

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240125

Docket: A-337-23

Citation: 2024 FCA 18

Present: GLEASON J.A.

BETWEEN:

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

Appellants

and

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

Respondents

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 25, 2024.

REASONS FOR ORDER BY:

GLEASON J.A.

Federal Court of Appeal



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REASONS FOR ORDER

GLEASON J.A.

[1] The appellants have moved for a stay of the judgment of the Federal Court in *Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)*, 2023 FC 1511 (per Furlanetto J.). They seek a stay until 60 days following the disposition of their appeal from the

Federal Court's judgment. In the judgment in question, the Federal Court quashed and declared retroactively invalid and unlawful as of April 23, 2021 the *Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999*, registered on April 23, 2021, and published on May 12, 2021, in the Canada Gazette Part II, Vol. 155, Number 10 (the Order).

[2] The Order added plastic manufactured items (PMI) to the List of Toxic Substances in Schedule 1 to the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (CEPA).

[3] Section 90 of CEPA (as it read on April 23, 2021) delegates to the Governor in Council the authority to add substances to Schedule 1 to CEPA. It provided:

Addition to List of Toxic Substances

- **90** (1) Subject to subsection (3), 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.

- Priority

(1.1) In developing proposed regulations or instruments respecting preventive or control actions in relation to substances specified on the List of Toxic Substances in Schedule 1, the Ministers shall give priority to

Inscription sur la liste des substances toxiques

- **90** (1) S'il est convaincu qu'une substance est toxique, le gouverneur en conseil peut prendre, sur recommandation des ministres, un décret d'inscription de la substance sur la liste de l'annexe 1.

- Priorité

(1.1) Lorsqu'il s'agit d'établir des projets de textes — règlements ou autres — portant sur les mesures de prévention ou de contrôle relatives à des substances inscrites sur la liste de l'annexe 1, les ministres donnent priorité

pollution prevention actions.

- Deletion from List

(2) Subject to subsection (3), the Governor in Council may, if satisfied that the inclusion of a substance specified on the List of Toxic Substances in Schedule 1 is no longer necessary, on the recommendation of the Ministers, make an order

- (a) deleting the substance from the List and deleting the type of regulations specified in the List as being applicable with respect to the substance; and
- (b) repealing the regulations made under section 93 with respect to the substance.

- Order subject to conditions

(3) Where a board of review is established under section 333 in relation to a substance, no order may be made under subsection (1) or (2) in relation to the substance until the board's report is received by the Ministers.

aux mesures de prévention de la pollution.

- Radiation de la liste

(2) S'il est convaincu qu'une substance n'a plus à figurer sur la liste de l'annexe 1, le gouverneur en conseil peut, sur recommandation des ministres et par décret :

- a) radier de la liste la substance et la mention du type de règlements afférents;
- b) abroger les règlements pris en application de l'article 93.

- Réserve

(3) La prise des décrets visés aux paragraphes (1) ou (2) est toutefois subordonnée à la réception par les ministres du rapport de la commission de révision éventuellement constituée en vertu de l'article 333.

[4] By virtue of this provision, substances may be added to the list in Schedule 1 to CEPA if the Governor in Council is satisfied that they are toxic.

[5] In the judgment under appeal, the Federal Court held that the Order was both unreasonable and unconstitutional because the Governor in Council “could not have been satisfied” that all PMIs are toxic (at paras. 116 and 184).

[6] It is common ground between the parties that the Order enabled the promulgation of a subsequent regulation, the *Single-use Plastics Prohibition Regulations*, SOR/2022-138 (the *Single-use Regulations*).

[7] As of the date of these Reasons, several provisions in the *Single-use Regulations* have come into force. These provisions prohibit, in the circumstances detailed in them, the manufacture and import for sale in Canada of a number of single-use plastic items. These include certain types of: single-use plastic ring carriers, single-use plastic straws, plastic checkout bags, single-use plastic cutlery, single-use plastic foodservice ware, and single-use plastic stir sticks. In addition, the *Single-use Regulations* prohibit the sale in Canada as of December 20, 2023 of certain: plastic checkout bags, single-use plastic cutlery, single-use plastic foodservice ware, single-use plastic stir sticks, and single-use plastic straws.

