

GREENMAIL

NEWSLETTER

*A Report On Developments
in Environmental
Regulation*

December 2002

BILL 90, THE WASTE DIVERSION ACT, 2002

Ontario has enacted new legislation governing product stewardship and producer responsibility for waste. Introduced as Bill 90 nearly one year ago, and following a fifteen-year gestation, the *Waste Diversion Act, 2002* was brought into force June 27, 2002. The Act creates a radical new model for industry to regulate itself. Under the model, private sector manufacturers, distributors, and retailers reach agreements on funding for waste diversion programs, a private sector industry association sets the associated fees and allocates them to affected industries, and government regulations enforce the agreements. The private sector is writing the invoices but the Minister of the Environment provides the needed muscle.

ONTARIO'S BLUE BOX

Ontario enjoys one of the most comprehensive curb-side recycling programs in North America in both range of materials collected and level of service available. Curb-side recycling began in 1985 with a pilot project in Kitchener. The city distributed large blue plastic bins, Blue Boxes, to Kitchener residents, who filled the boxes with newspaper, glass containers, and tin cans otherwise destined for landfills. The Blue Box quickly spread to a significant portion of Ontario's population; latest statistics (2001) reveal 4.3 million Ontario households recycling an average of 163 kilograms of paper, glass, metal and plastic, mostly through Blue Boxes. The statistics also suggest that most Ontario residents are prepared to devote extra time and effort to separate materials at the source, allowing the separated streams to be collected and sold to recycling markets. Many municipalities also now provide programs for special household waste, like paint, motor oil, and car batteries, and centralized composting for organic materials. Exhaustion of municipal landfills – most significantly in Toronto, but throughout the entire province as well – creates continuing need for more effective waste diversion and recycling.

WHERE'S THE MONEY?

In part, municipal curb-side recycling's success can be attributed to both capital financing programs for municipal governments and industry contributions, encouraged by recycling and reduction targets for the soft drink industry in the 1980s and 1990s. Unfortunately, these programs fell victim to their own success; most industry and provincial funding for curb-side recycling ended in the late 1990's as diversion rates increased. While mature markets for recycled materials remain, recycling revenues do not cover the program's full cost. The program's expanding scope and provincial downloading of new responsibilities to municipalities have put many municipalities in a hole.

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Various industry organizations in Ontario voluntarily joined recycling programs when the Blue Box started to take off. Ontario Multi-Media Recycling Inc. (OMMRI) was the first. Formed in the late 1980s on behalf of food and soft-drink manufacturers, the OMMRI initiative funded recycling at a time when the Minister was debating more rigorous beverage can and bottle take-back and re-use requirements. Later, OMMRI 2 and Corporations Supporting Recycling (CSR) succeeded OMMRI.

The range of interested parties continues to grow, with today's voluntary industry funding group, CSR, representing some 120 brand-owner companies and numerous consumer products industries, including grocery products manufacturers and distributors, soft drink companies and suppliers, printing paper users, plastic packaging manufacturers and suppliers, and paper packaging manufacturers. The uneasy coalition of brand-owners and consumer products companies that have funded municipal recycling programs has travelled a long road to finally get to the new legislation; suggestions for enabling legislation were first made to Ontario's Peterson government fifteen years ago.

WASTE DIVERSION ONTARIO

The new Act creates Waste Diversion Ontario (WDO), a non-share corporation that could be seen as Blue Box III. An umbrella organization with responsibility for overall implementation of provincial waste diversion programs, WDO's mandate is to promote recycling and oversee the development and operation of the Blue Box and other initiatives. On the Minister's direction, WDO will develop a diversion program for any waste designated for inclusion in the Blue Box. WDO is to develop each waste diversion program in co-operation with an industry funding organization (IFO), which may be a pre-existing organization or one incorporated by WDO for the specific program. All waste diversion programs must include research and development, activities to reduce, reuse and recycle waste,

communication with the public, and educational and public awareness efforts. A waste diversion program must provide the municipalities with payments equalling fifty percent of the municipal net costs for the diversion program relating to the designated waste.

DESIGNATION OF WASTE

The Act authorizes the Minister to designate the materials the Blue Box must include. Regulation 273/02 established the initial materials – the paper, metal, glass and plastic constituting the typical contents of current Blue Boxes. Regulation 273/02 also includes textiles for the first time, although most existing municipal programs are not widely capturing textiles at this time. The regulation apparently included textiles to accommodate the small number of municipal Blue Box programs that already incorporated textiles. However, many believe that textiles make no significant contribution to overflowing landfills, and programs like Goodwill and the Salvation Army already adequately address end-of life textiles. Future plans call for designating used motor oil, tires, automobile batteries, electronics, and white goods as waste, with additional designations expected to follow.

