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December 9, 2020

The Honourable Jonathan Wilkinson, P.C., M.P.
Minister of the Environment and Climate Change

c/o Mr.Thomas Kruidenier
Executive Director
Program Development and Engagement Division
Department of the Environment
Gatineau, Quebec K1A 0H3

By E-mail: eccc.substances.eccc@canada.ca

Dear Minister Wilkinson:

RE: Notice of Objection and Request for Board of Review in relation to the Proposed Order to add "plastic manufactured items" to Schedule 1 to the *Canadian Environmental Protection Act, 1999,* as published in the *Canada Gazette,* Part I, Volume 154, Number 41: Order Adding a Toxic Substance to Schedule 1 to the *Canadian Environmental Protection Act, 1999* (*October 10, 2020*).

This letter is the Canada Coalition (the "**Coalition**")[1] of the Foodservice Packaging Institute ("**FPI**")'s Notice of Objection in response to the October 10, 2020 notice in the *Canada Gazette*, Part I, in which the Minister of the Environment and the Minister of Health (the "**Ministers**") recommended that the Governor in Council make an order adding "Plastic Manufactured Items" to Schedule 1 of the *Canadian Environmental Protection Act, 1999* ("***CEPA***")[2] (the "**Proposed Order**").

About the Foodservice Packaging Institute and the Canada Coalition

FPI is the material neutral trade association representing the foodservice packaging industry in North America. FPI promotes the value and benefits of foodservice packaging and serves as the industry's leading authority to educate and influence stakeholders. Members include raw material and machinery suppliers, manufacturers, distributors, and purchasers of foodservice packaging.

The Coalition exists, under the umbrella of FPI, to support the Canadian plastic packaging industry. The mission of the Coalition is to represent plastic food packaging products accurately

[1] A new entity is being formed under the name The Canada Plastic Products Coalition with the intention that this entity will assume all positions as set out herein on behalf of the Coalition, once formed.
[2] *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 ("*CEPA*")

and fairly to the Canadian government and its citizens. The Coalition is committed to advocating on behalf of the plastic food packaging industry, which ensures food and beverage products are supplied to consumers in a sanitary, economically sound, and sustainable manner.

Members of the Coalition are companies involved in the manufacture of plastic packaging and resins. These companies produce plastic food packaging, straws, and single-use and reusable bags in Canada, and have extensive experience working to find solutions for their products at end-of-life.

Overview of the Coalition's Objections

The breadth of what is being proposed is astonishing. "Plastic manufactured items" can be made from a wide range of compounds into a vast array of products used by Canadians every day – anything from coffee cup lids and stir sticks to contact lenses to masks, gowns and gloves – the personal protective equipment being used to fight the spread of COVID-19. If the Governor in Council makes the Proposed Order, all of these every day products would be deemed to be "toxic", and could be subject to regulation, restriction, and even prohibition by the Government of Canada.

As such, and as explained in more detail below, the Coalition objects to the Proposed Order for the following reasons:

1. "Plastic manufactured items" are not "a substance". They are a broad, heterogeneous class of substances that cannot be collectively classified "toxic" and listed in Schedule 1 of *CEPA*;

2. The Ministers have not completed a scientific screening assessment or review to support their recommendation as contemplated by subsection 77(1) of *CEPA*. This departure from the usual process contravenes the legitimate expectations of the public and industry stakeholders that a proper scientific assessment will be completed before a substance is deemed to be "toxic";

3. The Science Assessment that was completed does not support a finding that "plastic manufactured items" are "toxic";

4. The federal government, including through the Canadian Council of the Ministers of the Environment ("**CCME"**), has not yet completed its scientific research into plastic waste, or developed the resulting policies. The Proposed Order is therefore premature, as the federal government does not yet have the necessary scientific evidence to make a determination as to toxicity or the need for regulation; and

5. The Proposed Order is inconsistent with Canada's global commitments under the Ocean Plastics Charter. It is expected that the Government of Canada would intend to comply with its international obligations, and not make orders or enact regulations that are inconsistent with those obligations.

The Coalition therefore requests that the Ministers establish of a board of review under section 333 of *CEPA* to review the basis for the Ministers' recommendation. The purpose of a board of review is to "inquire into the nature and extent of the danger posed by the substance in respect of

which the decision is made or the order, regulation or instrument is proposed".[3] In determining whether or not to convene the board of review, the Ministers should consider "the sufficiency of the science in support of the proposed order".[4]

For the reasons noted above and described in more detail below, the Coalition submits that there has been no proper scientific assessment of "plastic manufactured items" to support a determination that they are "toxic". As such, the Coalition submits that a board of review is required to inquire into the science supporting the Proposed Order. The board of review must consist of at least three members with knowledge about the Canadian environment, environmental and human health or traditional aboriginal knowledge such that the board of review would provide valuable insight into this important decision.[5]

A. Preliminary issue – the Proposed Order is unconstitutional

As a preliminary matter, the Coalition submits that the Governor in Council does not have jurisdiction to enact the Proposed Order because in pith and substance it seeks to regulate waste management, which is a matter of provincial jurisdiction.

1. In pith and substance the Proposed Order is about waste management

It is well established by the Supreme Court that the toxic substances targeted under *CEPA* must be precise, and the prohibition must not be unnecessarily broad. A failure to adhere to this risks a finding of *ultra vires* as being outside the ambit of the criminal law power, and encroaching on provincial powers.[6]

As discussed in more detail below, the approach being taken with the Proposed Order has not been a narrow, targeted one. Rather, the Proposed Order seeks to add "plastic manufactured items" – a broad, heterogeneous class of substances ubiquitous in everyday life – to Schedule 1. Everything from plastic grocery bags to contact lenses to personal protective equipment would be deemed to be "toxic" and subject to federal government regulation, restriction, and even bans. This will encroach on provincial powers.

