

**MMBC: WHAT ARE THE ISSUES?**

**NOVEMBER 29, 2013**

*Reece Harding & Joanna Track*

---

## MMBC: WHAT ARE THE ISSUES?

### I. BACKGROUND

In 2004, the Province enacted the Recycling Regulation under the *Environmental Management Act* to implement a framework for extended producer responsibility programs in respect of particular products. The purpose of the Regulation is to shift responsibility upstream in the product life cycle, onto the producer and away from local governments and general taxpayers.

In May 2011, the Province amended the Recycling Regulation to include a new product category: packaging and printed paper (PPP). Packaging is defined in the *Environmental Management Act* as “a material, substance or object that is (a) used to protect, contain or transport a commodity or product, or (b) attached to a commodity or product or its container for the purpose of marketing or communicating information about the commodity or product”. Packaging can include anything from corrugated paper containers, to aluminum cans, to plastic bottles. Printed paper is defined in the Recycling Regulation as “paper that is not packaging, but is printed with text or graphics as a medium for communicating information, and includes telephone directories, but does not include (a) other types of bound reference books, (b) bound literary books, or (c) bound text books”.

The amendment to the Recycling Regulation requires that, in order to sell, offer for sale, distribute, or use PPP products in a commercial setting, every producer of PPP products must submit a product stewardship plan, in a format satisfactory to the director, by November 2012. The Regulation goes on to require that all producers have an approved plan, and begin complying with the approved plan, by May 2014.

A producer, in respect of PPP products, is defined as “a person who manufactures the product and sells, offers for sale, distributes or uses in a commercial enterprise the product in British Columbia under the manufacturer’s own brand”. The definition of producer also includes a person who is not the manufacturer of the product, but is the owner or licensee of a trademark under which the product is sold, distributed or used in a commercial enterprise in BC, and a person who imports the product into BC for sale, distribution or use in a commercial enterprise. Local governments are not considered producers of PPP.

According to the Regulation, in order to approve the PPP stewardship plan, the director has to be satisfied that:

- “(1) the plan will achieve, or is capable of achieving within a reasonable time,
  - (a) a 75% recovery rate for PPP;
  - (b) any performance requirements or targets established by the director;
- and

- 
- (c) any performance requirements or targets in the plan;
- (2) the producer has undertaken satisfactory consultation with stakeholders prior to submitting the plan for approval and will provide opportunity for stakeholder input in the implementation and operation of the product stewardship plan;
  - (3) the plan adequately provides for:
    - (a) the producer collecting and paying the costs of collecting and managing PPP;
    - (b) reasonable and free consumer access to collection facilities;
    - (c) consumer awareness;
    - (d) assessing the performance of the stewardship program, the management of costs incurred by the program, and the management of environmental impacts of the program;
    - (e) dispute resolution for disputes that arise between a producer and a person providing collection or management services; and
  - (4) the plan adequately provides for the collection of PPP by the producer from residential premises, and from municipal property that is not industrial, commercial, or institutional property.”

Residential premises are defined in the Regulation to include houses, apartments, condominiums, town homes and other premises in which persons reside, but the definition does not include institutional accommodations or visitor accommodations.

In deciding whether to approve a PPP stewardship plan, the director may also consider additional information, including the timelines and effectiveness of the plan, the population and geographical area of the markets in which the producer sells or distributes PPP, the nature of the product, and the size of the population intended to be served by each collection facility.

Under the Regulation, a producer must review its approved plan every 5 years, and either submit to the director proposed amendments to the plan, or advise in writing that no amendments to the plan are necessary. Additionally, on or before July 1 in each year, producers must provide the director with a report respecting the preceding year, and must post that report on the Internet. The report must include a description of the educational materials and strategies used by the producer, the total amount of the producer’s product sold and collected, the location of the producer’s collection facilities, and the amount of product managed by or on behalf of the producer, among other things

Any producer who does not have an approved plan and does not comply with the approved plan by May 2014, or who fails to meet its review and reporting requirements, commits an offence and is liable to a fine not exceeding \$200,000.

