

THE CHALLENGES OF OVERSEEING FAIRNESS IN THE MARKETPLACE FOR EPR PROGRAMS

October 7, 2015



Who is WDO?

- Created in 2002 by the Ontario government under the Waste Diversion Act
- Not-for-profit, industry-funded organization that oversees Ontario's regulated recycling programs for “designated waste”
- Designated waste is material identified through regulations by the Minister of the Environment & Climate Change



What do we do?

- **Overseer**
 - Monitor waste diversion programs for policy concerns (e.g., marketplace fairness) & effectiveness and efficiency (e.g., program performance against targets for e.g., collection, diversion & public accessibility)
- **Catalyst & Facilitator**
 - Engage, communicate & consult with a broad base of stakeholders about program & WDO initiatives and updates, industry trends, and community achievements
 - Provide thought leadership in identifying national & international best practices and new opportunities for more waste diversion
- **Mediator**
 - Help resolve disputes (e.g., between program operators and their stakeholders)

What are WDO's responsibilities?

Waste Diversion Ontario shall (under section 5, Waste Diversion Act),

- a) develop, implement and operate waste diversion programs... and monitor the effectiveness and efficiency of those programs;
- b) seek to enhance public awareness of and participation in waste diversion programs;
- c) seek to ensure that waste diversion programs developed under this Act affect Ontario's marketplace in a fair manner;
- d) determine the amount of money required by Waste Diversion Ontario and the industry funding organizations to carry out their responsibilities under this Act;

What are WDO's responsibilities?

- e) establish a dispute resolution process for,
 - i. disputes between an industry funding organization and a municipality with respect to payments... , and
 - ii. disputes between an industry funding organization and a person with respect to the person's obligations... ;
- f) maintain a list of plans... and ensure that the list... public;
- g) monitor the effectiveness of plans approved under section 34;
- h) conduct public consultations on any matter referred... by the Minister;
- i) advise or report to the Minister on any matter referred... ; and
- j) ensure that any operating agreement... are made available to the public.

What do we oversee?

Programs

Municipal Hazardous or Special Waste
(e.g., single-use batteries, oil filters, antifreeze)

Blue Box
(e.g., residential newsprint, glass, steel cans)

Used Tires
(e.g., tires from cars, trucks, construction, mining equipment)

Waste Electrical and Electronic Equipment
(e.g., computers, TVs, phones, copiers)

Paint Industry Stewardship Plan
(i.e., paint and coatings)

What is EPR?

- OECD defines “Extended Producer Responsibility (EPR) as an environmental policy approach in which a producer’s responsibility for a product is extended to the post-consumer stage of a product’s life cycle.

An EPR policy is characterized by:

- the shifting of responsibility (physically and/or economically; fully or partially) upstream toward the producer and away from municipalities; and
 - the provision of incentives to producers to take into account environmental considerations when designing their products.”
- Lindhqvist (2000) describes four key areas of responsibility: economic, physical, liability, information.

How EPR, Competition Act, and Regulated Conduct Defence Relate

- Competition Act
 - Criminal sanctions prohibit agreements among competitors to fix prices, allocate markets, or restrict output that constitutes “naked constraints on competition”
 - Civil sanctions prohibit agreements likely to substantially lessen or prevent competition
- Depending on the provincial legal framework, EPR program operators may not be subject to requirements of the Competition Act
- Producers that form collective EPR programs may have a “regulated conduct defence” (RCD)
- RCD occurs when other law (federal, provincial, or municipal) authorizes or requires conduct that is prohibited by the Competition Act
 - Recognizes that a party cannot comply with two conflicting laws (“impossibility of dual compliance” test)

Sources:

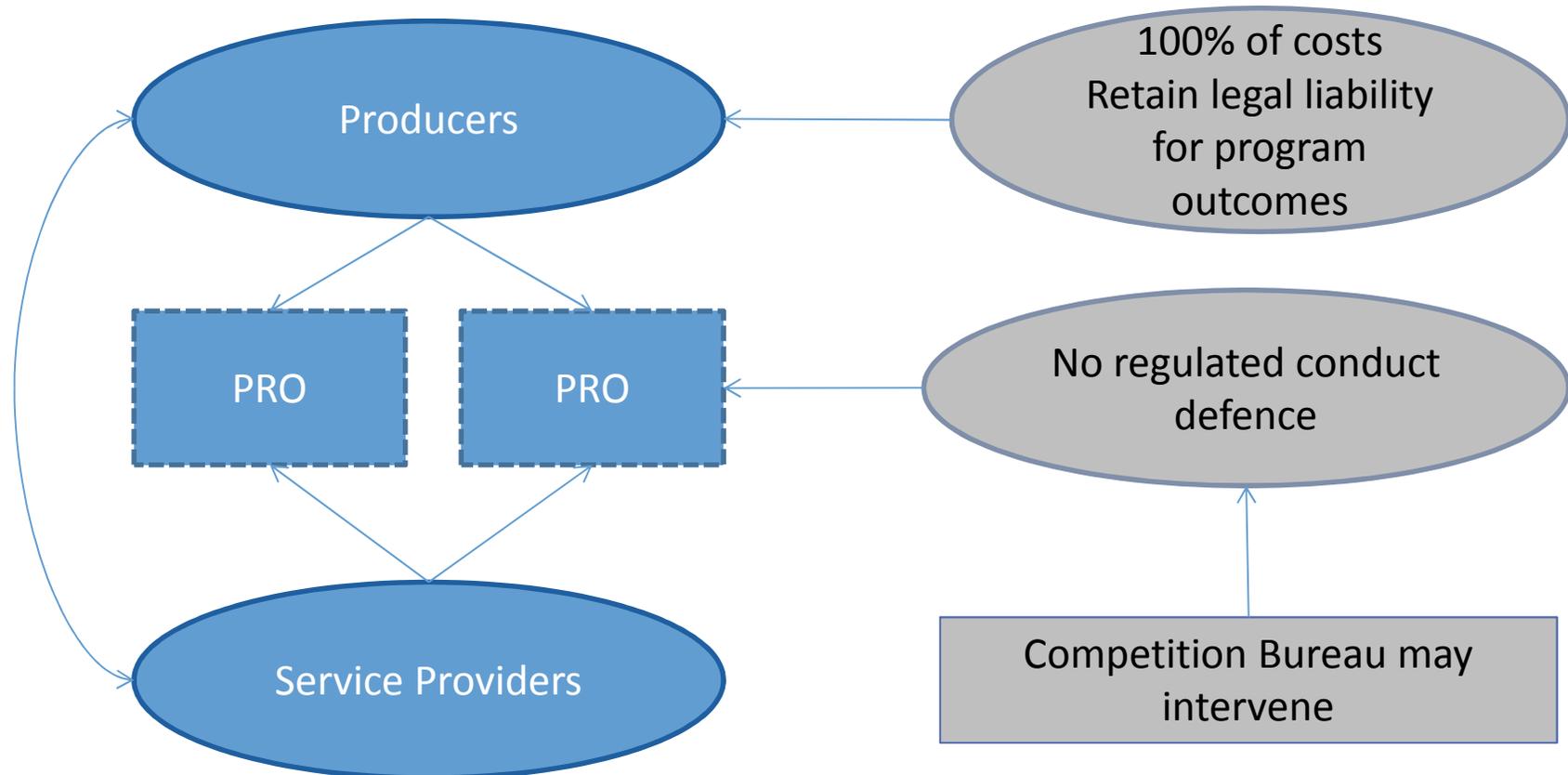
Competition Bureau, 2009, Competitor Collaboration Guidelines

Competition Bureau, 2006, Regulated Conduct

OECD Policy Roundtable on Regulated Conduct Defence, chapter on Canada, p 93.

