Federal Court of Appeal File Number:
(Federal Court File No. T-824-21)

FEDERAL COURT OF APPEAL

B E T W E E N :

ATTORNEY GENERAL OF CANADA, THE MINISTER OF THE ENVIRONMENT AND CLIMATE CHANGE, AND THE MINISTER OF HEALTH

Appellants

and

RESPONSIBLE PLASTIC USE COALITION, DOW CHEMICAL CANADA ULC, IMPERIAL OIL, A PARTNERSHIP, BY ITS MANAGING PARTNER IMPERIAL OIL LIMITED AND NOVA CHEMICALS CORPORATION

Respondents

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Toronto where the Federal Court of Appeal ordinarily sits.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

December 8, 2023

Issued by: _____
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APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Judgment of the Honourable Madam Justice Furlanetto dated November 16, 2023 by which she granted the application for judicial review brought by the Respondents and retroactively quashed and declared invalid and unlawful as of April 23, 2021 the *Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999*, registered on April 23, 2021 and published on May 12, 2021, which added "plastic manufactured items" to the List of Toxic Substances in Schedule 1 of the *Canadian Environmental Protection Act, 1999* ("*CEPA*").

THE APPELLANT ASKS for:

1. An Order setting aside the Judgment and dismissing the Respondents' application for judicial review;

2. An Order granting the Appellants their costs of the appeal and of the application in the Federal Court; and

3. Such further and other relief as counsel may advise and this Court deems just.

THE GROUNDS OF APPEAL are as follows:

1. This is an appeal from a Judgment of the Federal Court allowing an application for judicial review of decisions made under *CEPA* resulting in the addition of "plastic manufactured items" ("PMI") to Schedule 1, the List of Toxic Substances. These two decisions were:

   a) A decision by the Minister of the Environment declining to establish a Board of Review under s. 333 of *CEPA* "to inquire into the nature and extent of the

danger posed" by pollution from plastic manufactured items entering into the environment (the "Board of Review decision"); and

b) An Order in Council made on April 23, 2021 by the Administrator in Council under s. 90 of *CEPA*, adding "plastic manufactured items" to Schedule 1 (the "Order in Council" or "Order").

2. The Respondents challenged these decisions as being unreasonable. They also challenged the constitutional validity of the Order as being *ultra vires* the federal government's criminal law power.

3. The matter was heard in the Federal Court in Toronto from March 7-9, 2023.

4. Following the hearing of the matter, on June 13, 2023, Bill S-5, the *Strengthening Environmental Protection for a Healthier Canada Act* (the "*Strengthening Environmental Protection Act"*) received Royal Assent. Section 58 of the *Strengthening Environmental Protection Act* replaces Schedule 1 to *CEPA* by the Schedule 1 set out in the schedule to the *Strengthening Environmental Protection Act,* and the newly enacted list includes "plastic manufactured items". The Royal Assent of the *Strengthening Environmental Protection Act* removed any live controversy between the parties in this dispute, because regardless of the Federal Court's decision, "plastic manufactured items" remains on Schedule 1.

<u>The lower court held that the decisions were unreasonable and that the Order was unconstitutional</u>

5. In the Court's decision, it held that a) the Order is both unreasonable and unconstitutional and b) the Minister's decision not to establish a Board of Review is unreasonable. The Court further concluded that the application is not moot because a

challenge to the legal foundation for listing PMI on the former Schedule 1 may be relevant to its listing on the Schedule 1 as newly enacted by the *Strengthening Environmental Protection Act*.

6. The Court held that the Order was unreasonable because the Governor in Council acted outside of its authority in adopting the Order because, in the Court's view, certain PMI included within the scope of the listing were not "toxic" per s. 64 of *CEPA*. In particular, the Court found that – despite that the material before the Governor in Council was expressly not before the Court and had been protected by cabinet confidence under s. 39 of the *Canadian Evidence Act* – the "evidence available to the GIC did not support the finding that all PMI are toxic".

7. The Court characterized the decision to identify PMI as toxic as "devoid of consideration of the extreme variability in the shape and type of plastic used to make items and of plastic's variable properties, or whether the plastic item is conducive to causing harm to" animals or the environment. Even when taking into account the precautionary principle, the Court held that the Order was overbroad when considering the statutory context and the Supreme Court's guidance in *R v Hydro-Québec*.

8. The Court held that the Minister's decision to refuse a Board of Review was unreasonable because the Minister did not grapple with key issues or central arguments raised by the parties, namely, concerns over the breadth of the proposed Order. The Court characterized this as a central argument raised by the objectors, and held that the failure to refer to the argument left uncertainty as to whether the Minister considered the argument or whether the Minister "lumped the argument into the non-scientific concerns which were policy-based".

