Court file No. T-1468-22

FEDERAL COURT

PETRO PLASTICS CORPORATION LTD.,
OREGON PRECISION INDUSTRIES, INC. DBA PAKTECH,
RESPONSIBLE PLASTIC USE COALITION,

Applicants

- and –

THE ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS

A PROCEEDING HAS BEEN COMMENCED by the Applicants, Petro Plastics Corporation Ltd., Oregon Precision Industries, Inc., and Responsible Plastic Use Coalition. The relief claimed by the Applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto or Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicants' solicitor or, if the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

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 APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU

Issued by: ORIGINAL SIGNED BY WAYNE SAWTELL A SIGNÉ L'ORIGINAL

DATE: JUL 15 2022

Registry Officer

Address of local Registry Office: 90 Sparks Street / 90, rue Sparks
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TO: **The Attorney General of Canada**
Ontario Regional Office
Department of Justice Canada

APPLICATION

This is an application for judicial review under sections 18 and 18.1 of the *Federal Courts Act* seeking the review of three related decisions, which together resulted in the adoption of regulations prohibiting the manufacture and use of certain plastic manufactured items which the government has arbitrarily defined as single use plastics, under the *Canadian Environmental Protection Act* ("***CEPA***").

The first was a decision, made jointly by the Minister of the Environment and Climate Change and the Minister of Health (together, the "**Ministers**"), to publish draft regulations proposing a ban on a category of "Plastic Manufactured Items" that the government has selected and branded as "Single Use Plastics" (the **"Draft"**). The Draft and accompanying rationale were published on December 25, 2021 in the *Canada Gazette* Part I, Volume 155, Number 52.

The second was the decision of the Ministers, on June 16, 2022 to refuse to establish a Board of Review under Section 333 of *CEPA*, to reconsider the Draft, following the receipt of twenty-five additional Notices of Objection and Requests for a Board of Review filed pursuant to Subsection 332(2) (the "**Refusal**").

The third was the decision of the Governor-General in Council to subsequently enact and publish the Single-use Plastics Prohibition Regulations in the *Canada Gazette* Part II, Vol. 156, Number 13 on June 20, 2022 under SOR/2022-138 (the **"Ban")**.

Together, the Draft, the Refusal to convene a Board of Review and the Ban are the "**Decisions**" in relation to which judicial review is sought.

THE APPLICANTS NOW MAKE APPLICATION FOR:

1. An Order in the nature of certiorari, quashing the Draft, the Refusal, and the Ban under *CEPA* to banish the import, manufacture and sale of certain plastic manufactured items (**"PMI"**) that the government considers to be intended for single use (**"SUP"**);

2. An Order of prohibition, restraining the Ministers and the Governor in Council from regulating SUPs under *CEPA*, including any restrictions restraining the import, manufacture and sale of SUPs;

3. A declaration that the Ban is *ultra vires* the powers of the Federal Parliament pursuant to section 91 of the *Constitution Act, 1867*;

4. An Order in the nature of mandamus requiring the Ministers to establish a Board of Review to inquire into the nature and extent of the harm, if any, posed by SUPs, which have yet to be properly evaluated;

5. An Order for interim and interlocutory relief to suspend the coming into force and enforceability of the Ban pending the outcome of this judicial review application and any further orders which ensue in respect of the Ban;

6. The costs of this Application, and

7. Such further and other relief as the Applicants may request and that this Honourable Court may deem appropriate under the circumstances.

THE GROUNDS FOR THE APPLICATION ARE:

THE PARTIES

8. The Ministers jointly administer *CEPA*.

9. The Attorney General of Canada is named as a respondent on behalf of the Governor General in Council in Council ("Governor in Council"). The Governor in Council is granted statutory authority pursuant to *CEPA* to make orders adding substances to Schedule 1, the List of Toxic Substances and to promulgate regulations in respect of substances listed in Schedule 1 of *CEPA*.

10. The Applicant, Petro Plastics Corporation Ltd. ("**Petro**") is a corporation that was incorporated in Ontario. Petro manufactures SUP that will be banned by the Ban.

