
Policy Forum: Should Extended Producer Responsibility Programs Use Eco-Fee-Included Pricing?

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ABSTRACT

Extended producer responsibility (EPR) programs shift the responsibility for the operation and funding of end-of-life waste management programs for a wide variety of problematic and hazardous wastes and products from municipalities and taxpayers to producers. With the exception of a couple of programs in New Brunswick and Quebec, which are described in the article, the majority of these programs are funded through the use of an eco-fee-excluded pricing mechanism. Eco fees are collected at the point of purchase and are remitted to producer responsibility organizations, which have the legal obligation to manage waste and end-of-life products.

The use of eco fees that are visible to the consumer has been controversial in the environmental and waste management policy communities, where there has been debate as to what is the best EPR financial mechanism to encourage producers to internalize the costs of recycling and end-of-life management and to otherwise improve product environmental performance. The debate about the visibility of eco fees has parallels in the debate that has been explored in the pages of this journal (and elsewhere) regarding tax-inclusive versus tax-exclusive pricing for the goods and service tax/harmonized sales tax.

The author describes the discussions in both the tax and the environmental fields, sets out a number of policy principles to guide EPR program funding, and contends that eco-fee-included pricing would support the primary EPR objective of providing incentives for improving product environmental performance. At the same time, eco-fee-included pricing would strengthen the shift of responsibility for program performance to producers and would be compatible with a number of other EPR program objectives. It is suggested that the failure of phase 2 of Ontario's Municipal Hazardous and Special Wastes EPR program in 2010 points to the need for governments to look more closely at the EPR eco-fee-included pricing mechanism and at the programs in New Brunswick and Quebec, and to be more prescriptive regarding cost internalization by producers.

KEYWORDS: PRICING ■ FEES ■ ENVIRONMENT ■ WASTES ■ POLICY ■ PRODUCT

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INTRODUCTION

Previous articles in this journal have raised the issue of whether the goods and services tax/harmonized sales tax (GST/HST) should be added at the cash register using tax-exclusive pricing or should be addressed using a tax-inclusive pricing approach, where the tax is included in the advertised store shelf and cash register price.¹ Interestingly, a similar issue is being debated in environmental policy and regulatory circles regarding eco fees, which are special charges for the end-of-life disposition or recycling of consumer products used to finance extended producer responsibility (EPR) programs. In Canada and other member countries of the Organisation for Economic Co-operation and Development (OECD), EPR has become a widely used environmental policy instrument designed to transfer the financial and operational responsibility for a wide variety of end-of-life products and wastes from municipalities and taxpayers to the producers, brand owners, or importers of the products. Funds for such programs are commonly raised through visible eco-fee-excluded pricing.

Generally, legislation mandating EPR is silent on the issue of the visibility or non-visibility of eco fees. The majority of producers and retailers, when given a choice to either exclude or include eco fees in the pricing of products, have chosen

1 David M. Sherman, "Policy Forum: Tax-Included Pricing for HST—Are We There Yet?" (2009) vol. 57, no. 4 *Canadian Tax Journal* 839-56; Richard M. Bird, "Policy Forum: Visibility and Accounting—Is Tax-Inclusive Pricing a Good Thing?" (2010) vol. 58, no. 1 *Canadian Tax Journal* 63-76; and W. Jack Millar, "Policy Forum: The Case for Maintaining Tax-Exclusive Pricing" (2010) vol. 58, no. 4 *Canadian Tax Journal* 77-85.

the eco-fee-excluded approach and have added the eco fee at the cash register. However, legislation in New Brunswick requires that eco fees be included in sticker prices, and in Quebec a similar approach has been adopted in the operation of the provincial waste paint EPR program, *Éco-peinture*.

A variety of arguments have been raised on each side of the eco fee issue. Perhaps the most interesting aspect from the point of view of tax experts and practitioners is that the arguments raised have been completely different from those raised in the GST/HST context. In general, the issues have been based on a discussion of which approach is better from the point of view of the objectives of all EPR programs, the purpose of which is to shift end-of-life costs away from municipalities and property taxpayers and to have producers internalize these costs in the price of goods (as they do with other costs incurred in manufacturing and selling their products). In a similar fashion to the visibility of the GST/HST, the visibility of eco fees has served to heighten consumer awareness about EPR programs, but often at the price of misinformed public debate about who is responsible for imposing the fees and confusion as to whether or not the fees are a tax under another name.

