IN THE MATTER OF the *Arbitration Act, 1991*, S.O. 1991, c. 17
AND IN THE MATTER OF an arbitration between:

STEWARDSHIP ONTARIO

Claimant

and

THE RESOURCE PRODUCTIVITY AND RECOVERY AUTHORITY

Respondent

AWARD

Arbitrator: Ronald G. Slaght

Appearances:

Lisa Constantine for Stewardship Ontario

Adam Stephens for The Resource Productivity and Recovery Authority

Heard:

February 18, 19, 20, 21, 2020 and March 10, 11 and 12, 2020

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PART 1 - INTRODUCTION & GENERAL BACKGROUND

1. Municipal recycling, now evolved into the blue box program residents of Ontario take for granted, emerged in municipalities around Ontario in the 1980s. Windsor is considered to be the first to implement organized recycling. The City of Kitchener introduced a comprehensive recycling blue box program in the late 1980s.[1] It was not until 1994, however, under the *Environmental Protection Act* ("***EPA***")[2] that a comprehensive and regulated regime was put in place for qualifying municipalities to implement municipal recycling for defined materials and pursuant to regulations governing the program.[3]

2. An attempt to better organize recycling goals and controls was made with the coming into being of the interim Waste Diversion Organization ("**iWDO**"), in 1999. Various stakeholders were represented there including industry, municipalities and government.

3. The iWDO issued a report in September, 2000 which established principles going forward and recommendations designed for what was then considered a reasonable goal, to achieve a 50% landfill diversion target through municipal recycling and costs sharing.[4]

4. The next material event was the enactment of the *Waste Diversion Act, 2002* ("***WDA***"). Its stated purpose was to promote recycling and to provide for waste diversion programs to accomplish that goal in all respects.[5]

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[1] An interesting and informative history of recycling in Ontario is found in "The Story of the Blue Box" Book of Documents [**BOD**], Vol. 8, Tab 23.
[2] *Environmental Protection Act*, R.S.O. 1990, c. E.19 [***EPA***].
[3] Regulation 101/94 under the *EPA*, in s. 7 required qualifying municipalities to operate and maintain a Blue Box waste management system. The Regulation provided in Schedules definitions of what was basic Blue Box waste and which of that waste was recyclable with a view to limiting the collection of waste materials and processing and using the waste.
[4] Achieving Sustainable Municipal Waste Diversion Programs in Ontario, BOD, Vol. 6, Tab 1.

5. The WDA established a non-share capital corporation, Waste Diversion Ontario ("**WDO**") to be responsible under the WDA for its programs and the achievement of its goals.[6]

6. Under the *WDA*, the Minister could require WDO to develop a waste diversion program for designated waste and any such program was to include a program agreement between WDO and the industry funding organization.

7. By letter dated September 23, 2002[7] (the "**Program Request Letter**"), the Minister wrote to WDO requiring that WDO develop a waste diversion program for blue box waste.

8. The Program Agreement, mandated by s. 25(3) of the *WDA*, was entered into between WDO and the industry funding organization, Stewardship Ontario (sometimes "**SO**"), on February 28, 2003 and was subsequently amended and restated from time to time. The parties are now under an Amended and Restated Program Agreement effective as of January 1, 2010.[8] This Arbitration is constituted under the Dispute Resolution provisions, particularly s. 16.5, of that Agreement.

9. The requisite waste diversion program, known as the Blue Box Program Plan ("**BBPP**")[9] was ultimately approved by the Minister in December, 2003.[10] The approval letter also enclosed the final regulation designating blue box waste under the *WDA*, Regulation 273/02.

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[5] *Waste Diversion Act, 2002*, S.O. 2002, Chapter 6 [***WDA***] BOD, Vol. 1, Tab 3, s. 1.
[6] *WDA*, *ibid*., ss. 3, 5.
[7] Program Request Letter, Blue Box Program Plan, BOD, Vol. 2, Tab 9, Appendix II.
[8] Restated Program Agreement, January 10, 2010 [**Program Agreement**], BOD, Vol. 2, Tab 13.
[9] Blue Box Program Plan [**BBPP**], BOD, Vol. 2, Tab 9.
[10] Minister's Approval Letter, December 22, 2003, BOD, Vol. 4, Tab 39.

10. The *WDA* in s. 27 required that material changes to the BBPP are to be approved in writing by the Minister. There have been three amendments since approval of the BBPP in 2003. All three are relevant to the issues arising in this matter. They may be described as:

(a) the Cost Containment Amendment ("**Costs Containment Principles**" or "**CCP**"), dated July 12, 2004, revised January 31, 2005;[11]

(b) the "In-Kind" Amendment, approved November 4, 2005;[12] and

(c) the Continuous Improvement Fund ("**CIF**") Amendment, October 17, 2007.[13]

11. The *WDA* in s. 5(d) requires WDO to determine the amount of funding required from Stewardship Ontario to meet its responsibilities under the *Act*. The BBPP in section 7 established a Cost Calculations regime to arrive at the annual Steward financial obligation ("**Steward Obligation**").[14]

12. The Municipal Industry Program Committee ("**MIPC**"), a sub-committee of WDO's Board populated by representatives of Stewardship Ontario, the municipalities ("**AMO**") and, latterly, the City of Toronto, would meet each year and arrive at a recommendation for the amount of the annual Steward Obligation.[15]

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[11] Costs Containment Principles [**CCP**], BOD, Vol. 2, Tab 12,
[12] BOD, Vol. 2, Tab 10.
[13] BOD, Vol. 2, Tab 11.
[14] BBPP, *supra* note 9, section 5.4; *WDA*, *supra* note 5, ss. 25(5) and s. 51; BBPP, *supra* note 9, section 7.
[15] AMO is the Association of Municipalities of Ontario, the umbrella organization representing participating municipalities, other than the City of Toronto.

13. The WDO Board routinely accepted MIPC's recommendation. In 2014, however, MIPC could not agree on the quantum. WDO ultimately directed that the 2014 Obligation would be set by arbitration between SO and the municipalities, and the parties agreed to do so.

14. As a result, an *ad hoc* arbitration proceeded before an arbitrator, The Honourable Robert Armstrong, who was asked to set the 2014 Steward Obligation. The parties to the arbitration were Stewardship Ontario, the City of Toronto and AMO. WDO was not a party.[16]

15. The main issue in dispute was municipal costs, particularly whether municipalities were bound to a requirement that their costs be reasonable and whether certain cost bands, which had been put in place under the Costs Containment Amendment would govern. Another issue that arose however, was in relation to the In-Kind Amendment and particularly, whether municipalities could recover as part of the annual Steward Obligation the cash value (or 50% of that) of the in-kind advertising that they were receiving from Newspaper Stewards, in lieu of a cash contribution by those Stewards as part of the Steward Obligation.

16. Arbitrator Armstrong concluded that 50% of the $2.2 million of in-kind advertising used by municipalities should be included in municipalities' costs and be paid as part of the 2014 Steward Obligation ("**2014 Award**").[17]

17. Consensus did not return in 2015. MIPC was again tasked with recommending the 2015 Steward Obligation but was unable to agree. Among other matters, Stewardship Ontario objected to the inclusion of the cash value component of municipal in-kind advertising in the calculation of the Steward Obligation for 2015.

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[16] David Pearce Affidavit, February 6, 2020, [**Pearce Affidavit**], paras. 58-63.
[17] 2014 Arbitration Award [**2014 Award**], BOD, Vol. 4, Tab 48, para. 284.

18. In June 2015, the Minister of the Environment notified WDO that it was its obligation in any event, not MIPC's, to set the annual Steward Obligation and it should do so.[18] The Minister also directed WDO to get on with addressing cost containment.

19. WDO adopted Arbitrator Armstrong's approach to set the 2015 Steward Obligation, but then took steps to establish new methodologies going forward. These included striking committees, hiring consultants and pursuing the costs containment issue.[19] Submissions were made to WDO by the various stakeholders, including Stewardship Ontario and the municipalities, over the contentious issues that were percolating among the parties.

20. These included SO's continued position that in-kind advertising was not a "cost incurred" for municipalities. WDO had included a cash contribution by Stewards for the value of in-kind advertising in the 2015 Steward Obligation. Stewardship Ontario now also asserted that the annual Steward Obligation had been incorrectly calculated for years by including municipal costs incurred for recycling components of the Blue Box Program that did not fit within the definitions of Printed Paper and Packaging ("**PPP**") in ss. 2.1.1 and 2.1.2 of the BBPP. This gave rise to the second issue in dispute, often called in these proceedings the non-obligated issue.[20]

21. As these contentious issues escalated and stakeholders continued to assert their respective positions to WDO, now directly charged with setting the Steward Obligation, significant changes occurring in recycling programs from inception under the BBPP in 2004 were having an effect. First, municipal gross costs of recycling had increased substantially. In 2005, municipal Gross

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[18] June 16, 2015 letter, BOD, Vol. 4, Tab 49.
[19] Geoff Rathbone Affidavit, February 7, 2020, [**Rathbone Affidavit**], paras. 79-84.
[20] Stewardship Ontario October 27, 2015 letter, including Appendices A, B & C, BOD, Vol. 4, Tab 60.

Costs were $182.4 million, by 2015, they were $332.8 million.[21] Moreover, the composition of materials in the blue box was changing noticeably. With a decline in newspaper readership, newsprint recycling also declined. Telephone directories disappeared. Both these elements were significant revenue producers historically, reducing the Net Cost to be paid by Stewards.

22. As well, packaging and its related recycling costs were evolving. New packaging innovations were overall positive for the environment but were more costly to manage and not all were recyclable in any event. Finally, the analysis and audits of what was actually being put in the blue box, what could be recycled, what could be sold and what was considered contamination or residue increased in reliability, and this knowledge fuelled disagreements among the stakeholders.[22]

23. Among the reports that came out of the steps WDO took following the 2014 Arbitration was the Parry Report. Ms. Elizabeth Parry, a consultant, was to address the issue of non-obligated materials raised by Stewardship Ontario. The Parry Report, as discussed below, established a decision tree for determining what, if any, materials could be removed from funding in setting the Steward Obligation, seeking to balance the tension between obligated materials or PPP and non-PPP materials solicited by municipalities and included in blue box waste. The Report determined that pots and pans, their costs and value, were the only materials that met the criteria for removal from the Steward Obligation.[23]

24. Also among the steps taken by WDO following the 2014 Arbitration, where Arbitrator Armstrong had rejected the existing costs bands methodology, was to appoint a Panel to review

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[21] Working Group Final Report, May 3, 2016, revised May 12, 2016, BOD, Vol. 4, Tab 60, p. 6.
[22] Final Majority Panel Report, September 15, 2015, BOD, Vol. 4, Tab 50, pp. 10-13.
[23] Parry Report, May 2, 2016, BOD, Vol. 4, Tab 59.

Blue Box Costs Containment and the In-Kind Program. Stewardship Ontario and the municipalities had representation on the Panel. The Panel Report included much discussion about the current make-up of the blue box and the changing nature of packaging and its implications for costs and revenues (the "**Evolving Tonne**"). The Panel Report set out a series of possible options that could be adopted to address costs containment principles and proposed that the existing costs methodology model be updated to take into account the effects of the Evolving Tonne.[24]

25. A Working Group was established to implement the Panel's recommendations. Again, the Working Group included appointees from Stewardship Ontario and from municipalities as well as consultants and a neutral director.

26. Among the recommendations of the Working Group was that Stewards should make a contribution to costs containment, pursuant to the Costs Containment Amendment and the BBPP.

27. The Working Group concluded that Stewards bear some responsibility for the changing nature of the Blue Box stream, the Evolving Tonne. Stewards should make an additional contribution over and above its contribution already provided through the Continuous Improvement Fund, which directs payments from the Steward Obligation to municipalities to fund efficiency projects. The Working Group proposed that the additional Steward costs containment contribution be set at 50% of the total annual CIF contribution. [25]

28. Thus crystallized the third issue in dispute before this Tribunal. Stewardship Ontario has made multiple submissions to WDO/RPRA objecting to a Stewards Cost Containment

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[24] Final Majority Panel Report, *supra* note 22, p. 44.
[25] Working Group Final Report, *supra* note 21, s. 8.0.

contribution as unlawful under the terms of the BBPP, the Costs Containment Amendment, and other authority.

29. WDO set the 2016 annual Steward Obligation in the amount of $121.5 million. Included in its make-up was an amount for newspaper in-kind advertising, a Steward cost containment charge, calculated in the amount of $2.1 million, and, on the non-obligated issue, WDO reduced the Net Cost otherwise payable by a $109,543 deduction for pots and pans.

30. In 2016, the *Resource Recovery and Circular Economy Act* ("***RRCE***") was enacted.[26] It established the Resource Productivity and Recovery Authority ("**RPRA**"), the Respondent in this Arbitration, as a replacement for the WDO. The *Waste Diversion Transition Act* ("***WDTA***") also passed in 2016, replaced the *WDA*. For our purposes, the material objects of the new statute did not change and RPRA's authority and objects are to perform the duties previously carried out by WDO.[27]

31. Among its objects, the *RRCE* allows for the wind-up of existing waste diversion programs and their replacement. It also establishes the Provincial Interest, a series of enumerated aims that RPRA is to have regard to when carrying out its duties and exercising its powers under the *WDTA*.[28]

32. Since 2016, the parties have followed a particular process leading to setting the annual Steward Obligation. Stewardship Ontario and the municipalities make oral and written

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[26] *Resource Recovery and Circular Economy Act* S.O. 2016, c. 12, Schedule 1, [***RRCE***], BOD, Vol. 1, Tab 4; RPRA s. 21.
[27] *Waste Diversion Transition Act,* S.O. 2016, c. 12, Schedule 2, [***WDTA***],BOD, Vol. 1, Tab 5.
[28] *RRCE*, *supra* note 26, ss. 2 and 10.

submissions to RPRA's Finance Committee, a committee cross-populated with members of RPRA's Board.

33. RPRA Staff then provides a report to the Board with analysis of the current issues, background information and recommendations. The Board then considers the matter and approves a methodology for the current year. Staff, with the assistance of Stewardship Ontario and others, then populates the template or methodology with the numbers for that year, and the Steward Obligation is set.

34. In each year through 2019, RPRA included amounts for the three disputed components in calculating the Net Cost to be paid by Stewards. These included an amount for In-Kind newspaper advertising, a pots and pans deduction and an amount for Steward costs containment to be paid directly to municipalities.

35. On June 21, 2018, [29] RPRA's Board approved the methodology to be used to calculate the 2019 Steward Obligation. The calculations were subject to exchanges of data and information among the parties.

36. In the course of that exchange, SO realized that the proposed Steward Costs Containment input to Net Cost, derived from a formula, had increased to $7,153,500, about three times the amount for 2018. Further review and discussion between the parties ensued.[30] Matters were not resolved. The 2019 Steward Obligation had been set by RPRA at $126.4 million in June, 2018.[31]

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[29] June 21, 2018 RPRA Board Minutes, BOD, Vol. 5, Tab 72, s. 4.0.
[30] Frank Denton (RPRA) email to David Pearce, September 21, 2018, BOD, Vol. 5, Tab 79.
[31] July 27, 2018 email exchange, BOD, Vol. 5, Tab 73; July 27, 2018 Stewardship Ontario memo, BOD, Vol. 5, Tab 76.

Stewardship Ontario commenced this arbitration on October 15, 2018[32] under the Dispute Resolution provisions of the Program Agreement, putting the lawfulness of the three contested inputs for decision by an arbitrator.

37. In August 2019, the Minister delivered a wind-up letter, requiring that the existing Blue Box Program be wound up by the year 2025, following which a new regime for defraying the costs of municipal recycling, founded on the assumption by industry of all costs, will be implemented.[33]

PART 2 - THE NOTICE OF DISPUTE

38. Stewardship Ontario's Dispute raised the three issues that remain in dispute, in-kind advertising, Steward costs containment, and the non-obligated issue, and asserted as its main submission that none of these was authorized by the BBPP, or by any statute or legislative authority. As a result, RPRA had breached the Program Agreement in determining the 2019 Steward Obligation. Stewardship Ontario invoked s. 16.2 of the Program Agreement, one of five subparagraphs dealing with Dispute Resolution under that Agreement, taking the view that these were legal issues between Stewardship Ontario and RPRA and fell to be determined under that subsection.

PART 3 - PROCEDURAL HISTORY AND DECISIONS

39. RPRA's position was that any arbitration with respect to the dispute raised by Stewardship Ontario in its Notice of Dispute should proceed under s. 16.5 of the Program Agreement, arguing that such disputes are to be resolved under that subsection.

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[32] Stewardship Ontario October 15, 2018 letter, BOD, Vol. 5, Tab 81.
[33] August 15, 2019 letter, BOD, Vol. 8, Tab 22.

40. To resolve the impasse, SO first brought a Court Application seeking declaratory relief that s. 16.2 and not s. 16.5 was the applicable dispute resolution path. Eventually, the parties agreed to arbitrate the issue and this Arbitrator was appointed.

The Earlier Awards

41. The Tribunal resolved the issue in favour of s. 16.5 and the arbitral process called for by that section.[34] The Tribunal found that the three issues in dispute concerned "the total stewardship obligation", an undefined term in s. 16.5 of the Program Agreement and thus should be litigated under that subsection. The Tribunal however rejected the proposed arbitral process put forward by RPRA, which had included AMO and the City of Toronto as parties to the arbitration, essentially for the reason that the Program Agreement is a bilateral agreement, the parties to which are Stewardship Ontario and RPRA only, and nothing in that Agreement permits the addition of other parties to the applicable dispute resolution procedure.

42. The Tribunal directed the parties to make efforts to agree upon a procedure, failing which the Arbitrator had set out the procedure to be followed as a Schedule to the Tribunal's Reasons.

43. Ultimately, the parties did agree and the Tribunal authorized the agreed procedure in a subsequent Award[35] which was followed by the parties for the matters and steps leading to this hearing.

44. The submission to arbitration contained in the agreed protocol provides as follows:

> 2. The Arbitrator will render a decision on the following issues in Stewardship Ontario's October 15, 2018 dispute letter in relation to the

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[34] Process Award, June 7, 2019, Stewardship Ontario Book of Authorities, [**SOBOA]**, Tab 1(a).
[35] July 7, 2019, Award, SOBOA, Tab 1(b).

> 2019 Steward Obligation and all subsequent Steward Obligations to be set by RPRA:
>
> In setting the Annual Steward Obligation, does RPRA have the requisite legal authority or jurisdiction under the Blue Box Program Plan and the Waste Diversion Transition Act to:
>
> (i) impose a "Steward Cost Containment" fee;
>
> (ii) include municipal costs for materials which do not meet the Blue Box Program Plan definition of Printed Paper and Packaging; or
>
> (iii) include municipalities' use of newspaper in-kind linage as a cost incurred by the municipalities.
>
> (collectively, the "Dispute").

45. The jurisdiction of the Arbitrator reflected above, was clarified and refined by agreement of the parties and the Arbitrator during the hearing.[36] The clarification was designed to ensure the Arbitrator had sufficient latitude to decide all issues between the parties, the breadth of which had been fully formed only in the course of the proceeding, including the question of the standard of review which the Arbitrator is to apply. As will be seen below, Stewardship Ontario's fundamental position is that this dispute arises under a contract between the parties pursuant to provisions included in that contract defining and governing what is to be decided and that, as a result, the correctness standard for issues of law arising in contract proceedings, defined by the *Sattva*[37] principles, applies. RPRA, on the other hand, as a regulator exercising statutory powers of decision, takes the view that the standard of review in this Arbitration is reasonableness, aligned with principles of administrative law including those now restated in the recent *Vavilov*[38] decision in the Supreme Court of Canada.

