

EPR Canada Discussion Paper
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Getting EPR Oversight Right

What is EPR oversight?

Extended producer responsibility (EPR) is defined by the OECD¹ as an environmental policy approach in which a producer's responsibility, physical and/or financial, for a product is extended to the post-consumer stage of the product's life cycle².

Under EPR, legal rules make producers (brand owners, manufacturers and first importers) responsible for achieving environmental outcomes³ associated with the end-of-life management of wastes from products and packaging they supply into the marketplace and for adhering to administrative rules so that those environmental outcomes can be verified.

The legal rules related to EPR may be supplemented by other rules that govern service providers to ensure the environmental outcomes sought under EPR. Service providers may include producer responsibility organizations (PROs) providing administrative compliance services or companies providing material collection, reuse or recycling, transport and marketing services (collectively 'service providers').

Together, the design of the rules and the oversight mechanisms to ensure adherence to the rules determine whether the environmental outcomes will be achieved.

Why does EPR oversight matter?

Oversight of producers and their producer responsibility organizations is critical to ensure that:

- The regulator has verified information on the amount of products and packaging supplied in the jurisdiction;
- The regulator has verified information on the amount of products and packaging that has been managed in accordance with the EPR rules;
- All producers undertake their legal responsibilities and there is no "free-riding" which can
 - Undermine the environmental outcomes sought;

¹ Organization for Economic Co-operation and Development Extended Producer Responsibility: A Guidance Manual for Governments, 2001 (www.oecd.org/home/0,3675,en_2649_201185_1_1_1_1_1,00.html)

² This approach is the basis for the Canadian Council of Ministers of the Environment's Canada-Wide Action Plan for EPR.

³ Minimize waste; increase resource recovery; decrease hazardous and toxic substances in products and packaging; minimize greenhouse gas emissions; minimize environmental impacts from resource recovery, waste reduction and disposal activities.

- Result in economic inefficiency because the producers that are compliant bear higher costs of compliance than they would were all producers compliant (through erosion of economies of scale of collection and recycling efforts or through compliant producers managing materials supplied by non-compliant producers);
- Competition among producers and/or among producer responsibility organizations is on the basis of common and enforced environmental outcomes to avoid a ‘race to the bottom’ where compliance is achieved at least cost without regard to environmental performance;
- Producers are held accountable for achieving environmental outcomes to drive innovation and investment in the collection and management of products and packaging; and
- Respect for the rule-of-law is maintained and the role of EPR as a public policy tool is not undermined.

Regulation and oversight of service providers that collect, reuse and recycle products and packaging is a critical complement to the oversight of producers. It is intended to:

- Ensure that services delivered to producers are consistent with legislative requirements;
- Ensure a level regulatory playing field among recyclers of designated materials whether they service EPR programs or not in order to prevent leakage of products and packaging from producer compliance efforts into unregulated markets⁴;
- Assist producers in managing liability and the associated due diligence by setting minimum recycling standards for recycling service providers; and
- Prevent a ‘race to the bottom’ where unregulated service providers compete to provide producers with services solely on price in the absence of enforced recycling standards.

How does EPR oversight work?

It is the responsibility of the government to ensure oversight of regulated parties. It may do this by its own means or by delegating the responsibility to an administrative authority established under statute.

Governments that provide oversight of producer responsibility programs directly do so using government staff and available financial resources. Governments can benefit from their years of experience enforcing other legislation by redirecting their experienced compliance and enforcement staff to their EPR programs. As well, direct government involvement puts perceived distance between oversight and those being regulated. However, governments always have discretion, with the result that governments can be vulnerable to lobbying by formidable sectors to avoid compliance action. There are also examples of government fiscal constraints limiting budgets and staff responsibilities exceeding available time with the result that the necessary level of diligence is not applied to oversight to achieve the objectives described above.

Alternatively, governments can establish an independent, not-for-profit authority through legislation and prescribe the authority’s activities through an operating agreement between the authority and the Crown. Typically, such an authority recovers the costs of oversight through a schedule of fees payable by the regulated parties.

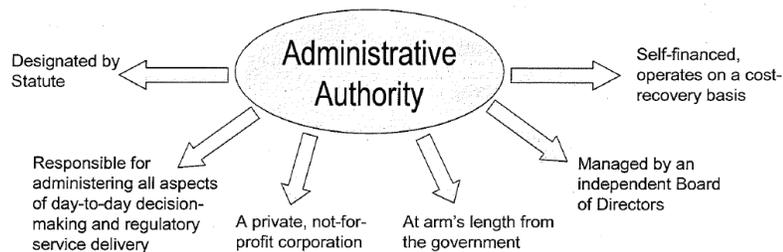
⁴ Where the commodity value of a product or package exceeds collection and recycling costs, it is typically traded freely in open markets. Recyclers that do not need to meet EPR program recycling standards have a competitive advantage in managing these items. The effect is that designated products and packaging can “leak” away from producers and producers must pay their recycling service providers more to “pull” these items away from the open market and into the EPR program. This situation results in additional costs to producers and consumers without a net increase in environmental outcomes.

