

GREENMAIL

NEWSLETTER

*A Report On Developments  
in Environmental  
Regulation*

January 2004

**HAD ENOUGH OF POST-CHRISTMAS BILLS? MEET THE GRINCH OF 2004**

Just when you thought it was safe to open your post-Christmas mail, think again. You may soon receive a letter setting out new costs for Ontario businesses that generate paper and packaging. On December 22, 2003, the Ontario government announced that it had approved the Blue Box Program Plan produced by Waste Diversion Ontario in cooperation with Stewardship Ontario. After months of waiting and speculation, made even longer by the recent change in government, Ontario has moved forward with its plan to compel businesses that produce Blue Box waste (to be known as “stewards”) to fund 50% of the cost of recycling – a bill that totalled \$84 million in 2002. Stewardship Ontario expects that the “date of obligation” will be set for February 1, 2004. It appears that the time has come for industry stewards to prepare to comply with the Plan. And if that doesn’t get your heart rate up, you should know that municipal costs are on the rise and the Ontario government wants to move from 50 per cent diversion in the present Plan to 60 percent for 2008!

**THE BLUE BOX PROGRAM PLAN**

The Plan creates a funding regime under the *Waste Diversion Act, 2002*<sup>1</sup> whereby the companies that produce and distribute existing Blue Box materials (paper, metal, glass, plastic and textiles) to consumers will be obligated to contribute to the municipalities’ recycling costs when the same products end up in the waste stream. Under the Plan, the relevant industry participants or “stewards” must cover 50 per cent of the municipal net costs for the recovery of the designated materials. The target for 2004 is \$31 million. The contributions required for other wastes handled by Ontario municipalities are yet to be negotiated.

Before Waste Diversion Ontario could submit the Plan to the government for approval, it had to ensure that it met the requirements set out in the *Waste Diversion Act, 2002*<sup>1</sup>, as well as the Program Request Letter from the former Minister of the Environment, Chris Stockwell. To do this, the first industry funding organization or “IFO”, Stewardship Ontario, was created. The core members of Stewardship Ontario came from “CSR” or “Corporations Supporting Recycling,” the consortium of food, beverage, and packaging companies who have previously been involved in the organization of the Blue Box, plus the Retail Council of Canada and the Canadian Newspaper Association. It was Stewardship Ontario that was largely responsible for drafting the Plan recently approved by the current Minister of the Environment.

Stewardship Ontario is the designated IFO for Blue Box wastes. This means that companies that are obligated to contribute under the Plan can do so by becoming members of Stewardship Ontario. All members in good standing will be deemed to be in compliance with the *Waste Diversion Act, 2002*.

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<sup>1</sup> S.O. 2002, Chapter 6.

It is not mandatory for companies to join Stewardship Ontario. Designated stewards may submit an Industry Stewardship Plan (ISP) for approval by Waste Diversion Ontario to implement their own program to recover Blue Box wastes. Any ISP would have to meet the requirements set out in the *Waste Diversion Act, 2002*, as well as the requirements contained in the Minister's Program Request Letter, as mentioned above. It may be worthwhile for companies to explore this option, depending on the nature of their business. For example, a white goods company that delivers appliances straight to consumers' homes may find it less expensive for its delivery people to remove the delivery boxes when they leave and recycle the boxes on its own premises, rather than allowing the boxes to enter the municipalities' waste streams.

In Spring 2003, Waste Diversion Ontario was asked to create two new diversion programs, one for used tires and the other for used oils. Ontario Tire Stewardship was created and has been preparing a draft program plan, due to be submitted to the Minister of the Environment on January 30, 2004. The Ontario Used Oil Management Association was also created to prepare a recovery program for used oil. Given that there is an existing infrastructure for both of these materials, the likelihood is that their plans will not involve municipal services and will be ISPs independent of the Blue Box and of municipal recycling services.

### **WHAT ARE "BLUE BOX WASTES"?**

Although the definition of Blue Box wastes under the *Waste Diversion Act, 2002* is very broad, the Blue Box Program Plan covers only *consumer packaging material* and *printed papers* commonly found in residential waste, consisting of any combination of the following materials: glass, metal, paper, plastic and textiles.

#### *Consumer Packaging Material*

For the purposes of the Plan, packaging includes the following varieties:

- (a) Sales packaging or primary packaging – defined in the Plan as “packaging conceived so as to constitute at the point of purchase a sales unit to the final user or consumer”;
- (b) Grouped packaging or secondary packaging – packaging that allows for a number of sales units to be grouped together, whether or not the products are sold this way; and
- (c) Transportation, distribution or tertiary packaging that is intended to be disposed of by the consumer (i.e. corrugated computer boxes).

The definition also incorporates service or in-store packaging, such as, for example, paper or plastic bags provided at the time of purchase, disposable plates and cups, and take-out and home delivery food service packaging (i.e. pizza boxes, folded cartons). Also caught are any packaging components or other elements attached to the packaging, such as labels, staples, pins and clips.

#### *Printed Papers*

All printed paper is considered Blue Box waste. Some examples include newspapers, glossy magazines, product catalogues, directories, envelopes, statements, information inserts, informational and promotional materials, annual reports, greeting cards, coupons, and flyers.

### **WHO QUALIFIES AS "STEWARDS"?**

The most important question facing industry participants is whether they come under the definition of “steward”. The Plan includes sales revenue and tonnage-based *de minimis* thresholds that will exempt some of the smaller producers of Blue Box waste. To find out if you are obligated under the Plan, take the following self-test provided by Stewardship Ontario:

1. Are you a brand owner, first importer, or franchisor doing business in Ontario? (A “brand owner” is defined as “a person who is the owner, licensee of, or first importer of a product bearing a trademark under which a consumer product is sold or otherwise distributed, whether the trademark is registered or not.”<sup>2</sup> The definition also includes an association representing someone described above, and a party who has accepted responsibility for products of such a person.)
2. Do you generate Blue Box wastes in Ontario?
3. Were your Ontario sales \$2 million or greater in 2002?
4. Did you generate more than 15 tonnes of Blue Box wastes in Ontario in 2002?

