

## WHEN REGULATORS CHANGE THE RULES —

# Ontario's Outgoing WEEE Waste Diversion Program

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**W**ith the passage of the Resource Recovery and Circular Economy Act and its introduction of an Individual Producer Responsibility regime, the trials and tribulations of all waste diversion participants under the government-managed, Waste Diversion Act, 2012 may soon be a memory. But with any waste diversion scheme, there will be insights to be gained both in Canada and elsewhere as to how a well-intentioned program can be undermined by its own design flaws. This article focuses on one such flaw, namely, the short-term and evolving needs of waste diversion regulators and the long-term requirements for industry market stability and certainty.

In the relatively early days of broad-based resource recovery, a more comprehensive waste diversion strategy in Ontario, Canada, was introduced by the provincial government through the Act, which empowered the Minister of the Environment to designate a material, such as waste electrical and electronic equipment ("WEEE"), for which a waste diversion program was to be established. WEEE (such as computers and displays) were to be processed to remove toxic substances and thereby protecting the physical environment. In addition to WEEE, the Ontario government also designated other waste streams, such as Blue Box waste, namely used tyres, and municipal hazardous or special waste, for waste diversion programs.

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## THE ACT AND APPROVAL OF WASTE DIVERSION PROGRAMS

Under the Act, the government regulator, Waste Diversion Ontario ("WDO"), was created and mandated to develop, implement, and operate waste diversion programs for designated substances, and monitor the effectiveness and efficiency of those programs.

Once a diversion program was developed, the Act mandated the Minister to approve in writing a waste diversion program. If any material changes were made to an approved waste diversion program, the Minister was obligated to approve these material changes under the Act.

The Minister of the Environment and WDO entered into an operating agreement (the "WEEE Operating Agreement") in respect of the WEEE waste diversion program. Among other things, the Operating Agreement set out the roles of the parties, the code of conduct, and the handling of complaints and inquiries.

## CONTENTS OF THE WEEE PROGRAM PLAN

### (i) WEEE Regulation

The legislative debates occurring at the time that the Act was passed highlight the broad range of waste that can be processed for diversion purposes and how it is not feasible to legislate specific waste diversion requirements for each form of waste. Waste diversion requirements are, instead, specified on a program-by-program basis. Therefore, the Minister's approval of a waste diversion program, such as the waste diversion program plan for WEEE, can be viewed as akin to a legislative amendment. Indeed, this intent is captured in the Act, and mandates that the public consultation Environmental Bill of Rights, 1993 process applies with necessary modifications to a waste diversion program or "material changes" to that program under consideration by the Minister.

Out of this context, the provincial electronic waste diversion program arose from Ontario Regulation 393/04 (the "Regulation"), made under the Act, which formally designated WEEE for diversion purposes from this WDO was mandated to develop a waste diversion program for WEEE with specified minimum program requirements.

