



CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW & POLICY

517 College Street, Suite 400, Toronto, Ontario M6G 4A2 (416) 923-3529 FAX (416) 923-5949

Who Pays For Blue? Comments on the CIPSI/Ontario Stewardship Proposal

CIELAP Brief 94/5

Prepared by:

**Mark Winfield, Ph.D.
Director of Research**

July 1994

VF:
CANADIAN INSTITUTE FOR
ENVIRONMENTAL LAW AND POLICY.
Who pays for blue?: Comments on
the CIPSI/Ontario stewa...RN13836



Who Pays For Blue? Comments on the CIPSI/Ontario Stewardship Proposal

Introduction

The Canadian Institute for Environmental Law and Policy (CIELAP) welcomes the opportunity for public discussion, provided by the June 8 release of a proposal regarding the funding of consumer packaging recycling through the municipal Blue Box system by the Ontario Ministry of Environment and Energy and the Canadian Industry Packaging Stewardship Initiative (CIPSI).¹ The Institute has taken a strong interest in the question of the financing of residential waste diversion in Ontario over the past two years. In October 1993, CIELAP published the discussion paper Who Pays for Blue? Financing Residential Waste Diversion in Ontario.

The Ontario/CIPSI proposal represents a first step towards operationalizing the principle of producer responsibility for the post-consumer management of products and packaging through waste reduction, reuse and recycling. However, the Ontario/CIPSI proposal suffers from a number of serious weaknesses. CIELAP's concerns in this regard are focussed in four areas:

- 1) the lack of specific waste diversion performance requirements for members of the proposed Canadian Packaging Stewardship Initiative Organization (CIPSO) and the structure of the performance requirements to be imposed on "packaging stewards" who choose not to join CIPSO;
- 2) the viability of the proposed financial arrangements between CIPSO and Ontario municipalities;
- 3) the likely effectiveness of the proposed "backdrop" mechanisms; and
- 4) the proposed accountability structures for the CIPSO/Ontario stewardship system.

The deficiencies of the CIPSO/Ontario proposal in each of these areas should be addressed prior to the implementation of the proposed system.

Performance Requirements

Perhaps the most serious weakness with the proposed Ontario/CIPSI stewardship system is the absence of any performance requirements related to the use of reusable or recyclable packaging, or the development of markets for recovered materials, for firms which are members of the proposed industry funding organization, the Canadian Industry Stewardship Organization (CIPSO). Rather, such firms are simply required to make

financial contributions to CIPSO. In contrast, firms which choose not to join CIPSO, and develop diversion plans of their own, will be required to meet an annual diversion rate of 50%.

CIELAP has indicated on a number of occasions that it regards diversion performance requirements as an essential element of a stewardship system.² The absence of such requirements for CIPSO and its members creates a number of significant problems. The application of differential requirements to firms inside and outside of CIPSO is unfair and undermines the equal application of the principle of stewardship. As was argued in Who Pays for Blue?, all firms using or producing the types of packaging and products to be captured by the stewardship system should be required to meet common diversion requirements. Participation in an industry funding organization (IFO) should be only one way in which a producer might choose to meet an established level of post-consumer management responsibility.

In addition, if the levies which firms pay to CIPSO are ultimately to be based on the costs of collecting their packaging materials through the Blue Box, firms may actually be provided with an incentive not to adopt recyclable packaging, or even to discontinue its use. This may be especially true in the case of firms using packaging types, such as low-density plastics, whose curbside collection costs are likely to be high. Structures need to be established to ensure the CIPSO members move to, or continue to employ, packaging which is recyclable or reusable. The use of recyclable or reusable packaging, or evidence of imminent plans to adopt such packaging, should be a condition of CIPSO membership. This condition should be included as a component of the Province's backdrop regulation supporting the stewardship system. The "acceptance" or "recycling guarantee" system employed by the Duales System Deutschland (DSD) might provide the model for such a mechanism.

