McMillan Binch LLP

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Newsletter

A Report On Developments in Environmental Regulation

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Inside

WASTE DIVERSION UPDATE – INCREASED FEES, VOLUNTARY STEWARDS, AND MOVING BEYOND THE BLUE BOX

Introduction

In our last Greenmail in January, we alerted our clients to the launch of a new Ontario government program that requires Ontario businesses to fund 50% of the cost of municipal recycling. The program, the Blue Box Program Plan, is administered by a new umbrella organisation called "Waste Diversion Ontario" or "WDO". That program is well underway and Stewardship Ontario, the relevant industry funding organisation ("IFO"), has issued the first invoices for Blue Box materials. There have recently been a number of new developments which are important for our clients, particularly those in the retail sector, food services, packaging, and those involved in printing and print media.

In addition, WDO has moved beyond the Blue Box and created a new IFO, Ontario Tire Stewardship. Although there is some controversy surrounding the definition of "steward" under the new plan, it appears that a new set of fees for tire brand owners and first importers will be imposed in the not-so-distant future.

Update on Blue Box Program Plan

Increased Fees for June-December 2004

The WDO's initial target was to recover $31,000,000 towards municipal blue box costs. This target proved to be conservative as municipal recycling costs sharply increased over the last two years. The fees under the Blue Box Program Plan are going in only one direction — up.

For the first part of 2004, the fees for each product are based on 2002 data. New data was gathered to update these numbers and, after a period of public consultation, the Board of Directors of the WDO approved new fee rates for the last half of the year on March 23, 2004. The WDO and Stewardship Ontario are currently waiting for the requisite approval from the Minister of the Environment, Leona Dombrowsky. If approved, the fees will be effective from July 1 through December 31, 2004.

Some of the largest increases are for magazines and catalogues, other printed paper (any paper other than newspaper, magazines/catalogues and telephone directories), plastic packaging (including PET bottles and polystyrene), and paper based

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packaging (including old corrugated containers and gabletop). The following table shows the increases in fees for these types of Blue Box Wastes:

Type of Blue Box Waste	Original Fee	New Fees for the last half of 2004	Increase
Magazines/Catalogues	0.081 ¢/kg	0.310 ¢/kg	283%
Other Printed Paper	0.251 ¢/kg	1.318 ¢/kg	425%
Plastic Packaging	6.692 ¢/kg	9.610 ¢/kg	44%
Paper Based Packaging	4.728 ¢/kg	5.987 ¢/kg	27%

If approved, these fees will apply to the last six months of 2004, but will be levied against the same 2002 material data reports that stewards submitted when they registered with Stewardship Ontario. For 2005, stewards will have to submit updated reports, although Stewardship Ontario has yet to decide whether it will request data from 2003 or 2004.

Voluntary Stewards – All for One, One for All

Stewardship Ontario recently released its revised procedures for becoming a "voluntary steward". A voluntary steward is a company that does not qualify as an obligated steward under the Plan, but elects to register with Stewardship Ontario in order to assume responsibilities for another steward's fees. As required in the new rules, a voluntary steward must have a "commercial connection" to the Blue Box Waste for which it is assuming responsibility.

The concept of a voluntary steward program has been, and remains, highly contentious. In its original proposal, Stewardship Ontario restricted the program to two types of voluntary stewards — out-of-province companies and service packaging suppliers. The second type, service packaging suppliers, was particularly contentious because, understandably, Ontario's suppliers of service packaging were not pleased with the idea that they could be held responsible for all of their customers' packaging fees. Stewardship Ontario argued that this approach offered a number of benefits, including improving reporting accuracy and compliance, and reducing administrative complexity. In a document posted on its website during the public consultation period, Stewardship Ontario used Belgium as an example of the success of this type of program. In Belgium, it stated, "some 300 suppliers report service packaging on behalf of more than 50,000 retailers."

It did not take long for Ontario retailers to also see the benefits of this policy. The result was that a great number of Ontario companies were poised to transfer the obligation for their fees onto a small number of packaging suppliers.

Not surprisingly, these suppliers pushed back. Before long, the draft documents had disappeared from the Stewardship Ontario website. When the final procedure was released, it was different from the original proposal. The program is no longer restricted to out-of-province companies or suppliers of service packaging. Any company can now become a voluntary steward, as long as there is a commercial connection between the steward and the designated Blue Box Waste.

However, some would argue that the program still has its flaws. One of the biggest criticisms of the program is that voluntary stewards cannot elect to become a steward for only one of their customers, and not elect for others. In other words, once a company elects to cover one of its customer's fees, it must elect to cover **all** of its customers' fees.

For example, let's say Company XYZ manufactures house brand home appliances for two major department stores. Department Store A requests that Company XYZ cover the Blue Box fees for the house brand products that it carries, products that would otherwise be the responsibility of Department Store A. Company XYZ considers its position, and for business reasons, it agrees. Under Stewardship Ontario's voluntary steward policy, in order for Company XYZ to assume responsibility for Department Store A's fees, it must also assume responsibility for Department Store B's fees.