The Ministers' recommendation to the Governor in Council to make the Proposed Order is based on the *Science assessment of plastic pollution* (the "**Science Assessment**"). The Science Assessment was a review of the current state of science on "plastic pollution" – the less than 1% of plastic waste that the report estimated was discarded outside of the normal waste stream in 2016 through direct release to the environment or through dumps or leaks.[7] It is evident from the Science Assessment that the impetus for the Proposed Order is a concern regarding the management of plastic waste.

Further, the discussion paper published concurrently with the Proposed Order (the "**Discussion Paper**"), supports that the purpose of the Proposed Order is to enable the Government of Canada

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[3] *CEPA*, s.333(1)
[4] *Goodyear Canada Inc. v. Canada (Environment)*, 2017 FCA 149 [*Goodyear*], at para. 49
[5] *CEPA*, s. 334
[6] *See R. v. Hydro-Québec*, [1997] 3 SCR 213, 1997 CanLII 318 (SCC) [*Hydro-Québec*], at para. 147
[7] *Science assessment of plastic pollution*, Environment and Climate Change Canada and Health Canada, October 2020 ("Science Assessment"), s. 1

to steps towards "eliminating plastic pollution in Canada, including potentially banning or restricting certain harmful single-use plastic products". [8] The Discussion Paper notes:

> **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 behavior 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 plastics economy.[9]

The Discussion Paper proceeds to identify six single-use plastic items for a potential ban or restrictions (the "**Proposed Bans**"). Thus, through the Proposed Order and subsequent regulations, the Governor in Council is purporting to assume the power to regulate every conceivable aspect of a wide array of products that are integral to all aspects of Canadian society. It is doing so on the basis an identified waste management issue, which is a matter of provincial jurisdiction. As set out below, the Government of Canada's proposed approach is inconsistent with existing agreements with the provinces and existing efforts by the provinces to manage plastic waste, demonstrating that the Proposed Order and the Proposed Bans would intrude on provincial jurisdiction.

2. The Proposed Order is inconsistent with federal-provincial agreements on plastics

Through the Proposed Order, the Government of Canada is purporting to assume jurisdiction over regulation of "plastic manufactured items", including the power to restrict and even ban various plastic products. This would be inconsistent with existing federal-provincial agreements on plastics, which provide for resource recovery and valorization of plastics in place of bans.

The Canadian Council of Ministers of the Environment (CCME) Plan

Concerns around the prevalence of waste plastic have been the basis for a long-standing and committed federal-provincial process on plastics, which has resulted in the CCME Zero Plastic Waste Strategy (the "**CCME Plan"**). The CCME Plan was developed collaboratively with all levels of government, industry and other stakeholders, with the express purpose to eliminate plastics waste, including its impacts upon the environment – the same purpose expressly behind the Proposed Order.

It consists of three separate jointly issued policy and program documents:

a) CCME Strategy on Zero Plastic Waste, 2018 (the "**CCME Strategy**");[10]

[8] Discussion paper: A proposed integrated management approach to plastic products to prevent waste and pollution, October 2020 (the "Discussion Paper")
[9] Discussion Paper
[10] Canadian Council of Ministers of the Environment, Strategy on Zero Plastic Waste, 2018 ("CCME Strategy")

b) CCME Canada-wide action plan on zero plastic waste, Phase 1, 2019 (the "**Phase 1 Action Plan**");[11] and

c) CCME Canada-wide action plan on zero plastic waste, Phase 2, 2020 (the "**Phase 2 Action Plan**").[12]

Each of these policy initiatives expressly anticipate a different approach than the Proposed Order would unilaterally impose.

Preserving plastics resources for the circular economy

The CCME Strategy, for instance, makes it clear that all levels of government are to work towards adopting a circular economy for plastics:

> Working on innovative solutions to address global plastic waste is vital for protecting our oceans, lakes, waterways and natural environment. **Redefining plastic waste as a valuable commodity presents an economic opportunity to conserve resources and build on our competitiveness**. In addition, improving plastic recycling rates will reduce GHG emissions. Canadians can show global leadership by moving to a more circular plastics economy—one which captures and retains the value of plastics across their lifecycle. Working together to change how plastics are used and managed will increase prosperity and protect the environment.[13]

This priority of capturing the value of all plastics over efforts to restrict / eliminate plastics, is also reflected in the CCME Strategy:

> In order to recover value from all used plastics, Canada's recycling infrastructure will need to be significantly expanded. Enhanced facilities, innovative products and technologies and processes are needed across Canada to deal with increased volumes of all types of plastics. This includes expanding facilities for easy to recycle products, establishing capacity to deal with plastics that aren't currently recycled in Canada, and finding solutions for highly contaminated and hard-to-recycle plastics. This also includes exploring if and how other value recovery processes that are not currently commonplace in Canada, such as reuse, remanufacturing or chemical recycling, could be supported as part of the zero plastic waste solution. Canadian innovators are well positioned to take advantage of growing global markets in these areas.[14]

The CCME Strategy extends the commitment to recovering value through the growth of recycling infrastructure to "all types of plastics". The Coalition submits that it is only through the

[11] Canadian Council of Ministers of the Environment, Canada-wide action plan on zero plastic waste, Phase 1, 2019 (the "Phase 1 Action Plan")
[12] Canadian Council of Ministers of the Environment, Canada-wide action plan on zero plastic waste, Phase 2, 2020 (the "Phase 2 Action Plan")
[13] CCME Strategy, p. 1 [Emphasis added]
[14] CCME Strategy, p. 8

preservation of all available plastics resources can the CCME Plan facilitate the necessary infrastructure to meet its zero plastic waste goals.

CCME Strategy committed to respect division of powers

Consistent with this emphasis on resource recovery strategies for plastics, the CCME Strategy expressly recognizes that the constitutional division of powers must be respected as part of this process:

> The strategy must also ensure that all parts of Canadian society – including industry, all orders of government, and individuals – play their role in reaching zero plastic waste and reducing marine litter. It will be **implemented respecting the division of federal, provincial and territorial responsibilities, as well as ensuring complementarity**, and will require pathways that respond to the particular circumstances found in the North.[15]

Nowhere in the CCME Strategy is there a recognition of, or allowance for, the implementation of a federal ban on materials which are to be used as resources in Canada's strategy.

