

**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

-and-

STEWARDSHIP ONTARIO

Respondent

Counsel:

Dianne Saxe
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for the Association of Municipalities of Ontario

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for the City of Toronto

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for Stewardship Ontario

The Motion

1. This is an arbitration between the Association of Municipalities of Ontario (“AMO”) and the City of Toronto (“Toronto”) as Applicants, and Stewardship Ontario (“SO”) as Respondent.
2. The Applicants move for an order that this arbitration hearing should be open to the public.

The Background

3. AMO is a non-profit corporation and a voluntary association of over 200 Ontario municipalities which operate blue box programs. Toronto is one of the municipalities that operates a blue box program.
4. SO is incorporated under section 24 of the *Waste Diversion Act*¹ (the “Act”). SO is designated by the Ontario Minister of the Environment as the Industry Funding Organization (“IFO”) for two waste diversion programs established under the Act, including the blue box program.
5. SO is a non-profit organization financed by the industries (Stewards) who are the brand owners or first importers of products and packaging materials that are managed under the blue box program. The Stewards comprise both large and small businesses. Section 25(5) of the Act deals with the Stewards’ payment obligation in respect of the blue box program:

¹ *Waste Diversion Act, 2002*, SO 2002, c 6.

A waste diversion program developed under this Act for blue box waste must provide for payments to municipalities to be determined in a manner that results in the total amount paid to all municipalities under the program being equal to 50 per cent of the total net costs incurred by those municipalities as a result of the program.

6. The Act establishes Waste Diversion Ontario (“WDO”), which is a non-share capital corporation with responsibility for developing, implementing, and operating waste diversion programs and monitoring the effectiveness and efficiency of those programs pursuant to section 5(a).

7. Pursuant to section 5(d) of the Act, WDO is responsible for determining the amount of money required by it and the IFOs to carry out their responsibilities under the Act.

8. Under section 5(e)(i) of the Act, WDO shall establish a dispute resolution process for disputes between an IFO and a municipality with respect to payments to the municipality under a waste diversion program.

9. SO’s funding obligation has been the subject of negotiation through the Municipal Industry Programs Committee (“MIPC”) whose membership is comprised of representatives of the Municipalities and the Stewards. The Committee is chaired by the Executive Director of WDO. One of the roles of the Committee is to provide WDO with a final recommendation in respect of the Stewards’ obligation under section 25(5) of the Act. The Committee was not able to agree on a recommendation for the 2014 year.

10. As a result of the failure to negotiate a dollar figure for the 2014 year, the matter is now before me as a single arbitrator pursuant to the *Arbitration Act*.² The terms of reference for the arbitration are set out in WDO's "Dispute Resolution Policy & Procedure for Finalizing the 2014 Steward Blue Box Obligation" (the "Policy"). The Policy is attached as Appendix A to these reasons.
11. With the above background I now turn to the question of whether this arbitration should be held in public or in private.

The Position of the Applicants

12. The Applicants advanced essentially two grounds in support of the motion:
- (i) Section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "Charter") and the open court principle dictate that this hearing should be open to the public; and
 - (ii) Absent the application of the Charter, an arbitrator has the discretionary power to open the proceedings to the public, and this power should be exercised on the facts of this case.

(i) The Charter and the Open Court Principle

12. The Applicants submit that this arbitration is unlike a conventional private arbitration. There is no arbitration agreement in which the parties have agreed to resolve their dispute in private. They argue that the arbitration was

² The *Arbitration Act*, 1991, SO 1991, c 17.

imposed on the parties through the statutory power of section 5(e)(i) of the Act. Further, the Applicants submit that this is more akin to a statutory hearing than a private arbitration. There is a presumption that such hearings are public in accord with the open court principle and section 2(b) of the Charter. In support of this ground they cite: *Armada Communications Ltd v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 242 (CA); *N J v Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 129 at paras 44 and 48; *Vancouver Sun (re)*, 2004 SCC 43 at para 24; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at para 87; and *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at paras 32-40.

