Federal Court  Cour fédérale

**Date: 20231116**

**Docket: T-824-21**

**Citation: 2023 FC 1511**

**Toronto, Ontario, November 16, 2023**

**PRESENT: The Honourable Madam Justice Furlanetto**

**BETWEEN:**

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

**Applicants**

**and**

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

**Respondents**

**and**

**AMERICAN CHEMISTRY COUNCIL AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, PLASTICS INDUSTRY ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC. AND OCEANA CANADA, ANIMAL JUSTICE, ATTORNEY GENERAL FOR THE PROVINCE OF ALBERTA, ATTORNEY GENERAL FOR THE PROVINCE OF SASKATCHEWAN**

**Interveners**

# JUDGMENT AND REASONS

## I. Overview

[1] This is an application for judicial review [Application] of the Federal Government's decisions relating to the addition of "Plastic Manufactured Items" [PMI] to the List of Toxic Substances in Schedule 1 of the *Canadian Environmental Protection Act*, 1999, SC 1999, c 33 [CEPA]. Subsequent to the initial hearing of this application, Schedule 1 was repealed and re-enacted with all of its same listed substances, pursuant to Bill S-5, the *Strengthening Environmental Protection for a Healthier Canada Act*, SC 2023, c 12 [Bill S-5]. Although this Application involves the Order (defined below) that enabled PMI to be listed on Schedule 1 as it existed pre re-enactment, for reasons set out below I find that the remedies arising from this Application nonetheless remain of value to an existing controversy between the parties and that the amendments under Bill S-5 have not rendered this Application moot. The analysis that follows accordingly considers all issues argued.

[2] The Applicant, Responsible Plastics Use Coalition [RPUC], is a not-for-profit corporation comprised of companies from the plastic industry who do business in Canada. The Applicants Dow Chemical Canada ULC and Nova Chemicals Corporation are chemical and plastic resin manufacturers and distributers, and the Applicant, Imperial Oil, by its Managing Partner, Imperial Oil Limited, is a manufacturer of petrochemicals from which plastic resins are made.

[3] The Applicants raise two challenges in this Application. First, the Applicants assert that 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, in the *Canada Gazette* Part II, Vol. 155, Number 10 [Order] was unreasonable as it was not a proper use of the Administrator-in-Council's/Governor-in-Council's [GIC's] authority and does not comply with the statutory scheme under CEPA. They contend that the listing for PMI is too broad, that PMI is not a "substance" or "class of substances" that could fall under the List of Toxic Substances in Schedule 1 of CEPA, and that the proper scientific analysis and risk assessments were not completed to demonstrate that PMI are toxic. The American Chemistry Council, American Fuel & Petrochemical Manufacturers, and Plastics Industry Association, who have intervener status [Industry Interveners], assert that the *Canada-United States-Mexico Agreement* [CUSMA] and the *Technical Barriers to Trade Agreement* [TBT], to which Canada is a signatory, ought to inform the Court's interpretation of the requirements of finding a substance toxic under CEPA.

[4] The Applicants further contend that the decision of the Minister of Environment and Climate Change [MECC] to deny requests for a Board of Review to assess the alleged risks associated with PMI, and its proposed addition to Schedule 1 [BOR Refusal] was unreasonable. Pursuant to rule 302 of the *Federal Courts Rules,* SOR/98-106, and the consent of the parties, the Order and BOR Refusal collectively comprise the decisions under review for the purposes of this Application.

[5] Second, the Applicants, the Attorney General for the Province of Saskatchewan [Saskatchewan] and the Attorney General for the Province of Alberta [Alberta] argue that the

Order is unconstitutional. They assert that it falls outside of federal criminal law power [CLP]. Saskatchewan and Alberta participate in response to a Notice of Constitutional Question issued by the Applicants.

[6] The Attorney General of Canada [AGC] is the named Respondent on behalf of the GIC who has statutory authority under CEPA to make orders adding substances to Schedule 1. The MECC and the Minister of Health [collectively, the Ministers] jointly administer CEPA.

[7] The Respondents assert that the Order was reasonable. They argue that the only administrative constraint on the GIC's ability to make the Order was the statutory scheme of CEPA and that the GIC acted in accordance with their power under CEPA and its overarching purpose. The Respondents assert that Canada's trade agreements are irrelevant and outside the jurisdiction of the Federal Court on this Application.

[8] The Respondents further argue that the BOR Refusal was reasonable, as the objections made did not cast doubt on the core scientific findings supporting the recommendation for the Order. The Respondents contend that the Order is a valid exercise of Parliament's CLP and that the Applicants' constitutional arguments are premature.

[9] Environmental Defence Canada Inc. and Oceana Canada [EDCOC] and Animal Justice are also interveners in the Application who oppose the Applicants' arguments. EDCOC additionally argues that the Order is constitutional under the national concern doctrine, otherwise known as the Peace Order and Good Government [POGG] principle. The Applicants,

Saskatchewan, and Alberta assert that EDCOC cannot raise POGG through its intervention, as the Respondents did not pursue this issue in argument.

[10] As set out further below, PMI was too broad to be listed on the List of Toxic Substances in Schedule 1 and this breadth renders the Order both unreasonable and unconstitutional. The GIC acted outside of their authority and the scheme of the relevant provisions of CEPA in listing the broad category of PMI on Schedule 1. Similarly, the Order exceeded beyond the CLP as there is no reasonable apprehension that all listed PMI are harmful. The Order extends beyond the guardrails established in *R v Hydro-Quebec*, [1997] 3 SCR 213 [*Hydro-Quebec*] for rendering the scheme under CEPA within the CLP.

## II. Background

### A. *Background to the Order and BOR Refusal*

[11] It is undisputed that plastics are ubiquitous. Plastics have been around for over 50 years and comprise manufactured items that include final products, as well as components of products that are found in every facet of everyday life and in industry sectors as diverse as packaging, construction, automotive, electronic equipment, textiles, white goods, and agriculture.

[12] Plastic waste management (the disposal and recycling of plastics) and plastic pollution (plastics that remain in the environment and are not disposed of through a waste management system) have been the subject of growing environmental concern and government focus since at least 2016.

[13] In 2018, the Canadian Council of Ministers of the Environment from all federal, provincial and territorial governments developed a Canada-wide Strategy on Zero Plastic Waste, which recognized plastic pollution as a serious and "exponentially increasing global environmental problem". It sought to put a scheme in place to achieve its goals by 2030.

[14] Environment and Climate Change Canada [ECCC] commissioned Deloitte and Cheminfo Services Inc to conduct an economic study on the quantities, uses, and end-of-life management of plastics in the Canadian economy, which was published in 2019 as the "*Economic Study of the Canadian Plastic Industry, Markets and Waste"* [Deloitte Study]. The Deloitte Study opined that a zero plastic waste economy would deliver significant benefits to Canada, but could not be achieved without concurrent, strategic intervention by government, industry stakeholders, and the public across each stage of the plastic lifecycle. The Deloitte Study estimated that 29 kilotonnes of plastic waste (which represented 1% of all plastic waste generated) was released into the environment in Canada in 2016, while 86% was maintained in landfills.

[15] In February 2020, the Ministers published a draft report titled "Science Assessment of Plastic Pollution" in the *Canada Gazette*, Part I for public comment, which was published in final version on October 7, 2020 [Science Assessment]. The executive summary of the Science Assessment outlined its objective as:

> The purpose of this report is to summarize the current state of the science regarding the potential impacts of plastic pollution on the environment and human health, as well as to guide future research and inform decision-making on plastic pollution in Canada. It provides a review of the available information on plastic pollution, including its sources, occurrence, and fate, as well as on the potential effects of plastic pollution on the environment and human health. This report is not intended to quantify the risks of plastic

> pollution on the environment or human health, but rather to survey the existing state of science in order to guide future scientific and regulatory activities.

[16] The Science Assessment constituted a review of over 600 scientific publications. It looked at the effects of both macroplastics (plastics greater than 5mm) and microplastics (plastic particles less than or equal to 5mm in size) on the environment and on human health.

[17] The Science Assessment recognized a lack of "standardized methods for monitoring microplastics and characterizing the environmental and human health effects of plastic pollution, as well as inconsistencies in the reporting of occurrence and effects data in the scientific literature." It found that macroplastics had been demonstrated "to cause physical harm to environmental receptors on an individual level and to have the potential to adversely affect habitat integrity" and that "organisms had been shown to ingest macroplastics and to become entangled in macroplastics." The report "anticipated that the frequency of occurrence of physical effects on individual environmental receptors [would] continue to increase if current trends continue[d] without mitigation measures", and recommended action "to reduce macroplastics and microplastics that end[ed] up in the environment."

[18] At the same time that the Science Assessment was published, the MECC also published a discussion paper entitled "*A Proposed Integrated Management Approach to Plastic Products to Prevent Waste and Pollution*" [Discussion Paper]. The purpose of the Discussion Paper was to seek input on an integrated management approach to plastics, including their regulation under CEPA. The Discussion Paper outlined a proposed framework for managing single-use plastics [SUP], which involved grouping SUP items into categories and identifying those that were either

environmentally problematic or problematic from a "value recovery" perspective (*i.e.* low recycling rate), and which performed essential functions or lacked viable alternatives. The Discussion Paper recognized the Government of Canada's commitment to ban or restrict harmful SUP items "where warranted and supported by science" and identified six plastic items that met the requirements of a ban or a restriction (plastic checkout bags, stir sticks, six-pack rings, cutlery, straws, and food service ware made from problematic plastics).

[19] In further conjunction with the publication of the Science Assessment, on October 10, 2020, the Government of Canada published a proposed order and preliminary regulatory impact analysis statement [RIAS] in the *Canada Gazette*, Part I, giving notice of the GIC's intention to make an order under section 90 of CEPA to add PMI to the List of Toxic Substances in Schedule 1. The preliminary RIAS provided a 60-day public comment period.

[20] From November 2020 to January 2021, the Ministers engaged in consultations regarding the proposal and solicited feedback from stakeholders. During the consultation process, 17 civil society organizations, one territorial government, two local governments, and one organization representing municipalities indicated support for the proposed order. However, 123 industry associations or companies, two provincial governments, and one foreign government indicated opposition to the proposed order. Several industry stakeholders argued that CEPA was not the appropriate tool to manage plastic waste, suggesting instead that new legislation should be created, or that the federal government should let provincial and territorial governments manage the issue.

[21] During November and December 2020, 60 Notices of Objection were filed under section 134 of CEPA, and 52 requests were made for a Board of Review [BOR] to be established pursuant to section 333 of CEPA.

[22] On April 21, 2021, the Ministers denied all requests for a BOR. The Order was subsequently registered on April 23, 2021, and published in the *Canada Gazette*, Part II, on May 12, 2021.

[23] The RIAS identified the objective of the Order as enabling "the ministers to propose risk management measures under CEPA on certain [PMI] to manage the potential ecological risks associated with those items becoming plastic pollution." The RIAS referred to "macroplastic pollution as pos[ing] an ecological hazard, including physical harm, to some animals and their habitat" and stated that "all plastic manufactured items" had the potential to become plastic pollution.

[24] The RIAS referred to data from the Deloitte Study on the plastic market sectors, the percentage of end-use plastic in 2016 by sector and the corresponding amount of plastic waste generated by sector. The RIAS also referred to the state of the science with respect to the effects of plastic pollution on the environment and human health as reported in the Science Assessment and the recommendations made in the Science Assessment.

[25] The RIAS acknowledged the opposition to the Order and outlined the departments' response to recurrent criticism from stakeholders, including with respect to the processes followed and screening assessments conducted, stating that:

> …while the typical processes under the Chemicals Management Plan do provide a risk-based approach to managing chemicals, the ministers are not limited to those processes to better understand threats to the environment or human health so that they can determine whether action is justified to prevent pollution that can cause environmental harm. In addition, while screening assessments are required for substances assessed under section 74 of the Act, plastic manufactured items were not reviewed under this authority. The ministers are satisfied that the science assessment shows that plastic pollution has an immediate and long-term effect on the environment, in particular to wildlife and their habitat, and that it provides the evidence to add plastic manufactured items to Schedule 1 to CEPA.

## III. Preliminary Issues

[26] There are two preliminary issues raised by the Respondents on the Application: the first is an assertion of mootness arising from changes that were made to CEPA after the Application was heard, and the second relates to the evidence that should be considered by the Court on the Application.

### A. *Amendments to CEPA*

[27] Shortly after the Application was heard, Bill S-5 received Royal Assent. As a result of Bill S-5, CEPA was amended and Schedule 1 of the List of Toxic Substances was repealed and re-enacted. The new Schedule 1 now has two parts: Part 1 and Part 2. All of the substances that were listed on Schedule 1 of the List of Toxic Substances are on the new Schedule 1 in one of the two parts. PMI is listed under Part 2 of the re-enacted Schedule 1.

[28] Upon Royal Assent of Bill S-5, the parties indicated by letter their agreement that the Court could and should continue to decide the Application, either because it was not moot (the Applicants' submission) or because the Court may exercise its discretion to do so (the Respondents' submission). However, in view of the re-enactment of Schedule 1, the parties requested that they be given the opportunity to provide further submissions as to the impact of Bill S-5 on the Court's pending decision. The parties proposed a schedule which allowed for further submissions to be provided in writing. The schedule provided for initial representations from the Respondents, followed by representations from the Applicants and interveners Alberta and Saskatchewan, which would then be followed by further reply submissions from the Respondents. A further hearing in respect of the submissions was also scheduled and took place on September 15, 2023.

[29] In the submissions, the Respondents maintained that the Application was moot, but that this was one of the rare and exceptional circumstances where the Court could nonetheless exercise its discretion to decide the pending issues. The Applicants, Alberta and Saskatchewan submitted that the Application was not moot and that the only issue arising from Bill S-5 was one of remedy.