The CCME Strategy also makes it clear in developing the Phase 1 Action Plan that the federal and provincial governments, along with industry and other stakeholders are to work through the CCME process, assuming "shared roles" in arriving at a consensus outcome:

> **4.1 Shared roles, responsibilities and leadership**
>
> This strategy recognises that many parties must collaborate to achieve zero plastic waste, including **resin producers, product manufacturers**, retailers and consumers, waste management stakeholders (e.g., municipal operators, recyclers, shore clean-up groups) and various orders of government. The success of this strategy will also be dependent on a broad range of complementary measures and actions, which would enable different parties to successfully participate and take leadership in the result areas discussed above.[16]

Coalition members have participated directly or through industry associations in the CCME Plan on the basis that it was the locus for policy and decision-making around plastics management in Canada, as regularly represented as such by all CCME members. The Coalition submits that it would be unfair and unreasonable for the ECCC to disregard the very process in which it has enlisted key plastics industry stakeholders, such as the Coalition.

The federal government, through the Proposed Order, would abrogate the CCME Plan, including its scientific assessment and related roadmaps commitments.

3. Provinces and territories have been exercising jurisdiction in managing plastics

Plastics are already a heavily managed resource. Provincial and territorial governments themselves, along with enabled municipal and regional governments, are already exercising

[15] CCME Strategy, p. 5
[16] CCME Strategy, p. 11

jurisdiction in the area of plastic waste. The Proposed Order would both infringe upon this jurisdiction and undermine its exercise. The Proposed Bans would further undermine the efforts of provincial and territorial governments to put in place regimes to deal with plastic waste.

Provincial extended producer responsibility plastic regimes already developed

The Proposed Order does not represent a legislative initiative into an unregulated field, but rather an attempt by the federal government to intrude into a field of provincial / territorial jurisdiction which has already been fully assumed by the provinces / territories. Further, the provinces and territories have used this jurisdiction to develop forms of extended producer responsibility (EPR) regimes across the country which place the obligation for the resource recovery of plastics with the "producers" (*i.e.*, manufacturers / brand owners / importers), a model frequently endorsed by the federal government, including under the CCME Plan.

For instance, the Province of Ontario recently released its new proposed Blue Box Regulation under Ontario's *Resource Recovery and Circular Economy Act* (the "**Ontario Blue Box Regulation**").[17] In support of the Ontario Blue Box Regulation, the province specifically identified that the EPR framework, and not government bans, would allow all stakeholders to achieve the same proposed environmental benefits of the Proposed Order:

> **Key principles of the proposed regulation**
>
> Under a producer responsibility framework for recycling, costs are shifted from municipalities and taxpayers to producers that are better able to control costs through influence over:
>
> - the types of products and packaging put into the marketplace
> - the materials used to make products and packaging
> - how the products and packaging are managed at end-of-life
>
> This model encourages producers to find new and innovative ways to reduce costs and improve the environmental management of recyclable materials.[18]

In addition, the Ontario Blue Box Regulation places the decision-making into the hands of industry and allows for a holistic and lasting supply chain strategies and not mere product substitutions, as would be occasioned by *ad hoc* bans, which may not realize improved environmental outcomes. Such interventions into these markets, such as the bans on certain single-use products proposed in the Discussion Paper adversely impacts these markets directly, as well as creating instability which will limit the successful growth of and investment in resource recovery industries.

[17] A proposed regulation, and proposed regulatory amendments, to make producers responsible for operating blue box programs, October 19, 2020, https://ero.ontario.ca/notice/019-2579
[18] A proposed regulation, and proposed regulatory amendments, to make producers responsible for operating blue box programs, October 19, 2020, https://ero.ontario.ca/notice/019-2579

Extended producer responsibility programs expanding coverage of plastic manufactured items

Plastic manufactured items are already being added to provincial EPR programs, which would be undermined by the Proposed Order. For instance, the provinces of Ontario and British Columbia have recently expanded the scope of materials to be subject to their EPR / circular economy regimes, which are the very same materials which the integrated management approach set out in the Discussion Paper would purport to ban.

Ontario Blue Box Regulation

Under the Ontario Blue Box Regulation, both packaging and "packaging-like products" are to be governed by the regulation's resource recovery requirements:

> "blue box packaging" means, (a) primary packaging, convenience packaging, or transport packaging that is provided with a product, (b) ancillary products that are provided with or attached to another product to facilitate that use of the product, and (c) products such as disposable straws, cutlery or plates that are supplied with a food or beverage product, that facilitate the consumption of that food or beverage product, and that are ordinarily disposed of after a single use, whether or not they could be reused;
>
> "packaging-like product" means any product such as aluminum foil, metal trays, plastic film, plastic wrap, wrapping paper, paper bags, plastic bags, cardboard boxes, and envelopes that, (a) is used for the containment, protection, handling, delivery, presentation or transportation of products, and (b) is ordinarily disposed of after a single use, whether or not it could be reused;

These are the materials covered by the Proposed Ban, which not only precludes these materials from being properly processed as resources, but also creating uncertainty over compliance with the Ontario Blue Box Regulation as a whole, which is anticipated to be in force in 2022.

British Columbia Recycling Regulation

Similarly, British Columbia recently authorized amendments to its Recycling Regulation. Effective January 1, 2023, "packaging-like products and single-use products" will be added to Schedule 5 Blue Box materials. Packaging-like products will include food containers; foil and wraps; bags; boxes; and objects purchased by or supplied to consumers expressly for the purpose of protecting, containing or transporting commodities or products. Single-use products will include straws and items used to stir beverages; utensils, plates, bowls and cups; and party supplies.[19]

Like the Ontario Blue Box Regulation, compliance with the British Columbia Recycling Regulation would be threatened with the Proposed Order, and confidence in the overall EPR regime would be undermined by this unilateral federal government initiative.