Statutory authorities are governed by a board of directors appointed by government, elected through a defined process or some combination. However, members are selected, the board has a fiduciary duty to administer the authority as set out in legislation and the authority's operating agreement with government. In accordance with governance best practices, members should be selected based on their skills and capabilities and to avoid a conflict of interest with their fiduciary duties. This is especially critical given the perception that payment of fees by regulated parties to offset an authority's cost could influence compliance and enforcement decisions taken by the authority.

An authority operates at the will of government and is subject to review and enforcement should it be non-compliant or abuse its powers.

The Administrative Authority Model

The Administrative Authority Model establishes an accountability and governance framework between a Ministry and private not-for-profit corporations that administer legislation on behalf of the government. A Ministry retains overall accountability and control of the regulating legislation



Whether government oversees EPR programs or delegates this responsibility to an authority, similar activities are required to ensure compliance by all parties and to deliver a level playing field for obligated producers, their PROs and service providers. These activities include:

- Registering producers;
- Receiving and managing data from producers on the services provided and the quantity of products and packaging supplied to and collected from consumers, diverted from disposal and disposed;
- Assessing the data to determine whether producers delivered the services required and met the legislated performance requirements;
- Enforcing compliance where necessary by:
 - Implementing a producer free-rider detection program;
 - Identifying and resolving anomalies in data reported by producers including through audit and/or inspection and seizure of documents, as required;
 - Imposing penalties for administrative violations; and
 - Prosecuting offences for contraventions of the legislation.

Practical implications of oversight

There are some practical challenges in delivering oversight.

For example, where a producer supplies a small amount of obligated material, the producer's internal cost to quantify the material supplied, the authority's cost to register the producer and the PRO's cost to administer compliance services may, individually or combined, be more than the cost to manage the

producer's material at end of life⁵. As such, delivering a fully level playing field for producers may need to be balanced against adding costs (for producers, consumers and the economy) that do not contribute to achieving the government's legislative objectives. Some jurisdictions have exempted small producers in an effort to balance these interests. Where small producers are exempted, this exemption should be included in the EPR rules set by government.

Enforcement against producers within a government's jurisdiction is relatively straight-forward. However, with the increase in online sales originating outside of the jurisdiction and delivered directly to consumers (without an importer or distributor within the jurisdiction), new legislative and enforcement approaches are required to hold the out-of-jurisdiction producer responsible for managing its product or packaging generated within the jurisdiction at end of life.

Those who have followed the evolution of shared and full producer responsibility programs for packaging and printed paper in Canada recognize another challenge for governments and those managing these materials at end of life. Newspapers are commonly collected from households across Canada in the familiar system of curbside collection of commingled materials. However, newspapers contribute to end-of-life management costs in only one⁶ of the five provinces with some form of producer responsibility for printed paper and packaging. In the remaining four jurisdictions, costs to manage newspapers in the residential recycling system are paid either by the province⁷ or by municipalities⁸.

Delivering a level playing field for producers may be only part of the oversight challenge. Where multiple PROs operate in parallel to manage the same designated material, they will naturally seek opportunities for competitive advantage. As discussed above, oversight is required to ensure that these competitive advantages are a result of innovation and efficiency rather than unacceptable approaches to service delivery or fraudulent activity.

Where service delivery costs are apportioned among multiple PROs based on market-share, a PRO may be motivated to under-report producers' data, pay fewer costs and, in doing so, realize a competitive advantage. Multiple PROs also create an opportunity for compliant producers to temporarily avoid their obligations by leaving one PRO and being slow to join another. In these examples, both taken from actual experiences in European jurisdictions, effective and responsive oversight is key to ensure producers are continuously compliant and costs are apportioned to PROs, and their producer members, using accurate data.

⁵ This cost imbalance can be further exacerbated where the authority incurs costs to locate and prosecute a free-riding producer as these costs would then be charged to the non-compliant producer.

⁶ Quebec requires newspaper publishers to meet their financial obligation through cash payments.

⁷ Manitoba.

⁸ Ontario requires newspaper publishers to provide in-kind advertising lineage to municipalities as a form of compensation. In Saskatchewan, Multi-Material Stewardship Western (MMSW) pays municipalities only for the packaging and printed paper supplied by producers that are its members. As newspaper publishers are not members of MMSW, the cost to manage newspapers remains with municipalities. In BC, Multi-Material BC (MMBC) contracted with municipalities that accepted its incentive offer by the September 2013 deadline. The material collected in these municipalities is sufficient for MMBC to meet the recovery obligation of MMBC's members which do not include newspaper publishers. For MMBC to include municipalities that originally opted out and now wish to join, non-compliant newspaper publishers need to join MMBC so that the denominator in the recovery rate calculation is increased by the quantity of newspapers supplied by the publishers. MMBC would then need to increase collection to continue to meet its recovery obligation and would use the fees paid by newspapers to do so.

