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

AWARD

Counsel:

Dianne Saxe Meredith James	for the Association of Municipalities of Ontario
Glenn K. L. Chu Matthew Cornett	for the City of Toronto
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INTRODUCTION

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. AMO is a non-profit corporation and a voluntary association of over 200 Ontario municipalities which operate Blue Box programs. Toronto is not a member of AMO but it operates Ontario's largest Blue Box program.

3. SO is incorporated under section 24 of the Waste Diversion Act[1] (the "Act"). SO is designated by the Ontario Minister of the Environment (the "Minister") as the Industry Funding Organization ("IFO") for two waste diversion programs established under the Act, including the Blue Box waste diversion program.

4. SO is a non-profit corporation financed by the industries (stewards) who are the brand owners or first importers into Ontario 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 ("Steward Obligation"):

> A waste diversion program developed under this Act for blue box waste must provide for payments to municipalities to be

[1] Waste Diversion Act, 2002, SO 2002, c 6.

> 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.

5. The Act established 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).

6. 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.

7. 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.

8. SO's funding obligation has been the subject of annual negotiation through the Municipal Industry Programs Committee ("MIPC") whose membership is comprised of representatives of the municipalities and the stewards. MIPC is a WDO committee and is chaired by the Executive Director of WDO. One of the roles of MIPC is to provide WDO with a final recommendation in respect of the Steward Obligation under section 25(5) of the Act. MIPC was not able to agree on a recommendation for the 2014 year.

9. As a result of the failure to determine 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", which is attached as Appendix A to these reasons.

10. A related issue to the determination of the dollar figure under section 25(5) of the Act involves whether payment of the obligation may be made "in-kind". Under the Blue Box Program Plan that was eventually approved by the Minister, a portion of the Steward Obligation is satisfied by newspaper advertising provided by the Canadian Newspaper Association ("CNA") and the Ontario Community Newspapers Association ("OCNA").

11. In addition to determining the 2014 Steward Obligation pursuant to section 25(5) of the Act, I am invited to make comments or suggestions for determining the Steward Obligation in future years.

12. In this arbitration AMO and Toronto (collectively, the "Municipalities") claim $115,172,332, to be paid in cash, for the 2014 Steward Obligation. SO asserts that the proper number is $95,679,612. At the heart of the dispute is the interpretation of section 25(5) of the Act. The Municipalities claim that the words "50 per cent of the total net costs incurred" mean 50 per cent of

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[2] Arbitration Act, 1991, SO 1991, c 17.

actual costs paid by the municipalities for the operation of municipal Blue Box programs and reported in the annual Datacall (a province-wide financial survey, explained further below). SO argues that the net costs are not actual costs as reported by the municipalities but are best practice costs, which are costs adjusted by a computer program generically described as the best practice cost model – the various iterations of this model are described later in these reasons. Much more will be said about these two different approaches to the determination of the total net costs incurred under section 25(5) of the Act.

13. This arbitration took place over five months and several weeks of hearing days. There were over two dozen witnesses called and approximately 700 documents produced. I have heard the evidence of senior personnel from most of the relevant players, including WDO, AMO, Toronto and SO. I have also heard from a number of witnesses who participated in MIPC on behalf of both parties between 2003 and 2013. Many witnesses have been involved in waste diversion since before the Act came into effect. Some had a hand in crafting the waste diversion program at issue in this arbitration, and many had been involved with the program, on behalf of the municipalities or the stewards, for many years. All of the evidence has been carefully considered.

14. In order to understand the respective positions of the Municipalities and SO it is important to understand the historical background from the time of the first Blue Box program to the passage of the Act to the present day.

I. THE HISTORICAL BACKGROUND

1. The Early Days

15. Prior to the passage of the Act some Ontario municipalities established their own Blue Box programs under the Environmental Protection Act, RSO 1990, c E 19 (the "EPA"). Even before this, Kitchener was credited with establishing the first Blue Box program in the province in the early 1980s. In these early days, some industries were contributing voluntarily to capital and operating costs associated with recycling in Ontario. Around 1986, the Ontario soft drink manufacturers, distributors and suppliers created Ontario Multi-Material Recycling Inc. and pledged $1,500,000 towards the development of a Blue Box program. Around 1987, funding was increased to $20,000,000 over four years and members of industry, municipalities and government worked together to expand the Blue Box program. Around 1990, the soft drink industry was voluntarily joined by grocery, plastics, packaging and newspaper industries to pledge $45,000,000 over the following five years

to support the Blue Box program. In 1994, Ontario Regulation 101/94, Recycling and Composting of Municipal Waste, was made under the EPA. This imposed an obligation on certain municipalities to establish, operate and maintain a Blue Box program, and was essentially a legislative scheme on what municipalities had largely been doing on their own.

16. By 1999, the Ministry of the Environment (the "MOE") entered into a memorandum of understanding (MOU) with several organizations, including AMO and a number of stewards and steward associations, to promote municipal recycling on a province-wide basis. This MOU established the interim Waste Diversion Organization ("iWDO"). The iWDO was the predecessor of the WDO. The idea of the MOU was to bring order to the existing system and to get all of industry to contribute to the Blue Box program.

17. Part of the role of the iWDO was to undertake investigations, including consultations with affected stakeholders, and then prepare reports for the Minister. In September 2000, iWDO submitted a report to the Minister entitled "Achieving Sustainable Municipal Waste Diversion Programs in Ontario" (the "iWDO Report"). This report set out a number of recommendations for the Blue Box program, including that the costs of the program be shared on a 50-50 basis between industry and municipalities for a

period of five years. The report also recommended the following method for calculating costs:

> The net cost of recycling for Ontario as a whole would be calculated on the basis of an annual province-wide survey of all municipal waste diversion program costs based on a standardized methodology of tonnage and cost reporting that the WDO would adopt.
>
> [See p. 71 of the iWDO report.]

18. Derek Stephenson, iWDO's overall program manager and the chief representative for SO during the negotiation and drafting of the iWDO Report, testified in this arbitration at paragraphs 39 and 40 of his affidavit:

> Stewards reviewed a variety of approaches, including similar programs internationally. Ontario Stewards chose a shared responsibility model with Ontario municipalities. The essence of this model was a 50/50 split of actual residential Blue Box program costs between stewards and municipalities. None of the other accepted recycling program models allowed stewards to pay less than this on a long term basis.
>
> Ultimately, OWDO [iWDO] board members agreed to unanimously support the final report. One of its recommendations was that stewards and the municipalities should share, 50/50, the actual net costs that all Ontario municipalities incurred in diverting packaging and printed papers generated by households from landfill.

19. Geoff Rathbone, another Steward representative on iWDO, also testified in this arbitration. His evidence at paragraphs 35 and 36 of his affidavit was:

> The original deal for the 50/50 cost split was struck in the negotiations leading up to the OWDO [iWDO] September 2000 report. … [industries] ultimately agreed to a 50-50

> model, or the shared responsibility model, in which actual Blue Box costs would be split equally between stewards and municipalities. This is what became s. 25(5) of the Waste Diversion Act.
>
> Stewards always wanted to pay only 50 per cent of the costs of an "efficient" program. Stewards did not want to have to pay for inefficiencies. Their idea was that there was a theoretical cost of an efficient program and stewards wanted municipalities to run their programs at that "efficient" level. But the final deal was 50 per cent of actual costs, with performance incentives to individual municipalities to improve their efficiency and effectiveness. See p. 70 to 73 of the OWDO [iWDO] report.

2. **The Act and the Development of the Blue Box Program Plan**

20. The iWDO report led to the enactment of the Act in 2002. In this arbitration the Municipalities referred to the debates in the Legislature prior to the passage of the Act in support of their position that "total net costs" in section 25(5) means actual costs.

21. For example, in the fall of 2001, section 24(5) of the Bill introducing the Act, which is now section 25(5) of the Act, provided for payments from stewards that did not "total more than 50 per cent of the total net operating costs incurred by the municipalities in connection with the program." During the debates on November 26, 2001, it was Mr. Arnott, then Minister Witmer's representative, who moved to amend the language to provide for payments "being equal to 50 per cent of the total net costs incurred by municipalities as

a result of the program." According to the record of the debates, this amendment was proposed to correct some municipalities' misunderstanding that the previous language would have entitled stewards to pay less than 50 per cent of Blue Box costs. The amendment was said to be in line with the recommendation of the iWDO report.[3]

22. Further, it was a municipal representative who proposed the ultimately accepted amendment from the initial reference to 50 per cent of "operating costs" to 50 per cent of "net costs" on the basis that net costs would include capital costs expended to deliver waste diversion programs that are not normally encompassed by the term "operating costs" in the municipal budgeting world.[4]

23. The Act received Royal Assent on June 27, 2002. On September 23, 2002, the then Minister, Chris Stockwell, wrote to the Chair of the WDO:

> . . .
>
> . . . Pursuant to subsection 23(1) of the Act, I am requiring that WDO develop a waste diversion program for blue box waste in co-operation with an industry funding organization to be incorporated under Part III of the Corporations Act for the purpose of the program. I would ask that the program be submitted for my approval by February 28, 2003. An addendum to this letter provides additional areas to be addressed in the proposed program submission.

[3] See Ontario Official Report of Debates (Hansard) of the Standing committee on general government (37th Parliament, 2nd session), November 26, 2001 at page G-370.
[4] See Ontario Official Report of Debates (Hansard) of the Standing committee on general government (37th Parliament, 2nd session), September 7, 2001 at page G-185.

24. The addendum attached to Minister Stockwell's letter included the following with respect to the funding of the program:

> . . .
>
> 7. The proposed funding rules under the program will include:
>
> a. The method used to calculate the total net costs incurred by municipalities as a result of the program;
>
> b. The funding formula to be used for determining payments to municipalities, including variations in costs dependant on north/south and urban/rural differences; and
>
> c. A funding performance incentive to encourage program efficiency and effectiveness.
>
> 8. The program will include a plan, with funding provisions, outlining research and development activities to support and increase the effectiveness and efficiency of blue box waste diversion.
>
> ….
>
> 10.The proposed funding rules under the program will account for the voluntary contribution of the Canadian Newspaper Association (CNA) and the Ontario Community Newspaper Association (OCNA) of newspaper advertising with a value of $1.3 million annually and, in addition, annual funds for the purpose of implementing and monitoring the advertising program and any administrative expenses incurred by WDO and the designated IFO. The program will contain a plan on how the advertising will be allocated and administered. The funding rules will also contain a formula to determine when additional funding support from newspaper members will be

> required should the cost of recycling newspapers become a cost to municipal blue box programs.
>
> 11. The program will include a plan, with funding provisions, outlining activities to develop and promote products that result from the program.
>
> 12. The program will include a plan, with funding provisions, outlining educational and public awareness activities to support the program.

25. Immediately after it received the Minister's program request letter, the WDO Board set up a task group of representatives of AMO and Stewards to design a new Blue Box program. This group became known as the AMO/Stewardship Ontario Task Group, and ultimately became MIPC under the Blue Box Program Plan.

26. The mandate of the AMO/Stewardship Ontario Task Group is set out in section 4.3 of what was ultimately approved as the Blue Box Program Plan:

> The mandate of the AMO/Stewardship Ontario Task Group was to reach agreement on key Blue Box program development issues before a draft Program Plan was to be submitted to the WDO Board for approval. It was also agreed that the continuation and mandate of the AMO/Stewardship Ontario Task Group would be reviewed once the Blue Box Program Plan was submitted.

27. The Task Group met seven times between October 2002 and January 2003 and reached agreement on a number of the core issues it identified as resulting from the Act and the Minister's letter. These included:

- Agreement on a calculation of the 50 per cent of total net costs for the first year of the program; and

- Agreement on the establishment of a technical working committee of AMO and industry representatives for the purpose of determining the methodology and procedures for calculating total net costs of municipal Blue Box programs in subsequent years – The Task Group also agreed on principles to guide the future calculation of costs along with the design and data collection procedures.

28. The principles agreed upon by the Task Group as guidelines for the calculation of total net costs in subsequent years, included:

(1) Accuracy: Best estimates of actual expenditures and revenues using best available information. Protocol for data collection and reporting must be agreed by AMO and the IFO [Stewardship Ontario].

(2) Transparency: All parties must know the source of the data and be able to understand how the numbers were derived.

(3) Verifiability: Industry and municipalities must be able to verify how the estimate was derived. This may involve 3rd party verification of data. The IFO [Stewardship Ontario] and WDO technical and/or financial auditors must also be able to verify the data.

(4) Constitutionality: Passes the constitutional test in that the net cost appropriately reflects a reasonable fee for services provided under the Blue Box Program.

(5) Consistency of Reporting: Consistency in the submission of agreed upon data, in an agreed upon format, in a timely manner.

(6) Ability to Identify Costs: The information gathered and submitted must be in sufficient detail to identify cost drivers.

The above constitutionality principle, which is later re-titled "Acceptability" in the Blue Box Program Plan, was necessary because there had to be a direct and reasonable connection, or nexus, between the cost of the Blue Box activity and the fees that were paid by the stewards that put that Blue Box waste into the system.

29. In its 2002 – 2003 Annual Report AMO referred to the work of the Task Group and specifically commented on the successful achievement of agreement between municipal and steward members of the Task Group "on key aspects of the Blue Box program plan".

3. **The Blue Box Program Plan**

30. Prior to receiving WDO Board approval of the Blue Box Program Plan ("BBPP"), there was a consultation process held to provide information to and receive feedback from municipalities, as well as industry and the public. There were six such sessions involving 199 municipal representatives from 111 municipalities. The WDO Board was also kept apprised of the progress being made in the design of the BBPP. Following a special meeting of the WDO Board to address outstanding issues in the BBPP, the board approved

the BBPP on February 19, 2003 and submitted it to the Minister on February 28, 2003.

31. The BBPP approved by the board covered the Blue Box waste prescribed by the Act: glass, metal, paper, plastic and textile. Further, the BBPP "addresses only consumer packaging material and printed papers commonly found in the residential waste stream."[5]

32. Once WDO approved the BBPP, ministerial approval did not follow immediately. A number of stewards were concerned about the potential cost of the BBPP and began to lobby the Minister to reject it. The language of the BBPP itself explained the basis for this concern:

> The cost of Blue Box programs is not in the direct control of industry, rather, it is determined by decisions made by municipalities based on direction from their Councils, staff and residents. Costs are also influenced by drivers such as energy, the consumer price index and the level of competition among private sector service providers. As such, the costs presented herein are based on a series of conservative assumptions and the current understanding of the direction of the recycling industry as a whole (e.g., with respect to the movement towards more single stream collection programs.)
>
> [See s.7.3.4 of the BBPP.]

33. The BBPP also contained cost projections, which showed costs in 2001 around $60,000,000 growing to as high as almost $120,000,000 in 2006. The

[5] See section 2.1 of the BBPP.

concern about escalating costs led to the inclusion in the BBPP of cost containment strategies:

> Cost Containment Strategies
>
> Given the potential for Blue Box Program costs to double within five years it is in the interests of Stewards and municipalities to pursue all possible strategies for containing costs. Furthermore, environmental performance of the system should also be considered along with cost performance when considering expanding programs to add materials with little potential to significantly increase diversion but with higher than average management costs (e.g., plastic film). At some point, it is more economically and environmentally beneficial to focus on other waste diversion programs (e.g., organics) where the cost per unit of diversion achieved will be much lower.
>
> [See s.7.4.2 of the BBPP.]