[19] Province of British Columbia, Order in Council No. 370, June 29, 2020

The Coalition relies upon all of the above in submitting that the provinces and territories are already exercising jurisdiction in the area of plastic waste and the Proposed Order would both infringe upon this jurisdiction and undermine its exercise.

4. Conclusion

In pith and substance, the Proposed Order is an attempt by the federal government to usurp authority over regulation of plastic waste. The Coalition submits that the Proposed Order is therefore *ultra vires* the government of Canada.

Nevertheless, without prejudice to the Coalition's position that the Proposed Order is unconstitutional, the Coalition is filing this Notice of Objection and requesting that a Board of Review be constituted to review the Ministers' recommendation for the reasons set out below.

B. The Coalition's objections to the Proposed Order

1. "Plastic manufactured items" are not "a substance" that can be classified as "toxic" and listed under Schedule 1 to *CEPA*

The statutory language in Part 5 of *CEPA* is singular

CEPA is a science-based statute. As noted in the preamble:

> Whereas the Government of Canada recognizes **the integral role of science**, as well as the role of traditional aboriginal knowledge, in the process of making decisions relating to the protection of the environment and human health and that environmental or health risks and social, economic and technical matters are to be considered in that process…[20]

Part 5 of *CEPA* sets out a science-based legislative scheme to provide for a scientific assessment of whether a substance meets the definition of toxicity such that regulation of the substance – as a matter of criminal law – is warranted. The scheme is directed at individual substances, not collections of substances.

The statutory language in Part 5 of *CEPA* refers to individual substances. For example, of particular relevance to this Notice of Objection:

1. Section 64 sets out the criteria whereby "**a substance**" qualifies as "toxic";
2. Section 74 requires the Ministers to conduct a screening assessment of "**a substance**" to make a determination as to its toxicity;
3. Following a section 74 assessment, section 77 requires the Ministers to propose one of three measures with respect to "**the substance**" that has been assessed; and

[20] *CEPA*, preamble [Emphasis added]; *see also Goodyear*, 2017 FCA 149, at para. 49, in which the Court noted that the essence of the decision whether "to convene a board of review under s. 333 is the Minister's assessment as to **the sufficiency of the science** in support of the proposed order". [Emphasis added]

4. Section 90(1) allows the Governor-in-Council to make an order adding "**a substance**" to the List of Toxic Substances in Schedule 1.

The definition of "substance", as set out in section 3(1) of *CEPA* is similarly singular:

> "substance" means **any distinguishable kind of organic or inorganic matter**, whether animate or inanimate, and includes
>
> 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,
>
> b) **any element** or free radical,
>
> c) **any combination of elements** of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and
>
> 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,
>
> and, except for the purposes of sections 66, 80 to 89 and 104 to 115, includes
>
> 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,
>
> 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
>
> g) **any animate matter** that is, or any complex mixtures of different molecules that are, contained in effluents, emissions or wastes that result from any work, undertaking or activity.

There is nothing in the language in Part 5 of CEPA that would allow for an entire class of heterogeneous products manufactured from a wide range of compounds to be collectively assessed and added to the List of Toxic Substances in Schedule 1.

CEPA does not allow for the addition of a broad class of substances to Schedule 1

In *Hydro Québec*, the majority upheld as constitutional certain provisions allowing for the regulation of substances added to the List of Toxic Substances in predecessor legislation to *CEPA*. In doing so, the majority noted that "[s]pecific targeting of toxic substances based on individual assessment avoids resort to unnecessarily broad prohibitions and their impact on the exercise of provincial powers."[21] As such, it was important to the constitutionality of this legislation – in that

[21] *Hydro Québec*, 1997 CanLII 318 (SCC), at para. 147 [Emphasis added]

the legislation not allow the federal government to impede on provincial jurisdiction – that the Court understood the statute required the toxicity assessments of substances be done on an individual basis. The scheme should be interpreted as requiring individual assessments.

In addressing concerns regarding the scope of the toxic substances provisions in the predecessor to *CEPA*, the majority also concluded that the scope was circumscribed because, "when the Governor in Council makes an order adding to the List of Toxic Substances in Schedule I, it involves a determination that the substances added are of a kind akin to those already listed in Schedule I."[22]

"Plastic manufactured items" have nothing in common with the 151 substances currently listed in Schedule 1. As a broad, heterogeneous class of substances, "plastic manufactured items" are not akin to the individual substances such as lead, ozone, and formaldehyde that are already on the list.

The Regulatory Impact Analysis Statement published in the *Canada Gazette* along with the Proposed Order (the "**RIAS**") acknowledges the breadth of "plastic manufactured items":

> Broadly speaking, plastics (which are the main ingredients in the manufacture of plastic items) are materials that can be created from a wide range of synthetic or semi-synthetic organic compounds. Plastics are formed from long-chain polymers of high molecular mass and often contain chemical additives. Different polymers can be manufactured using different compositions of petroleum products, plant-based starting material, or recycled and recovered plastics.
>
> Plastic manufactured items are 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.[23]

Accepting that the definition of "substance" in *CEPA* can include a "manufactured item", the definition allows for "any manufactured item", singular. Each such manufactured item would need to undergo a separate screening assessment process and determination of its toxicity. That was not done here. Rather, the Ministers are recommending the addition of the broad class of "plastic manufactured items" to Schedule 1.

On June 29, 2016, the Governor in Council designated "plastic microbeads that are ≤ 5 mm in size" as a toxic substance under Schedule 1 of *CEPA*. While microbeads are an outlier that also do not have anything in common with the other substances currently listed in Schedule 1, they are one type of "manufactured item" and as such, unlike "plastic manufactured items", they could arguably fit within the definition of a "substance". The Coalition also notes that the addition of microbeads to Schedule 1 was done in consultation with industry stakeholders, including the Cosmetics Alliance of Canada. Whether they are properly "a substance" that could be added to Schedule 1 was not challenged by any of these stakeholders; there was an agreement on behalf of

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[22] *Hydro Québec*, 1997 CanLII 318 (SCC), at para. 145

[23] Regulatory Impact Analysis Statement, *Canada Gazette*, Part I, Volume 154, Number 41: Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999, October 10, 2020 ("RIAS"), Background

industry that microbeads were an issue of concern that should be addressed. As such, the Coalition submits that microbeads are an outlier with a unique history, and their inclusion in Schedule 1 does not support the addition of broad class of substances like "plastic manufactured items" to Schedule 1.