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[36] Transcript, March 12, 2020, pp. 1907-1922 and email, March 23, 2020.
[37] *Sattva Capital v. Creston Moly*, [2014] 2 R.C.S., 2014 SCC 53 [***Sattva***].
[38] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [***Vavilov***].

46. There is another issue which the parties have agreed falls within this Tribunal's jurisdiction. Whether correctness or reasonableness governs the initial decisions, whether RPRA had the lawful authority to require a cash value for in-kind, levy a Steward Cost Containment charge and take the view it did of the non-obligated dispute, and depending upon which party succeeds on these threshold extricable issues of law, there remains to be considered the implementation question: did RPRA act reasonably, if it had authority, in its execution of the particular program element.

47. These latter questions have relevance for the years after 2019. The Tribunal's jurisdiction flowing from the submission extends to years after 2019. This may involve the Arbitrator willingly or not, in assessing reasonableness issues at least for one or more future years. For immediate example, RPRA has signalled[39] it is reconsidering its methodology for calculating the cost containment charge for 2020. This issue is further dealt with later in this Award.

Divisional Court Decision

48. The City of Toronto and AMO brought injunction proceedings in the Divisional Court in January, 2020, seeking to enjoin this Arbitration from proceeding and for related relief. The matter came on before Justice Swinton, who released her Decision and Reasons, dismissing the Application on January 30, 2020.[40]

49. Justice Swinton found (para. 33) that this Tribunal is not exercising a power of decision and obtains its authority from the Program Agreement between RPRA and Stewardship Ontario.

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[39] Frank Denton September 21, 2018 email, *supra* note 30.
[40] *City of Toronto v. Resource Productivity & Recovery Authority*, 2020 ONSC 599 [**Divisional Court Decision**], SOBOA, Tab 2.

Further, the arbitration process is governed by the provisions of the *Arbitration Act* (para. 35)[41] and rulings of the arbitrator are not subject to judicial review by the Divisional Court (para. 33).

50. Justice Swinton decided that participation in the arbitration by RPRA is not an exercise of a statutory power of decision but rather is compliance with RPRA's obligations in the Program Agreement (para. 35).

51. The Applicants had argued before the Divisional Court that the determination of the Steward Obligation can never be characterized as a "dispute between RPRA and Stewardship Ontario." Justice Swinton found that to be a question of arbitrability and within the Arbitrator's jurisdiction (para. 37). Justice Swinton pointed out that this Tribunal determined, in the Process Award, that Stewardship Ontario's Notice of Dispute raised a dispute within the broad meaning of s. 16.5 of the Program Agreement, that it was a dispute in relation to the total steward obligation and must be decided under that Agreement (para. 44).

PART 4 - MATERIAL LEGISLATION, DOCUMENTS AND PRINCIPLES OF CONSTRUCTION

52. I referenced the most relevant documents and legislation in general terms earlier in these Reasons, and will deal with much of it again in the balance of this Award. I will not, however, go through these materials and refer to the salient sections, paragraphs and terms, each in turn. This is a private arbitration and the parties and counsel are all extraordinarily well-informed about these materials and so too now is the Arbitrator, perhaps to some lesser extent. I see no need in these lengthy Reasons to conduct this sort of review. I have however, read and reviewed these materials multiple times and even if not specifically noted, I have considered all relevant,

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[41] *Arbitration Act, 1991*, S.O. 1991, c. 17.

even tangentially relevant, legislation, sections, paragraphs, letters, agreements, emails, schedules and appendices. And, of course, all the arguments and submissions of the parties.

53. In the analysis below and in reaching my conclusions over the law and facts, I have applied standard principles of contract[42] and statutory interpretation,[43] which in this matter intersect under the broad rubric that each contract document and statute must be read as a whole meaning should be taken from the contract documents and legislative pronouncements taken as a whole, and that effect should be given to the material provisions in reaching conclusions. Importantly for this matter, these materials must be read together collectively in reaching decisions on contractual and legislative intent and purpose.

54. I have also considered the principal differences between the two, contract and statute, in that respect. Contract interpretation makes an attempt to learn the purpose and intent of the parties, at least two, from the words they have used and the factual matrix. Statutory interpretation involves the intent of only the legislature (perhaps with Hansard). Nonetheless, the overall purpose is to find harmony and consistency from all sources, if possible.[44]

55. I have also considered the effect in law of Minister's letters,[45] including where they form part of contract documents, and I have constantly strived to place the Blue Box Program Plan in

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[42] Before *Sattva*, the Ontario Court of Appeal laid down the principles of interpretation which I have followed. See e.g., *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205; *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59; *Salah v. Timothy's Coffees of the World Inc.*, 268 OAC 279, *Vavilov* is of course the new standard for application of administrative law principles.

[43] Sullivan on *The Construction of Statutes*, 6th ed.

[44] When the landscape includes a series of documents, legislation, contracts, Ministers' letters, assistance in interpreting one can be drawn from the related materials. See Geoff Hall, *Canadian Contractual Interpretation Law*, 3rd ed., 2016 at s. 2.2.6, pp. 21-23, for a useful discussion in a contract setting.

[45] I will not set out a detailed review of this issue. I generally accept the analysis Mr. Stephens provided in his memorandum, "The Import of Minister's Letters". This was not an issue seriously contested by Ms. Constantine. The parties each relied upon certain aspects of this epistemological evidence as having the force of law. I am

the greater context of all the surrounding materials to which it relates. Not surprisingly, this massive amount of material does not always maintain a perfect symmetry or consistency from its beginnings in the *EPA* through the Minister's August, 2019 letter terminating the existing Blue Box Program. I have, however, attempted to find cohesion and reasoning by reading the documents and statutes having regard to the broader intent and purposes that all were directed at.

PART 5 - THRESHOLD INTERPRETATION ISSUE

56. I will here first set out in general terms the respective positions of the parties on the issue of interpretation, what is the standard of review applicable to the issues in dispute, and then provide my analysis.

Stewardship Ontario's Position

57. Stewardship Ontario's core submission is that this dispute in its essence is a contractual dispute, arising between two parties bound together by contract, the Program Agreement. More specifically, this is and has been found to be a dispute within s. 16(5) of that Agreement about "the total steward obligation" and with respect to "in-kind contributions" to be made to "municipalities" under the Blue Box Program Plan and accordingly falls to be determined under the terms of that Agreement. Contract interpretation principles apply.

58. The parties in Section 4 (s. 4.1 for WDO/RPRA and s. 4.2 for Stewardship Ontario) contracted that they will each implement the Blue Box Program Plan and the Program's policies and procedures identified there which are their respective responsibilities. Although cautiously expressed, without the usual language employed to assert breach of contract allegations,

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satisfied that each of the letters I refer to in these Reasons can be traced to some legislative formation, policy or direction.

Stewardship Ontario alleges RPRA has breached the terms of the Program Agreement, failed to implement and give effect to the requirements of the BBPP and has purported to make material changes to the BBPP without the requisite approvals. These are issues of mixed fact and law and the parties agreed there are threshold and extricable issues of law to be determined on a correctness standard in accordance with fundamental contract principles set out in *Sattva*.

59. This approach is confirmed by both the Process Award of this Arbitrator and the Divisional Court Decision. The Divisional Court made clear that this is a private arbitration, proceeding to arbitration under a contract to which the *Arbitration Act*, not the *Judicial Review Act* applies.

60. RPRA is not exercising a statutory power of decision within this arbitration. Administrative law principles do not apply. The record is the evidence before this Tribunal, not a static record as if the Tribunal were conducting a judicial review.

61. The Program Agreement forms part of the BBPP, is referenced in all the legislation, reaffirmed to continue in force under the *WDTA*, and through s. 16.5 requires disputes to be resolved with each party bound to the same standard, that of correctness in law.

62. No deference is owed to decisions of RPRA. RPRA is a full party participant in the arbitration pursuant to the Program Agreement. Its obligations flow through the contract for a reason and that settles the standard of review for its actions. *Vavilov* has no relevance for this process.

RPRA's Position

63. RPRA maintains that the standard of review applicable is that of reasonableness. That the dispute is being litigated in an arbitral process is not determinative. The matter is one of substance not form, and the Tribunal must look to the subject matter of the dispute to arrive at the appropriate standard of review. In this matter, the administrative decisions of RPRA's Board are being reviewed, and this gives rise to a standard of reasonableness in that review. RPRA relies upon *Vavilov* for these principles. There are no *Vavilov* exceptions applicable in this matter. Neither does the fact that the parties are in a contractual relationship in the Program Agreement affect these fundamental principles. Read in its pith and substance, the Program Agreement was really designed to provide the regulator with the power to ensure that its counterparty complied with its obligations under the applicable legislation and the Blue Box Program Plan.

64. Further, the correctness standard is an exception to the general rule and applies only to certain types of fundamental legal questions, none of which arises in this matter. Moreover, there is nothing in the Program Agreement, including its dispute resolution provisions, that permits the pure substitution by the Arbitrator of the Tribunal's view of the issues in dispute to that of the Regulator. Rather the Arbitrator enjoys only the power to address the decisions of the actual decision-maker, RPRA, on a reasonableness standard.

65. To do otherwise would constitute an unlawful sub-delegation of authority from RPRA to the Arbitrator. The applicable legislation and documents creating the obligations between the parties are all consistent that the decisions, including the fundamental decision about how much the industry funding organization, Stewardship Ontario, is to pay, are solely within its ultimate

jurisdiction[46] and that it has discretion to exercise in carrying out those obligations. The applicable standard to be applied in this proceeding is to determine whether RPRA's exercise of its discretion in the circumstances of each item in dispute was reasonable.

66. This is an exercise in administrative law. The record is therefore only that which was before the RPRA Board when each decision in dispute was made.

Analysis

67. In my view, the standard of review applicable in this matter is that of correctness. This is primarily because the parties have entered into a contract defining their rights and obligations in material respects including those governing the three items in dispute and the process to be employed in resolving these disputes. As a result, their disputes are to be determined on the basis of contract interpretation principles.

68. The true nature of this dispute has been determined by the Process Award issued by this Arbitrator and by the Divisional Court Decision, both decisions affirming the framework of contract underlying this Arbitration.

69. For example, Justice Swinton stated the following:

> [35] In my view, participation in the arbitration is not an exercise of a statutory power of decision by RPRA, but rather compliance with RPRA's obligations in the Program Agreement with SO – …
>
> and
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> [42] …RPRA is an administrative and regulatory body that developed the Blue Box Program Plan in conjunction with SO and entered into the Program Agreement with it. Most importantly, it agreed to arbitrate disputes about the Blue Box Program Plan with SO.

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[46] See s. 5(i) of the *WDTA*: "to determine how much [Stewardship Ontario] is to pay…"

70. Before examining the issue in detail, a few observations are in order. The first of these is that this is an unusual circumstance. It would have been within the power of the legislature to establish a regime by which RPRA made statutory decisions affecting the interests of the stakeholders, with policies, statutory directions and a clear hierarchal structure, with the regulator doling out its decisions on the basis of the obligations and directions under which it operates. In other words, a standard administrative tribunal in the nature of those familiar to all operating with the Ontario legislative framework.

71. In those circumstances, RPRA's decisions would be tested by judicial review just as its decisions over municipalities in this regime are to be tested by judicial review only. Municipalities must exercise their review of RPRA's decisions by judicial review. [47]

72. But that is not this case. The legislature, in its wisdom, mandated that these parties enter into an agreement to reflect duties and obligations owed to each other through that agreement and included a dispute resolution provision in that agreement mandating that disputes over the total steward obligation, which is this dispute, are to be resolved pursuant to arbitration between the parties and not in any other manner, and not in court.

73. One could speculate about the reasons why this was done, perhaps a recognition that Stewardship Ontario would be making a significant financial contribution to the program being administered by RPRA, and ought to have a greater role to play in ensuring that RPRA met its obligations. One can see some elements of this in the Program Agreement, for example, the section that Stewardship Ontario relies upon, s. 3.5 of the Program Agreement, recording that no material change may be made to the BBPP or to the terms of the Program Agreement without the

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[47] Divisional Court Decision, *supra* note 40, paras. 41, 44.

Minister's approval. As well, the Agreement describes its own intended purpose. In s. 1, entitled "Purpose of the Agreement", we see the following:

> 1.1 The Purpose of this Agreement between Waste Diversion Ontario and Stewardship Ontario is to:
>
> (a) Define the roles and responsibilities of the two parties…

74. At the same time, RPRA benefits from this arrangement. It has a direct contractual right to enforce Stewardship Ontario's obligations to perform its duties.[48]

75. In my view, for whatever the reason, the existence of the Program Agreement fundamentally alters the relationship of the parties from a standard administrative law perspective into something different, a contractual framework in which the contract is said to define the roles and responsibilities of the parties and provides for a dispute resolution procedure consistent only with the application of an arbitral process. It is as far away as possible from the usual administrative law practices and procedures. In my view, RPRA's submissions on this issue seek to read out of the parties' relationship the fact, existence, language and meaning of this contract and to impose upon disputes arising between the parties an administrative law regime that is simply not applicable to the defined relationship between these parties.

76. RPRA, in its submission, argues that the standard of review applicable is reasonableness because the applicable standard of review is determined by the subject matter of the dispute, not the forum.[49]

77. The standard of review however is not determined by the subject matter of the dispute but by the relationship between the parties, its nature and what the framework establishing and

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[48] Program Agreement, *supra* note 8, ss. 4, 16.
[49] RPRA Written Submissions, Part A – Standard of Review, p. 41.

governing that relationship says about disputes between the parties. In this case, all of that is contractual in nature including that the parties agreed that the forum would be arbitration.

78. As to subject matter in any event, this is defined very broadly in the contract – in s. 16(5) to include any dispute over the total steward obligation or in-kind contribution, precisely this dispute.

79. It was for that reason that RPRA sought to invoke s. 16(5) in the Process Arbitration.

80. This is not to say of course that questions of reasonableness are ruled out entirely. I agree with RPRA in its argument that a standard of reasonableness applies in the second question arising, assuming the standard of review has been determined: did RPRA act reasonably in implementing the authority and powers that it had. This is the test in administrative law but also in contract.[50]

81. Moreover, I disagree with RPRA's submission in its Written Argument (para. 202) that s. 16.5 leaves disputes about the statutory power to be determined in accordance with a dispute resolution procedure adopted by RPRA, that does not on its face require private arbitration as the resolution procedure.

82. Any reasonable review of the dispute resolution provisions in this contract read as whole, including s. 16.5, makes it clear beyond doubt that disputes arising under s. 16.2 or 16.3 or 16.5 where that section speaks about a dispute resolution procedure can mean only an arbitration procedure. It cannot mean that WDO could decide that the dispute resolution procedure will be a judicial review. Reading the contract as a whole, it is clear that dispute resolution has been taken

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[50] *Shelanu Inc. v. Print Three Franchising Corp.*, [2003] O.J. No. 1919 (C.A.) [***Shelanu***].

out of the administrative law context, because the parties' obligations are being expressed in contractual form. In any event, leaving aside this Arbitrator's Process Award, Justice Swinton decided that issue against RPRA's submissions in the Divisional Court Decision.[51]

83. Turning briefly to the Program Agreement, the Agreement has incorporated by reference the obligations of the parties set out in the statutory framework recorded in legislation. For example, under s. 4.1(d), WDO agrees it will implement its responsibilities identified in the Blue Box Program Plan. In s. 4.2(e), Stewardship Ontario does the same and agrees to comply with the terms of the Blue Box Program Plan.

84. It is the terms of the Blue Box Program Plan that underlie the three items in dispute in this matter. These are contractual obligations of the parties with respect to the three items in dispute and they are to be determined on contract principles in a procedure which puts the two contracting parties on an equal footing, participants in an arbitration to decide this dispute concerning as it does the total steward obligation.

85. Moreover, the parties entered into an Arbitration Agreement by the terms of which the Arbitration is subject to the *Arbitration Act*, not the *Judicial Review Procedure Act*, and the Arbitrator was given the power to grant any relief that would be within the jurisdiction of a judge of the Superior Court of the Province of Ontario at a trial in that court.[52]

86. In a similar vein, the parties agreed in the Arbitration Protocol that the decision of the Arbitrator would be final and binding, subject to the right of a party to appeal the decision to the

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[51] Divisional Court Decision, *supra* note 40, paras. 35, 42.
[52] Arbitration Agreement, September 16, 2019, Article 3.

court on a question of law. Again, such a provision is inconsistent with any suggestion that administrative law principles are at work in this dispute.[53]

87. I am also satisfied that the parties themselves, in s. 2 of the Arbitration Protocol identified standalone issues of law that they wanted determined in the Arbitration.

88. Not surprisingly, there is little helpful case law in resolving this matter. Both parties rely upon a decision of Justice Pepall sitting as she then was as a motions judge, in *OMERS Realty Corp. v. Sears Canada Inc.*,[54] a decision which was reversed in the Court of Appeal. In *OMERS*, a statutory provision permitted landlords to collect a shortfall in their total tax obligations from other mall tenants, where some tenants had reached a statutory cap on taxes.[55]

89. The landlord, OMERS, selected Sears to make up the shortfall. Sears objected and the matter went to arbitration pursuant to an arbitration clause in the lease between the parties. A majority of the arbitrators held that the shortfall should have been allocated amongst all tenants and substituted its decision for that of the landlord. OMERS appealed to the Ontario Superior Court.

90. Justice Pepall held that the Arbitrators had erred in that the landlord's decision to require payment from eligible tenants only was a statutory power of decision and the panel had no authority at law to substitute its judgment for that of OMERS without first applying administrative law principles which at that time required the decision by OMERS to be rendered patently unreasonable.

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[53] Protocol, June 21, 2019 Award, SOBOA, Tab 1(b), s. 7.
[54] *OMERS Realty Corp. v. Sears Canada Inc.*, [2005] O.J. No. 634 [***OMERS***], Stewardship Ontario Supplemental Book of Authorities, Tab 3, reversed in *OMERS Realty Corp. v. Sears Canada Inc.*, 2011 OAC 179, RPRA Supplementary Brief of Authorities, Tab 5.
[55] *Municipal Act*, R.S.O. 1990, c. M. 45, ss. 447.24 and 447.25.

91. RPRA relies upon this language from Justice Pepall's Reasons:

> 22. Section 31 of the *Arbitration Act, 1991* provides that an arbitral tribunal is to decide a dispute in accordance with the law. The arbitration represents a process to address a dispute; it does not confer jurisdiction to ignore or rewrite the law and established legal principles.[56]

92. While RPRA acknowledges that the Court of Appeal disagreed with Justice Pepall's Decision, it points out that the result the Arbitrators reached was upheld on other grounds. This, however, requires some explanation.

93. The central point for the purposes of this matter, is that the Court of Appeal was very clear in its disagreement with Justice Pepall's conclusion that the Arbitrators had erred in substituting the Panel's judgment for that of the landlord without first determining whether the exercise of the landlord's discretion was patently unreasonable, because the landlord was exercising a statutory power of decision, based on the legislation.