11. The Applicant, Oregon Precision Industries, Inc. which carries on business under the name PakTech ("**Paktech**") is a corporation doing business in the United States and Canada, manufacturing and selling, *inter alia*, food and beverage packaging handles from recycled plastic materials, mainly High Density Polyethylene, to Canadian industry.

12. Responsible Plastic Use Coalition ("**RPUC**"), is a corporation that was incorporated federally under the *Canada Not-for-profit Corporations Act*, to work towards an effective regulatory response to the problem of plastic pollution in Canada.

GROUNDS FOR RELIEF SOUGHT

The Ban is Unconstitutional and Ultra Vires CEPA

13. The pith and substance of the Ban is an overall strategy to regulate the lifecycle of plastic substances including the manufacture, use and disposal of all plastics. This purpose is *ultra vires* the powers of the Federal Government under Part 5 of CEPA, pursuant to the *Constitution Act 1867.*

14. The Federal Parliament has a carefully circumscribed legislative jurisdiction in respect of toxic substances under Part 5 of *CEPA* pursuant to the exercise of its criminal law powers under section 91(27) of the *Constitution Act 1867.*

15. In order for Parliament to regulate a substance using Part 5 of *CEPA*, a substance must be shown to be "toxic", as the term is defined in section 64 of *CEPA*. The requirement to demonstrate that a substance is toxic is necessary in order for a regulation under *CEPA* to be consistent with a criminal law purpose under the *Constitution Act, 1867.* In other words, the substance must pose a threat or danger, in the same way that Parliament regulates other threats or dangers to the public, peace, order, health and security such as the regulation of narcotics and firearms pursuant to its criminal law power.

16. The Ministers have the onus of showing that a substance is "toxic" under *CEPA* in order for the substance to be regulated. The determination of whether a substance is "toxic" is objective, and based upon scientific evidence.

17. The Ministers have not established that the SUPs are "toxic". In fact, there is no credible evidence that any of the SUPs are "toxic".

18. Accordingly, the Ban cannot be justified as an exercise of the criminal law power conferred upon Parliament.

19. Further, absent proof of toxicity, there is no jurisdiction under *CEPA* to regulate SUPs. For each SUP that Parliament seeks to regulate pursuant to *CEPA*, that SUP must first be shown to be toxic under the provisions of *CEPA*, failing which Parliament cannot regulate using Part 5.

20. Given that the government has no risk assessment for any of the SUPs it seeks to regulate and banish, the Ban is thus *ultra vires* the legislative framework of Part 5 of *CEPA*.

Regulation of selected Items is premature and ill-conceived:

21. As with any exercise of authority granted by a federal statute, the Decisions must be consistent with the scope of the statutory mandate and meet the requirements of its enabling legislation. In this regard, they fail.

22. The Ban is not justified in light of the legal and factual constraints that bear upon it, most notably the governing statutory scheme and the powers that it confers.

23. The Respondents have failed to demonstrate that SUPs are "substances" that meet the requirements for being subject to regulation.

24. The Respondents have failed to establish the quantity or concentration at which the SUPs are entering the environment. They have not determined at what quantity or concentration these prohibited substances are likely to cause harm. They have not conducted a risk assessment. They have not met the criteria for taking action against these SUPs pursuant to section 64 of *CEPA*.

25. There is no factual or logical connection between the subject matter of the Ban and the purported objectives to be attained by Ban under *CEPA*.

26. The Respondents have failed to compare alternative approaches for reducing the pollution derived from SUPs.

27. The Respondents failed to conduct an assessment of whether the manufacture of alternatives to SUPs would result in less pollution. Such an assessment would include an investigation of the impacts of manufacture, raw materials, treating or preventing effluents, transportation of substitute products, and new sources of alternatives to the SUPs that are to be banned (a "life cycle assessment").

28. Without an actual life cycle assessment of alternatives, as compared with the prohibited SUPs, the environmental analysis of Environment and Climate Change Canada ("**ECCC**") is not merely incomplete, but it risks being misleading and counterproductive.

