

GREENMAIL

NEWSLETTER

*A Report On Developments
in Environmental
Regulation*

January 2005

**A HAPPY NEW YEAR?
THE GOOD NEWS AND THE NOT-SO-GOOD NEWS OF 2005**

INTRODUCTION

In a previous Greenmail, we highlighted the introduction of Bill 133, the *Environmental Enforcement Statute Law Amendment Act, 2004*. Bill 133 introduces significant “Environmental Penalties” and increases the burden of liabilities and duties for corporate directors and officers. It creates dramatic new enforcement tools that could impact all Ontario industries that are subject to environmental regulation. The introduction of the bill with little advance notice has created concern in a number of industry groups.

In a speech delivered December 8, 2004 at a conference on Environmental Regulation, Environment Minister Leona Dombrowsky provided some welcome context to Bill 133 which we describe in this issue of Greenmail. Her statements should reduce anxiety and focus the enforcement debate on specific problems and specific industries rather than on Ontario industry as a whole.

We also bring you an update on the Blue Box Program Plan, and an indication of what’s to come over the next three years for Ontario’s stewards. Stewardship Ontario’s mandate to cover 50% of municipalities’ recycling costs has proven to be a daunting task. This can only mean one thing for stewards – increased fees.

Lastly, we provide an update on the used tire program plan developed by the Ontario Tire Stewardship. After months of deliberation, the Ontario Tire Stewardship has received approval for its used tire plan from Waste Diversion Ontario (“WDO”) and has submitted it to the Ministry of the Environment (“MOE”). Although certain aspects of the plan were tweaked as a result of comments from the MOE, tire retailers remain stewards under the plan. This time, will the rubber hit the road?

BILL 133 REVISITED - THE GOOD NEWS

Shortly after the McGuinty government took office in October 2003, and in a relatively short period, there were several spills into the St. Clair River from the petrochemical industry in the “Chemical Valley” area around Sarnia. Two of the spills were sufficiently problematic to require the closing of municipal water systems downstream. The occurrence of multiple spills coming so soon after the swearing-in could not help but be a major embarrassment to a new minister. Minister Dombrowsky subsequently ordered the deployment of the MOE environmental SWAT team to begin an inspection sweep of industries in the area. MOE press releases for the months that followed highlighted enforcement actions throughout the Sarnia area.

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Response

Bill 133 was initiated as a more comprehensive response to the unfortunate incidents in Sarnia. On its face, it makes sweeping amendments to Ontario's environmental laws but the text explicitly provides that it would be applicable to only those areas designated by regulation. In her speech on December 8, the Minister made it clear that the legislation would apply initially only to those industries in Ontario that discharge effluents into Ontario's surface waters. In effect, the initial targets of the Act are exactly the same companies that were targeted a decade ago under the MISA¹ program. Minister Dombrowsky indicated that the approximately 178 enterprises subject to the MISA Program were the only facilities that would be touched by Bill 133 at this time. She specifically stated that neither municipalities nor agricultural entities would be caught by Bill 133.

She also indicated that automotive emissions are not going to be a target of Bill 133 and removed any suggestion (which we had originally raised) that the Bill could cover such emissions.

The qualifications introduced by Minister Dombrowsky are welcome news. Introducing new administrative penalties and circumscribing the due diligence defence has created a lot of anxiety for regulated industries, both at the operational and the Board level. But tightening restrictions on what appear to be problem industries threatening the water supplies of millions of Ontario residents does not seem like such a radical idea. The Ontario Bar Association and others continue to raise concerns about appeal rights, directors and officers liability, and procedural fairness but the Minister's speech has made Bill 133 seem much less threatening than first appeared to be the case and may also signal a willingness to smooth some of the rougher edges that still remain.

THE BLUE BOX PROGRAM: MORE INCREASES – NOT-SO-GOOD NEWS

As 2005 dawns, Ontario's stewards are bracing themselves for another marked increase in their Blue Box Program Plan fees. Before the Plan was even one year old, Stewardship Ontario reported that the amount contributed by stewards under the 2004 fee structure had not reached its target of covering 50% of municipalities' recycling expenses. It is thought that the initial fees (which had been set without data from stewards) were too low. The shortfall is going to have to be made up, but it will be spread over three years to ease the burden on stewards.

On August 31, 2004, Stewardship Ontario held a workshop to discuss the 2005 fee schedule for the Plan. As a result of input received at the workshop, the following decisions were made by Stewardship Ontario:

1. To establish separate fee rates for aluminium food and beverage cans, aluminium foil and other aluminium packaging;
2. To make-up over three years the projected shortfall in fees collected for the program years 2003 and 2004. Therefore, one-third of the current projected shortfall would be incorporated into the 2005 fees.
3. To allocate the projected shortfall to be recovered in 2005 as follows:
 - (a) 50% according to the under- and over-reporting for specific materials; and
 - (b) 50% as a general cost.
4. To set annual fee rates based on the quantities of Blue Box materials reported by stewards to prevent further compounding of the shortfall in fees collected in future years.
5. To make changes to the share of the administration and other program costs allocated to each material over two years.
6. To maintain the current level of aggregation of fees for printed paper and packaging as per the fees for 2004 (except for aluminium).