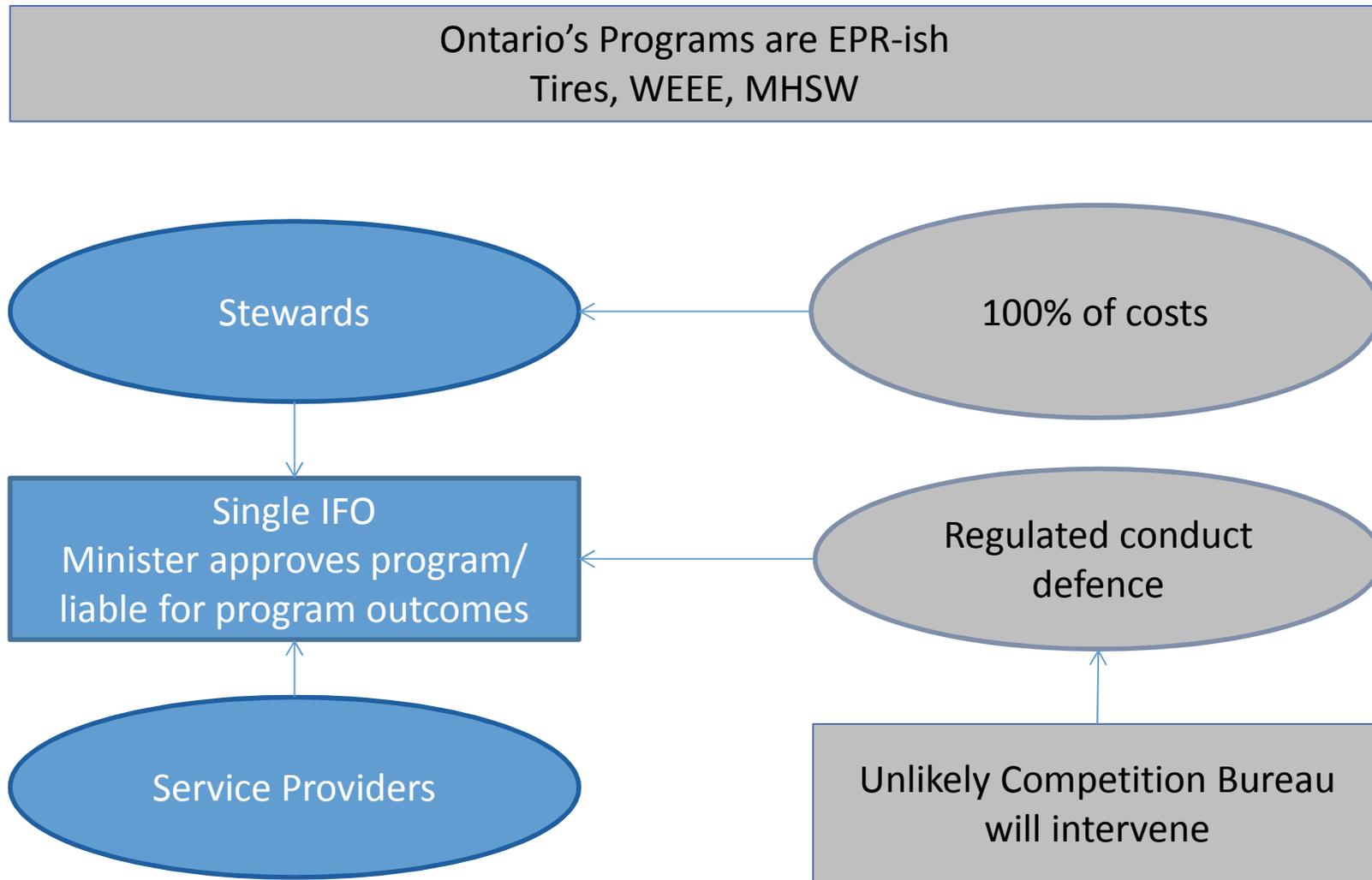


Full EPR in theory
In Canada, likely EPR-ish in practice



In practice:

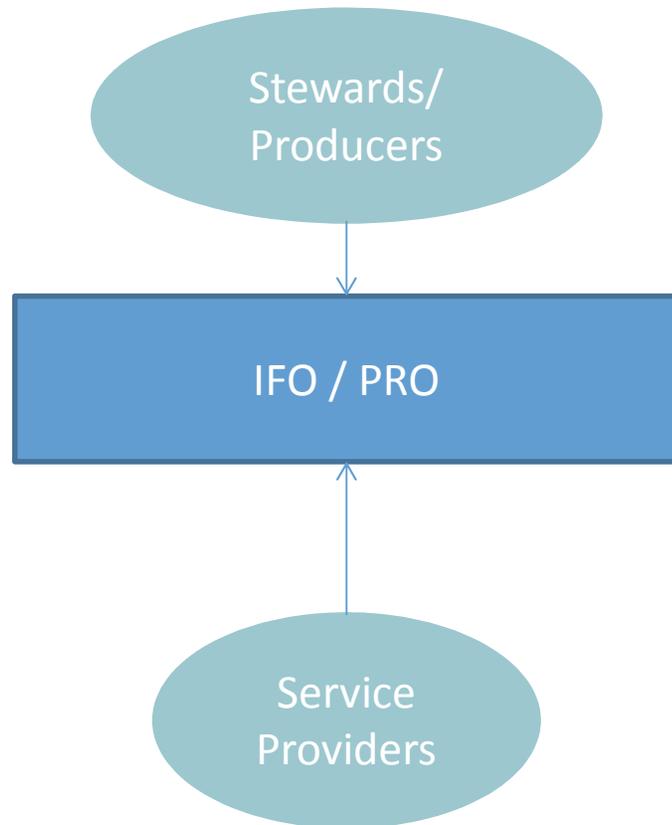
- Tend to have one program operator per material category
- Liability tends to be transferred via contract
- RC defence depends on whether government approves the program plan



How do EPR-ish programs interact with the market?

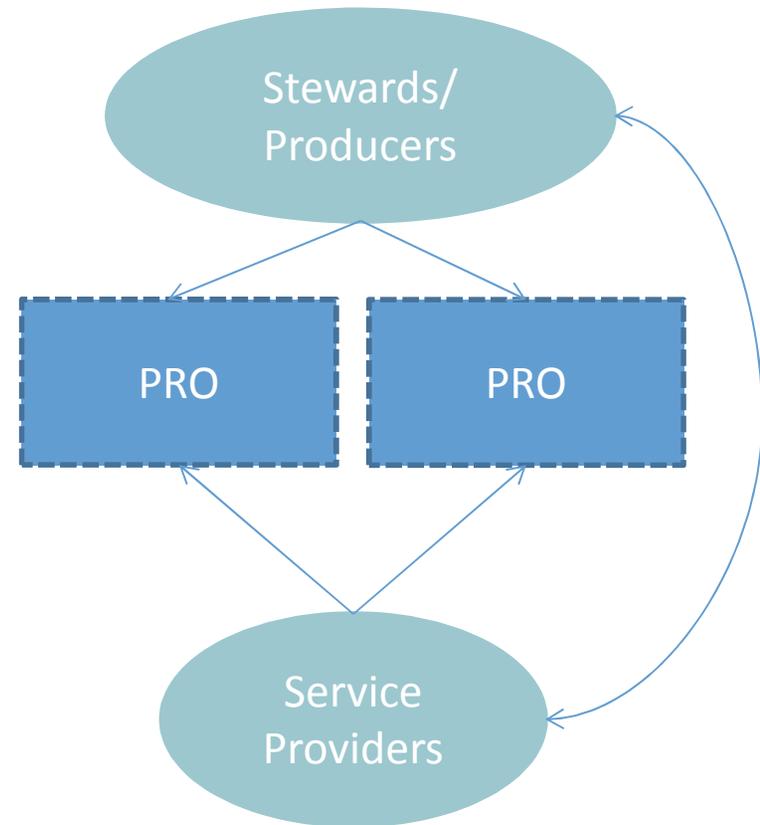
- Use single collective organization to implement program and charge back to producers for costs
 - No producer choice of collectives for program delivery
 - Service providers have only one collective client
- Establish, create, monitor and/or incent markets for end-of-life materials
 - Might be a natural market available outside the program
- Use competitive contracting processes (e.g., RFPs) and/or incentive systems to direct waste to desired end-of-life management options