34. In the summer of 2003, lobbying efforts to convince the Minister to turn down the request for approval of the BBPP increased significantly by some of the stewards who were now split in their support for the BBPP. While the soft drink industry and the LCBO continued to be strong supporters, retailers and the newspaper publishers were strongly opposed to the BBPP going forward. Those who opposed approval argued:

(1) that municipalities would include marginal or inappropriate costs in the Datacall;
(2) the municipalities would use Blue Box funds to promote unrelated public policy issues; and
(3) if municipal autonomy were to govern then efforts to promote an efficient province-wide system would be compromised.

35. In their written submissions, Counsel for SO summarized the dilemma that then emerged, and which has to some extent plagued this program from its inception:

> The dilemma that is at the core of this Arbitration had now manifested itself. On the one hand, Municipalities will generally always subjectively assert that they are operating as efficiently and effectively as they are able and that the costs they report must be accepted at face value. On the other hand, Stewards will generally always subjectively assert that Municipalities are not operating as efficiently and effectively as they could and that the reported costs are inflated.

36. In July 2003, the early results of the 2002 municipal financial survey (Datacall) suggested that the total system costs were significantly higher than the BBPP's projected costs. Also, in July 2003, the Chair of WDO, Ms. Gemma Zecchini (who also testified during this arbitration), and the WDO Board's Government Relations Advisor attended a meeting with staff from both the Premier's office and the Minister's office. A senior staff member from the Premier's office advised that the viability of the BBPP was threatened as a result of significant lobbying from the stewards. Ms. Zecchini was advised that approval of the BBPP would depend upon containing the municipalities' costs of the Blue Box program.

37. On July 30, 2003, the WDO Board established a Cost Containment Subcommittee of six members with equal representation for the municipalities

and SO ("Subcommittee"). A list of goals and objectives for its first meeting on August 6, 2003 was prepared by the Subcommittee as follows:

1. Move the issue of cost containment and the Blue Box Program Plan (BBPP) forward i.e. get it done
2. Remove impediments to BBPP approval in 2003
3. Reach agreement on cost containment principles to determine the 'right' cost and a process to get there
4. Provide certainty for stewards financial obligations
5. Identify acceptable benchmarks for costs and revenues
6. Develop level of comfort with the numbers
7. Identify where other impediments lie and take them into account
8. Acknowledge 2002 Financial Datacall as first real numbers
9. Identify areas of policy advice to Minister

NOTE: The term 'numbers' was used to denote both costs and revenues.

38. The Subcommittee also discussed the respective interests of SO and the municipalities. Included in the SO interest list was the need to address the gap between cost projections and actual costs. The municipalities emphasized the need to eventually ensure 50 per cent of the verified, net, agreed costs.

39. The concept of grouping municipalities into cost bands for the purpose of calculating costs was first discussed in this initial meeting of the Subcommittee and was included among the nine principles of cost containment agreed to at that meeting, as follows:

1. Verification must be completed to identify real numbers
2. Costs must be for residential BB materials only
3. Identify/agree on cost components of BBPP

4. Cost bands must reflect:
    i. municipal diversity
    ii. best practices
    iii. incentives to move municipal program costs into bands
    iv. opportunities over time to reduce costs and fit within bands
5. Gap between cost projections and real numbers must be bridged over life of the plan
6. Cost increases above baseline in years 2 to 5 must be related to increase in tonnage and/or cost of living or must be supported by documentation
7. Autonomy of municipal government decision-making remains intact
8. No cross subsidization of materials' costs
9. Stewards must support packaging reduction and stewards/WDO must support market development through procurement and other initiatives

40. Dennis Darby, a Steward representative on the Subcommittee, testified to the use that could be made of cost bands:

> The intention of the Sub-committee was that cost bands would be used to identify the costs of operating an efficient Blue Box Program, would provide guidance to the municipalities, and would be used in the calculation of the total net costs incurred by the municipalities so as to provide some predictability and fairness for Stewards in relation to the net costs calculation.

41. After the first meeting of the Subcommittee, the Chair of the WDO wrote a letter to the Premier on August 11, 2003 to advise that WDO was taking action in respect of the concerns about the escalating costs of the BBPP. The letter advised that the Subcommittee had "reached agreement on a set of

principles that will govern the setting of costs for future years (i.e., after Year 1)." The letter further stated:

> I am pleased to report that one of those principles will ensure that any gap between amended costs and initial projected costs for the Plan will be absorbed over the life of the Plan and that year-over-year increases will be limited to certain discrete circumstances such as increases in population, increases in the volume of waste diverted from landfill and the changing commodity value of these materials. Industry will not be facing an exponential cost increase, although incremental increases and adjustments for special circumstances are to be expected.

42. On September 17, 2003, the WDO Board approved the nine cost containment principles, which had by then been referred to MIPC for further analysis.

43. The Subcommittee then explored MIPC's suggestions as to the potential uses of cost bands. Although there had been opposition from the municipal representatives on MIPC, which worked on methodologies for implementing the cost containment principles, the Subcommittee, including its municipal members, recommended the use of cost bands to the WDO Board. In a letter from Ms. Zecchini to the WDO Board on October 27, 2003, the recommendations of the Subcommittee were described as follows:

> After discussions by the Cost Containment Sub-committee, the Sub-committee agreed that:
>
> 1. Municipal performance groupings are acceptable for use to identify outliers during the Datacall verification process.

2. Municipal performance groupings cannot be used to contain payment in the absence of other factors, such as but not limited to municipal diversity, local circumstances and efforts to change programs over time.

3. After identification of outliers through the use of municipal performance groupings, criteria for filtering the outliers are required.

4. A process to apply the criteria, vet the process, provide an opportunity for municipal programs under review to present their position and allow for dispute resolution must be defined.

5. MIPC will be asked to further develop the filtering criteria and outline the filtering process for presentation to the Cost Containment Sub-committee.

This approach recognizes the use of cost bands as a method to identify outliers and implements a defined process to determine the legitimacy of outlier municipal programs. The process will take factors such as municipal diversity, local circumstances and efforts to change programs over time into account when determining the legitimacy of outlier municipal programs.

44. During that same meeting of the Subcommittee, agreement was reached between municipal and SO representatives that municipal administrative costs would be capped at 1 per cent of total BBPP costs for programs that contract out their waste diversion services and 3 per cent for programs that do not. Counsel for the Municipalities submits that this was a deal made in exchange for not using cost bands to cap municipal Blue Box system costs. Counsel for

SO denies any such deal. In 2005, the aforesaid percentages were increased to 3 per cent and 5 per cent, respectively.

45. In October 2003, the BBPP had still not yet been approved, a new government was elected in Ontario and a new Minister, Ms. Leona Dombrowsky, was appointed. On November 25, 2003, Ms. Zecchini and Ms. Glenda Gies, the Executive Director of WDO, met with the Minister Dombrowsky and urged her to approve the BBPP. They advised the Minister that WDO was aware of the concerns about escalating costs of the program and explained that the WDO Board had appointed the Subcommittee (by then renamed the Cost Effectiveness Subcommittee) to address these concerns. They also advised that WDO was running out of its initial funding and needed BBPP approval so that it could recover its operating costs from SO.

46. On December 22, 2003, the Minister sent two letters to Ms. Zecchini, as Chair of WDO. The first of the two letters contained her formal approval of the BBPP submitted to the former Minister in February 2003. The second letter set out a number of requests for changes or additions to the approved BBPP. For example, the second letter increased the diversion target for the BBPP from the original 50 per cent to at least 60 per cent of Blue Box waste by 2008. The second letter also addressed the issue of costs of the program:

> The new 2004 fees schedule should include 2 new actions. First, a cost-containment strategy that will ensure municipal blue box program costs are properly managed. Second, I would like WDO to do further analysis on the financial and operational impacts of the Blue Box Program Plan on the small business community, and include incentives for small businesses to improve diversion of their blue box wastes in order to reduce their cost.
>
> The Appendix includes detailed program requirements which I want you to ensure are explicitly included as part of the program and addressed in the submission.
>
> I am requesting that you submit the above items to me for my approval by March 31, 2004.

47. A list of the Minister's requests was appended to this second letter. The Appendix entitled "Detailed Program Requirements" included the following:

> 1. Policies and practices to lead to at least 60 per cent diversion of all Blue Box wastes by 2008 through reduction, reuse or recycling.
> 2. Target percentages for each Blue Box material that will be diverted annually in the program. Policies and practices to ensure that the proposed material diversion targets are met.
> 3. Benchmark targets for municipal diversion rates.
> 4. Specific cost containment principles for municipalities and stewards to follow. Policies and practices that will ensure compliance with cost containment principles.
> 5. Policies and practices to encourage effectiveness and efficiency for municipal Blue Box systems.
> 6. Policies and practices to ensure that the administrative costs incurred by Waste Diversion Ontario and Stewardship Ontario are no more than 5 per cent of the total program costs.
> 7. Projected schedule of steward's [sic] fees.

4. **Cost Containment Strategy and the Cost Containment Plan**

48. In response to the Minister's request for a cost containment strategy, MIPC, under the direction of WDO's Executive Director, Ms. Gies, and relying on the work of the Subcommittee, prepared a discussion paper entitled "Discussion Paper # 2: Cost Containment Principles, Policies and Practices/Effectiveness and Efficiency Policies and Practices". Discussion Paper # 2 adopted the nine cost containment principles developed and agreed upon in October 2003. Discussion Paper #2 is the foundational document to what ultimately became the Cost Containment Plan (the "CCP").

49. Public consultation sessions were held in Kingston, Toronto, London and Sudbury in respect of Discussion Paper #2. Written submissions were also received. Following this consultation process, the CCP was developed. The CCP was ultimately reviewed and approved at a two-day retreat of MIPC in June 2004. The WDO approved the CCP on July 9, 2004 and sent it to the Minister on July 12, 2004 for approval.

50. In the meantime stewards continued to express concerns about the escalating costs of the BBPP. Particular concerns related to errors discovered in the municipalities' costs reported to the Datacall in 2004. The reported costs (which were incurred by municipalities in 2003) were approximately $117.5

million as compared to the approximately $87 million projected in the BBPP.[6] The stewards began to doubt whether even the CCP would be effective in keeping costs down.

51. On November 1, 2004 (and again on December 15, 2004) the Chair of WDO wrote to the Minister requesting that she defer her consideration of the CCP pending further discussions between SO and the municipalities. Before these discussions were completed, the Minister wrote to WDO on December 30, 2004 approving the CCP. The Minister's letter also requested WDO to undertake three additional actions, including the implementation of the CCP on an accelerated time frame -- she stated that she "would like to see the reasonable cost bands implemented in 2006 rather than 2008 as proposed." She then requested that the final revised CCP be sent to her by January 31, 2005.

52. Following the approval of the CCP, on January 4, 2005 the MOE issued a press release about the BBPP. It said:

> … For the first time since industry began paying into the program, stewards' fees will be based on actual costs incurred by municipalities. This means municipalities will be receiving the full 50 per cent of net costs, per the cost-sharing arrangement under the Waste Diversion Act.

[6] See Table 7.3 of the BBPP.

53. In January 2005, Ms. Gies again took the lead with the assistance of MIPC in responding to the Minister's request. The revised CCP was sent to the Minister on January 31, 2005. It provided inter alia for the implementation of reasonable cost bands in 2006 and best practice cost bands for 2008.

54. Several months later, on August 11, 2005, Ms. Laurel Broten, the new Minister, approved the revised CCP. In December 2004 and again in August 2005, the Minister's letters to WDO enclosed a Notice of Approval indicating that the approval of the CCP was a material change to the BBPP pursuant to section 27 of the Act.

55. Pending approval of the revised CCP, MIPC, with the assistance of WDO, set out to develop reasonable cost bands as an interim approach in order to accomplish the necessary preparation for the introduction of best practice cost bands in 2008. The work undertaken was considered and approved by MIPC at a two-day retreat in June 2005.

5. **Reasonable Cost Bands**

56. In order to define reasonable cost bands a concept described as the Effectiveness and Efficiency Factor (the "E&E Factor") was used to measure overall municipal performance under the BBPP. Efficiency was measured as a municipality's net cost per tonne and effectiveness was measured in terms

of a municipality's diversion percentage. The E&E Factor equals net cost per tonne divided by the diversion percentage. In the E&E formula a municipality's diversion percentage equals the total tonnes of Blue Box material marketed divided by the total tonnes of Blue Box material generated. Guy Perry, a Steward representative on MIPC, testified that within groupings of similar municipal programs (discussed below), better performing programs tend to have lower E&E Factors "given that they have a higher efficiency (i.e., lower cost) in the numerator and a higher effectiveness (i.e., a higher percentage recovery) in the denominator."

57. For the purpose of employing the E&E Factor in the context of reasonable cost bands, the participants at the MIPC retreat divided the province into eight municipal groupings – large urban, urban regional, small urban, rural regional, rural collection south, rural depot south, rural collection north and rural depot north. The E&E Factors were then calculated for each municipality. Mr. Perry explained the use of this information in paragraphs 53, 54 and 56 of his affidavit:

> 53. MIPC then determined, for each grouping, a Reasonable Cost E&E Factor, which was calculated as the mean plus one standard deviation of the E&E Factors for the 75 per cent better performing programs. The Reasonable Cost E&E Factor for each group was used to define an upper limit on the E&E Factors of municipal programs.

> 54. The net cost of municipal programs with E&E Factors at or below the Reasonable Cost E&E Factor for their respective grouping were included in the calculation of the total net costs incurred by the municipalities as a result of the program. The cost of municipal programs with E&E Factors above the Reasonable Cost E&E Factor of their respective grouping were adjusted to equal the cost corresponding to the number of tonnes recovered given the Reasonable Cost E&E Factor, and these adjusted costs also were included in the total net costs incurred by the municipalities as a result of the program.
>
> . . . .
>
> 56. It was recognized that inaccuracies remained in the data reported, the estimates of generation and, as a consequence, in the resulting Reasonable Cost E&E Factors. This was addressed using a sample of three quarters of the programs for 2006 (two thirds for 2007) and setting the Reasonable Cost E&E Factor at one standard deviation above the mean. It was understood that over time, with better data, and with the effects of other cost containment initiatives, much of the variability in cost and performance likely would decrease. However, it was also recognized that variability likely would remain for two reasons: i) factors beyond the control of the municipalities, and ii) decisions made by the municipalities regarding the design and operation of their recycling programs, both of which would result in differences in cost and performance. Further work would be required to understand these differences.

58. Mr. Perry concluded his evidence on this subject at paragraph 57 of his affidavit:

> The municipal representatives on MIPC accepted the definition of reasonable cost bands in this manner, and MIPC agreed to a $10 million reasonable cost band reduction for the 2006 Steward Obligation and a $14 million reasonable cost band reduction for the 2007 Steward Obligation. This resulted in a $24 million reduction in total net costs over two years and a corresponding impact of $12 million on the Steward Obligation. …

59. The boards of AMO, SO and WDO approved reasonable cost bands. With respect to AMO specifically, the minutes of the June 21, 2005 MIPC meeting provide:

> 3. Implementing 'reasonable cost' bands
>
> a) AMO Executive response to MIPC agreement on reasonable cost bands
>
> The following was presented to and approved by the AMO Board of Directors:
>
> - Reasonable cost bands based on the E&E Factor to result in $10 million in cost reductions in 2006 and $14 million in 2007 for a total of $24 M over two years
> - E&E Fund be directed to identify and implement best practices
> - Best practice admin at 5 per cent and 3 per cent in 2007

60. On December 21, 2005, Minister Broten wrote to the Chair of WDO as follows:

> I am pleased to see that various aspects of the Cost Containment Plan, which I approved on August 11, 2005, will be implemented with the 2006 fees. In particular, I note that the principle of "reasonable cost bands" has reduced the

> overall system costs by $10 Million. I applaud the Association of Municipalities of Ontario and all stewards of Blue Box waste for working together to achieve such a significant level of cost containment.