2. No basis under section 77 for the Ministers' recommendation

The Ministers have not undertaken any assessment or review under section 77 that would serve as a basis for their recommendation. The Ministers' actions in recommending the addition of "plastic manufactured items" to Schedule 1 without a proper screening assessment or other scientific assessment/review under section 77 are contrary to the government's established procedures and the expectations of the public and industry stakeholders.

Section 90(1) of *CEPA* provides that the Governor in Council may, if satisfied that a substance is toxic, and on the recommendation of the Ministers of the Environment and Health (the "Ministers"), make an order adding the substance to the List of Toxic Substances in Schedule 1. Further, subsection 77(1) of *CEPA* provides three bases upon which the Ministers may recommend that a substance be added to the List of Toxic Substances in Schedule 1:

a) a screening assessment under section 74,

b) a review of a decision of another jurisdiction under subsection 75(3) that, in their opinion, is based on scientific considerations and is relevant to Canada, or

c) an assessment whether a substance specified on the Priority Substances List is toxic or capable of becoming toxic (section 76).

Each of subsection 77(1)(a), (b), and (c) contemplates a scientific assessment or review. None of these were conducted to justify the Ministers' recommendation with respect to "plastic manufactured items".

First, the Ministers did not conduct a screening assessment under section 74 to determine whether a substance is toxic or capable of becoming toxic prior to recommending that the substance be added to the List of Toxic Substances in Schedule 1.

The Science Assessment does not purport to be a "screening assessment" under section 74 of *CEPA*, nor does it constitute one. Rather, as the Science Assessment explicitly acknowledges, it is a literature review, not a scientific assessment:

> This report is a review of the current state of the science on plastic pollution. It is not intended as a substitute for chemical risk assessment, and it is similar to the approach taken for the Science Summary on Microbeads (ECCC 2015). Typically, a chemical risk assessment is conducted to assess the potential for risk to the environment and human health associated with a substance. However, significant data gaps currently exist that preclude the ability to conduct a quantitative risk assessment, including 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 (Gouin et al.

> 2019). Indeed, risk assessment frameworks for evaluating the potential risks associated with plastic pollution are currently under development. For example, see Gouin et al. (2019) for a discussion on the development of an environmental risk assessment framework for microplastics.[24]

A screening assessment under section 74 of *CEPA* is "a statutorily mandated scientific evaluation of a chemical substance to determine whether it is toxic or capable of being toxic".[25] The purpose of a screening assessment is to examine scientific and technical information about a substance to determine whether it meets the definition of "toxic" as set out in section 64 of *CEPA*. In the case of screening assessments in the past, Environment Canada and Health Canada have prepared a draft screening assessment report that reviews the evidence and draws a conclusion as to whether the substance meets the section 64 definition of "toxic". The results of the screening assessment are then published in the *Canada Gazette* for a 60-day comment period.

The Science Assessment draws no such conclusion. The Science Assessment does not assess whether "plastic manufactured items" meet the definition of "toxic" in section 64 of *CEPA*. In fact, the Science Assessment does not refer to *CEPA* at all, nor to its definition of "toxic". Neither does the Science Assessment assess the "toxicity" of "plastic manufactured items". Rather, the Science Assessment concerns a literature review on the state of science with respect to "plastic pollution". It recommends that additional research be conducted to address key knowledge gaps identified in the report, and concludes that "action" is needed to reduce plastic pollution. The Coalition submits that this does not and could not constitute a section 74 "screening assessment" of "plastic manufactured items".

Second, the RIAS includes only a passing reference to measures being pursued by other jurisdictions. The Ministers have not relied upon any decision of another jurisdiction that was reviewed pursuant to subsection 75(3), so subsection 77(b) does not apply.

Third, "Plastic manufactured items" is not a "substance" specified on the Priority Substances List, so neither could there have been an assessment satisfying subsection 77(c).

With the exception of microbeads, the Coalition understands that each of the existing substances in Schedule 1 was added to the Toxic Substances List after proceeding through a scientific assessment or review under subsection 77(1)(a), (b), or (c).[26] The Ministers have created a legitimate expectation in the public and industry stakeholders that this usual process will be followed before the Ministers recommend that the Governor in Council add a "substance" to the List of Toxic Substances in Schedule 1 to *CEPA*.

None of the assessments/reviews set out in section 77 were undertaken prior to the Ministers' recommendation to add "plastic manufactured items" to Schedule 1. The Ministers have

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[24] Science Assessment, s. 1.1

[25] *Goodyear*, 2017 FCA 149, at para. 41

[26] While the Coalition acknowledges that the Ministers departed from the usual process in developing the order adding microbeads to Schedule 1, the Science Summary published on microbeads, unlike the Science Assessment, did specifically consider, and recommend, that microbeads be considered toxic under subsection 64(a) of *CEPA*. Further, for the reasons stated above, the Coalition submits that microbeads are an outlier with a unique history and should not serve as a precedent to allow the Ministers to sidestep the usual and expected process for adding substances to Schedule 1.

contravened legitimate expectations that they would follow the established process prior to designating a "substance" as "toxic" and listing it on Schedule 1.

3. The Science Assessment is inadequate and insufficient to support a finding of toxicity of plastic manufactured items

The Science Assessment does not address "plastic manufactured items"

Even if "plastic manufactured items" constitute a substance that may lawfully be added to Schedule 1, there is no scientific basis for doing so. The Science Assessment does not address the toxicity of "plastic manufactured items."

The Science Assessment assesses the toxicity of "plastic pollution" which is in turn defined as "plastic that is discarded, disposed of, or abandoned in the environment outside of a managed waste stream."[27] As assessment of "plastic pollution" is not an assessment of "plastic manufactured items."