EPR-ish: No Choice in Program Operator



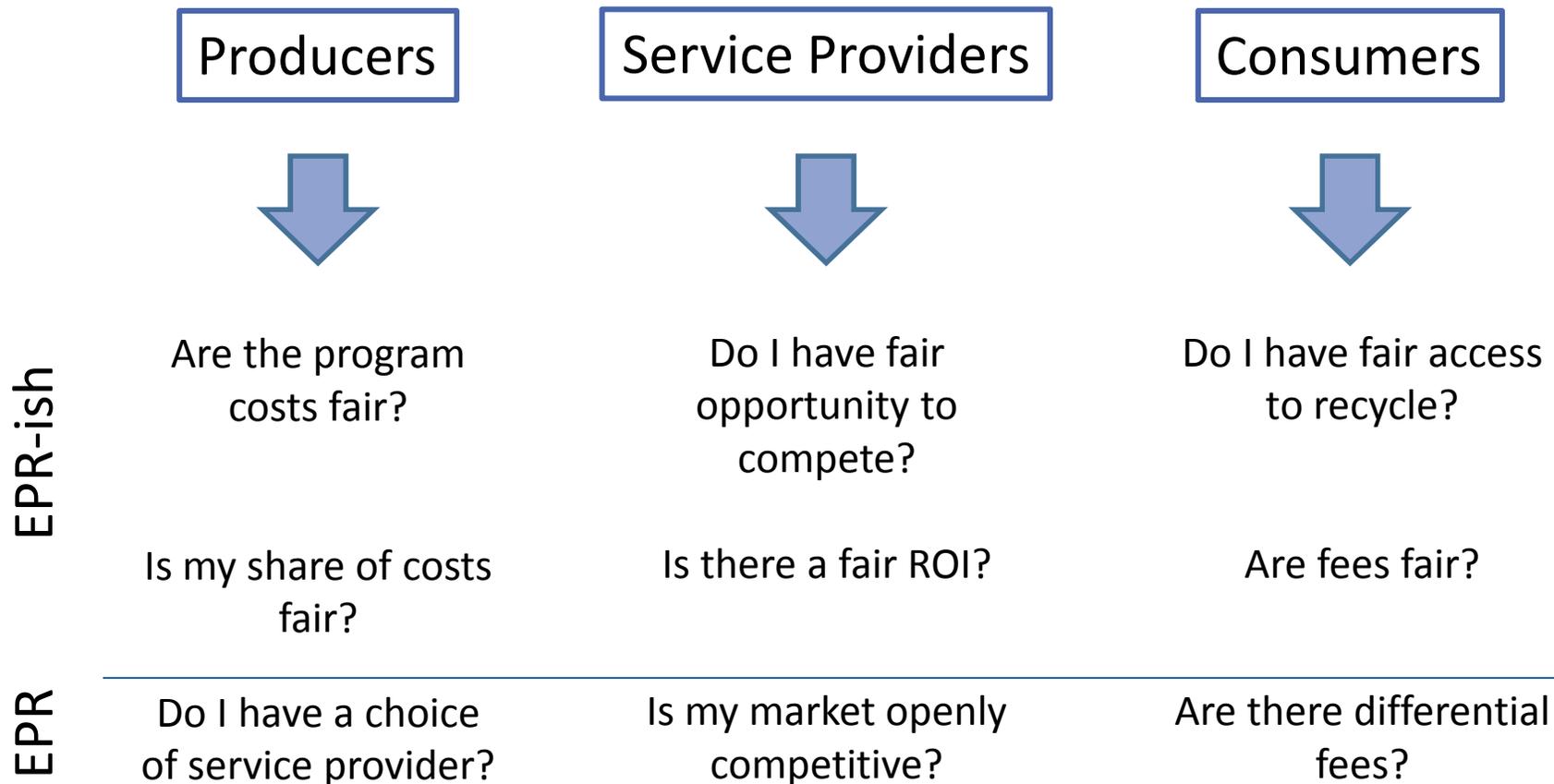
If I don't like what's happening,
I have nowhere else to go.