94. The Court of Appeal said the following:

> 25 The landlord's decision does not come within the scope of public law and thus is not amenable to judicial review. As Brown and Evans explain, the decision in question must come within the scope of public law to engage the prerogative remedies that may be obtained by way of judicial review. They go on to explain that, "the paradigm of a public body is one that exercises statutory powers in the discharge of regulatory or other governmental responsibilities in respect of persons with whom it is not in a contractual or other private law relationship." The landlord is a private actor whose relationship with the affected tenant is formed by private contract.[57] (Arbitrator underlining)

95. The Court of Appeal continued:

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[56] RPRA Closing Submissions, para. 215.
[57] *OMERS Realty Corp. v. Sears Canada Inc.*, 2011 OAC 179, para. 25.

> 28 In my view, the issue for the arbitration board was one of statutory interpretation. Its function was to interpret the legislation and determine whether the landlord's actions were in compliance with the legislative requirement. In this, the board was required to be correct. Any appeal from the board's determination raises a question of law, which is to be reviewed on a correctness standard.[58] (Arbitrator underling)

96. The Court went on to find that the majority Arbitration Panel had conducted its analysis correctly, leading to the result that the landlord had a right to determine which of the eligible tenants will bear the shortfall, and for that reason, the appeal itself was dismissed.

97. This shows for our purposes that the Court of Appeal was quite clear that where parties are operating under a private contract, as they clearly are here and as Justice Swinton found them to be, administrative law principles are not applicable but rather the standard to be applied in interpreting the legislation by those arbitrators is one of correctness stemming from the contract between the parties, in that case, the lease.

98. RPRA also argues that a standard of correctness cannot be applied in this arbitration because to do so would effectively delegate RPRA's statutory responsibility pursuant to the *WDTA* to the Arbitrator, who would be substituting the Tribunal's decision or judgment in the exercise of RPRA's powers, for that of RPRA's Board. This would be tantamount to a hearing "*de novo*" with the Arbitrator substituting his determination of the issues for that of the RPRA Board.

99. Again, in my view, this concern is misplaced. The Tribunal in this matter is not substituting its determination of the broad powers that RPRA is given and the responsibilities it must meet under the statute. The Tribunal is deciding whether RPRA met those obligations,

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[58] *OMERS*, *supra* note 54, para. 28.

pursuant to a contract between the parties in which that question is to be determined by a third party arbitrator in accordance with a submission to arbitration.

100. The Tribunal is not acting as a review body of RPRA's actions but rather as a decision maker as to the lawfulness of those actions, all arising naturally from the consequences of the contract between the parties. And, it should not be forgotten that this Agreement was both required by the legislation and approved by the Minister and it forms part of the BBPP.

101. Finally, I repeat that issues of reasonableness are very much a part of the overall submission to arbitration of this matter. I am to determine the lawfulness of RPRA's decisions with respect to non-obligated materials, to impose an in-kind charge as part of the annual Steward Obligation, and to impose a Costs Containment charge on Stewards. Secondary issues in all matters arise assuming RPRA's lawful authority and that is whether the implementation of these specific decisions was reasonable on the ground, so to speak.

102. *Vavilov* is obviously an important decision in providing recent guidance on the proper application of the reasonableness standard in matters of administrative law. RPRA relies upon *Vavilov* in support of its argument that reasonableness is the standard of care. The Courts stated in *Vavilov* that there is a "presumption that reasonableness is the applicable standard in all cases"[59] where administrative decisions are being reviewed and that the presumption of reasonableness is "intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the Court."[60]

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[59] RPRA's Closing Submissions, p. 41, paras. 193-196.
[60] *Vavilov*, *supra* note 38, at para. 10 and para. 33.

103. The question at hand here however, is whether in this case the matters in dispute have been left for a determination by the administrative decision makers rather than by arbitration and whether the presumption in such case that reasonableness is the applicable standard, has any application in this matter.

104. In its submissions, Stewardship Ontario points out the significant caveat that the Supreme Court of Canada registered in its introduction to the new analysis of reasonableness in administrative decisions. The Court stated:

> Reasonableness review is a methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court.[61]

105. In such a case, the methodological distinction between a reasonableness review and a correctness review is determined by the true nature of the parties' delegation, in this case by means of contract bringing with it the correctness standard applicable in such matters.

106. Justice Swinton recognized the true nature of this dispute in the Divisional Court Decision. Among other things, Justice Swinton determined the following:

> 27. …Nor are [the applicants] seeking to stay a decision that has been made and is under review. Here, the applicants seek to stop a private arbitration proceeding that was commenced pursuant to an agreement between RPRA and SO, which is proceeding under the *Arbitration Act, 1991,* S.O. 1991, c. 17.
>
> * * * * *
>
> 33. The arbitrator is not exercising a statutory power of decision. He obtains his authority from the agreement between RPRA and SO, and the arbitration process is governed by the provisions of the *Arbitration Act*.

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[61] *Vavilov*, *supra* note 38, para. 12.

* * * * *

> 35. In my view, participation in the arbitration is not an exercise of a statutory power of decision by RPRA, but rather compliance with RPRA's obligations in the Program Agreement with SO – an agreement that has been approved by the Minister, and that cannot be changed in a material way without ministerial approval.
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> * * * * *
>
> 42. …RPRA is an administrative and regulatory body that developed the Blue Box Program Plan in conjunction with SO and entered into the Program Agreement with it. Most importantly, it agreed to arbitrate disputes about the Blue Box Program Plan with SO.
>
> * * * * *
>
> 44. …While the applicants may be restricted to judicial review as a way to challenge the Steward Obligation decision, the Program Agreement requires SO to resort to a non-judicial forum to resolve its dispute about the inputs permitted under the Blue Box Program Plan.

107. All of this is to say that in my view, the *Vavilov* principles are simply inapplicable to the matter at hand. In accordance with the distinction drawn in *Vavilov*, these matters are proceeding by way of private contract to which the regulator is a party. In such circumstances, the correctness standard applies.

108. A final way to look at this issue would be to analyze the rights the parties would have should RPRA as a party to a contract, nonetheless have the benefit of a reasonableness standard applied to its conduct. What does this mean for Stewardship Ontario. One of the benefits that RPRA obtains through the Program Agreement is the right to enforce Stewardship Ontario's obligations set out in the Agreement if the parties cannot otherwise agree, through the dispute resolution provisions in s. 16. This provides RPRA with a direct means to fulfill its mandate to oversee the management of this multi-faceted recycling program by creating a direct contractual relationship between the two main parties.

109. In securing that procedural advantage through contract, it is reasonable and fair that in pursuing its rights under the contract, RPRA would need to meet the contract standard, that of correctness. Looked at from the other side, could Stewardship Ontario argue in this matter that this is an administrative law proceeding and in any dispute with RPRA it need only meet reasonableness standard to defeat RPRA's claim. Or, would RPRA be bound only by a reasonable standard when its conduct is being measured and Stewardship Ontario conduct be measured by a correctness standard when its conduct is being measured.

110. Again, all of this to say that in my view, this is a contract case and the issues of law that have emerged fall to be determined on a correctness standard. *Vavilov* has no role to play.

111. A correctness standard is to be applied by the reviewing court, in this case, the arbitrator, charged with deciding the parties' disputes.

112. As will be evident from this Tribunal's Award however, this question of the standard of review, while important and an integral part of this analysis, in the end has not been of particular significance in the decisions I have reached.

113. It follows from all of this that the record to be reviewed is the record before the Arbitrator, not the record that RPRA's Board had before it when making the deicsions called into question here.

114. As I set out below, in my view, RPRA met a standard of correctness in implementing a Costs Containment charge, in its management of the non-obligated issue, and its implementation of those decisions was reasonable in both instances. In contrast, I have decided that RPRA had no lawful authority to impose a cash charge upon Stewards in the calculation of Net Cost

representing the value of in-kind newspaper services nor does that decision meet a reasonableness test.

PART 6 - THE EVIDENCE

115. I will describe here the fact witnesses and their evidence in general terms and will leave any detailed review for my analysis of each of the three items in dispute. The direct and reply evidence was given in affidavit form. The principal witnesses, David Pearce on behalf of Stewardship Ontario and Geoff Rathbone for RPRA, by agreement, expanded on their affidavit evidence in the witness box, and this was helpful in focussing on the material issues in dispute. All the evidence was helpful and particularly listening to each side give its perspective on the issues but at the end of the day much of the material evidence from which the Arbitrator had to draw inferences and give interpretation, was not in dispute and primarily as well, the issues of interpretation remained the focus of the hearing.

116. David Pearce joined Stewardship Ontario in 2011 and latterly was Operations Officer, primarily responsible for all discussions and decisions concerning the annual Steward Obligation. His initial affidavit was 58 pages long. He weighed in with another 20 pages by way of Reply. He often had difficulty in cross-examination answering the question asked, but I assess this as borne out of his evident frustration at what Stewardship Ontario sees as a long history of RPRA ignoring concerns over the issues that Stewardship Ontario had put on the table as early as 2014. But his evidence was reliable and I have accepted most of what he told me, with appropriate allowances for his sometimes enthusiastic advocacy on behalf of Stewardship Ontario in his affidavit and in the box.

117. Geoff Rathbone, currently the Director of Transition, was the principal witness for RPRA. He has long and deep experience in the recycling sector and has held highly relevant positions in the private sector, with municipalities and now with RPRA. He joined WDO as Director of Operations in August 2015 and has been in his current position since 2017. He is the staff executive responsible to RPRA's Board for the annual Steward Obligation. His was a 50 page affidavit. Mr. Rathbone's affidavit contained a lot of argument as well as material facts but he gave his oral evidence in a restrained and straight-forward manner, and made concessions where appropriate. I accept his evidence as reliable although it was evident he has a lot on his plate in managing multiple parties and their often colliding interests.

118. There were two other fact witnesses. Igor Cugalj, who is a technical analyst working on behalf of Stewardship Ontario, gave evidence on the non-obligated issue, particularly around audits and the exclusion of non-obligated costs from funding. Glenda Gies, who has vast experience in these matters and is a member of RPRA's Board, testified on behalf of RPRA. I will deal with their evidence in the course of the analysis and review below.

119. I now turn to the three issues in dispute. I will follow the order of s. 2 of the Submission.

PART 7 - THREE INPUTS IN DISPUTE

Costs Containment

The Parties' Positions on Costs Containment

Stewardship Ontario's Position

120. RPRA's mandate is to apply the provisions of the BBPP and the relevant legislation. The BBPP does not support Steward cost containment or a charge for that. Read as a whole, the BBPP contemplates municipal costs containment only. Municipal costs were recognized as an

issue from the outset. The Costs Containment Amendment is not authority because its purpose was not to impose a Costs Containment fee on Stewards. Principles 5 and 8 are aspirational to which aspirations Stewardship Ontario has adhered but they do not support the imposition of a financial penalty on Stewardship Ontario.

121. The Evolving Tonne is not justification for imposing Steward Costs Containment beginning in 2016. The Evolving Tonne has been a known factor since at least 2004. The EIF which became the CIF by the CIF Amendment, recognized that Stewards' contribution to costs containment was to be made through the CIF, diverting part of the Steward Obligation to assist municipalities in increasing efficiencies, but it is no justification for an additional fee. Any such fee tied to the CIF would have required ministerial approval and an amendment because it constitutes a material change to the BBPP. None was forthcoming.

122. The Provincial Interest cannot derogate from the specific principles of the BBPP and the Costs Containment Amendment.

123. Moreover, the methodology adopted by RPRA in 2018 and 2019 is fundamentally unreasonable and unsupported by any expertise. It imposes an unjustified unfairness on Stewardship Ontario and was implemented without proper notice and without seeking the input of its partner in setting a Costs Containment fee. It deviates from the Working Group recommendation and its patent unreasonableness can be seen in the threefold increase in the amount the formula produced in just one year, from 2018 to 2019, and from the expert evidence. The packaging choices the Stewards are making are environmentally sound and to the extent that costs are increasing because of the Evolving Tonne, Stewards already contribute 50% of that increase through the Steward fees they pay.

RPRA's Position

124. Imposing a Costs Containment fee, if appropriate, is fundamental to RPRA's obligation to set the Steward Obligation in accordance with the full panoply of authorizations under which it operates. The Costs Containment Amendment, which was a companion to the BBPP, implemented directions from the Minister to develop specific costs containment principles for both municipalities and stewards. Each subsequent direction from the Minister reiterated both the importance of costs containment and the inclusion of Stewards' costs containment in the overall goal to achieve efficiencies and meet waste diversion goals, clearly revealed in the Costs Containment Amendment and Principles 5 and 8.

125. Following the 2014 Arbitration, the Minister reiterated that, due to the increasing costs of the programs, RPRA was to develop and implement Costs Containment measures to address those increasing costs. As packaging decisions made by Stewards were increasing costs of the programs, RPRA was fully justified under its mandate to implement the Provincial Interest and from the directions and requirements of the various program documents, to impose a Costs Containment amount in setting the overall Steward Obligation.

126. Moreover, these were reasonable decisions and the adopted methodology is reasonable and meets its intended purpose which was to act as incentive to Stewards to take into account the costs that their packaging decisions are adding to the overall program costs.

127. The Costs Containment fee is assessed and applied rationally and reasonably, not on a dollar for dollar basis, and reflects, as does the municipal Costs Containment charge, RPRA's efforts to encourage efficiencies and waste diversion goals, as mandated by the Provincial Interest and the program documents.

128. Moreover, Stewardship Ontario did not comment or complain about the methodology for determining the amount of the Steward Obligation until after the 2019 methodology was approved using the same formula as in 2018. The formula is rational in that it seeks to identify the difference in rates of change between the volume of materials relative to weight year over year. It identifies trends and the increase in the amounts produced by the formula from 2018 to 2019 reflects the increasing costs of managing end of life materials produced by the Stewards, and justifies the imposition of such a fee. Effecting some balance between municipal Cost Containment fees and those of Stewards is a reasonable approach to RPRA's overall mandate. RPRA does not seek to impose Costs Containment fees on a dollar for dollar basis but rather on a basis and in the amounts required to meet its purpose, effecting change and behaviour modification in order to continue to maximize waste diversion in the overall recycling stream.

129. The Record for this proceeding should be that when RPRA was making its decisions. Expert evidence is not admissible nor relevant in this matter.

Facts and Findings

130. On the day that the Minister approved the Blue Box Program Plan, the Minister also directed WDO to develop a costs containment strategy to ensure that municipal Blue Box Program costs are properly managed.[62] This became the Costs Containment Amendment.[63]

131. Although Stewardship Ontario suggested otherwise, it is to be noted the BBPP itself does contain a direction with respect to Steward costs containment. In section 7.4.2, entitled "Costs

[62] December 22, 2003 letter, *supra* note 10.
[63] CCP, *supra* note 11.

Containment Strategies", and forming part of the detailed methodologies for calculating municipal Blue Box Program costs, the following appears:

> 7.4.2 Costs Containment Strategies
>
> Given the potential for Blue Box Program costs to double within 5 years, it is in the interests of Stewards and municipalities to pursue all possible strategies for containing costs. (Arbitrator underlining)

132. Both Stewards and municipalities had responsibility to contain costs from the outset.

133. Section 7.4.2 continues on to describe the efforts that the stakeholders, including Stewardship Ontario, are to take to investigate options by which "Stewards' costs and overall program costs can be contained.[64] The section identified five different options by which Stewardship Ontario could carry out this obligation, including to introduce costs containment strategies for adoption by municipalities.

134. In its materials and arguments, Stewardship Ontario refers to the CCP as the "Municipal Costs Containment Amendment". It is however not referred to that way in any of its terms or related materials. It is called Costs Containment Principles, Policies and Practices, with an emphasis on Small Business Measures.

135. The Minister's December, 2003 letter directed WDO to develop costs containment strategies to ensure that the proposed diversion rate of at least 60% of Blue Box Wastes would be achieved. By an Appendix to the letter, the Minister set out detailed program requirements to be met in such a costs containment program. These requirements included at paragraph 4:

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[64] BBPP, *supra* note 9, Section 7.4.2, pp. 63-64.

> 4. Specific costs containment principles for municipalities and stewards to follow. Polices and practices that will ensure compliance with costs containment principles. (Arbitrator underlining)

136. The Costs Containment program was to develop these principles. Policies and practices were to accompany the principles. They were enforcement tools. By the amendment to the Blue Box Program Plan, the comprehensive CCP, policies and practices were put into effect.

137. The Costs Containment Amendment, in its Executive Summary, repeated this Ministerial direction, specifically:

> - Specific costs containment principles for municipalities and stewards to follow. Policies and practices that will ensure compliance with Costs Containment Principles. (Arbitrator underlining)

138. Reading the CCP as a whole, in my view, there is no doubt that it was addressing both municipal and steward costs containment, although some greater emphasis in the detail was placed on municipal costs containment, particularly in s. 3, which addresses containment of municipal operating costs and asks the question in the heading: "3. What is Costs Containment?"

139. The CCP, in its terms, recommended both a set of Principles and a description of the Policies and Practices to be put in place to support the Principles (s. 5.2).

140. The Principles address both municipal and steward responsibilities as had been directed by the Minister, and consistent with all earlier commentaries. Principle 5 of the Costs Containment plan provided:

> 5. Stewards will, where possible, use materials that can be cost effectively managed in the Blue Box Program while meeting their

> customers' needs and will support enhanced material markets through procurement and other market development initiatives.

141. Principle 8 provided:

> 8. Stewards, where possible, will seek to minimize the amount of materials that result in Blue Box Waste while meeting their customers' needs.

142. The Policies and Practices "that require action on the part of Stewardship Ontario"[65] addressed with specificity how stakeholders were to act in order to meet the Principles relevant to their responsibilities for Costs Containment. By way of example, the Policies and practices included the following in respect of Stewards:

> - *Where possible, promote actions to minimize the amount of materials that result in Blue Box Waste while meeting their customers' needs, select materials that can be managed at the lowest cost and support enhanced material markets through procurement and other market development initiatives by various measures including,, but not limited to the following:*
> - *Minimizing the use of materials that will result in Blue Box Wastes*
> - *Use, where possible, materials that can be cost effectively managed in the Blue Box Program.*[66]

143. In my view, when read together the Principles and Policies and Procedures for Stewards were more than a protocol. They required action and are specifically directed at both reducing the weight and volume and cost of Steward materials going into the Blue Box.

144. This was reinforced in the Minister's letter where conditionally approving the CCP, the Minister of Environment stated:

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[65] CCP, *supra* note 11, s. 5.2, p. 19.
[66] *Ibid*., s. 5.2, p. 22.

> …going forward, I want to ensure that municipalities and stewards remain vigilant in holding the line on Blue Box Program costs. (Arbitrator underling)

145. The letter went on to say:

> Industry stewards must continuously take steps to reduce costs to better design for recyclability of packaging and printed paper destined for the blue box system…[67]

146. The letter imposed a requirement that WDO provide an annual report setting out actions being taken by stewards and municipalities to improve markets and revenues and to improve the recyclability of packaging and printed paper destined for the blue box.

147. Some months later, the Minister wrote again by letter dated August 11, 2005,[68] giving final approval to the CCP but required of WDO that "you must ensure that municipalities and stewards fulfill their shared responsibilities in a way that respects the principles in the plan."

148. Finally, a December 21, 2005 letter,[69] approved new rules for setting steward fees and requested that WDO "undertake a review and assessment of actions taken by stewards in accordance with the principles of the Costs Containment Plan and the impact of the funding model on stewards."