Furthermore, the performance requirements imposed on CIPSO members should ensure not only that the packaging materials employed by IFO members are recyclable or reusable, but also that the secondary materials collected through the Blue Box system are in fact utilized as feedstocks for new production. CIPSO has indicated that it anticipates that the rebate system which it has proposed to encourage material utilization will have a strong effect on the development of markets for secondary materials. This belief should be supported by specific commitments regarding material utilization by CIPSO members. These might be delivered collectively through the CIPSO organization.

The structure of the 50% diversion performance requirement proposed for non-CIPSO members is also problematic. The independent diversion systems developed by firms outside of CIPSO have the potential to be the site of significant innovation, and given the format of the proposed stewardship system, are likely to feature reduction or reuse, rather than recycling, options. However, the requirement that independent plans be implemented within three months of the promulgation of the proposed backdrop regulation makes it unlikely that any producers, other than those with independent

diversion systems already in place (e.g. the brewing industry) will be in a position to take advantage of this option. In addition, the requirement for a fixed performance of 50% diversion per year would seem to discourage the pursuit of reduction options, as credit for reduction efforts would only be available in the first year in which they were implemented. These provisions might be restructured to permit cumulative performance towards a higher overall diversion goal. In this context, it should be noted that the National Packaging Protocol (NAPP) 50% rate appears to be providing incentives to firms to make capital investments which lock them into a 50% diversion rate for an extended period of time. This eliminates the possibility of further progress on diversion rates for some time to come.

In sum, all Ontario packaging stewards should be required to reach a common diversion performance requirement, regardless of whether they are members of CIPSO or not. As proposed in Who Pays for Blue?, this diversion requirement should be set above the 50% target contained in the NAPP, and phased-in over a number of years, to provide clear signals to firms regarding the appropriate direction for their long-term investments in packaging systems.

Finance

The CIPSI proposal indicates that producers will increase their contributions to the costs of operating Ontario's Blue Box system from the present level of between \$3 and \$4 million per year to approximately \$11 million per year in the first two years of the new system. These funds are to be raised through a \$24/tonne levy on the packaging used by domestic brand owners, or the distributors or retailers of imported products. A contribution of \$65/tonne is to be paid to municipalities collecting "qualifying" packaging waste through their Blue Box systems. Beyond the second year of the program, municipalities would be responsible for the first third of the cost of collecting packaging through curbside programs, while material revenues and CIPSI contributions would make up the remainder.

Such a funding structure, particularly the Phase II component, would clearly be a major improvement over the present situation. The shift to true material type costs in Phase II is an especially important positive aspect of the proposed system. The move to a levy structure of this nature by the DSD is reported to have had a major impact on packaging design and use in Germany.

However, the proposed arrangements apparently anticipate very little growth in the amounts of packaging materials collected through curbside systems in the first two years. Furthermore, in the Phase II component of the system CIPSI anticipates its contribution growing to \$90/tonne. However, this figure is based on assumptions which may underestimate the costs of collecting packaging through the Blue Box at \$240/tonne and be overly optimistic in valuing the materials collected through the system at \$70/tonne.

A number of estimates place the cost of collecting packaging through the Blue Box system at over \$300/tonne,³ while the overwhelming bulk of the revenues generated by packaging collected through the Blue Box system come from one material; aluminum.

Most of the packaging materials with significant market value (metals, glass, and some plastics) are already collected through the Blue Box system. Consequently, the addition of new materials to the Blue Box collection systems is unlikely to significantly increase system revenues. In addition, the costs of operating Blue Box systems will not increase as a direct function of the weight of new materials collected. Rather, the addition of new materials will increase the complexity of sorting and processing operations, as more material types will have to be handled. In the result, the expansion of Blue Box systems to include new packaging material types is likely to increase the proportion of materials with high per unit diversion costs and low market value. Indeed, it is possible, particularly in light of recent experience in Germany,⁴ that the municipal one-third cost of some materials could exceed the disposal costs of the same materials. It is not clear that this consideration has been fully accounted for in the financial arrangements contained in the CIPSI/Ontario proposal.