## STATUTORY SCHEME FOR WEEE PROGRAM PLAN

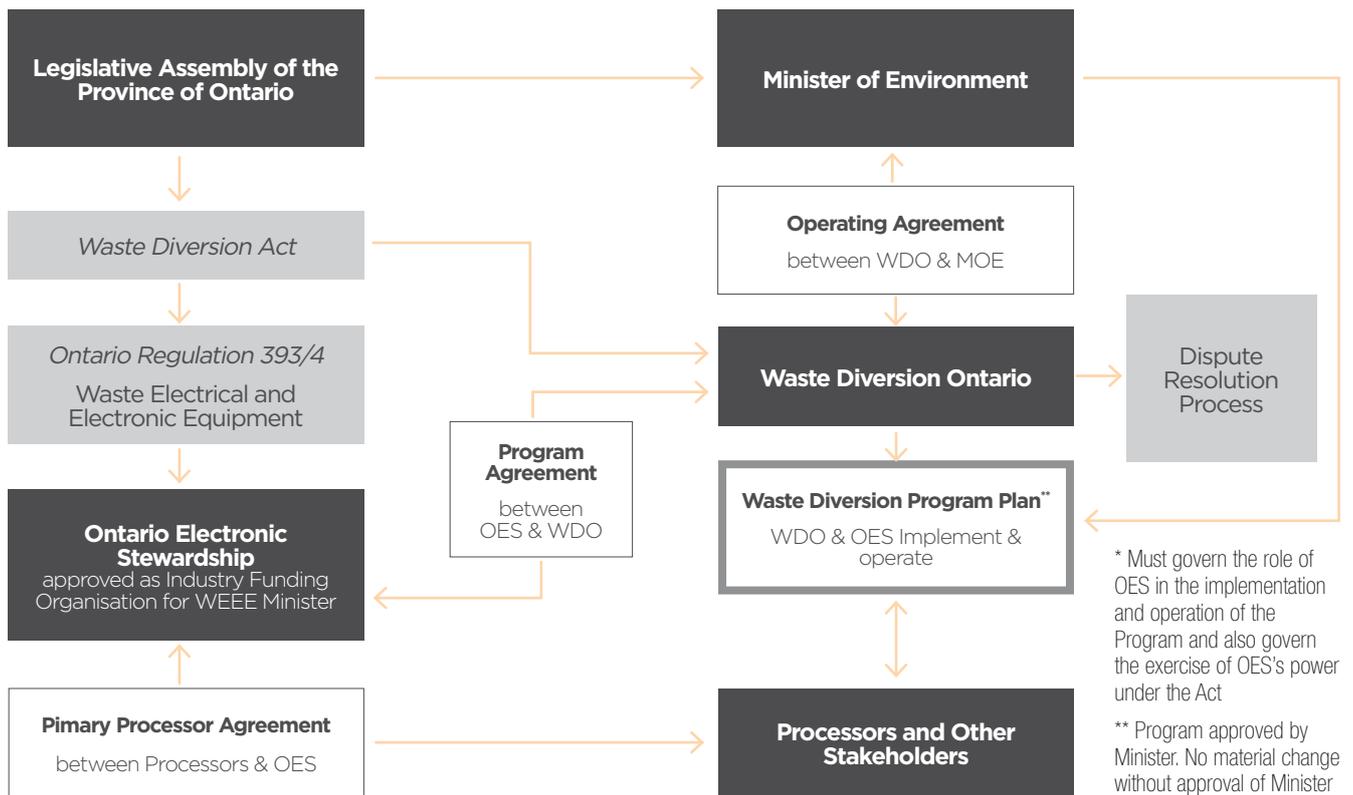


Figure 1: The statutory scheme for the WEEE waste diversion program.

### (ii) Ontario Electronic Stewardship

The Minister required WDO to work with an Industry Funding Organization ("IFO") to develop an appropriate waste diversion program for WEEE. The Regulation designated Ontario Electronic Stewardship ("OES") as the IFO for WEEE waste diversion. OES is a non-crown and not-for-profit corporation that is responsible for the operation of the waste diversion program for WEEE. OES will be wound up with the implementation of the RRCEA to WEEE in the coming months.

### (iii) WEEE Program Development

The Minister approved the WDO Final Waste Electrical & Electronic Equipment (WEEE) Program Plan (the "Phase 1 Program Plan") in March 2008. A second phase was agreed to and added to the program the following year.

WDO and OES entered into a program agreement (the "Program Agreement") which was a component of the WEEE Program Plan, which defined and circumscribed the powers of OES. WDO and OES were statutorily obligated to implement and operate the program as required by the Act.

WEEE processors reasonably understood the requirement for Ministerial approval for a "material change" to provide a measure of certainty and finality to the existing Program Plan, save for under unusual circumstances for which the processors and the public would have some ability to provide input into any impending change.

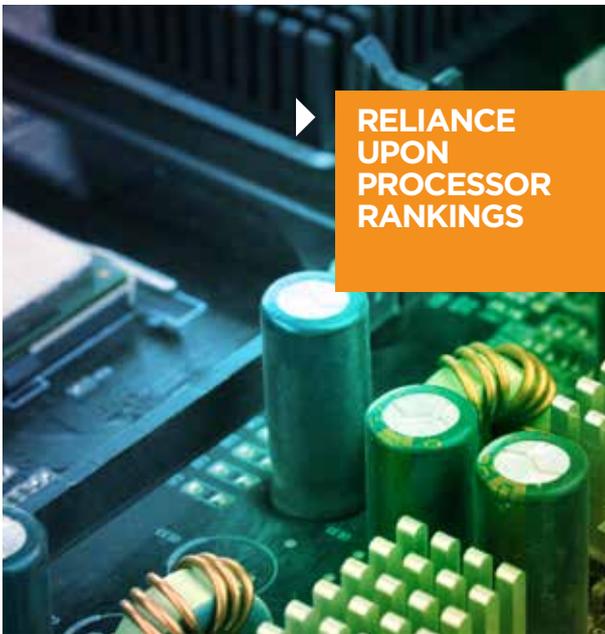
### (iv) Primary Processors Participate in the WEEE Program Plan

The key issue for processors was how their activities were valued under the plan. The WEEE Program Plan describes how WEEE material will be "responsibly" managed. The first point in the WEEE management chain is known as "primary processing" which entailed "receiving [the WEEE material] from OES, sorting, dismantling, disassembly, shredding or any other material processing activity, preparing material for further downstream processing and disposal". The degree of effectiveness of this process was known as recycling efficiency and quality. Primary processors are responsible for completing this first point in the WEEE management chain.