149. In light of all of this, I cannot accept Stewardship Ontario's submission that there was never any direction or contemplation that Stewards could be required to contribute additional funds or pay a Steward Costs Containment fee. As I set out in paragraph 131 above, even the BBPP placed a material onus on Stewards to contain costs.

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[67] Minister's December 30, 2004 letter, BOD, Vol. 6, Tab 3.
[68] Minister's August 11, 2005 letter, BOD, Vol. 6, Tab 4.
[69] Minister's December 21, 2005 letter, BOD, Vol. 6, Tab 5.

150. In an effective cross-examination, Ms. Constantine secured admissions from Mr. Rathbone that, among other things, the Regulator could not set the annual Steward Obligation in a manner contrary to the BBPP, or ministerial directives and plan amendments. Mr. Rathbone agreed.[70]

151. As set out above however, these authorizing documents, including the BBPP itself, do contemplate steward containment fees and require stewards to take specific steps, among other things, to reduce the costs of their materials ending up in the blue box. Principles 5 and 8 under the CCP are to be taken as directives and matters to be accomplished by Stewards.

152. The Principles are to be read with the Policies and Practices and the Ministerial directives and impose duties on Stewards to reduce the costs of their design decisions over printing and packaging choices.

153. Ms. Constantine put to Mr. Rathbone the section 3 provision of the CCP asking the question "What is Costs Containment?" and that only municipal costs containment were described there. Mr. Rathbone agreed but added this was because municipalities are the front line operators of the programs. In my view, this accurately reflects the some time emphasis on municipal costs containment in the CCP and in other documents, but as I have set out certainly not to the exclusion of obligations upon the Stewards to also effect costs containment programs to control municipal costs.[71]

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[70] Rathbone Cross-Examination, February 26, 2020, p. 1058; Stewardship Ontario Costs Containment Compendium, Tab 1.

[71] Rathbone Cross-Examination, *supra* note 70, pp. 2015-2016; Stewardship Ontario Costs Containment Compendium, Tab 22.

154. Ms. Constantine put to Mr. Rathbone in cross-examination that there was nothing in the BBPP mentioning Steward Costs Containment.[72] As I have set out above, s. 7.4.2 specifically sets out costs containment obligations on Stewards. It makes no logical sense that with the emphasis on improving design decisions, diversion rates and lowering costs, that only municipalities would have been bound by obligations but Stewards would not.

155. The urgency surrounding cost containment dramatically changed after 2014 and in the following years. Costs of municipal recycling were rising, the Evolving Tonne continued to burden recycling costs and revenues. Consensus among the stakeholders was difficult to secure. Indeed, the municipalities had rejected the concept that their costs recoverable had to be reasonable and that they had responsibilities to effect efficiencies. This had led to the 2014 Arbitration.

156. As earlier noted, this led in 2015 to a flurry of activity including the establishment of various working groups, panels and the hiring of consultants to assess the current state of the blue box and make recommendations to WDO as to how to proceed. The subjects considered included all three of the issues in dispute.

157. A Panel on Costs Containment was appointed which included experts and representation from both stewards and municipalities.

158. The Majority Panel Report, of which the Stewardship Ontario representative was a signatory, constituted a comprehensive review of the state of blue box recycling, packaging, the

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[72] Rathbone Cross-Examination, *supra* note 70, p. 1223; Stewardship Ontario Costs Containment Compendium, Tab 24.

Evolving Tonne and the Costs Containment principles and policies that had been earlier laid down as I have reviewed above.[73]

159. The Report included a statement by Stewardship Ontario about its own role in influencing packaging choices made by Stewards. The Report records the following:

> Stewardship Ontario clarified that it is a compliance scheme, responsible for discharging steward Obligations under the WDA. While it collects funds from all obligated stewards in Ontario, it does not really represent stewards, except in WDA related issues and has a limited ability to influence packaging choices, except through the fees charged. (Arbitrator underlining)[74]

160. The Panel reported that there had been a reduction in the relative proportion of paper in the blue box, particularly newsprint and that changes to steward packaging had resulted in lighter weight packages and packaging that is more expensive to recycle.[75]

161. The Panel Report made a series of recommendations to be further considered when decisions about Costs Containment by municipalities and Stewards were to be implemented. A Working Group was then established, in 2016 to implement the recommendations. The Working Group included consultants and representatives of Stewardship Ontario and the municipalities, as well as some professional assistance from analysts and consultants.

162. The Panel had recommended a 50:50 costs containment payment shared by municipalities and Stewards should be implemented in an amount to be determined by the two parties. There appeared some confusion or perhaps disagreement as to whether this

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[73] Majority Panel Report, *supra* note 22.
[74] *Ibid*., *supra* note 22, p. 8, s. 3.6.
[75] *Ibid*., *supra*, p. 10, s. 4.

recommendation was to require an additional amount to be paid by Stewards to the CIF, in addition to the diverted funds already there diverted.

163. In any event, this was clarified in the Working Group Report. The Working Group also reviewed the nature of the Evolving Tonne and its effect on costs and proposed a number of options for addressing the costs containment principles.

164. The Working Group referenced Principles 5 and 8 of the Costs Containment Amendment. The Report recognized the environmental benefits of investments that Stewards had made to reduce the weight of packaging and printed paper and concluded in s. 8.0 of its report that:

> As the Stewards bear some responsibility for the changing nature of the Blue Box stream, Stewardship Ontario should make a contribution to the CIF, matching (50:50) the municipal contribution to the CIF on an annual basis, that is over and above the payment to municipalities for operating the Blue Box Program.[76]

165. The Working Group proposed that WDO set the Steward Costs Containment amount so as to match the municipal contribution diverted from the direct payments by Stewards to municipalities, for projects undertaken from the CIF fund.

166. Of course, Stewardship Ontario was already funding 50% of the CIF through its overall contribution to Net Cost of the Blue Box Program.

167. Stewardship Ontario objected to the proposed additional 50% Steward contribution to the CIF. In its submission to WDO, Stewardship Ontario asserted that this proposed contribution contradicted the dictate of the Blue Box Program Plan, specifically that the CIF, which itself had been the subject of an amendment to the BBPP, required contributions to be taken out of the

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[76] Working Group Report, *supra* note 21, p. 62.

existing financial obligations to municipalities. Any alteration of that requirement would require an amendment to the BBPP and moreover because this proposed additional payment would require additional costs to be paid by the Steward community, it represents a material change which itself requires ministerial approval.[77]

168. A similar position was asserted by Stewardship Ontario in a submission to WDO's Board on June 15, 2016.[78]

169. WDO, in advising Mr. Pearce at Stewardship Ontario of its decision concerning the 2016 Annual Steward Obligation, stated that in reaching the calculation described in Table 1 to its letter, it had:

- added $2.1 million, reflecting a contribution by Stewardship Ontario associated with the increase in costs resulting from changes in the nature of package material in the blue box stream to adhere to the principles in the Cost Containment Plan.[79]

170. No other substantive response was made to the many Stewardship Ontario submissions to the regulator over this issue.

171. This decision did not reflect the Working Group recommendation that the Steward costs containment charge should equate with the municipal contribution of amounts allocated to the CIF. Rather, the $2.1 million was to be paid directly to municipalities forming part of the calculation of 50% of Net Cost paid to municipalities.

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[77] Stewardship Ontario Response to the Working Group Report to WDO, BOD, Vol. 4, Tab, 63.
[78] Stewardship Ontario Submission, June 15, 2016, BOD, Vol. 4, Tab 64.
[79] June 21, 2016 WDO letter, BOD, Vol. 4, Tab 65.

172. At the same time, it is noteworthy that the amount diverted from Net Cost to the CIF was set at $4.2 million of which, of course, $2.1 million is one half.

173. For 2017, RPRA followed the practice it had established in 2016, namely setting the Costs Containment charge at one-half of the CIF contribution and adding it as a direct payment to municipalities rather than an amount to be added to the CIF fund itself. Stewardship Ontario raised the same objections that it had in 2015 and 2016 to this fee.[80]

174. Matters changed materially in getting to the 2018 Annual Steward Obligation. RPRA's Board decided that as the CIF contribution was to be set at zero and as in previous years the Steward Costs Containment charge had been tied to 50% of the total CIF contribution, a new methodology would be adopted to determine the amount of the 2018 Steward Costs Containment fee.

175. RPRA Staff, principally Mary Cummins, overseen by Mr. Rathbone, developed a formula to be used to calculate the Steward Costs Containment charge (the "**Formula**"). The Formula, about which there was much controversy in this arbitration, focussed on the difference in the rate of change year over year between volume on the one hand and the weight of blue box waste on the other.[81] This produced a factor which is multiplied by the Net Cost of the Program to arrive at the Steward Costs Containment charge. The principle was to take account of the continuing effects of the Evolving Tonne on Blue Box costs. If the difference in the rates of change identified by the Formula increased, then this would have an expected increase in costs.

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[80] Rathbone Affidavit, *supra* note 19, p. 30, para. 118.
[81] Mary Cummins August 21, 2017 email, Exhibit 16.

RPRA's Board approved the use of the Formula in calculating the Costs Containment amount for 2018.[82]

176. RPRA did not advise Stewardship Ontario of its intended shift to this Formula nor did it seek any input or advice from Stewardship Ontario over the purpose, nature, content or efficacy of the proposed Formula.

177. Mr. Pearce was notified by Mary Cummins of the change in methodology used to determine the 2018 Steward Obligation, including the basic premise of the Formula in an email dated August 21, 2017 in which she also disclosed to Mr. Pearce the 2018 Steward Obligation as approved by the RPRA Board.[83] The email included this:

> For the 2018 Steward Obligation, the percentage differential between tonnes supplied and volume supplied (0.9%) has been used to calculate the Steward Costs Containment. This is to reflect the effect on system costs from changes in the characteristic of items in the Blue Box stream.
>
> Please let me know if you have any questions.

178. Mr. Pearce acknowledged he received this email, and saw the above reference but in cross-examination, he skated around the suggestion that this was notice of the Formula to Stewardship Ontario, in connection with the 2018 Steward Obligation but no complaints were made about the Formula until after the 2019 methodology, using the same Formula, had been set by RPRA's Board. I find Mr. Pearce simply missed the reference to the Formula in Exhibit 16. Stewardship Ontario raised no complaints about it until 2018. In the result, no questions were asked of RPRA about the methodology. The Costs Containment charge had increased relatively

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[82] Rathbone Affidavit, *supra* note 19, p. 31, paras. 119-120.
[83] Email August 21, 2017, Exhibit 16.

little from the previous year, an increase of about $70,000 of a total Steward Obligation of $124,840,470.[84]

179. Stewardship Ontario had continued to object to the imposition of any Costs Containment fee in its submissions to RPRA's Board concerning the 2018 Steward Obligation. Its position was that the Board lacked authority to implement such a fee.[85]

180. For 2019, the year that brings us together in this Arbitration, the parties followed the usual procedure. All of the municipalities, the City of Toronto and Stewardship Ontario made written and oral presentation to RPRA's Finance Committee, that year, on June 6, 2018. RPRA Staff led by Mr. Rathbone then prepared its report and recommendations to the Board and the Board ultimately set the parameters into which Staff with assistance from Stewardship Ontario produced the numbers to populate the various fields, leading to the calculation of Net Cost to be paid by Stewardship Ontario to municipalities.[86]

181. As to the Costs Containment charge, Stewardship Ontario took its usual position that all costs must be based on the approved Program Plan and asserted that WDO had introduced Steward Costs Containment but had not provided information and data to support its determination. Stewardship Ontario objected as well on the basis that the impact of the Evolving Tonne was already being shared 50:50 between Stewards and municipalities and that the Evolving Tonne is caused by environmentally sound changes being made by Stewards and in consumer preferences. Stewardship Ontario's submissions, orally and in writing, contained no reference to the Formula that had been used to set the 2018 Steward Obligation and no

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[84] Pearce Cross-Examination February 21, 2020, pp. 581-588; Pearce Cross-Examination, February 20, 2020, pp. 366-367.
[85] Stewardship Ontario Presentation to RPRA Board, April 11, 2017, BOD, Vol. 4, Tab 67.
[86] 2019 Submissions and Report, BOD, Vol. 4, Tab 84, Tabs A-C.

submissions were made about its suitability, validity or at all, because, as I find, neither Mr. Pearce nor apparently anyone else at Stewardship Ontario had picked up the references in Exhibit 16 to the Formula nor had any requests been made or follow up questions been asked[87].

182. In the result, RPRA's Board again approved the Formula for use in calculating the 2019 Steward Costs Containment contribution to the overall Steward Obligation for 2019.

183. RPRA's Board set the 2019 Steward Obligation at $126.4 million. This included an amount of about $7 million for Costs Containment. This was an increase of about three times the Costs Containment fee of the previous year. This figure of course did catch the attention of Mr. Pearce and others at Stewardship Ontario. A back and forth ensued between RPRA Staff and Stewardship Ontario over the Costs Containment amount, the Formula, and the entitlement to impose a Costs Containment amount at all. These issues were not settled and this Arbitration was commenced to resolve the dispute.

Analysis

184. I find that RPRA's imposition of a Costs Containment charge as part of its determination of the Steward Obligation for 2019 accords with its lawful authority under the relevant documents and legislation, measured against a standard of correctness. In any event, its decision to do so was reasonable having regard to the many directives and specific requirements that Steward Costs Containment may be taken into account by the regulator in meeting the Provincial Interest and the mandate imposed upon it by its constating authority. Most importantly, there is a body of evidence that supports the exercise of RPRA's authority to do so. In so doing, RPRA is

[87] Stewardship Ontario Submission to Finance Committee, BOD, Vol. 5, Tab 84(3), p. 1194.

not in breach of the Program Agreement and it has not breached the BBPP nor any other direction or authority.

185. I cannot accept Stewardship Ontario's argument that costs containment is about only municipal cost containment. Starting with the BBPP, the clear direction of that Plan, and every direction issued by Ministers and a fair reading of the CCP, reviewed by me above, all make it evident beyond question that Stewards had responsibility to act to contain and reduce municipal costs.

186. Principles 5 and 8, which are not precisely directives to Stewards, must be read with their companions, including the Policies and Procedures and the constant drumbeat that both municipalities and stewards must act. All of this does not make cost containment for Stewards voluntary or aspirational only.

187. When the consultants, Panel and Working Group identified Stewards as contributors to rising costs, a conclusion which I find reasonable on the evidence, RPRA had a reasonable basis to impose such a charge.

188. The directives in the three Minister's letters earlier set out, in the circumstances of the Evolving Tonne, for which Stewards bore some responsibility, are sufficient for me to conclude that RPRA acted lawfully in imposing such a charge for the 2019 Obligation.

189. There are two provisions I will review briefly. RPRA is given authority in s. 5(1) of the *WDTA* to determine the amount of money Stewardship Ontario must pay to meet its

responsibilities under the *Act*.[88] RPRA is to have regard to the Provincial Interest defined in s. 2(f) of the *RRCE* to "hold persons who are most responsible for the design of products and packaging responsible for the products and packaging at the end of life."[89]

190. In the circumstances of the findings I have made on this issue, these provisions support the levy of a charge to form part of the Steward Obligation. In levying this charge on a lawful, proper foundation, RPRA has not breached the Program Agreement, the terms of the BBPP, nor any other obligation owed to Stewardship Ontario.

191. Clearly RPRA cannot act capriciously or unreasonably in the exercise of its authority to set fees and charges in setting the Steward Obligation. Here, I have found it has a principled basis to exercise these powers, based on relevant evidence. Stewardship Ontario itself acknowledged that Stewards can be motivated in their decisions only by the fees they are charged. David Pearce sensibly acknowledged both that the overall effects of Steward changes to packaging and printed paper has been an increase to the cost of operating residential Blue Box programs[90] and that you can attempt to influence packaging choices with fees.[91]

192. In so doing, RPRA has breached no part of the Program Agreement nor any other duty or obligation it has to Stewardship Ontario.

193. To summarize, RPRA had lawful authority to charge Stewardship Ontario with a Costs Containment charge, founded in the BBPP, the Costs Containment Amendment, and particularly in Minister's letters, reviewed on a standard of correctness. It also had a body of compelling

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[88] *WDTA*, *supra* note 27, s. 5.
[89] *RRCE*, *supra* note 26, s. 2(f).
[90] Pearce Cross-Examination, *supra* note 84, p. 556.
[91] Pearce Cross-Examination, *supra* note 84, pp. 567-569.

evidence to support the decisions to do so. All of that justified, if necessary, reliance upon the relevant Provincial Interest direction and s. 5(i) of the *WDTA*. This may be important because those provisions, before RPRA can act, must be read with all other relevant provisions. RPRA is not authorized simply to levy fees and charges, based solely on these broad provisions.

194. They are to be read with every other relevant provision. In this matter, they are supported by other authority and by the evidence. These provisions therefore supported RPRA's authority to levy a Steward Cost Containment fee.[92]

The Formula in 2019

195. I have found that RPRA's decision to include a Costs Containment charge in the 2019 Steward Obligation is within its lawful authority measured on a standard of correctness and that its actions meet a standard of reasonableness, if that standard were to apply. There is however, a second question. That is whether employing the Formula as a means to calculate Costs Containment charges in 2019 RRPA's obligation to act reasonably in the exercise of the authority it enjoys[93] and where the law imposes an obligation on one contracting party which may enjoy authority to act, to do so in good faith and on reasonable terms.[94]

196. Stewardship Ontario objects vehemently to the use of Formula in calculating Costs Containment charges, using a number of colourful epitaphs to make its point. Stewardship Ontario called expert evidence to review the Formula, its effect and suitability as a means to arrive fairly at a Costs Containment charge.

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[92] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140, at paras. 46, 77-79.
[93] *Vavilov*, *supra* note 38.
[94] *Shelanu*, *supra* note 50, para. 96.

197. My determination that the contractual standards apply meant that this dispute over the total steward obligation is to be determined on the basis of the record before the Arbitrator and not on a record restricted to materials and positions that were before the regulator when it made its determinations, in this instance, its decision to impose Costs Containment charges for the 2019 Steward Obligation using the Formula.[95]

198. I also point out of course that Stewardship Ontario raised questions about the Formula during the course of setting the Steward Obligation. RPRA was aware of those objections before it finalized the calculations for 2019. And of course it was fully aware of Stewardship Ontario's objections both in the Statement of Issues and the affidavit and expert evidence filed by Stewardship Ontario here, evidence filed with enough notice that RPRA had every opportunity, should it have chosen to do so, to respond in kind.

The Expert Evidence

199. Turning to the expert evidence, the first issue is that of admissibility. Stewardship Ontario filed two reports from its expert, J.D. Lindeberg, who is the President and CEO of Resource Recycling Systems Inc., with deep experience in matters of recycling and related matters. Both reports are dated October 4, 2019.

200. One report ("**Report #1**") concerned whether the means and methods by which the waste audits and data analysis of materials in the Blue Box Program performed by Stewardship Ontario and others met professional standards. This report more or less mirrored the affidavit evidence and oral testimony of Igor Cugalj, was largely uncontested and not in dispute. Mr. Lindeberg concluded that the processes used to collect and analyze data related to the blue box materials,

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[95] See also the Divisional Court Decision, *supra* note 40, paras. 35, 42.

both PPP and non-PPP, were rigorously designed and implemented and yielded statistically valid outcomes, as did the studies designed to measure the materials in each of the relevant categories.[96]

201. The second report ("**Report #2**")[97] is concerned with the Steward Costs Containment fee imposed by RPRA using the Formula and constitutes an opinion on the merits of the Formula as well as upon the validity of the underlying rationale for the exercise, expressed to be that the volume of recyclable materials is increasing more rapidly than its weight.