The RIAS defines "plastic manufactured items" 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."[28]

The Science Assessment does not address the potential toxicity of "plastic manufactured items" and fails to mention the name or definition at all.

The analyses of the occurrence and fate of a type of plastic pollution described throughout the studies cited in the Science Assessment are only applicable to those particular substances and environments they specifically address. The Science Assessment does not intend to, and in fact does not make conclusions regarding any harm associated with the presence of manufactured plastics.

The only basis for connecting "plastic manufactured items" to the subject of the Science Assessment appears in the RIAS, which provides that "all plastic manufactured items have the potential to become plastic pollution."[29]

The Proposed Order therefore appears to be based solely on an assessment of environmental harm that is not inherent to plastics, but caused by irresponsible disposal of certain plastic items in certain environments. The Science Assessment confirms that any risk to the environment comes not from "plastic manufactured items" *per se*, but from multiple subsequent intervening acts, behaviours, and practices of consumers, the waste management sector and others.

There is broad agreement within industry and society that elimination of plastic litter, mismanaged waste released to the environment, and keeping the valuable benefits of plastics resources available to Canadians are a priority. The Coalition's position is that the potential for environmental harm and of end-of-life mismanagement of a subset of plastics, as investigated in the Science

[27] Science Assessment, p. 15
[28] RIAS, Background
[29] RIAS, Background

Assessment, is separate from the issue of toxicity of "plastic manufactured items." The Science Assessment does not provide a basis for adding "plastic manufactured items" to Schedule 1.

The evidence provided in the Science Assessment is insufficient to support a finding that plastic manufactured items are "toxic"

Section 64 of *CEPA* provides that a substance meets the definition of "toxic" if it is entering or may enter the environment in a quantity or concentration or under conditions that:

a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;

b) constitute or may constitute a danger to the environment on which life depends; or

c) constitute or may constitute a danger in Canada to human life or health.

The Coalition submits that the threshold for determining that a substance is *CEPA*-toxic under section 64 is significant, and must be supported with sufficient scientific evidence. The Science Assessment does not recommend that "plastic manufactured items" be added to Schedule 1.

The statutory language in *CEPA* supports the requirement that the determination that a substance is "toxic" requires sufficient scientific evidence. Section 46 gives the Minister the authority to conduct research and collect information, including in a situation where a substance has not been "determined to be toxic under Part 5 because of the current extent of the environment's exposure to [it], but whose presence in the environment must be monitored if the Minister considers that to be appropriate." (s. 46(1)(b)) The statute contemplates that substances which may be of continued concern to the Minister may nevertheless not meet the s. 64 threshold to be considered toxic.

The *CEPA* preamble includes a commitment to implementing the precautionary principle, which is described as "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" [emphasis added]. The precautionary principle does not support action in the present case. The findings of the Science Assessment with respect to microplastics pollution indicate that evidence of potential harm is "less clear and sometimes contradictory."[30]

The toxicity definition under s. 64 is a function of the quantity or concentration of the substance entering the environment, and the harm or danger the substance causes.

The basis for the Proposed Order to add "plastic manufactured items" to Schedule 1 appears to be an estimate that less than 1% of plastic waste in Canada in the year 2016 was discharged into the environment outside of the normal waste stream as dumping or leaks of plastic waste. This estimated ≤1% are the unmanaged releases that are assumed to make up the category of plastic pollution that is assessed in the Science Assessment. The Science Assessment does not purport to engage in a risk-based analysis of the suspected impact of this estimated ≤1% of plastic pollution, and proceeds by accepting the relevance of assessing this subset of plastics.

[30] Science Assessment, p. 82

Since the prevalence or concentration of a substance entering the environment is a key consideration to determine toxicity, the Coalition questions the fact that the Science Assessment does not elaborate on how the ≤1% estimate was reached. References point to the 2019 Summary Report "Economic study of the Canadian plastic industry, markets and waste ("Economic Study Summary Report"), prepared for Environment and Climate Change Canada by Deloitte and Cheminfo Services Inc.[31] The Economic Study Summary Report is a model analysis of a potential zero plastic waste scenario that seeks to illustrate a potential outcome of plastic management policies. The model incorporates the ≤1% leakage assumption, without additional elaboration.

It appears that the estimate may be based on a 2015 research paper by Jambeck et al., which estimates the mass input of plastic pollution globally from land-based-sources into the ocean.[32] It is unclear how the Jambeck study can be used to quantify the proportion of plastic in Canada that ends up as plastic pollution, regardless of the source or destination.

The reliance of the Science Assessment on the estimate of ≤1% unmanaged plastic pollution, based on a model developed for a completely different purpose, is not justifiable.

Moreover, and setting aside the discrepancy between plastic pollution, as assessed, and "plastic manufactured items", the Science Assessment does not conclude or support the conclusion that "plastic manufactured items" be added to Schedule 1.

Subsection 64(c) pertains to substances that enter the environment under conditions that constitute or may constitute a danger in Canada to human life or health. Subsection 64(c) is not applicable in this case. The Science Assessment concludes outright that plastic pollution is not considered toxic to human health. In particular, macroplastics are not considered in the assessment, and the cited studies on the effects of microplastics do not identify a concern for human health.[33]

The findings of the Science Assessment do not support the designation of plastic manufactured items as ecotoxic under subsections 64(a) or (b). These provisions pertain to substances that enter the environment under conditions that (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity, or (b) constitute or may constitute a danger to the environment on which life depends.

The Science Assessment identifies gaps in scientific literature that are presented as areas of future study, but in fact highlight the lack of evidence of harmful effects of plastic pollution on the environment. Methodological issues are prevalent in many of the studies referred to in the Science Assessment.