The main purpose of this article is to set out these arguments and to argue that the eco-fee-included approach is superior from the point of view of EPR policy objectives. The article also describes the legislative authority and operational structure of EPR programs, the debate around eco fees, and the different approaches that have been taken to eco fee visibility.

These issues were central to the media coverage and public confusion regarding the implementation of phase 2 of Ontario's Municipal Hazardous and Special Wastes (MHSW) program in July 2010. The failed launch of the program and its ultimate cancellation highlighted a number of challenges associated with the management and implementation of environmental policy using an EPR instrument. Much of the controversy centred on the application of visible eco fees at the point of purchase to finance the collection, recycling, and disposal of waste from a wide range of common hazardous household products. The eco fees were remitted through retailers to Stewardship Ontario, an industry not-for-profit producer responsibility organization (PRO) established under provincial environmental legislation and given financial and operational responsibility to manage such products at the end of their life. Headlines such as "Eco Fee Fiasco Stalls Blue Box Overhaul"² and "Eco Fee Issues Linger, Says Environmental Watchdog,"³ and an op-ed article entitled "Eco Fee Monopolies Must End,"⁴ emphasized the public concern about the fees and served to make management of the issue a sudden and unexpectedly high priority for the provincial government in an otherwise slow summer in provincial politics.

In response, Ontario's environment minister announced on July 20, 2010 that his ministry would pay, at a cost estimated at \$5 million, the eco fees for a three-month

2 *Toronto Star*, July 25, 2010.

3 *Toronto Star*, July 28, 2010.

4 Don Dewees and Usman Valiante, "Eco Fee Monopolies Must End," *Globe and Mail*, July 21, 2010.

period during which the fees and the program would be reviewed.⁵ Upon the completion of the review, the ministry announced on October 12, 2010 that the government was cancelling phase 2 of the household hazardous waste program and ending what it called “consumer fees” on the products covered under phase 2.⁶ With this announcement, the responsibility for the phase 2 products reverted to the municipalities. Despite provincial promises of funding support that accompanied the announcement, the president of the Association of Municipalities of Ontario (AMO) expressed concern about a new ill-defined municipal role and stated that “the producers of the waste get off relatively free here.”⁷

Ironically, the use of eco fees to fund such initiatives is far from unique in Canada. In fact, phase 1 of Ontario’s MHSW program was launched in July 2008 using fees in a similar fashion on a different and shorter list of hazardous and special waste products, with little or no public debate. Most EPR programs use a similar advanced disposal fee mechanism to fund the operation of programs through the application of visible eco fees at the point of purchase. The launch of phase 2 of the MHSW program was, however, plagued by a series of missteps—a start up at the same time as the implementation of the HST in Ontario; the complete lack of advance communication to the public by either Stewardship Ontario or the producers, retailers, and brand owners explaining the rationale for the fees; the inconsistent application of the fees by retailers; a complex fee structure; and in some cases, errors in the calculation and posting of the fee.

While recognizing the mistakes made in the MHSW program, much of the Ontario controversy might have been avoided, and the need for provincial government intervention and the rollback of the program would have been less likely, if the eco fee had been included in the price of the products covered by the program rather than excluded and added at the point of purchase.

INCENTIVES FOR ENVIRONMENTAL PERFORMANCE

The debate regarding EPR fees in environmental and waste management policy circles has centred on eco fee visibility to the consumer and whether or not visibility of the fee has a bearing on the EPR policy objective of having costs of end-of-life product management internalized in the price as a factor of production no different than other costs such as manufacturing, distribution, marketing, and sales. EPR programs shift responsibilities from municipalities and taxpayers to the producers

5 Ontario, Ministry of the Environment, “Province Takes Action on Eco Fees: McGuinty Government Committed To Keeping Household Hazardous Waste out of Environment,” *News Release*, July 20, 2010.

