Ontario’s blue box transition: Bringing individual producer responsibility to packaging

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On October 19, 2020, Ontario’s Ministry of the Environment, Conservation and Parks released a proposed regulation to govern the Ontario blue box program under the *Resource Recovery and Circular Economy Act, 2016* (the RRCEA). The regulation will transition Ontario’s blue box recycling program, covering paper products and packaging (PPP), to full extended producer responsibility (EPR).

Since 2002, Ontario has operated a shared responsibility framework for EPR, with municipalities and producers each bearing half the cost of municipal blue box programs. Municipalities, however, have remained in charge of operating recycling systems. The new regulation transitions both financial and operational responsibility to producers. It also aims to refine EPR using the innovative policy mechanism of individual producer responsibility (IPR), making each individual “producer” of PPP directly and individually responsible for resource recovery of the PPP placed onto the market in the province.

Using IPR, the province aims to hold individual producers accountable for the entire lifecycle of their own products – a watershed event in the development of a circular economy for PPP.

There are a number of notable requirements in the draft regulation implementing an IPR framework for PPP in Ontario.

Expanded list of materials

Currently, the blue box system includes paper products and packaging materials. The new regulation expands this list to include “packaging-like products” and certain single-use items. By including packaging-like products, the regulation targets items that so far have been free riders in Ontario’s blue box system. These include aluminum pie plates or bags bought in bulk. These items are indistinguishable from many considered packaging, such as aluminum plates used to package pies sold in supermarkets. With respect to single-use products, the regulation targets products such as straws, cutlery, plates used to consume food, and drink containers that are “ordinarily disposed of after a single use, whether or not they could be reused.”

Ontario's choice to include these items aligns Ontario's list of materials with those regulated as PPP in British Columbia. BC recently announced plans to include single-use and packaging-like products in its list of obligated materials under its EPR system by 2023. Perhaps this is a sign of more cross-country harmonization on PPP regulation, consistent with the federal initiatives in this area.

Special rules for compostables

Citing challenges with determining proper management approaches for compostable materials, the new regulation imposes registration and reporting obligations with respect to compostable materials, but does not mandate collection or management requirements.

It is hoped that these lowered obligations will provide policymakers with the information necessary to determine how these materials are used in Ontario, and to suggest better approaches to their management. Only a few facilities in Canada may be able to manage compostable materials. Optical scanners at most material recovery facilities cannot sort these materials, while manual sorters cannot easily tell the difference between certain types of compostable and conventional plastics.

This arguably reflects the ongoing uncertainty around the role that bioplastics and alternatives to plastics will play in Canada's management of PPP.

New definitions targeting online free riders?

Online retail is growing rapidly worldwide, particularly during COVID-19 when physical stores are, at times, inaccessible. Ontario is no exception to this trend. This heightened online retail activity is, however, introducing in Ontario's market products by producers that have no presence in Ontario or Canada and may not be registering as producers or paying fees to fund Ontario's recycling system. This scenario has exacerbated the quantities of free riders in most EPR systems, whose products are collected by local recycling systems that they do not fund. Past product stewardship laws in Canada have reinforced this divide by only obligating resident sellers.

The draft regulation appears to address this challenge by designating "marketplace facilitators" that contract with "marketplace sellers" as producers if they are resident in Canada. The regulation defines "marketplace facilitator" as a person who,

> (a) contracts with marketplace sellers to facilitate the supply of the marketplace seller's products by,
>
> > (i) owning or operating an online marketplace or forum in which the marketplace seller's products are listed or advertised for supply, or
> >
> > (ii) transmitting or otherwise communicating the offer or acceptance between the marketplace seller and a buyer, and
>
> (b) provides for the physical distribution of a marketplace seller's products to the consumer, such as by the storage, preparation, or shipping of products

This definition appears to capture many online retailers who make the products of many sellers available to Ontarians.

Annual allocation table

Most surprisingly, the regulation also sets out a number of rules that will govern the creation of an "annual allocation table," the first of which should be submitted as early as March 31, 2022. These rules help to determine which producers will be responsible for collecting from which sources, notionally allocating to them specific residences, facilities or public spaces each year.

The rules also set out the factors to be considered in the making of these allocations. Although the regulation leaves allocation decisions with producers and their producer responsibility organizations (PROs), once in force, the rules will have a regulatory effect over all producers and PROs in the system.

The allocation method is a novel approach to regulating producer responsibility and appears to run counter prior provincial commentary that the new blue box regulation under the RRCEA would be outcomes-focused and not prescriptive as to the manner in which producers chose to fulfill their obligations. The possibility that the Minister might either police existing rules, or even make rules for producers and/or their PROs should they fail to successfully do so themselves, appears to deviate from the free market foundations of this IPR model.

Conclusion

The new blue box regulation under the RRCEA is innovative in its decisions to implement a policy as complex as IPR for PPP. In addition to the novel approaches already discussed, many others bear mentioning, including reducing management requirements for use of recycled content in products, and joint and several liability between and among producers and their PROs for certain obligations under the regulation.

The proposed regulation is available for public comment for 45 days (until **December 3, 2020**). In addition, the province is also looking for feedback on amendments to Regulation 101/94 under Ontario's *Environmental Protection Act*. Regulation 101/94 sets rules for recycling and composting municipal waste and standards for blue box waste management systems, including collection, acceptance, transportation and processing. As much is changing, stakeholders may have a lot to say before Ontario finalizes the new PPP regime.

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