PMI reasonably fall within CEPA's broad statutory definition of "substance," rejecting the respondents' arguments premised on the singular wording of "substance" versus the plural "PMI." It further held that the Minister acted reasonably in declining to establish a Board of Review, as the objections raised did not undermine the scientific basis for the listing and largely concerned policy questions more appropriately addressed at the regulatory stage.

Whether the Order is ultra vires Parliament's criminal law power

The FCA held that a s. 90 listing has no prohibitory or penal effect and therefore is not itself an exercise of the criminal law power. Relying on its "two-stage" conception of CEPA regulations, the Court declined to address the breadth of the listing and whether it purported to regulate matters which did not cause harm, relegating any division of powers issues to future challenges of PMI regulations. As the Court put it, "It is only at the second stage, when regulations are put in place, that the criminal law power is engaged."[2] The Court also added that it must not speculate about hypothetical misuse of statutory authority, citing Justice Jamal's dissent in *Reference re Impact Assessment*

Act on this point. It was on this basis that the Court declined to contemplate concerns about the "effects" of the Order and its potential to enable regulation trenching into areas of provincial jurisdiction.

The FCA went on to offer additional *obiter* observations about the criminal law power. Most notably, with respect to the "substantive content of the criminal law power," the Court accepted that the criminal law power requires a substantive "reasoned apprehension of harm" threshold. The Court quoted Justice Kasirer's statement in his wary dissent in Reference re Genetic Non-Discrimination Act that "harm cannot be illusory, speculative or a pretext."[3] However, the FCA stopped short of articulating a specific justificatory threshold, stating only that the basis for such harm must rest on evidence, logic, or common sense.

Implications for regulated industries

The FCA's ruling keeps in place the federal ban on six categories of single-use plastics that are widely used across the retail, food service, packaging, and consumer products sectors. Businesses operating in these areas should therefore anticipate continued scrutiny of plastic products and packaging, as well as possible future restrictions enabled by the listing.

More broadly, the decision signals that challenges to CEPA measures will remain most viable at the regulatory stage, where the federal government must justify any prohibitions or controls targeting the broad category of PMI with a clear, evidence-based rationale tied to environmental harm.

Nonetheless, the battle over plastics is not over yet. Even setting aside the possibility of obtaining leave to appeal the FCA's decision to the Supreme Court of Canada, the Responsible Plastic Use Coalition (among others) is poised to take on the federal government over the *Single-use Plastics Prohibition Regulations*, which are the subject of a separate Federal Court proceeding that is currently stayed pending a final judgment on the Order.[4]

BLG's *Rick Williams, Pierre Gemson, Brett Carlson, Rebecca Lang and Andre Matheusik acted for the Canadian Constitution Foundation, one of the interveners on the appeal to the Federal Court of Appeal.*

Footnotes

[1] The Order itself is technically no longer in force. In 2023, Parliament enacted the *Strengthening Environmental Protection for a Healthier Canada Act*, which repealed and re-enacted Schedule 1 of CEPA in two parts, rendering the specific Order under review spent. However, because the same substances were re-listed under the amended statute and because the *Single-use Plastics Prohibition Regulations* continue to depend on the original listing, the FCA exercised its discretion to hear the appeal.

[2] Decision at para 159.

[3] Decision at para 185.

[4] See *Petro Plastics Corporation Ltd et al v Canada (Attorney General)*, File No. T-1468-22.

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