IN THE MATTER OF AN ARBITRATION TO DETERMINE THE 2014 STEWARD OBLIGATION FOR THE BLUE BOX PROGRAM

BETWEEN:

ASSOCIATION OF MUNICIPALITIES OF ONTARIO and THE CITY OF TORONTO

Applicants/Responding Parties

-and-

STEWARDSHIP ONTARIO

Respondent/Moving Party

DECISION RE MOTION FOR BIFURCATION

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I. **Nature of the Motion**

1. The Respondent, Stewardship Ontario, seeks an order for bifurcation of this arbitration proceeding.

2. The issues to be determined in this arbitration, as framed in the Statement of Claim, are:

    i. Is the 2014 Annual Steward obligation equal to 50% of the total net costs that municipalities actually incurred to operate their Blue Box programs, or of some lesser amount;

    ii. What were those actual total net costs;

    iii. Can Stewardship Ontario force municipalities to accept part of that sum in "in kind" newspaper advertising services, instead of monetary payment, and, if so, in what amount and how is its value to be calculated; and

    iv. What factors curtail the municipalities' s. 25(5) cost recovery right and how should those factors be applied.

3. Stewardship Ontario requests that the following threshold issue be determined prior to the hearing of the remaining issues:

i. did the Minister of the Environment intend and purport to impose "payment containment" or any like measure by her approval of the Blue Box Program in 2003 and the Cost Containment Plan in 2004/2005 and thereby to potentially limit the total amount paid to municipalities pursuant to subsection 25(5) of the *Waste Diversion Act, 2002* to an amount less than 50 per cent of their actual net costs as a result of the Blue Box Program; and

ii. if the answer is yes, did the Minister have the authority to do so?

4. There is no dispute that I have the discretion to order a bifurcated hearing. I note that in addition to the agreement of the parties, section 20(1) of the *Arbitration Act, 1991*, SO 1991, c 17 provides that:

> The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

5. The only issue to be determined is whether a bifurcated hearing is appropriate in the circumstances of this case.

6. The parties exchanged motion material, including facta, and made oral submissions at a hearing held on March 27, 2014.

II. **Position of the Parties**

a. Stewardship Ontario

7. Stewardship Ontario argues that the issue of the scope of section 25(5) of the *Waste Diversion Act, 2002,* and specifically whether the municipalities are entitled to their actual costs, or something other than their actual costs, is a threshold issue. Although it is not dispositive of the matter, counsel argued that my decision on the scope of section 25(5) would focus the parties' evidence with respect to the quantification of the Stewards' obligation to the municipalities, and may provide the necessary impetus for the parties to come to a negotiated settlement.

8. Counsel for the Respondent suggested a more flexible approach to the issue of bifurcation and relied on a decision of Perell J in *Peter v Medtronic Inc* (2009), 83 CPC (6th) 379, 2009 CarswellOnt 6335 (Ont Sup Ct).

b. Association of Municipalities of Ontario & The City of Toronto

9. The Applicants argue that in determining whether to bifurcate this proceeding, I must be guided by the precedent set in *Elcano Acceptance Ltd v Richmond, Richmond, Stambler & Mills* (1986), 55 OR (2d) 56 (ONCA)

and *Air Canada v WestJet Airlines Ltd* (2005), 20 CPC (6th) 141, 2005 CarswellOnt 7420 (Ont Sup Ct).

10. The Applicants submit that by reference to the factors set out in *Air Canada*, the Respondent has not made out a case for bifurcation:

    i. The Respondent has not identified any clearly separable issue as the scope of section 25(5) of the *Waste Diversion Act, 2002* necessarily includes a determination of whether the Stewards can force the municipalities to accept part of their entitlement in "in kind" payments;

    ii. No answer to the proposed threshold issue would be dispositive of the matter;

    iii. There will be no saving of time and/or expense as the parties have already commenced production and witness preparation on the basis that all issues are to be heard at once;

    iv. The hearing will not be shortened, and due to the potential for duplication as a result of the overlap in issues, the hearing may actually be lengthened; and

    v. The parties do not agree that bifurcation is appropriate.

11. According to the Applicants, therefore, the motion should be dismissed.

III. ANALYSIS

12. In my view the principles articulated by the Court of Appeal in *Elcano* have withstood the test of time and are still good law, whether applied to a civil action in the courts or a proceeding by way of arbitration under the *Arbitration Act.*

13. *Elcano* was a solicitors' negligence case in which the Court of Appeal directed a new trial where it found that the trial judge failed to properly exercise his discretion in ordering a bifurcated proceeding. Morden J.A., writing for the Court said at page 59:

> However, since it is a basic right of a litigant to have all issues in dispute resolved in one trial it must be regarded as a narrowly circumscribed power. This approach is supported by the familiar statutory admonition which is continued in s. 148 of the Courts of Justice Act, 1984 (Ont.), c. 11:
>
> 148. As far as possible, multiplicity of legal proceedings shall be avoided.
>
> There is also the judicial admonition of Meredith C.J.C.P. in Waller v. Independent Order of Foresters (1905), 5 O.W.R. 421 at p. 422: "Experience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon ... ". The power should be exercised, in the interest of justice, only in the clearest cases. We would think that a court would give substantial weight to the fact that both parties consent to the splitting of a trial, if this be the case. On the other hand, a court should be slow to exercise the power if one of the parties, particularly, as in this case, the defendant (see Emma Silver Mining Co. v. Grant (1878), 11 Ch. D. 918 at p. 928), objects to its exercise.

14. Nordheimer J., referred to *Elcano* in *Air Canada* when he articulated his non-exhaustive list of five factors in respect of bifurcation.

15. The typical bifurcation case involves splitting the issues of liability and damages. However, that is not this case. Indeed, there is not much about this case that could be described as typical. I am not persuaded that the proposed threshold issue related to section 25(5) of the *Waste Diversion Act, 2002* can be clearly separated from the other issues. It is perhaps more likely that the issues will blend together as the evidence unfolds.

16. While at the end of the day it may turn out that there would have been an advantage to deciding the proposed threshold issue at the outset, I am not, at this stage, persuaded that this is the case.

17. I am also mindful of Morden J.A.'s caution in *Elcano* that "… a Court should be slow to exercise the power [to order bifurcation] if one of the parties, particularly, as in this case, the defendant … objects to its exercise."

18. Counsel for the Respondent argued that at the outset of this arbitration the Applicants favoured bifurcation. In the Reply pleading filed by the Applicants they withdrew their position regarding bifurcation. There is now some dispute between the parties as to whether the Applicants' original position was the same as what the Respondent now seeks. While I accept that counsel for the Respondent is entitled to make this point, I also accept

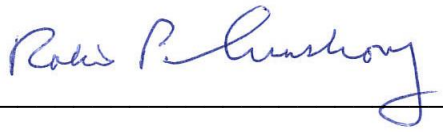
that the Applicants are entitled to change their minds, whatever the reason may be.

19. Finally, in the view I take of this motion, I am not satisfied that bifurcation would produce a significantly shorter and less costly hearing.

20. This case, therefore, is unlike the case in *Medtronic*, where Justice Perell found that the issue of quantification of the disgorgement of profits was dependent on and easily separable from the issue of waiver of tort. Further, despite the parties disagreement on the issue of bifurcation in that case, Justice Perell determined that there were obvious advantages to all parties in separating the issues and that a substantial saving of time and expense would result. The reasoning in *Medtronic* does not lead me to conclude that I should order bifurcation in this case.

21. For the foregoing reasons the motion is dismissed.

Dated at Toronto, this 31st day of March 2014.



The Honourable Robert P. Armstrong, Q.C.