[8] The Regulatory Impact Statement (RIAS) that accompanied the *Single-use Regulations* explains that the prohibited items are the most prevalent items contributing to plastic pollution and that it is estimated that the *Single-use Regulations* will result in a net decrease of

approximately 1.3 million tonnes of plastic waste in Canada over 10 years. This represents approximately 3% of the plastic waste in the country and 5% of the total plastic pollution in Canada.

[9] It is clear from the materials filed by the appellants, which include the mandate letters issued to two successive Ministers of the Environment and Climate Change, that banning the use of harmful single-use plastics and taking steps toward eliminating plastic pollution in Canada were and are important objectives of the federal government.

[10] Based on the evidence filed by the appellants in support of their stay motion, it appears that Environment and Climate Change Canada has spent over \$1.5 million in the 2022-2023 fiscal year and had planned spending of over \$3.3 million in the 2023-2024 fiscal year to implement the *Single-use Regulations*. Activities undertaken include meeting with businesses and industry associations, publishing news releases, conducting social media campaigns, completing design work for compliance materials, conducting campaigns with regulatees, developing and delivering training to enforcement officers, and responding to enforcement referrals.

[11] According to the same evidence, as of December 8, 2023 (the date the appellants' supporting affidavit was sworn), many businesses have switched to alternatives to the single-use plastics that then were or would be prohibited by the *Single-use Regulations*. It is to be anticipated that many more businesses have made or are in the process of making the switch as

several prohibitions came into force on December 20, 2023 or will come into force on June 20, 2024.

[12] The *Single-use Regulations* are being challenged in an application that is currently pending before the Federal Court in Court File T-1468-22. While the parties to that application have agreed that it should be stayed, pending the disposition of this appeal, the Federal Court has not issued a stay order. Moreover, as the appellants note in their submissions, another party could commence a similar application in the Federal Court at any point.

[13] With this background in mind, I turn now to more specifically address the appellants' stay application.

[14] The test for the grant of a stay in a case like this is well-known and requires the moving party to establish that: (1) their appeal raises a serious issue; (2) they would suffer irreparable harm if the stay were not granted; and (3) the balance of convenience favours granting the stay: *RJR-Macdonald Inc v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 334 (*RJR-MacDonald*); *Canada v. Canadian Council for Refugees*, 2008 FCA 40 at para. 18 (*Canadian Council for Refugees*).

[15] The threshold for establishing the first criterion of a serious issue is generally a low one. It will be met in a case like the present if the issues raised in the Notice of Appeal are not frivolous: *RJR-Macdonald* at 348; *Canadian Council for Refugees* at paras. 18, 22.

[16] Here, I am satisfied that the Notice of Appeal raises many such issues. This is especially so when one recalls that the applicable standard of review will require this Court to effectively step into the shoes of the Federal Court, to re-conduct the reasonableness analysis, and to decide if it erred in law in its constitutional analysis. Thus, the first criterion for the issuance of the requested stay is met.

[17] I am also of the view that the second and third criteria are met in this case.

[18] The case law recognizes that, where the grant or refusal of a stay would suspend legislation, regulations or other promulgations, the public interest is engaged and is considered as part of both the second and third criteria for the issuance of a stay: *RJR MacDonald* at 348; *Canadian Council for Refugees* at para. 24.

[19] The public interest, moreover, is to be widely-construed. As noted by the Supreme Court of Canada at page 346 of *RJR MacDonald*, in the context of a request to stay the effect of legislation that was alleged to violate the Charter:

... the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. **The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.**

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest.

[Emphasis added.]

[20] Contrary to what the respondents assert, these principles have been applied to stay cases outside the Charter context. For example, the Quebec Court of Appeal, in a division of powers case, refused a stay where the effect of granting it would have been to suspend legislation in *Québec (Procureur général) c. Canada (Procureur général)*, 2013 QCCA 1263 at para. 50.