202. There is no question about Mr. Lindeberg's qualifications, experience and expertise to express the opinions contained in his reports and no objection was made on this basis. He, among other qualifications, apparently coined the term the "Evolving Tonne". I found Mr. Lindeberg to be qualified to give these opinions.[98] The evidence is relevant to the issues before me and is admissible.

203. I will here deal with the issues raised by Mr. Lindeberg in Report #2, the Costs Containment report.

204. In his evidence, Mr. Lindeberg discussed the substantial substitution of flexible packaging for materials that would normally have been shipped in a cardboard box but are now shipped in an envelope that is glued down. This is a good example of the continued evolution of

[96] Report #1, JD Lindeberg, October 4, 2019, Exhibit 18.
[97] Report #2, JD Lindeberg, October 4, 2019, Exhibit 17.
[98] Transcript, February 24, 2020, pp. 687-689.

the Evolving Tonne with substantial benefits in shipping costs and supply chain costs but also that flexible packaging is going to create complications for curbside recycling.[99]

205. Mr. Lindeberg also opined that lightweighting is a good thing because it reduces the overall environmental consequence of the product stream as a whole but it has some negative aspects in complicating revenue and recovery and sorting of curbside waste. There are positive and negative consequences.[100]

206. In its essence, Mr. Lindeberg's criticism of the Formula was that the Formula was oversimplistic and lacked the sophistication necessary to be a good measure of the overall impact of the Evolving Tonne.[101] It fails, by way of example, to take into account the benefits of lightweighting on depreciation of recycling equipment at the depots, it does not take account of relativity of weight among specific materials in the recycling system, some more dense than others. The weight/volume foundation of the Formula does not account for the effect on costs of each of the stages of the recycling system, where some contribute more to overall costs than do others.[102]

207. In his testimony, he expanded to some extent on these criticisms, including that other factors needed to be taken into account, including cost of equipment, operational (labour) costs and market values of collected material, by way of example.[103]

208. In Mr. Stephens' brief cross-examination, Mr. Lindeberg, after some spirited resistance, agreed that if intended to serve as an incentive, such that producers think about the impact of

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[99] Lindeberg Evidence, February 24, 2020, p. 709.
[100] Lindeberg Evidence, February 24, 2020, pp. 708-710.
[101] Lindeberg Evidence, February 24, 2020, p. 716-717.
[102] Report #2, October 4, 2019, Exhibit 17, p. 19-20.
[103] Lindeberg Evidence, February 24, 2020, p. 719.

their packaging choices when making decisions, then a formula like this, simple or not, would sometimes possibly cause producers to optimize their designs with end of life recovery in mind. The witness resisted the suggestion that the financial cost, say $7 million, would act as an incentive in that respect because of its comparatively low financial impact compared to the overall Steward Obligation in any given year.

209. Ultimately, Mr. Lindeberg agreed that a Steward Costs Containment fee is a mechanism to incentify producers to take into account the costs of their packaging choices in making decisions, with the important caveat that to him the question of degree would be important in light of the disparity between the two figures, $244 million versus $7 million for 2019.[104]

210. I can accept most of Mr. Lindeberg's opinion about the Formula employed by RPRA to calculate a 2019 costs containment charge in that it lacks rigour by not taking into account all the factors to be considered if one were building a perfect model.

211. On the other hand, some of the criticisms did not appear overly material to me, for example, not factoring in depreciation. Measuring the contribution of labour cost increases, if any, with the evolution of the blue box might be valuable, but in my view, this falls into the category of something that would provide additional information but is not central to the fundamental purpose of this Formula.

212. Mr. Lindeberg, of course, was not retained to create a formula that would take into account all the factors he referred to in his evidence. It is difficult therefore to arrive at any appreciation beyond the theoretical about the changes to the ultimate outcome that would be the

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[104] Lindeberg Evidence, February 24, 2020, pp. 724-730.

result of the application of a perfect formula taking into account all of Mr. Lindeberg's criticisms.

213. Mr. Rathbone in his evidence[105] and Mr. Stephens in his cross-examination, stressed the limited purpose of the Formula. Its purpose was to provide a means for RPRA to ensure that the stewards make some contribution towards[106] the proven effects of costs resulting from the Evolving Tonne and Stewards' contribution to that phenomenon, as the expert panels had concluded was occurring.

214. I accept RPRA's evidence that this was the intended purpose, not to calculate on a dollar by dollar measure the real effect of the Evolving Tonne on costs and revenues.

215. I can also agree with Ms. Constantine's criticism that the principal author of the Formula, Mary Cummins, was not an expert to Mr. Lindeberg's standard. At the same time, she and others at RPRA, including Mr. Rathbone, who oversaw its development, created a Formula that produced a measure of what effect the packaging decisions Stewards were making was having on the system. And Mr. Lindeberg said $7 million is not a significant amount when taken against the overall $244 million to be paid. ($244 million is not an exact number.)

216. It is important in my view to take into account that $7 million does not constitute what would be produced by a methodology that took into account all of Mr. Lindeberg's factors and others, including the views of the municipalities. I fully expect that if applied on a one-to-one basis, the Costs Containment charges would be much higher than those which RPRPA levied in 2019.

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[105] Rathbone Affidavit, *supra* note 19, paras. 119-123, 126.
[106] Rathbone Affidavit, *supra* note 19, para. 123.

217. Even if in Mr. Lindeberg's terms, $7 million is not going to create much of an incentive, it certainly caught the attention of Stewards and Stewardship Ontario in 2019. Perhaps that is the point of the exercise.

218. I also consider, in assessing the reasonableness of RPRA's approach in the overall context of the evidence, Stewardship Ontario's own analysis, set out at paragraph 159 above, that it has limited ability to effect the conduct of Stewards, other than in the fees they are charged.

219. In the same vein, David Pearce agreed that the Evolving Tonne did increase the overall costs of the program and the Costs Containment fee could influence packaging decisions.[107]

220. I have found RPRA had the authority to include such a charge. In my view, taking all of this into account, including the reaction of Stewardship Ontario to the additional fees being charged its Stewards and the overall impact that this issue has had, there is no doubt that the effect of the Evolving Tonne has increased costs and reduced revenues of recycled blue box waste. Weight and volume are the fundamental drivers in that. In that sense, levying such a fee based on the basic premise underlying the Evolving Tonne falls squarely within the primary mandate set by the BBPP and all the related materials, that it is incumbent upon both Stewards and municipalities to control costs of the system and that RPRA has the requisite authority to impose reasonable fees upon stakeholders to ensure both cost control and the diversion rates, that are the target of the overall system.

221. As well, over Ms. Constantine's objections, I do consider it relevant and a proper exercise of RPRA's discretion to consider the relative effects of Costs Containment principles

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[107] Pearce Cross-Examination, *supra* note 84.

between the municipalities and Stewardship Ontario when setting the charges, and for that matter, in carrying out its duties generally. Stewardship Ontario certainly enjoys a much more direct relationship with RPRA than do the municipalities, including of course through the Program Agreement. Nonetheless looked at as a whole, neither stakeholder's actions can be considered in a vacuum.

222. RPRA may reasonably take into account balancing features between them when making its decisions over matters such as Costs Containment. In that sense, I do consider it relevant in reaching my conclusion on this issue that, as shown by the chart produced during Mr. Stephens' argument (and which I don't believe was given an exhibit number) that for 2019, notwithstanding the threefold increases in the Costs Containment charges levied against Stewardship Ontario, taking into account the even greater increase in municipal Costs Containment deductions, which come off the top, the ultimate Net Cost to be paid by Stewardship Ontario for 2019 rose only 1.2% .

223. Taking all matters into account, the Formula could be better and more rigorous, consultation with Stewardship Ontario ought to have been better, and the decision-making including transparency over the weighing of the various factors, should have been better. Nonetheless, I find that having regard to its intended purposes, which I accept, and notwithstanding the evident weaknesses, I am not prepared to find that RPRA's decision to employ the Formula and the methodology in reaching its 2019 Costs Containment charges was unreasonable.

224. It is unfortunate both that RPRA chose to disclose this Formula only in the detail of an email sent in August 2017 after the overall Steward Obligation had been calculated, including a

Costs Containment charge. It is equally unfortunate that Mr. Pearce missed the reference entirely, and that Stewardship Ontario and RPRA did not engage in debate surrounding the Formula until one year later, when RPRA sought the involvement of Stewardship Ontario in populating some of the calculations for 2019 again, after the methodology had been accepted by RPRA's Board and Staff were in the process of calculating the Net Cost. This did nothing to enhance communications or good will between the parties.

225. At a certain level these communication failures do go into the mix of assessing reasonableness. But I have found RPRA's actions to be overall reasonable in all the circumstances and that finding must on balance carry the day over the missed and missing exchange between the two central players in this complex arrangement. It is unfortunate that the statements expressed in Mr. Denton's September 21, 2018 email were not earlier expressed.

226. I have also taken into account in my decision not to send the 2019 Costs Containment Charge back to RPRA that it is now in the course of reconsidering the methodology in setting the 2020 Steward Obligation, although no particulars were revealed in the evidence, other than that the Formula has apparently produced anomalous results for 2020. As I may remain seized of that issue, if necessary, I find that a forward looking solution is more reasonable than going over old ground, in light of my findings over the threshold issue and RPRA's entitlement to include a Costs Containment charge in the Steward Obligation. A principal reason why I found the Formula acceptable as an implementation tool, is that its use was not for the purpose of creating an amount that would mirror the precise amount by which Stewards' packaging choices have contributed to the problem of the Evolving Tonne.

227. This of course is likely impossible to do on any reasonable basis in any event, but RPRA's approach – to find a meaningful but measured charge designed to effect behaviour modification should continue to be the foundation of such a fee in future.

In-Kind

History and the Blue Box Program Plan

228. In the BBPP, February, 2003, approved by the Minister in December 2003, it was noted that during consultation sessions with stakeholders, municipalities advised that standard newspaper advertisements and flyers were not effective in either increasing participation in blue box programs or improving recovery rates. They anticipated that targeted and municipality specific advertisements were required in place of generic advertising. Some municipalities questioned the value of the Newspaper Industry Stewards (CNA/OCNA) contribution towards increasing diversion or lowering costs. It was recorded that these issues had been discussed with CNA/OCNA. They were addressed in the Blue Box Plan.[108]

229. At s. 6.5.3 of the BBPP under the General heading, Promotion and Education, the BBPP recorded that CNA/OCNA had negotiated with the Ministry of the Environment that their first $1.3 million in obligations as calculated by the pay in model would be in the form of newspaper advertising.

230. The BBPP recorded that discussions were ongoing among Stewardship Ontario, AMO and CNA/OCNA to design a program to best maximize the effectiveness of a program of

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[108] BBPP, *supra* note 9, s. 4.5.5.

newspaper advertising. The comprehensive plan would be ready and would be launched after the Blue Box Program Plan was approved.[109]

231. In her December 30, 2004 letter, written about one year after implementation of the BBPP, the Minister approved the 2005 schedule of steward fees and requested that WDO submit an amendment to the Plan to expand the existing in-kind contribution of the CNA/OCNA. The Minister stated:

> This would not have an effect on the fees structure as it applies to other industry stewards. In developing the amendment, please address the areas I have described in the Addendum to this letter.[110] (Arbitrator underlining)

232. In an Addendum to the letter, subtitled Expansion to the In-Kind Contribution For Members of the CNA/OCNA, there were additional requests of the Minister that WDO should follow a number of principles, including:

> - The 2005 stewards' fees structure approved by the Minister shall remain unchanged. The reduction in anticipated 2005 fees from CAN and OCNA would be replaced by in-kind contributions to municipalities, not by direct payments from the remaining stewards. (Arbitrator underlining)

233. As noted the Amendment came into effect in November, 2005.[111]

234. The BBPP included in its terms examples of how the value of newspaper in-kind advertising was to be treated in calculating the Net Cost for which Stewards would be responsible under the Plan. There were two examples, showing the Year One Net Cost Calculation and the other, the Year One Industry Obligation in the operation of the plan. Both

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[109] *Ibid*., s. 6.5.3.
[110] Minister's December 30, 2004 letter to WDO, *supra* note 67.
[111] In-Kind Amendment, *supra* note 12

showed the value of newspaper in-kind advertising as a deduction from Net Cost.[112] The effect of the Amendment and the calculations were to decrease the amount of cash made available to municipalities.

235. There is no dispute between the parties that from the inception of the BBPP through the 2013 Steward Obligation, the Program was administered exactly as the Blue Box Program Plan examples required. The in-kind contribution of CNA/OCNA was a deduction from the Net Cost otherwise payable by Stewardship Ontario to municipalities. No amount was added to the Net Cost to be paid by Stewardship Ontario to municipalities as the value of the in-kind contribution.

The 2014 Arbitration

236. As noted earlier, the 2014 Arbitration was constituted by agreement between the municipalities and Stewardship Ontario following WDO's direction and the failure of MIPC to agree on a recommendation for the 2014 Steward Obligation. It was an *ad hoc* arbitration. Arbitrator Armstrong was charged with the responsibility to set the 2014 Steward Obligation. WDO was not a party to the arbitration.

237. As noted earlier, one issue was the municipalities' contention that the in-kind contribution made by the newspaper industry over the years was not justified as a matter of law and constituted an unfairness to municipalities, among other things because the amounts set off were rising and the rates that were built into those charges were unreasonable.[113]

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[112] BBPP, *supra* note 9, pp. 57-58, Table 7.1 and Table 7.2.
[113] 2014 Award, *supra* note 17, para. 248.

238. The Arbitrator received lengthy submissions from the parties over the issues of law and interpretation surrounding the in-kind contribution issue.[114]

239. The municipalities argued that section 25(5) of the WDA did not permit in-kind payments, that the Minister had no authority to provide for them and no authority to exempt Stewardship Ontario from paying fees under the fees regime of the BBPP. If none of that were correct, the municipalities argued that they ought to be permitted to add the value of the in-kind contribution to their costs in the Datacall for the relevant year and there was no logical reason for denying them these costs.[115]

240. For its part, Stewardship Ontario submitted that the Arbitrator had no jurisdiction to determine issues of law and was in place only to set the quantum for 2014. Municipalities were integral to establishing the in-kind arrangement in the first place and the Minister's authority was firmly grounded in various sections of the WDA and the policies expressed in Minister's letters and the Amendment itself.[116]

241. I set this background out in some detail by reason of the argument advanced by RPRA in this matter that issue estoppel and abuse of process apply and that Stewardship Ontario is estopped from relitigating the same issue decided by Arbitrator Armstrong in the 2014 Arbitration, that the value of in-kind advertising should be included in Net Cost to be paid by Stewards in that year.

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[114] *Ibid*., paras. 245-279,
[115] *Ibid*., paras. 250-270.
[116] *Ibid*., paras. 271-279.

The Arbitrator's Decision

242. It is quite clear from the 2014 Award, that the Arbitrator did not deal with issues of law and authority that were raised before him over the in-kind issue. This is evident in at least two paragraphs of the Reasons:[117]

> 281. While I see some merit to both parties' legal submissions concerning the statutory authority for in-kind payments by newspaper Stewards in order to satisfy their obligations under s. 25(5) of the *Act*, I am not satisfied that it is within my jurisdiction to deal with it.
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> * * * * *
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> 288. …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.

243. It is of course fundamental to the jurisdiction and task of this Tribunal to decide those issues of law and authority in this Tribunal's decision-making over the in-kind contribution.

244. The Arbitrator recognized that if he were to order that the newspaper Stewards contribution should be made in cash, that he would be ignoring the original agreement between the Minister and the CNA/OCNA and the provisions of the BBPP, and the subsequent amendment requested and approved by the Minister.[118]

245. Arbitrator Armstrong decided that 50% of the value of the in-kind advertising should be paid as part of the 2014 Steward Obligation and observed, that to him, "It makes no sense to treat it any other way."[119] That was the full extent of the reasoning, consistent with the broad discretion he enjoyed to set the 2014 Steward Obligation.

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[117] *Ibid*., para. 281, 288.
[118] *Ibid*., para. 282.
[119] *Ibid*., paras. 284.

246. Arbitrator Armstrong had observed that the system of in-kind payments was extremely unfair to municipalities and that the issue should be addressed by the relevant parties including the Minister and representatives of WDO. He made a strong recommendation that the in-kind payment model be removed or certainly limited to a level that is reasonable both as to the total amount and the rates charged.[120] (It is conceded by the parties to this Arbitration that including 50% of the value of in-kind contributions as a Net Cost to be paid by Stewardship Ontario works an unfairness to both municipalities and Stewardship Ontario.)

247. The Arbitrator had been invited to make suggestions or comments for determining the Steward Obligation in future years but in respect of the in-kind issue, his suggestion and recommendation was just that the system be dealt with by the relevant authorities and either removed or limited in the future.[121]

Post-2014 In-Kind Contribution

248. In setting the Steward Obligation in the following years, WDO/RPRA has followed a modified version of the Arbitrator's 2014 Ruling. RPRA now includes as a cost only that portion of in-kind advertising that is used by municipalities to promote the blue box program and takes the position that such in-kind advertising is a "cost incurred" by municipalities in operating the program within the meaning of s. 11(1) of the *WDTA*.[122]

249. Stewardship Ontario has objected to this practice in each such year and even delivered a legal opinion to WDO in 2016 reviewing the legal issues involved.[123] To the best of my review,

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[120] *Ibid*., para. 293.
[121] *Ibid*., para. 283.
[122] See the discussion in RPRA's Staff Report for the 2019 Steward Obligations, BOD, Vol. 5, Tab 84(4), p. 1201.
[123] February 19, 2016 letter, Constantine Legal, BOD, Vol. 4, Tab 56.

until this proceeding neither WDO nor RPRA had responded to these submissions on the lawful authority of the regulator to impose this cost.

Positions of the Parties in Brief

250. Stewardship Ontario argues that the BBPP, the in-kind contribution Amendment and the related Minister's letters constitute a complete code for the treatment of the newspaper industry's in-kind contribution to municipalities. They do not permit or authorize the inclusion of these costs in the obligations of the other Stewards, nor do they authorize any alteration in the fees to be paid by the other Stewards. Further, the in-kind advertising contribution is not a "cost incurred" by municipalities as a result of the program and is not recoverable from Stewardship Ontario. Finally, the Arbitrator's 2014 Decision was effective only for that year and in any event is incorrect and not binding for subsequent years.

251. For its part, RPRA submits that its management of the in-kind costs issue is reasonable and that its inclusion of in-kind costs as costs incurred within the meaning of the legislation is reasonable and reflects the purpose and intent of the BBPP to indemnify municipalities over their costs, reasonably interpreted and understood. Moreover, its modified continued application of the Arbitrator's Decision is also reasonable. Finally, Stewardship Ontario is estopped by the doctrines of abuse of process and issue estoppel from relitigating the issue.