6. **Best Practice Cost Bands and the KPMG Report**

61. After developing and employing reasonable cost bands MIPC turned its focus to a definition of best practice cost bands. Initial steps taken included: consultation with various experts including the Ontario Centre for Municipal Best Practices and the Ontario Municipal Benchmark Initiative; consultation with experts in Europe and Australia; the retention of Queen's University to conduct a literature review; and consultation with many municipalities in an effort to define best practices and assess their impacts. Unfortunately nothing concrete emerged from this initial search for a definition of best practices.

62. At the MIPC retreat in 2006 the decision was made to retain third party consultants. A MIPC Steering Committee for the Best Practices Project was then created. The Effectiveness &Efficiency Fund (a fund created with the fees paid by stewards and used to finance improvements to municipal Blue Box programs) provided the funding for the project. Nigel Guildford was retained as Project Co-ordinator. Through a request for proposals process the Steering Committee selected KPMG to lead the best practices consulting

team. A Project Charter was developed which stated the Project's objectives as follows:

- Key objective - To determine the Ontario net system best practice cost for determining stewards' contribution.
- Identify Ontario Blue Box Recycling Program Best Practice activities, opportunities and associated costs.
- Use of E&E fund to promote best practices.

63. According to the Project Charter, the key drivers for the Project were:

- Realization on the part of Stewardship Ontario, the Minister of the Environment, Stewards, and other stakeholders that the costs of Blue Box program [sic] are rising
- Municipalities want to maximize diversion
- Stewards are concerned that their share of the program cost goes toward some programs that are not considered to be best in class
- The Minister of the Environment has determined that Stewards' obligation will be confined to 50 per cent of Best Practice costs by 2008
- Net system cost for 2008 fee setting need to be determined, based on rigorous identification of true Best Practice costs
- Previous attempts to address this issue have not provided the information required to define best practice code
- Municipalities expressed concerns that their unique characteristics have not been fully taken into account when previous classification and costing methods were employed

64. The Project Charter also included the following working definition of best practices:

> Best Practices are defined as waste system practices that affect Blue Box recycling programs and that result in the attainment of provincial and municipal Blue Box material diversion goals in the most cost-effective way possible.

65. The KPMG team included recycling system experts from both Canada and the United States, and representatives from a broad range of municipalities throughout the province. The investigation included some 32 site visits during the course of the team's research, consultations with municipalities and regular status updates to MIPC on the progress of the Project.

7. **The KPMG Report**

66. A draft report was presented to MIPC at a 3-day retreat in May 2007. MIPC members met with the KPMG team on the first day of the retreat. The second and third days involved committee discussions on the KPMG best practices cost model and other broader issues in respect of best practices.

67. The final KPMG two-volume report was delivered to MIPC in July 2007 ("KPMG Report"). Volume I described fundamental best practices applicable to all municipal Blue Box systems as well as conditional best practices applicable only to programs with specific characteristics and under certain conditions.

68. KPMG was not able to satisfactorily predict the cost and performance implications of best practices in individual municipalities. Mr. Guildford described the problem at page 3 of a report, which he made as the Best Practices Project Co-ordinator:

> With respect to the estimation of the cost implications of individual best practices, KPMG was unable to meet the project's objectives. The reason is straightforward: the data available from the WDO datacall combined with additional information from the site visits, while extensive and carefully verified, contain nowhere near enough detail to permit the analysis of individual best practice costs …

69. KPMG did, however, produce in Volume II of its report a cost model, which was intended to estimate the total net system cost under best practices (the "KPMG Model"). In Mr. Guildford's opinion the objective of the Best Practices Project was met in the development of the KPMG Model.

70. Guy Perry, already referred to above, gave evidence as to the mechanics of the KPMG Model. He was a Steward representative on MIPC and is a person with more than 20 years' experience in waste diversion and recycling in both the public and private sectors. From 2004 through 2010, he was directly involved in the process of determining the total net costs incurred by the municipalities as a result of the program. His explanation of how the KPMG Model worked was that it used an analogue program for each of the eight municipal groups already employed by MIPC for the reasonable cost bands

with one additional ninth group. According to Mr. Perry "KPMG then extrapolated the data to all programs according to a set of criteria and rules."

71. For the first few years, in populating the KMPG Model, MIPC used a number of scenarios applying different values for inputs, which resulted in a range of best practice costs.

72. From the outset it was acknowledged that the KPMG Model would need to be updated to continue to be relevant in future years. Volume II of the KMPG Report addresses how the KPMG Model could be updated for use in future years. Page 24 of Volume II states:

> However, as Best Practices are temporal in nature, eventual review of Net System Cost under Best Practices may be necessary. For this purpose the team has developed a process for updating the cost model, including gathering data, normalizing and aggregating costs, and testing the validity of results.

8. **The use of the KPMG Model**

73. It is worth explaining at this point that even prior to the KPMG Model, it was understood and agreed between the parties that the Steward Obligation for any given year would be set using cost data from two years prior. Therefore, to determine the 2008 Steward Obligation, for example, the parties would rely on the data concerning costs incurred by municipalities as a result of the program in 2006. This data came from the province-wide financial survey, the

Datacall, into which the municipalities reported their costs the year after which they were incurred. This is explained in more detail below.

i. 2008 Steward Obligation

74. As already indicated, one of the objectives of the Best Practices Project was to employ the KPMG Model to determine the Steward Obligation for 2008. Prior to its application in 2007, adjustments were made to the parameters of the KPMG Model by agreement of the parties. A range of inputs was used creating a range of outputs. In the summer of 2007, the KPMG Model was populated with 2006 data from the 2007 Datacall to produce a total net system cost under best practices. The KPMG Model costs for 2006 were compared to the municipalities' costs as reported and verified through the Datacall. In the result, the reported costs were used to determine the 2008 Steward Obligation because they were at the lower end of the range produced by the KPMG Model.

ii. 2009 Steward Obligation

75. The KPMG Model was again adjusted according to agreement between the parties. Again the municipalities' costs as reported and verified through the Datacall were at the lower end of the range produced by the KPMG Model.

The 2009 Steward Obligation was again based on the municipalities' reported costs.

iii. 2010 Steward Obligation

76. At a MIPC meeting on July 4, 2008, the parties agreed that best practices would continue to be used to determine the 2010 Steward Obligation. At that same meeting, further discussions were had concerning: the review and update of the parameters to be used in the KPMG Model, the establishment of a working group of technical experts balanced between municipalities and stewards to review the parameters and the analogue communities used in the Model, and the retention of technical experts.

77. This working group became known as the Best Practices Committee or Best Practices Working Group, and was responsible for recommending to the greater MIPC adjustments and modifications to the KPMG Model, at this point more frequently referred to as simply the best practices cost model.

78. As in prior years, adjustments were made to the model in 2010 by agreement. MIPC no longer used a variety of inputs, meaning only a single best practice cost figure would be produced by the model. This time reported costs came in higher than the model costs. The municipal and steward representatives on MIPC agreed to set the 2010 Steward Obligation on the basis of the mid-point

between the municipal costs as reported and verified through the Datacall and the costs produced by the model.

iv. 2011 Steward Obligation

79. The Best Practices Working Group further refined the best practices cost model. Mustan Lalani, an SO representative on MIPC and the Working Group who testified in this arbitration, and Alec Scott, a municipal representative who also testified in this arbitration, took the lead in developing the model used to determine the 2011 Steward Obligation. MIPC remained actively involved.

80. Instead of a single analogue program for each municipal group, the updated model used a sample of analogue programs for groups 1 to 5 (larger, more dense municipalities) and for groups 6 to 9 (smaller municipalities) they used a theoretical model (based on the assumption that no program was running at best practices).

81. According to SO, the changes to the model were simply another iteration of the annual modifications done to the original KPMG Model. Municipalities contend, on the other hand, that the model used to determine the 2011 Steward Obligation was in fact a new model, which they call the Baseline Cost Model.

82. Suffice it to say that in setting the Steward Obligation for 2011, MIPC again agreed upon the parameters of the model before populating it with data. It also agreed upon a tolerance threshold – the point at which model costs would be used if reported costs were higher. As the model costs were significantly lower than the municipalities' reported costs, the 2011 Steward Obligation was based on the Baseline Cost Model costs plus a 'variance policy' as agreed by MIPC, namely 50 per cent of the difference between (i) the reported costs less 3.5 per cent and (ii) the model costs.

v. 2012 Steward Obligation

83. For the 2012 Steward Obligation, an updated version of the 2011 Baseline Cost Model was used by MIPC. The Steward Obligation was established by taking the mid-point between the cost produced by the model and the cost reported and verified through the Datacall after the application of a 6.5 per cent tolerance threshold, again as agreed upon by MIPC.

vi. 2013 Steward Obligation

84. In 2012, Ms. Glenda Gies, who was no longer the Executive Director of WDO, was asked by the CEO to facilitate the MIPC discussions for setting the 2013 Steward Obligation. These discussions took place at a two-day

retreat in June 2012. Again, certain adjustments to the Baseline Cost Model were made as a result of an agreement between the parties. Although they started with the model, it was clear to Ms. Gies that neither side had any confidence in it. The parties finally agreed to use the system cost per tonne from the previous year, with adjustments for market conditions. While the gap between the cost produced by the model and the cost reported and verified through the Datacall was huge – $293,734,250 versus $315,707,630 – the agreed result for the 2013 Steward Obligation was $293,352,857, only 0.1 per cent lower than the model output.

vii. 2014 Steward Obligation

85. MIPC was unable to reach a consensus on the 2014 Steward Obligation. Although there were some discussions in MIPC as to how to approach the 2014 Steward Obligation, they come to naught.

86. Both sides agree that in 2012 a model was run and a figure produced as part of the negotiation process. The MIPC draft meeting notes for May 30, 2013 record: "Alec Scott is to run last year's BP Model with Will's [Will Mueller of WDO] input." Will Mueller is an employee of WDO, and reports to Richard Findlay (the Director of Operations and Oversight). Mr. Mueller did not testify during this arbitration. On July 12, 2013, Mr. Mueller sent an e-

mail to persons participating in a conference call that day which said: "Please see attached a copy of Best Practices model, run with 2012 Datacall data. The output is $291,787,453." The information was contained on an Excel spreadsheet entitled, "2014 Obligation Baseline Cost Model – 2013 – 07 – 12".

87. The subsequent negotiations and a mediation failed to achieve consensus between steward and municipal representatives on MIPC.

88. The parties now disagree as to the use to be made of the model run in 2012 for the purpose of setting the 2014 Steward Obligation. Alex Chan, an employee of SO and a member of MIPC from February 2010 until September 2011, gave evidence that he reviewed the work of Daniela Fernandez, a senior analyst for SO, who reviewed the model run by Mr. Scott and Mr. Mueller. Mr. Chan testified in paragraph 13 of his affidavit that:

> As is described in detail below, the Best Practices Cost Model prepared by Mr. Scott and Mr. Mueller forms the basis for Stewardship Ontario's calculation that it is relying upon for the purpose of this Arbitration and for the amount set out in paragraph 99 of the Statement of Defence of Stewardship Ontario. To my knowledge, neither Ms. Fernandez nor any other Stewardship Ontario members of MIPC participated in the populating of data and running of the Best Practices Cost Model that was found on the July 12, 2013 Spreadsheet.
>
> (Emphasis added.)

He further testified at paragraph 14 of his affidavit:

> Our joint review concluded, and I continue to believe, that the methodology used by Mr. Scott and Mr. Mueller to apply best practice cost bands for the determination of the total gross costs was unchanged from the previous year. Data inputs, such as the reported costs, tonnes, best practices scores and Consumer Price Index (CPI), had all been properly updated in the July 12, 2013 Spreadsheet prior to receipt.

89. Mr. Chan's affidavit sets out the details of how Ms. Fernandez and he arrived at the 2014 Steward Obligation by relying on the output from the model utilized by Messrs. Scott and Mueller. Paragraphs 16 through 21 of the Chan affidavit set out the relevant detail as follows:

> 16. Ms. Fernandez and I concluded, through our review of AMO's calculation, that the methodology approved by MIPC in May 2012 and used in the prior year was the same methodology used in the Best Practices Cost Model sent by Mr. Mueller on July 12, 2013.
>
> 17. Using the 2012 Datacall data, which was mutually agreed to by Stewardship Ontario, AMO, and WDO, the total best practice gross cost calculated by Mr. Scott, an AMO employee, and Mr. Mueller, a WDO employee, was **$291,787,453**. This compared to a gross cost reported in the Datacall of $326,323,722, a variance of about 11 per cent, with the best practice calculation being lower. We, Stewardship Ontario, simply accepted their methodology and used their gross cost number to calculate the total net costs as follows.
>
> 18. Applying the three year average revenue of **$102,677,331**, which had increased by $7.7 million or 8.2 per cent over the previous year's calculation, resulting in total net costs of **$189,110,122**. According to paragraph 99 of the Municipalities Claim, the three year average revenue of $102,677.331 is not in dispute.

19, As has been agreed upon practice of MIPC in prior years, 50 per cent of the prior year adjustments, namely **$2,249,102** was then factored in, particularly relating to the results of the Toronto financial audit that reversed a previous finding that Toronto had over-reported (which had been included at a rate of 50 per cent in a previous adjustment), bringing the best practice total net costs, including prior year adjustments, to **$191,359,224**. This is the total net cost incurred by municipalities as a result of the Blue Box Program as determined utilizing the best practices cost bands. In paragraph 99 of the Municipalities Claim, the municipalities have double-counted the prior year adjustments (i.e. they have departed from the agreed upon past practice of applying 50 per cent of the prior year adjustments to the calculation).

20. The number found at paragraph 99 of the Statement of Defence of Stewardship Ontario is simply this number, $191,359,224.00, divided by 2 (i.e. 50 per cent), which equals **$95,679,612**.

21. In summary the calculation is as follows:

Total gross costs for 2012 calculated utilizing best practices cost bands:	$291,787,453
Less three year average revenue:	-$102,677,331
Plus prior year adjustments:	+$2,249,102
Total net costs for 2012 calculated utilizing best practices cost bands:	**$191,359,224**
50 per cent of the total net costs incurred by the municipalities as a result of the program:	**$95,679,612**

(Emphasis in the original.)

90. In sum, SO submits that the number produced by the Baseline Cost Model populated in 2012 ought to be used as the basis for the 2014 Steward Obligation.

91. The Municipalities disagree. They submit that the baseline cost model was never intended to be used to determine the 2014 Steward Obligation. Mr. Scott responded to the evidence given by Mr. Chan in a reply affidavit. He testified that Mr. Mueller asked him to run the model to assist in the MIPC negotiations. He did so as a favour to Mr. Mueller. However, he told Mr. Mueller that the Municipalities did not wish to run the model. Mr. Scott did not think that the model produced useful information and should be discarded.