6 Ontario, Ministry of the Environment, “Statement from Ontario Minister of the Environment John Wilkinson Regarding Waste Diversion,” *News Release*, October 12, 2010.

7 Lee Greenberg, “McGuinty Government Scraps Controversial Eco Fees for Good,” *Ottawa Citizen*, October 13, 2010, quoting AMO president Peter Hume.

of the products of concern. From an environmental policy perspective, the challenge is how to structure EPR regulations and programs, which are focused on waste and end-of-life products, to encourage product redesign and innovation with a view to minimizing environmental impacts not only at the end of life but also during the rest of the product's life cycle.

A strong case can be made for eco-fee-included pricing as an essential component of EPR programs designed to provide incentives for product innovation. In order to cover the costs of end-of-life management and to meet the other environmental objectives, an ideal system would have two key components. First would be an internalized pricing mechanism, or eco-fee-included pricing. This would be coupled with a differential fee mechanism, to reflect the cost of managing the environmental impacts of the product and the end-of-life recycling cost. For example, companies that produced products that were more easily disassembled for recycling and did not include harder-to-manage toxic substances would be charged a lower eco fee, reflecting the lower recycling cost. EPR programs would be designed to provide producers with an environmental innovation incentive by rewarding them with lower end-of-life management costs for their products as compared with the products of their competitors. Consumers should be made aware that environmental costs have been internalized into the product price. The different price point could help consumers to differentiate between products on the basis of their overall environmental performance.

As noted earlier, the eco fee visibility/invisibility issue has close and interesting parallels to the debate on tax-inclusive/tax-exclusive pricing for the GST/HST. Most environmental managers of EPR programs are likely unaware of the discussions that have arisen in the economics and tax communities regarding the inclusive or exclusive pricing of value-added taxes (VAT) such as the GST and the HST. Similarly, eco fees have not featured prominently in the economics and tax communities. The Ontario MHSW failure suggests, however, that there would be value in mutual consideration of the issues from both an economic and an environmental policy perspective. The MHSW controversy also suggests that governments can no longer avoid the eco fee visibility issue by defaulting to PROs that appear to prefer visible fees, and they will have to seriously consider more prescriptive approaches regarding EPR program fees in the future.

BACKGROUND: EXTENDED PRODUCER RESPONSIBILITY

In a seminal 2001 report, the OECD defined 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.”⁸ The OECD noted two related features of EPR policy:

8 Organisation for Economic Co-operation and Development, *Extended Producer Responsibility: A Guidance Manual for Governments* (Paris: OECD, 2001), 9. The report was the culmination of six years of work, including workshop hosted by Environment Canada in Ottawa in December 1997.

- 1) the shifting of responsibility (physically and/or economically; fully or partially) upstream to the producer and away from municipalities, and
- 2) to provide incentives to producers to incorporate environmental considerations in the design of their products.⁹

The interest among OECD members, including Canada, about the possibilities of EPR was driven to a significant degree by the stubborn and continuing rise in both the quantity of waste and the rate of increase (which was similar to the rate of economic growth) despite the expenditure of considerable resources and efforts on pollution prevention and waste reduction. Interest was heightened in 1991 by the adoption in Germany of a national packaging ordinance, which for the first time used EPR policy to address issues related to the generation and management of waste packaging by shifting the traditional municipal responsibility for waste packaging to the producers and brand owner users of packaging. In response to the ordinance, German producers established *Duales System Deutschland* (DSD) to fund and manage a program of packaging collection and recycling. DSD became the model for not-for-profit EPR PROs. It levies fees on producer members based on the amount of packaging that each producer puts onto the German market and the material used (paper, aluminum, glass, etc.). DSD members are licensed and given the right to use a “green dot” logo on packaging that is part of the program.

