

Waste Diversion Act

ARBITRATION

2014 Annual Steward Obligation for the Blue Box program

AMENDED **MUNICIPAL REPLY**

1. Stewardship Ontario (SO)'s Statement of Defence misstates the position of the municipalities in this arbitration. The municipalities do not say that "the Minister acted *ultra vires* in requesting and approving the Cost Containment Plan" (CCP), nor do they seek a declaration to this effect.
2. The municipalities say that the Minister had jurisdiction to approve the CCP precisely because the CCP does not cap, or derogate from, the Stewards' Obligation under s. 25(5). What the Minister approved was restricted to cost containment, i.e. efforts to reduce future actual costs, *not* payment containment, as claimed by stewards. Any attempt to impose payment containment would have had to have been unambiguous.
3. Municipalities accept and support cost containment, which is why they paid for the entire KPMG process through the municipally-funded E +E/CIF funds. Municipalities have made extraordinary efforts to improve their efficiency and effectiveness, despite a surge of stewards' complex and lightweight packaging, which has dramatically driven up Blue Box costs.
4. In the alternative, the Minister acted *ultra vires* if she did purport to impose payment containment or any measure that reduced cash payments to municipalities below 50% of their actual net costs. If she did, the arbitrator is entitled to decide whether the Minister had the authority to do so. The true meaning of s. 25(5) governs this arbitration, and this arbitration is the correct venue to decide all the issues necessary to determine the amount of the Stewards' Obligation for 2014.
5. The Minister does not have "ultimate control and discretion over the scope, goals, form and contents of the Blue Box Program". He or she only has such authority as is expressly granted to him or her by the *Waste Diversion Act, 2002*, S.O. 2002 c.6 (WDA).
6. There is no meaningful distinction between Blue Box "systems" and "programs". These words are used interchangeably, as in the April 2009 WDO report, *Blue Box Program Plan Review Report and Recommendations*:

The shared responsibility model is the basis for the existing BBPP and was designed as a partnership between Blue Box stewards and municipalities. Under this

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partnership, municipalities manage and deliver the Blue Box system and Blue Box stewards contribute 50% of the system cost.

7. The Blue Box Program is not an “opt-in” program for either municipalities or stewards. In the alternative, this is irrelevant; municipalities have “opted in” to the extent necessary by reporting their costs through the Datacall.
8. The negotiated settlements of previous years cannot affect the interpretation of the WDA, and do not amount to a legal estoppel of the municipal Claim under s.25(5). SO obtained a substantial benefit from these settlements, exceeding \$62 million, without changing its legal position or giving up any legal right in exchange. In addition, each year’s negotiation has been concluded on a different basis, with a different method of calculation.
9. To the extent that the so-called “Best Practices” have been used in past years’ negotiations over the Stewards Obligation, this has depended entirely on municipal agreement. In some past years, municipalities compromised their legal rights in the interests of good relations with stewards. There is no such municipal agreement in effect for 2014.
10. SO relies upon an October 17, 2007 Agreement, which had a term of three years and has expired; it has no application to the 2014 Stewards’ Obligation. The 2007 Agreement was replaced by an Agreement dated July 20, 2011, which conspicuously omitted any reference to “best practice” costs.
11. The statements attributed to KPMG, referred to in paragraphs 63, 65 and 66 of the Defence, are irrelevant. They merely repeat instructions that SO gave to KPMG.
12. KPMG was not authorized to speak for the Minister, the KPMG report was not approved by the Minister and it is not part of the approved BBPP. KPMG’s comments contradict the Ministers’ own words, which nowhere expressly authorize stewards to pay less than 50% of actual total municipal net cost. On the contrary, Ministers have repeatedly restated stewards’ obligation to pay half, i.e. an equal share, of municipal Blue Box “cost”. The plain meaning of “cost” is the cost actually incurred by municipalities.
13. Since 2008, the Minister’s instructions have been that stewards pay too little, not too much, of Blue Box costs. His letter to WDO of October 16, 2008 sought recommendations on how to move from 50% towards 100% steward funding of Blue Box programs:

9. Stewardship fees:

Current steward fees for certain Blue Box wastes may be too low to encourage either increased waste diversion or the use of materials in product manufacturing or packaging that can be easily recycled. Recommend how the steward fee structure can be revised

10. EPR funding:

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The BBPP does not reflect full Extended Producer Responsibility (EPR) funding since *the WDA requires Blue Box stewards to fund 50% of municipal program costs*, with municipalities funding the rest. Recommend how to move the BBPP towards full EPR funding. [emphasis added]

14. In its April 2009 report, *Blue Box Program Plan Review Report and Recommendations*, WDO recommends that the Blue Box program should transition to 100% steward funding within 5 years. This is one feature of Bill 91, now before the Ontario Legislature. Since the current cost sharing structure was about to be replaced, and since the parties managed to agree on each year's Steward Obligation, municipalities had no reason to launch a legal challenge of the CCP or the in-kind deduction.
15. KPMG's comments also contradict the BBPP and explicit commitments by SO and by WDO about the nature and impact of the CCP. In a significant admission against interest, SO's May 14, 2009 letter to WDO states:

...Stewardship Ontario has been a strong supporter of continuous improvement through strong program management - which the Blue Box Program Plan and Cost Containment Plan were designed to support in two key ways: one, via the E&E/CIF, which helps finance technical innovations and structural changes within the system to improve performance, and two, via a "pay out" funding model that signals the kinds of behaviour that will send signals to incentivize continuous improvement by rewarding municipalities financially for implementing key management practices, and achieving superior performance....