92. Mr. Scott provided a list of criticisms of the model which included:

(i) The baseline cost model is not a best practices cost model. It does not represent an update of the original KPMG Model as contemplated by the KPMG Report. No version of the KPMG Best Practices Cost Model was run in 2012 or 2013 according to Mr. Scott.

(ii) The baseline cost model compares municipalities to the cheapest members of their peer group regardless of why some programs are cheaper and whether the lower price is sustainable.

(iii) The baseline cost model was not designed to estimate costs that would have been incurred under the Cost Containment Plan. The model fails to take into account the additional costs imposed on the Municipalities as a result of the difficulty in recycling new lightweight

packaging materials that may find their way into the blue box.

(iv) The CPI was not included in the baseline cost model as claimed by Mr. Chan in his affidavit.

(v) The 2012 baseline cost model can produce a range of numbers but the number Mr. Scott produced for Mr. Mueller was only one possible output. The output Mr. Scott produced did not provide either the total costs incurred by the municipalities in 2012 or the "best practice system costs" as the term was used in the KPMG Report.

93. Mustan Lalani, a management consultant, was employed by SO from June 2008 until September 2012 to model, analyze and negotiate the amount of the Steward Obligation each year. He was also an SO representative on MIPC from June 2008 until March of 2012. Mr. Lalani, as indicated above, worked with Mr. Scott to develop the Baseline Cost Model. As to the utility of the model, he testified as follows in paragraphs 72 and 73 of his affidavit:

72. The computer model that Mr. Scott and I developed was not designed to, and does not, represent the costs that municipal Blue Box programs could realistically have achieved in the year of the relevant Datacall.

73. Because of the substantial variability among Ontario municipalities and their Blue Box programs, the Baseline Cost Model will always produce a calculated figure substantially less than the verified costs incurred by municipalities. The gap between the two figures is likely to be greater when there is greater variability in costs, recovery and Best Practice scores within each municipal grouping. This will occur because every

municipality was benchmarked against the top 50 per cent of municipalities within a "band".

94. As a result of the parties' disagreement they have resorted to this arbitration. It is now my responsibility to determine what MIPC was unable to do in 2012 by consensus – set the 2014 Steward Obligation.

II. THE ISSUES

95. The issues to be decided in this arbitration are as follows:

(i) Does the Steward Obligation under section 25(5) of the Act equal 50 per cent of total net costs actually incurred by the municipalities?

(ii) What are the total net costs incurred by the municipalities as a result of the program in 2012?

(iii) Does section 25(5) of the Act permit in-kind contributions in lieu of cash payments to municipalities from newspapers in Ontario who are members of the Canadian Newspaper Association ("CNA") and the Ontario Community Newspapers Association ("OCNA").

(iv) What factors, if any, curtail the municipalities' cost recovery right under section 25(5) of the Act, and how should those factors be applied?

III. POSITION OF THE PARTIES & ANALYSIS

1. Does the Steward Obligation under section 25(5) of the Act equal 50 per cent of total net costs actually incurred by the municipalities?

96. This question turns on the correct interpretation of section 25(5) of the Act, which I repeat for convenience:

> 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.

i. The Position of the Municipalities

97. The Municipalities argue that this issue turns on two questions: (a) the meaning of section 25(5) of the Act, and (b) whether any subsequent enactment has changed this meaning.

a) <u>The meaning of section 25(5)</u>

98. The Municipalities argue that the plain meaning of this provision is clear:

- the stewards are required to pay the costs actually incurred by the municipalities,
- as a result of collecting, handling, transporting and processing blue box waste that Stewards produce, and which
- municipalities report to the annual financial Datacall.

99. The Municipalities contend that if the Legislature intended to place a reasonableness limit on the stewards' payment obligations, it would have done so. The Municipalities rely primarily on the Civil Remedies Act, 2001, SO 2001 c 28, where, according to the Municipalities, the Legislature distinguished between compensation of costs incurred by the Crown, which have no reasonableness limitation,[7] and the compensation of private claimants, which is limited to "reasonable" costs.[8]

100. According to the Municipalities, there is no need for any reasonableness limit; net costs mean actual costs incurred by the municipalities. Section 25(5) is not enabling in that it does not delegate power to a specific person or entity to determine which costs are to be shared. Though WDO has a great deal of flexibility in determining how the BBPP is designed and implemented, including how to calculate and verify the costs reported by the municipalities,

[7] See for example sections 4(1), 6(2.1), 6(3), 6(3.2), 6(3.3), 9(1), 11(2.1), 11(3), 11(3.2), 11(3.3), 11(3.4), 11.3(9), 11.4(3), 11.4(4), 11.4(6), 11.4(7), 15(2.1), and 15(3).
[8] See sections 5(1) and 10(1).

the Municipalities contend that once the costs are determined, the 50 per cent split is mandatory.

101. Finally, the Municipalities reject the proposition that "as a result of the program" in section 25(5) of the Act means anything but as a result of collecting, handling, transporting, and processing Blue Box wastes that Stewards generate, and which municipalities report to the Datacall. "Program" cannot refer to the BBPP, which is only a mechanism to verify municipal costs and collect funds from stewards. The only costs actually incurred as a result of the BBPP are administrative costs.

102. The Municipalities note that in addition to the plain meaning of the provision, the Act must be "given such fair, large, and liberal interpretation as best ensures the attainment of its objects."[9]

103. In determining the object and purpose of the Act, the Municipalities suggest that reliance may properly be had on extrinsic evidence such as the iWDO Report, the Hansard evidence and the evidence of Mr. Stephenson, Mr. Rocoski, Mr. Sferrazza, Mr. Rathbone, and Mr. Cook (all tendered as witnesses by the Municipalities).

104. They contend that one of the most important purposes of the Act is to secure long-term and sustainable funding for municipalities. This is evident from the

[9] Legislation Act, 2006, SO 2006 c 21, Sch F, s 64.

recommendations in the iWDO Report, which led to the Act and specifically the inclusion of section 25(5) and the requirement that stewards should pay 50 per cent of the net costs of municipal recycling programs, calculated through an annual, province-wide survey.

105. This is also consistent with the evidence of Mr. Stephenson, a primary author of the iWDO Report, whose evidence was that "[t]he essence of this [recommended funding] model was a 50/50 split of actual residential Blue Box program costs between Stewards and municipalities." In his affidavit, Mr. Rathbone, who was, along with Mr. Stephenson, with Corporations Supporting Recycling (a prominent steward organization) in and around 2000, provides that "…the final deal was 50 per cent of actual costs, with performance incentives to individual municipalities to improve their efficiency and effectiveness."

106. The Municipalities argue that the Hansard evidence demonstrates that the stewards proposed to limit costs while the Act was being drafted, but that these proposals were not accepted.

107. When introducing Bill 90 to the Legislative Assembly, Minister Witmer noted that "[t]his legislation firmly establishes a partnership between industry and the municipalities…", which presumes an equal financial burden. It is

instructive, according to the Municipalities, that subsequent Ministers have continued to refer to the Act as requiring a 50-50 split.

108. With the foregoing in mind, the Municipalities suggest that the only way that stewards could now be entitled to pay less than 50 per cent of actual costs incurred is if the statutory right set out in section 25(5) of the Act has been changed, which they say it has not.

b) <u>No subsequent enactment changed the meaning of section 25(5)</u>

109. The Municipalities submit that it is SO who must prove that the statutory right has been contained or changed in some way. Municipalities argue that no Ontario law imposes payment containment -- no regulation has defined "net costs incurred" as anything but the actual program costs incurred by the municipalities. The BBPP does not provide for any payment containment, and most importantly, the Municipalities argue that the CCP is not a legal document, and to the extent it has been construed as such, it has been misinterpreted.

(i) No Regulation

110. According to the Municipalities, the Minister has the power in section 42(j) of the Act to "defin[e] any word or expression used in [the] Act that is not already defined." This power has not been exercised in respect of the phrase "net costs incurred". As a result, the Municipalities argue that none of the actions taken by the Minister under section 7 (Policies established by Minister) or section 27 (Changes to approved program) can be said to have defined section 25(5) since the Minister cannot do through other sections what has not been done through section 42.

(ii) No payment containment in the BBPP

111. The Municipalities state that there is nothing in the BBPP that allows stewards to pay less than 50 per cent of the costs reported and verified though the Datacall. The BBPP provides that net costs are to be determined by simple arithmetic as part of the Datacall, with MIPC bearing the responsibility to ensure that only eligible costs are reported and then verified.

112. The Municipalities argue that the BBPP uses the phrase "net costs" approximately 99 times – and always to mean "what costs were incurred" as opposed to "what costs should have been incurred." In fact, 'net costs' were to be used for many purposes, including the Effectiveness and Efficiency

Fund (later renamed the Continuous Improvement Fund - CIF), the Municipal Funding Allocation Model (MFAM), and the Pay-In-Model. These last two models refer to the method used to determine the funds paid to the individual municipalities and the method used to determine the fees paid by individual stewards, respectively.

113. The BBPP refers clearly to the cost figures (both gross and net) for year one as a "negotiated number", and the Municipalities contend that there is nothing to suggest that the same negotiated process would be used in future years. If it were, they argue that a dispute resolution mechanism would have been necessary. According to the Municipalities, it is of note that WDO twice assured the Minister that it was not.

114. The Municipalities disagree with the Stewards' position that the principle of "acceptability", one of the six principles set out in the BBPP to be used as a guideline for the net costs calculation, requires costs incurred by municipalities to be limited to a reasonableness standard. The Municipalities maintain that the reference to "acceptability" in section 7.3.1 of the BBPP applies to the fees that SO charges its stewards. It is concerned with the constitutional validity of those fees – which is why, according to the Municipalities, there is no reference to "acceptability" in regard to the costs incurred by municipalities as a result of their Blue Box Programs.

115. Finally, the WDO, which approved the BBPP, has no authority to change section 25(5) of the Act, which means the BBPP could not have changed the determination of the Steward Obligation contained therein. Though the WDO has the power to determine the amount of money required by it and the IFO to carry out their responsibilities under the Act, it cannot determine the amount of money to be paid to municipalities under section 25(5).

(iii) The CCP did not affect the statutory right

It is not a legal document

116. The Municipalities argue that the CCP is not a legally binding document and was not intended to be. In her letter dated December 22, 2003, Minister Dombrowsky requested a "cost-containment strategy".

117. The Municipalities contend that the CCP has the language style and structure of a report, not a legally binding document. Additionally, it was designed with principles and objectives to be pursued by stewards and the Ministry of the Environment, as well as municipalities. Though municipalities have diligently adhered to their responsibilities, there is no evidence that the Stewards have met their obligations under the CCP.

118. For example, contrary to the stewards' responsibility to use materials that can be cost effectively managed in municipal Blue Box programs, the evidence is

in fact that stewards' packaging has shifted to materials that are more expensive to recycle.

It did not amend the BBPP

119. The Municipalities argue that the Minister has no power to amend the BBPP, but can only approve or disapprove the amendments made by the WDO. Since the WDO did not adopt the CCP as an amendment to the BBPP, no approval by the Minister can give it such effect. To that end, the Municipalities contend that the words of the WDO Board meetings should be taken literally, and these do not refer to the CCP as an amendment.[10]

120. The Municipalities argue that the Minister's Notice of Approval is vague, at best, and does not clearly indicate what it purports to approve.

121. Like the other amendments to the BBPP, an amendment in respect of the CCP would have been set out in detail so that the parties and members of the public could calculate its financial impact. It is noteworthy that the CCP does not purport to amend the BBPP, or any wording contained therein; rather, in its own words, it "focuses primarily on cost containment activities that can be addressed within the structure of the approved BBPP."

[10] See General Electric Canada Co v Aviva Canada Inc, 2012 ONCA 525 at paragraph 23.

It was not intended to impose payment containment

122. The Municipalities argue that no Minister intended for the CCP to change how future Blue Box costs would be divided between stewards and municipalities. No Minister has referred to "best practice costs" or "best practice system costs" in relation to the Steward Obligation.

The scope and purpose of the CCP

123. The Municipalities submit that neither the scope and purpose of the CCP nor the public consultation record made in respect of the CCP support the position that it amended the BBPP.

124. The CCP defines cost containment as distinct from payment containment. According to the Municipalities, cost containment is about actual, future costs, and the two major elements of cost containment are that: (1) individual municipal Blue Box programs should have a financial incentive to improve efficiency (which is provided through the MFAM), and (2) municipalities should have access to funds to do so (which is provided through the Effectiveness &Efficiency Fund and later the CIF).

125. Municipalities agree that best practice scores can and have been useful in the decision-making processes for both the distribution of funds to municipalities

and the targeting of grants through the Effectiveness &Efficiency Fund and CIF.

126. The record of public consultations is also consistent with this position. It shows that cost bands were proposed only for use in identifying extraordinary costs/outliers. According to the Municipalities, by definition, outliers are an exception, meaning 50 per cent of a municipal grouping cannot be outliers.

127. Cost bands, as an implementation of best practice costs, were not intended to be used as a cap or limit on costs. The Municipalities submit that the cap on administrative costs appears in the consultation document as a trade for the stewards' proposal to use cost bands to cap/limit overall costs. Accordingly, the stewards cannot benefit from slashing administrative costs by the millions and then not honour their end of the bargain.

The ambiguous language refers to the MFAM, not payment containment

128. The Municipalities suggest that if the Minister wanted the taxpayers to bear a larger portion of the cost to divert Blue Box waste, she would not have left the parties to negotiate this amount of public funds without rules, transparency and a dispute resolution method.

129. As noted above, the correct interpretation of cost bands in the CCP is that they apply to the distribution of money among individual Blue Box programs:

the cost bands are defined, applied to identify outliers within an individual municipal program, and then used to determine net costs and funding for those same individual programs.

130. The Municipalities accept that best practice costs were to be used to set 2008 Steward Obligation, but contend that the CCP is clearly limited to 2008, meaning this has no relevance to the determination of the 2014 Steward Obligation.

131. Even if the Minister purported to change the statutory right through the CCP, the Municipalities argue that this would have been ultra vires and, therefore, ineffective.

c) Municipalities' conclusion on Issue 1

132. With the foregoing in mind, the Municipalities argue that the only interpretation is that section 25(5) of the Act requires the stewards to pay to the municipalities 50 per cent of their net costs actually incurred in diverting Blue Box waste.

133. In the alternative, the Municipalities contend that the costs are limited by some reasonableness standard, the costs reported by municipalities to the Datacall and verified by WDO are reasonable costs, for which the municipalities are entitled to recover from stewards 50 per cent.

ii. The Position of Stewardship Ontario

134. The crux of SO's position is that the funding obligation in section 25(5) of the Act is to be interpreted with regard to the BBPP, as amended by the CCP. This, in turn, leads to a conclusion that "net costs incurred" is calculated with the use of best practices cost bands, which are operationalized through the best practices cost model developed by KPMG and subsequently revised by MIPC.