## II. MMBC AND THE PPP STEWARDSHIP PLAN

The Recycling Regulation authorizes producers to appoint an agency to carry out their duties under the Regulation, including preparation and review of the required stewardship plan. Multi-Material British Columbia (MMBC) is a not-for-profit agency established under the British Columbia *Society Act*, and was formed by the major PPP producers to develop a stewardship plan for PPP in order to discharge their obligations under the Regulation. MMBC is industry led and funded, and is comprised of major retailers and producers from across BC. As of September 13, 2013, over 1275 producers had registered with MMBC, naming the society as their agent for the purpose of complying with the Regulation. Producers that choose to be members of MMBC are responsible to pay fees that are sufficient, in aggregate, to implement the PPP stewardship plan.

The Regulation specifies that the PPP stewardship program must achieve, or must be capable of achieving within a reasonable time, a 75% recovery rate. However, according to the stewardship plan, unlike prior product categories residential PPP is already being recovered at an estimated 50-57% recycling rate through local government, not-for-profit, and private sector initiatives. Therefore, MMBC has developed a stewardship plan for PPP that is different from other plans developed in BC, where limited collection services or no collection services were in place prior to the material being added to the Recycling Regulation. In November 2012, MMBC submitted a PPP stewardship plan to the Ministry of Environment and, after several amendments, the plan was approved by the Province on April 15, 2013.

Local governments are currently the primary drivers of residential PPP collection and recycling activity, either through direct collection and processing, or through contracts with private or not-for-profit collectors and processors. The PPP stewardship plan developed and submitted by MMBC proposes to build on these existing recycling services, with a goal of minimizing economic dislocation for those currently operating the system, avoiding confusion for residents, and mitigating any potential temporary loss of environmental performance. According to MMBC, “building on the current operating recycling system through development of commercial partnerships with existing economic players is considered the most responsible, economically efficient and environmentally prudent approach to maintaining and enhancing the recovery of residential PPP in BC.”

To achieve the objective of maximizing outcomes while minimizing dislocations, MMBC developed the following market engagement principles to guide the development of the PPP stewardship plan:

- focus on outcomes, not process;

- provide economic incentives and set simple rules;
- foster interaction, collaboration, and competition to drive innovation; and
- set the stage for evolution.

MMBC is responsible for implementing the PPP stewardship plan on behalf of the producers that have chosen to be members. In the stewardship plan, MMBC has positioned itself as the body that will assume responsibility for driving residential PPP collection and recycling activity in BC, potentially supplanting the role that local governments have historically played. MMBC proposes to enter into agreements with qualified collectors and qualified processors, setting out the activities to be performed and the outcomes to be achieved by each. According to the stewardship plan, MMBC's approach to delivery of PPP collection services is based on providing an opportunity for those currently involved in the collection of PPP to be part of the PPP collection system when producers assume responsibility for the PPP recovery system in May 2014.

#### **A. Collection of PPP by Qualified Collectors**

MMBC has established a set of collector qualification standards that include basic obligations common to all current PPP collectors, as well as additional requirements for tracking and reporting sources and quantities of collected PPP. Local governments, private companies, and not-for-profit organization that meet these collector qualification standards will be qualified as MMBC collectors. Qualified collectors will be offered financial incentives for PPP collection, and the value offered will be established as market-clearing prices (i.e. the prices at which the market will deliver the service required by MMBC). MMBC will pay collectors once the PPP they have collected has been accepted for processing by a primary processor under contract with MMBC. The collector qualification standards can be found online at: <http://multimaterialbc.ca/sites/default/files/documents/pdf/financial-incentives/Collector-Qualification-Standards.pdf>

Under the stewardship plan, MMBC will offer financial incentives for 4 categories of service:

- (1) curbside collection in areas where single-family and multi-family residents deliver PPP to curbside;
- (2) multi-family building collection where multi-family residents deliver PPP to a central storage area accessible by all residents of the multi-family complex;
- (3) operation of depots that receive PPP from residents of single-family and multi-family households; and
- (4) collection from streetscapes (i.e. municipal property that is not industrial, commercial, or institutional property).