13. The Applicants also rely on the Supreme Court's judgments in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 and *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 in respect of the open court principle.

(ii) The Discretion of the Arbitrator to Order a Public Hearing

14. In support of this ground counsel cites two cases: *Toronto Star Ltd v Toronto Newspaper Guild* (1976), 14 OR (2d) 278 (Div Ct) and *North Simcoe Hospital Alliance v Ontario Nurses' Assn* (2007), 165 LAC (4th) 60 at para 11. Both cases are labour arbitration cases under the applicable Labour Relations Act.
15. In *Toronto Star* the Divisional Court held at paragraph 3 that the Board of Arbitration was a statutory tribunal "to which the parties are compelled to

resort [to] arbitration” pursuant to section 37 of the Labour Relations Act. Grange J., writing for the Court, said at paragraph 21: “...I have concluded that there is a discretion to determine whether the public should be admitted to the proceedings of the Board.”

16. In *North Simcoe Hospital Alliance* the arbitrator admitted the public to an arbitration hearing involving the discipline of a nurse for alleged patient abuse. In opening the hearing to the public, Arbitrator Knopf listed a number of factors that might be considered in determining whether to exercise his discretion to open the hearing, including:

- (i) The nature of the dispute;
- (ii) The implications of an order excluding witnesses;
- (iii) The impact on the proceedings if observers and press are present;
- (iv) Whether there is any legitimate public interest in the issues; and
- (v) The extent to which the matter is already a matter of public knowledge.

17. The Applicants submit that applying the above factors to the circumstances of this case, leads to the conclusion that the arbitration should be open to the public.

The Respondent’s Position

18. The Respondent advances the following grounds in opposition to the motion:

- (i) Arbitrations under the *Arbitration Act* are presumptively private;
- (ii) The case law concerning the Charter and the open court principle do not apply to such arbitrations; and

- (iii) SO's proposal with respect to confidentiality as set out in Article 11 of its draft procedural order, presents a workable solution for providing the public with access to information concerning the arbitration.

(i) Arbitrations Under the Arbitration Act Are Presumptively Private

19. In support of this position the Respondent relies on a line of English cases. In *Dolling-Baker v Merrett*, [1991] All ER (CA) at page 899 the English Court of Appeal said:

That qualification [of confidentiality] is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer...It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself.

20. In a more recent case, *Emmott v Michael Wilson & Partners Ltd*, [2008] EWCA Civ 184 at paras 105-106 the English Court of Appeal said:

...case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration. The obligation is not limited to commercially confidential information in the traditional sense...this is in reality a substantive rule of arbitration law reached through the device of an implied term.

21. The Respondent also refers to *Adesa Corp v Bob Dickensen Aviation Services Ltd* (2004), 73 OR (3d) 787 (Sup Ct) where Cameron J. of the Ontario Superior Court referred to the element of confidentiality in arbitration proceedings. The case involved a motion by the Defendants for the Plaintiffs to produce transcripts of discoveries and evidence from an arbitration proceeding in which the Plaintiffs, but not the Defendants, were parties. The information sought from the arbitration was in respect of issues identical to some of the issues in the court action. Cameron J. granted the order but in doing so he commented on the expectation of confidentiality of the parties in the arbitration and the part confidentiality plays in maintaining the integrity of the process. However, immediately after this observation, he said confidentiality was not essential to the arbitration process.

(ii) The Charter and the Open Court Principle Do Not Apply

22. The Respondent argues that the case law relied upon by the Applicants relates to statutory tribunals, such as the Labour Relations Board, and the courts, where the presumption is that hearings are public. The Respondent further submits that the Applicants have not cited any Canadian case holding that the open court principle applies to arbitrations. In addition, the Respondent contends that the *Arbitration Act* signals that arbitration proceedings are distinct from court proceedings. In particular, section 7 provides for a court to stay proceedings where the parties have an agreement to arbitrate and section 45 enables the parties to an arbitration to agree to an appeal procedure or opt out of any right of appeal altogether. Finally, section 20 of the *Arbitration Act* gives the arbitrator a broad discretion to determine the procedure to be followed in the arbitration proceedings.