In 1998, after seven years of operation, Germany’s federal Ministry for the Environment reported to the OECD at an EPR workshop in Washington that as a result of the packaging ordinance, manufacturers had changed their packaging in response to differential packaging material management fees, that packaging use had fallen considerably, that the use of reusable packaging had become widespread for transport packaging, and that a collection and recycling system had been successfully established.¹⁰

The adoption of similar EPR approaches in other member states of the European Union following the German packaging ordinance led to the adoption in 1994 of the European Commission’s packaging directive, which set standards and requirements for EPR or packaging for all EU states.¹¹ Through such directives, the European Commission mandates the transposition of EPR policy into national member state legislation. In addition to packaging, the approach has been used for waste electronics and electrical equipment (WEEE), end-of-life vehicles, and batteries.

There is no consistent pattern regarding the visibility of EPR eco fees in Europe, with the exception of packaging EPR programs, which (for reasons that will be cited later) typically use a fee-included, non-visible pricing mechanism. The variation

9 *Ibid.*, at 18.

10 *Ibid.*, at 19.

11 Council Directive 94/62/EC of December 20, 1994 on packaging and packaging waste, OJ L 365.

between the European WEEE EPR programs is a case in point.¹² In most cases, national WEEE EPR legislation in Europe leaves the visibility of eco fees to the discretion of the producers; that is, visible fees are described in the transpositional legislation as “optional.” However, France and Spain mandate that the fees should be visible; in Greece, visibility is mandated through the supply chain but not to the final consumer; and in Ireland, visibility is mandatory for certain WEEE categories.

In the cases where the national legislation makes visibility optional for the producer, the operating programs show a variety of practices. Programs in the United Kingdom, Germany, Austria, and Sweden do not use visible fees. In some countries, some WEEE programs, including the NVMP program in the Netherlands, the Recupel program in Belgium, and the Ecotrei program in Italy, all use visible fees.

In Canada, the first EPR program was legislated in British Columbia in 1994 for the management of waste paint by producers. Since 1994, the EPR approach has been widely adopted in Canada for the management of a wide array of hazardous or problematic waste products, such as used crankcase oil, packaging, tires, electronics and electrical equipment, hazardous and special household products, used farm pesticide containers, refrigerants, and mercury-containing products such as fluorescent lamps and switches. In the majority of these cases, the programs are regulated provincially. However, the federal government, through Environment Canada, has indicated its intention to introduce national regulation of refrigerants and other ozone-depleting substances and mercury-containing products under the Canadian Environmental Protection Act, 1999.¹³ Historically, some programs, such as those for pesticide containers and rechargeable batteries, have been operated on a voluntary basis by producers, but the products managed under these programs are progressively being covered under new EPR regulations.

EPR has been formally endorsed as an environmental policy by all Canadian jurisdictions through the adoption in October 2009 by the Canadian Council of Ministers of the Environment (CCME) of a Canada-wide EPR action plan.¹⁴ The action plan follows the spirit of the OECD’s 2001 guidance manual and is built on the same idea that EPR “provides incentives to producers to incorporate environmental considerations in the design of their products” and “shifts the historical public sector tax-supported responsibility for some waste to the individual brand owner, manufacturer or first importer.”¹⁵ The action plan establishes six-year and eight-year

12 Knut Sander, Stephanie Schilling, Naoko Tojo, Chris van Rossem, Jan Vernon, and Carolyn George, *The Producer Responsibility Principle of the WEEE Directive: Final Report* (Brussels: European Commission, August 19, 2007), 57-58.

13 SC 1999, c. 33.

14 Canadian Council of Ministers of the Environment, *Canada-Wide Action Plan for Extended Producer Responsibility*, approved in principle by the council at Kingston, Ontario, October 29, 2009 (Ottawa: CCME, 2009).

15 *Ibid.*, at i.

commitments to manage priority products through EPR policies and sets out common coordinated policies and key elements for the adoption and management of EPR programs. At present, more than 45 EPR programs exist in Canada, with the majority being regulated provincially.¹⁶

TYPICAL EPR PROGRAM STRUCTURE AND FUNDING

Typical EPR Program Regulatory Structure

EPR regulations are typically applied as a waste management measure to end-of-life products and waste materials that pose environmental risks if disposed of improperly or pose unique collection and management challenges to municipalities, which have historically been responsible for the provision of waste management collection, recycling, and disposal services. EPR programs have proved successful in establishing recycling programs for various kinds of problematic waste and in relieving municipalities of some of the burden of waste management costs.