WASTE DIVERSION PROGRAMS

The Minister is currently taking steps to put WDO to work. In a September 23, 2002 letter to the WDO Chair, the Minister has required a waste diversion program for the five already designated wastes, with an initial IFO to be incorporated for the program, by February 28, 2003. It is anticipated that the CSR membership – with some minor tinkering around the edges – will form the initial IFO to address the immediate tasks in the Minister's letter. WDO's initial Board of Directors¹ includes all major food, soft-drink, retail and consumer products interests involved in Blue Box funding to date. However, the Act opens the door for new players and contributors.

¹ Voting Members: AMO (Association of Municipalities of Ontario), Retail Council of Canada, Corporations Supporting Recycling (CSR), Canadian Newspaper Association, LCBO, Brewers of Ontario, Recycling Council of Ontario. Observer but non-voting: Ontario Waste Management Association, Paper and Paperboard Packaging Council, Ontario Community Newspaper Association, Canadian Manufacturers of Chemical Specialties.

Each IFO will have authority to levy fees from industry stewards, contemplated to be the relevant stakeholders. In the case of the initial designated materials, most of the industry stewards subject to fees already know who they are: newspaper publishers, soft drink manufacturers, grocery products manufacturers, and retailers. Currently represented by CSR or another industry association, members of these groups presumably know what is happening. For example, in a submission to the legislative committee at Queen's Park during Bill 90's consideration at the committee stage, CSR represented the following in addition to its own members:

- Food and Consumer Products Manufacturers of Canada (FCPMC);
- Canadian Counsel of Grocery Distributors (CCGD);
- Canadian Federation of Independent Grocers (CFIG);
- Canadian Manufacturers of Chemical Specialties (CMCS);
- Canadian Paint and Coatings Association (CPCA);
- Canadian Soft Drink Association (CSDA);
- Non-Prescription Drug Manufacturers Association of Canada (NDMAC); and
- Canadian Cosmetic, Toiletry and Fragrance Association (CCTFA).

Obviously, many interested parties have followed this matter for some time and have developed a reasonably clear sense of what to expect.

The desire for a level playing field has motivated industry buy-in for these programs. A number of CSR participants who have contributed to recycling in the past are concerned about free-riders. Some parties whose products commonly find their way into the Blue Box are contributing to costs in no material way. Understandably, this rankles with the various CSR members who see competitors shirking their responsibility for the waste they generate and the Blue

Box programs from which they benefit. Although it does envision certain *de minimis* participants (too small for inclusion in the IFO and from whom no funding will be required), the Act represents a serious response to objections voiced against industry free-riders since the OMMRI days: all industry stakeholders must contribute to the solution.

Under the Act, WDO and the IFO will enter into a written agreement covering the IFO's role and exercise of powers and the program's implementation and operation. The IFO is expected to designate the persons or classes of persons who are stewards for a specific designated waste and set the fees the stewards must pay. To this extent, the industry is self-regulating. Although the IFO is neither the government nor a government agent, its rules nevertheless have mandatory effect, an unusual feature of the Act.

In its Bill 90 submissions, CSR urged the government to treat competing materials and companies in the same way and add all post-consumer wastes to ensure a level playing field. For its part, industry hoped to continue managing its own affairs to minimize the bureaucracy associated with the WDO and avoid compliance costs. The Minister clearly heard this message: though the Minister will be consulted at every stage, the initiative falls squarely within the industry players' hands. Creating waste diversion programs and implementation details with the appropriate industry funding organizations is a task for the affected industries. Although the Minister will require communication plans and public consultation, the Minister will neither set nor allocate fees. These tough decisions have been left to industry, in accordance with its own request. Both the municipalities and the cadre of existing industry players hope that funding organizations and the industries that fees are allocated to will buy into the program as enthusiastically as the average Ontario householder who diligently sets a full Blue Box by the curb every week or so.

RULES RELATING TO STEWARDS

The inevitable question arises: who will pay for the activity the new Act generates? According to the Act, program funding will come from industry stewards to be designated by regulations. Steward is defined as a person with “a commercial connection to the designated waste or to a product from which the designated waste is derived.” Other terms frequently used in connection with waste diversion are brand-owners and first importers.² The Minister’s September 23 letter requires a communication plan for the initial Blue Box materials, and exhaustive communications plans will be required for each new waste diversion program and IFO. While most of the players have been working at this for some

time, some companies will find themselves involved for the first time; their introduction to WDO or the relevant sector IFO – in the form of a funding invoice – may come as a big surprise. WDO does not expect to get this perfect the first time, and probably would be pleased to get it right even eighty percent of the time on its first go-round.

The WDO’s launch would undoubtedly be smoother in a more buoyant economy. Nevertheless, waste diversion is here to stay, whether capital markets are good, bad or indifferent.

If you have any questions about Ontario waste diversion, an IFO, or a request for Blue Box funding, please contact the author.

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² The use of the term steward reflects the difficulties in trying to include relevant manufacturers and importers using provincial legislation. It is difficult for a province to enact legislation aimed at packaged goods or soft drinks coming from provinces other than Ontario. The terminology used in Bill 90 shows the limitations of provincial jurisdiction in Canada.

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