Local governments will also be offered financial incentives to provide public education, promotion, and first point of contact for collection service customers. Where a local government declines the incentive offered, and does not notify MMBC that it wishes to continue to provide the service at its own cost, MMBC will find an alternative service provider, and will provide the public education, promotion, and management of collection services through its own means.

The stewardship plan takes into account that many local governments are currently providing PPP collection services through contractors and, in some cases, those contracts extend beyond the May 2014 implementation date. According to the plan, in such cases the term of the contract between MMBC and the local government will be aligned with the expiry date of the contract between the local government and its collection contractor. This gives the local government the ability to accept the financial incentives from MMBC, but still consider its options at the expiry of its current collection contract.

## **B. Post-Collection Services**

Under the stewardship plan, MMBC will contract directly for post-collection services, which include all activities subsequent to the collection of PPP from BC residents, such as: receiving PPP from collection vehicles, picking up PPP from depots, consolidation and transfer where required, handling and sorting PPP, preparing PPP for shipment to end-markets or downstream processors, marketing PPP to maximize commodity revenue, appropriately managing residual materials, and reporting the quantities of material received and marketed.

MMBC says they will engage primary processors on a contractual basis, first by issuing a request for expressions of interest to gauge processors' capacity to receive, process, and market a defined list of PPP received from collections, and second by issuing a request for proposals to PPP processors that are able to manage that defined list of PPP. In order to respond to the RFP, processors will have to make PPP handover arrangements with qualified contractors. Processors will be qualified based on compliance with the processor qualification standards and evaluation criteria, including but not limited to: price, location, capability, capacity, output to recycling end-markets per tonne received, and material received. In the contractual arrangement between MMBC and processors, processors will be tasked to find the "best" markets for materials, and the agreements will incorporate mechanisms to share market revenue and commodity risk.

While collectors will contract directly with MMBC in order to receive the market-clearing price for PPP collection, and processors will contract directly with MMBC in order to receive payment for post-collection services, collectors and processors will have to work together to arrange for the handover of PPP from the collector to the processor. In addition, certain circumstances may warrant contractual arrangements between collectors and processors. For example, if the collector owns a transfer facility and the processor wants to use the facility as part of its bid submission to MMBC for post-collection services.

### **C. Dispute Resolution**

Under the Regulation, the stewardship plan must include a dispute resolution procedure for disputes that arise between a producer (or its agent) and a person providing services related to the collection and management of PPP during implementation of the plan or operation of the PPP stewardship program.

For disputes arising with collectors and processors, MMBC will use the following dispute resolution processes:

- discussion with MMBC senior management;
- facilitation to prevent escalation and to explore interests/remedies;
- mediation (process to be specified in commercial agreements); and
- arbitration (process to be specified in commercial agreements).

These dispute resolution processes are mandatory and are included in the Masters Service Agreement between MMBC and qualified collectors, which is discussed in more detail below. Notwithstanding that disputes are to be resolved using the above-listed processes, the Master Services Agreement also allows either party to apply to court for a temporary restraining order or other form of injunctive relief.

### **III. OPTIONS FOR LOCAL GOVERNMENTS**

While local governments are currently the primary drivers of residential PPP collection and recycling activity in British Columbia, in May of 2014 that will change. Local governments have until November 30, 2013 to decide how they will, or will not, be involved in the new collection scheme. Local governments have 4 options to consider.

#### **A. Decline incentives and continue to provide PPP collection at local government's own cost**

Local governments that wish to continue to provide PPP collection services to their residents, without any involvement from MMBC, may do so at their option. Under the Regulation, producers are responsible for PPP collection in BC, but local governments may give notice to MMBC and the Minister of Environment that they wish to continue providing curbside and/or multi-family building collection services at their own cost. In such cases, MMBC has confirmed in the stewardship plan that it will not implement a competitive procurement process and will not provide curbside collection in those jurisdictions.