Full EPR: Choice in Program Operator



If I don't like what's happening,
I can use the other program operator.

Fairness in the marketplace for the EPR & EPR-ish



Some complaints WDO receives on fairness

1. Producer fees – too high or disproportionate
 - I'm paying too much compared to my competitors.
 - I'm paying too much in relation to the price of my product.

2. Service providers – restricted ability to compete
 - I don't have the same access to the market as my peers.
 - There is a lack of clarity on the rules.
 - I am not being fairly compensated.
 - I'm concerned about unfair contract language.
 - I'm concerned about the transparency of decision-making.

Fairness in the marketplace advice

Discussed 'fairness in the marketplace' with the Competition Bureau

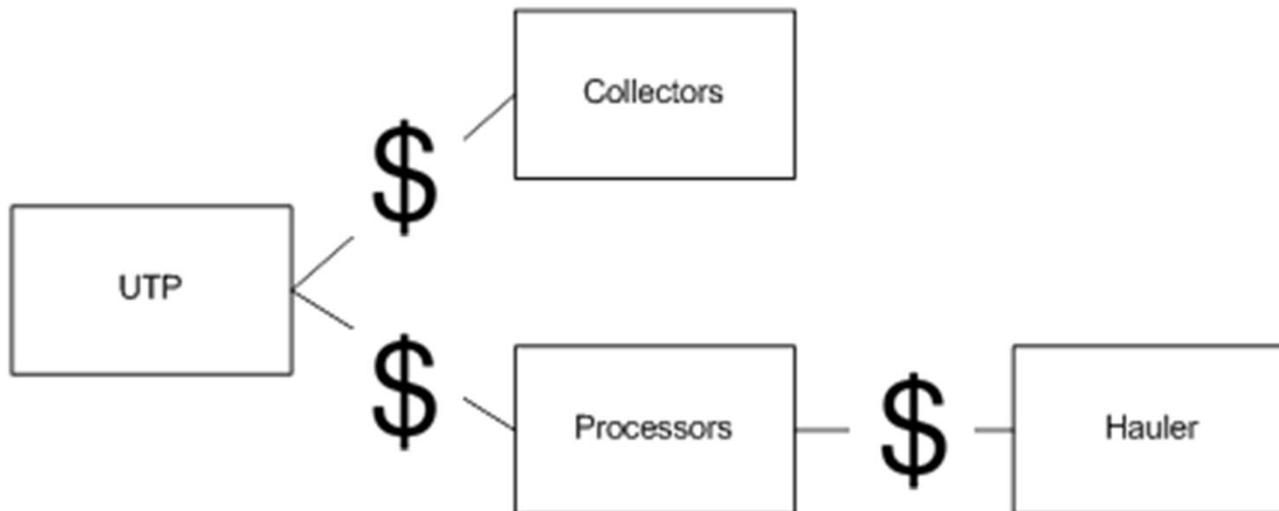
- They prefer the phrase "providing equitable opportunity to compete".

General advice:

1. In mature markets, incentive systems are preferred over contract systems because they allow for a more open and competitive marketplace.
 - Fewer barriers to entry (i.e., competitors not locked out of market for the contract period)
2. If competitive contracting systems are necessary (e.g., RFPs), contracts should be short term (2-3 years maximum).
3. Incentives must be regularly reviewed to ensure rates are efficient and effective.
 - Rates that are too high could distort the market
 - Rates that are too low could result in the program not achieving its recycling goals