23. Apart from the Respondent's assertion that the authorities cited by the Applicants have no relevance to the case at bar, counsel argues that the Charter can only apply if WDO, and by extension the arbitrator, are governmental entities or performing a governmental activity in this arbitration. Counsel submits that neither is the case.

(iii) Stewardship Ontario's Proposal With Respect to Confidentiality

24. Prior to the hearing of this matter counsel for SO provided a draft procedural order which contained a proposed regime with respect to confidentiality in article 11. According to article 11, the hearing would be held in private with members of the parties entitled to attend. Information about the arbitration would be confidential, but could be disclosed provided that the recipients and the parties agree to be bound by the confidentiality provisions of the procedural order. Further, information could be disclosed where required by law, such as under the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M 56.
25. The Respondent agrees that the final decision – setting out the ultimate result of the arbitration – could be disclosed publicly.
26. In the submission of the Respondent there is no need for a completely public hearing process, which would unnecessarily undermine the benefits of a private arbitration process.

Analysis

(i) The Application of the Charter

27. I agree that for the Charter to apply there would have to be a finding that WDO, and by extension the arbitrator, is a governmental entity or is exercising a governmental activity. In *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 44 Laforest J., writing for the court, said:

The second important point concerns the precise manner in which the Charter may be held to apply to a private entity. As the case law discussed above makes clear, the Charter may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself “government” for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged Charter breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as “government” within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the Charter, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as “private”. Second, an entity may be found to attract Charter scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly “governmental” in nature – for example, the implementation of a specific statutory scheme or a government program – the entity performing it will be subject to review under the Charter only in respect of that act, and not its other, private activities.

28. WDO is a corporation without share capital, established by the Act to, among other things, develop, implement and operate waste diversion programs.³ Its board of directors is made up of, among others, members from the AMO and representatives of SO.⁴ According to the Act it has all the capacity and powers of a natural person.⁵ It is not an agent of the Crown.⁶ The Crown cannot be held liable for any act or omission of WDO, a member of its board of directors, or any of its officers, employees or agents, and it receives its funds from IFOs,⁷ as those are defined under the Act.⁸ It is clear that WDO is not a governmental entity, and though it may be arguable that some of WDO's actions constitute the exercise of governmental activity, I do not believe it is pertinent to the present case, as regardless of whether WDO exercises governmental activity in any capacity, the arbitrator does not.
29. The arbitrator's jurisdiction is set out in WDO's Policy. It is important to note that under the heading, "Dispute Resolution Procedure for 2014" the first paragraph states:

The parties agree that arbitration will be used to determine the 2014 Annual Steward obligation for the blue box program. Specifically, the arbitrator will be asked to determine Stewardship Ontario's obligation pursuant to subsection 25(5) of the Waste Diversion Act, 2002 (Ontario) to contribute to the "net cost" incurred by the municipalities as a result of the waste diversion program for blue box waste.

³ See paragraph 5(a).

⁴ *Ibid.* at section 4.

⁵ *Ibid.* at section 16.

⁶ *Ibid.* at section 17.

⁷ *Ibid.* at section 18.

⁸ *Ibid.* at section 32. See also section 24.