9. The Court further held that the Order is *ultra vires* the federal government's criminal law power. The Court held that the Order did not fall under Parliament's criminal law power because, in its estimation, not every plastic manufactured item has the potential to create a reasonable apprehension of environmental harm.

10. On this point, the Court distinguished PMI from other listed substances (such as lead and carbon dioxide) observing that while those substances are not inherently toxic, they have aspects or uses that are toxic. By contrast, the Court found that PMI is a broad category that includes items with no reasonable apprehension of environmental harm. On this basis, the Court found that the broad and all-encompassing nature of the Order was *ultra vires* as it does not restrict regulation to only those plastic items that truly have the potential to cause harm to the environment.

11. Finally, the Court concluded that the application is not moot because a challenge to the legal foundation for listing PMI on the former Schedule 1 may be relevant to its listing on the Schedule 1 as newly enacted by the *Strengthening Environmental Protection Act*.

12. In the result, the Court ordered that the Order adding PMI to Schedule 1 is retroactively quashed and declared invalid and unlawful as of April 23, 2021.

The lower court erred in finding the decisions unreasonable, that the Order was *ultra vires*, and that the application was not moot

13. On appeal from a decision on judicial review, the Federal Court of Appeal "steps into the shoes" of the Federal Court and determines a) whether the Federal Court selected the appropriate standard of review and b) whether the Federal Court applied

that standard correctly. This is a non-deferential standard; however, the *Housen v Nikolaisen* standard of "palpable and overriding error" does apply to any findings of fact conducted on the certified tribunal record and affidavit evidence.

14. On the administrative law issues, the lower Court should have held that the standard of review was reasonableness and that the decisions were reasonable. On the constitutional validity of the Order, the Court should have held that the Order was *intra vires* the federal government's criminal law power. Finally, the Court should have held that the application was rendered moot following Royal Assent of the *Strengthening Environmental Protection Act.*

15. In reaching the conclusion that the decisions were unreasonable, that the Order was unconstitutional, and that the application was not moot, the Court committed a number of reversible errors.

16. On the administrative law issues, while the Court selected the proper standard of review – reasonableness – it erred in its application of reasonableness review to the Governor in Council's decision to promulgate the Order and to the Minister's decision not to establish a Board of Review.

17. Reasonableness is a standard that "draws its colour from the context". The Court's application of reasonableness review did not properly consider the relevant context, including the role of the Governor in Council generally and within the specific context of *CEPA,* the nature of plastic pollution, and the nature of the harm caused by plastic pollution. In particular, the Court's decision does not properly take into account the unique role of the Governor in Council, who sits at the apex of the executive, and

is tasked with coordinating and balancing divergent views and interests throughout the nation. Moreover, the Court's decision ignores key contextual aspects of the decision-making here, including that: a) *CEPA* assigns to the Governor in Council the assessment of whether, in its opinion, a substance is "toxic"; b) toxicity under *CEPA* requires only that a substance "have or may have" an immediate or long term harmful effect on the environment and/or constitute or "may" constitute a danger to human life or health or to the environment on which life depends; and c) decision-making under *CEPA* must be made according to the precautionary principle.

18. The Court's statement that PMI may be too broad to be a "substance" under *CEPA* is inconsistent with the proper interpretation of *CEPA's* text, context and purpose. PMI falls within the definition of "substance" under s. 3 of *CEPA*. On its face, *CEPA*'s definition of "substance", which includes "any distinguishable kind of organic or inorganic matter", is broad enough to include PMI. The Court's interpretation of the definition of "substance" is also inconsistent with *CEPA*'s purposes, which include the prevention of environmental harm and the use of the precautionary principle. The Court's statement cannot be supported by the text of the definition, considered in its proper context and in light of *CEPA*'s purposes.

19. Moreover, in concluding that "the evidence available to the GIC did not support the finding that all PMI are toxic", the Court committed a number of reversible errors, including:

a. **The Court engaged in an impermissible reweighing and reassessing of the available evidence in the record**: The Court engaged in a reweighing of the evidence in the record, namely the Science Assessment, to find the