[30] A proceeding is moot where there is no longer any live controversy between the parties: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] at p 353. While the general policy is that the Court will decline to decide a case that is moot, the Court maintains discretion to depart from this policy where other factors are satisfied; such as, where collateral consequences result in an adversarial context that prevails, where judicial economy favours a

decision and resolution of an issue is in the public interest, and where rendering a decision does not depart from the Court's traditional role: *Borowski* at pp 358-363.

[31] The parties disagree as to whether a live controversy remains. The Respondents assert that the controversy in this application centers around the Order and listing of PMI on Schedule 1 to the List of Toxic Substances, which is now repealed. Thus, even if the Order is found invalid or unconstitutional it will not affect the listing of PMI on the new Schedule 1 as Bill S-5 is now the enabling legislation for the listing. The Applicants argue that a finding that the Order was invalid and/or unconstitutional on the date it was made could nonetheless impact the listing of PMI as PMI would not be listed on the new Schedule 1 if it had not been listed on Schedule 1 of the List of Toxic Substances. They assert that the underlying constitutional question remains unchanged by the manner of enactment – that is, whether the listing is a valid exercise of the CLP. Thus, a finding that the Order (and its listing on Schedule 1 of the List of Toxic Substances) was *ultra vires* has practical utility on the retention of PMI on the current Schedule 1. Similarly, a finding that the Order was void as of the day it was made on administrative law grounds, will impact whether PMI should be retained on Schedule 1 or whether it should be deleted pursuant to the transitional provisions of Bill S-5 or under the GIC's authority.

[32] I agree that the challenges to the Order raised in this Application remain relevant to the listing of PMI on the new Schedule 1. While Parliament could have chosen to add PMI to Schedule 1 for different reasons, the logical inference from the transposition of the complete List of Toxic Substances from Schedule 1 under CEPA to Schedule 1 enacted by Bill S-5 is that PMI

would not be listed on the new Schedule 1 if it were not listed on Schedule 1 of the List of Toxic Substances. A challenge to the legal foundation for listing PMI on Schedule 1 of the List of Toxic Substances therefore may be relevant to its listing on the new Schedule 1. The Application is not moot.

[33] However, even if I were to move on to the second stage of the *Borowski* analysis, there is no dispute between the parties that the issue in this Application should be determined as a decision here may have a consequential impact on the ongoing challenge in this Court to the *Single Use Plastics Regulations*, SOR/2022-138 [*SUP Regulations*]. The *SUP Regulations* prohibit the manufacture, import and sale of six categories of single use plastics. The adoption of the *SUP Regulations* was enabled by the listing of PMI on Schedule 1 of the List of Toxic Substances and the GIC's regulation-making power under section 93 of CEPA. RPUC is also an Applicant in the SUP challenge (*Petro Plastics Corporation Ltd et al v Canada (Attorney General)*, Court File No. T-1468-22 [*Petro Plastics*]). In *Petro Plastics*, the applicants challenge the *SUP Regulations* on administrative and constitutional grounds. As agreed by the parties, the outcome of this application may have direct practical implications on the *Petro Plastics* proceeding. The impact on *Petro Plastics* along with the time and expense already expended on this application justifies a decision being rendered on the pending issues.

[34] Accordingly, I will go on to consider the issues as argued before me and the analysis that follows relates to CEPA and its Schedule 1 as it existed prior to the amendments imposed by Bill S-5 unless stated otherwise.

B. *The Evidence and Record before the Court*

[35] As a further preliminary matter, the Respondents question whether certain evidence submitted by the parties on the Application can be considered by the Court.

[36] As the Order in issue is an order of the GIC, the record is subject to Cabinet privilege and the Certified Tribunal Record [CTR] before the court is what was before the Ministers. In addition to the CTR, each side also filed additional fact and expert evidence.

[37] The Applicants filed three fact affidavits:

1) An affidavit from a law clerk within the solicitors for the Applicants' law firm that attached correspondence between the parties, the external expert reviews and the peer reviewed articles received from counsel for the Respondents to the Science Assessment;

2) An affidavit from a paralegal of the law firm, attaching copies of provincial legislation relating to waste management and recycling, municipal by-laws, proposed by-laws and articles relating to plastic waste and the regulation of plastic products; and

3) An affidavit from Randi Rahamim, the Executive Director of the RPUC and the Managing Director of Teneo, an organization that provides strategic communications and management consulting services to clients on topics of corporate interest, such as environmental, social and corporate governance

matters. The Rahamim affidavit summarizes the concerns that were raised by RPUC in response to the Order and the views and concerns of its members to the Order based on interviews that she conducted.

[38] The Respondents do not appear to dispute that this background evidence is properly before the Court.

[39] The Applicants also provided two expert affidavits:

1) The Affidavit of Dr. Frank Gobas, who is a professor at Simon Fraser University in the Faculty of the Environment, with a cross-appointment as a faculty member in the Biological Sciences Department within the Faculty of Science. Dr. Gobas is an expert in the fields of environmental fate, toxicology and risk assessment of pollutants. Dr. Gobas was asked to "provide scientific information" to assist the Court in its review of the Order and the Science Assessment. His affidavit opines on the scientific risk assessment a toxicologist would engage in to determine whether a substance was toxic.

2) The Affidavit of Geoff Granville, who is a biochemist and toxicologist working with the federal regulation of toxic substances in Canada. Mr. Granville is described as an expert in biochemistry, toxicology and the environmental risk assessment of chemicals and substances in Canada. He was active as a lead representative and was involved in the development, implementation and reform of CEPA 1988 and CEPA 1999. Mr. Granville reviews and opines on "the risk

assessment process that Canada relied upon in relation to each of the substances that Canada added to Schedule 1 pursuant to CEPA 1988 or CEPA 1999."

[40] The Respondents provided three affidavits, including a fact affidavit from a paralegal with the Department of Justice who attached information relating to RPUC from its website and information transmitted by its members. The Respondents also provided the following additional evidence:

1) The Affidavit of Thomas Kruidenier, the Acting Executive Director of the Program Development and Engagement Division, Environment and Climate Change Canada. Mr. Kruidenier was involved in overseeing the preparation of the draft Science Assessment, the internal and external expert review process, the review of public commentary and the preparation of the final version of the Science Assessment. He was also involved in reviewing objections to the proposed Order. Mr. Kruidenier's affidavit reviews these steps and responds to the Applicants' "criticisms" of the Science Assessment and the comments of the Applicants' experts on the Science Assessment.

2) The Affidavit of Dr. Chelsea Rochman, a professor of Ecology at the University of Toronto and a scientific advisor to the Ocean Conservancy. Dr. Rochman is described as an expert in ecotoxicology, environmental chemistry and aquatic and marine ecology. Dr. Rochman was asked to review and comment on the affidavits of Dr. Gobas and Mr. Granville by responding to specific questions relating to the scientific value of the Science Assessment and studies like it, and the manner of

> assessing environmental impacts and risks of plastic pollution, including quantitative methodologies.

[41] The evidence record was the subject of two lengthy motions to strike that resulted in the removal of those portions of the Gobas and Granville affidavits that provided legal opinions regarding the interpretation and application of the relevant provisions of CEPA, and removal of portions of the Kruidenier and Rochman affidavits that were not relevant or were found to be aimed at improperly advancing or bolstering the decisions under review. The Order and Reasons relating to the Gobas and Granville affidavits provided the following directions relating to their amendments (*Responsible Plastic Use Coalition v Canada (Environment and Climate Change)*, 2022 FC 377):

> [71] … the Granville Affidavit is struck but with leave to amend to rectify or remove the offending passages. ... The Granville Affidavit should be revised in such a way to allow for a discussion of past risk assessment processes of substances added to Schedule 1 of *CEPA 1988* or *CEPA 1999*. The discussion should not include argument regarding the statutory requirements of *CEPA 1999* nor offer any views on the merits of the impugned decisions.
>
> [72] With respect to the Gobas Affidavit, it is struck in its entirety. However, leave is granted to serve a revised affidavit identifying Dr. Gobas and allowing for identification of exhibits C through S. The revised Gobas Affidavit may only provide neutral non-argumentative commentary and contextual information relating to these exhibits.

[42] At the hearing of the Application, the Respondents argued that the Applicants' expert evidence should not be used by the Court as it is not evidence that was before the decision-makers and was proffered to have the Court second-guess the scientific methodologies that were used to support the decisions.

[43] The general rule on judicial review is that absent limited exceptions, the evidentiary record is restricted to the material that was before the decision-maker. Evidence that was not before the decision-maker, or that could have been placed before the decision-maker, that goes to the merits of the matter is not admissible: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [*Bernard*] at para 13; *Delios v Canada (Attorney General)*, 2015 FCA 117 [*Delios*] at para 42; *Galderma Canada Inc v Canada (Attorney General)*, 2022 FC 19 at para 12. The rationale behind the general rule is to promote judicial efficiency and to recognize the differing roles of administrative decision-makers and reviewing courts: *Bernard* at paras 15-16.

[44] As one of the recognized exceptions, general background information that will assist the Court in understanding the issues in the judicial review may be permissible as long as it does not include additional evidence, argument, or comments on the evidence before the decision-maker: *Access Copyright* at para 20a; *Delios* at paras 44-48; *Bernard* at paras 20-23. A second exception allows for evidence highlighting the complete absence of evidence on a conclusion reached by the decision-maker: *Access Copyright* at para 20c; *Bernard* at para 24; *Re Keeprite Workers' Independent Union et al and Keeprite Products Ltd* (1980), 29 OR (2d) 513 (CA).

[45] The Applicants assert that the Granville and Gobas affidavits provide useful background information about toxicology, plastics, and past practice relating to the assessment of substances listed on Schedule 1. I agree; however, in my view, this presents a fine line. As stated *in Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 83

(and recently repeated in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at para 62), opinions that ask the court to conduct a *de novo* analysis using a different yardstick extend beyond the bounds of reasonableness review:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was unreasonable.

[46] As set out further below, to the extent I rely on the Granville and Gobas affidavits, I do so only to refer to its factual background content, including the government documents and background regarding the substances listed on Schedule 1 and evaluated under Part 5 of CEPA. This is rather than for any opinions that may lend to creating a new yardstick for independent evaluation of whether PMI is properly listed or whether a Board of Review should have been constructed. I have approached the Kruidenier and Rochman affidavits with these same principles in mind.

## IV. Issues and Standard of Review

[47] The following issues are raised by this Application:

1) Is the Order unreasonable?

2) Was the decision to refuse a Board of Review unreasonable?

3) Is the Order unconstitutional as being outside the federal CLP?

4) Can the Court consider POGG and if so, is the Order unconstitutional for being contrary to POGG?

[48] The parties do not dispute that the decisions are to be reviewed on the reasonableness standard as considered within the particular context in which the decisions were made. As explained in *Vavilov* at paragraph 89:

> ....reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case.

[49] In this case, the Ministers and GIC are constrained by the statutory scheme of CEPA. The role of the Court is to ask if the enabling legislation construed reasonably allows for the particular decision. This requires looking at the text, context and purpose of the legislation. As set out at paragraphs 108 to 110 of *Vavilov*:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along

with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's

> authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

[50] The approach set out in *Vavilov* was applied in *Portnov v Canada (Attorney General)*, 2021 FCA 171 and *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 [*Innovative Medicines*], both of which involved challenges to decisions of the GIC to make regulations as a species of administrative decision-making. In *Innovative Medicines*, the Federal Court of Appeal emphasized at paragraphs 39 and 40 the importance of looking at the limiting statutory language when considering the regulation-making power of the GIC:

> [39] I sympathize somewhat with the underlying motivation of the Supreme Court in *Katz* and the Alberta Court of Appeal's application of *Katz* in the two recent cases: for good reasons based on the separation of powers between the judiciary and the executive, courts should not lightly interfere with decision-making by the Governor in Council, especially when its policy content is high. But the Supreme Court in the later case of *Vavilov*, sensitive to context, says the same thing. Under *Vavilov*, the broader the regulation-making power in a statute, particularly in matters of policy that are quintessentially the preserve of the executive, the less constrained the regulation-maker will be in enacting the regulation: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA

> 100, [2021] 1 F.C.R. 374 at para. 28 (applying *Vavilov* and earlier cases consistent with it), aff'd 2022 SCC 30.
>
> [40] This is especially so for the Governor in Council. The Governor in Council is "at the apex of the executive", serves as "the grand co-ordinating body for the divergent provincial, sectional, religious, racial and other interests throughout the nation", and represents "different geographic, linguistic, religious, and ethnic groups*": Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, 458 D.L.R. (4th) 125 at paras. 36-38. Thus, subject to limiting statutory language passed by our elected representatives, the Governor in Council's regulation-making power is often relatively unconstrained. The key is the limiting statutory language. *Vavilov* goes straight to that key, focusing on what meanings the language of the regulation-making power can reasonably bear. *Katz* doesn't. It focuses on matters of form, namely, the nature of the instrument being enacted, a regulation, and the maker of the instrument, the Governor in Council. Then it asks only one thing: whether the regulation, presumed to be valid, is so "irrelevant", "extraneous" or "completely unrelated" to the "statutory purpose" that it must be struck.

[51] For constitutional challenges and questions relating to the division of powers, the parties agree that an exception to reasonableness review applies and the standard of review is correctness: *Vavilov* at paras 17, 55; *Mason* at paras 41-42.

## V. Analysis

### A. *Is the Order unreasonable?*

#### (1) What is the appropriate context for the Court's review of the Order?

[52] As a preliminary matter, the Respondents note that the parties do not agree as to what constitutes the appropriate context for reasonableness review of the Order.