30. During oral submissions counsel for the Applicants, in support of his position that this arbitration was imposed by the Act, argued that there was no agreement between the parties to proceed by arbitration. Counsel argued that the use of the word “agree” in the Policy was an error. There was no evidence provided in support of this position. No issue has been raised concerning the accuracy of any other part of the document. I am satisfied that the parties agreed to proceed by way of arbitration.
31. The arbitrator’s jurisdiction is defined by the Policy. The parties chose the arbitrator and, to some extent, helped to define the parameters of the arbitration although some significant issues have been left for me to determine.
32. The only statutory authority exercised was when WDO drafted the Policy pursuant to its responsibilities under the Act. Specifically, under section 5(e) of the Act, the WDO “shall... establish a dispute resolution process for disputes between an industry funding organization and a municipality with respect to payments to the municipality under a waste diversion program...” The Policy constitutes just that. It provides that “[t]he dispute over the 2014 Steward Obligation shall be finally resolved by arbitration before a single Arbitrator pursuant to the *Arbitration Act, 1991* (Ontario)...” It does not delegate any decision-making authority from WDO. In fact, nowhere in the Act does WDO have the power to resolve disputes like the present one. Aside from the establishment of a dispute resolution policy, there is no statutory decision-making authority to delegate; therefore, the arbitrator is not acting

pursuant to the Act. As is set out under the *Arbitration Act*, the arbitrator acts pursuant to the agreement of the parties.⁹

33. I am satisfied that the Charter is not engaged by the actions of the arbitrator.

(ii) Are Arbitrations Presumptively Private?

34. At the start, a distinction needs to be made between the private and/or confidential nature of arbitration proceedings. In the argument of this motion the two concepts were used interchangeably.

35. In my view privacy concerns the public's access to the arbitration hearing. Confidentiality applies to the information relating to the arbitration and can include the evidence, documents exchanged, transcripts, notes taken, pleadings and the award. The context in which confidentiality in arbitration arises in the Canadian case law is largely when the arbitration is over and one of the parties to the arbitration commences a court action. Examples of such cases can be found in the two cases relied on by the Respondent: *Adesa Corp v Bob Dickenson Auction Service Ltd* (2004), 247 DLR (4th) 730 and *GEA Group AG v Ventra Group Co*, 2009 CanLii 17992 (Sup Ct).

36. The Canadian case law on the private nature of arbitration is sparse. The *Arbitration Act* is similarly silent on the issue.

⁹ See section 2(1) of the *Arbitration Act*. Note that 2(3) provides that "This Act applies, with necessary modifications, to an arbitration conducted in accordance with another Act, unless that Act provides otherwise; however, in the event of conflict between this Act and the other Act or regulations made under the other Act, the other Act or the regulations prevail. 1991, c. 17, s. 2 (3)." There is no suggestion that this is the provision engaged in the present circumstances.

37. In *Adams v Canada*, 2011 ONSC 325, the Applicant sought judicial review of a decision of the Court of Arbitration for Sport (the “CAS”). In that case the arbitration agreement was contained in the contract between the applicant, a Paralympic athlete, and Athletics Canada. In granting the government’s motion to quash the application, which was upheld on appeal,¹⁰ the Motion Judge found that despite the fact that the arbitration takes place within a regulatory framework the arbitration panel was a private tribunal. Though the issue was not public access to the hearing, in determining that the Divisional Court did not have the jurisdiction to grant the remedy of *certiorari*, the Motion Judge made the following important remarks at paragraphs 44 and 45:

[44] ... In my view, it is plain and obvious that the CAS arbitration panel that heard Mr. Adams’ appeal was not exercising a statutory power. Its powers were derived solely from contract. Therefore, none of the declaratory relief sought is within the jurisdiction of the Divisional Court, since the power to grant such relief is limited to situations involving the exercise of a statutory power.