The section titled "Knowledge gaps and considerations for future research" cites research findings that show an error rate for visually identifying articles as plastics ranging from 33% to 70% error, which effectively undermines the reliability of many of the studies that claim to assess occurrence of microplastics.[34] In what is described as "another major gap in the analytical process," the

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[31] Deloitte LLP and Cheminfo Services Inc., *Economic Study of the Canadian Plastic Industry, Markets and Waste*, Summary Report to Environment and Climate Change Canada, 2019 ("Economic Study Summary Report")
[32] Economic Study Summary Report, p. 38, definition of "LEAK"
[33] Science Assessment, pp. 64, 81
[34] Science Assessment, p. 76

Science Assessment indicates that its literature review did not identify any inter-laboratory studies that would assist with method evaluation.[35]

Moreover, the Science Assessment refers to ecotoxicological research that does not reflect the actual conditions and concentrations in which plastics may be found.[36] The studies the Science Assessment relies on are often unable to conclusively show that the observed toxicity was in fact caused by plastic. One example found that certain plankton suffered acute mortality due to the presence of other a chemical additive found on the plastic particles obtained for the experiment, but not by the plastic itself once cleaned.[37] It is unknown how many of the other toxicological studies rely on similarly tainted materials.

The Coalition's position is that the scientific evidence presented in the Science Assessment does not support the Proposed Order to add "plastic manufactured items" to Schedule 1 of *CEPA*.

4. Prematurity – federal government calls for more plastics research / policy roadmap

The Proposed Order is premature as the federal government, including through the CCME, has not yet completed its scientific research into plastic waste, or developed the resulting policies.

Specifically, the federal government, through the CCME, has identified the need for plastics-related studies, research and further policy development prior to taking action on plastics. Such activities are scheduled to run until end of 2021 at the earliest. As such, the Coalition submits that the Proposed Order is premature, as the federal government does not have the scientific basis to make a determination as to the toxicity of plastic waste or the requirements for regulation.

The CCME Plan

Concerns around the prevalence of waste plastic have been the basis for a long-standing and committed federal-provincial process on plastics, which has resulted in the CCME Zero Plastic Waste Strategy (the "**CCME Plan"**). The CCME Plan was developed collaboratively with all levels of government, industry and other stakeholders, with the express purpose to eliminate plastics waste, including its impacts upon the environment – the same purpose expressly behind the Proposed Order.

It consists of three separate jointly issued policy and program documents:

a) CCME Strategy;[38]

b) the Phase 1 Action Plan;[39] and

[35] Science Assessment, p. 76
[36] Science Assessment, p. 79
[37] Science Assessment, p. 79
[38] Canadian Council of Ministers of the Environment, Strategy on Zero Plastic Waste, 2018 ("CCME Strategy")
[39] Canadian Council of Ministers of the Environment, Canada-wide action plan on zero plastic waste, Phase 1, 2019 (the "Phase 1 Action Plan")

c) the Phase 2 Action Plan.[40]

Each of these policy initiatives expressly anticipate a different process and timeline than the Proposed Order would impose.

a) CCME Strategy to consider "diverse measures"

The CCME Strategy specifically addresses the intended work of the federal and provincial governments around single use plastics – both recognizing their value in Canada and setting out aspirations as to how they may be better managed. The CCME Strategy goal, or "result area", for action on single-use plastics is as follows:

> **Result Area 2: The responsible use and recycling of single-use products is significantly increased**
>
> Single-use and disposable plastic products – such as shopping bags, cigarettes, razors, straws, utensils, and beverage and take-out containers – are items that are intended to be used only briefly before they are thrown away or recycled. While many of these items can serve a valuable function, such as food waste reduction, storage, or transportation, in some situations they can be avoided or replaced with reusable, recyclable or compostable alternatives. However, single-use plastics may sometimes be necessary for accessibility, health, safety or security reasons...
>
> **Diverse measures**, such as the provision of reusable alternatives, the introduction of fees or restrictions on the use of some products (e.g., bags), awareness campaigns, and the implementation of government and corporate operations initiatives can increase the responsible use of plastics and prevent plastic waste.[41]

These "diverse measures" under the CCME Strategy are to be developed under the CCME Action Plans to follow and, notably, nowhere do the parties endorse the prohibiting of any single use plastic items.

b) Phase 1 Action Plan to develop roadmap in 2021

The Phase 1 Action Plan specifically addresses single-use and disposable plastic products and proposes that these materials be subject to an assessment process involving multiple stakeholders, which is anticipated to extend into 2021. At the conclusion of this process, a solutions "roadmap" is anticipated before the end of 2021:

> Priority Action 2: Single Use and Disposable Plastic Products
>
> Many single-use, disposable plastic products can help to reduce food waste, protect health, improve safety and lower transportation emissions and costs. Some single-use plastic items can be avoided, designed to be readily

[40] Canadian Council of Ministers of the Environment, Canada-wide action plan on zero plastic waste, Phase 2, 2020 (the "Phase 2 Action Plan")
[41] CCME Strategy, pp. 6-7 [Emphasis added]

> recyclable, redesigned or replaced by alternatives that are more durable, have a lower environmental footprint and/or are easier to recover at end of life.
>
> To facilitate action on single-use plastic waste, **CCME will develop a roadmap to strengthen management of single-use, disposable plastics.** This work will involve defining and identifying the single-use items that are most likely to be released into the environment or pose other end-of-life management challenges. CCME will work with stakeholders and other interested parties to promote solutions to single-use and disposable plastic items and identify sustainable alternatives to their use. Work associated with this action area **will be completed by the end of 2021.**[42]

Without explanation or even notice, the federal government has disregarded this federal-provincial "roadmap" process on single use and disposable plastics and has, instead, attempted to supplant it with the Proposed Order.

c) Phase 2 Action Plan acknowledges need for more plastics science / 2026 progress reporting

In addition to the planned single use plastics "roadmap" arising from the Phase 1 Action Plan, the Phase 1 Action Plan expressly acknowledges the need for more research and not restrictive measures such as the Proposed Order:

> The Government of Canada will lead the implementation of **Canada's Plastics Science Agenda** and work with jurisdictions, academia, industry, and funding organizations to advance plastics research. This includes targeting investments in plastics-related science and innovation along the plastics value chain to **better understand the effects of plastic pollution** and identify opportunities for plastics design and management for improved circularity in the economy.
>
> CCME will develop guidance for Canada-wide monitoring to detect and assess plastic pollution in Canada using harmonized approaches across jurisdictions and regions. **This will enable data to be compared across jurisdictions to support evidence-informed decision-making. Jurisdictions will promote or participate in collaborative networks to advance plastics science and innovations to encourage dialogue among the research community, businesses, and decision makers**.[43]

The federal government's recognition of the need for research to:

- "better understand the effects of plastic pollution"; and
- "detect and assess plastic pollution in Canada",

[42] Phase 1 Action Plan, p. 5 [Emphasis added]
[43] Phase 2 Action Plan, p. 6 [Emphasis added]

as preconditions for "evidence-informed decision-making" is clear affirmation that the Proposed Order is, at best, premature.