29. The Applicants do not dispute that reducing plastic pollution is desirable, but doing so should not come at the cost of increased environmental damage. In order to ensure a strategic course is chosen that is both sensible and of net benefit to the environment, all factors relevant to an environmental strategy that results in removing SUPs from the market must be properly evaluated for their respective environmental impacts. No such analysis was performed.

30. Thus the Ban is not well founded or rationally connected to its true objective, the reduction of environmental pollution.

The Proper Course of Action Would Have Been to Properly Assess the Environmental Impacts of SUPs, But The Ministers Rejected That Option:

31. Section 333(2) of *CEPA* provides that the Minister may establish a Board of Review to inquire into a matter where a person files a Notice of Objection.

32. Sections 334 and following specify the rules applicable to establishment of and the procedures to be followed by a Board of Review.

33. A Board of Review undertakes its mandate on terms that are quasi-judicial in nature, with procedural safeguards and powers to sanction breaches of process.

34. A Board of Review, if convened, could have conducted the analysis of SUPs that ECCC failed to carry out. The role of a Board of Review is precisely to frame the proper questions and research the answers to those questions in order to determine whether a chosen strategy will have the desired outcome.

35. The Ministers have only ever established one Board of Review since the enactment of *CEPA*, 22 years ago. This was the Siloxane D5 Board of Review. The decision of the Siloxane D5 Board of Review revealed that ECCC had employed a result-oriented approach that did not rely on the best available scientific evidence.

36. The Board of Review was highly critical of the Screening Assessment prepared by ECCC in respect of Siloxane D5.

37. The Board of Review found that the Siloxane D5 Screening Assessment was characteristic of a "less robust, lower-tiered screening assessment", which resulted in the Board's numerous recommendations and suggested corrective actions, including that the substance did not biomagnify through the food chain, contrary to the Screening Assessment findings.

38. The Board of Review's detailed and incisive commentary ultimately spelled the end for any future use of this procedure for calling into question any decision that ECCC wished to implement. After the first and only Board of Review gave its report, ECCC has effectively shut down that path of scientific analysis for any decision that ECCC may wish to enact. This refusal is unreasonable and *ultra vires*.

39. The failure to establish a Board or Review prevents an independent evaluation of whether a substance is in fact "toxic" and whether it should be regulated pursuant to *CEPA*.

40. ECCC's bias has tainted subsequent refusals to call a Board of Review, and the Ministers have never properly justified their failure to establish another Board of Review. The Ministers have taken refuge from the Board of Review by stating that those who file Notices of Objection that seek a Board of Review have not raised sufficient new science to cause the Ministers to justify establishing a Board of Review.

41. The Minister has substituted a deliberately nebulous test for calling a Board of Review, one that does not exist in the enabling statute *CEPA*, nor in any regulation or other instrument guiding this decision, in order to avoid the test that does exist in the statute. The purpose of a Board of Review is to "to inquire into the nature and extent of the danger" posed by the release.

42. The Ministers cannot shield themselves from the expert scrutiny mandated in their enabling statute for fear of their analysis being tested against the best available science. The Board of Review is not limited to consideration of "new" science. It can and should assess whether there was sufficient scientific support for the decision under review.

43. For SUPs, there is no evidence as to how the SUPs were defined, and no support for how the definitions are used in the Ban. There is no analysis of whether this Ban and its underlying policy choices will reduce pollution, as there is no analysis of pollution and environmental exposure from substitute products that will replace the banished SUPs.

44. The Applicant RPUC, along with numerous others, filed a submission including a Notice of Objection seeking a Board of Review. There were 146 written submissions from 75 industry based

organizations, 22 provincial, territorial and municipal submissions, one submission from an indigenous group, 29 submissions from non-governmental organizations, and 19 other submissions of various stripes, based upon the Regulatory Impact Analysis Statement (RIAS) accompanying the Ban.

45. The Ministers received 25 Notices of Objection requesting that a Board of Review be convened, yet none of the submissions were individually or collectively capable of satisfying the Ministers that a Board of Review was warranted. Such a finding strains credulity.