EPR regulations are generally simple and short, in contrast to many other regulations. They identify the products of concern and require that a manufacturer or an importer of the identified product prepare a stewardship plan describing how it will collect and manage the product at the end of life. Regulations typically also identify the provisions that the stewardship plan should contain, set out collection and recycling targets to be met, and prescribe certain reporting and data-tracking protocols. British Columbia's Recycling Regulation,¹⁷ which allows for the use of EPR for a wide array of products, is fairly typical of the newer generation of regulations. EPR regulations were originally unique to one particular product or substance, but in recent years, regulators have adopted a broader, more encompassing, and more efficient approach that uses one generic omnibus regulation for the mandating of EPR for a variety of different targeted products or substances.

The BC Recycling Regulation, for example, includes the following:

- identification of the producer—the person who sells, offers for sale, or distributes in the province;
- identification of the categories of product and a more detailed schedule showing listed products in each category;
- requirements to have an approved stewardship plan for the identified products;
- requirements that the stewardship plan identify how it will achieve or be capable of achieving a recovery rate of 75 percent;
- mandated consultation with stakeholders;

16 Environment Canada, "Extended Producer Responsibility & Stewardship: Inventory" (<http://www.ec.gc.ca/epr/>); and *Canada-Wide Action Plan for Extended Producer Responsibility*, supra note 14.

17 British Columbia, Environmental Management Act, Recycling Regulation, BC reg. 449/2004, as amended.

- requirements for making consumers aware of the stewardship plan and the location of collection facilities;
- documentation of what producers have done to reduce the environmental impact of their products through approaches such as redesigning for easier disassembly and recycling;
- data-gathering and annual reporting requirements; and
- the requirement that the stewardship plan provide for the collection and payment of the costs of collecting and managing the designated products.

Of importance for this discussion, it should be emphasized that the BC regulation is also typical in that it does not prescribe how the costs of the EPR program are to be raised, whether or not there should be eco fees, and whether or not such fees, if used, should be visible to the consumer at the point of purchase. All of these decisions thus default to the PROs. This is the same practice as in the European WEEE legislation cited earlier, in which fee visibility is “optional” and therefore up to the discretion of the producers in the PROs.

Typical EPR Program Structure and Funding Mechanisms Using a Visible Eco Fee

In response to EPR regulations, producers in Canada, similarly to those in the original German DSD example, have established not-for-profit PROs made up of corporations covered by the regulations and designed to manage the environmental obligation that has been given to them. PROs have a specific and narrow legal mandate related to the EPR program. Transparency in decision making, PRO operations, financial management, and reporting are key to good PRO operation, particularly in the light of concerns about potential collusion and threats to competition.¹⁸

Common practice in most Canadian EPR programs is for producers to recoup program costs through the application of a point-of-sale eco fee that is visible to the consumer. As noted above, most regulations provide no direction or prescription for how the costs are to be covered or whether or not fees levied by producers should be visible to the consumer. While governments have mandated producers to extend their responsibility for products to the end of product life, eco fees are determined by and remitted to the PRO, not to government, and are therefore not taxes.

Because most PROs have their own source of funding from visible eco fees, they can operate largely independently from the head offices of the individual corporate members. This has proven to be a successful structure for producers and for the establishment and operation of collection and recycling programs. It has been argued that this independence, built on the independence derived from funding that does not come from corporate headquarters, has allowed PROs to be more proactive, more nimble, and more efficient, and that the mechanism of visible fees remitted

18 Environment Canada, *Guidance Manual for Establishing, Maintaining and Improving Producer Responsibility Organizations in Canada* (Ottawa: Environment Canada, August 2001).

directly to the PRO helps to make this possible. Independence of funding facilitated by the visible fee mechanism means not having to clear most decisions with corporate head offices, which could be an irksome and time-consuming process. It is another question altogether whether this structure and funding mechanism gives producers the incentive for better product design with a reduced environmental footprint, which is one of the core objectives of EPR policy.