[45] Further, the remedy of *certiorari* is not available because the arbitration panel was a private tribunal, appointed pursuant to an agreement. It had no public mandate and did not exercise any public powers. Public law remedies, such as *certiorari*, are not applicable to private law decision-makers. The Divisional Court only has jurisdiction to review public law decisions. I recognize, as did the Alberta Court of Appeal, that distinguishing between public and private law functions is not always clear-cut. However, that is not the situation here. But for the agreement to submit disputes to arbitration, there would be no basis whatsoever for the CAS to have any powers over Mr. Adams. As I have already stated, Mr. Adams

¹⁰ See 2011 ONSC 7592.

voluntarily signed the agreement and the fact that he had no power to negotiate terms different from all other athletes wishing to compete is immaterial to whether he nevertheless agreed to the arbitral process. Further, I recognize that the issues raised here are of significant importance to the public, both because of the personal rights and freedoms involved, and because of the importance to the public in maintaining the integrity of sports competitions. That does not turn a private arbitral process into a public law decision-making process. Finally, I recognize that there is a significant degree of government involvement in this matter, both with respect to influencing the content of the anti-doping policy and through the control it wields over athletes and sports organizations by withholding funding from those who do not want to play by those rules. Nevertheless, the arbitration process is not an exercise of public power, but rather a matter of private contract...

(Emphasis Added.)

38. In *Rea International Inc v Muntwlyer*, 2004 Canlii 31795 (Ont Div Ct), the Ontario Divisional Court, again on an application for judicial review of an arbitration award, noted at paragraph 8 that the *Arbitration Act*, “is now widely regarded as a comprehensive code governing private arbitrations in Ontario which limits court intervention in the arbitration process very narrowly.”
39. Though neither of these cases deals with the issue of public access to arbitration proceedings, the underlying assumption appears to be that arbitrations established by contract, and conducted pursuant to the *Arbitration Act*, are presumptively private. This is supported, to some extent, by the fact that the *Arbitration Act* only empowers the court to intervene in an arbitration on narrowly construed grounds, and it provides that the arbitration process is

directed by the parties, or the arbitrator, where the parties have not otherwise provided.¹¹

40. This is also consistent with the policy behind arbitration, which is often touted as a private alternative to public court proceedings.
41. Further, this is in line with foreign jurisprudence and institutional rules.
42. It is uncontroversial in English law that arbitration is a private process. It is considered one of the advantages “over the courts as a means of dispute resolution,” and in the case of *Oxford Shipping Co Ltd v Nippon Yusen Kaisha (The “Eastern Saga”)*, [1984] 2 Lloyd’s Rep 373, the private nature of arbitrations was used to justify the arbitrator’s inability to consolidate arbitrations that dealt with similar issues, but to which different persons were parties. The Court held that as the arbitration agreement dictates the parameters of the arbitration, strangers to the agreement could not be added to the arbitration proceeding without the consent of all parties.
43. Moreover, the Australian High Court decision of *Esso/BHP v Plowman*, [1995] 128 ALR 391, found that subject to a contrary intention by the parties, arbitration is private, in that it is closed to the public. Though the arbitrator has discretion to set the procedure, including whether the proceedings are open to the public, this discretion has to be exercised having regard to the provisions of the relevant contract, and according to the High Court, the private nature of the process is inherent in the parties agreement to submit their dispute to arbitration.

¹¹ See section 20.

44. Finally, the London Court of International Arbitration,¹² the International Chamber of Commerce,¹³ the United Nations Commission on International Trade Law,¹⁴ and the International Centre for Settlement of Investment Disputes Arbitration (Additional Facility) Rules,¹⁵ all provide that, subject to a contrary agreement by the parties, arbitration proceedings are private.
45. I believe that the authorities, sparse though they are, arguably support the position that the arbitration process pursuant to the *Arbitration Act* is presumptively private – particularly in the typical commercial arbitration case unless the parties have agreed otherwise. However, in the view I take of this case I do not need to conclude that a presumption of privacy exists.

(iii) Is the Respondent's Proposal with Respect to Confidentiality the Answer to this Motion?

46. As indicated above, although they are in a sense related concepts, there is a distinction between a public hearing and the protection of confidential records. I do not agree that the Respondent's confidentiality proposal will best address the question that I have to decide as I think that it is quite possible to have a public hearing and protect confidential information. I will say more about this below.