135. SO focuses on the purpose of the statute as a whole and the administrative nature of the program. It seeks to give effect to the Act's provisions "so that the administrative agencies may function effectively, as the legislature intended … and wherever possible, avoid a narrow technical construction and endeavour to make effective the legislative intent as applied to the administrative scheme involved."[11]

136. SO agrees that both direct and indirect evidence should be considered, and relies on, in particular, the purpose statement of the Act,[12] Hansard, and specifically statements by Ministers introducing or defending the Act,[13] and the legislative scheme. According to SO, the analysis is with the aim of "grasp[ing] and explain[ing] the basic structure on which the Act is built and

[11] See Maple Lodge Farms v Canada, [1982] 2 SCR 2 at page 7.
[12] See Council of Canadians with Disabilities v Via Rail Canada Inc, [2007] 1 SCR 650 at paragraph 287.
[13] HL v Canada (Attorney General), 2005 SCC 25 at paragraph 105.

how the various parts and provisions were meant to function within this structure to achieve the desired goal…[or] mix of goals."[14]

a) <u>The purpose of the Waste Diversion Act</u>

137. SO submits that section 1 of the Act sets its purpose as the promotion of "the reduction, reuse and recycling of waste and [the] provi[sion] for the development, implementation and operation of waste diversion programs." SO argues that this Act was meant to be a new start and a new level of cooperation and coordination between industry and the municipalities compared to what was already in place for Blue Box waste diversion. This is demonstrated by the government's increasing diversion targets, which require "fundamental technical, social and policy shifts from citizens and from industry."[15] It was the new levels of coordination and cooperation between industry and the municipalities that were emphasized in the government's remarks while the Act was in the Legislature.

138. According to SO, cooperation is the cornerstone of the regulatory regime: Minister Witmer introduced the statute as a "partnership between industry and

[14] See Ruth Sullivan, <u>Sullivan on the Construction of Statutes</u> (Fifth Edition) (Markham: Lexus Nexus, 208) at pages 364-365.

[15] See page vi of the iWDO Report, which makes the quoted comment in the context of explaining the changes necessary to reach 50 per cent diversion (the goal at that time). See also the letters from the Minister to WDO dated December 22, 2003 and August 14, 2009.

the municipalities …[that] will build on the blue box and … will be funded 50-50 by industry and the municipalities."[16]

139. SO argues that a partnership means compromise and cooperation, such that municipalities cannot submit a bill for 50 per cent of whatever it says the service costs. This is evidenced by the regulatory framework of the Act, which facilitates this partnership and delegates a supervisory role to the WDO and the Minister.

b) The legal framework within which the delegated powers are exercised

140. SO contends that the Act and various contracts required by the Act create an administrative structure that tasks various entities with the design, implementation, operation, funding, monitoring, and amending of waste diversion programs. SO argues that the Act was a political compromise between municipalities and the industry, with WDO created to provide new accountability for Blue Box waste management in the province.

141. According to SO, within this regime, the ultimate authority rests with the Minister as far as the scope, form and content of a program created under the Act. Therefore, once a program like the BBPP is approved by the Minister, WDO and the IFO are required to operate the program accordingly. The

[16] See Ontario Official Report of Debates (Hansard) (37th Parliament, 2nd session), June 26, 2001 at page 1882.

BBPP is therefore a natural starting point to inform the parties' obligations under the Act.

c) The entirety of the Act must be interpreted in the context of the "Nexus Principle"

142. SO argues that any interpretation of the funding provisions of the Act must be made in accordance with the law applicable to administrative fees or levies. It submits that the funds paid by stewards are properly interpreted as a fee that must be charged for a regulatory purpose, or be necessarily incidental to a broader regulatory scheme.[17] As such, there must be a nexus between the fees collected under the Act and the cost of the regulatory scheme. If the fees charged exceed the cost of the service provided, they risk being characterized as a tax, which in this case would be unconstitutional as the province can only levy direct taxes.[18]

d) Section 25(5) of the Act

143. SO contends that both the English and French versions of the Act support the interpretation that section 25(5) only imposes a payment obligation on stewards in relation to municipalities that have opted into and complied with

[17] See Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134.
[18] See Eurig Estate (Re), [1998] 2 SCR 565, which dealt with the nature of the probate levy as properly a fee or a tax.

the BBPP. Further, the amount paid is determined with respect to the BBPP as developed, approved and amended by the Minister.

144. SO adds that the Act does not define net costs, and there is no mention of the term "actual" in section 25(5). Further, SO denies that any of the submissions made on behalf of municipalities in the Legislature assist in determining which costs would be included, or to what extent certain costs are included. Many language suggestions were made by municipalities, which were not accepted. Ultimately, there were discussions right into December 2001 concerning the language of section 25(5), the question always posed being, what costs are municipalities entitled to 50 per cent of?

145. All of this is to suggest that "net costs incurred" must be interpreted in light of the BBPP and what SO characterizes as its subsequent amendment by the CCP.

e) <u>The Blue Box Program Plan</u>

146. According to SO, the guiding principles developed by the AMO/SO Task Group are the starting point for any analysis of what was subsequently done in relation to the development of the methodology to calculate net costs incurred by municipalities as a result of the BBPP.

147. These principles, with slight variation, along with the role of the Task Group, which became MIPC, were incorporated into the BBPP. It is SO's position that the BBPP is a proscriptive, directional, and aspirational document that is not to be interpreted like a statute. The BBPP did not define a methodology or procedure for calculating total net costs, a task which was left to MIPC. To the extent any guidance was provided, SO submits that it was high level and provided on the understanding that work and judgment were still required to determine which costs were eligible and to what extent. For example, the BBPP provides for the Datacall, which SO notes is not something prescribed by the Act, and around the time of the first Datacall in 2003, there was no consensus or guidance in the BBPP on what data would be included. The parties agreed that this would be determined as part of an iterative process.

148. SO notes that the BBPP included projections for future costs which were projected to almost double in five years. As a result, the drafters of the BBPP felt the need to include a statement that "…it is in the interests of Stewards and Municipalities to pursue all possible strategies for containing costs."[19] This comment is even more important since Municipalities reported costs that almost doubled the BBPP's projections in the program's first year.

[19] See section 7.4.2 of the BBPP at page 63.

149. SO's position is that in the BBPP MIPC was tasked with defining how to calculate gross costs and gross revenues, which it did through the CCP and the best practices cost model.

f) The Cost Containment Plan

150. Without the CCP, SO's position is that the BBPP may never have been approved. To understand the impact of the CCP, SO focuses on the agreement of the Subcommittee on the nine principles of cost containment, including the principle of "cost bands", which, according to Dennis Darby, a representative of SO on the Subcommittee who proposed the principle and who was not cross-examined on his evidence, were to be used in identifying the costs of operating an efficient BBPP and used "in the calculation of the total net costs incurred by the municipalities…".[20]

151. SO submits that cost bands were a compromise that both municipal and steward representatives on the Subcommittee supported. SO acknowledges that steward and municipal representatives on MIPC disagreed on the use of "cost bands to identify extraordinary blue box costs", but argues that this disagreement was overridden by the Subcommittee that recommended (with

[20] See Darby affidavit at paragraph 14.

input from the municipal members) that cost bands be used to determine the legitimacy of costs in calculating the net costs incurred.

152. If cost bands were not used to determine total net costs, SO argues that they would be ineffective in incentivizing cost containment. SO adamantly rejects the Municipalities' proposition that in lieu of using cost bands to limit municipal costs, the parties agreed to cap administrative costs. According to SO, the administrative cap simply related to how those costs would be reported in future Datacalls. As Municipalities did not call any witness from the Subcommittee on this point, SO requests that an adverse inference be made against them.

153. According to SO, the development of the CCP was a collaborative process that built on the work of the Subcommittee. All parties knew that payment containment (i.e., the use of cost bands to limit costs) was part of the process.

154. SO argues that the CCP clearly set out the practices and policies that required collaboration from both municipalities and stewards, and was explicit that cost bands would be "subsequently utilized to determine net program costs and funding."[21]

155. According to SO, the Minister's approval of the CCP indicating that the approval was pursuant to section 27 of the Act means that the CCP

[21] See page iv of the original CCP.

constituted a material change to the BBPP. SO argues that the Minister's Press Release from this time, which refers to stewards' fees based on "actual" costs incurred by municipalities, uses loose language that cannot be taken at face value. Rather, this statement needs to be considered in the context of the BBPP and the CCP which inform the cost-sharing arrangement under the Act.

156. After the Minister requested revisions to the CCP, SO argues that no objections were made by any municipal members despite the fact that the revised CCP made clear that reasonable cost bands were to be used in 2006, and best practices cost bands in 2008.

157. Again, when approving the revised CCP the Minister noted that the approval constituted a material change to the BBPP as contemplated by section 27 of the Act.

158. SO submits, therefore, that the BBPP was approved by the Minister under section 26 of the Act. The Minister then made two material changes to the program in approving each version of the CCP. These changes are therefore binding on the parties, including their impact on the calculation of total net costs incurred under the program.

159. The Municipalities make much of the lack of dispute resolution process required by section 5(e) of the Act to argue that the parties understood the net cost calculation to be simple accounting not impacted by the CCP. SO points

out, however, that in the Letter of Understanding between the parties, WDO was required to establish, and did establish, a dispute resolution process if the municipalities and stewards could not agree in MIPC. According to SO, there is no need for a dispute resolution process to regulate disputes between IFOs and municipalities concerning payments to municipalities since under the BBPP it is WDO, and not SO, that determines the payments to individual municipalities.

iii. Analysis

160. Before addressing the main arguments under Issue 1, I wish to deal with three subsidiary but important issues raised by AMO:

(a) the weight to be attached to the MIPC evidence;

(b) the role of the municipal representatives on MIPC; and

(c) the alleged partisan advocacy of certain witnesses tendered by SO.

a) <u>The weight to be attached to MIPC evidence</u>

161. Counsel for the Municipalities submits that I "should give no weight to anything purportedly done at MIPC".

162. The Municipalities' written submissions at paragraph 292 state:

> MIPC is not a legal person, and has no inherent authority or decision making power. Its "decisions" do not bind anyone.

> It is merely a committee of WDO, with the limited jurisdiction set out in s. 5.4 of the BBPP. This authorizes MIPC to supervise which types of municipal costs are eligible to be submitted to the Datacall, and to verify the accuracy of municipal reports.

163. I do not accept this submission. MIPC in my view has a broad power to make recommendations to the WDO Board. The suggestion that its power is limited to supervision of which types of municipal costs are eligible to be submitted to the Datacall and to verifying the accuracy of municipal reports is to misread section 5.4 of the BBPP. In short, no one has suggested that MIPC made decisions. MIPC made recommendations, which were adopted by the Board of WDO.

b) <u>The role of the municipal representatives on MIPC</u>

164. I cannot conclude as was suggested to me that the municipalities were under gunned and working from a position of serious disadvantage because their MIPC members were mostly volunteers and perhaps did not have the same level of expertise as was available to the stewards. The evidence is that municipalities were active participants in the administration of the BBPP from the outset. This began with the AMO/SO Task Group, and continued through MIPC. The record of meeting minutes and consultations demonstrate that all MIPC members had the opportunity to record their

objections and this was confirmed by the municipal witnesses on cross-examination. Municipal members were quite happy to accept cost containment, reasonable cost bands and best practice cost bands when these produced results that met or exceeded the municipalities' reported costs. When this changed, the evidence is that they objected to the imposition of cost bands used to limit net system costs, and in fact, as will be discussed below, the evidence is that the municipalities were successful in avoiding the model output being used as the dollar figure for the relevant Steward Obligation. The record simply does not support the conclusion that municipalities were disadvantaged in MIPC.

c) <u>The alleged partisan advocacy of certain witnesses tendered by SO</u>

165. Counsel for the Municipalities submits that some of the witnesses for SO engaged in partisan advocacy. At paragraph 304 of their written argument, it states:

> The partisan advocacy of Ms. Gies, Mr. Perry and Mr. Clarke at this hearing illustrates the MIPC milieu in which municipal volunteers, and their collaborative, open culture, collided with stewards' well-funded focus on cutting municipal funding.

166. Nothing would be gained by providing the litany of particular allegations made against Ms. Gies, Mr. Perry, Mr. Clarke and also Ms. Arcaro who was

singled out for strong criticism. As already stated, Ms. Gies was the Executive Director of WDO and Chair of MIPC at a critical time. Andrew Pollock, an AMO representative of MIPC who testified at this arbitration spoke highly of her work. To me she presented as an experienced and devoted professional. Mr. Perry, Mr. Clarke and Ms. Arcaro were SO witnesses with SO connections. Ms. Arcaro expressed very strong views against the position of the Municipalities, which could have been tempered. That said, I am fully aware that evidence from witnesses who have an interest in the outcome of this arbitration must be carefully scrutinized. This applies to witnesses on both sides of the dispute. In this case most of the witnesses who were called were aligned with one side or the other. There were very few neutral witnesses. That said, I think that on the whole witnesses did their best in helping me to understand what is a complicated and difficult case, with much at stake.

167. I now turn to the merits of Issue 1.

d) <u>"Net costs incurred" must be reasonable</u>

168. This interpretive question raised by the first issue comes down to what the Legislature intended in using the words "net costs" in section 25(5) without

modification. In my view, the Legislature either intended the Stewards to pay actual costs or reasonable costs.

169. Counsel for the Municipalities submits that the Legislature, aware of the distinction between a reasonable cost and an actual cost, invokes the reasonableness limit explicitly, when it intends to do so. The Municipalities rely on the 203 times the Ontario Legislature has made reference to "costs incurred" in its statutes. They also rely on examples where the Legislature has distinguished between costs incurred, meaning actual costs, and reasonable costs. The Municipalities refer in particular to the Civil Remedies Act, 2001, SO 2001, c 28, which they point out distinguishes provisions dealing with the compensation of "costs incurred" by the Crown, which have no reasonableness limitation, from provisions dealing with compensation of "reasonable expenses" incurred by private claimants. For example, "costs incurred" appears in sections 4 and 6 of the Civil Remedies Act, which provide that:

> **Interlocutory order for preservation, management or disposition of property**
> 4. (1) On motion by the Attorney General in a proceeding or intended proceeding under section 3, the Superior Court of Justice may make any or all of the following interlocutory orders for the preservation, management or disposition of any property that is the subject of the proceeding:
> ….

5. An order to sever or partition any interest in the property or to require any interest in the property to be sold or otherwise disposed of, and for all or part of the proceeds of the severance, partition, sale or other disposition to be paid to the Crown in right of Ontario as compensation for its costs incurred in preserving, managing or disposing of the property and in enforcing or complying with any other order made under this subsection in respect of the property.

….

Special purpose account

6. (1) If property forfeited to the Crown in right of Ontario under this Part is money or is converted to money, the money shall be deposited in a separate, interest bearing account in the Consolidated Revenue Fund.

Same

(2) For the purpose of the Financial Administration Act, money deposited under subsection (1) shall be deemed to be money paid to Ontario for a special purpose.

Payments out of account for Crown's costs

(2.1) If money is deposited in an account under subsection (1), the Minister of Finance shall make payments out of the account, at the request of the Director and in the amounts determined by the Director under subsection (3.4), to compensate the Crown in right of Ontario for its costs incurred,

(a) in conducting the proceeding under this Part with respect to the property;

(b) in determining whether the proceeding under this Part should be commenced;

(c) in preserving, managing or disposing of the property under this Part; and

(d) in enforcing or complying with orders made under this Part in respect of the property.

….