For those local governments providing a unique and comprehensive service at higher-than-average levels, who are concerned with the potential degradation of the existing quality of service, and who are unsatisfied with the terms of MMBC's proposed collection contract,

declining MMBC's incentive program and continuing their own service may be the preferred option. A number of municipalities have said publicly that they are considering declining MMBC's offer and continuing to provide collection services at their own cost. However, keeping the status quo is seen by many local governments as less than ideal, given the opportunity to have industry, rather than taxpayers, pay the costs of collecting and recycling PPP under the Recycling Regulation. Further, residents may end up paying twice, once on their property taxes and again at the store, because PPP producers may be able to build the costs of supporting MMBC into their prices

Local governments that decline the financial incentives and notify MMBC of their intention to continue to provide collection services will not be listed in MMBC's request for proposals for post-collection services. Following evaluation of the post-collection proposals, MMBC will enter into contracts with the successful bidders to receive, process, and market the PPP collected by MMBC's collectors. The successful bidders will not be under contract to receive, process and market PPP collected by local governments who have declined the collection incentives and have notified MMBC of their intention to continue to provide collection services on their own. Those local governments will be left to contract directly with processors.

It should be noted that, according to MMBC's website, if a local government initially declines the incentives and notifies MMBC and the MoE that it wishes to continue to provide PPP collection services at its own cost, it may not be able to join the MMBC program until MMBC issues the second RFP for post-collection services. The second RFP will be issued following expiry of the first post-collection service provider contracts, which are expected to be 5 to 7 years in length.

#### **B. Decline incentives such that MMBC will be responsible for collection**

The second option for local governments is to decline the financial incentives offered by MMBC and decline to continue providing collection services at their own cost, thereby effectively handing over the collection service to MMBC. MMBC will then find a private company to carry out the service, either through a competitive procurement process or otherwise.

Many local governments have expressed dissatisfaction with the terms of the proposed Master Services Agreement and have declined to accept MMBC's offered financial incentives on that basis. The terms of the Master Services Agreement are seen by many as one-sided, unreasonable, and commercially unacceptable, and a number of local governments have declined to continue providing collection services on the terms MMBC has proposed. Many local governments may be concerned that they will lose money if they become collectors and continue providing the service their residents expect under the pricing and penalty structure MMBC has offered, and will be forced to charge taxpayers for a portion of the service. This may be seen as an unacceptable result, since the intent of the Recycling Regulation is to require producers to pay and local governments should not be made responsible for the producers' obligations.



An additional potential concern with handing off collection services to MMBC is that service levels may decline, with public anger directed to city hall for a service the local government no longer has control over. Still, for many, the terms of the Master Services Agreement are so unfavourable to the local government collector that the likelihood of reduced service levels is preferable to the risk of entering into a one-sided agreement that could result in additional costs to taxpayers.

MMBC has indicated its intention to work with those local governments who decline MMBC's offer in order to co-ordinate delivery of PPP collection services by MMBC and delivery of garbage collection services by the local government.

**C. Accept incentives and contract with MMBC to provide PPP collection as a Qualified Collector**

Local governments who wish to accept the financial incentives offered by MMBC, but who also wish to continue collecting recyclables in their communities to try to ensure certain service levels are maintained, may become qualified collectors under contract with MMBC.

The financial incentive to local governments for curbside collection includes PPP curbside collection services, public education, promotion, and first point of contact for curbside collection service customers. For multi-family building collection, the initial financial incentive is for collection only, but if a local government accepts that offer then an additional incentive will be offered to provide public education, promotion, and first point of contact for collection service customers. Local governments may also be concerned that the prices offered by MMBC for those services will not cover their actual costs.

**D. Neither accept nor decline incentives and request more time from MMBC**

A number of local governments have written to the Ministry of Environment, asking for more time to consider their options for involvement in the new PPP collection scheme. However, in a letter to the Executive Director of the Union of BC Municipalities, the Deputy Minister responded that the incentive offer and deadline are not set by the Province and, therefore, local governments need to negotiate an extension directly with MMBC.