[53] The Respondents assert that the Order was a policy decision made by the GIC on behalf of the government, after consultation and by weighing the interests of stakeholders, and in furtherance of its overall objectives to address plastic pollution. They refer to the "Instrument choice" section of the RIAS, which states that:

> The Government of Canada has initiated a comprehensive agenda to achieve zero plastic waste and eliminate plastic pollution by 2030, which will require implementing a range of risk management measures. The departments determined that non-regulatory measures (e.g. voluntary agreements, guidelines, codes of practice) alone would not be sufficient to implement this agenda, and that regulatory measures would also be required.
>
> The addition of a substance to Schedule 1 to CEPA enables the ministers to propose risk management measures. ...
>
> [...]
>
> Based on the information provided in the science assessment, the ministers are satisfied that "plastic manufactured items" meet the criteria set out in paragraph 64(a) of the Act. Accordingly, the ministers recommended that plastic manufactured items be added to Schedule 1 to CEPA, which enables the ministers to propose risk management measures under CEPA on certain plastic manufactured items to manage the potential ecological risks associated with those items becoming plastic pollution. Any risk management measures developed under CEPA will be guided by the precautionary principle as set out in paragraph 2(1)(a) of the Act.
>
> The use of CEPA over other existing acts of Parliament would enable to Ministers to access the full range of authorities needed to manage plastic manufactured items among their entire life cycle. Therefore, adding "plastic manufactured items" to Schedule 1 to CEPA is the preferred option.

[54] The Respondents argue that taking away the GIC's authority to make such an order limits the options open to government. They contend that the Court is not free to decide that the Order is unreasonable because it disagrees with the policy choice it embodies. Rather, the role of the

Court in this context is limited to assessing whether there was authority within the governing statute for the GIC to make the Order it made.

[55] The Applicants assert that the Order was not discretionary in the ordinary sense nor is the policy content of the Order itself so great as to justify any higher level of deference.

[56] While the RIAS sets out certain policy goals of the government in instituting the Order, the authority of the GIC arises from CEPA itself and its statutory scheme. Thus, to address this issue, I will start with a review of the scheme and relevant provisions of CEPA.

[57] The full title of CEPA is "An Act respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development." The Declaration of CEPA states that its primary purpose is "to contribute to sustainable development through pollution prevention."

[58] CEPA was amended in 1999 to include, *inter alia*, the following preamble clauses which emphasize the Government of Canada's commitment to pollution prevention and operating under the precautionary principle, and its recognition of the importance of the ecosystem:

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| […] | […] |
| Whereas the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection; | qu'il s'engage à privilégier, à l'échelle nationale, la prévention de la pollution dans le cadre de la protection de l'environnement; |
| Whereas the Government of Canada acknowledges the | qu'il reconnaît la nécessité de procéder à la |

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| need to virtually eliminate the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented; | quasi-élimination des substances toxiques les plus persistantes et bioaccumulables et de limiter et gérer les polluants et déchets dont le rejet dans l'environnement ne peut être évité; |
| Whereas the Government of Canada recognizes the importance of an ecosystem approach; | qu'il reconnaît l'importance d'adopter une approche basée sur les écosystèmes; |
| […] | […] |
| Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation; | qu'il s'engage à adopter le principe de la prudence, si bien qu'en cas de risques de dommages graves ou irréversibles, l'absence de certitude scientifique absolue ne doit pas servir de prétexte pour remettre à plus tard l'adoption de mesures effectives visant à prévenir la dégradation de l'environnement; |
| […] | […] |

[59] Section 2 of CEPA sets out certain mandatory duties of the GIC in its administration of CEPA, including as relevant to this Application, the GIC's duty to:

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| (a) exercise its powers in a manner that protects the environment and human health, applies the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost- | a) exercer ses pouvoirs de manière à protéger l'environnement et la santé humaine, notamment celle des populations vulnérables, à appliquer le principe de la prudence, si bien qu'en cas de risques de dommages graves ou irréversibles à l'environnement, l'absence de |

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| effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches; | certitude scientifique absolue ne doit pas servir de prétexte pour remettre à plus tard l'adoption de mesures effectives visant à prévenir la dégradation de l'environnement, ainsi qu'à promouvoir et affermir les méthodes applicables de prévention de la pollution; |
| […] | […] |
| (c) implement an ecosystem approach that considers the unique and fundamental characteristics of ecosystems; | c) adopter une approche qui respecte les caractéristiques uniques et fondamentales des écosystèmes; |
| […] | […] |
| (j) protect the environment, including its biological diversity, and human health, from the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes; | j) préserver l'environnement — notamment la diversité biologique — et la santé humaine des risques d'effets nocifs de l'utilisation et du rejet de substances toxiques, de polluants et de déchets; |
| […] | […] |
| (k) endeavour to act expeditiously and diligently to assess whether existing substances or those new to Canada are toxic or capable of becoming toxic and assess the risk that such substances pose to the environment and human life and health; | k) s'efforcer d'agir avec diligence pour déterminer si des substances présentes ou nouvelles au Canada sont toxiques ou susceptibles de le devenir et pour évaluer le risque qu'elles présentent pour l'environnement et la vie et la santé humaines; |
| […] | […] |

[60] CEPA is organized into twelve different parts: Part 4 deals with "Pollution Prevention", Part 7 deals with "Controlling Pollution and Managing Wastes", and as relevant to this

Application, Part 5 deals with “Controlling Toxic Substances”, which includes maintaining Schedule 1.

[61] Through Part 5, CEPA ensures that no new substances are introduced into the Canadian marketplace before they have been assessed to determine whether they are toxic or capable of becoming toxic to the environment or human health. It provides “a procedure to weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm.”: *Hydro-Quebec* at para 147.

[62] Pursuant to subsection 90(1) of CEPA (as it read at the time of this Application): “...the Governor in Council may, if satisfied that a substance is toxic, on the recommendation of the Ministers, make an order adding the substance to the List of Toxic Substances in Schedule 1” [emphasis added]. A substance had to comply with subsection 90(1) to be included on the List of Toxic Substances in Schedule 1.

[63] Once a substance was listed on the List of Toxic Substances in Schedule 1, section 93 allowed the GIC, on recommendation of the Ministers, to broadly make regulations with respect to the substance, including (as this section read at the time of the Application):

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| (a) the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source; | a) la quantité ou la concentration dans lesquelles elle peut être rejetée dans l’environnement, seule ou combinée à une autre substance provenant de quelque source ou type de source que ce soit; |

(b) the places or areas where the substance may be released;

b) les lieux ou zones de rejet;

(c) the commercial, manufacturing or processing activity in the course of which the substance may be released;

c) les activités commerciales, de fabrication ou de transformation au cours desquelles le rejet est permis;

(d) the manner in which and conditions under which the substance may be released into the environment, either alone or in combination with any other substance;

d) les modalités et conditions de son rejet dans l'environnement, seule ou combinée à une autre substance;

(e) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;

e) la quantité qui peut être fabriquée, transformée, utilisée, mise en vente ou vendue au Canada;

(f) the purposes for which the substance or a product containing it may be imported, manufactured, processed, used, offered for sale or sold;

f) les fins auxquelles la substance ou un produit qui en contient peut être importé, fabriqué, transformé, utilisé, mis en vente ou vendu;

(g) the manner in which and conditions under which the substance or a product containing it may be imported, manufactured, processed or used;

g) les modalités et conditions d'importation, de fabrication, de transformation ou d'utilisation de la substance ou d'un produit qui en contient;

(h) the quantities or concentrations in which the substance may be used;

h) la quantité ou la concentration dans lesquelles elle peut être utilisée;

(i) the quantities or concentrations of the substance that may be imported;

i) la quantité ou la concentration dans lesquelles elle peut être importée;

(j) the countries from or to which the substance may be imported or exported;

j) les pays d’exportation ou d’importation;

(k) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;

k) les conditions, modalités et objets de l’importation ou de l’exportation;

(l) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing it;

l) l’interdiction totale, partielle ou conditionnelle de fabrication, d’utilisation, de transformation, de vente, de mise en vente, d’importation ou d’exportation de la substance ou d’un produit qui en contient;

(m) the total, partial or conditional prohibition of the import or export of a product that is intended to contain the substance;

m) l’interdiction totale, partielle ou conditionnelle d’importation ou d’exportation d’un produit destiné à contenir la substance;

(n) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported, offered for sale or sold in Canada;

n) la quantité ou la concentration de la substance que peut contenir ou rejeter dans l’environnement un produit fabriqué, importé, exporté, mis en vente ou vendu au Canada;

(o) the manner in which, conditions under which and the purposes for which the substance or a product containing it may be advertised or offered for sale;

o) les modalités, les conditions et l’objet de la publicité ou de la mise en vente de la substance ou d’un produit qui en contient;

(p) the manner in which and conditions under which the substance or a product containing it may be stored, displayed, handled,

p) les modalités et les conditions de stockage, de présentation, de transport, de manutention ou d’offre de

transported or offered for transport;

transport de la substance ou d'un produit qui en contient;

(q) the packaging and labelling of the substance or a product containing it;

q) l'emballage et l'étiquetage de la substance ou d'un produit qui en contient;

(r) the manner, conditions, places and method of disposal of the substance or a product containing it, including standards for the construction, maintenance and inspection of disposal sites;

r) les modalités, lieux et méthodes d'élimination de la substance ou d'un produit qui en contient, notamment les normes de construction, d'entretien et d'inspection des lieux d'élimination;

(s) the submission to the Minister, on request or at any prescribed times, of information relating to the substance;

s) la transmission au ministre, sur demande ou au moment fixé par règlement, de renseignements concernant la substance;

(t) the maintenance of books and records for the administration of any regulation made under this section;

t) la tenue de livres et de registres pour l'exécution des règlements d'application du présent article;

(u) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;

u) l'échantillonnage, l'analyse, l'essai, la mesure ou la surveillance de la substance et la transmission des résultats au ministre;

(v) the submission of samples to the Minister;

v) la transmission au ministre d'échantillons de la substance;

(w) the conditions, test procedures and laboratory practices to be followed for conducting sampling, analyses, tests, measurements or monitoring of the substance;

w) les conditions, procédures d'essai et pratiques de laboratoire auxquelles il faut se conformer pour les opérations mentionnées à l'alinéa u);

(x) the circumstances or conditions under which the Minister may, for the proper

x) les cas ou conditions de modification par le ministre, pour l'exécution de la présente loi, soit des

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| administration of this Act, modify | exigences posées pour les opérations mentionnées à l'alinéa u), soit des conditions, procédures d'essai et pratiques de laboratoire afférentes; |
| (i) any requirement for sampling, analyses, tests, measurements or monitoring, or | |
| (ii) the conditions, test procedures and laboratory practices for conducting any required sampling, analyses, tests, measurements or monitoring; and | |
| (y) any other matter that by this Part is to be defined or prescribed or that is necessary to carry out the purposes of this Part. | y) toute mesure d'ordre réglementaire prévue par la présente partie et toute autre mesure d'application de la présente partie. |

[64] The scheme under CEPA is thus binary. First, the GIC must determine whether a substance is toxic such that it can be listed on Schedule 1; second, and only after a substance is listed, does the GIC have broad authority to regulate the substance.

[65] To add something to Schedule 1 of CEPA, therefore, the GIC must be satisfied that it is a substance or class of substances that is toxic, within the meanings prescribed by CEPA. Subsection 90(1) provides no discretionary language with respect to these requirements.

[66] The Order, which was made pursuant to subsection 90(1), cannot be described as "quintessentially executive in nature", nor as being grounded on "polycentric, subjective or indistinct criteria" that are based on "the administrative decision makers' view of economics, cultural considerations and the broader public interest": *Entertainment Software v Society of*

*Composers, Authors, and Music Publishers of Canada*, 2020 FCA 100 at para 28. I agree with the Applicants, the fact that the Order is aligned with the government's policy motivations does not mean that it justifies a higher level of deference.

[67] The Applicants argue that PMI as a broad category meets neither of the requirements of subsection 90(1) of CEPA. As such, the Order is unreasonable because it does not comply with the statutory scheme under CEPA and was not a proper use of the GIC's authority. The Respondents argue that it was within the GIC's authority to add PMI to Schedule 1 and that the choice to list PMI as a toxic substance was reasonable when considered within the text, context and purpose of CEPA and the provisions at issue.

(2) Substance or class of substances

[68] Subsection 90(1) of CEPA permits the addition of a "substance" to Schedule 1, and by virtue of subsection 3(3), a class of substances. "Substance" and "class of substances" are defined in subsection 3(1) of CEPA (as it read at the time of the Application) as follows:

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| **substance** means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes | **substance** Toute matière organique ou inorganique, animée ou inanimée, distinguable. La présente définition vise notamment : |
| (a) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment, | a) les matières susceptibles soit de se disperser dans l'environnement, soit de s'y transformer en matières dispersables, ainsi que les matières susceptibles de provoquer de telles transformations dans l'environnement; |

(b) any element or free radical,

b) les radicaux libres ou les éléments;

(c) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

c) les combinaisons d'éléments à l'identité moléculaire précise soit naturelles, soit consécutives à une réaction chimique;

(d) complex combinations of different molecules that originate in nature or are the result of chemical reactions but that could not practicably be formed by simply combining individual constituents,

d) des combinaisons complexes de molécules différentes, d'origine naturelle ou résultant de réactions chimiques, mais qui ne pourraient se former dans la pratique par la simple combinaison de leurs composants individuels.

and, except for the purposes of sections 66, 80 to 89 and 104 to 115, includes

Elle vise aussi, sauf pour l'application des articles 66, 80 à 89 et 104 à 115 :

(e) any mixture that is a combination of substances and does not itself produce a substance that is different from the substances that were combined,

e) les mélanges combinant des substances et ne produisant pas eux-mêmes une substance différente de celles qui ont été combinées;

(f) any manufactured item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, and

f) les articles manufacturés dotés d'une forme ou de caractéristiques matérielles précises pendant leur fabrication et qui ont, pour leur utilisation finale, une ou plusieurs fonctions en dépendant en tout ou en partie;

(g) any animate matter that is, or any complex mixtures of different molecules that are,

g) les matières animées ou les mélanges complexes de molécules différentes qui sont contenus dans les

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| contained in effluents, emissions or wastes that result from any work, undertaking or activity. | effluents, les émissions ou les déchets attribuables à des travaux, des entreprises ou des activités. |
| **class of substances** means any two or more substances that | **catégorie de substances** Groupe d'au moins deux substances ayant : |
| (a) contain the same portion of chemical structure; | a) soit la même portion de structure chimique; |
| (b) have similar physico-chemical or toxicological properties; or | b) soit des propriétés physico-chimiques ou toxicologiques semblables; |
| (c) for the purposes of sections 68, 70 and 71, have similar types of use | c) soit, pour l'application des articles 68, 70 et 71, des utilisations similaires |

[69] The RIAS uses the language of paragraph 3(1)(f) to define 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."

