

Supplementary Report on Update and Action Plan on the Single-Use and Takeaway Items Reduction Strategy, including the Circular Food Innovators Fund

Date: November 27, 2023

To: Infrastructure and Environment Committee

From: General Manager, Solid Waste Management Services

Wards: All

SUMMARY

This report supplements the Update and Action Plan on the Single-Use and Takeaway Items Reduction Strategy (the Update Report), including the Circular Food Innovators Fund report, which provides information on waste reduction initiatives from the Solid Waste Management Services Division (Solid Waste). The Update Report proposes a new Single-Use and Takeaway Items Bylaw (SUTI Bylaw) applicable to retail business establishments as part of Stage 2 of the Single-Use and Takeaway Items Reduction Strategy (Reduction Strategy), which took into consideration the Government of Canada's Single-Use Plastic Prohibition Regulations (Federal Regulations).

This supplementary report provides information on a Federal Court of Canada (Federal Court) ruling that found the current legal basis for the Federal Regulations to be unreasonable and unconstitutional, thereby compromising their enforcement.¹ The combination of this court decision, the Federal Government's recent decision to appeal, and the possibility that the Federal Government might amend its approach in the process have led SWMS staff to recommend reporting back in Q1 2024 on the implications for and any necessary changes to the SUTI Bylaw.

RECOMMENDATIONS

The General Manager, Solid Waste Management Services, recommends that:

1. City Council direct the General Manager, Solid Waste Management Services, to report back in Q1 2024, with any recommendations to adjust the Single Use and Takeaway Items Reduction Strategy that considers the Federal Court's decision quashing the *Order Adding a Toxic Substance to Schedule 1 to the Canadian*

¹ See Federal Court Decisions - Responsible Plastic Use Coalition v. Canada (Environment and Climate Change) - November 16, 2023 - section VI. Conclusion - <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/524419/index.do?q=plastic+toxic>

Environmental Protection Act, 1999 (CEPA), the pending appeal and any amended approaches by the Federal Government.

FINANCIAL IMPACT

There are no financial impacts to detail in this report. Further information is outlined in the Update Report.

DECISION HISTORY

At its meeting on July 7, 2022, Infrastructure and Environment Committee received item IE 31.15 entitled "Update on Single-Use and Takeaway Items Reduction Strategy - Reducing Single-Use (formerly Voluntary Measures) Program Launch" which included the next steps that Solid Waste staff would report back in 2023 on an implementation timeline and approach for the Reduction Strategy, ensuring alignment between the City's proposed SUTI Bylaw and the Government of Canada's Single-Use Plastics Prohibition Regulations.

The Infrastructure and Environment Committee document can be viewed at:
<https://secure.toronto.ca/council/agenda-item.do?item=2022.IE31.15>

At its meeting on June 8 and 9, 2021, City Council adopted item IE22.7 entitled "Urging the Federal Government to Take Action to Manage Plastics," and endorsed the integrated management plan for plastics proposed by the Government of Canada, which includes: adding plastic manufactured items as a toxic substance to the Canadian Environmental Protection Act; banning six single-use items: checkout bags, stir sticks, six-pack rings, cutlery, and certain takeout containers and straws; and, establishing a minimum requirement for recycled plastic content. City Council requested the Government of Canada to implement the management plan as soon as possible; requested the Government of Canada to work with the City to explore, with a view to investing in, reuse systems to replace single-use plastic products; requested the Government of Canada to establish a registry that publicly reports on: descriptions of the plastic manufactured items in Canada, a list of chemicals found in each product, and the amount of plastic that enters the waste stream in Canada each year. City Council also requested that the Government of Canada establish a framework for the adoption of Extended Producer Responsibility regulation across the country and to set a national recycling target for plastic products.

The City Council decision document can be viewed at:
<https://secure.toronto.ca/council/agenda-item.do?item=2021.IE22.7>

At its meeting on April 24, 25, 26, and 27, 2018, City Council adopted item PW28.8 entitled "State of Toronto's Blue Bin Recycling Program," which directs City Council to request the Government of Canada to develop a national strategy that addresses plastic pollution that would include several regulations aimed at making the producers of products and packaging directly responsible for reducing resource, as well as

developing a national single-use plastics reduction and/or recycling performance standard; establishing a national single-use plastics recycled content performance standard; eliminating the use of problematic products and packaging that pollute the environment; and reducing consumer and industrial use of single-use plastics, including, but not limited to, plastic bags, bottles, straws, tableware, polystyrene (foam), plastic tea bags, cigarette filters, and beverage containers.

The City Council decision document can be viewed at:

<https://secure.toronto.ca/council/agenda-item.do?item=2018.PW28.8>

COMMENTS

Background

The legal basis for the Federal Regulations is the designation of plastic manufactured items (PMI) as toxic pursuant to *Canadian Environmental Protection Act, 1999 (CEPA)* and the subsequent listing of PMI in Schedule 1. Two applications brought by a group of plastics producers known as the Responsible Plastics Use Coalition (RPUC) and certain plastic manufacturers and distributors of plastic resins (the Applicants), resulted in two Federal Court challenges in 2021 and 2022, seeking judicial review of both the Federal Government's designation of PMI as toxic, and the associated Federal Regulations.