Stewardship Ontario is seeking to restore the idea of rewarding performance, a concept which has received support from municipal staff during recent "best practice" workshops organized by Stewardship Ontario under the E&E Fund. *This approach would not impact the total amount that Stewards contribute to the operation of Ontario's blue box system in any given year, merely how that funding is allocated among municipalities.* [emphasis added]

16. Similarly, in a letter to AMO, copied to the Minister's Office, dated June 8, 2009, WDO states

"WDO has *not* adopted schemes that disallow *actual* municipal costs...The Act requires that payments to municipalities equal 50% of the total net costs but does not stipulate the method for distributing the funding. ...It is the distribution methodology... that is under discussion, *not the amount of funding to be distributed*... The WDO Board looks forward to the recommendation from MIPC on funding distribution methodology for 2010 that is consistent with the requirement in the Cost Containment Plan to fund best practices." [emphasis added]

17. Stewards have hardly given municipalities a "blank cheque". On the contrary, Blue Box program costs actually incurred by Ontario municipalities have been under constant supervision and restraint, resulting in steward fees that have been among the lowest in the world.

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18. In 2007, the first year that SO calculated the so-called “best practices costs”, verified municipal costs fell squarely within the range of “best practices” estimates. They may have continued to do so if SO had not changed its computer model to prevent this result from recurring.
19. Paragraph 101 of the Defence mischaracterizes the “Guiding Principles” referred to in paragraph 7.3.1 of the BBPP. These principles were established for use in the design of the Datacall system, to define *which* costs municipalities were allowed to report through the Datacall, not to allow stewards to refuse to share those costs, once accepted and verified. As the next page stated, “All direct costs and some indirect costs to the program will be included in the net cost calculation.” The Datacall rules have now been in place for many years, and they are not at issue in this arbitration.
20. SO’s amended Defence sets out a substantive defence only to Issues 1, 3 and 4. The Defence does not dispute, or set out any factual basis to challenge, Issue 2: the accuracy of the municipalities’ total net costs incurred, as reported and verified *for 2012*, and as set out in paragraph 99 of the Claim.
21. SO has not challenged the municipalities’ calculation that 50% of the total net Blue Box costs *actually* incurred by municipalities for 2012 is at least \$114,072,322. SO’s Defence merely refers to audits from other, irrelevant, years. Those audits were intentionally not representative of municipalities as a whole. All relevant audit results have already been taken into account in the prior year adjustments referred to in the Claim.
22. In terms of audits and reporting accuracy, municipal net cost data reported through the Datacall is at least as accurate as the waste quantity reports filed by stewards, and far more accurate than the “capture rate” data that allegedly underpins the “in-kind” calculation, and the “efficiency” component of the pay-out model. Municipal net cost data is sufficiently reliable for the purposes of this arbitration. It was not challenged by SO when WDO verified and approved the 2012 total municipal net costs.
23. On Issue 3, if in-kind contributions may be deducted from the Stewards’ Obligation, without municipal consent, SO’s Defence has not claimed, justified or explained any particular “value” for the in-kind contribution for 2014, nor set out how the value should be determined. In the absence of a credible foundation for a specific amount, the “value” of the deduction for 2014 should be assessed at \$0.00 (zero).
24. In addition, SO’s Defence does not raise any factual dispute with paragraphs 114 – 115 of the Claim. SO has therefore accepted that the “value”, if any, of in-kind contributions used by municipalities should be counted in the municipalities’ subsequent year’s costs, under s. 25(5) of the WDA. The amount of \$114,072,322 referred to in the Claim does not include the previous year’s in-kind deduction, which municipalities have not been permitted to submit through the Datacall. The Claim should therefore be increased by 50% of last year’s “in-kind” deduction, (\$6,140,409), to \$117,142,526.
25. As to Issue 4, the so-called “Best Practices Model” has many versions, is highly subjective and does not produce a unique or objective outcome. Claiming to have used the model, in paragraph 99 of the Defence, does not explain how or why SO calculates

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its 2014 obligation as only \$95,679,612. This is not a sufficient pleading to define the issues between the parties, and municipalities cannot respond to it in any meaningful way.

26. Given the limited hearing dates available from counsel for SO, municipalities believe it is no longer practicable to bifurcate this arbitration. There is no time available to complete one phase of the arbitration, obtain the arbitrator's decision, and start another phase four weeks later.
27. Municipalities therefore propose to call their case on Issues 1, 3 and, if needed, 2, when the arbitration begins. SO may then call its case on any or all four issues. Municipalities propose to respond to Issue 4, the so-called "Best Practices Model", in reply, after SO has called its case and explained the factual and legal basis for its calculation.

All of which is respectfully submitted.

Dated at Toronto, Ontario on the 26 day of February, 2014

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