As an example of this structure and funding mechanism, in the Ontario WEEE EPR program, a retailer will collect at the point of sale an “environmental handling fee” of \$3.15 on the purchase of a laptop computer, \$12.25 on the purchase of a flat screen, liquid crystal display (LCD) monitor, \$5.40 on a duplex ink jet printer, and \$0.40 on a new keyboard. These fees are identified and added in separately on the cash receipt prior to the application of the HST, and the fees are remitted to Ontario Electronics Stewardship (OES), the designated PRO for waste electronics in Ontario. OES uses the money to manage and promote the EPR program and, most importantly, to fund the collection and recycling of the electronic equipment when, at some point in the future, it no longer has any use or value and is taken by the final owner to an OES or affiliated collection facility.

Consistent with most Canadian EPR programs, most of these fees are undifferentiated between brand owners and models within the same product categories. The \$3.15 environmental handling fee for the laptop is the same whether the computer is branded by Dell, HP, or Acer. The fee reflects the cost calculated by the PRO to collect and recycle all laptops. The fact that one model might be easier to disassemble for recycling or contain a smaller amount of toxic substances (such as mercury) than another model or brand, and therefore cost less to recycle, is not taken into account in the fee structure. Fees are set through the collective responsibility mechanism of the PRO, not through an individual producer responsibility mechanism for a particular model or brand. Recycling efficiencies are the primary driver, and in most cases, costs can be kept lower for the collective by not differentiating between models and brands.

The only example of differentiated fees in Canadian EPR programs occurs in the “blue box” packaging recycling programs in Ontario and Quebec. These, however, are not full EPR programs because costs and responsibilities are shared between the producers—in this case, the users of packaging—and the municipalities that operate the curbside collection and depot recycling programs. In Ontario, packaging producers and municipalities that operate the curbside system share the costs equally on 50/50 basis; in Quebec, the producer share is less than 50 percent. In both provinces, there are proposals to revise the arrangement to make producers 100 percent responsible for the program costs.

Differentiated fees are paid by the producers on the basis of the packaging they put onto the market and are assigned to packaging materials on the basis of the costs of recycling those materials after collection. Stewardship Ontario, the packaging PRO for Ontario, adjusts fees annually according to material markets, and fees are calculated and assigned on a cents-per-kilogram basis for 10 different types of packaging materials. For example, the 2009 unit fee for polyethylene terephthalate (PET) plastic bottles was set at 12.484 cents per kilogram whereas the fee for clear glass

containers was 3.461 cents per kilogram. Because these fees are so small when calculated on a packaging unit basis—in fact, fractions of cents—the fees are included in the price of the packaged product and are not visible to the consumer.

Difficulties in this system can arise in the product supply chain between the producer that is mandated by the EPR regulation as the responsible steward and the retailer that actually sells the product, and this was undoubtedly at the root of some of the difficulties with the launch of phase 2 of Ontario's MHSW program. In some cases, large retailers such as Canadian Tire, Sears, Home Hardware, and Walmart, which brand their own products, or companies such as Dell, which uses a direct sell business model, may also be the producer or the first importer of their proprietary branded products and are thus directly responsible for the eco fee. In most cases, the retailer functions as the fee collector, similarly to retailers that are responsible for the collection and remittance to provincial and federal authorities of provincial sales tax and GST/HST.

Almost all EPR programs in Canada, with the exception of some in New Brunswick and Quebec, use this visible eco fee mechanism, and visible fees are widely supported by most producers covered by EPR initiatives. The advantages of a visible fee from the perspective of the producer, the PRO, and the retailer are that it is relatively simple to apply and to track, it is applied uniformly to products in the same category, it facilitates independent PRO action, and it can be passed directly through to the consumer in a similar fashion as the GST/HST.

Visibility of eco fees also provides the producer with the opportunity to argue that the fee has been established at the behest of government and is really not the producer's responsibility. In an era of acute awareness of taxes, the visibility of the eco fee, like the visibility of the GST/HST, can result in political and public opposition, as was the case in the Ontario phase 2 MHSW implementation. At least one spokesperson for an industry association affected by the MHSW program, while addressing a number of legitimate concerns about what was included in the program, also took the opportunity during the media coverage of the controversy to put some of the blame on the Ontario environment minister, arguing that he approved the MHSW plan and therefore he was responsible for the fees.¹⁹ Similarly, at the debut of phase 1 of the MHSW program, communications from the PRO to the public posted in at least some retail stores where fees were being applied suggested inaccurately that the fees were the province's responsibility and were a form of tax.