[21] Here, the appellants have established that the promulgation of the Order and enactment of the subsequent *Single-use Regulations* were undertaken pursuant to the federal government's responsibility to act in the public interest as that concept has been defined by the case law.

[22] Moreover, the linkage between the Order and the *Single-use Regulations* is evident. While the appellants do not concede that the Federal Court's judgment means that the *Single-use Regulations* are invalid, they nonetheless recognize that the Order enabled the enactment of the *Single-use Regulations*.

[23] Such enablement is evident. Subsection 93(1) of CEPA ties the Governor in Council's delegated authority to promulgate regulations under CEPA to substances having been listed in Schedule 1 of CEPA. At the relevant time, subsection 93(1) of CEPA provided:

Regulations

- **93(1)** Subject to subsections (3) and (4), the Governor in Council may, on the recommendation of the Ministers, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule 1, including regulations providing for, or imposing requirements respecting,
 - (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;
 - (b) the places or areas where the substance may be released;
 - (c) the commercial, manufacturing or processing activity in the course of which the substance may be released;
 - (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;
 - (e) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;
 - (f) the purposes for which the substance or a product containing it may be imported, manufactured, processed, used, offered for sale or sold;

Règlements

- **93(1)** Sous réserve des paragraphes (3) et (4), le gouverneur en conseil peut, sur recommandation des ministres, prendre des règlements concernant une substance inscrite sur la liste de l'annexe 1, notamment en ce qui touche :
 - 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) les lieux ou zones de rejet;
 - c) les activités commerciales, de fabrication ou de transformation au cours desquelles le rejet est permis;
 - d) les modalités et conditions de son rejet dans l'environnement, seule ou combinée à une autre substance;
 - e) la quantité qui peut être fabriquée, transformée, utilisée, mise en vente ou vendue au Canada;
 - 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;
 - (h) the quantities or concentrations in which the substance may be used;
 - (i) the quantities or concentrations of the substance that may be imported;
 - (j) the countries from or to which the substance may be imported or exported;
 - (k) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;
 - (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;
 - (m) the total, partial or conditional prohibition of the import or export of a product that is intended to contain the 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;
 - (o) the manner in which, conditions under which and the
- 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) la quantité ou la concentration dans lesquelles elle peut être utilisée;
 - i) la quantité ou la concentration dans lesquelles elle peut être importée;
 - j) les pays d'exportation ou d'importation;
 - k) les conditions, modalités et objets de l'importation ou de l'exportation;
 - 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) l'interdiction totale, partielle ou conditionnelle d'importation ou d'exportation d'un produit destiné à contenir la substance;
 - n) la quantité ou la concentration de celle-ci que peut contenir un produit fabriqué, importé, exporté, mis en vente ou vendu au Canada;
 - o) les modalités, les conditions et l'objet de la publicité ou de

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| <p>purposes for which the substance or a product containing it may be advertised or offered for sale;</p> | <p>la mise en vente de la substance ou d'un produit qui en contient;</p> |
| <p>○ (p) the manner in which and conditions under which the substance or a product containing it may be stored, displayed, handled, transported or offered for transport;</p> | <p>○ p) les modalités et les conditions de stockage, de présentation, de transport, de manutention ou d'offre de transport de la substance ou d'un produit qui en contient;</p> |
| <p>○ (q) the packaging and labelling of the substance or a product containing it;</p> | <p>○ q) l'emballage et l'étiquetage de la substance ou d'un produit qui en contient;</p> |
| <p>○ (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;</p> | <p>○ 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;</p> |
| <p>○ (s) the submission to the Minister, on request or at any prescribed times, of information relating to the substance;</p> | <p>○ s) la transmission au ministre, sur demande ou au moment fixé par règlement, de renseignements concernant la substance;</p> |
| <p>○ (t) the maintenance of books and records for the administration of any regulation made under this section;</p> | <p>○ t) la tenue de livres et de registres pour l'exécution des règlements d'application du présent article;</p> |
| <p>○ (u) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;</p> | <p>○ u) l'échantillonnage, l'analyse, l'essai, la mesure ou la surveillance de la substance et la transmission des résultats au ministre;</p> |
| <p>○ (v) the submission of samples of the substance to the Minister;</p> | <p>○ v) la transmission d'échantillons de la substance au ministre;</p> |
| <p>○ (w) the conditions, test procedures and laboratory practices to be followed for</p> | <p>○ w) les conditions, procédures d'essai et pratiques de laboratoire auxquelles il faut se</p> |