Analysis

252. The Program Agreement requires that the parties adhere to, implement and comply with the BBPP as amended.[124] They must otherwise perform their respective duties and obligations

[124] Program Agreement, *supra* note 8, ss. 3.5 and 5.

lawfully and under the authority of one or more of the many directions, including Ministerial letters and legislation, under which they operate.

253. There is no discretion at large existing in either party, free entirely from the constraints and powers found in this collection of governing and authoritative materials.

254. Mr. Rathbone fairly conceded in his evidence that in carrying out its mandate, RPRA must comply with the BBPP,[125] not an admission borne of any surprise, but nonetheless a meaningful reminder when considering the hoary issue of newspaper in-kind cost allocation.

255. After careful consideration, I am unable to find any support or lawful authority to validate RPRA's inclusion of 50% of the value of in-kind contributions by the newspaper industry in the Net Cost to be paid by other Stewards.

256. I am particularly unable to find lawful authority in the BBPP, the in-kind Amendment or in any Minister's letter. Indeed, in my view, all of these in their terms make it an obvious conclusion that, whatever the genesis and ultimate fairness or unfairness of the decision that newspaper advertising would constitute an exception to the usual rule, the financial consequences of that direction, a negotiated result, cannot be visited upon the other Stewards through Stewardship Ontario.

257. I have, consistent with my standard of review analysis, applied a standard of correctness to this issue but in my view, even if the administrative law standard of reasonableness were applied, RPRA's decision remains unsupported by and is not rooted in any relevant authority and

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[125] Rathbone Cross-Examination, *supra* note 70, p. 1058.

cannot be considered reasonable in such circumstances. Indeed, I find it to be unreasonable and the exercise of a discretion untethered from any foundation in law or authority.

258. As I reviewed when dealing with the Cost Containment dispute above, RPRA enjoys significant powers to impose costs on Stewards, in carrying out its duties.[126] These however are not absolute. They may be constrained by other existing authority having the force of law. They all are to be considered together among other reasons, to avoid commercial unfairness, absurdity or unreigned discretion.

259. RPRA argues that it is acting reasonably in following the 2014 Award. That Award, however, was limited to the year in question, did not purport to speak to subsequent years, and was not founded nor did it purport to be on any lawful authority or other governing direction.

260. The BBPP records that municipalities suggested that the CNA/OCNA contribution should cover costs for newspaper advertising with a view to increasing participation in the blue box program and improving recovery rates. The CAN/OCNA then negotiated with the Ministry that the first $1.3 million would be in the form of newspaper advertising. A program was to be designed to attend to the particulars of this conversion of funds to be launched after the Blue Box Program Plan was approved.

261. The Minister's letter of December 30, 2004, approving the 2005 steward fees, directing the WDO to submit the amendment to the Plan to expand existing in-kind contribution of the CNA/OCNA, contained this specific direction in respect of the in-kind contribution and the amendment to be drafted:

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[126] See this Award, paras. 193-194.

> This would not have an effect on the fees structure as it applied to other industry stewards.

262. The in-kind contribution Amendment, among other things, made clear that any additional responsibilities of CNA and OCNA, beyond the initial $1.3 million in future years were to be in the form of in-kind newspaper advertising.[127]

263. These materials, including the Minister's letter, make it plain that the diversion of the newspaper industry's otherwise contribution to the Steward Obligation is to have no effect on the other Stewards and the fee calculations and structure under which they operate.

264. Including any portion of the cash value of the newspaper industry's in-kind contribution, be it 50% or any other amount, breaches the clear meaning of the BBPP, the in-kind contribution Amendment and Ministerial directions.

265. That has a direct effect on the fees structure as it applies to other industry Stewards and is unauthorized and unlawful.

2014 Award, Estoppel and Costs Incurred

266. RPRA, in continuing to levy an addition of 50% of the modified in-kind contribution relies upon the 2014 Award and the meaning of "costs incurred". In my view, neither approach is sustainable.

267. Arbitrator Armstrong did not purport to grapple with the positions in law of the parties to that arbitration, which of course did not include WDO. Arbitrator Armstrong specifically declined to consider the submissions on the law and authority, which, reading the 2014 Award,

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[127] In-Kind Amendment, *supra* note 12, s. 6.5.3.

included many of the same submissions made before me but which I am obliged to consider in the submission to arbitration with which I am charged.

268. Moreover, Arbitrator Armstrong did not speak to subsequent years and his suggestions and recommendations, which were not followed by any requisite authority, were that the entire in-kind contribution provision ought to be replaced and repealed.

269. The Arbitrator was very direct and transparent in making all of that clear. His decision on the point was expressed in conclusory terms but without any particular explanation, consistent with the *ad hoc* nature of his mandate. In these circumstances, no estoppel can arise in respect of the 2014 Award. Firstly, the parties are not the same as were before him. Although this is not always fatal to an abuse of process argument, in my view it is fatal here, among other reasons, because Arbitrator Armstrong did not have before him or consider the contract between the parties to this Arbitration, the Program Agreement.[128]

270. More particularly as the Arbitrator made clear, he was not making any decision based on the legal positions of the parties, and certainly did not have before him the Program Agreement, it is perfectly clear the issue before the Arbitrator decided by him is not the issue being litigated in this Arbitration. That issue has never been decided and was not determined in the 2014 Arbitration.[129] There is no estoppel.

271. As to the question of in-kind advertising as a "cost incurred", within the meaning of s. 11(1) of the *WDTA*, in my view there are two answers. Firstly, to read that value back in as an

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[128] The expanded scope to non-parties is to ensure that goals of efficiency, fairness and finality are achieved. If the issue was never considered there can be no reason to extend the doctrine. *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77 Respondent's Book of Authorities [**RBOA**], Tab 12, paras. 43, 53.

[129] Fundamental to the operation of issue estoppel is that the same question arising has been decided, *B.C. (Workers' Compensation Board) v. Figliola*, [2011]3 S.C.R. 422, paras. 27-28.

obligation of Stewards, is to mount a collateral attack on the Minister's decision that the fees structure was not to be affected for other Stewards. The Minister's pronouncements mean that even if "cost incurred" would otherwise include such a charge, that should not be done here because the result would be to increase the fees the other Stewards are to pay – the very result that the Minister decreed was to be avoided. Cost incurred in this context must be read together with the other relevant language and directions on the issue and cannot include the cash value of newspaper advertising.

272. Secondly, I am not persuaded that the amount added to Net Cost, being the value of the advertising received by municipalities is a "cost incurred" by them in the context of these facts. They do not pay it. They do not account for it in their General Ledgers. It is not an out of pocket expense to them. They receive the value of it in-kind.

273. There are many cases interpreting in the circumstances of each set of facts the meaning of "cost", "costs" and "costs incurred". And of course, there are the dictionary definitions. In my view, the underlying principle emerging from the cases is that there must be an actual out of pocket expense or its equivalent before the amount is either a "cost" or is "incurred".[130] That is not the case for this add-on. Municipalities receive the value in another way. I find that the cash value of the in-kind newspaper contribution is not a "cost incurred" by municipalities within the meaning of s. 11(1) of the *WDTA*.

274. In the result, RPRA's decision to include such amount as an increase to the Net Cost to be paid by Stewards has no foundation in contract, law or authority, is not reasonable and cannot

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[130] See *Grundy's Custom Framing Ltd. (Trustee of) v. Inglis Ltd.*, [1996] O.J. no. 771, SOBOA, Tab 11, para. 114; *Waytowich v. Kitimat (District)*, 2012 BCPC 400, RBOA, Tab 7, paras. 21, 23.

be justified as an exercise of RPRA's discretion. It is not anchored to any substantive foundation. It finds no support in the constating documents and none in the 2014 Award. Understandable as it may have been for RPRA to continue to calculate the Steward Obligation in light of the Arbitrator's 2014 Award, as a balancing factor between municipal and Steward interests, it cannot be justified when finally considered as an issue of law. The 2019 Steward Obligation in the amount of $126.4 million is to be recalculated to remove the addition to Net Cost of about $1.1 million.

Non-Obligated

275. What is the scope and limit of Stewardship Ontario's lawful obligation to contribute to municipal costs of managing blue box waste resulting from autonomous recycling programs set in place by municipalities in Ontario?

276. The answer to this fundamental question arising in this Arbitration requires consideration of multiple statutes, regulations, policy found in multiple writings, Ministers' letters, a contract, the BBPP and other lesser sources including the Datacall with its user guide, curbside and other audits, and, of course, the evidence in this proceeding including not only the principal witnesses, but Mr. Cugalj, Ms. Gies and the expert, Mr. Lindeberg, all to be considered together in keeping with the principles of interpretation governing a review of both contractual and legislative language, amid the surrounding circumstances.

277. And yet, to a considerable degree, the differences between the parties on this issue largely fall to be determined by the meaning of two subsections of the BBPP, ss. 2.1.1 and 2.1.2, definitions of Packaging Materials and Printed Papers, respectively.

Stewardship Ontario's Position in Brief

278. SO has maintained since at least 2016,[131] that these subsections limit the Steward Obligation and the Net Cost calculation to those defined blue box wastes only.

279. Many items that end up in the recycling bin are not PPP and therefore not part of the BBPP and Stewards should not be paying for them.

280. Stewardship Ontario argues that municipal recycling obligations, imposed by the EPA, are not coincident with Stewards limited funding obligations, defined in the BBPP. The costs and revenues associated with, for example, office paper purchased by residents and solicited for blue box recycling by most municipal programs are not within the defined responsibilities of Stewards and are not to be included in the calculation of the annual Steward Obligation.

281. Nothing in any of the legislation nor from the Provincial Interest permits RPRA to make unilateral changes to the BBPP, without Ministerial approval or an amendment. The Program Agreement mandates compliance by RPRA with the BBPP, which is the expression of all the statutory directions found in the *WDTA*.

282. Among other things, Stewardship Ontario argues that RPRA has essentially acknowledged all this to be correct in its actions including in implementing the Parry Report recommendations, in the revised 2016 Datacall Guide, in Staff reports, and elsewhere.

283. The increased number and better reliability of audits now permits a proper calculation of the numbers and a reliable deduction of amounts from the Net Cost of Stewards, but RPRA refuses to carry out this exercise.

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[131] Stewardship Ontario Submissions, *supra* note 132.

RPRA's Position in Brief

284. For its part, RPRA submitted in its oral opening, as far as I can determine for the first time ever, that ss. 2.1.1 and 2.1.2 are not designed to limit Stewards' obligations under the legislation and the BBPP, but rather are "steward-facing" only. Those definitions were developed to determine who would be a Steward and how Stewards' responsibilities under the BBPP would be addressed. Those determinations together with the Steward Rules do not relate at all to the funding obligation but only to defining and refining the identification of Stewards and those Stewards' specific responsibilities to Stewardship Ontario, to identify those who are to do the funding.

285. For RPRA, the funding obligation is rooted in the legislation, Regulation 101/94 under the *EPA* and Regulation 273/02 under the *WDA*. The Program Request Letter moved these obligations into the BBPP.

286. RPRA submits that all of this historically and now under Section 11(1) of the *WDTA* perfectly align municipal programs to their funding through the BBPP. The BBPP, in section 2.1, is clear that the funding obligation of Stewards is described there and is in relation to the broadly worded categories of Blue Box Wastes included there, limited only by the recognition that because Blue Box programs collect primarily packaging and printed materials, the obligation is limited to "…consumer packaging material and printed papers commonly found in the residential waste stream."[132]

287. To return to our example, this includes office papers solicited by municipalities within the funding obligation, together with other materials, referred to as residue or contamination that

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[132] BBPP, *supra* note 9, section 2.1.

is found in blue boxes, items such as rubber hoses, unrecyclable plastics and rope and other such unsolicited but commonly deposited materials.[133] This is because historically and now enshrined in the BBPP, the funding obligation is aligned with the costs of municipalities in collecting the designated waste, and this includes the cost to manage certain residue, sometimes described as the non-PPP materials, and contamination that comes with the program.

288. It has always been the case that Stewards fund 50% of the costs of municipal recylcing programs and that is what the BBPP says.

289. Somewhat ironically, RPRA points out that Stewardship Ontario's position is a new argument being made years after the Blue Box Program had operated consistently and transparently with the broader inclusion of materials and costs of collection within the funding obligation, without protest and also consistent with the overall direction provided to RPRA by the various constating documents, Ministers' letters, the Provincial Interest to which it must adhere and other components of the BBPP, including Schedule "A" to the Program Agreement and Appendix IX to the BBPP.

History and Background

290. This dispute percolated to the surface in the period surrounding the 2014 Arbitration. More precise audits, curbside studies, were undertaken beginning in 2012-2013 and produced data showing percentages by weight of materials in blue boxes that to Stewardship Ontario demonstrated there was a lot of material that was not Printed Packaging and Paper ("**non-PPP**" or "**non-obligated**"). These studies were not the first to be done but they were carried out

[133] RPRA Closing Submissions, pp. 8-12.

literally at the curb before any sorting activities and thus could now be said to represent an accurate picture of what was going into residential blue boxes.[134]

291. Additional curbside studies conducted in 2014-2015 showed an increase in non-PPP materials by weight. Stewardship Ontario began to assert that it was not responsible for municipal costs incurred due to the collection, transportation and processing of materials in the blue box other than PPP, this was non-obligated material and these costs needed to be deducted before Net Cost was calculated.[135]

292. Among its suggestions, Stewardship Ontario advanced that the Data Call Guide should be updated and used as a means to exclude non-PPP materials from the inputs to the calculation of costs.[136]

293. The 2014 Arbitration did not deal with the non-obligated issue, but as we have seen, when MIPC was unable to reach a recommendation for 2015, RPRA undertook various studies and retained consultants to examine the contentious issues. Out of this process, came the Parry Report.[137]

294. This consultant, Ms. Parry, was retained to do a review arising out of the objections Stewardship Ontario was making to WDO over the inclusion in Net Cost of municipal costs for handling what it considered to be non obligated materials, that is, materials not falling within the PPP definitions in ss. 2.1.1 and 2.1.2 of the BBPP.

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[134] Stewardship Ontario Submission, *supra* note 132, pp. 7-9.
[135] Stewardship Ontario Submission to RPRA Board, June 15, 2006, BOD, Vol. 4, Tab 65.
[136] Considerations for Review of Non-Obligated Blue Box Materials, March 21, 2016, BOD, Vol. 4, Tab 58.
[137] Parry Report, *supra* note 23.

295. The Parry Report recognized the argument that Stewardship Ontario was making, that it should be responsible only for limited materials, or obligated materials, as Stewardship Ontario defined the term, but then made a statement as well that waste in the blue box which fits within the broader definition of Regulation 273/02 may also be eligible for reimbursement.[138]

296. Rather than resolving that debate (Mr. Rathbone stated, after thought, that this question is a legal issue),[139] the consultant took as a key task that she should examine the materials and make recommendations having regard to the overarching goal of the Blue Box Program, to drive materials out of the waste stream, together with related goals of encouraging ease of participation for residents and the need for audited and verifiable data if adjustments were to be made.[140]

297. With these considerations in mind, Ms. Parry concluded that only pots and pans, frequently solicited, often found in the blue box and clearly identifiable, can be deemed ineligible for reimbursement as the costs of handling these materials will have little or no impact upon the overall goals of programs.

298. She recommended no other deductions, including no deductions for paper products, PPP-like material and no adjustment for residual waste which she considered to be unsolicited but that nonetheless always appears in the blue box and which, in her opinion, represented eligible expense.[141]

299. Ms. Parry included cases where, in her view, it was unclear if the material is obligated or non-obligated. These included office papers purchased by residential consumers, not paper

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[138] Parry Report, *ibid*., pp. 3-4, ss. 2.2 and 2.3.
[139] Rathbone Cross-Examination, *supra* note 70, pp. 1012-1018.
[140] Parry Report, *supra* note 23, s. 3.1, p. 6.
[141] Parry Report, *ibid.*, s. 4, Recommendations, p. 10.

within the strict definitions in ss. 2.1.1. and 2.1.2. As well, she posited that even where the materials may be non-obligated, it was unclear if nonetheless they should be eligible costs within the program. These included pots and pans but also residue or contamination picked up in the course of collecting otherwise obligated printed paper and packaging. The consultant did not resolve this issue on any interpretive or legal analysis but, as I have said, considered the question in relation to the goals of the program, particularly whether inclusion or exclusion for reimbursable costs would affect diversion rates and other policy principles reflected in the BBPP.[142]

300. What she did do was to design a decision tree, later modified by WDO, to work material through to see if it could be excluded from funding, measured against the goals of the BBPP, as she described them.[143]

301. Stewardship Ontario provided a comprehensive response to the Parry Report, dated May 31, 2016, reiterating that it was responsible only for obligated materials and back-dated deductions for non-obligated materials should be made for the 2013 and 2015 Steward Obligation amounts and the 2016 Obligation should reflect those same adjustments.[144]

302. WDO made no reply to the May 31, 2016 Stewardship Ontario analysis. Its response, such as it was, is contained in a letter from Michael Scott, WDO's CEO, dated June 21, 2016, to Mr. Pearce advising of the Board's conclusions about the 2016 funding obligation, calculated at $121.5 million and which included a deduction of $109,543 "representing the cost of non-obligated material in the municipal blue box system as was recommended in the final report on

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[142] Parry Report, *ibid*.
[143] Parry Report, *ibid*., s. 3.1, p. 6 and s. 4, p. 10
[144] Stewardship Ontario Response, May 31, 2016, Tab 62.

the review of the non-obligated material," in other words, a deduction for pots and pans only, per the Parry Report. WDO did advise that it had asked MIPC to develop a better and more precise set of instructions to municipalities concerning non-obligated materials but that it would not re-open the 2015 funding obligation because this could lead to other requests to open past years to take into account principles that were not considered when the WDO approved those funding obligations.[145]

303. Also in this period, the Working Group Final Report, revised version, May 12, 2016,[146] in its analysis stated a principle that "the Steward Obligation is limited to costs directly attributable to the municipal Blue Box system."[147] With that said, the Working Group did not specifically address the controversies arising out of the Parry Report. Stewardship Ontario filed a reply to the Working Group Report, attached as an Appendix to that Report, reiterating its position that the 2015 Steward Obligation should be recalculated to reflect costs incurred by municipalities for obligated materials only and that for 2016 the Steward Obligation must be calculated on that basis.[148]

304. In December 2015, the WDO Board passed a series of motions concerned with the distinction between obligated (as Stewardship Ontario defined the term) and non-obligated material. Mr. Rathbone agreed in cross-examination that this was a bit of a watershed moment in that the Board was now recognizing there needed to be better guidance to municipalities between the two categories, because funding could be effected.[149] In its presentation to the WDO Board

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[145] WDO letter, *supra* note 79.
[146] Final Working Group Report, *supra* note 21.
[147] *Ibid.*, p. 8.
[148] Appendix "A" to the Working Group Report, *supra* note 21, p. 4.
[149] Rathbone Cross-Examination, February 26, 2020, pp. 1145-1146, ll. 1. 16-8; Directors Minutes, December 9, 2015, BOD, Vol. 8, Tab 12, pp. 1-3.

on June 15, 2016, Stewardship Ontario again submitted that its obligation must be defined by the definitions contained in the BBPP only, for obligated materials and that adjustments needed to be made to both the final 2015 Steward Obligation and the proposed 2016 Obligation.[150]

305. This led to MIPC's consideration of a revised Datacall Guide. This exercise generated much controversy among the participants which included representatives of Stewardship Ontario, RPRA and the municipalities as to how the Datacall Guide should express notice to municipalities that there may be exclusions from funding for materials that are solicited, find their way into the blue box but are not be obligated materials.