[70] The Applicants argue that PMI are neither a substance nor a class of substances for the purposes of CEPA, but rather a broad category containing thousands of disparate items. They assert that the definition of substance in paragraph 3(1)(f) of CEPA is in the singular; thus, it only contemplates single specific items – *i.e.*, fishing nets or six-pack rings.

[71] They further assert that PMI do not have the requisite connection to form a class of substances as the properties and attributes of PMI vary widely. They point to, *inter alia*, statements made by Dr. Rochman that plastics are "made from many, many different polymers and they have different chemical additives", that they have different shapes, designs, functions, chemical structures, and toxicological or hazard profiles (Rochman cross examination at pp 81, 87-88), and that plastic pollution is "a complex mixture of plastic materials ranging in product type, polymer type, size, chemical additive mixtures, shape, and color" (Rochman affidavit at para 22).

[72] The Respondents concede that they are not asserting that PMI is a class of substances. They accept that PMI can vary in their form and shape, chemical composition, chemical structure and physico-chemical properties and are used for a variety of purposes.

[73] Rather, they contend that PMI satisfies the definition of a "substance" as "substance" is intended to be in the plural. The Respondents refer to subsection 33(2) of the *Interpretation Act*, RSC 1095, c I-21, which states that: "[w]ords in the singular include the plural, and words in the plural include the singular" and to the French text of paragraph 3(1)(f), which they assert indicates that this paragraph was intended to apply in the plural.

[74] The Applicants take issue with each of these arguments. They assert that subsection 33(2) of the *Interpretation Act* must be read together with its subsection 3(1), which states that "[e]very provision of the Act applies, unless a contrary intention appears, to every enactment". In this

case, the Applicants assert, and I agree, CEPA uses plural and singular definitions intentionally, including within the definition of subsection 3(1) of CEPA.

[75] Further, even if paragraph 3(1)(f) is read in the plural, as consistent with the use of the article “les” in the French language version, it does not take away from the singular use of the word “substance” in the preamble of the definition, which is consistent in both languages and must be read together with paragraph 3(1)(f). In either case, it is my view that the intended reading of paragraph 3(1)(f) is that any manufactured item comprised of organic or inorganic material that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, can be included in the definition of a substance.

[76] The Applicants argue that to read “substance” as including a broad category ignores the statutory context and purpose of the language of CEPA. The scheme of CEPA is clear: an individual item is a substance, whereas multiple items can only be added where they are a class of substances and share similar properties. If otherwise, these definitions would be redundant, and/or inconsistent, which runs contrary to principles of statutory interpretation: *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 37, citing *Québec (Attorney General) v Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831 at p 838.

[77] They assert that an interpretation of substance that would include PMI is contrary to the scheme of Part 5, which requires that the substances and classes of substances listed on Schedule 1 be identified with precision to enable an assessment of toxicity and risk assessment.

As contended by the Applicants "[i]t is not possible to conduct a single risk assessment for thousands of disparate products ranging from bottle caps to railway cars." Such assessments can only be done if substances are listed one at a time, or if there is a class of substances that share similar chemical, physico-chemical or toxicological properties, or similar types of use. They point to the existing list of substances on Schedule 1, which they assert follow this scheme.

[78] The Respondents argue that the Applicants' view is overly technical and at odds with the purpose of CEPA, and its aim to provide the government with robust and efficient tools to prevent pollution. It submits that if each item or type of plastic was its own substance it would be subject to its own assessment causing significant delay to controlling plastic pollution in contradiction of the precautionary principle and the observation in the RIAS that "[a]ll plastic manufactured items have the potential to become plastic pollution."

[79] EDCOC makes similar submissions. It asserts that given the centrality of the precautionary principle, the Court should interpret CEPA in a "large and liberal manner that most fully protects the environment and human health." It notes that this is consistent with the Supreme Court's recognition that environmental legislation is entitled to a generous interpretation as it is remedial legislation that is intended to respond to a wide variety of dangerous scenarios: *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 at para 9.

[80] In my view, these arguments are intimately linked to the further issue of whether the GIC acted outside their authority because the second requirement of subsection 90(1) had not been satisfied, in that it cannot be demonstrated, and was not demonstrated, that all PMI were toxic.

While I agree that PMI as a category appears broader than the definition of substance in paragraph 3(1)(f) and the existing substances that appear on Schedule 1, on its own this is insufficient, in my view, to render the Order unreasonable. Rather, in my view, the second requirement of subsection 90(1) must be considered before any determination can be made as to whether the Order is contrary to subsection 90(1) and to the scheme of CEPA.

(3) Do PMI satisfy the requirement of being a toxic substance?

[81] Section 64 of CEPA outlines when a substance will be considered toxic for the purpose of Part 5 of CEPA:

| **Toxic substances** | **Substance toxique** |
|---|---|
| 64 For the purposes of this Part and Part 6, except where the expression "inherently toxic" appears, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that | 64 Pour l'application de la présente partie et de la partie 6, mais non dans le contexte de l'expression « toxicité intrinsèque », est toxique toute substance qui pénètre ou peut pénétrer dans l'environnement en une quantité ou concentration ou dans des conditions de nature à : |
| (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity; | a) avoir, immédiatement ou à long terme, un effet nocif sur l'environnement ou sur la diversité biologique; |
| (b) constitute or may constitute a danger to the environment on which life depends; or | b) mettre en danger l'environnement essentiel pour la vie; |
| (c) constitute or may constitute a danger in Canada to human life or health. | c) constituer un danger au Canada pour la vie ou la santé humaines. |

[82] As provided in the RIAS, in listing PMI on the List of Toxic Substances, the Ministers were satisfied that PMI met the ecological criterion for a toxic substance set out in paragraph 64(a). The RIAS refers to the current science evidence as confirming that "plastic pollution was ubiquitous in the environment" and that "macroplastic pollution pose[d] an ecological hazard, including physical harm, to some animals and their habitat." The RIAS premises its findings on the background that "all plastic manufactured items have the potential to become plastic pollution."

[83] For the purpose of assessing whether a substance is toxic or is capable of becoming toxic, section 68 of CEPA as it read at the time of the Application provided that either Minister may:

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| (a) collect or generate data and conduct investigations respecting any matter in relation to a substance including, without limiting the generality of the foregoing, | (a) recueillir ou produire des données sur les questions se rapportant à cette substance et mener des enquêtes sur ces questions, notamment sur : |
| (i) whether short-term exposure to the substance causes significant effects, | (i) le fait que l'exposition à court terme à la substance entraîne ou non des effets sensibles, |
| (ii) the potential of organisms in the environment to be widely exposed to the substance, | (ii) la possibilité que des organismes se trouvant dans l'environnement soient exposés de façon généralisée à la substance, |
| (iii) whether organisms are exposed to the substance via multiple pathways, | (iii) le fait que des organismes soient exposés ou non à la substance par de multiples voies, |
| (iv) the ability of the substance to cause a | (iv) la capacité de la substance d'entraîner une réduction des fonctions |

reduction in metabolic functions of an organism,

(v) the ability of the substance to cause delayed or latent effects over the lifetime of an organism,

(vi) the ability of the substance to cause reproductive or survival impairment of an organism,

(vii) whether exposure to the substance has the potential to contribute to population failure of a species,

(viii) the ability of the substance to cause transgenerational effects,

(ix) quantities, uses and disposal of the substance,

(x) the manner in which the substance is released into the environment,

(xi) the extent to which the substance can be dispersed and will persist in the environment,

(xii) the development and use of alternatives to the substance,

(xiii) methods of controlling the presence of the substance in the environment, and

métaboliques d'un organisme,

(v) sa capacité d'entraîner des effets latents ou tardifs pendant la durée de vie d'un organisme,

(vi) sa capacité de causer des anomalies dans les mécanismes de reproduction ou de survie d'un organisme,

(vii) le fait que l'exposition à la substance puisse contribuer ou non au déclin de la population d'une espèce,

(viii) la capacité de la substance d'avoir des effets se transmettant d'une génération à l'autre,

(ix) ses quantités, ses utilisations et son élimination,

(x) la façon dont elle est rejetée dans l'environnement,

(xi) la mesure dans laquelle elle peut se disperser et persister dans l'environnement,

(xii) la mise au point et l'utilisation de substituts,

(xiii) les méthodes permettant de limiter sa présence dans l'environnement,

| | |
|---|---|
| (xiv) methods of reducing the quantity of the substance used or produced or the quantities or concentration of the substance released into the environment; | (xiv) les méthodes permettant de réduire la quantité de la substance utilisée ou produite ou la quantité ou la concentration de celle-ci rejetée dans l'environnement; |
| (b) correlate and evaluate any data collected or generated under paragraph (a) and publish results of any investigations carried out under that paragraph; and | b) corréler et analyser les données recueillies ou produites et publier le résultat des enquêtes effectuées; |
| (c) provide information and make recommendations respecting any matter in relation to a substance, including, without limiting the generality of the foregoing, measures to control the presence of the substance in the environment. | c) fournir des renseignements et faire des recommandations concernant toute question liée à une substance, notamment en ce qui touche les mesures à prendre pour limiter la présence de celle-ci dans l'environnement. |

[84] There is no dispute that the Science Assessment serves as the foundation for the Ministers' recommendation that PMI met the ecological criterion for a toxic substance under paragraph 64(a) of CEPA. The RIAS refers to the Science Assessment as being made in accordance with section 68 of CEPA for the purpose of "summariz[ing] the current state of the science regarding the potential impacts of plastic pollution on the environment and human health, as well as to inform future research and decision-making on plastic pollution..." The

RIAS provides the following summary of the state of the science with respect to the environment from the Science Assessment:

> The degradation of plastic pollution in the environment can be a slow chemical and physical process, influenced by factors such as exposure to sunlight, oxidants, physical stress, and the chemical composition of the specific plastic manufactured item. Many plastic manufactured items identified as "biodegradable" only break down when exposed to high temperatures for prolonged periods that are only achievable in industrial composting facilities.
>
> Studies have confirmed the widespread occurrence of plastic pollution in many aquatic environments around the globe, including surface waters, sediments, and shore-lines, as well as in terrestrial environments. For example, in Canada, studies have found an abundance of plastic pollution in surface waters and sediments within the Great Lakes. Plastic pollution has also been detected in several international study locations, including the Adriatic Sea, the Arctic Sea, the South Pacific, the North Pacific, the North Atlantic, the South Atlantic, the Indian Ocean, and in the waters surrounding Australia. In 2018, the Great Canadian Shoreline Cleanup removed over 100 tonnes of litter from Canadian shorelines, with 7 out of the top 10 most commonly collected items being either plastics or containing plastics (i.e. cigarette butts, tiny plastics or foam, bottle caps, plastic bags, plastic bottles, straws, and food wrappers).
>
> Certain types of macroplastic pollution (e.g. ropes, nets, cable ties, plastic bags, packaging rings) have been widely reported in the scientific literature to exhibit adverse effects on some animals as a result of entanglement or ingestion. Entanglement can lead to suffocation, strangulation, or smothering, and can even result in mortality.
>
> Ingestion can also cause direct harm to organisms by blocking airways or intestinal systems, which can lead to suffocation or starvation. Macroplastic pollution can also impact the integrity of habitats, for example, by transporting invasive species into well-established ecosystems, disrupting their structures and dynamics, or by transporting diseases that can alter the genetic diversity in the ecosystem. In contrast to macroplastic pollution, the potential impact of microplastic pollution on animals is less clear in the scientific literature.

[85] The Applicants assert that the text, context and purpose of CEPA indicate that Parliament did not intend to confer on the GIC the power to extrapolate potential harm and to label items toxic unless they met the requirements of section 64. They argue that the Government had no evidentiary foundation for concluding that all PMI are toxic. Simply stated, they say that what was listed was not studied and what was studied was not listed. They assert that only twelve items and certain types of litter were identified in the Science Assessment as causing environmental harm, namely "lost and abandoned fishing gear (rope, line, nets), bags, straws, cable ties, packaging bands (i.e., six-pack rings), bottle caps, balloons, sheets/films (for corals, sponges and plants), and one large plastic bowl." However, the Order impermissibly extrapolates this evidence to cover the entire category of PMI. They argue that the Government failed to characterize exposure levels and to conduct a risk assessment to evaluate toxicity of all PMI. They assert that exposure levels need to be evaluated as a measure of the population; otherwise, environmental harm cannot be established.

[86] The Granville affidavit attaches ECCC's guidance document entitled "*Overview of the Ecological Assessment of Substances under the Canadian Environmental Protection Act, 1999*" [EA Guide], which states that "[a] substance is considered toxic if, after rigorous scientific assessment and based on decisions taken under federal programs, it either conforms or is equivalent to "toxic" as defined in the Canadian Environmental Protection Act (CEPA)."

[87] The EA Guide outlines the steps in an ecological risk assessment as including both an exposure characterization – *i.e.*, "[t]he ways in which a substance may enter the environment, what happens to the substance in the environment, and how non-human organisms may be

exposed to the substance," and a hazard characterization of "the potential effects of the substance on the environment or its biological diversity." An ecological risk characterization is then conducted "integrating information on its effects and the potential for exposure in Canada" along with an uncertainty analysis.

[88] The EA Guide states that the main objective of quantifying exposure is to "determine the concentrations of the substance in the media in which it is expected to reside following release to the environment." The EA Guide outlines different procedures that may be used to quantify exposure, depending on the information available for the substance, including when available, measured data from monitoring studies in Canada, or other countries, or calculations made "at the local scale using models based on generic environments to which site-specific information may be incorporated."