THE TAX-INCLUSIVE/TAX-EXCLUSIVE GST/HST DEBATE

In discussing the visibility of eco fees in EPR programs, it is useful to review the arguments put forward in the debate in economics and taxation circles about the visibility to consumers of the GST/HST at the point of purchase. As noted earlier, the positions

19 Randall Denly, "Liberals Ducking Eco Fee Blame," *Ottawa Citizen*, July 20, 2010, quoting Shannon Coombs, president of the Canadian Consumer Specialty Products Association.

for and against tax-inclusive/tax-exclusive GST/HST pricing have been set out in a series of articles appearing in recent issues of this journal.²⁰ Commenting on those articles, Krever and van der Westhuysen have characterized the debate as being between the tax-inclusive price display camp, which seeks transparency in terms of visibility of the actual total and final cost to the consumer, and the tax-exclusive camp, which seeks transparency in respect of the tax component of the final cost by presenting the consumer with separate quotations of the sticker price and the actual amount due at the cash register.²¹ They note:

Hiding the impact of taxes and subsidies on the final price until shoppers have committed to a purchase and are ready to pay at the checkout prevents those consumers from making rational choices on the basis of that final price.²²

The arguments for tax-exclusive pricing made by Bird support the current Canadian practice, which is unique among VAT countries, of adding the GST/HST separately on the point-of-purchase cash receipt, on the basis that “people should know the actual cost of what they are getting from government.”²³ Bird “tend[s] to favour tax consciousness, not tax anaesthesia,”²⁴ and notes that “the continued ‘in your face’ visibility of the tax has made the GST a highly salient political issue.”²⁵

In contrast, Sherman has made a strong case for tax-inclusive pricing for the GST/HST, suggesting that Canada follow VAT practice in other countries and include the tax in the shelf price.²⁶ He points out some inconsistencies in the visibility of the GST/HST for gasoline pump prices, taxi fares, vending machines, movie and theatre tickets, and new homes, and discusses what he describes as “arcane constitutional reasons that few people understand” for the fact that Canada is, with few exceptions, a “tax-extra” country.²⁷ Despite the political debates that have surrounded the development of tax-exclusive pricing (of which the current referendum challenge to the July 1, 2010 application of the HST in British Columbia is a good example) and the constitutional challenges of direct and indirect taxation, Sherman states that “tax-included pricing is better for the economy,”²⁸ and in support of this view makes the following points:

20 *Supra* note 1.

21 Richard Krever and Anthony van der Westhuysen, “Tax-Exclusive or Tax-Inclusive Pricing: Amazement and Dismay from Abroad” (2010) vol. 58, no. 3 *Canadian Tax Journal* 787-89, at 787.

22 *Ibid.*, at 788.

23 Bird, *supra* note 1, at 76.

24 *Ibid.*

25 *Ibid.*, at 69.

26 Sherman, *supra* note 1.

27 *Ibid.*, at 846.

28 *Ibid.*, at 844.

1. Tax-extra pricing acts as a drain on the economy by impeding consumer purchases. . . .
2. Consumers do not like to pay tax. . . . [The visible GST/HST] feed[s] political opposition to a tax that experts and economists almost universally agree is a “good” tax. . . .
3. . . . [T]ax-included pricing, if introduced, will provide a psychological boost to spending.²⁹

Sherman also notes that in all VAT countries except Canada, prices are advertised as tax-inclusive.

Cash register receipts show the VAT being paid, but the price advertised is the price that one pays. There is a good reason for this practice: it is sensible, and it is what consumers want.³⁰

The difficulty with tax-exclusive pricing from a consumer’s point of view is, of course, that the posted price is not the real price. Until you actually approach the cash register, the final price will be unknown unless you carry a calculator with you or are considerably better at mental arithmetic than most Canadians (myself included) likely are.