That said, in the same letter to UBCM, the Deputy Minister indicated that local governments who have not accepted the incentives and executed an agreement with MMBC by the November 30 deadline should notify MMBC that they need more time to consider MMBC's offer. Local governments are also asked to notify the MoE and confirm continuity of service to the public until such time as the local government and MMBC execute an agreement. Should the local government subsequently decline to execute an agreement with MMBC and indicate that MMBC should provide the service, the local government will be required to provide continuity of service to the public until MMBC can provide the service.

#### IV. MASTER SERVICES AGREEMENT

One concerning aspect of the new PPP collection scheme is that MMBC has unilaterally set the terms under which local governments may participate in the scheme. MMBC has circulated pricing information and a sample Master Services Agreement for curbside collection, multi-family building collection, and depot collection, and has seemed reluctant to negotiate over the terms of that contract with local government collectors. Some feel that, although local governments have the knowledge and proven record of being able to provide collection services to their residents, MMBC has taken it upon itself to set the terms of such collection services in a way that could be problematic, both from a commercial and legal perspective.

##### A. Commercial Terms

Many local governments have expressed concern with the commercial terms contained in the Master Services Agreement, and may be prepared to reject MMBC's offer on that basis alone. While the commercial concerns are numerous, the following are the most commonly expressed concerns by local governments.

1. Pricing – Many local governments have expressed concern that the prices offered by MMBC are far too low to cover the local government's costs of providing the service, thereby defeating the intention of the recent changes to the Recycling Regulation, which is to shift the financial burden away from taxpayers and onto industry. MMBC has unilaterally determined what it is willing to pay for collection services, and some feel MMBC has done so without adequate regard for local and regional variables that may impact pricing (e.g., inflation, fuel costs, etc.). Some local governments have expressed concern that MMBC may be in a conflict of interest, and should not be entitled to establish the actual costs of collecting and managing PPP. The Recycling Regulation is focused on making producers responsible for the actual costs of collection and management of PPP, not for producers to be able to determine unilaterally how much of that cost they wish to pay.
2. Contamination Levels – MMBC's requirement that loads of recyclables contain no more than 3% contamination of other materials could result in heavy fines to local governments. Many local governments say their blue box pickup currently runs above that maximum level of contamination, and that they have existing contracts with recycling processors that allow for higher rates of contamination (e.g., 10%). Under the Master Services Agreement, MMBC can impose a fine of \$5,000 for every truckload that is over the contamination limit. Such fines may greatly undermine the financial incentives being paid to the local government for collection services.
3. Capital Costs – According to newspaper reports, some municipalities have expressed concern with the cost of providing collection vehicles to the standards

required by the Master Services Agreement. For smaller communities in particular, the collection vehicle standards are considered very high. Local governments may be required to invest considerable capital costs in order to provide the containers, trucking fleets, and other infrastructure necessary to meet the requirements of the Agreement.

4. Service Levels – There is no assurance from MMBC that the current level of PPP recycling services will be retained. Because many local governments consider the terms of the proposed Master Services Agreement unfavourable to collectors, there is a concern that reputable collectors will not concede to these conditions, thereby resulting in a degradation of the existing quality of service. Further, while the stewardship plan includes curbside collection of newspaper, cardboard, plastic, and metal food containers, it excludes glass containers from curbside collection, which could undermine the existing recycling efforts of many municipalities who currently pick up glass at the curb. Some local governments have expressed concern with turning over the service to MMBC due to the anticipated degradation of the service, but feel they cannot continue to provide the service to the current level at the prices proposed under the Master Services Agreement.
5. Changes to Scope of Services – Under the Master Services Agreement, MMBC has the ability to request additions, deletions, amendments, or any other changes to the scope of the work to be provided. The contractor can only refuse to provide the new work if “it is not technically possible” for the contractor to carry it out. There is no clarification as to the meaning of “technically possible”, but it is arguable that the contractor must carry out any additional work requested unless it is “impossible” for the local government to do so. Through this change request process, MMBC can unilaterally change the terms of the Agreement and expand the scope of the work beyond that anticipated by the local government. Similarly, collectors are required to comply at all times with MMBC’s policies and standards, as those may be updated or amended by MMBC from time to time. This seems like an easy way for MMBC to unilaterally amend the Agreement and impose additional obligations on its collectors, which local governments may or may not be prepared to, or capable of, carrying out.