[89] The EA Guide explains that the lines of evidence explored are considered using a weight-of-evidence approach that considers multiple sources of information and lines of evidence. The EA Guide states that "the ecological assessment and its conclusions regarding the ecological risks posed by the substance provide the scientific foundation for recommending whether or not the substance meets the criteria set out in Section 64 of CEPA 1999."

[90] Mr. Granville reviews the approach taken to risk assessments for the substances that were listed on Schedule 1 when PMI was listed. He explains that the list at that time included 152 entries (two of which were blank). This included nine substances that were formerly regulated by the *Environmental Contaminants Act*, RSC 1985, c E-12 and the *Clean Air Act*, RSC 1985,

c C-32 that were rolled onto Schedule 1 when CEPA 1988 (CEPA 1999's predecessor) was enacted, as well as 135 "Existing Substances" (substances that were in commerce prior to the implementation of CEPA 1988 that are listed on Canada's Domestic Substances List [DSL]) and six "New Substances" that were not listed on the DSL and were assessed for toxicity prior to their introduction into commerce.

[91] New substances are assessed pursuant to a notification and assessment process set out in sections 83 and 108 (for organisms) of CEPA of under the *New Substance Notification Regulations (Chemicals and Polymers)*, SOR/2005-247 and the *New Substance Notification Regulations (Organisms)*, SOR/2005-248. Existing Substances are subject to a screening assessment process set out under section 74 of CEPA and have been subject to priority substance screening assessments to accelerate the assessment of the 23,000 substances on the DSL (sections 73 and 76 of CEPA). They may also be assessed under section 75 where use has been prohibited or substantially restricted by province, territory or member of the Organization of Economic Cooperation and Development, or under section 68.

[92] Mr. Granville notes that the government has carried out various forms of risk assessment to assess toxicity under CEPA for all but one of the substances that were previously added to Schedule 1. The one exception, listing #133, was for "plastic microbeads that are ≤ 5mm in size" which was supported by a science literature review that did not quantify exposures. This is the only other manufactured item that appears to be listed on Schedule 1. He notes that the listing of microbeads was not challenged through the Notice of Objection or BOR process and had a very

narrow focus of the risk management measure proposed, which was removal of microbeads from personal care products.

[93] The Industry Interveners additionally refer to certain international agreements to which Canada is a signatory (Sectoral Annex 12-A of CUSMA on Chemical Substances and Article 2.2 of the TBT). These agreements refer to using a risk-based approach to regulate chemical substances and chemical mixtures that includes consideration of both hazard and exposure and looks at potential adverse environmental effects caused by the chemical substance or chemical mixture. They assert that the interpretation of CEPA must be consistent with the language of these treaties.

[94] While a treaty may be relevant when interpreting statutes that purport to implement the treaty, in whole or in part (*Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*SOCAN*] at para 44), it cannot overwhelm clear legislative intent. The Court's task is to interpret what the legislature (federally and provincially) has enacted and not subordinate this to what the federal executive has agreed to internationally. International law cannot be used to support an interpretation that is not permitted by the words of the statute: *SOCAN* at para 48, citing *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176 at para 60.

[95] In this case, CEPA states only by way of preamble that "the Government of Canada must be able to fulfil its international obligations in respect of the environment." It does not seek to

implement either CUSMA or TBT. I agree with the Respondents, the references to CUSMA and TBT are of little relevance to the analysis.

[96] Irrespective, there is no real dispute that a chemical assessment of toxicity has historically included a risk-based assessment looking at both hazard and exposure. The Respondents do not deny that quantitative analyses of the type typically conducted for chemical compounds were not conducted in this case. However, they assert that it was not necessary and was impractical in view of the substance at issue.

[97] The RIAS explains that the PMI were not reviewed under the same authority as those substances assessed under section 74 of CEPA or those that are subject to a chemical assessment:

> ...while the typical processes under the Chemicals Management Plan do provide a risk-based approach to managing chemicals, the ministers are not limited to those processes to better understand threats to the environment or human health so that they can determine whether action is justified to prevent pollution that can cause environmental harm. In addition, while screening assessments are required for substances assessed under section 74 of the Act, plastic manufactured items were not reviewed under this authority. The ministers are satisfied that the science assessment shows that plastic pollution has an immediate and long-term effect on the environment, in particular to wildlife and their habitat, and that it provides the evidence to add plastic manufactured items to Schedule 1 to CEPA.

[98] The Respondents assert that there are limitations to what can be tested when a substance is not a chemical and the substance is not dispersed into the environment in a predictable way that can be modelled or measured.

[99] Indeed, the Science Assessment acknowledges certain limitations with respect to its purpose and scope. The executive summary and introductory portions of the Science Assessment states that it is "not intended to quantify the risks of plastic pollution on the environment." The Science Assessment is "not intended as a substitute for chemical risk assessment", which is typically "conducted to assess the potential for risk to the environment and human health associated with a substance." It states that "significant data gaps currently exist that preclude the ability to conduct a quantitative risk assessment" and notes that "risk assessment frameworks for evaluating the potential risks associated with plastic pollution are currently under development." The Science Assessment recommends that further research be carried out to assess, *inter alia*, "[d]eveloping standardized methods for sampling, quantifying, characterizing, and evaluating the effects of macroplastics and microplastics."

[100] The Science Assessment refers to the information on macroplastics being limited to "data from litter cleanup initiatives as well as from reports in the popular press" and effects such as entanglement, ingestion or impacts on habitat integrity. It notes various challenges with microplastics in identifying items, where degradation has occurred and items have become unrecognizable.

[101] Animal Justice submits that for most substances that cause chemical harm, particularly those that are imperceptible, it is only with comprehensive testing that substances can be demonstrated as toxic. However, in this case, it is readily observable that plastics are entering the environment in a manner that is causing harm. While the precise number of animals affected

by plastic pollution was not characterized, the Science Assessment established that plastic pollution is entering the environment in quantities that are sufficient to harm animals.

[102] The Respondents assert that paragraph 68(a) of CEPA permits the Ministers to "collect or generate data and conduct investigations respecting any matter in relation to a substance" for the purpose of assessing whether PMI was toxic. The Science Assessment was a critically reviewed assessment of over 600 scientific literature references that was made in accordance with paragraph 68(a). It recommended pursuing action to reduce macroplastics and microplastics in the environment in accordance with the precautionary principle, and in the Respondents' submission was sufficient to support the listing of PMI on Schedule 1.

[103] EDCOC reinforces the need to look at persistence and accumulating effects as "Canada's environment doesn't get a fresh start each year" – there is a slow rate of breakdown of plastic in the environment. As stated in the Science Assessment, "[s]ince plastics degrade very slowly and are persistent in the environment, the frequency of occurrence of plastic pollution in the environment is expected to increase." They assert that the projected rise in plastic pollution needs to be considered. Environmental policies must anticipate and prevent environmental degradation and allow government to act in a preventative manner.

[104] EDCOC refers to *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 at paragraph 43, which described the impact and importance of considering the precautionary

principle as a vehicle to overcome a lack of complete scientific certainty to avoid postponing measures to protect the environment:

> [43] The precautionary principal recognizes, that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to predict environmental harm. Moving from the realm public policy to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law: *Spraytech* at paras 30-31.

[105] However, even with the precautionary principle in mind, recognizing the difficulty of achieving the same precise quantifications and risk assessments as with chemicals, the challenge with the Order is its breadth and scope when considered within the scheme of Part 5 of CEPA and the interpretation of that scheme as discussed by the Supreme Court of Canada in *Hydro-Quebec*.

[106] As described in *Hydro-Quebec* at paragraph 147, Part 5 of CEPA (then Part II) provides "a procedure to weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm. Specific targeting of toxic substances based on individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers." It is, as argued by the Applicants, in effect a triage tool.

[107] The intention of CEPA is that only substances that are toxic in "the real sense" were on the List of Toxic Substances: *Hydro-Quebec* at paras 143-145.

[108] Mr. Granville refers to the example of benzenamine, N-phenyl-, reaction products with styrene and 2,4,4-trimethylpentene (BNST) which was removed from Schedule 1 when it was later shown not to be toxic. He notes from his review of the substances listed on Schedule 1 that if only certain forms of a substance or group of substances were found to meet the test in section 64, or if information was unavailable for certain forms of a substance, only those meeting the test were listed, leading to narrower substance additions in some instances. He further notes certain substances that were not listed on the basis of an inconclusive assessment, that were added later when a subsequent assessment showed toxicity.

[109] The Respondents point to examples of substances on Schedule 1, such as lead and carbon dioxide, that are not inherently harmful until released into the environment. They note that *Hydro-Quebec* at paragraph 141 provides that toxic as used in CEPA includes "substances that are not *per se*, toxic, but that may, when released into the environment in a certain quantity, concentration or condition, become toxic." However, all of these examples are of different forms of the same substance; the breadth does not engage a large group of disparate items like PMI.

[110] The statement in the RIAS that "all plastic manufactured items have the potential to become plastic pollution" serves as the foundation for the breadth of the Order extending to all PMI, but the RIAS does not provide the evidence to bridge the gap between this statement and the Order listing the category of PMI as toxic.

[111] A peremptory conclusion will rarely assist a reviewing court. As stated at paragraph 102 of *Vavilov*:

> To be reasonable a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision may be set aside ... a reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan* at para 55; *Southam* at para 56.

[112] The RIAS provides that "[p]lastic manufactured items that are discarded, disposed of, or abandoned in the environment outside of a waste management system (such as a recycling facility or landfill) constitute plastic pollution." It notes that in Canada "the majority of plastic manufactured items that become plastic waste enter a managed waste stream" and refers to the data from the Deloitte Study, indicating that 1% of plastic waste entered the environment as plastic pollution in 2016, with the majority remaining in landfill. Thus, not all plastic waste becomes plastic pollution.

[113] The basic principle of toxicity for chemicals is that all chemical substances have the *potential* to be toxic; however, for a chemical 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.

[114] In this instance, the reverse logic appears to be applied: all PMI are identified as toxic because they are made of plastic and because all plastic is deemed to have the potential to become plastic pollution. The conclusion is 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 from strangulation or suffocation or to the environment because of effects such as rafting etc.

[115] As noted earlier, the RIAS refers to only a small number of specific items (ropes, nets, cable ties, plastic bags, packaging rings) as being reported in the scientific literature to exhibit adverse effects on some animals as a result of entanglement or ingestion.

[116] In my view, the GIC could not have been satisfied from this evidence that all PMI are toxic.

[117] The government in the context of considering regulations to prohibit SUP published findings in the Discussion Paper indicating that not all PMI are harmful. The Discussion Paper reported on ECCC's categorization of select SUPs and whether they were environmentally problematic. The report (excerpted below) indicated several types of SUPs (other bags (for example, garbage), multi-packaging, disposable personal care items, contact lenses and packaging, and hot and cold drink cups and lids) that were not considered to be environmentally problematic because they were either not prevalent, or were not known or suspected to cause

environmental harm. However, despite recognition that these items are not environmentally problematic, they are included in the category of PMI that are toxic.

*Table 2: Analysis of information of selected single-use plastic products*

| | Environmentally problematic | | Value recovery problematic | | | Exemption considerations | |
|---|---|---|---|---|---|---|---|
| | Prevalent in environment | Known or suspected to cause environmental harm | Hampers recycling and/or wastewater treatment | Non-recyclable, low or very low recycling rate | Barriers to increasing recycling rate | Performs essential function | No viable alternatives |
| Plastic checkout bags | ✓ | ✓ | ✓ | ✓ | ✓ | | |
| Stir sticks | ✓ | ✓ | ✓ | ✓ | ✓ | | |
| Six-pack rings | ✓ | ✓ | ✓ | ✓ | ✓ | | |

| | Environmentally problematic | | Value recovery problematic | | | Exemption considerations | |
|---|---|---|---|---|---|---|---|
| | Prevalent in environment | Known or suspected to cause environmental harm | Hampers recycling and/or wastewater treatment | Non-recyclable, low or very low recycling rate | Barriers to increasing recycling rate | Performs essential function | No viable alternatives |
| Cutlery | ✓ | ✓ | ✓ | ✓ | ✓ | In some cases, for security | |
| Straws | ✓ | ✓ | ✓ | ✓ | ✓ | In some cases, for accessibility | |
| Food packaging and service ware made from problematic plastics | ✓ | ✓ | ✓ | ✓ | ✓ | | |
| | | | | | | | |
| Other bags (for example., garbage) | | | ✓ | ✓ | ✓ | | |
| Snack food wrappers | Some kinds | | Some kinds (for example., bioplastics) | ✓ | ✓ | ✓ | |
| Multi-packaging | | | ✓ | ✓ | ✓ | | |
| Disposable personal care items | | | ✓ | ✓ | ✓ | | |
| Beverage bottles and caps | ✓ | ✓ | | | | | |
| Contact lenses and packaging | ✓ | | | ✓ | ✓ | ✓ | ✓ |
| Hot and cold drink cups and lids | ✓ | | ✓ | ✓ | ✓ | | |
| Cigarette filters | ✓ | ✓ | | ✓ | ✓ | | ✓ |

[118] Even if the statement that all PMI have the potential to become plastic pollution is taken on its face, the evidence available to the GIC did not support the finding that all PMI are toxic.

[119] In this case, the GIC knowing that such a broad extrapolation was not supported by the evidence, and in particular that certain PMI included within the scope of the listing were not toxic, acted outside their authority in listing the broad category of PMI on Schedule 1 in an unqualified manner.