¹Municipal Industrial Strategy for Abatement - A regulatory program initiated in the 90s to first catalogue and then regulate discharges from large water users such as pulp & paper mills and iron and steel manufacturers

Because the first year of the program, 2004, was based on 2002 data, stewards will use their 2003 data to calculate their 2005 fees.

Here is a comparison of the fees for the last half of 2004 and the new 2005 fees:

Type of Blue Box Waste	Fee for the last half of 2004	New Fees 2005	Increase
Magazines/Catalogues	0.310 ¢/kg	0.862 ¢/kg	178%
Other Printed Paper	1.318 ¢/kg	9.029 ¢/kg	585%
Plastic Packaging	9.610 ¢/kg	13.907 ¢/kg	44.7%
Paper Based Packaging	5.987 ¢/kg	7.904 ¢/kg	32%

Until Stewardship Ontario can make up for the shortfall from its first year of operation, the fees will continue to rise.

ON THE ROAD AGAIN? THE USED TIRE PLAN

As highlighted in a previous Greenmail, used tires were designated on March 23, 2003, as waste under the *Waste Diversion Act, 2002*. Ontario Tire Stewardship (“OTS”) was developed shortly thereafter as the industry funding organization required by the legislation. OTS is comprised of producers and retailers of tires. It submitted a plan for used tires to the WDO in the spring of 2004. The WDO board deferred its consideration of the plan in order to consult with the Minister of the Environment on the definition of “steward”. During this consultation, the Minister’s office emphasized that stewards should be defined as tire “brand owners” and “first importers”, not retailers. The major reason for naming brand owners and first importers as stewards would be the expectation that a fee levied against these tire producers would provide an incentive for them to develop more environmentally-friendly products.

On September 15, 2004, a revised version of the Scrap Tire Diversion Program Plan (the “Tire Plan”) was re-submitted to the WDO and quickly approved. It was then submitted to the MOE for approval.

Definition of Steward

The revised Tire Plan does not yield to pressure from the MOE to change its definition of steward to mean brand owners and first importers. Instead, it retains its original definition, again naming tire retailers as stewards. In the Tire Plan, the OTS justifies this conclusion by interpreting “Brand Owner” as “a Retailer who sells tires to end-users.” In addition, the OTS argues that the designation of retailers as “stewards” is in compliance with the *Waste Diversion Act, 2002*, since retailers have a clear “commercial connection” with used tires.

The requirement that stewards must have a clear commercial connection with the designated waste can be found in section 30(2) of the *Waste Diversion Act, 2002* where it states that no one shall be designated a steward in respect of a designated waste “unless the person has a commercial connection to the designated waste or to a product from which the designated waste is derived.” While this condition must be satisfied before a steward is designated, the steward need not have a *particular type* of commercial connection.

However, the OTS further explains its choice by stating that “the Retailer is easily identifiable, with physical assets, audit and compliance are easier, and the grey market leakage is minimized.”

Grey market leakage occurs when a Tire Stewardship Fee (“TSF”) is paid for new tires that are eventually sold outside of Ontario. Once the tires leave Ontario, it is likely that no fee will be collected from consumers to offset the payment of the TSF. For example, say tire manufacturers were designated as stewards under the Tire Plan. A tire manufacturer sells 100 tires to a retailer and, in connection with this sale, the manufacturer remits \$400 (plus GST and PST) in TSFs to OTS. This additional fee is included in the price of the tires and paid to the manufacturer by the retailer. The retailer then sells 60 of the tires to a US distributor, and 40 to Ontario consumers. The Ontario consumers are charged a levy to offset the cost of the TSF, but the US distributor is not charged the same levy because this would compromise the retailer’s competitive position in the market.

In this scenario, the retailer would not be able to recoup the additional amount it paid when it purchased the tires from the manufacturer. This is known as “leakage”. The closer the connection between the party remitting the TSF and the party collecting the fees from consumers (i.e. the retailer), the less leakage that will occur. This is part of the reason why the OTS designated retailers as stewards.

The upshot of all this is that retailers were designated as stewards under the Tire Plan for the simple reason that they are the ones in the best position to charge the TSFs back to consumers. Regardless of how “steward” is defined, it appears that consumers will be the ones footing the bill.

The revised Tire Plan is now posted for comment on the Environmental Bill of Rights website at www.ene.gov.on.ca/envregistry/023913er.htm. Written submissions may be made until February 14, 2005.

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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