306. The language in the Datacall User Guide alerting municipalities to the possible limitations on funding was finally settled in 2016 for the 2017 collection as follows:[151]

> Definition of Residential Blue Box Material
>
> Municipalities are asked to report all materials collected in their residential Blue Box program. However, funding for the Blue Box Program is limited to Printed Paper and Packaging and as such, not all costs reported may be included in the Steward Funding Obligation. For a full definition of Blue Box materials included in the Blue Box Program, please Appendix F: Definitions of Packaging Materials and Printed Paper. (Arbitrator underlining)

307. To my mind, this is a classic example of compromise language being settled by committee, without resolving the central question inherent in the debate. Stewardship Ontario maintains that this language clearly put the municipalities on notice that Steward funding would be limited to Printed Paper and Packaging defined in ss. 2.1.1 and 2.1.2 of the BBPP.

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[150] Stewardship Ontario Submission, *supra* note 78.
[151] 2106 Datacall User Guide, Brief of User Guides 2014-2019, Tab 3, p. 9.

308. For its part, RPRA argues that this language was a way to give notice to municipalities, as Ms. Parry had recommended, that there may be material that would be excluded from funding if it met the revised decision tree language test. An example would be the pots and pans exclusion first raised in that Report.

309. Mr. Pearce agreed in his evidence that on two separate occasions, Stewardship Ontario had attempted to have the word "may" replaced with the word "will" to read "will not be funded" or words giving that meaning. Mary Cummins had advised him that this language would not be accepted by the municipalities and that ultimately what was to be funded and what was not was a decision to be made by RPRA's Board.[152]

310. RPRA maintains as well that Stewardship Ontario exaggerates the importance of the Datacall Guide. The Guide is a guide for use by municipalities when considering how to report information into the data call system. It does not purport to be a definitive statement of the ultimate fate of the reported material, nor could it be reasonably understood to be that by any knowledgeable party.

311. Ms. Gies' evidence, which I accept, was that the revised Datacall Guide was not for the purpose of directing municipalities that non-obligated material would now not be eligible for funding. It was to address one of the Parry recommendations, that notice be provided to municipalities that this was now an issue. RPRA's Board would make the decision on funding, it

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[152] Pearce Examination-in-Chief, February 19, 2020, pp. 299-300; Pearce Cross-Examination, *supra* note 84, pp. 524-525.

has not done so, and before doing so would have to recognize the entire landscape of considerations, to determine whether that would be reasonable.[153]

312. For the years 2017 and 2018, RPRA's Board approved Steward Obligations which contained a deduction from Net Cost for pots and pans only. The Board did not accede to Stewardship Ontario's position, repeated by it in all those years, that Stewards should be responsible for only the PPP defined in ss. 2.1.1 and 2.1.2.

313. This brings us to 2019, the year in dispute in this Arbitration.

314. The parties followed the same practice now in effect for a number of years. AMO, the City of Toronto and Stewardship Ontario made oral and written presentations to the Finance Committee of RPRA's Board on June 6, 2018. RPRA Staff provided its written advice and recommendation to the Board following the Finance Committee presentations.

315. Stewardship Ontario again made its now familiar presentation that Stewards must pay only for materials defined as Printed Paper and Packaging in the BBPP and it has no obligation to pay for non-obligated materials. It cited the updated Datacall User Guide and made the argument that municipalities are paying $55 million to manage non-PPP in their recycling programs, representing 22% of reported Net Cost.

316. In its graphic presentation of how the Steward payment obligations should be calculated, it argued that a deduction should be made from Gross Costs for those costs to manage non-PPP, the Non Obligated materials, and what it described as "excessive contamination."[154]

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[153] Gies Cross-Examination, February 27, 2020, pp. 1424-1428.
[154] Stewardship Ontario Presentation, *supra* note 87, pp. 1186-1187, 1192 and 1196.

317. It is noteworthy that in these proceedings, the costs Stewardship Ontario seeks to be deducted for the 2019 Obligation are now in the magnitude of $29 million, a substantial difference from the $55 million graphed in its presentation to the Finance Committee in June, 2018.[155]

318. The difference appears to be accounted for mainly by more sophisticated audit data available by reason of the various audit exercises undertaken by Stewardship Ontario and others through the CIF, as Mr. Cugalj explained in his affidavit and in his evidence at the hearing.[156]

319. Mr. Cugalj's evidence focused on how Stewardship Ontario distinguishes between obligated and non-obligated material from the blue box. Mr. Cugalj's methodology involves dividing the materials into two categories, PPP (either marketable or non-marketable) meaning revenue generating or non-revenue generating on the one hand, and non-PPP (either marketable or non-marketable), on the other.

320. I have no difficulty accepting Mr. Cugalj's evidence about what he did and what the results are at face value, although the numbers have changed significantly since the original submission to the Finance Committee. Nor for that matter do I with Mr. Lindeberg's Report #2 approving the methodology and that the results are valid,[157] but serious issues arise about the efficacy of this analysis in relation to the questions that need resolution in this dispute.

321. Naturally enough, the analysis is directed towards supporting the position SO takes on the merits: that Stewards are responsible only for obligated PPP and not non-obligated PPP, and that

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[155] Pearce Affidavit, *supra* note 16, pp. 47-48, para. 164.
[156] Igor Cugalj Affidavit [**Cugalj Affidavit**], February 20, 2020, Overview, paras. 3-7.
[157] Lindeberg Report #2, Exhibit 18, Conclusions, pp. 6-7.

Stewards have no responsibility for non-PPP or contamination resulting from materials solicited by municipalities nor for materials that are simply put into the recycling system by residents.

322. Mr. Cugalj and Stewardship Ontario's calculations considered the marketability of both PPP and non-PPP in their costs calculations, but as Mr. Pearce agreed in cross-examination, marketability of materials is not a proxy for solicited materials, because non-solicited materials may nonetheless have value – the best example being the current state of pots and pans, which when the Parry Report was prepared were mostly solicited by municipalities but are now, while continuing to have value, not solicited by municipalities.[158]

323. In view of the decision that I have reached on the non-obligated issue, set out below on this issue, and in reflecting upon these lengthy Reasons, in my view it is not necessary to resolve these inconsistencies and differing positions between the parties on the Stewardship Ontario methodology, calculations and results.[159]

Analysis

324. After careful consideration, I conclude that Stewardship Ontario's obligation to contribute funds through the Steward Obligation is not confined to funding only the municipal collection of PPP defined by ss. 2.1.1 and 2.1.2 of the BBPP.

325. Reading all the relevant legislation, policies, ministerial directions and related materials, and having limited regard to both the history of the Blue Box Program as it evolved, the conduct

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[158] Pearce Cross-Examination, *supra* note 84, pp. 538-539; pp. 545-546.

[159] The same can be said about Stewardship Ontario's position over deductibility of the costs of contamination. Its STINO position would suggest that it bears no responsibility for any contamination in the system, again, only for PPP. But Stewardship Ontario equivocated on this point in this Arbitration, recognizing at least as a practical matter, that no means exists to entirely identify the material – even office paper and that "excessive contamination" is occurring. See Stewardship Ontario March 21, 2016 Submission, *supra* note 134, s. 30, pp. 7-8. See also Pearce *supra* note 151, February 19, 2020, pp. 307-314.

of the parties through 2014, and other findings which I will detail, I am satisfied that the intent, purpose and meaning of the Blue Box Program Plan is that Stewards are to contribute 50% of the reasonable costs of municipal recycling programs for material broadly defined by Regulation 273/02, limited only that it be generally in the nature of consumer packaging and printed papers that one would find in a residential blue box.

326. The costs recoverable are the costs of managing such a program – this means including the reasonable costs of managing residue or contamination that is a constant companion of recyclable waste. This is the meaning of s. 2.1 of the BBPP, itself consistent with all earlier descriptions, notices, directions and legislative language.

327. More particularly, I am unable to accept the submission that Steward Obligations are defined and therefore limited by ss. 2.1.1. and 2.1.2 of the BBPP. I agree with RPRA's submission that the definitions in those subsections and the rules are "steward facing", for the purposes of sorting out who are the Stewards and who will contribute to fund the costs to be paid by industry.

328. These provisions are not designed to limit or define the Stewards' Obligations in the larger contemplation of the Blue Box Program Plan taken as a whole. That meaning would be inconsistent with all other statements defining the broad responsibilities of Stewards, read together as a whole, and is not in harmony with the purposes and policy of the BBPP.

329. Indeed, s. 2.1.1, its introduction, includes this language, "…Stewardship Ontario has adopted the following definition of packaging." In the introduction to s. 2.1.2, this language appears: "as a general definition, Stewardship Ontario designates all printed paper as blue box waste." (Arbitrator underlining)

330. These subsections continue: "these definitions will be reviewed annually by Stewardship Ontario using the procedure for amending rules as outlined in section 9.1.8. Examining section 9.1.8, it is clear that although the rules need to be approved by WDO/RPRA, the rules are designed to identify stewards and to allow for changes to the definitions of PPP in the blue box in order to identify additional stewards and to change the responsibilities of existing stewards. No fair reading of these subsections against the other relevant materials, can result in a conclusion that Stewardship Ontario may unilaterally, or at least without any input from municipalities or others, alter and change its own funding responsibilities through its internal rules.

331. This is made clear in a number of ways, most particularly by the plain reading of s. 2.1.1 and s. 2.1.2 of the BBPP but also by many earlier directions that led to the BBPP.

332. Of course, a history like this one does not manifest in an always seamless path to enlightenment. Stakeholders advocating for their interests, government setting policy in a political setting, and simply the accumulation of multiple statements designed to more or less say the same thing, all over many years, enhances the value of employing the confirmed rule of interpretation – reading everything together, to arrive at a conclusion giving meaning to the language the parties have themselves employed.

333. This leads me to one observation from high level. If some frustration has developed – why cannot the rules have been more clearly articulated – the reason for that is because in my view the broadly shared underlying purpose at hand throughout was itself quite open-ended but commonly understood – municipal recycling programs and the industry contribution were twinned from the outset. Stewards are to pay 50% of the net cost of running those programs.

334. I cannot therefore accept Stewardship Ontario's first submission that these obligations are distinct, two ships passing in the regulated night, each sailing under its own orders. That is not how this program works. And the 2010 attempt to expand the Steward class, recognizing as it did that the obligation to fund was more or less written in stone in a powerful statement of that reality.

335. So, reading and assessing the relevant legislation, the BBPP and the policy directives of Ministers, taken together and considered with the history of the program and conduct of the parties over time, leads only to the conclusion that the financial obligation of Stewards under the program was intended to and is directed at supporting municipal recycling programs in all their gritty endeavours, constrained only by very few parameters and certainly not by the precise definitional structure of printed paper and packaging found in those subsections of the BBPP and the Steward Rules.

336. Rather, the thrust of the legislative and regulatory regime, more or less consistently directed over time was that Stewards were funding participants in a program designed to encourage municipalities to solicit a broadly described set of waste materials, rooted in two regulations.

337. When these directions were carried into the BBPP in 2003-2004, following the direction of the Minister's Program Request Letter, the broad goals of the program and for Stewards were restated and continued.

338. They were not narrowed and limited in the BBPP. This becomes clear when the BBPP is read as a whole in harmony with the legislation and the role of WDO/RPRA reflected in the legislation and the many policy directives that led to and followed the BBPP.

339. Without conducting an exhaustive review of all the materials, legislation, history and contextual materials, much of which I have described and referred to earlier in these Reasons, a short course in arriving at the nature and extent of the Stewardship funding obligation may be stated as follows.

340. Section 25(5) of the *WDA* described the blue box program payments to municipalities as follows:

> (5) 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 a total amount paid to all municipalities under the program being equal to 50% of the total Net Costs incurred by those municipalities as a result of the program. (Arbitrator underlining)

341. Section 11(1) of the WDTA is to similar effect.[160] Both statutes describe the funding obligation in relation to costs incurred by municipalities to manage their programs in plain language. They do not describe a regime tied to particular definitions. There is an obvious connection between municipal recycling programs and the funding obligation of Stewards in this language, a connection which Stewardship Ontario denies, fundamental to its position that whatever municipalities are doing in their recycling programs is divorced from Stewards' obligation to fund limited deposits into those municipal blue boxes.

342. The "program" referenced in ss. 25 and 11 is the program constituted by the BBPP which was to be designed by s. 23(1) of the WDA.[161] The waste diversion program to be designed was described by the Minister in his Program Request Letter, which is found at Appendix II of the

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[160] *WDTA*, *supra* note 27, s. 11(1).
[161] *WDA*, *supra* note 5, s. 23(1).

BBPP and is specifically required to be complied with by Stewardship Ontario in the Program Agreement.[162]

343. The Program Request Letter contained twelve specific policies to be addressed within the BBPP. These are repeated in paragraph one of the Program Agreement. They include a description of what the BBPP must support in the following terms:

> (3) The Program shall include support for all materials designated as Blue Box Waste under the *Act* and which are managed by or on behalf of Ontario municipalities. (s. 2.1)
>
> and
>
> (4) The Program shall support at a minimum, all categories of wastes set out in Schedule 1 of Ontario Regulation 101/94 under the *Environmental Protection Act* (s. 2.1)

344. The reference is to s. 2.1 not to ss. 2.1.1 and 2.1.2. In turn, s. 2.1 defines blue box waste in broad terms, with reference to Regulation 273 and provides its own description of what the Blue Box Program addresses in the following language:

> This definition is broad in scope and encompasses packaging and printed materials in a wide range of consumer products. However, given that municipal Blue Box programs collect primarily packaging and printed materials and do not generally collect consumer products, the Blue Box Program Plan addresses only consumer packaging materials and printed papers commonly found in the residential waste stream. (Arbitrator underlining)

345. Again, the description of the program, 50% of the Net Cost of which the Stewards are to fund, is described in relation to municipal collection of printing and packaging materials commonly found in the residential waste stream, and in broad terms falling within the

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[162] Program Agreement, *supra* note 8, s. 4.4.2(e).

descriptions in Regulation 273, and not in terms of the restricted definitions that follow in ss. 2.1.1 and 2.1.2.

346. The evidence in this hearing discloses that many materials not falling within the definitions found in ss. 2.1.1. and 2.1.2 are nonetheless solicited by municipalities and are commonly found in the blue box. The most descriptive example again is office paper purchased by residents for home use but not supplied by Stewards, a product not included within the specific definitions in ss. 2.1.1 and 2.1.2.

347. There is much in the trail of events leading to the BBPP that buttresses a conclusion that the obligations placed upon Stewards there are focused on municipalities' own obligations to encourage waste diversion by their solicitation of a broad or loosely defined set of materials in the nature of printed paper and packaging commonly found in the municipal blue box.

348. The initial regulation, 101/94 set the municipal obligation to collect materials in very broad terms,[163] the very first description of blue box wastes.

349. The iWDO Report in 2000[164] which first addressed the funding obligations of Stewards, yet to be set down in legislation or the BBPP, made clear that funding, to be 50% from industry, was to be calculated in relation to municipal programs, not derived from the parsing and dissection of materials in the blue box but rather in keeping with the broad definitions found in Regulation 101/94 under the EPA and in subsequent language in the WDA.

350. As to the history of events after the BBPP went live for all the years 2004 through 2013, the three interested parties, municipalities, Stewardship Ontario and WDO all acted under the

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[163] Regulation 101/94, *supra* note 3.
[164] iWDO Report, *supra* note 3.

blue box program to include in the Gross Costs of municipalities materials solicited by municipalities including what Stewardship Ontario now calls non-obligated materials, and also contamination. Stewardship Ontario paid 50% of those costs as recommended by MIPC established by the BBPP and comprised of representation for Stewardship Ontario, AMO, and latterly, the City of Toronto.

351. This historical path is not decisive, parties may change their minds, and in the end the language is to be interpreted, but it is instructive in that the parties who were involved in designing the BBPP and what was intended, all saw the funding obligation to mean the same thing, as the program began to operate.

352. Certainly there was no doubt from early on that all parties understood that the blue box materials contained non-PPP material and contamination, as audits were conducted and knowledge existed as to what the blue box materials were.[165]

353. In 2010, Stewardship Ontario proposed an amendment to the BBPP to expand the definitions in ss. 2.1.1. and 2.1.2 to include within the steward class other producers of materials similar to those now falling within the steward definitions in the BBPP.[166]

354. There can be no doubt from Stewardship Ontario's proposal that it fully understood the nature of what was existing in the blue box and being paid for. What was to be done was to sweep in more contributors and products to broaden the number of funders in the allocation of costs to attend to the costs of managing municipal recycling.

355. For example, s. 3.3 of its revised plan included the following:

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[165] Curbside Material Composition Study, April, 2013, Exhibit 23.
[166] Revised Blue Box Program Plan, BOD, Vol 7, Tab 6.

> Included in this revised Blue Box Program Plan, as Packaging and Printed Paper, are products which are made of materials already designated as Blue Box Wastes and which fulfill a function similar to Packaging or Printed Paper.

356. These materials are nearly identical and indistinguishable from Packaging or Printed Paper already covered by the Blue Box Program on which Blue Box Program fees are paid but they were not covered by the 2003 Blue Box Program Plan:

> …the main goal of these expanded definitions is related to payment of fees. In total, stewards will still be responsible for the same amount of fees, but this will be more equitably allocated among producers.[167]

357. There was no suggestion that the way to deal with things was to insist that Stewards' liabilities be restricted to funding only existing PPP.

358. In this submission, SO recognized that the Stewards were paying, consistent with the precise language in the WDA and s. 2.1 of the BBPP, for all materials collected by municipalities in their blue box, that is PPP, contamination, plus PPP-like materials.

359. The draft revised BBPP was submitted to WDO and approved by its Board and delivered to the Minister. The Minister however, did not approve these revisions.

360. In my view in this proposal, Stewardship Ontario was correct in its analysis of the BBPP and the legislation.

361. An impetus for Stewardship Ontario's change of position appears to have resulted from the increase in knowledge arising from the flow of information and data from the curbside audits begun under the Terms of Reference in 2015.[168]

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[167] *Ibid*., s. 3.3, pp. 10-11.

362. A second impetus was the flurry of activities following upon the 2014 Arbitration and MIPC's inability to settle upon a fee recommendation in 2015. As noted, the distinction between obligated and non-obligated materials gained some traction in the Parry Report. This combination of events brought forth the fully formed Stewardship Ontario submissions that its obligations were entirely limited to the obligated subset of blue box materials.[169]

363. Since then, Stewardship Ontario has maintained that its liability is limited to PPP, reinforced in that by the subsequent events surrounding the Datacall Guide.

364. With all of that then, coming back to the central question, do the BBPP provisions 2.1.1 and 2.1.2 support Stewardship Ontario's contention that it enjoys limited liability.

365. The first principle of interpretation is to examine the words themselves with a view to determining whether they convey the meaning or intention contended for by the proponent. I find that they do not. I repeat that the language is steward-facing only and speaks to the difficult and complex problem of allocating to industry the responsibility, based on who does what.