The use of the weight of materials alone as the unit of measure for establishing producer financial contributions during Phase I is also problematic. The weight-based approach tends to favour low density packaging materials, particularly plastics, even though these may, in fact, be associated with high collection, sorting and processing costs. A formula based on a combination of weight and number of units of packaging generated may, as proposed in Who Pays for Blue?,⁵ provide for a closer reflection of the costs of dealing with particular types of packaging in the Blue Box system. This might ease the transition to a "real" cost basis in Phase II as well.

Enforcement

A third major problem with respect to the Ontario/CIPSI proposal relates to the enforceability of the stewardship requirements which the province intends to establish through a "backdrop" stewardship regulation made using powers under the *Environmental Protection Act* provided by the *Waste Management Act* of 1992. The province proposes to require all consumer "packaging stewards" to develop waste management plans to achieve an annual diversion rate of at least 50%. As noted earlier, "stewards" which join CIPSO will be exempted from these requirements. In the case of packaging for which no one comes forward to accept responsibility as the packaging steward, the packaging materials would apparently be banned from sale in Ontario.⁶ The Ministry of the Environment and Energy has stated prosecutions under the *Environmental Protection Act* will be the primary mechanism employed to enforce these requirements.

Serious questions must be raised regarding the practicality and effectiveness of this approach. It is particularly difficult to envision what form of action might be taken

against CIPSO or its members if they fail to meet their obligations to municipalities. The province's enforcement record with respect to the performance requirements established by the infamous 1985 refillable container use regulation (*Ont. Reg. 340*) does not inspire confidence in this sense. Many CIPSO members, particularly those using plastic or composite packaging, may be resistant to the implementation of the Phase II funding formula. Consequently, a more credible and practical enforcement mechanism may be required.

The CIPSI/Ontario proposal includes all businesses producing or selling goods which cost more than \$5,000 per year. As a result, the possibility of widespread non-compliance, especially among small businesses who neither join CIPSO nor develop and implement an independent diversion plan, seems strong. In the event of problems of this nature, the pursuit of a large number of prosecutions by the province against such businesses seems, for both political and administrative reasons, unlikely. The overcoming of due diligence defenses in cases of non-performance of independent diversion plans may also be difficult. Furthermore, the proposed ban of materials for which no one assumes responsibility as a packaging steward, as noted in Who Pays for Blue?, may be difficult to impose against domestic producers for political reasons, and raises serious problems regarding international trade law in the case of imports.⁷

It was considerations of this nature that lead CIELAP to propose in Who Pays for Blue? the use of a producer-level packaging recycling levy, from which exemptions could be withdrawn for non-performance, to enforce any industry stewardship responsibilities which might be imposed by the province. The possibility of the imposition of such a levy would provide the province with much greater leverage in its dealings with CIPSO, and also provide a less draconian enforcement mechanism in cases of non-performance with independent diversion plans. Although such a structure would require new legislation, CIELAP continues to believe that it would be the most effective means of establishing and enforcing the principle of producer post-consumer management responsibility in Ontario. Legislation to establish a waste management fee system should be enacted prior to the end of Phase I of the CIPSI/Ontario proposal. The recent initiative of the Manitoba government in this regard should also be noted.⁸

Accountability Structures

The Ontario/CIPSI proposals regarding accountability mechanisms present major problems. The establishment of a Stewardship Council, appointed by the Association of Municipalities of Ontario (AMO) and CIPSO, which would include representatives of the public, to provide advice on the operation of the stewardship system is proposed. However, real decision-making power would lie with a Management Forum, consisting of CIPSI and AMO representatives. Major environmental organizations involved in waste management issues, including CIELAP, have already indicated to the province that this arrangement is wholly inadequate and unacceptable. This aspect of the Ontario/CIPSI

proposal requires a complete revision to ensure public participation and accountability in the operation of Ontario's residential recycling system.

Accountability functions should be focussed in a single body, appointed by the provincial government. One third of the members might be nominated by municipalities and one third by CIPSI. The remaining third of the members should represent the public at large. This category might include environmental non-governmental organizations, organized labour, consumers and others. The accountability body should be provided with full information regarding stewardship system performance, and be required to provide regular reports to the provincial government and the public.