B. *Was the decision to refuse a Board of Review unreasonable?*

[120] Subsection 333(1) of CEPA provides for BOR proceedings at the discretion of the Ministers. As is it read at the time of the Application, this provision provided:

| **Establishment of board of review** | **Danger de la substance** |
|---|---|
| 333 (1) Where a person files a notice of objection under subsection 77(8) or 332(2) in respect of<br><br>(a) a decision or a proposed order, regulation or instrument made by the Governor in Council, or<br><br>(b) a decision or a proposed order or instrument made by either or both Ministers,<br><br>the Minister or the Ministers may establish a board of review to inquire into the nature and extent of the danger posed by the substance in respect of which the decision is | 333 (1) En cas de dépôt de l’avis d’opposition mentionné aux paragraphes 77(8) ou 332(2), le ministre, seul ou avec le ministre de la Santé, peut constituer une commission de révision chargée d’enquêter sur la nature et l’importance du danger que représente la substance visée soit par la décision ou le projet de règlement, décret ou texte du gouverneur en conseil, soit par la décision ou le projet d’arrêté ou de texte des ministres ou de l’un ou l’autre. |

> made or the order, regulation or instrument is proposed.

[121] It is up to the Minister to determine the extent of danger posed by the substance and whether there is sufficient uncertainty or doubt in the underlying science that a BOR is warranted: *Goodyear Canada Inc v Canada (Environment)*, 2017 FCA 149 [*Goodyear*] at para 45. CEPA does not set any criteria for determining whether to establish a BOR. This is a discretionary determination of the Minister which has been contrasted with other circumstances in which the Minister *must* establish a BOR, such as when the Minister decides not to list a substance as toxic in the face of a recommendation to list the substance as toxic in the final screening assessment: *Goodyear* at para 46.

[122] As stated in *Goodyear* at paragraph 49, "[t]he essence of a decision not to convene a board under section 333 is the Minister's assessment as to the sufficiency of the science in support of the proposed order. Consistent with standard of review principles, the Court is reluctant to second-guess decisions of this nature."

[123] As noted in the RIAS, throughout the consultation process, 123 industry associations or individual companies, two provincial governments, and one foreign government indicated opposition to the proposed Order. A number of the stakeholders expressed concern that the proposed Order did not reflect a risk-based approach to managing toxic substances, including inconsistencies with typical processes under the Chemicals Management Plan, such as not assessing chemically distinct substance, and not publishing a draft and final screening assessment. The departments also received 60 written notices of objection on the proposed

Order, 52 of which included a request for a BOR to inquire into the nature and extent of the danger posed by PMI. All requests for a BOR were denied.

[124] The RIAS describes the nature of the objections as follows:

> Many objectors raised policy concerns in their notices of objection. For instance, several objectors stated that not all plastic manufactured items have the potential to cause the ecological harm identified in the science assessment and, accordingly, were of the view that the scope of the proposed Order was overly broad, and it should be narrowed down to the individual plastic manufactured items of concern. Many objectors identified a need to strengthen the science used to inform decision making, and depicted how an independent scientific panel could help fill the scientific gaps remaining in the science assessment before action is taken.
>
> Over 30 notices of objection raised concerns related to the science presented in the science assessment. Two of the most common scientific issues raised by objectors were the completeness of the science assessment and the quality of the studies cited. Some objectors provided references with additional scientific information. Several objectors expressed concern about the lack of information and lack of focus on specific plastic polymers or specific plastic items within the science assessment. Objectors also raised concerns regarding the use of studies exploring the effects of microplastic pollution that did not use environmentally relevant conditions, or conditions relevant to the Canadian environment, as well as the use of studies exploring the effects of microplastics in relation to human health. Several objectors pointed out potential inaccuracies in the science assessment, and many called attention to the need for further research in several study areas.

[125] The MECC engaged in a two-step process for analyzing the notices of objection. First, it determined whether the information provided would lead to a change in the findings of the Science Assessment regarding the ability of macroplastics to cause harm to the environment. It determined from this analysis that it did not. Second, it elicited a review by neutral departmental officials who agreed that a sound scientific process had been respected and the conclusions of the first review were reasonable.

[126] The RIAS provides the following summary of the process followed:

> The departments conducted an analysis of the scientific information provided in the notices of objection, including the additional studies. The departments maintain that the science assessment presents a thorough summary of the science available in the peer-reviewed literature, and considers all data available at the time it was written. Upon review, the departments found that no change to the scientific findings underlying the Order (i.e. that macroplastics can cause harm to the environment) was warranted. To help ensure that this finding was fair, a neutral party within the Department conducted an independent review of the scientific analysis of the notices of objection. This party found that the scientific process had been respected, and that the conclusion is reasonable.
>
> Given the current state of the science, the departments have not identified concerns for human health at this time, and agree with the need for further research in several study areas. The departments acknowledge that the science assessment presents some conflicting evidence in the scientific literature regarding the ecological impacts of microplastic pollution and, accordingly, the science assessment calls for further research in this realm. Notwithstanding the data gaps in these areas, the departments maintain that the findings of the science assessment underlying the Order hold: macroplastic pollution can cause harm to the environment.

[127] The Applicants argue that the MECC ignored the key question in their notice of objection, which was whether the Science Assessment provided evidence that *all* PMI are toxic, dismissing the objection as a matter of policy. They assert that the review process instead focused on whether additional scientific sources could change the initial conclusions of the Science Assessment. The Applicants contend that the issue relating to the breadth of the proposed Order and whether there was sufficient evidence of toxicity for the broad listing was an issue of science that should have been considered in the analysis.

[128] In their notice of objection, the Applicants argued, *inter alia*:

> ...the potential harm identified in the Literature Review relates to a handful of specific macroplastic items. However, the Proposed Order does not propose to list these specific macroplastic items, or all macroplastics. Instead, it proposed to list a category ("Plastic Manufactured Items"), which would contain every product manufactured from plastic in Canada.
>
> Accordingly, the Literature Review identified a potential harm for a Substance that is not proposed for listing, and the Substance proposed for listing ("Plastic Manufactured Items") is not the Substance for which a risk of harm to the environment has been identified.
>
> The Literature Review did not study, review, or reach any conclusions in relation to "Plastic Manufactured Items", nor did the Literature Review link "Plastic Manufactured Items" to the handful of specific macroplastic wastes identified as posing a risk.
>
> Therefore, "Plastic Manufactured Items" do not satisfy the criteria for toxicity set out in section 64, and cannot be listed on Schedule 1.

[129] The MECC provided the following response to the Applicants' objections in the BOR Decision. There was no specific response to the breadth argument:

> I have fully and carefully considered the issues set out in your Notice of Objection. As the scientific information provided in your Notice did not raise sufficient uncertainty or doubt in the scientific considerations underlying the proposed Order to warrant the establishment of a Board of Review, I am denying your request to establish a Board of Review. The scientific considerations that underlay the proposed Order are related to the ability of macroplastics to have an immediate or long-term harmful effect on the environment or its biological diversity as set out in section 64 CEPA.
>
> In your Notice of Objection, you stated that the risks demonstrated by macroplastics are in relation to the presence of fishing gear. It is not the intent of the Science Assessment of Plastic Pollution to draw conclusions on specific items but rather to survey the state of science on plastic pollution. There is evidence reported in the Science Assessment that indicate that lost, abandoned, or discarded fishing gear is a common cause of entanglement of organisms, and

> there is further information that demonstrates that other plastic items may cause harm to organisms. For instance, macroplastic items may become entangled with aquatic organisms that may lead to mortality. With regard to the ingestion of macroplastics, the Science Assessment summarised several studies that indicate that macroplastic items may harm organisms via ingestion.
>
> You also stated that the Science Assessment did not use sound scientific principles. I can assure you that the Science Assessment reviewed the current state of science regarding plastic pollution, and clearly acknowledges that uncertainties exist and that high quality information is lacking in several study areas. Further, the report underwent an external peer review by both domestic and international experts, and was subject to a 90-day public comment period. Scientific studies discussed in the report were validated against a set of qualitative criteria, which are discussed in the relevant sections of the report. Where study limitations were identified, this is clearly indicated in the text.
>
> In your Notice of Objection you further refer to the knowledge gaps in the Science Assessment of Plastic Pollution related to the lack of reliability in the use of visual identification of microplastics and stated that the estimate of 1% of plastic waste generated annually in Canada is unsupported. As this information was not related to the science supporting the proposed Order, I did not consider it in my decision regarding the establishment of a Board of Review.
>
> With regard to the non-scientific issues raised in your Notice of Objection, as well as the non-scientific references provided, these are being considered alongside other comments received on the proposed Order and will be addressed in the Regulatory Impact Analysis Statement that is published with the final Order.

[130] The Respondents assert that the breadth of the Order was not a relevant consideration for the MECC when determining whether to establish a BOR. Rather, this was a question for the MECC when determining whether to recommend that the GIC add PMI to Schedule 1. The Respondents contend that if the MECC was satisfied that the Science Assessment established that PMI are “entering or may enter the environment in quantity or concentration or under conditions that have or may have an immediate or long-term harmful effect on the environment

or its biological diversity", the only consideration left was whether there was anything in the objections that would lead to a change in this core finding.

[131] They nevertheless assert that the MECC was satisfied that there was sufficient evidence that PMI are toxic within the meaning of section 64 of CEPA and that there was no scientific information in the Applicants' objection to cast doubt on this.

[132] However, neither of these explanations are provided in the MECC's BOR Decision.

[133] The memorandum to the MECC on the notices of objection states that objections that were non-scientific were not considered in developing the recommendation to deny a BOR, as they did not relate to the mandate of the BOR. The memorandum states that such objections would be addressed in the final decision on the Order and in the accompanying RIAS. The memorandum refers to an Annex detailing the non-scientific objections, which included the "Rationale for broad listing based on findings of Science Assessment."

[134] Thus, the memorandum suggests that the recommendation was not to consider the sufficiency of the scientific evidence relating to the listing of PMI. While the Respondents assert that the Science Assessment concluded that "all manner of plastic items can cause harm when released into the environment – regardless of their shape, size, or purpose at the time of release", as stated earlier, there is no such finding in the Science Assessment.

[135] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. A failure to meaningfully grapple with key issues or central arguments raised by parties may call into question whether the decision-maker was actually alert and sensitive to the matter before it: *Vavilov* at paras 127-128, repeated in *Mason* at para 74.

[136] In my view, the issue of the breadth of the proposed Order was a central argument that challenged the sufficiency of the science. As such, it should have been addressed in the MECC's response. The failure to refer to the argument leaves uncertainty as to whether the MECC considered the argument or whether it lumped the argument into the non-scientific concerns which were policy-based. This lack of transparency and completeness renders the BOR Decision unreasonable.

C. *Is the Order unconstitutional as being outside the federal CLP?*

[137] The second challenge to the Order is to its constitutionality. The Applicants assert that the Order extends beyond the federal CLP.

[138] A law will fall under subsection 91(27) of the *Constitution Act, 1867* if it contains three elements: 1) a criminal law purpose; 2) a prohibition; and 3) is accompanied by a penalty: *Hydro-Quebec* at paras 34-36 and 119; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*Assisted Human Reproduction Act*] at paras 35-36; *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2020 FCA 88 [*Groupe Maison*] at para 49; *Reference re Firearms Act*, [2000] 1 SCR 783 [*Firearms Reference*] at para 27.

[139] In *Hydro-Quebec* at paragraph 132, the Supreme Court of Canada confirmed that the protection of the environment through prohibitions against toxic substances, is a "wholly legitimate public objective in the exercise of the criminal law power." It is a public purpose sufficient to support a criminal prohibition that does not rely on any of the other traditional purposes of criminal law (health, security, public order, etc.): *Syncrude Canada Ltd v Canada*, 2016 FCA 160 [*Syncrude*] at para 49 in reference to *Hydro-Quebec,* including part of the dissent that agreed with Justice La Forest's view.

[140] The Supreme Court of Canada considered the statutory scheme relating to listing toxic substances on Schedule 1 of CEPA (pre-1999) and the ability to regulate such substances thereafter. It found that there were sufficient limitations (referred to by the Applicants as "guardrails") within the statutory framework to interpret the legislation narrowly and to keep it within the constitutional bounds of the CLP. As stated at paragraphs 130 and 146 of *Hydro-Quebec* with respect to Part II and sections 11 and 34(1) of CEPA 1988, which became Part 5 and sections 64 and 93 of CEPA as amended in 1999:

> I conclude that Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances. I quite understand that a particular prohibition could be so broad or all-encompassing as to be found to be, in pith and substance, really aimed at regulating an area falling within the provincial domain and not exclusively at protecting the environment. A sweeping prohibition like this (and this would be equally true of one aimed generally at protection of health) would, in any case, probably be unworkable. But the attack here ultimately is that the impugned provisions grant such a broad discretion to the Governor in Council as to permit orders that go beyond federal power. I can imagine very nice issues being raised concerning this matter under certain types of legislation, though in such a case one would tend to interpret the legislation narrowly if only to keep it within constitutional bounds.

> But one need not go so far here. For, it seems to me, as we shall see, when one carefully peruses the legislation, it becomes clear enough that Parliament has stayed well within its power.
>
> [...]
>
> In summary, as I see it, the broad purpose and effect of Part II is to provide a procedure for assessing whether out of the many substances that may conceivably fall within the ambit of s. 11, some should be added to the List of Toxic Substances in Schedule 1 and, when an order to this effect is made, whether to prohibit the use of the substance so added in the manner provided in the regulations made under s. 34(1) subject to a penalty. These listed substances, toxic in the ordinary sense, are those whose use in a manner contrary to the regulations the Act ultimately prohibits. This is a limited prohibition applicable to a restricted number of substances. The prohibition is enforced by a penal sanction and is undergirded by a valid criminal objective, and so is valid criminal legislation.

[141] The Applicants do not challenge these findings from *Hydro-Quebec* or the constitutional validity of subsections 90(1), 64(a), section 93 and Schedule 1 of CEPA. Rather, their constitutional challenge within the Application relates to the Order and the corresponding listing of PMI on Schedule 1. Their arguments are two-fold. First, they assert that the Order does not seek to restrict toxic substances, but rather to manage plastics in the economy. Second, they argue that the breadth of the Order extends outside the guardrails established in *Hydro-Quebec* and the constitutional limitations intended by the underlying statutory scheme.