The result? It is likely that most companies will think twice before signing on as a voluntary steward for *any* of their customers, since if it's all for one, it's one for all. This issue is only now coming to the fore and one can anticipate some serious confrontations between Stewardship Ontario and retailers on the one hand and manufacturers and suppliers on the other.

Used Tires – Ontario Tire Stewardship

While the Blue Box wastes have been hogging most of the headlines, the Ministry of the Environment ("MOE") served notice last year that other wastes were going to be targeted as well. On March 23, 2003, used tires were designated as waste under the *Waste Diversion Act.* Ontario Tire Stewardship ("OTS") was developed shortly thereafter as the industry funding organization. OTS is comprised of producers and retailers of tires.

OTS developed and submitted a plan to the MOE and the WDO board. While the WDO board approved the plan, the MOE did not support the plan as proposed, taking issue with the OTS' definition of "steward". As a result, no tire recycling regime is currently in force in Ontario. OTS expects that it will take 90 days to reformulate its plan once it meets with the Minister to address her concerns.[1] The newly constituted plan will then have to be presented to stakeholders for consultation and then submitted to the MOE and WDO for approval.

The OTS plan is to apply initially only to the recycling of highway tires (i.e. cars and trucks). After the second year of the program, however, the inclusion of "off road" tires, including tires from agricultural machinery, will be assessed as part of the annual program review. OTS anticipates that operations for funded diversion of off road tires will begin in the third year of the plan's implementation.

The OTS designated tire retailers as stewards under its plan. It proposed that upon the sale of a new highway tire, or the sale of a new highway vehicle, the retailer would collect and remit, within 30 days after month-end, an advance disposal fee (ADF) to the OTS. The anticipated fee is $4.00 per tire for a passenger or light truck tire, or $6.00 per tire for tires used in larger commercial trucks. The fee would also be assessed in relation to any spare tires sold with a new vehicle. To compensate retailers for their efforts in collecting and storing used tires, OTS proposed that a handling fee of $0.35 to $0.50 per tire be paid to retailers, to be remitted through deductions to the amount retailers are liable to provide to OTS under the program.

As noted, the choice of tire retailers as stewards under the program has been a contentious one. The MOE is insistent that stewards be defined as tire "brand owners" and "first importers". It appears that OTS will be forced to cede to this demand.

Currently, tire derived products include rubberized asphalt and civil engineering and landscaping applications. Further, used tires are exported to the United States to be used as a fuel source. OTS cites the expectation that this export will be curtailed within five years as further impetus for tire recycling efforts in Ontario. While no tires are currently used as a fuel source in Ontario, at least one cement kiln that is to utilize such fuel has been approved for operation in Ontario. It has yet to be determined whether the use of tires as cement kiln fuel would be considered to contravene the provision in the legislation against the promotion of waste diversion programs involving burning.

The OTS plan will also set aside funding for the remediation of existing tire stockpiles. This part of the program will be planned and conducted on an ongoing, site-by-site basis, with the prospect of many of the stockpiled tires being used for fuel production.

This section was written by Lisa Brost, Student-At-Law.

[1] As of April 2, 2004, OTS had not yet met with the Minister.

Used Oil – A Flawed Attempt

The Used Oil Program Plan, as prepared by the newest Industry Funding Organization, the Ontario Used Oil Management Association ("OUOMA"), was rejected last month by the WDO. Although the plan was due to be submitted to the Minister of the Environment by March 31, 2004, the WDO was granted a 90-day extension in order to submit a revised plan.

The draft plan had two significant flaws. First, it has been argued that OUOMA underestimated the current rate of recovery for used oil products when it set its fees and incentive payments. There is already a province-wide network in place for the collection of waste motor oils. Many garages and service stations provide facilities for the collection and handling of used oils, oil filters and oil containers. While OUOMA used a 65% to 70% rate of recovery, the WDO assessed the rate to be 69% to 89%, figures that attest to the general success of the existing infrastructure.

OUOMA's use of the lower figure as the statistical foundation of the plan raises questions about the appropriateness of the financial incentives designed to encourage used oil collection. This, in turn, brings into question the fee structure. In the new draft, if the plan is based on a much higher rate of recovery, the fees payable by used oil stewards should be reduced significantly.

To go a step further, a rate of recovery close to 89% actually begs the question — is a program like this really needed in the first place?

Secondly, while section 25(2) of the *Waste Diversion Act* expressly states that any waste diversion program developed under it shall not promote the burning of a designated waste, the financial incentives in the plan presented by OUOMA inadvertently did just that. Under the draft plan, the same financial incentives were offered to all collectors of used oil products, regardless of whether the oil would be sold for burning or for re-refining. Therefore, there was no incentive for collectors to sell their oil to the more environmentally-friendly re-refiners. In fact, because the used oil must be of a higher quality in order to be re-refined, the plan had the potential to encourage burning as the main end-use.

It is expected that the new plan will have a tiered structure whereby there will be incentives for collectors to sell their used oil products for the purpose of re-refining, rather than burning.

The Used Oil Program Plan is now due June 30, 2004.

This section was written with the kind assistance of Clarissa Morawski of CM Consulting.

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