¹² See Article 19(4) of the LCIA Arbitration Rules (1998): "All meetings and hearings shall be in private unless the parties agree otherwise in writing or the Arbitral Tribunal directs otherwise."

¹³ See Article 26(3) of the ICC Rules of Arbitration (2012): "The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted."

¹⁴ See Article 28(3) of the UNCITRAL Arbitration Rules (2010): "Hearings shall be held in camera unless the parties agree otherwise..."

¹⁵ See Article 39(2) of the ICSID Arbitration (Additional Facility) Rules (2006): "Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."

Conclusion

47. Section 2(b) of the Charter and the open court principle do not apply to this case. Assuming, without deciding, that there is a presumption of privacy in respect of this arbitration, I am left to consider whether such a presumption is rebutted and whether I should order the hearing to proceed in public.
48. The Applicants rely entirely on the nature of the case and the issue to be determined by arbitration. Simply put, they argue that there is a significant public interest in the province-wide blue box program, and specifically, in the ultimate decision made in respect of its costs.
49. While considering whether there is a basis to rebut the assumed presumption and exercise my discretion to order a public hearing I have taken into account the following factors:
- a) The nature of the dispute;
 - b) The impact on the proceedings of the presence of the public and the media;
 - c) Any negative effect on the parties to the proceedings; and
 - d) Whether there is a legitimate public interest to be served in ordering a public hearing.

a) The Nature of the Dispute

50. This arbitration concerns a significant environmental protection program for the province of Ontario. It also concerns a potentially significant amount of taxpayer money. Every municipality with a population in excess of 5,000 persons is required to have a blue box program. The program in issue here involves over 200 cities, towns and other municipalities in the province. It is estimated by the parties in their pleadings that 50% of the net costs, to be paid by the Stewards, is somewhere between \$95 million and \$117 million for 2014. What is not funded by SO will be paid from the public purse.

b) The Impact on the Proceedings of the Presence of the Public and the Media

51. None of the parties suggested that the presence of the public or the media would have any adverse impact on the proceedings. The parties are sophisticated and they are represented by experienced and sophisticated counsel. I can discern no reason to suggest that a hearing attended by the public and the press would have a negative effect on the proceedings.

c) Any Negative Effect on the Parties to the Proceedings

52. The Applicants, who are the movers of this motion not surprisingly, did not suggest that there would be any negative impact on the case for the Municipalities or Toronto. They argued that this is in effect a public dispute over tax dollars. Specifically, because the Stewards' obligation in any given year is calculated on the basis of the blue box program's revenue and costs

from two years prior, the bulk of the information relied upon in this matter is already publicly available.

53. Counsel for the Respondent, during their argument, relied entirely on the presumption of privacy to oppose the motion. When asked if there were any negative factors to be considered in respect of the Respondent the reply was that during the cross-examination of one or more witnesses of the Applicants there was some prospect that confidential proprietary information of one or more of the Stewards could be disclosed.
54. In my view the protection of such confidentiality can be addressed if and when it arises. If a case is made out for such protection then the appropriate order can be made on the basis of a full record.

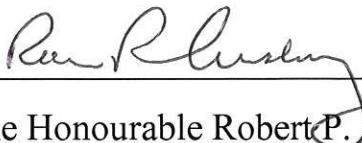
d) Is There a Legitimate Public Interest to be Served in Respect of the Issues to be Decided in this Arbitration?

55. I am satisfied that there is a significant public interest in this arbitration.
56. This is not a typical commercial arbitration dispute carried out pursuant to the *Arbitration Act*. The crux of the dispute concerns a government program, and the outcome may have significant consequences for Ontario taxpayers. Further, this is not a case where a governmental entity was acting in a private capacity by entering into a commercial contract. The City of Toronto and the members of the AMO are governmental entities engaged in a public program in respect of the protection of the environment.