366. No other party is called upon to participate or is called upon to comment, join in or adopt the definitions and their manifestation in the rules as called for in these sections (although WDO, as the regulator, was required to approve annual changes that might be made to these definitions). Municipalities however have no role to play and of course municipalities were deeply involved in the design of the Blue Box Program Plan.[170]

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[168] Terms of Reference, BOD, Vol. 9, Tab 2.
[169] Stewardship Ontario Submissions, *supra* notes 129, 134, 142 and BOD, Vol. 4, Tab 63.
[170] It is noteworthy that changes in the Rules are communicated to Stewards only, s. 9.18, BBPP. I also conclude that in its terms, s. 33(4) of the *WDTA* limiting the rules to designating as stewards only those who have a

367. Now understanding to some degree the relationship between the municipalities on the one hand and Stewardship Ontario on the other, it is not conceivable that municipalities would agree that Stewardship Ontario could set and amend its own funding obligations, leaving out of that an entire body of waste already included in municipal recycling programs.

368. And the evidence is that nobody did think that at the time. Glenda Gies, a witness who had vast experience in these matters and whom I found credible and reliable, was Executive Director at WDO at the time. She gave this evidence in discussing the 2010 proposal:

> I was saying that the detailed definitions in the Blue Box Program Plan were used for the rules for stewards to identify and ensure compliance by those companies. But they were not used as instruction to municipalities about what they should collect or should not collect because they had an obligation to comply with Ontario regulation 101 including schedule 1 as you pointed out here. Because municipalities were collecting the items that were included in the definitions including the revised definition proposed in the revised plan in 2010, those items were already in the municipal collection system and the costs were already included in the costs that were being reported through the Datacall. There was no expectation that by changing those definitions it was going to change the cost. The cost already included those materials.[171]

369. The next step is to examine the words in the context of the other words found relevant or coexisting with the language in question, in this case the BBPP read as a whole, the statutes and regulations which underlie its creation and the Minister's directions found primarily in the Program Request Letter.

370. In my view, the interpretations and meaning called for by Stewardship Ontario are not reconcilable with the import of the relevant language of these companion documents, all of which essentially provide a direct connection between municipal recycling and a broad scope of

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"commercial connection" to the designated waste is consistent with the inward-facing purpose of ss. 2.1.1, 2.1.2, 9. 18 and the Rules; it speaks to those who may become Stewards, not to the funding obligations of Stewards.

[171] Gies Examination-in-Chief, February 27, 2020, pp. 1411-1412.

responsibility in Stewards to share the reasonable costs of managing recycling programs 50/50 with municipalities. The language can however live harmoniously with a conclusion that the definitional exercise in ss. 2.1.1 and 2.1.2 is related to Stewards only and does not touch the funding obligation of Stewards to municipalities.

371. Moreover, reading those sections as Stewardship Ontario would have it, gives the language a meaning that is inconsistent with the thrust and direction of other specific related terms of the BBPP and the Program Agreement when read with that submission.

372. Schedule "A" to the 2010 Program Agreement is a highly complex roadmap to determine how the Steward Obligation in any given year will be allocated to Stewards in certain reporting categories based upon determining costs of collecting and processing, factoring in recovery rates, i.e. revenue from recycled materials and, among other things, an equalization factor that reallocates costs from categories producing higher recovery rates to those producing lower rates.

373. The relevant point is that this elaborate scheme, together with that in Appendix IX, discussed below, do not take as the starting point the division among Stewards of costs to be allocated by the definitions set out in ss. 2.1.1 and 2.1.2. The reason for that is that the Stewards must allocate the actual costs, or 50% of the Net Cost, of the entire blue box program including allocating the costs for non-PPP material and contamination. This complex exercise is necessary in order to distribute the real costs that the Stewards are responsible for as opposed to a straight-forward allocation among them of the costs for the particular category to which they are assigned.

374. A similar conclusion is derived from examining Appendix IX to the BBPP. Appendix IX is a set of Costs Allocation Principles designed to assist in the allocation of material costs into

the categories for which Stewards will be responsible. These principles, among other things, in their complex structure, deal with the allocation of the costs of handling residue or contamination, by assigning those costs to certain materials in order to determine the share of the overall program costs to be allocated to real materials. Mr. Rathbone explained this process in his evidence[172] and Exhibit 22, is a graphic explanation of how these principles work in practice.

375. Appendix IX demonstrates that it was always recognized that residue would form part of the make-up of blue box materials and that it had to be allocated in a way that would result in Stewards dealing with the overall responsibility to pay for it in a fair and equitable manner.

376. The point of all of this is that Schedule "A" and Appendix IX in all their complexities, are inconsistent with a regime that would simply require the division of Steward responsibility into categories of Stewards responsible for the defined materials in ss. 2.1.1 and 2.1.2.

377. Stewardship Ontario argues that Schedule "A" is wholly irrelevant to the issues in dispute in that it deals only with the methodology employed to make up the total amount that needs to be raised from the Stewards to fund the Annual Steward Obligation. The issues concern the input into the Steward Obligation, not its eventual determination. If one or more of the issues in dispute is decided in its favour, then the methodology will be applied to amounts that are less the calculated amount of the input. This is true as far as it goes, but the relevant point arising from Schedule "A" is that the complicated allocations scheme is not based in any manner upon the defined definitions of PPP in ss. 2.1.1 and 2.1.2 but rather is set against broad material categories taking into account recovery rates and arriving at an allocation based upon all materials collected by municipalities found in the blue box. In this way, it is inconsistent with the submission that

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[172] Rathbone Examination-in-Chief, February 25, 2020, pp. 925-931.

the Stewards have limited obligations to fund municipalities, specifically limited to precise definitions in these subsections, as amended by the rules from time to time.

Hansard

378. RPRA seeks to rely upon a few statements made in the legislature by the Minister and during Committee hearings by representatives of AMO and the Minister's delegate as support for its arguments over the purpose and intent of the legislation. There was a binder of Hansard references made available during the course of the hearing.[173]

379. These include a statement by the Minister of the Environment on June 26, 2001 while introducing Bill 90, the *WDA*, as follows:

> It will require the WDO to develop initiatives for used oil, organics such as kitchen waste, household special waste like paints and solvents, scrap tires and other materials. It will build on the blue box and it will be funded 50-50 by industry and municipalities.

380. Other statements relied upon include submissions by AMO at Committee hearings on August 31, 2015[174] and by the Minister's delegate, explaining the purpose of an amendment that arose out of AMO's submissions[175] and finally a statement by a Mr. Arnott on behalf of the Minister including the following:

> It will provide for the growth in our already successful Blue Box Program by providing municipalities with 50% funding of their net Blue Box Program costs by industry.[176]

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[173] Hansard Binder.
[174] Hansard Binder, Tab 3, p. 105.
[175] Hansard Binder, Tab 6, p. 370.
[176] Hansard Binder, Tab 9, p. 4111.

381. Stewardship Ontario objects, on a number of grounds. Firstly, it argues that legislative history and debates are not admissible as proof of legislative intent, relying on certain authorities including *R. v. Heywood* in the Supreme Court of Canada, in 1994[177] and more particularly that the Hansard excerpts do not reveal legislative intent as the wording of section 25(5) in the *WDA* as enacted, is not consistent with the language used by the politicians.

382. Primarily, Stewardship Ontario relies upon its interpretive argument that the waste diversion program as designed and approved in the BBPP does not provide for a costs regime by which the Stewards fund 50% of municipal recycling costs, but rather a limited subset of those materials, as described many times in these Reasons.

383. In my view, the modern law on this issue in a civil context was set by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)* in 1998.[178] The Court stated:

> 35. Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:
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> > …until recently the courts have balked at admitting evidence of legislative debates and speeches...The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background the purpose of legislation.[179]

384. This statement of the rule has been repeatedly referred to in later cases, but now subject to more stringent conditions. Hansard evidence needs to be reasonably unambiguous to have any

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[177] *R. v. Heywood*, [1994] 3 S.C.R. 761, SOBOA, Tab 2, paras. 39-42.
[178] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.
[179] *Ibid*., para. 35.

weight and must relate directly to the circumstances surrounding the enactment of the legislation.[180]

385. Using these authorities as a guide, the statement by the Minister referred to in para. 379 above is admissible as some evidence consistent with the legislative purpose upon enactment of the WDA, that industry would pay 50% of the municipal costs of the existing blue box program rather than 50% of a more narrowly defined set of materials described in ss. 2.1.1 and 2.1.2 of the BBPP when it came into existence.

386. This ministerial statement is consistent with others to similar effect found throughout the materials and on the proper interpretation of the BBPP as I have determined it to be. I stress however, that the primary grounds for my interpretive decision is derived from a reading of the BBPP itself, taken as a whole, and my conclusion that the sections relied upon by Stewardship Ontario do not reflect a limited obligation upon stewards, all as I have set out above. I conclude therefore that as to Hansard, at least one of the statements is admissible but adds little to my conclusion on the issue.

387. I have found that RPRA was correct in the annual Steward Obligation to account for materials beyond those defined in ss. 2.1.1 and 2.1.2 of the BBPP and that the funding obligation is in respect of 50% of the Net Cost of municipal recycling programs defined in s. 2.1 of the BBPP, otherwise constrained by the limitations in that section and generally by the limitations in the applicable regulations governing the broader definitions of blue box waste. For greater certainty, Stewards' funding obligation includes funding non-PPP and materials that commonly would be found in the blue box but which are not those produced or manufactured by Stewards,

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[180] See *Canadian National Railway Co. v. Canada (Attorney General)* 2014 SCC 40 at para. 47.

including contamination, all against the background of municipal Costs Containment for which RPRA has long been exercising its discretion.

388. I have concluded that obligated and non-obligated materials, including residue (non-PPP as Stewardship Ontario would define it) and contamination fall within the obligation of Stewards to fund subject to some limitations, including the important principle that municipal costs must be reasonable costs and the obligation is limited by the concluding language of s. 2.1 of the BBPP. In my view, this is the correct interpretation established on a standard of correctness, applying standard contract and statutory interpretation principles to the language of the BBPP. This interpretation is consistent with the statutory language, the directions in Minister's letters and is supported contextually by the history of the parties through inception of the program through 2013.

389. RPRA is not in breach of the Program Agreement (nor the BBPP). It follows that RPRA also meets the *Vavilov* standard of reasonableness, if that test were to apply.

390. "Support", a word in this context redolent of a certain bureaucratic approach to drafting, is given meaning in paragraphs 3 and 4 of the Program Request Letter carried into the BBPP, by understanding what Stewards are to do. Stewards are to support through their funding, costs of the blue box program not specifically of their own making. Industry is making a contribution to municipal costs over and above that which on a piece by piece analysis might find them responsible for lesser amounts.

391. I am unable to agree with Stewardship Ontario's submission that "support" means funding for all categories of wastes in Regulation 101/94, provided that items also meet the definition of Printed Paper and Packaging in ss. 2.1.1 and 2.1.2.[181]

392. In again using the example, which to my mind best illustrates the point, Stewards must support office papers that commonly find their way into blue boxes, non-PPP material, because office and fine papers are solicited by municipalities, fall within the broad definitions in both Regulations 101/94 and 237/02 and are materials to be diverted from landfill through the recycling programs of municipalities in support of diversion targets and recycling, fundamental goals of the BBPP. They fall within the meaning of Blue Box Wastes in s. 2.1 of the BBPP and thus must be paid for in part by Stewards.

Conclusions on Non-Obligated

393. I have found that RPRA was correct to account for materials beyond those defined in ss. 2.1.1 and 2.1.2 of the BBPP in the annual Steward Obligation and that the funding obligation is in respect of 50% of the Net Cost of municipal recycling programs defined in s. 2.1 of the BBPP, otherwise constrained by the limitations in that section and generally by the limitations in the applicable regulations governing the broader definitions of blue box waste. For greater certainty, Stewards' funding obligation includes funding non-PPP materials that commonly would be found in the blue box but which are not those produced or manufactured by Stewards, including contamination.

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[181] Stewardship Ontario Closing Submissions, Tab 36(B), p. 4, para. 12.

Datacall Guide, RPRA's Board, Annual Reports

394. In light of this conclusion, I turn to an analysis of the conduct of the parties, particularly RPRA, following upon the Parry Report and its recommendations, including over the 2016 Datacall Guide, its annual reports and even its staff reports to the Board where staff suggested that excluding non-obligated materials from Steward Obligations to fund was lacking only a timetable for implementation.

395. Stewardship Ontario argues that RPRA, even assuming it acted within its authority, has been unreasonable in its conduct since the Parry Report. As I have pointed out earlier, SO argued that RPRA had conceded Stewardship Ontario's interpretation of the BBPP to be correct in the Datacall Guide. Secondly, whatever the legal result, RPRA should have done much more to identify excluded materials on the modified decision tree model.

396. As I pointed out, all parties recognized that the ultimate decision whether non-obligated materials would be removed from funding was that of RPRA's Board and there was unresolved disagreement between the parties on the s. 9 language. Stewardship Ontario's complaint is really that despite its many submissions to RPRA on this point, RPRA never responded in like manner and never took all the steps that it ought to have to make use of the available audit material and identify all materials that meet the decision tree in 2019.

397. In my view, these are valid concerns as far as they go, but in reading these materials together, including this Staff Report, the ambiguities arising out of the Datacall Guide and a lack of clarity on the legal positions, I find that Mr. Rathbone is not making admissions in any legal sense nor acceding to Stewardship Ontario's legal arguments, but rather is simply grappling with the need to accommodate RPRA's decision to implement the Parry recommendations and

remove from funding materials that would not otherwise harm the proper functioning of blue box recycling programs. These decisions, in my view, really had nothing to do with the legal question I am deciding, but were rather operational decisions being made by RPRA, Mr. Rathbone and his staff in balancing the competing interests of Stewards with municipalities' interests in the practical management of the BBPP.

398. It is the same with RPRA's Board. The Board comes under intense criticism from Ms. Constantine on a number of fronts, including its failure to respond to Stewardship Ontario's complaints, its failure to be engaged in the actual numbers populating the Steward Obligation rather than just in approval of methodologies, its overall responsibility for language in the Datacall Guide and in ambivalent statements that could be seen in the 2018 Annual Report.

399. While I appreciate the frustrations underlying these criticisms, I do not find the RPRA Board to have acted unreasonably or irresponsibly in its directions. Under the statutory regime and the Blue Box Program Plan, RPRA has multiple responsibilities and it is a fair and proper aspect of its duties to balance competing interests in fulfilling its obligations. Also, traditional Board responsibilities are to set policy, not to do calculations. It and RPRA Staff could have done better in communications but I am unable to conclude that these are failings that carry with them any legal consequences, such as sending the 2019 funding obligation back to RPRA to determine if additional exclusions to pots and pans could be made.

400. All of this is to say however, on a legal standard, my conclusion is that RPRA's management of the non-obligated issue over time was reasonable. Primarily, I find that it attempted in the management of Stewardship Ontario's complaints following 2014, to follow the advice that it had received from Ms. Parry, that it should accommodate deductions from the Net

Cost of materials, now solicited or not, that reasonably can be identified and whose removal from the funding obligation would not result in damage to the primary goals of the entire program.

401. I also accept RPRA's position that the methodologies used by Stewardship Ontario to calculate the amounts it says should be deducted in 2019 do not rise to the level of reliance and certainty. With the wide swings, I would not be comfortable adopting these numbers in any event, and would otherwise have sent the matter back for further effort.

402. Better collaboration and analysis is required if a proper carve-out is to be implemented, as it ought to be. I see no reason why that will not be accomplished, if intentions may be drawn from the efforts made in the exchanges between the parties before the Notice of Dispute was delivered.

403. The findings I have made obviate the need to delve at any length into Stewardship Ontario's Submissions on Estoppel by Representation and by Convention. Stewardship Ontario relies upon these principles in arguing that RPRA is estopped from denying the interpretation that Stewardship Ontario places upon the BBPP by reason of the statements in the Datacall User Guide, particularly but also in broader terms, RPRA's actions as I have set out above, Mr. Rathbone's actions and with the Staff Reports. It is commonly accepted that these legal principles are difficult to apply in contractual settings because of the high tests that must be met.[182]

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[182] For a good discussion of these principles and the cases, see Geoff Hall, *Canadian Contractual Interpretation Law*, *supra* note 44 at p. 201ff.

404. As Stewardship Ontario recognized in its submissions, estoppel by representation requires as one of its basic elements, an unambiguous statement of existing fact made by the representor with the intention that it be acted upon. Estoppel by convention requires that the parties have acted in reliance upon an agreed assumption that a given state of the facts or law is accepted between them as true. In such cases, one party may be estopped from questioning the facts or the law assumed by the parties if that test, together with other elements can be met in the circumstances. [183]

405. As I have found however, no such unambiguous statement nor agreed assumption can be made out in this case. The Datacall Guide, paragraph 9, in the 2016 version and following, is a classic statement of an ambiguity which the parties were unable to resolve. Moreover, Mr. Pearce, as I have found, knew that RPRA had not accepted Stewardship Ontario's proposed language but also that any decision at large to omit non-obligated materials from the funding obligation was something that was in the hands of RPRA's Board.[184] With these findings, these contractual interpretation doctrines can have no application in the determination of the parties' rights and interests in this case.

PART 8 - OVERALL CONCLUSIONS AND SUMMARY

406. I have found that RPRA, on a standard of correctness, has not breached its obligations in the Program Agreement, the BBPP or the statutes, all read together with the directions contained in Ministers' letters in including a Steward Costs Containment charge and over the non-obligated issue. Moreover, I found that implementation of its authority in both cases was reasonable in all the circumstances. Neither issue needs to be referred back to RPRA for any reason.

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[183] *Ibid*.
[184] Award, *supra* para. 309

407. I have found however that RPRA acted without authority in levying an in-kind fee to be added to the Steward Obligation. I found no authority to permit that addition to the funding obligation and these are to the opposite effect. I also determined that RPRA's inclusion of such a charge, if to be measured on a reasonableness standard, was unreasonable. It stands without authority and therefore is an exercise of discretion made, in legal terms, on an unprincipled basis.

408. With all of that, the 2019 Steward Obligation is to be adjusted by the $1.1 million cash addition made for the in-kind contribution but otherwise remains intact.

PART 9 - CONTINUED JURISDICTION

409. In accord with what I have set out above, my jurisdiction continues to an extent that is not capable of precise definition, at least to me, at this juncture. Certainly insofar as the three questions of law, those are now settled not just for 2019 but also for succeeding years. These were issues of law or principle now decided.

410. As well, the implementation of the decisions that RPRA made for 2019 on the Costs Containment and the non-obligated issues have been found to be reasonable. In the result, the only change to the 2019 Steward Obligation is with respect to the in-kind fee.

411. In those circumstances, unless the parties consider that my jurisdiction would continue in respect of the 2020 Steward Obligation on some basis, it would appear to me that my jurisdiction has been exercised.

412. As an abundance of caution however, I will reserve that for further consideration by the parties in possible submissions following release of this Award. For certainty therefore, this is

not a final Award, but rather should be seen as an interim Award until these issues of continuing jurisdiction are resolved.

PART 10 - COSTS

413. In accordance with the agreement of the parties, costs are reserved for further submissions. The parties and Tribunal can engage in scheduling of those submissions if the parties are unable to reach agreement between themselves.

414. Finally, I acknowledge the assistance that was rendered by the parties and counsel throughout this matter including the high quality of the advocacy and written submissions, and most particularly the civility with which counsel acted towards the Tribunal and each other.

May 28, 2020

Date

Ronald G. Slaght, Arbitrator