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| conducting sampling, analyses, tests, measurements or monitoring of the substance; | conformer pour les opérations mentionnées à l’alinéa u); |
| ○ (x) the circumstances or conditions under which the Minister may, for the proper administration of this Act, modify | ○ x) les cas ou conditions de modification par le ministre, pour l’exécution de la présente loi, soit des exigences posées pour les opérations mentionnées à l’alinéa u), soit des conditions, procédures d’essai et pratiques de laboratoire afférentes; |
| <ul style="list-style-type: none"> ▪ (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. |

[24] The respondents argue that the appellants take an inconsistent position on the stay motion to that they took before the Federal Court on the effect of subsequent legislation that added PMIs to Schedule 1 of CEPA and that this motion consequently should be dismissed.

[25] Subsequent to the passage of the *Single-use Regulations*, Parliament adopted legislation that also itself added PMIs to Schedule 1 of CEPA, namely, the *Strengthening Environmental Protection for a Healthier Canada Act*, S.C. 2023, c. 12 (Bill S-5). The respondents argue that,

in seeking the present stay, the appellants take a position that is inconsistent with their assertion before the Federal Court that Bill S-5 rendered the application to strike the Order moot. They say that, for this reason among others, this stay motion should be refused.

[26] With respect, I disagree. In its Reasons for Judgment issued in this matter, the Federal Court held at paragraph 32 that the adoption of Bill S-5 did not render the respondents' motion to strike the Order moot because:

...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 [the original] Schedule 1 of the List of Toxic Substances.

[27] I express no opinion on whether the Federal Court erred in this regard. What is certain, though, is that its decision has cast doubt on the validity of the *Single-use Regulations* and the effect of Bill S-5 on the validity of those regulations, which may well cause considerable confusion in the country.

[28] Given the number of parties impacted by the *Single-use Regulations*, the recent coming into force of many of the prohibitions in them, and the case law that favours the grant of a stay pending appeal in circumstances where legislation, regulations, or other promulgation would be rendered inoperative, I find that the second and third steps of the test for the grant of a stay are met in this case. In short, if the stay were refused, irreparable harm would be done to the orderly roll-out of the *Single-use Regulations* and considerable confusion would arise for the many businesses that have moved to comply with their provisions. This would not be in the public

interest, which has been found by binding case law to exist when there is some indication that the impugned legislation, regulation, or activity was undertaken by a body charged with acting in the public interest. The Governor in Council, who promulgated the Order, is the highest federal executive authority and is charged with so acting.

[29] Thus, a stay will be granted. However, it will not be for the full duration requested by the appellants.

[30] The appellants have requested that the stay should run until 60 days following the disposition of their appeal from the Federal Court's judgment. I believe it is appropriate that this interim stay should instead extend only to the date of such disposition. If the appellants wish a longer stay, they should make a request for it in their memorandum of fact and law and oral argument. It is a matter for the panel hearing the appeal to decide if the stay should be extended past the date on which this Court renders judgment on the appellants' appeal. I note, parenthetically, that no extension of this stay would be required if the appellants are successful in their appeal.

[31] The respondents have requested that, if the stay is granted, the appeal be expedited. I agree that this is appropriate.

[32] The parties shall forthwith confer to see if they can agree to a timeline for the completion of the steps required to perfect this appeal, with a view to its being heard by no later than June 7, 2024. They shall submit to the Court their agreed schedule or, failing agreement, their

respective proposed timelines within 7 days. The matter shall thereafter be returned forthwith to the undersigned to make the required order to set the schedule.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-337-23

STYLE OF CAUSE:

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CORPORATION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

GLEASON J.A.

DATED:

JANUARY 25, 2024

WRITTEN REPRESENTATIONS BY:

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