If you answered “yes” to each of the above questions, your company is obligated to contribute under the Plan. If, on the other hand, your answer to any question was “no”, you are exempt from your financial obligations under the Plan for this year. Of course, it is necessary to take the self-test each year.

### **HOW WILL THE FEES BE CALCULATED?**

Since the Plan was expected to come into force in 2003, the fees are based on 2002 data. Given the delays, the Plan was not approved until 2004. However, the fees will always apply to the current year of payment. Therefore, this year will be an anomaly in that stewards will be asked to calculate their fees for 2004 using their output data from 2002. Next year, it is likely that stewards will use 2004 data to pay their 2005 fees, skipping the 2003 data entirely.

Fees can be calculated on-line using Stewardship Ontario’s Data Reporting and Management System. Only registered stewards will be granted access to this confidential reporting system. However, it is possible to conduct preliminary fee calculations using the Year One Fee Calculator found in Table 9.5 of the Blue Box Program Plan, or online at [http://www.stewardshipontario.ca/xls/First\\_Year\\_Fee\\_Schedule.xls](http://www.stewardshipontario.ca/xls/First_Year_Fee_Schedule.xls). In order to calculate your fees, you must either know or be able to accurately estimate how much Blue Box waste your company produced in 2002. The system will calculate your annual fee, plus your fee per month for the current year.

Each type of material has been assigned a different cost per kilogram. For example, newspaper will cost .028 cents per kilogram, while all types of plastic packaging will cost 6.692 cents per kilogram. Aluminium, on the other hand, qualifies for a credit of 5.465 cents per kilogram since it generates revenue for the municipalities. Certain businesses that produce aluminium in conjunction with other types of blue box wastes (e.g. beverage companies) will benefit since the aluminium will offset the fees generated by other products such as cardboard and plastic. However, although the use of aluminium could potentially reduce a steward’s fees to zero, no one will receive a cheque.

Waste Diversion Ontario and Stewardship Ontario engaged in extensive consultation and discussion as they developed the fee setting methodology. Since the levy is expressed in terms of cents per kilograms, the formula appears to be weight-based. However, the fee methodology is actually based on three factors: recovery rate, net cost (based on Activity Based Costing), and an equalization factor.

### **WHAT SHOULD I DO TO COMPLY?**

It is clear that this type of reporting will require some effort on the parts of stewards. There are a number of steps that you should take to ensure your company is compliant under the *Waste Diversion Act, 2002*.

To start, appoint someone in your organization to take the lead on ensuring that your company fully complies with its new obligations. That individual should become familiar with the Plan, and if necessary, assemble a team of people to aid in the registration process. Depending on the size and business of the company, it may be necessary to determine whether the company even exceeds the *de minimis* thresholds. The team should include people who will be able to answer this question.

<sup>2</sup> See the General By Law Governing the Affairs of Stewardship Ontario at Appendix V to the Blue Box Program Plan, online: <<http://www.stewardshipontario.ca/main.asp?ID=43>>. The concept of “Brand Owners” is meant to capture items such as private label popcans and food packages which may be manufactured outside Ontario. The manufacturer is beyond the reach of Ontario laws but not the stores that distribute to the public.

There are a few ways of calculating the tonnage of Blue Box wastes produced in Ontario by your company. The most thorough way would be to conduct an audit of your packaging and printed paper output in Ontario. However, if your company has the numbers for Canada as a whole but they are not broken down for each province, you may want to simply apply the appropriate Ontario sales or population factor as provided by Stewardship Ontario. You will have to supply supporting evidence for your estimation. Lastly, you may use Stewardship Ontario's "Sectoral Calculator" to provide an estimate of your tonnage based on Ontario wholesale figures. The Sectoral Calculator will be available on the Stewardship Ontario website sometime later in January 2004.

Stewardship Ontario's website reports that they will begin to register stewards beginning in January 2004. It is expected that notification letters will be sent to stewards in mid-January. Fees for the first five months will be due immediately once calculated.

## **ENFORCEMENT**

Once stewards receive their letters of notification, they will have 90 days to comply with the Plan. The Ministry of the Environment has the authority to take enforcement action against recalcitrant stewards under section 41 of the *Waste Diversion Act, 2002*

Directors and officers of corporations that fail to comply are also subject to penalties. Section 41(2) stipulates, "every director, officer, employee or agent of the corporation who directed, authorized, participated in, assented to or acquiesced in the contravention is guilty of an offence." The penalties provided in the legislation are like those in other environmental legislation, that is to say tough! Upon conviction, an individual is liable to a fine of not more than \$20,000 for each day or part of a day on which the offence occurred or continued. Corporations are liable to a fine of not more than \$100,000 for each day or part of a day on which the offence occurred or continued.

Wise stewards will not wait to comply.

*For further information, please contact:*

Michael M. Peterson

416.865.7839

michael.peterson@mcmillanbinch.com

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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**MCMILLAN BINCH LLP**

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TELEPHONE: 416.865.7000  
FACSIMILE: 416.865.7048  
WEB: WWW.MCMILLANBINCH.COM

BCE PLACE, SUITE 4400, BAY WELLINGTON TOWER, 181 BAY STREET, TORONTO, ONTARIO, CANADA M5J 2T3