Additional Observations

System Scope

The absence of newsprint users from the stewardship system is a serious concern. Newsprint constitutes more than half of the material currently collected through the Blue Box system. The province should move to establish the post-consumer stewardship responsibilities of newsprint users, along the same principles as other producers, as soon as possible. The extension of the stewardship principle to wider categories of products, as is underway in western Europe, should also be considered for future action.

The extension of stewardship requirements to businesses doing as little business as \$5,000 per year should also be reconsidered, as the proposal has the potential to impose a substantial burden on very small enterprises and entail significant administrative costs. A \$30,000 per year threshold, similar to that employed for the purposes of the Goods and Services Tax, might be more appropriate.

The definition of "final consumer packaging," is not entirely clear. In particular, it is uncertain whether packaging provided for fast food would be considered "final consumer packaging." Materials of this nature should be captured by the stewardship system.

In addition, the proposal provides no indication how packaging associated with household hazardous wastes, which may be contaminated with such wastes, is to be dealt with. As indicated in Who Pays for Blue?, special arrangements may be required for materials of this nature.⁹

The status of packaging and other materials already covered by "stewardship" requirements, such as the environmental tax on non-refillable beer containers is unclear. Are such materials to be exempted from the proposed CIPSI/Ontario system? Similarly, the provincial government has stated that the existing refillable container regulation (*Ont. Reg. 340*) will remain in place. Are the refillable containers whose use is required by this regulation considered to be included in the stewardship system? As stated in Who Pays

for Blue?, CIELAP regards the refillable use regulations to be an important part of Ontario's stewardship system, and believes that their requirements should be enforced.¹⁰

Conclusions

The release of the CIPSI/Ontario discussion document represents an important first step in the implementation of the principle of product and packaging stewardship in Ontario. However, the proposal requires extensive refinements particularly in the areas of diversion performance requirements, financial arrangements, enforcement mechanisms and accountability structures. The enactment of new legislation to provide a clear basis for a more practical and credible backdrop mechanism, as proposed in Who Pays for Blue?, appears to be necessary to fully address these problems. This should be developed during the implementation of the Phase I component of the proposed system. CIELAP looks forward to further opportunities to contribute to the development of this important environmental policy initiative for Ontario.

Endnotes

1. The Funding of Packaging Recycling in Ontario: A Proposal by the Canadian Industry Packaging Stewardship Initiative (Toronto: CIPSI Ontario and the Ontario Ministry of Environment and Energy, 1994).

2. See for example, M. Winfield and Z. Makuch, Who Pays for Blue? Financing Residential Waste Diversion in Ontario (Toronto: Canadian Institute for Environmental Law and Policy, 1993). See also A. Mitchell, Executive Director, and M. Winfield, Director of Research, CIELAP, letter to the Hon. B.J. Wildman, Minister of Environment and Energy, March 15, 1994.

3. See, for example, A Curbside Tale (Toronto: Toronto Environmental Alliance, 1994). See also Ernst & Young, An Estimate of the Share of Collection and Processing Costs for Fibre and Packaging in Ontario's Blue Box Program (Toronto: Ontario Ministry of Environment and Energy, 1993), and correspondence from M. Winfield, Director of Research, CIELAP to Ron Clark, Acting Assistant Deputy Minister, Waste Reduction Office, December 20, 1993, regarding the Ernst & Young report.

4. DSD costs for 1993 are stated as follows:

Steel	C\$500/tonne;
Aluminum	C\$893/tonne;
Glass	C\$143/tonne;
Plastic Containers	C\$2,332/tonne;
Boxboard	C\$295/tonne; and
polycoat/laminates	C\$1,483/tonne.

Personal communication, Jack McGinnis, Recycling Development Corporation, to Paula Vopni, CIELAP Research Associate, June 13, 1994.

5. Winfield and Makuch, Who Pays for Blue?, p. 31.

6. *Draft Regulation*, ss.7(3) and 1(5).

7. Winfield and Makuch, Who Pays for Blue?, pp. 25-26.

8. See Manitoba Environment, A Framework for Product Stewardship in Manitoba, June 15, 1994.

9. Winfield and Makuch, Who Pays for Blue?, p. 19.

10. ibid., p. 35.