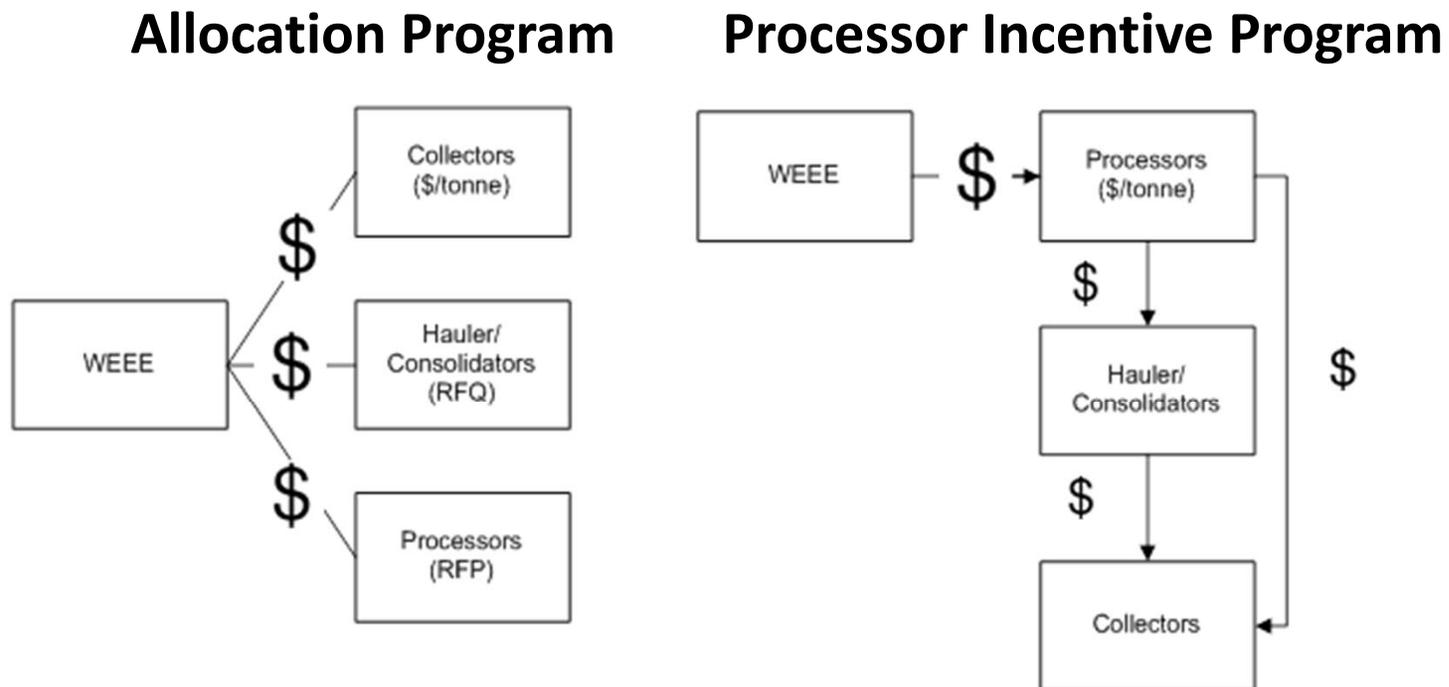
Ontario's Used Tires Program

- Pays a collection allowance directly, and a processing incentive (which trickles down)



Ontario's WEEE Program

- Operates an RFP system (called the Allocation Program), and a Processor Incentive Program that trickles down



Ontario's MHSW & Paint programs

- Manage nine wastes using different procurement processes at different points of the system
 - E.g., paint uses a transportation incentive when paint is collected from municipalities, and an RFP when paint collected from retail sites is transported

Questions for an oversight agency

For provincial recycling programs operated by a single, collective program operator, what does the IFO's/PRO's fairness report card look like?

1. Are there specific elements that should be included in contracts/incentive systems to set them up for 'fairness'?
2. Which criteria (e.g., market indicators) should an oversight agency use to monitor whether incentive systems or contract systems are fair?
3. Whistleblowers play a key role in fairness. Should they be protected while their information is being validated? If so, how?

Send me your answers!

Check “News” at www.wdo.ca
for updates and more questions

Jodi Tomchyshyn London
jodilondon@wdo.ca