170. These provisions do not have any reasonableness limit, and none is to be imposed, according to the Municipalities, because in sections 5(1) and 10(1) of the Civil Remedies Act, where the Legislature intended to impose a reasonableness limit, it did:

> **Legal expenses**
> 5.(1) Subject to the regulations made under this Act, a person who claims an interest in property that is subject to an interlocutory order made under section 4 may make a motion to the Superior Court of Justice for an order directing that reasonable legal expenses incurred by the person be paid out of the property.
>
> ….
>
> **Legal expenses**
> 10. (1) Subject to the regulations made under this Act, a person who claims an interest in property that is subject to an interlocutory order made under section 9 may make a motion to the Superior Court of Justice for an order directing that reasonable legal expenses incurred by the person be paid out of the property.

171. According to the Municipalities, the Civil Remedies Act never limits the reimbursement of the Crown's "costs incurred" by any reasonableness criteria, although as noted above, clearly imposes the limit in other circumstances.[22]

[22] For other examples of provisions concerning the compensation of the Crown for its "costs incurred", see 6(2.1), 6(3), 6(3.2), 6(3.3), 9(1), 11(2.1), 11(3), 11(3.2), 11(3.3), 11(3.4),11.3(9), 11.4(3), 11.4(4), 11.4(6), 11.4(7), 15(2.1), and 15(3).

172. The Municipalities did not provide any case law to support this proposition. It is of note that the provisions concerning the compensation of Crown costs fall under two broad categories:

a. The first concerns the Superior Court of Justice's power to order the proceeds of the forfeited property to be used to pay the Crown's costs "incurred in preserving, managing or disposing of the property and in enforcing or complying with any other order made under this subsection in respect of the property."[23]

b. The second deals with the Minister of Finance's ability to use the proceeds of forfeited property to compensate the Crown's costs incurred in:

i. conducting a proceeding under the Act;
ii. determining whether the proceeding under this Part should be commenced;
iii. preserving, managing or disposing of the property; and
iv. enforcing or complying with any other order made under this subsection in respect of the property.[24]

173. I have not found any Ontario cases that interpret the relevant provisions. However, the following analysis is relevant to the interpretation of the Civil

[23] This includes section 4(1), above, along with section 9(1).
[24] See sections 6 and 11.

Remedies Act and therefore has some value in considering the Municipalities' legal argument.

Category I: Powers Conferred on the Court under the Civil Remedies Act

174. With respect to the first category, the statute gives the Court, in making a costs award, the power to order that the proceeds of forfeited property be used to compensate Crown costs. Generally, the Court's power to award costs is found in section 131 of the Courts of Justice Act, which provides:

> 131.(1)Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

175. The Court's discretion in awarding costs is further guided by the criteria enumerated in Rule 57 of the Rules of Civil Procedure.

176. In awarding costs generally, it is well accepted that the Court must be guided by the principle that costs awards be "fair and reasonable" (see Zesta Engineering Ltd. v Cloutier (2002), 118 ACWS (3d) 341 at para 4, [2002] OJ No 4495 (CA)).

177. I am not persuaded that a costs order of the Superior Court of Justice pursuant to sections 4(1) or 9(1) of the Civil Remedies Act would be subject to any different standard.

178. There are two cases from outside of Ontario that while of limited assistance, are nonetheless illustrative of this point. In British Columbia (Director of Civil Forfeiture) v Wolff, 2012 BCSC 501, the British Columbia Supreme Court dealt with an application for reconsideration of the costs order in an application for forfeiture under the Civil Forfeiture Act, the British Columbia equivalent of the Civil Remedies Act. In the forfeiture application, the respondent successfully defended the forfeiture of his truck on the basis that it was not in the interests of justice. Since the forfeiture was successfully defended, the Court declined the government's request for its costs of storing the truck. In so doing, however, the Court commented at paragraph 27 that "[i]f the Director had succeeded in obtaining an order for forfeiture, the disbursements may well have been recoverable as part of the costs, subject to proof of the amount, and reasonableness." In the Civil Forfeiture Act, the only provision dealing with the Court's power to order costs is section 14(c), which provides:

> **Orders related to forfeiture orders and protection orders**
>
> 14. On application, a court may make, at any time of or subsequent to making a forfeiture order under section 5, one or more of the following orders:
>
> ….
>
> (c) an order directing that the money arising from the disposition of property or the whole or the portion of the

> interest in property … is applied in accordance with the direction of the court after taking into account all encumbrances.

179. The Court seems to very clearly, and quickly, acknowledge that compensation for expenses will be limited to what is considered reasonable, and the only reason I could decipher for this is because, generally speaking, the award of costs by the Court must be reasonable.

180. Similarly, in Alberta (Minister of Justice) v Sykes, 2011 ABCA 191, the Alberta Court of Appeal, in dealing with a similar situation as in Wolff, upheld a decision to dismiss a forfeiture application by the government, but contrary to Wolff, made an order for costs against the respondent (the owner of the vehicle). In that case the Court of Appeal determined that the forfeiture application was dismissed as a result of the exercise of the Court's residual discretion to refuse a forfeiture order, meaning the Crown satisfied its initial burden to establish the lawful seizure of the vehicle. The Court of Appeal ordered the respondent to pay the costs of storage, since there was a lawful seizure, but found that the Crown incurred unreasonable storage costs. As a result, the respondent was ordered to pay only what the Court deemed to be reasonable storage costs. The Crown bore the remaining costs. Of note are the following comments made by the Court, confirming that when a forfeiture

application is granted, reasonable costs are to be covered by the sale of the item:

> [48] … Barring exceptional circumstances, the responsibility for reasonable storage costs should be covered by the sale of the item seized whenever a lawful seizure occurs. Where the item seized is returned to the owner only because of the residual discretion to refuse a forfeiture order even though the Crown has met its burden of proof regarding use of the item seized, the owner of the item should be responsible for reasonable storage charges.
>
> [49] In this case, the Crown agreed to the storage fees for just over four months which came to about $3,300.00. … Although the respondent can be called upon to pay reasonable fees when property is legitimately seized and stored, the arrangement between the Crown and the storage company results in an excessive fee. Accordingly, I would direct the respondent to pay the storage costs in the sum of $750.00. All other storage costs are to be born by the Crown.

181. Again, in sections 18 and 19.98 of the Alberta Act, the Victims Restitution and Compensation Payment Act, SA 2001, c V-3.5, the analogous provisions to the Ontario Civil Remedies Act, provide that:

> **Other matters respecting property disposal order**
> (1) In the property disposal order or in an ancillary order the Court may also do one or more of the following:
>
> ….
>
> (d) make the order subject to any terms or conditions that the Court considers appropriate in the circumstances;
>
> (e) give any ancillary directions that the Court considers appropriate in the circumstances;

…

(h) … direct the payment of any expenses incurred or services provided in respect of the management, preservation, handling, maintenance or disposal of the restrained property or dealing with the title to the restrained property as a result of the restraint order or as a result of the property disposal order.

182. As in the Ontario Civil Remedies Act, neither the British Columbia Act nor Alberta Act refer to "reasonable" costs, yet both seem to be interpreted in a way that limits the compensation of costs/expenses to what is reasonable.

Category II: Powers Conferred on the Minister under the Civil Remedies Act

183. In the second category of compensable Crown costs under the Civil Remedies Act, the Minister is able to make payments out of the Consolidated Revenue Fund to compensate the Crown for its costs. This power is limited, I suggest, by the reasonable limitation imposed on any discretionary decision. In sections 6(3.4) and 11(3.4) of the Civil Remedies Act, the determination of the amount of the Crown's costs:

…shall be determined by the Director on any basis, or combination of them, <u>that he or she considers appropriate</u> in the circumstances, including:
(a) a flat rate for every forfeiture;
(b) a flat rate for every step taken
(c) an hourly rate;
(d) the actual costs; or

(e) a percentage of the value of the property forfeited.

(Emphasis added.)

184. The Director has the discretion to determine the costs on a basis that he or she considers appropriate. In my view the Director would not be able to make such a determination unreasonably. As is understood from the standard of review of administrative decisions, a discretionary decision must "be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law, in line with general principles of administrative law governing the exercise of discretion, and consistent with the [Charter]." Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at paragraph 53.

185. For the foregoing reasons, the statutes provided by the Municipalities do not support their position that the lack of reference to "reasonable" in section 25(5) of the Act means the Legislature intended the provision to require stewards to pay 50 per cent of "actual" costs incurred. In the case of the Civil Remedies Act, the relevant provisions are likely in fact to be subject to a reasonableness limitation.

186. As concerns the Waste Diversion Act, not only is the term "actual" conspicuously missing, but the section, similar to provisions of the Civil

Remedies Act, delegates the determination of the "payments to municipalities" to the WDO.

187. In my view an analogy could well be made such that the determination made by WDO of the net costs incurred must be made reasonably.

188. I want to emphasize that because I take a different view of the Civil Remedies Act than counsel for the Municipalities I do not say that ends the matter. The real question that remains to be decided is what section 25(5) of the Act means irrespective of the analysis above.

189. I now turn to the basic principle of statutory interpretation articulated by Elmer Driedger in his Construction of Statutes (Second Edition) 1983 at page 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

190. Both parties to this arbitration cite the above principle in support of their arguments. This principle has been consistently acknowledged by Canadian courts for decades as was observed by Justice Iacobucci in Bell Express Vu Ltd Limited Partnership v Rex, [2002] 2 SCR 559 at paragraph 26.

191. The purpose of the Act found in section 1 "is to promote the reduction, reuse and recycling of waste and to provide for the development, implementation,

and operation of waste diversion programs." The program that concerns us is a province-wide undertaking which today involves some 230 municipalities. When it was first introduced into the Legislature as Bill 90, it must have been well known that this was going to involve an enormous cost in the millions of dollars. While no one likely foresaw the escalation of costs to levels of today, it would have been apparent that the collection, processing, and recycling of Blue Box waste would involve an enormous and expensive undertaking across the province.

192. It cannot, in my view, as a matter of common sense have been in the contemplation of the Legislature that the Stewards be obliged to fund 50 per cent of the actual net costs without a limitation of reasonableness.

193. The diversity in geography, the long distances travelled, the scattered population, south to north and east to west, and the incredible differences in the size of the municipalities all suggest otherwise. Further, the municipalities fought for, and retained, decision-making autonomy in respect of the administration of their programs. It would have been apparent to the Legislature that the mix of these complex factors would attract significant costs on a province-wide basis.

194. In my view when one is talking about a program costing tens of millions of dollars (now hundreds of millions of dollars) it defies common sense to say

that the Legislature intended that 50 per cent of actual costs be paid without having said so. Indeed, the Municipalities appear to recognize this by their participation in the development and operation of an elaborate Datacall procedure. The Datacall process, which produces what counsel for the Municipalities refer to as "actual costs" in this arbitration, includes a significant number of adjustments to the costs reported by municipalities. As a result, many municipalities under the BBPP do not in fact receive 50 per cent of their reported net costs.

195. The Municipalities in particular rely on references to Hansard both in the Legislative Assembly and in Committee. None of these leads me to the conclusion that the Legislature intended that section 25(5) of the Act obliges the stewards to pay the municipalities for their actual net costs.

196. I have also considered the evidence of Messrs. Stephenson and Rathbone and others to the effect that the iWDO suggested that the new Act would provide for 50 per cent of actual costs. While both Mr. Stephenson and Mr. Rathbone were of this view, the Legislature chose not to use the words "actual net costs". I also place little weight on the press release from the Ministry dated January 4, 2005. Although it suggests that the stewards' fees would be based on actual costs incurred by the municipalities, the fact is that it was released

2.5 years after the Act received royal assent and does not persuade me of the intention of the Legislature at the time the Act was passed.

197. The Municipalities, as indicated above, advanced a lengthy argument to the effect that SO, in order to succeed on their position, must prove that the statutory right in section 25(5) of the Act has been contained or changed or indeed amended in some way to provide for something less than the payment of 50 per cent of actual net costs. The crux of the Municipalities' position that no such amendment has been made is that the CCP is not a legal document. It is further submitted that the CCP was limited to the determination of the 2008 Steward Obligation. I do not accept these arguments and I also note that the Municipalities submit that they "demonstrated utmost good faith, and pursued their CCP principles with great care."

198. The CCP was developed as a result of a request made by the Minister as a condition of approval of the BBPP. If I were to accept the Municipalities' position, the Minister would be able to approve amendments or material changes to the BBPP, but not request them. This makes little logical sense. Further, though the Minister did request the CCP, it was developed and approved by MIPC and the WDO Board, which then referred it up to the Minister for final approval. The CCP therefore went through the various

stages of approval necessary to constitute an amendment of the BBPP as contemplated by the Act.

199. The Municipalities also rely on the lack of explicit language in the CCP indicating that it constituted an amendment or a material change to the BBPP. To accept the Municipalities' argument on this point would be to prefer form over substance.

200. There is no dispute that the Minister approved the BBPP under section 26 of the Act and in approving the revised CCP the Minister referred to it as a material change to the BBPP as contemplated by section 27 of the Act. To argue years later that the CCP has no legal validity is simply not credible.

201. I now turn to SO's submission on the proper interpretation of section 25(5) of the Act. As already indicated above, SO makes essentially two points. First, the Act is program legislation, which should be interpreted in accordance with the principles articulated by the Supreme Court of Canada in Maple Lodge Farms, supra.

202. Second, the Act must be interpreted in the context of the nexus principle, i.e., that there must be a reasonable connection between the fees charged and the cost of a regulatory scheme. Simply put, the obligation of the stewards to pay 50 per cent of the total net costs incurred by the Municipalities must pass a reasonableness test. I acknowledge that the Municipalities challenge the

applicability of the "nexus principle" to the circumstances at issue here, namely, its application to the Steward Obligation under section 25(5) of the Act. That said, I find the argument persuasive at a high level. The evidence that I accept suggests that just the fees charged to stewards through the Pay-In-Model are integrally related to the Steward Obligation -- both are determined on the basis of the costs incurred by the municipalities as a result of the program.

203. In conclusion I find that under section 25(5) of the Act, the obligation that Stewardship Ontario pay 50 per cent of the total net costs incurred by the municipalities as a result of the program **is limited by the requirement that such costs be reasonable**.

2. **What are the total net costs incurred by municipalities as a result of the program in 2012?**

204. The parties do not disagree on the Datacall reported and verified costs incurred by the municipalities in 2012. There is no dispute that the gross costs as reported in the Datacall are $326,323,771 and that the applicable three-year average revenue is $102,677,331. Rather, the parties disagree as to what "total net costs incurred" means.

i. The Position of the Municipalities

205. According to the Municipalities, total net costs incurred is an accounting question, which has been answered through the 2012 Datacall, at much time and expense.

206. All said and done, the Municipalities request that, at minimum, the stewards pay $114,072,322.

207. This figure includes the agreed upon gross costs and revenue figures as provided by the Datacall, in addition to a prior year adjustment of $4,498,204, which is in dispute.