Certain single-use plastic items were not proposed in the SUTI Bylaw, specifically because they were listed in the Federal Regulations; however, some of these items, like plastic straws, plastic stir sticks, and plastic eating utensils, will naturally be covered by the proposed SUTI Bylaw as accessory food items under the Ask-First/By-Request requirement.

Detailed below are the actions taken by the Federal Government, an overview of the two court applications and the Government's potential next steps.

Actions Taken by the Federal Government

On October 7, 2020, the Federal Government published a discussion paper entitled "A Proposed Integrated Management Approach to Plastic Products to Prevent Waste and Pollution" to engage with stakeholders on the design and implementation of potential risk management measures for certain PMI, including regulatory instruments to ban single-use plastic items that cause harm to the environment, where warranted and supported by scientific evidence. In December 2020, City staff submitted supportive comments regarding the discussion paper, as detailed in the Single-Use and Takeaway Items Reduction Strategy - Stage 1 report.² The Federal Government recommended the addition of PMI to Schedule 1 in accordance with the precautionary principle,³ which

² See Single-Use and Takeaway Items Reduction Strategy - Stage 1 -

<https://www.toronto.ca/legdocs/mmis/2021/ie/bgrd/backgroundfile-166832.pdf>

³ As outlined in the Canada Environmental Protection Act 1999 Guiding Principles, the Government's actions to protect the environment and health are guided by the precautionary principle, which states that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used

would be consistent with the recommendation from the Science Assessment of Plastic Pollution, a report detailing "the current state of the science regarding the potential impacts of plastic pollution on the environment and human health,"⁴ to take action to address plastic pollution.

On May 12, 2021, the Federal Government published a cabinet order (Order) adding PMI to Schedule 1. PMI is a broad class of plastic substances that are defined by the Government as "any items made of plastic formed into a physical shape or design during manufacture, and have, for their intended use, a function or functions dependant in whole or in part on their shape or design. They can include final products, as well as components of final products."⁵

The Federal Regulations come into force on a staggered timeline, as shown in Table 1 below, beginning December 20, 2022, with the prohibition of manufacture and import for sale in Canada of the listed items (ring carriers prohibition came into effect on June 20, 2023).

Table 1: Timeline of Federal Regulations

Date of Implementation	Description of Measure
December 20, 2022	Prohibition on the import and manufacture of single-use plastic checkout bags, cutlery, foodservice ware made from problematic plastics, stir sticks, and straws
June 20, 2023	Prohibition of the import and manufacture of ring carriers in Canada
December 20, 2023	Prohibition of the sale of single-use plastic checkout bags, cutlery, foodservice ware made from problematic plastics, stir sticks, and straws
June 20, 2024	Prohibition of the sale of ring carriers, and sale of flexible straws packaged with beverage containers
December 20, 2025	Prohibition of the manufacture and import for the purposes of export of all six categories of single-use plastics

as a reason for postponing cost-effective measures to prevent environmental degradation," - <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/publications/guide-to-understanding/chapter-3.html>

⁴ The Science Assessment of Plastic Pollution is to guide future research and inform decision-making on plastic pollution in Canada. The report does not quantify the risks of plastic pollution on the environment or human health but surveys the existing state of science in order to guide future scientific and regulatory activities. See Government of Canada - Science Assessment of Plastic Pollution - <https://www.canada.ca/en/environment-climate-change/services/evaluating-existing-substances/science-assessment-plastic-pollution.html>

⁵ See Canada Gazette, Part I, Volume 154, Number 41: Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999 - <https://canadagazette.gc.ca/rp-pr/p1/2020/2020-10-10/html/reg1-eng.html>

City Council has expressed consistent support for the development and implementation of the Government's Canada-wide Action Plan on Zero Plastic Waste as outlined in the Decision History of this report.

Overview of the Federal Court Applications

On May 18, 2021, the RPUC, a not-for-profit corporation comprised of companies from the plastics industry, along with Dow Chemical Canada ULC, Imperial Oil, and Nova Chemicals Corporation, brought an application in the Federal Court seeking a review of the decisions that resulted in the addition of PMI to Schedule 1 (Application #1). The respondents to Application #1 are the Minister of the Environment and Climate Change, the Minister of Health, and the Attorney General of Canada. In the application, the Applicants argued that the Order was unreasonable and therefore not a valid exercise of the Federal Government's authority under CEPA. Specifically, the Applicants argued that the definition of PMI is too broad, that PMI is not a substance or a class of substance that could be included Schedule 1, and that the Federal Government did not undertake proper scientific analysis and risk assessments to demonstrate that PMI are toxic.