46. By letter dated June 16, 2022, The Minister of Environment and Climate Change (the "Minister") declined to establish a Board of Review pursuant to *CEPA*. In refusing to grant the relief sought in the RPUC's Notice of Objection, the Minister decided that the information provided in the Notice of Objection did not raise sufficient uncertainty or doubt in the scientific considerations underlying the Draft to warrant establishment of a Board of Review.

47. The Refusal was made despite a paucity of facts and evidentiary support about the nature and extent of environmental contamination and harm arising from the SUPs plastics that the Minister is attempting to regulate and no information about potential alternatives and their environmental impacts.

48. These are clear indications of the Minister's bias and fettering of discretion in exercising his powers under *CEPA*, which mandates that certain scientific criteria must be met prior to regulating a substance under Part 5.

49. The purpose of having a Board of Review is to inquire into the nature and extent of the danger that a substance poses.

50. A Board of Review would provide an objective, unbiased risk assessment, as Part 5 requires, and ensure the Decisions were based upon rational, factual and evidence-based scientific analysis.

What Does the Science Actually Describe About the Six Targeted Substances in the Ban

51. The Minister has admitted that he has no quantitative analysis of risk or of hazard for the SUPs being regulated, relying only on qualitative assertions from the Minister's Scientific Review of the available literature on plastic pollution that resulted in listing Plastic Manufactured Items ("**PMI**") on the Toxic Substances List (Schedule 1 of *CEPA*).

52. While the listing of PMI on the Toxic Substances List is the subject of an earlier proceeding (T-824-21) that remains ongoing, this subsequent Ban to regulate these particular plastic items raises new and different considerations, that are now precisely framed in respect of these six substances.

53. The Minister cites "validation against a set of qualitative criteria" as a basis for regulating the selected substances, citing that "plastic pollution is ubiquitous" and "poses a threat of harm to environmental receptors". These qualitiative statements are insufficient to meet the test in section 64.

54. Scientists have clearly rejected the use of hyperbole as a substitute for some attempt at assessing risk. Even if the methods used do not attain statistical significance or some other high standard of reliability, such methods might at least be capable of showing a generalized trend. Here, we do not even have that type of information to inform the Minister's analysis. Rhetoric is a poor substitute.

55. The Minister then cites the RIAS as the source of information for the data and other evidence for the prevalence and threat that the SUPs allegedly pose.

56. The RIAS states upfront that the proposed regulations are slated to cover six categories of SUPs: checkout bags, cutlery, food service containers, ring carriers, stir sticks and straws.

57. Upon identifying these problematic plastic items, the RIAS then states: "Manufacture and import for the purpose of export would not be subject to the proposed prohibition." p.6177, suggesting that these items are not problematic when sent to foreign countries, and are only problematic in Canada. No scientific citation or reasoning is provided for the distinction, because – obviously – there is no scientific justification for this arbitrary distinction.

58. The Draft goes on to state that for checkout bags, cutlery and straws, performance standards are identified to distinguish single use items from re-usable items. The basis for the distinction appears non-scientific and arbitrary. No measurement, no data, and no peer-reviewed science indicate the rate at which alleged SUPs are entering the environment from outside waste management streams, or their impact on the environment. Conclusions are assumed and untested. No alternatives are considered.

59. If the government had wanted to ban or criminalize these items regardless of the science supporting such action, another regulatory pathway should have been attempted. *CEPA* requires scientific rigour, and the provisions for a Board of Review are there to ensure that there is no end run around meaningful scientific inquiry for politically expeditious shortcuts unsupported by science.

60. The Ban defines the SUPs subject to the prohibition in the Ban. The definitions of the SUPs are variously:

(a) Not supported by any scientific assessment supporting the specifications as set out in the Ban; and

(b) Ambiguous insofar as in some cases the subject SUPs are defined by the intended use of the SUPs. Where a SUP has multiple uses, it can be banned for one use but permitted for another use.

61. The failure to properly define the SUPs creates considerable uncertainly within those regulated by the Ban as to whether or not the SUPs are prohibited. Where there are penalties for non-compliance, there should be certainty as to what is prohibited and what is not.