208. The Municipalities contend that the full prior year adjustment should be included, and object to SO's position that this amount be cut in half. When the municipalities agreed to halve the prior year adjustment in the past, their agreement was explicitly restricted to the particular year in question. For example, for the 2011-2013 Steward Obligations, the prior year adjustments were calculated as follows:

(a) In 2010, the concession was part of a multi-step threshold variance factor associated with the agreed use of the Baseline Cost Model which only applied in that particular year;

(b) The Municipalities submit that in 2011 there was no mention of the prior year adjustment, because it was made in favour of the Stewards; and

(c) In 2012, the prior year adjustment was included at 50 per cent as part of a methodology that was expressly limited to that year.

ii. The Position of Stewardship Ontario

209. SO submits that the total net costs incurred by the municipalities for the purpose of section 25(5) of the Act is $191,359,224. As a result, the Steward Obligation, being 50 per cent of the total net costs incurred by the municipalities as a result of the program, is $95,679,612.

210. SO submits that the gross costs incurred by the municipalities in 2012 are $291,787,453. This is the output of the last iteration of the best practices cost model as it was run by Alec Scott in 2013. This was the last methodology approved by MIPC in May 2012 and is consistent with the terms of the BBPP as amended by the CCP. Applying the three-year average revenue of $102, 677, 331, the resulting net costs are $189,110,122.

211. As it has been the agreed upon practice of MIPC in prior years, SO contends that only 50 per cent of the prior year adjustment should be included in the calculation of net costs. Therefore, while it does not contest the figure of $4,498,204, SO argues that only $2,249,102 should be included for the purpose of determining the 2014 Steward Obligation.

iii. Analysis

212. Having decided that section 25(5) of the Act places a limitation of reasonableness on total net costs, I turn to the primary reason for this arbitration. What is the Steward Obligation under section 25(5) of the Act for 2014? I have heard much evidence over the course of many weeks as to what the dollar figure should be. As matters now stand, the evidence comes down essentially to a choice between the costs reported and verified through the Datacall or the costs produced as a result of the operation of the Baseline Cost Model, assuming one or the other pass the test of reasonableness. I was not provided with any other choice and no one suggested that I should, as has happened in MIPC, simply split the difference between the two numbers. Similarly, no evidence was led as to whether I might consider using a tolerance threshold or variance policy, as has also been used in the determination of the Steward Obligation for more than one of the prior years. I am left with what can best be described as a "baseball arbitration".[25]

[25] For those not familiar with baseball arbitrations, as I understand it, a player (one party) names a desired dollar figure for his/her salary and the team (the other party) names a dollar figure that it is prepared to pay. The arbitrator is restricted to picking one of the two figures.

a) <u>The use of the Baseline Cost Model for 2014</u>

213. I have a problem with SO's number because it is the product of the Baseline Cost Model. There is much controversy in the evidence about the use of this Model and the number it has produced. The Municipalities rejected it out of hand for a variety of reasons, which I have detailed above in respect of the 2014 Steward Obligation. I will not repeat those criticisms.

214. Most of the criticism came from Alec Scott who was not a neutral witness. Mr. Scott has a long history as a municipal public servant. At the time of the hearing he was employed by AMO 60 per cent of the time and 40 per cent of the time by the CIF. He was the principal representative of AMO during this arbitration who instructed counsel and attended the hearing on a number of days. He also testified, albeit after a good deal of the evidence was heard. Counsel for SO submitted that Mr. Scott's critique of the Baseline Cost Model came only after he saw the affidavit of Mr. Chan.

215. Mr. Scott's credibility was further challenged when he was cross-examined on an internal document he drafted for the board of AMO in respect of the anticipated negotiations to determine the 2014 Steward Obligation. According to counsel for SO, this document suggests that AMO may have had some ulterior motive in bringing the negotiations to a standstill. I am not persuaded that too much turns on this allegation. However, I accept that I ought to

approach Mr. Scott's evidence with some caution. That said, I do think that Mr. Scott did his best to be forthright in answering questions asked of him during his testimony.

216. Bearing in mind the above observations concerning Mr. Scott as a witness, I believe he did raise a number of legitimate concerns about the Baseline Cost Model, which called for some response from an independent expert. No such witness was called by SO.

217. The failure of SO to call an independent expert witness to support their position on the role played by the KPMG Model, and subsequent iterations of it, is a major problem in this case.

218. SO did call the only witness with direct involvement in the KPMG project, Nigel Guilford. Mr. Guilford was the Senior Project Co-ordinator for the Best Practices Project launched in the fall of 2006. He assisted with the selection of the KPMG-led consortium, and in his own words was the intermediary between MIPC and KPMG. His responsibilities included ensuring that the Best Practices Project remain on track, that the requirements and requests from MIPC be communicated to KPMG, and that the ongoing results of KPMG's study be communicated to MIPC on a regular basis and thoroughly reviewed at its meetings.

219. At the end of the Project, one of Mr. Guilford's final tasks was to write a report summarizing his opinion on the findings, quality and extent of KPMG's work in light of the Best Practices Project parameters. His work on the BBPP largely concluded after he provided his report.

220. Though Mr. Guilford was the closest person to the project to be called as a witness, he provided little insight in either his affidavit or on cross-examination into the mechanics of the KPMG Report. Outside of what is stated in Volume I and II of the KPMG Report, Mr. Guilford could not recall much of what KPMG did or did not do in the course of their review. For example, in response to a question on cross-examination concerning the source of data used by KPMG to estimate processing capital costs, Mr. Guilford replied that "without rereading [the Report] and looking for that, I don't think I can answer that, but I'm sure KPMG could --". Similarly, when asked about the impact of the York Regional Material Recovery Facility on the KPMG processing cost curve, Mr. Guilford replied "[t]he person to ask would be someone from KPMG."

221. I do not mean to suggest that Mr. Guildford was somehow ill-prepared or a difficult witness. He was quite the opposite. It seems that as Project Co-ordinator, his involvement with the KPMG Report was more high level and administrative than technical. It is unfortunate, however, that he was the only

witness directly involved with the Best Practices Project and yet he was of little assistance in understanding its impact.

222. I am also concerned with the state of the evidence as to the extent to which the KPMG Model and its subsequent iterations were actually used to determine the Steward Obligation. It appears from the evidence that it was sometimes simply used as a negotiating tool by SO in the MIPC negotiations. In 2008 and 2009, the evidence is that the Steward Obligation was based on the municipalities' costs as reported and verified through the Datacall. In 2010 the parties settled on the mid-point between reported costs and model costs. In 2011 the parties agreed to use a tolerance threshold to determine the outcome. Again, in 2012 the parties arrived at the Steward Obligation by taking the mid-point between the model cost and the reported cost after the application of a tolerance threshold.

223. While I accept that a model was used in each of these cases, it was more of an aid in the negotiation than a methodology to produce the final number.

224. I am unable to accept that the evidence before me is sufficient to establish that the Baseline Cost Model, whether or not it is a subsequent iteration of the KPMG Model, can be used to provide a reliable figure for the 2014 Steward Obligation.

225. I want to make it clear that by rejecting the use of a model for the determination of the 2014 Steward Obligation, I do not reject the principles of cost containment and the objective of attempting to pursue best practices as a means of containing costs. Indeed, to do so would be "to throw out the baby with the bathwater."

226. Specifically, I have only rejected the utilization of best practice cost bands, to the extent they are incorporated into the best practices cost model, which I have found wanting due to the insufficiency of the evidence supporting its use. However, it is the particular model I have rejected, not best practices cost bands. I have not rejected their application in the promotion of best practices generally.

227. What becomes of the CCP and the use of computer models in future years will be for others to decide. One would hope that the parties will be able to move forward and build on much of what they have been able to agree upon in the past.

b) <u>The Datacall</u>

228. I now consider whether the costs incurred by municipalities in 2012 and reported and verified through the Datacall in respect of the 2014 Steward Obligation satisfies the test of reasonableness. I have not yet provided the

details of how the Datacall works. I propose to do so in the following paragraphs.

229. The Datacall, as it has come to be known, is not required by the Act. Prior to the BBPP, a tonnage survey operated by the Ministry of the Environment was carried out on a yearly basis. According to Glenda Gies, the first Executive Director of WDO, municipalities reported the tonnage of all Blue Box and non-Blue Box materials they collected, but did not report the costs or revenues associated with the collection or processing of said materials. Starting in 2003, the responsibility for the Datacall was transferred from the Ministry of the Environment to WDO. Under the guidance of Glenda Gies, the 'new' Datacall consisted of two components: (1) the tonnage survey, and (2) a financial survey specifically for Blue Box recycling.

230. In essence, the Datacall is an internet accessible software program. It is an electronic Financial Information Return that municipalities submit by April 30th of the year after costs were incurred and revenues earned. It is an important part of the BBPP, because the data collected is used to inform the MFAM and the CIF.

231. The BBPP empowers MIPC to oversee the collection of recycling data from the municipalities. The information collected from the municipalities each year includes:

(a) Basic program information, such as key personnel contacts, population size and households served,

(b) Level of service, including materials collected and collection frequency,

(c) Performance of the program, which is measured by contamination and capture rates, along with tonnes of materials put on the market, and

(d) Municipal Blue Box Program costs.

232. There are no detailed guidelines as to what costs are eligible and therefore should be reported, but section 7.3.3 of the BBPP provides that AMO and SO are to work together (through MIPC) to agree on the costs to be reported each year. What is an eligible cost, which helps determine the parameters of the Datacall, is guided by the six principles set out in section 7.3.1 of the BBPP. These parameters change based on the annual negotiations of the parties and any changes to the program. For example, the parameters of the Datacall changed as a result of the CCP. At a high level, the following costs and revenues associated with handling residential recyclables are to be reported:

(a) direct service delivery costs, including collection of Blue Box wastes by municipalities, contractors or a combination thereof,

(b) amortized capital costs including, for example, municipally owned vehicles, material recovery facilities (MRFs), and equipment not included in a contract for service price,

(c) public awareness and public education costs, including lineage (excluding lineage provided by the in-kind contribution), postage and printing costs,

(d) indirect administrative costs, which are capped, presently at 3 per cent of gross costs for programs that contract for Blue Box services and 5 per cent for programs that provide Blue Box services directly,

(e) revenue from the sale of Blue Box wastes, excluding any revenue retained by the private sector under revenue-sharing agreements,

(f) revenue from processing fees charged at municipally-owned MRFs,

(g) revenue from the sale of curbside containers, where the cost of them has been included as a cost, and

(h) revenues from grants or other funding.

233. Since the KPMG Report, the annual Datacall has also included questions, answered yes or no, that are used to estimate the “best practices” scores for each municipal program.

234. As noted above, MIPC is responsible for overseeing the annual Datacall, for verifying the reported data, and for housing the data. To do so, a working group was set up with a representative from the Ministry of the Environment and equal representation from AMO and SO. This working group was to have assistance provided by other representatives, as necessary, including other IFOs as new streams of materials were designated wastes.

235. This working group meets annually to review and make any necessary amendments to the Datacall questions and procedures. The MIPC working group is also responsible for consolidating the Datacall results and preparing recommendations for the WDO Board, which reviews and approves the results.

236. According to the BBPP, the Datacall figures are to be publicly available, with provisions made by MIPC for data management and use, including safeguarding confidential information.

237. The BBPP outlines the following verification process that is essential to the reliability of the Datacall data:

(a) First, it requires the municipality's external auditor and the Chief Financial Officer to sign off on the financial data reported in the yearly Datacall, confirming that "the information is true and correct and reflects the program delivery costs and revenues as defined in the [BBPP] and as reported in the [municipality's] general ledger."

(b) Second, the [BBPP] provides that all reported data be verified once it is submitted to "identify potential anomalies in reported financial data". Following this review, the Datacall information is forwarded to the WDO for follow up with those municipalities identified as "having anomalous results."

(c) A third and final verification, WDO may retain "an accredited financial auditing agency" to conduct an audit of those anomalous programs in addition to any random audit the WDO decides.

238. In practice, Richard Findlay, the Director of Operations and Oversight at WDO, who testified during this arbitration, described the second stage of the verification process as follows:

(a) Between April and July of each year the WDO reviews every number reported by every municipal Blue Box program; a process which takes approximately six person months.

(b) Reviewers look for any and all types of errors, including: typographical errors, unusual variances (by cost category in addition to aggregate costs) year to year or between comparable programs and any other entry that seems unreasonable.

(c) For every entry that raises a concern, municipalities are contacted for verification and backup.

239. According to Mr. Findlay, this process catches about 400 entries per year. In his capacity as Director of Operations and Oversight, it is his responsibility "to ensure that WDO accurately collects, verifies, approves and publishes the net costs incurred by each municipal Blue Box program each year." Once WDO staff has conducted their review, it is Mr. Findlay who reviews and approves the figures. After the figures have been approved, WDO calculates the net costs actually incurred by the municipalities.

240. The total net costs actually incurred by municipalities are calculated in and around July each year for the purpose of setting the following year's Steward Obligation. Following this determination, WDO commissions external audits

of approximately 20 municipal Blue Box programs. These audits are carried out by firms of chartered accountants, funded by SO, and any adjustments that result are taken into account as "prior year adjustments" in the following year's net costs calculation. Though they may conduct random audits, it seemed to be common ground that the 20 municipal audits conducted each year were, for the most part, targeted. If a municipality has over reported its net costs incurred by more than 2 per cent, a penalty is charged, equal to the value of the adjustment or the cost of the audit, whichever is lower. In either case no penalty greater than the limit of funding for that audited year will be imposed.

241. WDO cannot force a municipality to report its financial information; however there is a 10 per cent penalty for returns filed late. In 2012 Mr. Findlay provided that WDO received a report from each of the 230 municipal and First Nation Blue Box programs in the province; without a return, municipalities are ineligible for steward funding.

242. I am satisfied that the above description of the procedures used to produce the reported costs passes the test of reasonableness. In my view, the verification process is sensible, thorough and reliable. While it could never be said to be perfect it is the best available methodology for the determination of the 2014 Steward Obligation. Importantly, SO has not challenged the methodology or

the result of the 2012 Datacall in this proceeding. SO accepts the accuracy of the Datacall, but maintains its position that it is not good enough because the best practices cost model is required to determine the total net costs incurred by municipalities as a result of the program.

243. Before arriving at a final dollar figure for the total net costs, I must decide whether the full prior year adjustment of $4,498,204 should be included in the calculation as submitted by AMO. The SO position on the prior year adjustment, as discussed above, is based on what the parties agreed to in other years. I accept the evidence that each year was individually negotiated in respect of what to do with the prior year adjustment. The 2014 Steward Obligation is to be determined in a new year and should be treated as such.

244. I see no logic in reducing the prior year adjustment by 50 per cent before proceeding with the calculation of the net costs incurred by the municipalities. This would result in the prior year adjustment being reduced by a further 50 per cent to determine the Steward Obligation. The full prior year adjustment of $4,498,204 should be added to the reported costs before they are reduced by 50 per cent pursuant to section 25(5) of the Act.

3. **Does section 25(5) of the Act permit in-kind deductions in lieu of cash payments to municipalities?**

245. Section 6.5.3 of the BBPP explains that prior to the adoption of the BBPP the CNA and OCNA negotiated with the Minister for their first $1.3 million in obligations as calculated by the pay-in model – the model used by SO to calculate the fees for each steward – to be in the form of newspaper advertising. According to Section 9.14.3 of the BBPP, the CNA and OCNA would be required to pay, in cash, their allocated costs in excess of $1.3 million.