[142] There is a two-step analytical framework for the review of legislation on federalism grounds. At the first stage (the "characterization stage"), the Court considers the law's purpose and its effect with a view to identifying its true subject matter, essential character, or its "pith and substance." At the second stage (the "classification stage"), the Court considers whether the true subject-matter falls within the head of power being relied on to support the legislation's validity.

(*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 86; *Firearms Reference* at para 15).

[143] There are several core principles that are also relevant to the analysis; these include co-operative federalism, incidental effects and double aspects.

[144] Federalism and the division of powers is a fundamental organizing principle of the Canadian Constitution: *Reference re Secession of Québec*, [1998] 2 SCR 217 at paras 32, 55-60. Cooperative federalism recognizes that the provincial government and federal government are coordinate – the provinces are not subordinate to the federal government. A federal head of power cannot be given a scope that would eviscerate a provincial legislative competence: *Reference re Securities Act*, 2011 SCC 66 at para 71.

[145] The "pith and substance" doctrine is founded on the recognition that it is in practice impossible for the legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government: *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Western Bank*] at para 29. Secondary incidental effects, which may have practical significance, will not impact the constitutionality of a law, as long as the law's dominant purpose falls validly within a head of power assigned to Parliament: *Western Bank* at para 28; *Syncrude* at paras 61-70; *Groupe Maison* at para 46; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 [*Genetic Non-Discrimination Reference*] at para 22.

[146] The double aspect doctrine recognizes that some subject-matter may involve both provincial and federal powers. As recognized by Justice La Forest in *Hydro-Quebec* at paragraph 131, with respect to toxic substances, "the use of the federal criminal law power in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action."

(1) Pith and substance

[147] A law's pith and substance has been described as the law's "dominant purpose", "leading feature or true character" or "dominant or most important characteristic": *Genetic Non-Discrimination Reference* at para 29.

[148] In the characterization stage, the pith and substance must be identified without regard to the heads of legislative power to avoid the danger that the "exercise will become blurred and overly oriented towards results": *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA References*] at para 56. The Court looks at the Order's purpose and its effect to determine its dominant purpose: *Quebec v Canada (Attorney General)*, 2015 SCC 14 at para 29; *Syncrude* at para 39. Purpose is determined from the Order itself – *i.e.*, the intrinsic evidence – and from extrinsic evidence, such as the RIAS and government reports on which the law is based: *Syncrude* at para 39. The analysis then turns to determining the legal and practical effects of the Order; that is, how the law operates in practice and how it will affect the rights and liberties of those subject to its terms: *GGPPA References* at para 70.

[149] The Applicants assert that the pith and substance of the Order is directed to managing plastics in the economy, not toxic substances in the environment. Saskatchewan and Alberta characterize the purpose even more broadly, asserting that it is simply about regulating plastics.

[150] The Respondents argue that the pith and substance of the Order is to add PMI to Schedule 1 of CEPA in order to enable the exercise of delegated powers to prevent environmental harms associated with certain items entering the environment as plastic pollution.

[151] The Respondents stress the importance of being specific at the characterization stage, to help the second stage of the analysis (classification stage). They refer to *GGPPA References* at paragraph 69 where the Supreme Court of Canada rejected a broad characterization of the pith and substance in that case by the Attorneys General of Alberta and Ontario –*i.e.*, the regulation of greenhouse gas emissions – finding it was too non-specific and did not reflect the statute's goal:

> ...When characterizing a matter, a court must strive to be as precise as possible, because a precise statement more accurately reflects the true nature of what Parliament did and what it intended to do. Here, that means not denying that Parliament ultimately intended to reduce GHG emissions but, rather, recognizing that its goal in enacting this particular statute was to establish minimum national standards of GHG price stringency to reduce GHG emissions.

[152] The parties agree that when considering intrinsic evidence, the Court may look to the title and language of the Order.

[153] The title of the Order reads, "Order Adding a Toxic Substance to Schedule 1 to the *Canadian Environmental Protection Act, 1999*." The preamble states that pursuant to

subsection 90(1) of CEPA, the Administrator-in-Council is satisfied that the substance set out in the Order, namely PMI, is a toxic substance and that the Order is being made as a result of that conclusion. The text of the Order is brief and states only that, "Schedule 1 of the *Canadian Environmental Protection Act, 1999* is amended by adding the following in numerical order: 163 Plastic manufactured items."

[154] The Applicants assert that as the text of the Order captures all PMI, it reveals an intention to regulate all PMI, not just those that create risk to the environment. The Respondents argue that to understand the purpose and effect of the Order a review of the intrinsic evidence must also consider the statutory scheme of the underlying legislation – in this case, CEPA. In *Syncrude* at paragraphs 34-35, the Federal Court of Appeal considered the approach to be taken to a challenge to one or more provisions within a piece of legislation, noting that unless clear on their face, impugned provisions of legislation must be considered in context:

> [34] The Supreme Court of Canada has articulated the framework for determining the validity of a law made pursuant to the criminal law power. In *AHR*, the Chief Justice observed that where the challenge is to only one or more of the provisions of a piece of legislation, as opposed to the legislation as a whole, the inquiry *might* begin with consideration of the challenged provision or provisions alone. If the provision does not, on its face, intrude into the other jurisdiction, then there is no need to make further inquiry. The Chief Justice continued, however, and noted at paragraph 17 that "the impugned provisions must be considered in their proper context" and it might be necessary to consider the impugned provision in light of the entire scheme in order to understand its true purpose and effect.
>
> [35] This methodology has a long antecedence: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 68 O.R. (2d) 512 [*General Motors*]. *General Motors* affirms that the impugned provision must be examined in two stages, firstly by looking at the provision itself and secondly, as situated within the context of the broader statute. However, the first stage only stop the analysis if the provision is both independently comprehensible

> and demonstrably *valid*. Consequently, if analysis of the provision in isolation requires greater legislative context to be understood, or the provision is on its face of doubtful validity, then a broader analysis is inevitable.

[155] The Respondents assert that the text, preamble and declaratory provisions of CEPA are all consistent – the primary purpose of the legislation is to protect the environment through pollution prevention. One of the ways CEPA achieves this purpose is by prohibiting, through regulation, environmentally harmful aspects of its listed toxic substances. They contend that the Order serves as a precondition that allows the GIC to make regulations relating to PMI that are in line with the purpose of CEPA.

[156] The parties agree that the extrinsic evidence that bears on the Order's purpose includes the RIAS and the collection of governmental reports and studies that preceded the Order's making; namely, the Deloitte Study, the Science Assessment and the Discussion Paper.

[157] The RIAS identifies the "issues" underlying the Order as plastic pollution created by "[p]lastic manufactured items that are discarded, disposed of, or abandoned in the environment outside of a waste management system (such as a recycling facility or a landfill)." It refers to current scientific evidence (from the Science Assessment), confirming "plastic pollution is ubiquitous in the environment, and that macroplastic pollution poses an ecological hazard, including physical harm, to some animals and their habitat."

[158] The RIAS characterizes the objective of adding PMI to Schedule 1 of CEPA, as enabling the ministers to "propose risk management measures under CEPA on certain plastic

manufactured items to manage the potential ecological risks associated with those items becoming plastic pollution." However, the RIAS is narrower than the Order. The Order does not restrict the listed substance to *certain* PMI, but rather to PMI broadly. The RIAS does not provide guidance in its objectives as to what certain PMI would be the target of further regulation.

[159] The Respondents assert the objective stated in the RIAS confirms that the Order is not intended to have any substantive regulatory effect on its own. Rather, it is intended to enable the ministers to propose risk management measures for managing potential ecological risk associated with PMI becoming plastic pollution.

[160] Both parties refer to passages from the Discussion Paper. The Applicants argue that the Discussion Paper indicates that the focus extends beyond the restriction of toxic substances to include waste management and the broader circular plastic economy. The Applicants refer to the following passage from the Discussion Paper:

> **Managing plastics using CEPA**
>
> In order to take action as recommended in the Science Assessment, the Government of Canada has proposed using enabling authorities under CEPA to regulate certain plastic manufactured items. This will allow the Government to enact regulations that target sources of plastic pollution and change behaviour at key stages in the lifecycle of plastic products, such as design, manufacture, use, disposal and recovery in order to reduce pollution and create the conditions for achieving a circular plastic economy.
>
> [footnotes omitted]

[161] This broader focus is consistent with the Deloitte Study and the Strategy on Zero Plastic Waste, which outlines Canada's "circular economy approach" and its vision towards pursuing zero plastic waste. As stated in the Strategy on Zero Plastic Waste "[t]he vision is to keep all plastics in the economy and out of the environment" through the interdependence of three areas of activity as part of an integrated system: prevention; collection and clean-up; and value recovery.

[162] The reports demonstrate broad concern regarding environmental harms resulting from plastic pollution and the need to engage CEPA's prohibitory scheme as part of an integrated approach that includes pollution prevention as well as plastic waste management. There will be a reduction in plastic pollution if there is a reduction of plastic waste in general because there will be less waste to end up outside the waste management system.

[163] While the Applicants assert that the reference to a circular economy evinces an intention to regulate plastics unrelated to environmental harm, I do not agree that this is the intended purpose of the Order. The Order by its stated objective in the RIAS is intended to facilitate one aspect of the integrated approach, namely to list PMI on what was the List of Toxic Substances so that PMI could be regulated to manage the potential environmental harm associated with their becoming plastic pollution. The disconnect that exists is because of the breadth of what is listed in the Order.

[164] In discerning pith and substance, the Court may also consider the legal and practical effects of the Order – that is, how the Order operates in practice to impact "the rights and

liabilities of those subject to its terms": *GGPPA References* at para 70. While this part of the analysis can in some instances provide clarity as to dominant purpose, in this instance the parties agree that the Order on its own does not impact the rights and liabilities of Canadians; instead it targets the GIC and the GIC's regulation-making powers under section 93 of CEPA.

[165] There is only one example of regulations arising in respect of the listing – *i.e.*, the *SUP Regulations* to ban certain single use plastics. While these regulations target specific SUP items used or dealt with in specific circumstances, there is no suggestion that they exemplify the full scope of regulation that could be made under the GIC's authority in respect of SUP or other PMI. The effect of the Order renders all PMI subject to the regulatory powers set out in section 93 of CEPA.

[166] In my view, the dominant purpose or pith and substance of the Order was to list PMI on the List of Toxic Substances so that PMI could be regulated to manage the potential environmental harm associated with their becoming plastic pollution.

(2) Is the Order *ultra vires* Federal Jurisdiction?

[167] As stated earlier, for legislation to fall within the CLP it must contain a criminal law purpose, a prohibition and be accompanied by a penalty. The focus of the challenge here is to whether the Order can be characterized as providing a criminal law purpose.

[168] As set out in *Attorney General for Ontario v Reciprocal Insurers*, [1924] 2 AC 91 [*Reciprocal Insurers*] at page 343, "the machinery of criminal law" cannot be used to assume control over something that is not within Parliament's authority.

[169] Further, Parliament may not assume control over an activity that is not in itself harmful or dangerous in order to prevent the harmful or dangerous forms of the activity. As stated in the *Firearms Reference* at paragraph 43:

> Both firearms and automobiles can be used for socially approved purposes. Likewise, both may cause death and injury. Yet their primary uses are fundamentally different. Cars are used mainly as means of transportation. Danger to the public is ordinarily unintended and incidental to that use. Guns, by contrast, pose a pressing safety risk in many if not all of their functions. Firearms are often used as weapons in violent crime, including domestic violence; cars generally are not. Thus Parliament views guns as particularly dangerous and has sought to combat that danger by extending its licensing and registration scheme to all classes of firearms. Parliament did not enact the *Firearms Act* to regulate guns as items of property. The Act does not address insurance or permissible locations of use. Rather, the Act addresses those aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse.

[170] While *Hydro-Quebec* established that there is a criminal law purpose to the protection of the environment, this was because it was calibrated to a harm. It was protection of the environment through prohibition against toxic substances that justified the public objective in the exercise of the CLP: *Hydro-Quebec* at para 132.

[171] The Applicants assert all PMI cannot be listed on Schedule 1, even if the intention is only to regulate those plastics that have the potential to cause environmental harm. This is because PMI does not pose any environmental harm as a broad group. The Science Assessment has not

shown that there is a reasonable apprehension of harm for every plastic manufactured item. Indeed, the RIAS asserts that Parliament is only seeking to prohibit *certain* PMI that pose ecological risks on becoming plastic pollution. However, the Order and the listing is not so limited.

[172] The Respondents highlight that the Order benefits from a presumption of constitutional validity: *Firearms Reference* at para 25.

[173] The Respondents contend that the breadth of the listing is a reflection of how the statutory scheme under CEPA operates in practice – section 93 of CEPA allows the GIC to narrow the reach of the CLP to achieve CEPA's environmental objectives. They assert that sweeping delegation of regulation-making power is constitutionally valid as long as there are constitutional and administrative constraints on the delegated power enabled by order. While applied in a different context, the Respondents refer to the *GGPPA References* at paragraphs 87-88 as support for this contention:

> [87] To the extent that the *GGPPA* delegates to the executive the power to make regulations that amend the statute, such as in s. 168(4), this too, constitutes a permissible delegation to the Governor in Council. ... Any regulation that is made must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object (*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266 (B.C.S.C.), at p. 292, quoted in *Katz Group*, at para. 24), and it must be "within the scope [of] and subject to the conditions prescribed" by that statute (*Re Gray*, at p. 168). Therefore, the scope of the authority delegated in s. 168(4) is limited by and subject to the provisions of the *GGPPA*. The Governor in Council cannot use s. 168(4) of the *GGPPA* to alter the character of Part 1 of the statute, since any exercise of this authority to make regulations that are inconsistent with either the general purpose of reducing GHG emissions through the specific means of establishing minimum national

> standards of GHG price stringency would be *ultra vires* the *GGPPA* and open to judicial review. Moreover, the Governor in Council's power under s. 168(4) can be revoked by Parliament.
>
> [88] In the case at bar, Parliament, far from abdicating its legislative role, has in the *GGPPA* instituted a policy for combatting climate change by establishing minimum national standards of GHG price stringency. Sections 166(2), 166(4), 168(4) and 192 of the *GGPPA* simply delegate to the executive a power to implement this policy. This delegation of power is within constitutionally acceptable limits and the general rules of administrative law apply to constrain the Governor in Council's discretion under all of these provisions.