62. The Applicants seek to ensure that the rigours of science are respected in any Ban legislative programs against these SUPsunder *CEPA*.

The Ban is Ambiguous and Vague, Contrary to Principles of Criminal Law, and Unenforceable

63. The definitions employed in the Ban are often unclear, ambiguous or otherwise vague, in such a manner that the user must interpret the intent of the Ban and exercise discretion in determining whether the SUP in question is, in fact, banned.

64. There are consequences of breaching the government prohibitions. If the prohibitions are unclear, ambiguous or vague, then individuals will face sanctions for attempting to comply with a regulatory scheme that is based on poor science and poor guidance.

65. A legislative text with criminal sanction must be drafted with sufficient care and precision to make it understandable, and not arbitrary.

66. Many of the targeted SUPs in the Ban are described by their function. However, functionality is an irrelevant consideration for toxicity under *CEPA*. A substance becomes toxic at a certain concentration where its undesired effects are observed and quantified. Whether a SUP is used in a restaurant as opposed to a hardware store is of no moment.

67. A substance is not banned or regulated for toxicity under *CEPA* based upon the use to which it can be put, but rather based upon its risk for causing harm and its concentration in the environment.

68. However, because there is no quantifiable basis for determining a rate at which the SUP of concern enters the environment, nor a rate of harm associated with the concentration of the SUP, there is no measure of toxicity.

69. Even if there was a proper risk assessment for toxicity, if the result of the assessment is a ban on a particular SUP because of its physical effects on the environment, that ban would not be based solely on the use to which the SUP is put prior to its disposal. For example, a plastic container is not less toxic because it is used to hold nails for sale is a hardware store, as compared with the use of the same SUP to hold blueberries for sale in a grocery store. One should not be permitted to use and

dispose of the same SUP freely in one case while forbidding its use and disposal in another situation, especially where there is no discernable difference to the environmental impact of that SUP.

70. A manufacturer selling such containers, is acting legally when manufacturing and selling containers to a hardware store, but not to a grocery store. The same would not be true for other regulated manufactured items. A firearm would not be safe for use in a restaurant, but unsafe in a hardware store.

71. The prohibitions in the Ban relate to the import, manufacture and use of the targeted SUPs. At section 6 of the Ban, there is an outright ban on the manufacture, importation, and sale of single use plastic checkout bags, single use plastic cutlery, single use plastic foodservice ware and single use plastic stir sticks. Section 3 contains the same ban for ring carriers.

72. In reading the definitions of the SUPs targeted by these bans, they relate to the food industry. Ring carriers are defined in section 1 as relating to beverage transport, meaning the same plastic ring carriers can be used for similar containers that do not contain beverages without prohibition. Thus, a manufacturer can make ring carriers for yogurts, cereals, paint sets, and non-beverage items, can sell them to others for use, so long as not used for beverage containers.

73. Hence the issues of ambiguity and arbitrariness of the Ban are front and centre, and the unreasonableness of the Ban is clear. The Ban is arbitrary, unclear in that it is in fact a prohibition on the actual problematic SUP, or it is ambiguous in its application.

All Facts Point to an Unjustified Ban and Unreasonable Decisions Depriving the Public of Proper Inquiry

74. The Ministers improperly proceeded to regulate SUPs in an absence of evidence of toxicity and without any supportive science and no rational link to environmental protection. Further there is no evidence of harm to the environment and the Ministers refused to convene a Board of Review to inquire into the potential for any such harms arising from the SUPs that are the subject of the Ban.

75. Consequently, the Ban does not address the objectives of *CEPA*, and does not fall within the scope the environmental powers that Parliament may exercise.

76. Thus the Applicants ask that the Court award the available remedies requested above.

The Applicants Rely Upon:

77. The Certified Tribunal Record, for which production to the Court and the Applicants is requested pursuant to Rule 317;

78. Any Evidence provided by the parties in this proceeding;

79. And Such further and other materials as the parties shall provide and the Court may admit.

Dated at Toronto this 15th day of July, 2022

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