Coordinated process planned to 2026

In addition, the Phase 2 Action Plan anticipates a collaborative process involving joint consultation, coordinated actions and reporting in respect of "advancing the priorities of the two Action Plans":

> Federal, provincial and territorial governments are **working together to advance the priorities of the two Action Plans.** Additional actions may be completed by jurisdictions to complement the Phase 2 Action Plan. CCME will continue to report on progress to ministers regularly. The first update on this Action Plan will be provided at the 2021 Council of Ministers meeting. CCME will prepare a report on implementation of both Action Plans for ministers **in 2026.** This will ensure continued progress on our **common goals,** and accountability to Canadians.[44]

It is notable that work on the Action Plans is to extend until 2026 and that the "common goals" of all CCME members is to be advanced. No CCME member other than the ECCC has announced an intention to designate such materials as akin to "toxic", as the CCME Plan is specifically aimed at making such determinations.

The Coalition relies upon all of the above in submitting that the Proposed Order is premature as the CCME has not yet completed its scientific research into plastic waste, or developed the resulting policies.

5. Inconsistent with Canada's global commitments on international plastics research

It is expected that Canada would respect its international obligations. For this reason, when interpreting legislation, courts presume that the legislature would not intend to legislate in a manner that cannot be reconciled with its international obligations.[45] As set out below, the mandate of the Ocean Plastics Charter, signed by Canada in 2018, is to collaborate on a global, science-based approach and to develop a circular economy for plastics. The Coalition submits that the Proposed Order should not be made as it would be inconsistent with Canada's global commitments under the Ocean Plastics Charter.

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[44] Phase 2 Action Plan, p. 9 [Emphasis added]

[45] *GreCon Dimter inc. v. J.R. Normand*, 2005 SCC 46, at para. 39; *see also National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 S.C.R. 1324, at p. 1371; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, at para. 51; *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437, at para. 137; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 31; P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 367

Ocean Plastics Charter

Canada signed the Oceans Plastic Charter in June 2018.[46] Canada regularly holds out the Ocean Plastics Charter as representative of its international commitment to the development of an international, scientifically-based approach to plastic waste, including as relied upon in the CCME Strategy:

> **1.3 Canadian leadership**
>
> Building on international momentum, Canada launched an Ocean Plastics Charter as part of its 2018 G7 presidency, under the theme of ocean health and marine litter. Adopted by several countries and organisations as a blueprint for action, it advances ambitious targets and solutions for global action in five areas:
>
> i) sustainable plastic design, production and markets,
>
> ii) waste collection, management and infrastructure,
>
> iii) sustainable lifestyles and education,
>
> iv) research and innovation and,
>
> v) coastal and shoreline cleanup.[47]

None of these solutions imposed under the Ocean Plastics Charter involve a declaration of plastic items as toxic or as otherwise requiring the banning of these materials. In fact, the mandate of the Ocean Plastics Charter, like the CCME Strategy, is to, through research, treat plastics as a necessary resource for the international development of circular economy strategies, as set out in the charter itself:

> **4. Research, innovation and new technologies**
>
> a. Assessing current plastics consumption and undertaking prospective analysis on the level of plastic consumption by major sector use, while identifying and encouraging the elimination of unnecessary uses.
>
> b. Calling on G7 Ministers of Environment at their forthcoming meeting to advance new initiatives, such as a G7 Plastics Innovation Challenge, to promote research and development of new and more sustainable technologies, design or production methods by the private sector and innovators to address plastics waste in the oceans with a focus on all stages of the production and supply chain.
>
> c. Promoting the research, development and use of technologies to remove plastics and microplastics from waste water and sewage sludge.

[46] Oceans Plastic Charter, https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/ocean-plastics-charter.html
[47] CCME Strategy, p. 2

d. Guiding the development and appropriate use of new innovative plastic materials and alternatives to ensure they are not harmful to the environment.

e. Harmonizing G7 science-based monitoring methodologies.

f. Collaborating on research on the sources and fate of plastics and their impact on human and marine health.[48]

While work has begun on some of these international commitments, none have been concluded.

The Ocean Plastics Charter currently has no fewer than 26 country signatories as well as a number of Canadian and international stakeholders, including Coalition members.

The mandate of the Ocean Plastics Charter is clearly to develop an international, science-based circular economy for all plastics. While the charter does not preclude Canadian efforts to ban certain items, it anticipates a collaborative scientific research-based and coordinated approach to be undertaken before arriving at any such strategy.

In fact, the European Union's Directive on Single-Use Plastics, often cited by the federal government in support for the Proposed Order, does not classify plastics as "toxic" or contain the type of generalized ban on certain items proposed by the federal government.

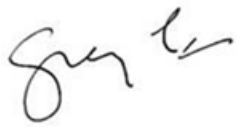
The Coalition relies upon all of the above in submitting that the unilateral action to implement the Proposed Order before the G-7 scientific and policy work is completed, is inconsistent with Canada's commitments under the Ocean Plastics Charter.

C. Conclusion

For all of the reasons set out above, the Coalition objects to the Proposed Order. The Coalition requests that the Ministers establish of a board of review under section 333 of *CEPA*.

Sincerely,

BORDEN LADNER GERVAIS LLP



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[48] Government of Canada, Oceans Plastics Charter, p. 4