After the Federal Government enacted the Federal Regulations in June 2022, on July 15, 2022, RPUC, Petro Plastics Corporation Ltd, and Oregon Precision Industries, Inc. (which carries on business under the name PakTech) brought an application in the Federal Court seeking a review of the decisions that led to the adoption of the Federal Regulations prohibiting the manufacture and use of certain PMI under CEPA (Application #2). The respondent to Application #2 is the Attorney General of Canada.

Detailed below are the two applications (Court File Nos. T-824-21 and T-1468-22).

Application #1 - Plastic Manufactured Items (Court File No.T-824-21) sought:

- An Order quashing the decision to add PMI to Schedule 1;
- An Order prohibiting the addition of any substance to Schedule 1, unless it meets both the test for “toxicity” (CEPA s. 64), and the definition of “substance” (CEPA s.3(1)(f)); and
- An Order requiring the establishment of a Board of Review to conduct a proper and meaningful review by scientists and experts to determine whether there is sufficient scientific evidence establishing that PMI are "toxic".

Application #2 – Single-Use Plastic Prohibition Regulations (Court File No. T-1468-22) sought:

- An Order quashing the Federal Regulations under CEPA;
- An Order prohibiting the Government from regulating single-use plastics under CEPA, including any restrictions on the import, manufacture, and sale of single-use plastics;
- A declaration that the ban on single-use plastic exceeds the authority of the Government under the Constitution Act, 1867;

- An Order requiring the Government to establish a Board of Review to inquire into the nature and extent of the harm (if any) posed by single-use plastics;
- An Order for interim and interlocutory relief to suspend the coming into force and the enforceability of the Federal Regulations pending the outcome of the application.

Subsequent to the hearing of Application #1 and prior to the Federal Court's decision was released, Bill S-5 (the Strengthening Environmental Protection for a Healthier Canada Act) received royal assent.⁶ As a result of Bill S-5, CEPA was amended and Schedule 1 was repealed and re-enacted. PMI is listed under Part 2 of the re-enacted Schedule 1.

Decision on Application #1

On November 16, 2023, the Federal Court released its decision on Application #1, in which it agreed with the Applicants that the Order adding PMI to Schedule 1 was unreasonable, because the scientific assessment undertaken by the Government did not sufficiently establish that all items that fall within the broad definition of PMI are toxic. The Federal Court further found that the Order was unconstitutional, as it was not a valid exercise of the Federal Government's criminal lawmaking power.

As a result of the decision, the Order is quashed (annulled, or set aside). This means that any proposed federal regulation that is dependant on PMI being listed in Schedule 1 has no legal basis and cannot, for the time being, proceed.

In its decision, the Federal Court specifically held that the repeal and re-enactment of Schedule 1 has no bearing on its decision that the Order is unreasonable and unconstitutional.

The Federal Government's Potential Next Steps

The Federal Government has indicated that they will appeal the ruling, and have until December 16, 2023, to appeal the decision to the Federal Court of Appeal. It will likely be several years before any appeal is heard and a decision is rendered. If the Federal Court of Appeal grants the Federal Government's appeal application they could potentially place an injunction on the decision by the Federal Court.

Despite the Federal Government's stated intention to appeal the decision, the decision takes immediate effect, meaning that the Order is immediately quashed unless the Government applies to the Federal Court for a stay pending appeal. As the Federal Court only has the jurisdiction to deem the Order listing PMI in Schedule 1 as unconstitutional and does not have the jurisdiction to delete PMI from Schedule 1 or quash any of the regulations that are already in place, the Federal Regulations are still in effect but not enforceable under CEPA.

⁶ See Bill S-5: Strengthening Environment Protection for a Healthier Canada Act - <https://www.canada.ca/en/environment-climate-change/news/2023/06/bill-s-5-strengthening-environmental-protection-for-a-healthier-canada-act.html>

As the Federal Court has ruled that listing PMI in Schedule 1 is unconstitutional, there is no longer a legal basis for the Federal Regulations. The Federal Government has the option of rolling-back the Federal Regulations or making the Federal Regulations constitutional. The Federal Government could do this by amending CEPA to replace PMI in Schedule 1 with a narrower subset of PMI. To do so, the Government will have to undertake scientific assessments that sufficiently establish that this narrower subset of PMI are toxic or capable of becoming toxic as those terms are defined in CEPA.

Next Steps

Regardless of the ruling and the appeal or Federal Government amendments that may follow, the reduction of single-use and takeaway items is important to achieve greater waste reduction, support reuse and diversion and prevent litter in the public realm, natural environment and waterways. The proposed SUTI bylaw presented in the Update Report, will immediately address plastic single-use food accessory items through the Ask First, By Request requirement.

Solid Waste Management Services staff are currently working to further assess the implications of this ruling and reviewing if any further measures should be added to the proposed SUTI Bylaw. This work requires collaboration with relevant City divisions, including but not limited to Legal Services and Municipal Licensing and Standards. Staff will report back in Q1 2024 with an update and any additional recommendations for an updated proposed SUTI Bylaw.

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SIGNATURE

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