246. On November 4, 2005, the Minister approved an amendment of these sections. Specifically, the limit of $1.3 million on the in-kind contributions made by CNA and OCNA was removed. From 2005 onward, the CNA and OCNA portion of stewards' fees, as calculated by the pay-in model, have taken the form of in-kind newspaper advertising. This advertising comprises of lineage, calculated using published CARD rates, and a single insert provided to AMO each year in all of the CNA member papers. CARD rates are the published rates charged by newspapers for advertising space. The applicable rates change depending on a number of variables, and in practice are often negotiated between the newspaper and the party seeking to

advertise. For the purposes of the in-kind contribution, the highest applicable CARD rate is used.

247. According to the amended section 9.14.3, if old newspaper prices fell below a certain price, the CNA and OCNA would be required to contribute cash in satisfaction of their obligation. There was no evidence that either the CNA or the OCNA have paid any portion of their obligation in cash to date.

248. The evidence is that, essentially, SO calculates the total fees payable by each steward to reflect the total costs of the program attributable to them. The methodology for the calculation of these fees is set out in the Amended and Restated Program Agreement between SO and WDO dated January 1, 2010. The WDO approved this methodology, and any future changes thereto would not only require WDO approval, but would constitute a material change necessitating Ministerial approval for the purposes of section 27 of the Act.[26] Once SO determines the total amount of the in-kind contribution, WDO allocates this sum between municipalities on the same basis as the allocation of cash payouts to municipalities using the pay-out model (also known as the MFAM). After this allocation is complete, the CNA and OCNA convert the dollar amounts into lineage using the CARD rates applicable to each

[26] See section 3.5(iii) and Schedule A of the Amended and Restated Program Agreement dated January 1, 2010.

participating newspaper. There is no WDO oversight into this conversion process, and some of the problems with this process are:

(i) the municipalities have no say in the newspaper they are allotted lineage in,

(ii) the municipalities either cannot use the lineage for other services offered by said newspaper or are allocated "lineage" for services not measured in terms of lines (i.e., internet advertising),

(iii) the municipalities are unable to report the value of the in-kind lineage that they use for the purpose of calculating the following year's steward obligation (in contrast to the advertising costs incurred in cash by the municipalities), and

(iv) often times municipalities are incapable of using the lineage allotted to them before the contributions 'expire', resulting in a loss to municipalities each year.

i. Position of the Municipalities

249. The Municipalities submit that the plain meaning of section 25(5) of the Act only permits cash payments to municipalities and that no other provision in

the Act, including section 31, permits in-kind contributions in lieu of money payments from Stewards to municipalities.

a) <u>Plain meaning of section 25(5) does not permit in-kind payments</u>

250. The Municipalities argue that the plain and ordinary meaning of the terms "payment" and "paid" in section 25(5) of the Act refers only to money. This is demonstrated by looking at the Act as a whole, which uses the verb "to pay" when referring to the transfer of money, and "to make" when referring to the transfer of non-monetary goods.

251. For example, section 13(1)(b) of the Act refers to the Board of the WDO passing bylaws for the appointment of officers and employees of WDO and the "payment of their remuneration and expenses." Section 30 empowers the IFO designated by the Act, here SO, to set the amount of fees to be "paid" from stewards and includes the power to require "payment" of interest or penalties when fees are not paid.

252. Where the Legislature did not intend the payment of money, the Municipalities argue that it used the verb "make", as in section 31(2), which allows the fees paid by Stewards to SO to be reduced "if the person has made voluntary contributions of money, goods or services to the organization…"

253. This interpretation is also consistent with section 32 of the Act, which mandates that money received by an IFO be kept in a fund established in respect of a program developed under the Act. Section 32(3) details the sources of money to be "paid" into the fund, and includes the voluntary contributions made under section 31(2) that are provided in cash.

254. The Municipalities submit that there is no ambiguity in section 25(5) of the Act, but to the extent there may be, it is resolved by the French version of the provision, which uses the terms "versement" and "verser". These terms, the Municipalities contend, are only associated with money.

255. Finally, this interpretation is consistent with the iWDO Report that recommended "financial support equal to fifty per cent" and the Hansard, which according to the Municipalities are clear that all major political parties understood that section 25(5) of the Act was about funding or providing money as financial support to the municipal Blue Box programs.

256. According to the Municipalities, any finding to the contrary would hamper the delivery of the Blue Box programs and be contrary to the purpose of the Act, namely the promotion of waste diversion and the provision for development, implementation and operation of waste diversion programs.

257. Municipalities argue that SO has not offered any evidence that justifies the amount of in-kind advertising proposed for the 2014 Steward Obligation,

namely $6.3 million. Given the amounts allocated and the lack of control over the advertising provided, Municipalities contend that this impedes the efficient and effective operation of the program.

258. It is the Stewards that calculate the in-kind contribution every year in an undisclosed internal process that is not reviewed by the WDO, and the CNA and OCNA then determine which newspapers are allocated to which municipality, a process which municipalities ultimately have no say in.

b) <u>Section 31 of the Act does not apply to payments to municipalities</u>

259. The Municipalities suggest that SO has agreed in their Amended Statement of Defence that section 31 of the Act does not authorize deductions from the Steward Obligation under section 25(5) for in-kind contributions. If they are mistaken, Municipalities argue that the plain meaning of the words in section 31(2) and the Legislative intent confirm that this provision does not support the payment of in-kind contributions under section 25(5) of the Act.

260. Section 31(2) provides for the reduction of fees payable by stewards to SO if that steward has made voluntary contributions of money, goods, or services to the IFO.

261. This provision makes no mention of municipalities or the payments to be made thereto by the stewards.

262. The CNA and OCNA contributions are made directly to municipalities, not the IFO, therefore they do not fall under section 31(2).

263. To the extent SO states it is the Minister that requires the in-kind payments from the CNA and OCNA, the Municipalities argue that the Minister has no such power to require SO to exempt the stewards from paying fees. Even if 31(2) were to apply to payments to municipalities, SO, with the approval of WDO, could (without the approval of the Minister) force municipalities to accept goods in lieu of money under section 25(5) of the Act.

264. There is no ambiguity in section 31(2) to suggest that this is a possibility, and the legislative history further reinforces that 31(2) relates only to the stewards' payment of fees to the IFO, not the municipalities.

265. The Legislative debates indicate that section 31(2) – then section 30(2) – was about the ability of an IFO to accept voluntary contributions and determine the impact of those contributions of the fees otherwise payable to it by stewards. Had it related to the Steward Obligation payable to municipalities, it would have been very easy for the Legislature to have referenced section 31 in section 25(5) of the Act.

266. For these reasons the Municipalities submit that there is no legislative authority for the provision of in-kind contributions in lieu of money. No effect

can therefore be given to those parts of the BBPP that authorize the in-kind contributions, and all of the 2014 Steward Obligation must be paid in cash.

267. In the alternative, if in-kind contributions are deemed permissible, the Municipalities submit:

(a) The pre-conditions set out in section 31 have not been met as no voluntary contributions have been made by the CNA or OCNA, they have not made these contributions to SO, and there is no evidence that WDO approved any fee reduction or exemption for the newspapers in question; and

(b) The value of the in-kind contribution must be equivalent to the cash that it is intended to replace, meaning it must, at a minimum, reflect the negotiated rates municipalities otherwise have with the newspapers, it must not expire, it must be applicable against any service offered by the newspapers (i.e., internet advertising), and it must be provided as a credit instead of lineage;

268. Further, the Municipalities contend that if in-kind contributions are allowed, and contrary to its alternative argument, the CARD rates are deemed a permissible means of providing in-kind advertising, that the improper CARD rates have been used to date to calculate the lineage provided by the in-kind

contributions. These rates, according to the Municipalities must consider a number of variables currently ignored, including the day of the week the advertising is run, the section of the paper, and how often.

269. Finally, the Municipalities argue that if in-kind contributions are allowed, they should be able to add the value of the in-kind contribution to their costs in the Datacall for the relevant year. If the in-kind contribution is used for an eligible expense that would be considered a cost if paid in cash, the Municipalities submit there is no logical reason for denying them these costs incurred via in-kind contributions.

270. In 2012, the Municipalities used $2.2 million in in-kind advertising, half of which they submit should be included in the Steward Obligation for 2014.

ii. Position of Stewardship Ontario

271. The crux of SO's position is that the in-kind contribution is an agreement between the Minister and the relevant stewards. Had the municipalities wished to, they ought to have challenged this agreement years ago, but more importantly, they cannot challenge it in this arbitration where neither the Minister nor the newspapers are a party.

272. SO takes the position that I do not have jurisdiction to determine the methodology by which payments are made to municipalities under section 25(5) of the Act, but am only directed to set the quantum due in 2014.

273. As concerns the propriety of the in-kind program, SO argues that the in-kind contribution was part of the BBPP from the outset as one of the program specifications the Minister required in the original program request letter dated September 23, 2002.

274. Contrary to their assertion, the municipalities were aware of this arrangement, and were integral in establishing a plan on how to administer it. The BBPP references the in-kind contribution as one of the ten core issues the AMO/SO Task Group agreed upon. Moreover, an AMO/CNA-OCNA subgroup was established to help design the in-kind contribution plan, now contained in section 6.5.3 of the BBPP.

275. When asked about the Minister's power to permit the CNA and OCNA to make in-kind contributions in lieu of money payments, SO points to sections 7, 23, 26 and 27 of the Act, which enables the Minister to: establish policies applicable to the programs under the Act; require WDO to develop a waste diversion plan; approve a waste diversion plan developed under the Act; and approve material changes made to the program plan developed under the Act.

276. Thereafter, SO's position is that section 25(5) of the Act creates a payment obligation for stewards that must be read in light of section 31. According to SO, this is consistent with the Hansard evidence that shows that municipalities were aware that the CNA and OCNA in-kind contribution was justified pursuant to section 31(2) of the Act.

277. If a determination is made that payments under section 25(5) of the Act must be made in cash, SO submits that it has no ability to require the CNA and OCNA to make money contributions, and section 9.18 of the BBPP recognizes that changes to the way in which SO collects fees (as set out in the Program Agreement between SO and WDO) require WDO and ministerial approval.

278. Therefore, if stewards are required to make payments of money, it was suggested that SO could not levy the totality of fees due, as to do so would require the remaining stewards to compensate for the newspapers' share and ignore the legal requirement that fees charged to stewards be reasonably connected to their costs of the program.

279. Finally, in response to the Municipalities' argument regarding the French language version of section 25(5), SO submits that when resort is had to the more reliable Ontario English-French Legal Lexicon, as opposed to the French dictionary relied on by the Municipalities, the French version is no

narrower than the English, equating "versement" and "verser" with "instalment" and "to pay" generally.

iii. Analysis

280. As indicated above, it was as a result of a negotiation with the Minister that the CNA and OCNA were permitted to pay their Blue Box fees by way of newspaper advertising up to a limit of $1.3 million. At the Minister's request, this was included in the BBPP. The $1.3 million limit was removed in 2005, again at the request of the Minister, but with the approval of the WDO Board. There is no dispute that the total amount of the in-kind contribution has been increasing over the years.

281. While I see some merit to both parties' legal submissions concerning the statutory authority for in-kind payments by the newspaper Stewards in order to satisfy their obligation under section 25(5) of the Act, I am not satisfied that it is within my jurisdiction to deal with it.

282. If I were to give effect to the Municipalities' submission and order that the newspapers' contribution should be made in cash, I would be ignoring the original agreement between the Minister and the CNA and OCNA and the provisions of the BBPP, and the subsequent amendment requested by the Minister and subsequently approved.

283. However, I am prepared to say that the system of in-kind payments by the newspapers is extremely unfair to the Municipalities. On the evidence before me, they clearly do not get what they are paying for. There appears to be no reason why the rates are set at the highest rates that newspapers charge for advertising when the Municipalities on their own are likely to be able to negotiate much lower rates. Also, the process used to determine the total in-kind contribution is still relatively opaque. In my view this issue should be addressed by the relevant parties, including the Minister and representatives of WDO. It would be my strong recommendation that the provision for in-kind payments by the CNA and OCNA to satisfy their portion of the Steward Obligation be removed or certainly limited to a level that is reasonable both as to the total amount and to the rates charged.

284. In respect of the $2.2 million of in-kind advertising used by the Municipalities in 2012, I agree that 50 per cent of that number should be included in the Municipalities' costs and 50 per cent of it paid as part of the 2014 Steward Obligation. It makes no sense to treat it any other way.

285. I should note before concluding this issue that both the CNA and the OCNA were offered the opportunity to attend this arbitration and make submissions and both declined.

4. **What factors, if any, curtail the municipalities' section 25(5) cost recovery right?**

286. In paragraph 4 of the Municipalities' amended claim they state:

> 4. If you decide in favour of the municipalities on (at least) issue 1, this will conclude the arbitration. If you determine, on issue 1, that the Annual Steward Obligation is curtailed by factors other than the costs actually incurred by municipalities, there will be a fourth issue:
>
> Issue 4: What factors curtail the municipalities' s. 25(5) cost recovery right and how should those factors be applied?

287. I assume that it is clear from what I have already said under Issue 1 that section 25(5) of the Act is governed by a test of reasonableness, which is a concept well known to the law for several centuries. That said, it is not a concept that can be precisely defined by producing a list of specific factors intended to apply to all circumstances. Apart from concluding that reasonableness is the test to be applied to net costs incurred in section 25(5) of the Act, I have nothing to add.

IV. CONCLUSION & RECOMMENDATIONS

288. For the foregoing reasons, the 2014 Steward Obligation is $115,172,322. As is noted above, SO has suggested that the in-kind contribution for the 2014

Steward Obligation is about $6.3 million. Though I have not dealt with the legality of this issue, I have made my views known about the "in-kind" contribution above, and suggest the current system be abandoned.

289. I indicated at the outset of this award that I was invited to make comments or suggestions for determining the Steward Obligation in future years.

290. I am satisfied that the method I have adopted to arrive at the Steward Obligation for 2014 is fair and reasonable and I would recommend its use for future years subject to a thorough review and discussion in MIPC as to any adjustments that need to be made each year.

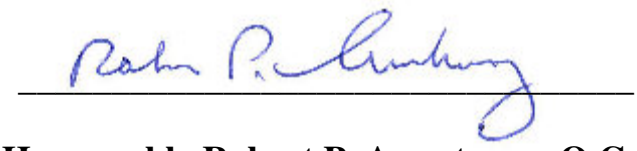
291. This approach of course must involve the employment of the Datacall and the verification process mandated by WDO. The Datacall over the years has been informed by the principles of cost containment. In my view those principles should continue to be applied and WDO should satisfy itself that this is the case before accepting a recommendation from MIPC.

292. In respect of the use of a computer model for the calculation of best practice costs, there was insufficient evidence before me to make a recommendation that this approach be pursued in the future. This is something for the parties and WDO to revisit in the future if there is the goodwill and the basis to do so.

293. As stated in paragraphs 283 and 288, supra, I recommend that the provision for in-kind payments by the CNA and OCNA to satisfy their portion of the Steward Obligation be abandoned. At the very least it ought to be limited to a level that is reasonable both as to the total amount and to the rates charged.

294. Although Counsel for the Municipalities requested that I make a recommendation that WDO reconsider the current cap on administrative costs and the current method of calculating the rolling three year average of revenues, I decline to do so. I did not have the benefit of submissions on the nature of the recommendation sought by either party. The Municipalities are certainly able to make this request directly to WDO.

Dated: November 25, 2014



The Honourable Robert P. Armstrong, Q.C.

APPENDIX "A"

CO

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.