Governor in Council's decision unreasonable – despite that the material before the Governor in Council in promulgating the Order was not before the Court, having been withheld as a confidence of the King's Privy Council, per s. 39 of the *Canada Evidence Act.* Moreover, the Science Assessment established that all manner of plastics can cause harm when released into the environment – regardless of a particular item's shape, size, or purpose at the time of release. In reweighing the evidence and substituting its decision for the Governor in Council, the Court exceeded its proper role on judicial review;

b. **The Court misinterpreted *CEPA's* requirements**: The Court recognized that the basic principle of toxicity for chemicals is that all chemical substances have the *potential* to be toxic. However, in concluding that not all PMI are toxic (under *CEPA*), the Court cited the argument that for a substance to be toxic it must be administered to an organism or enter the environment at a rate (or dose) that causes a high enough concentration to trigger a harmful effect. This is contrary to the clear words of *CEPA,* inconsistent with a contextual and purposive interpretation of s. 64 of *CEPA*, and contrary to the precautionary principle. It also ignores that the physical harm that plastic causes in the environment is not dependent on a dose-response relationship;

c. **The Court improperly relied on evidence that was not before the decision-maker**: In reaching its conclusion, the Court relied on extraneous expert evidence filed by the applicants in support of their application for judicial review that was not part of the certified tribunal record.

20. In reaching its conclusion that the failure to refer the matter to a Board of Review was unreasonable, the Court erred by simply substituting its own decision for that of the Minister of the Environment and Climate Change, concluding that the decision was unreasonable because the Minister did not properly consider the breadth

of the proposed Order, i.e. whether PMI were toxic (under *CEPA*). The Court's reasoning exceeds the scope of reasonableness review by impermissibly reweighing and reassessing the evidence considered by the Minister. The record established that the concerns raised by the objectors were considered by a two-stage panel at Environment and Climate Change Canada, and that the Minister was satisfied that these concerns did not raise sufficient uncertainty or doubt in the underlying science to warrant establishing a Board of Review to inquire further into the nature and extent of the danger posed by plastic pollution. None of the objectors provided information that called into question the core finding that macroplastics cause harm to the environment.

21. In determining that the Order was *ultra vires* the federal government, the Court selected the appropriate analysis – the "pith and substance" analysis – but erred in concluding that the Order was *ultra vires*. On this issue, the Court committed a number of reversible errors, including:

a. **The Court erred in its characterization of the Order's "pith and substance"**: The Court erred in characterizing the Order's pith and substance as being to list PMI so that PMI could be regulated to manage the potential environmental harm associated with their becoming plastic pollution. On a proper characterization, the pith and substance of the Order is to add PMI to Schedule 1 of *CEPA* in order to enable the exercise of delegated legislated powers to prevent environmental harms associated with plastic pollution;

b. **The Court erred in characterizing the Order's effect**: The Order is an enabling measure that has no regulatory effect. Its sole effect is to enable subsequent regulations and measures. The Order does not require anyone to do or refrain from doing anything;

c. **The Court erroneously conflated the Order with the regulatory measures it enables;**

d. **The Court erred in concluding that the Order was invalid on its own:** The Court erred in concluding that the Order was *ultra vires,* in the absence of any specific regulations (violating the presumptions of constitutional validity, constitutional compliance, and constitutionally conforming administration) and erred in concluding (contrary to the evidentiary record) that there is no reasoned apprehension of harm respecting all PMI;

e. **The Court erred in its understanding of and/or misapplied the Supreme Court of Canada's decision in *R v Hydro-Québec*;**

f. **The Court erred in drawing distinctions between PMI and other toxic substances:** The Court erred in drawing distinctions between PMI and other toxic substances on the List of Toxic Substances, such as lead and carbon dioxide.

22. Finally, the Court erred in concluding that the application was not moot as a result of the Royal Assent of Bill S-5. Because PMI remains on Schedule 1 as a result of the Royal Assent of S-5, the Court's decision has no practical effect with respect to the sole issue considered in this application (the addition of PMI to Schedule 1 by Order of the Governor in Council). Instead, the Court should have held that while the application was moot, it was open to the Court to exercise its discretion to determine the application.

23. The Appellants request that this appeal be heard in the City of Toronto.

24. The Appellants plead and rely upon the following:

a. *Canada Evidence Act,* RSC 1985, c C-5, s 39;

b. *Canadian Environmental Protection Act, 1999,* SC 1999, c 33, Declaration, Preamble, s. 2, 3, 56, 64, 68, 71(1)-2, 90(1), 90(3), 91, 92, 93, 99, 218(1)(a), 218(10)(a)-(b), 272(1)(f)-(h), 332, 333;

c. *The Constitution Act,* 1867, 30 & 31 Vict, c 3, s. 91;

d. *Federal Courts Act,* RSC, 1985, c F-7, s. 27, 52;

e. *Federal Courts Rules,* SOR/98-106, Part 6;

f. *Interpretation Act,* RSC, 1985, c I-21, s. 11*;*

g. *Single-use Plastics Prohibition Regulations,* SOR/2022-138; and

h. *Strengthening Environmental Protection for a Healthier Canada Act,* SC 2023, c 12.

25. Such further and other grounds as counsel may advise and this Court may permit.

December 8, 2023

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