[174] The Respondents argue by analogy that there are inherent constitutional and administrative constraints on the regulations made pursuant to section 93 of CEPA. They assert that the listing of a toxic substance on Schedule 1 does not alter the division of powers. Any regulation enacted in respect of PMI will be constitutionally valid only insofar as the regulation itself furthers a valid criminal law purpose (*Assisted Human Reproduction Act* at para 84), and will only be administratively sound if it falls within the scheme of CEPA. If it is not, it can be challenged.

[175] The Applicants assert this is nothing more than a "trust me" argument with the Order permitting the GIC to assume control over all PMI on the trust that regulations will be restricted to only those PMI that create a real risk to the environment. They contend that they should not have to wait until regulations are enacted to challenge an unconstitutional order. I agree.

[176] As set out in the record and highlighted by Saskatchewan, all of the provinces are heavily involved in the regulation of plastics. Most industries that produce or use PMI will be under provincial regulatory jurisdiction, including environmental aspects of their activities such as the

production and disposal of waste products. The ubiquity of plastic in society means that most businesses and organizations will use PMI and will be under provincial jurisdiction: *Constitution Act, 1867*, ss. 92(10), 92(13), 92(16).

[177] CEPA includes broad regulatory powers under section 93 for substances listed on Schedule 1.

[178] While the regulatory scheme under CEPA was held in *Hydro-Quebec* to be sufficient to establish the remaining two aspects of the CLP; that is, that the power to create offences under CEPA could be delegated to the GIC along with the power to determine the appropriate penalty for the regulatory offences, this delegation did not extend to the criminal law purpose.

[179] To employ criminal law, what is being restricted has to actually be dangerous *i.e.*, there needs to be a harm. Otherwise, the restriction amounts to nothing more than economic regulation, which does not satisfy the CLP test: *Reference Re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1; aff'd [1950] 4 DLR 689.

[180] In *Hydro-Quebec*, the Supreme Court discussed the focus within CEPA as being directed towards only those substances that were harmful to the environment. As stated at paragraph 138:

> There was no intention that the Act should bar the use, importation or manufacture of all chemical products, but rather that it should affect only those substances that are dangerous to the environment, and then only if they are not regulated by law.

[181] The intention of CEPA is that only substances that are toxic in "the real sense" were on the List of Toxic Substances: *Hydro-Quebec* at paras 143-145. The scheme provides "a procedure to weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm. Specific targeting of toxic substances based on individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers": *Hydro-Quebec* at para 147.

[182] This structure and framework did not change with the amendments to CEPA in 1999 or with the addition of the precautionary principle.

[183] Without the requirement for toxicity, there would be no point behind sections 64 and 90 of CEPA as any substance could be listed on Schedule 1 of any breadth as long as section 93 limited the substance by regulation. This would not serve the CLP as it would have the effect of turning the statute into a general regulatory power which defines all aspects of the CLP by regulation.

[184] As set out earlier, not every item within PMI has the potential to create a reasonable apprehension of harm. This is different from examples such as lead and carbon dioxide given by the Respondents, which are substances that may not be inherently toxic but which may have aspects or uses that are toxic. In this case, the substance (PMI) is a broad category of items that include items with no reasonable apprehension of environmental harm. The broad and all-encompassing nature of the category of PMI poses a threat to the balance of federalism as it does

not restrict regulation to only those PMI that truly have the potential to cause harm to the environment.

[185] The delicate balance discussed in *Hydro-Quebec* has not been maintained. The screening mechanism which grounded the CLP is no longer there.

[186] Section 93 is insufficient to maintain the Order within the CLP. The Order is *ultra vires* the CLP.

D. *Can the Court consider POGG and if so, is the Order unconstitutional for being contrary to POGG?*

[187] The Applicants, Saskatchewan and Alberta argue that the Court should not deal with POGG as it is not an issue between the parties in this case – the Notice of Application alleges that the Order is outside federal CLP only and the AGC did not defend this argument by asserting constitutionality on the basis of POGG. The Applicants rely on the decision in *R v Mortgentaler*, [1993] 1 SCR 462 at p 463 in which the Supreme Court of Canada stated that "[a]n intervener is not entitled ... to widen or add to the points in issue. ... An intervener cannot introduce a new issue on the ground that it is a response to an argument made by the [applicant] if the respondent has chosen not to raise the issue."

[188] As emphasized by Justice Stratas in *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour)*, 2022 FCA 67 at paragraph 14, citing his decision in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174 at paragraphs 55-56:

> [I]nterveners are nothing more than secondary participants in cases what already have parties. Thus, interveners must take the parties' issues as they find them. This Court once put it this way:
>
> > [I]nterveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.
> >
> > To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.

[189] EDCOC takes issue with the Applicants' jurisdictional argument. It asserts that the national concern doctrine was first put into issue by Saskatchewan and Alberta in their intervention factums and that it was just responding to those arguments. However, as Saskatchewan and Alberta were required to file their factums before the Respondents, the essence of their arguments was that the national concern doctrine did *not* apply. It can hardly be said that Saskatchewan and Alberta put the doctrine in issue by arguing against its application.

[190] I agree that the national concern doctrine is not a justiciable issue in this case. Moreover, even if it could be raised, it is my view that reliance on such doctrine in defence of the constitutional challenge is not appropriate as the listing of PMI does not have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern:

*GGPPA Reference* at paras 145-146, citing *R v Crown Zellerbach Canada Ltd,* [1988] 1 SCR 401. Nor is there any direct evidence of provincial inability.

[191] The Applicants do not dispute that the double aspect doctrine could apply in the national concern context such that if Parliament took jurisdiction over plastic pollution it would not take jurisdiction over waste management, which would still be within the jurisdiction of the provinces: *GGPPA Reference* at paras 120, 122, 126. However, they argue that by allowing the Federal government to regulate PMI, this may trigger the federal paramountcy principle where federal law can supersede provincial law. As such, it must be approached cautiously to avoid eroding the importance attached to provincial autonomy in the jurisprudence: *GGPPA Reference* at para 128.

[192] In this case, where the Supreme Court in *Hydro-Quebec* found that the CLP applies to CEPA, I agree with the Applicants that it does not follow that an Order made under CEPA would come under the national concern doctrine rather than the CLP.

## VI. Conclusion

[193] For all of these reasons, I find the Order and its corresponding listing of PMI on Schedule 1 of the List of Toxic Substances to be both unreasonable and unconstitutional.

## VII. Remedies

[194] The parties dispute what remedies are available for this Application in view of Bill S-5 and the repeal of Schedule 1 of the List of Toxic Substances. While they agree that the Court

may provide declaratory relief that the Order was both invalid and *ultra vires* as of the date it was made (*R v Albashir*, 2021 SCC 48 at para 38), they disagree as to whether any further relief may be ordered.

[195] The Applicants assert that if the proceeding is not moot then the Order may be quashed, which would have the effect of treating PMI as if it had never been added to Schedule 1 of the List of Toxic Substances: *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 58. The practical effect would be that this would delete PMI from Schedule 1 of the List of Toxic Substances as it appeared prior to the enactment of Bill S-5.

[196] The Applicants argue that such a deletion would invoke the transitional provisions found in subsection 62(2) of Bill S-5 such that it could be ordered that PMI be deleted from the current Schedule 1.

[197] Subsection 62(2) of Bill S-5 provides:

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|---|---|
| 62(2) If a substance is deleted from the List of Toxic Substances in Schedule 1 of the *Canadian Environmental Protection Act, 1999* before the day on which section 58 of this Act comes into force but the substance is specified on the list of toxic substances in Part 1 or 2 of Schedule 1 of that Act as it reads after that day, the Governor in Council must as soon as feasible after that day make an order deleting the substance from | 62(2) Si la liste des substances toxiques de l'annexe 1 de la *Loi canadienne sur la protection de l'environnement (1999)* est modifiée afin de radier une substance avant la date d'entrée en vigueur de l'article 58 de la présente loi et que cette substance est inscrite sur la liste des substances toxiques à la partie 1 ou à la partie 2 de l'annexe 1 de cette loi dans sa version postérieure à cette date, le gouverneur en conseil doit, |

| | |
|---|---|
| the list of toxic substances on which it is specified. | dans les meilleurs délais suivant cette date, prendre un décret afin de radier la substance de la liste des substances toxiques sur laquelle elle figure. |

[198] They assert that it would be absurd to read Bill S-5 as reflecting an intention to list items on Schedule 1 that do not come within the scheme of Part 5 of CEPA.

[199] In a related way, the Applicants argue that the same rationale for finding the Order and the corresponding listing of PMI on Schedule 1 of the List of Toxic Substances unconstitutional – *i.e.*, because there is no reasonable apprehension that all listed PMI are harmful – applies to the current listing of PMI on Schedule 1 as enacted by Bill S-5. Thus, they assert that the current listing of PMI cannot remain on Schedule 1 as it would be *ultra vires.*

[200] While there may be merit to the Applicants' assertions relating to the administrative and constitutional validity of the listing on the current Schedule 1, the authority to "add" or "delete" substances from the current Schedule 1 resides with the GIC and not with the Court. I agree with the Respondents, transposing these powers to the Court would exceed its statutory jurisdiction.

[201] The remedies available to the Court on judicial review are the powers set out in subsection 18.1(3) of the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*], namely to:

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| (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to | a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a |

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| do or has unreasonably delayed in doing; or | retardé l'exécution de manière déraisonnable; |
| (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal. | b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral. |

[202] These are not the same powers as the powers granted to the GIC by section 90 of CEPA to "add" and "delete" substances from Schedule 1.

[203] Further, declaring the Order unlawful does not go as far as deleting PMI from the existing Schedule 1. Unlike administrative authorizations, such as the Notice of Compliance issued under the *Patented Medicines (Notice of Compliance) Regulations* in *Apotex Inc v Bayer AG*, 2004 FCA 242 at paragraph 10, Schedule 1 is now part of Bill S-5. As set out in *R v Sullivan*, 2022 SCC 19 at paragraphs 45-46, it cannot be deleted by order of the Court. While a declaration of invalidity could lead the GIC to order that PMI be deleted from the current Schedule 1, the authority to take that step is within the discretion of the GIC.

[204] Similarly, I agree with the Respondents, it is the Order and not Bill S-5 that has been challenged in this Application. As such, it is not open to the Court to rule on the constitutional validity of Bill S-5. While the Court's finding on the constitutional validity of the Order may bear on the constitutional validity of the listing of PMI on Schedule 1 enacted under Bill S-5, this finding cannot be made without the provision of further argument and evidence from the parties,

including as to the scheme and purpose of the amendments made to CEPA as a result of Bill S-5. On the basis of the submissions that were made before me, I cannot conclude that there would be no relevant evidence or material argument forthcoming.

[205] For all of these reasons, the relief provided by this Order shall be limited to the Court's remedies under subsection 18.1(3) of the *Federal Courts Act*, which can include quashing the Order and declaring the Order both invalid and unlawful with retroactive effect.

## VIII. Costs

[206] As agreed by the parties, costs shall follow the event and thus be awarded to the Applicants. Should the parties be unable to agree on the quantum of costs, the Applicants shall have 15 days to provide its submissions and the Respondents 15 days thereafter to respond. Each party's submissions shall not exceed five pages in length.

**JUDGMENT IN T-824-21**

**THIS COURT'S JUDGMENT is that:**

1. 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, in the Canada Gazette Part II, Vol. 155, Number 10 is retroactively quashed and declared invalid and unlawful as of April 23, 2021.

2. Costs are awarded to the Applicants. Should the parties be unable to agree on the quantum of costs, the Applicants shall have fifteen (15) days from the date of this Judgment to provide its submissions and the Respondents fifteen (15) days thereafter to respond. Each party's submissions shall not exceed five (5) pages in length.

"Angela Furlanetto"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-824-21 |
| **STYLE OF CAUSE:** | RESPONSIBLE PLASTIC USE COALITION, DOW CHEMICAL CANADA ULC, IMPERIAL OIL, A PARTNERSHIP, BY ITS MANAGING PARTNER IMPERIAL OIL LIMITED, AND NOVA CHEMICALS CORPORATION v THE MINISTER OF THE ENVIRONMENT AND CLIMATE CHANGE, THE MINISTER OF HEALTH, AND THE ATTORNEY GENERAL OF CANADA AND AMERICAN CHEMISTRY COUNCIL, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, PLASTICS INDUSTRY ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC. AND OCEANA CANADA, ANIMAL JUSTICE, ATTORNEY GENERAL FOR THE PROVINCE OF ALBERTA, ATTORNEY GENERAL FOR THE PROVINCE OF SASKATCHEWAN |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 7 TO 9, 2023 AND SEPTEMBER 15, 2023 |
| **JUDGMENT AND REASONS:** | FURLANETTO J. |
| **DATED:** | NOVEMBER 16, 2023 |

**APPEARANCES:**

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| Andrew Bernstein | FOR THE APPLICANTS |
| Joseph Cheng<br>Andrew Law<br>Marilyn Venney | FOR THE RESPONDENTS |

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| Jenna Anne de Jong<br>Jean-Simon Schoenholz | FOR THE INTERVENERS AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, PLASTICS INDUSTRY ASSOCIATION AND AMERICAN CHEMISTRY COUNCIL |
| Manjit Singh | FOR THE INTERVENER ANIMAL JUSTICE |
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