## **B. Legal Terms**

From a legal perspective, the Master Services Agreement raises a number of substantial concerns that local governments should consider before signing on.

1. Subcontractor Issues – While MMBC recognizes that local governments may have existing contracts for PPP collection that extend beyond the May 2014 implementation date, local governments must consider whether the services to be provided pursuant to those agreements will satisfy the local government’s

obligations under the Master Services Agreement. Local governments who become collectors will be responsible for filling in any gaps in the service being provided by an existing contractor, either by amending their existing service contracts, or otherwise. The Master Services Agreement also prohibits collectors from subcontracting any of the collector's obligations without the written consent of MMBC, thereby potentially affecting the local government's ability to choose and approve its own contractors.

2. Regulatory Concerns – A local government acting as a collector for MMBC is likely still providing a collection service to its residents under the authority of the *Community Charter*. Therefore, local governments must consider whether their existing collection bylaws enable them to comply with the terms of the Master Services Agreement, or whether any amendments are needed. For example, the Master Services Agreement enables MMBC to remove a customer from the service area due to ongoing contamination issues, while the local government's bylaw may not allow for discontinuance of a service for such reason. Also, the *Community Charter* requires a municipality who wishes to discontinue providing a service to provide for the person affected to make representations to council, and for council to make the final decision on discontinuance. It is unclear whether existing service bylaws will be compatible with collection under MMBC, and further consideration of these regulatory concerns is necessary.
3. Unlawful Assistance – There is some argument to be made that, by agreeing to provide collection services for a price that is less than the true market value of those services, local governments may be unlawfully assisting the PPP producers on whose behalf MMBC is operating. It is unclear how MMBC came up with the “market clearing prices” being offered to local government collectors, but many local governments have expressed concern that the financial incentives proposed by MMBC are insufficient to cover the costs of providing the required collection services. Local governments are prohibited from assisting a business, except under a partnering agreement, and by agreeing to provide the collection services at less than market rate (if the market clearing prices are in fact below market rate), local governments may be providing financial assistance to PPP producers and thereby circumventing the intention of the Recycling Regulation, which contemplates producers being responsible for all costs. Further consideration of these complex legal issues is necessary.
4. Personnel – Under the Master Services Agreement, MMBC can require a local government to immediately remove any of its personnel from performing work for MMBC, if MMBC considers that person's performance to be unsatisfactory. In the latest version of the Agreement, MMBC has qualified this wording to account for situations in which the local government is restricted by a collective agreement, but local governments may still be put in the uncertain position of

being asked to remove personnel by MMBC in contravention of existing employment contracts.

5. Termination – Under the Agreement, either party can terminate the collection contract without cause on 180 days prior written notice. The wording in the Agreement requires that, on termination, the local government must wind down its collection activities and assist with the transfer of the service to another collector. While the no-fault termination clause does give the local government some flexibility to determine whether a contractual relationship with MMBC is in its best interest, the language in the Master Services Agreement is unclear whether, once a local government has opted into the MMBC service, it can opt out during the term of the Agreement and go back to providing collection services on its own. The termination provision may be less useful to local governments if they cannot take back control over collection. Even if the local government can terminate the Agreement and go back to providing its own service, the reality may be both politically and practically unfavourable. MMBC may continue to provide the service through another collector, and taxpayers may be unhappy with the idea of paying the local government to provide a service that MMBC is already providing. Local governments who have spent considerable funds on equipment and infrastructure may be left without a service to provide.

NOTES

NOTES