The Result

57. I am satisfied that the review of the above factors supports an order for a public hearing, which rebuts a presumption that may exist in favor of a private arbitration process. Those persons who may be interested in the arbitration will have access by attending personally at the hearing or through reports in the media. As I see it, an open and transparent hearing process in this case will serve the public interest and will not detract from the parties' ability to achieve a fair and just result. Issues concerning confidentiality can be appropriately addressed as they arise.
58. An order will go to the effect that the arbitration hearing in this matter shall be held in public.

Dated at Toronto, this 24th day of March 2014.


The Honourable Robert P.
Armstrong, Q.C.

SCHEDULE “A”

Dispute Resolution Policy & Procedure for Finalizing the 2014 Steward Blue Box Obligation

November 21, 2013

Dispute Resolution Policy:

One role of the Municipal-Industry Program Committee (MIPC) is to negotiate a final recommendation to Waste Diversion Ontario's Board of Directors regarding the Annual Steward Obligation for the Blue Box Program. MIPC is comprised of representatives of Stewardship Ontario and Association of Municipalities of Ontario/The City of Toronto (the parties).

MIPC has been unable to provide a recommendation to Waste Diversion Ontario's (WDO) Board of Directors on the 2014 Steward Obligation for the Blue Box Program. The dispute over the 2014 Steward Obligation shall be finally resolved by arbitration before a single Arbitrator pursuant to the *Arbitration Act, 1991* (Ontario), subject to the terms set out below, and is without prejudice to WDO's right to amend or modify the process for resolving a dispute with respect to the steward obligation in future years. The place of arbitration shall be Toronto, Ontario. The language of the arbitration shall be English.

A copy of the Arbitrator's decision including written reasons for decision will be provided to WDO.

Dispute Resolution Procedure for 2014:

1. The parties agree that arbitration will be used to determine the 2014 Annual Steward Obligation for the Blue Box Program. Specifically, the Arbitrator will be asked to determine Stewardship Ontario's obligation pursuant to Subsection 25(5) of the *Waste Diversion Act, 2002* (Ontario) to contribute to the "net costs" incurred by the municipalities as a result of the waste diversion program for blue box waste.
2. The arbitration shall be conducted by a single Arbitrator.
3. The process for selecting an Arbitrator will be as follows:
 - By **November 29, 2013**, the parties will share (by email) their recommendation for potential Arbitrators with each other and with WDO's Director of Operations. The recommendation should include a brief description of each Arbitrator's credentials. The parties will then communicate with each other and seek to identify an Arbitrator from among the names proposed not later than December 12, 2013. If requested by either party, WDO will seek to facilitate this discussion by arranging a meeting.
 - If the parties agree on the choice of an Arbitrator, the parties will retain the chosen Arbitrator.

- If by **December 13, 2013**, the parties have not provided written notice to WDO that they have agreed on the choice of an Arbitrator, WDO will select an Arbitrator and inform the parties of the selection by **December 20, 2013**.
4. The rules and process for the arbitration, including the process for obtaining additional expert evidence deemed necessary by the Arbitrator to inform the proceedings, shall be determined by the Arbitrator following consultation with the parties, subject to the following requirements:
 - The Arbitrator will be requested to take all reasonable steps to make his or her decision, and to provide written reasons for decision, not later than **March 15, 2014**. The Arbitrator may include comments or suggestions for determining the annual Steward Obligation for the Blue Box Program in future years.
 - The Arbitrator shall send the written decision, including reasons and any suggestions for a future process, to each of the parties and to WDO.
 - Each of the parties shall bear its own legal costs in connection with the arbitration. The costs of the Arbitrator and the arbitration facilities shall be borne equally by the parties unless the Arbitrator determines otherwise, in his/her discretion.
 5. The Arbitrator's decision will be final and binding, not subject to appeal, and will constitute the 2014 Steward Obligation for the Blue Box Program.