Blue Box Arbitration

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Overview

- **What's at stake?**
- How did we get here?
- Arbitration
  - Process
  - Personalities
  - Evidence
- What's ahead?

Caveat

- My opinion only
- Not speaking for AMO today

What's at stake?

- $MMs of public money
- 2014:
  - Verified municipal net cost ~$230MM
  - SO offered ~$95 MM
- WDA s. 25(5): stewards to pay 50% of "total net costs incurred as a result of the program"
  - They rarely have

Key issues

- What does BB cost?
- Why are costs going up?
- 50% of what?
- In Kind Deduction

What does BB cost?

- Actual costs are clear:
  - Datacall
  - Intensive verification by WDO
  - Audits

Why are costs going up?

- SO's PR: municipal inefficiency
- Reality:
  - Steward packaging choices
    - Toronto Blue Bin study
    - Complex light weight
  - Demographics
  - Weak MOE policy/regulatory support
  - Commodity prices
  - Fuel prices
  - Better cost tracking

50% of what?

- Actual costs?
- Reasonable costs?
- "Best practice costs"?
  - Relevance? Could/ did the CCP amend the BBPP?
  - Calculated how?
  - Computer model?
    - Repudiated by authors

In Kind

- Original deal:
  - Newspapers to provide $1.3 MM / year free advertising, not cash
  - ONP a valuable commodity, financial bedrock of BB

In Kind changes

- 2005: BBPP amended, removes cap
- ONP value way down
- Value of the advertising
  - CARD rate, inflexibility
  - Which newspaper?
  - Who still reads newspapers?
- SO changes calculation method, claims deduction >$6 MM/year

In Kind Issues

- Statutory authority: does WDA authorize any forced deduction?
- Is amount calculated correctly?
  - Deferred
- Is amount applied correctly?
  - CARD
- Exclusion from Datacall?

How did we get here?

- 40 years of Blue Box
  - Invented in Ontario
- Rising costs
- Poor regulatory design/ drafting
- Public/ private culture clash
  - "Shared funding"
  - Uneven resources

How did we get here?

- Reg. 101/94- mandatory municipal Blue Box programs
  - Funding struggles
- 2000: Interim OWDO report
  - Shared funding for 5 years
- 2001/2002: *Waste Diversion Act* cobbled together
  - "We can fix it in 5 years"

2002/3: BBPP

- September 2002: Minister request letter to WDO re Blue Box
- February: SO/WDO BBPP submitted
- June: first Datacall results
- July: stewards lobby Eves for payment containment

October crisis?

- Eves loses election
- WDO in financial crisis
  - Seed money running out
  - BB funding pressure
- WDO makes BB funding deal
- WDO borrows from SO

October 2003 deal

- SO asks for payment containment with cost bands
- AMO says no, counteroffers cap on admin costs
  - Gives up $7 million+/ year
- SO accepts counteroffer
- WDO approves deal
  - Cap still in place today

Cost containment plan

- 2003: Minister approves BBPP, asks for "cost containment strategy"
- 2004: WDO submits cost containment "recommendations"
- Datacall results higher
- SO demands payment containment, AMO refuses
- Minister approves part of CCP, asks for faster implementation

2005

- WDO resubmits CCP with faster implementation
- Minister approves
- **Was CCP an amendment to the BBPP? Did it have legal effect? If so, what?**

2006/7

- Gies: "Minister has determined" municipalities are limited to "best practice costs" using "cost bands"
- KPMG *Blue Box Program Enhancements and Best Practices Assessment Project*
  - "Best practices" or "best practice costs"?

2008/9

- Per KPMG model: "best practice costs" are less than verified costs
- SO pays 50% of verified costs
- WDO pays off its loan to SO
- Minister asks WDO to propose transition to 100% EPR
  - Starting long process to new Act

2009/10

- SO/ MIPC changes the model
- New design: output *always* less than actual costs
- WDO: *"has not adopted schemes that disallow actual municipal costs"*
- AMO negotiates year by year
- Culture clash, BATNA

2011/2012

- New model, same problems
- EPR always "soon"
  - Eco fees fallout(?)
- AMO/SO negotiate result, then back-calculate to the model
- Model gap balloons
- Funding gap balloons
- In kind deduction balloons
- New WDO board

2013

- WDO: BB program in trouble
- *Waste Reduction Act* introduced
- Negotiations fail
  - Huge funding gap
- Mediation fails
- WDO directs arbitration

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Arbitration Parties

- **Association of Municipalities of Ontario** and **City of Toronto**
  - vs.
- **Stewardship Ontario**

- Other BB programs on coat-tails

Arbitration Process

- Arbitrator Robert Armstrong
- Pleadings: Jan/ Feb
- Motions, e.g. Public hearing
- Hearing: April to July
- In Kind: September /deferred
- Decision: ?

38 Witnesses

- Most of Blue Box *Who's Who*
  - **AMO**: Derek Stephenson, Mustan Lalani, Rob Cook, Rick Findlay, Geoff Rathbone, Maria Kelleher, Jo-Anne St. Godard, George Rocoski, Vince Sferrazza, Craig Bartlett, Jay Stanford, Andy Pollock, Dave Gordon, Alec Scott, Mike Birett, Jake Westerhof…
  - **SO**: Glenda Gies, Gemma Zecchini, Damian Bassett, Dennis Darby, Lyle Clark…

Arbitration Evidence

- On AMO website:
  - Opening and closing arguments
  - In chief evidence by affidavit
- Six feet of documents
- Motions
- Cross examination
  - *Are we having fun yet?*

Lessons learned?

- Everything about waste is hard
- Poor regulatory design
  - Unbalanced power, resources, impact
  - Vague drafting
  - Annual "negotiations"
- Has cost municipalities >$60MM
- That was then, this is now

In hindsight:

- In hindsight, we entered into these discussions with … **rose coloured glasses**. …we really wanted our BB programs to work … and to keep BB materials out of garbage.

- We kept trying to earn the 50%, but it did not get better… **They talk about sustainability and being good stewards, and they talk about efficiency. … But really they just don't want to pay 50%**. It has finally become clear to us that the stewards don't wish to have a real partnership with us… Duped may be too strong a word, but behind all the talk about shared goals, the only real goal is to pay as little as possible.

- **[W]e …compromised in the hope of building a working partnership with SO. Now that we have been forced into a confrontation, the Act should be followed**.
  - Peter Hume, Ottawa Councillor

What's ahead?

- Decision soon for 2014?
  - No ETA
  - No appeal
  - In kind quantum, if needed
  - Catch up/ interest by March 2015
  - SO Reserve enough?
- Fees/ funding for 2015?
- Minister's mandate on waste

What will be different?

- Munic. will get full 50%
  - Can MIPC agree on actual costs?
  - Will WDO do it if they can't?
- Costs (and fees) will climb
- Enough incentives to make new deal?
- Will a new Act be better?

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