### (v) The List and the Allocation Methodology

OES contracts with approved primary processors (through a "Primary Processor Agreement") provided for a percentage allocation of collected WEEE material. Primary processors were required to satisfy the six-stage application and evaluation process to be placed on the OES Approved Processors List (the "List"). Only upon being approved and added to the List was a primary processor eligible to receive allocation of WEEE material from OES.

The WEEE Program Plan explicitly provided that WEEE material was allocated to processors on the basis of a competitive Request for Proposals ("RFP") which included specific scoring criteria (the "Allocation Methodology") identified in Table 4.3 of the WEEE Program Plan. The Allocation Methodology as follows: 50% weighting for Recycling Performance; 30% Cost; and 20% Innovation and Capacity. Recycling efficiency weighted over cost in a ratio of at least 1.5 to 1.



**RELIANCE UPON PROCESSOR RANKINGS**

The OES approved approximately 15 WEEE processors. In addition, the OES ranked all processors based upon a 2009 RFP process in accordance to the WEEE Program Plan requirements.

Approved processors, with their designed rankings, then entered into Primary Processor Agreements with OES in 2009. Critically, it was the rankings assigned by OES to processors which determined their share of the WEEE allocation, creating both capacity obligations and opportunities among the processors.

Some of those high-ranking processors were required to expend

significant resources to ensure that its operations and processes meet the WEEE Program Plan's requirements. Processors opened new electronics recycling facilities in Ontario specifically to provide higher recycling efficiency, while maintaining strict environmental and safety standards to comply with the Allocation Methodology. These initiatives were lauded by the Minister for both innovation and environmental protection.

All indications were that long-term capital investments were safe under the program.

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**THE ALLOCATION METHODOLOGY FLIPS**

Roughly two years later, the OES issued its second RFP (the "September 2011 RFP") and the rules were turned upside down, with the cost experience under the first RFP cited as a central factor in now prioritizing low cost over environmental processing standards.

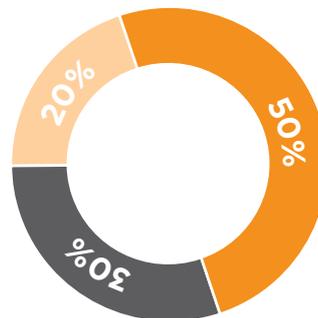
The scoring criteria identified in the September 2011 RFP was strikingly different and differently weighted than the criteria mandated by the Allocation Methodology: Processing Cost 55%, Freight 25% and Recycling Efficiency 20% (the "Modified Allocation Methodology").

Recycling Efficiency was now accorded 30% less weight than required by the WEEE Program Plan. See the pie charts of OES's deviation from the WEEE Program Plan.

Plas were repeatedly made to the OES to adhere to the requirements of the approved WEEE Program Plan. Further, the WDO and the Minister were alerted that the Modified Allocation Methodology was an unauthorized and unapproved "material change" to the WEEE Program Plan. Nobody listened.

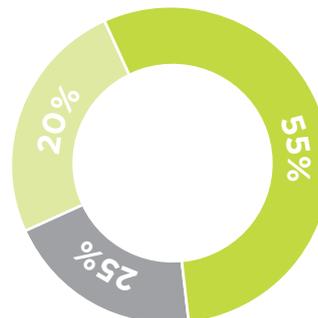
As a result, high ranking processors, some with new capital investment, fell to the bottom with the dire consequences of substantially diminished allocations.

**Comparison between Allocation Methodology in WEEE Program Plan and Modified Allocation Methodology**



**ALLOCATION METHODOLOGY**

- 50% Recycling Rate
- 30% Cost
- 20% Innovation & Capacity



**MODIFIED ALLOCATION METHODOLOGY**

- 25% Freight
- 55% Cost
- 20% Recycling Efficiency

**UNSUCCESSFUL LEGAL ACTION LAUNCHED**

At least one legal challenge was filed in the courts by impacted businesses, asserting that a failure of the Minister to carry out the mandatory obligations imposed by the Act to prevent unauthorized "material changes" in the safety and quality of the provincial electronic waste diversion program. As the Allocation Methodology had flipped, this change was material, if not fundamental, yet was not formally approved by the Minister under the Act. Further, the program change arguably sacrificed environmental protection by favouring cost factors over recycling efficiency. The legal challenge by industry ultimately failed.

Sadly, now on the eve of new long-term commercial agreements between producers and processors, that capital can confidently return to the WEEE diversion market. Meanwhile, diversion programs elsewhere in Canada and beyond can take heed of the perils of mixing industry and regulated markets with the inevitable conflicts between long-term planning and short-term program administration.