In an effort to protect the integrity of curbside collection systems, some governments⁹ have stepped in to allocate materials among multiple PROs¹⁰ and establish rules when the material allocated does not align with the material supplied by the PRO's producer members (which could result in non-compliance with material-specific performance targets). In these cases, the organization responsible for oversight is acting as a material clearinghouse and may find itself mediating issues arising when PROs take physical control of material collected by others¹¹, shared responsibility for communications to residents and disputes between PROs and with their service providers.

Where PROs directly manage collection systems, PROs can under-collect, miss performance targets and face enforcement (unless they are able to source additional material). Similarly, PROs can over-collect, incurring additional costs that must be borne by their members unless the PRO is able to sell the excess material. While PROs can arrange to buy or sell material through commercial transactions, reaching mutually agreeable arrangements between competing PROs can prove to be challenging.

How are Canadian provinces delivering oversight?

Oversight of EPR programs is delivered differently across Canadian provinces. In six of Canada's 10 provinces, the government retains full responsibility for oversight of EPR programs. Each of the remaining four provinces has delegated some oversight responsibility to a statutory authority, primarily for the assessment of performance data reported by producers to determine their compliance with legislated requirements.

Registration of producers, management of data on the quantity of material supplied by producers and identification of producers that may be non-compliant are responsibilities of PROs in all provinces except Alberta where the delegated authority is responsible.

In all provinces, government is responsible for investigating free-riders and for prosecuting offences. Where producers register with a PRO, governments take compliance action only if the PRO identifies possible free-riders. In these situations, a level playing field depends on PROs actively seeking free-riders and working collaboratively with government when enforcement is required. Pursuit of free-riders may not occur if a PRO is preoccupied with supply chain issues, is understaffed or prefers to avoid the effort to identify smaller or more reluctant producers.

Where producers report the quantity of material supplied to a PRO, the PRO reports aggregated data to the government or authority as part of performance reporting. In these situations, the government or authority does not have the quantity of material supplied by each individual producer and therefore does not have the data necessary to hold individual producers responsible for compliance.

Only two provinces have established administrative penalties as a more efficient method to address simple contraventions. Some provinces have taken steps to augment their capacity to effectively manage oversight by developing third-party audit protocols and retaining external parties to complete performance reviews.

⁹ Governments in the European Union. For example, the German government has established a clearinghouse to allocate packaging among the 10 PROs that provide compliance services to obligated producers.

¹⁰ Including consideration of, for example, weight, geography, composition, quality, form (single-stream, multi-stream, segregated), etc.

¹¹ For example, amount of unacceptable items in collected material (contamination rate).

While oversight of PROs is common, oversight of service providers that collect, reuse and recycle products and packaging on behalf of producers is not. These service providers may be regulated under other provincial legislation or municipal bylaws¹² to prevent environmental impacts¹³ but are not regulated or monitored under EPR legislation to ensure that services delivered to producers are consistent with EPR requirements and that service providers (and the producers and PROs to whom they provide service) don't gain a competitive advantage by avoiding any legislated requirements.

Oversight Activity	NFLD	PEI	NS	NB	QB	ON	MB	SK	AB	BC
Is oversight provided by government, an authority or a combination?	G	G	G	C	C	C	G	G	C	G
With whom do producers register?	PRO	PRO	PRO	PRO	PRO	PRO	PRO	PRO	A	PRO
Who identifies possible free-riders?	PRO	PRO	PRO	PRO	PRO	PRO	PRO	PRO	A	PRO
Who investigates possible free-riders?	G	G	G	G	G	G	G	G	G	G
To whom do producers report the quantity of material supplied?	PRO	PRO	PRO	PRO	PRO	PRO	PRO	PRO	A	PRO
To whom do producers report performance data?	G	G	G	A	A	A	G	G	A	G
Who determines whether producers complied with legislated requirements?	G	G	G	A	A	A	G	G	A	G
Who imposes administrative penalties?	NO	NO	NO	NO	G	NO	NO	NO	NO	G
Who prosecutes offences?	G	G	G	G	G	G	G	G	G	G
Who ensures that producers' service providers are delivering services consistent with EPR requirements?	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO

Legend: G – government; A – delegated authority; C – combination of government and delegated authority; PRO – producer responsibility organization; NO – no one

Oversight best practices

Based on experiences to date in Canada and other jurisdictions, oversight is most effective where:

- Oversight activities are not constrained by uncertain provincial budgets;
- Identification of free-riders is a core oversight activity and is not dependent on actions by PROs;
- The rules provide for the regulator having the information necessary to assess whether producers have met their obligations;
- Administrative penalties can be levied by the regulator for certain infractions to accommodate prompt and nimble action;
- Regulators are prepared to prosecute for contravention of the rules;
- Penalties include prohibition of sales into the jurisdiction to address non-compliance by out-of-jurisdiction producers who sell directly to consumers; and

¹² For example, permits to collect, transport or process waste or operate a waste management facility.

¹³ For example, to prevent spills, excessive or abandoned stockpiles, odours, leachate, noise, etc.

- Where governments delegate responsibility for oversight to an authority, roles and responsibilities are clearly delineated so that oversight is delivered seamlessly.

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