THE ENVIRONMENTAL POLICY DEBATE ON THE INCLUSION/EXCLUSION OF ECO FEES

While most Canadian EPR programs use a visible eco fee mechanism, as described above, this practice is not without controversy. The debate has focused primarily on the necessity of raising funds to meet EPR obligations and how such financial responsibility can be directed both to provide incentives for producers to improve the environmental performance of their products over the product’s life cycle and, in particular, to encourage product design that reduces environmental risks associated with disposal and recycling. While there are a number of issues that circle around EPR, the recent controversy in Ontario over phase 2 of the MHSW program serves to highlight a key element of all these issues—the approach to fees and product pricing.

To follow Krever and van der Westhuysen’s typology, the environmental debate on EPR funding splits between the eco-fee-excluded price display camp and the eco-fee-included camp. The arguments forwarded by each camp have little or nothing to do with the economic arguments that have characterized the GST/HST debate but focus instead on the environmental impacts and benefits of either approach.

Those who support the visibility of eco fees, like the supporters of tax-exclusive GST/HST, primarily emphasize that visibility itself sends valuable signals to consumers. In the case of the tax-exclusive camp, the signal seems to be that consumers

29 Ibid., at 844-45.

30 Ibid., at 845.

need to know about the tax in order to hold government tightly accountable for how their taxes are being used. In the case of eco-fee-excluded pricing, proponents argue that the visibility of the eco fee communicates to the consumer that there is a cost associated with sound environmental management at the end of the life of the product they are buying. This information may or may not influence a purchasing decision, but proponents would argue that awareness of the costs of environmental externalities that were not identified before the EPR program is worth promoting in itself. This kind of information can, of course, be communicated in any number of ways, but proponents argue that having the eco fee visibly added to the shelf price at the cash register is the best way to convey this message. The eco-fee-excluded approach, however, like the visible GST/HST, risks angering and annoying consumers if no, or insufficient, supporting information is provided regarding the rationale for the fee. This was one of the major issues that arose in the failure of phase 2 of Ontario's MHSW program.

In the absence of any such communications plan, the fee itself does not provide sufficient rationale for its existence, regardless of how it is named. Calling the fee an "environmental handling fee," or an "eco fee," or an "environmental disposal fee," to name a few examples, tells the consumer very little. What informs the consumer is a proper, widely visible and available communications and advertising program explaining why the fee exists and how it will be spent. This kind of communication and a comprehensive plan to roll it out is what is necessary and should not be confused with the supposed communication of the added price itself.

Along with most producers, the Retail Council of Canada (RCC) is a strong supporter of visible eco fees and eco-fee-excluded pricing. In its submission to the CCME consultation on the Canada-wide action plan for EPR,³¹ the RCC addressed the issue at length and, in particular, raised a number of concerns with the action plan's draft proposal at the time that "[c]osts associated with an EPR program should be internalized as a factor of production of the product and not be visible to the consumer."³² The RCC argued that "mandating hidden fees has effects across the supply chain, typically resulting in increased costs for consumers; much more than if the retailer chose to add the fee visibly as a separate line item on the sales receipt."³³ As we shall see, the CCME's response to this concern was to take a middle position, endorsing neither side in the debate.

A visible, price-excluded eco fee also allows national retailers to advertise and price products in a consistent way across the country, because the eco fee is not usually part of the nationally advertised price and is added at the point of purchase.

31 Retail Council of Canada, "Comments on CCME's Canada-Wide Action Plan for Extended Producer Responsibility," May 29, 2009 (<http://www.retailcouncil.org>).

32 Canadian Council of Ministers of the Environment, *Discussion Document: Towards a Proposed Canada-Wide Action Plan on Extended Producer Responsibility* (Ottawa: CCME, February 2009), 15.

33 *Supra* note 31.

However, this practice is starting to run into challenges associated with a broad desire, on the part of both producers and governments, for national EPR program harmonization. Program harmonization is promoted by the CCME action plan and is being increasingly discussed by PROs, which, in the majority of cases, are incorporated provincially. Efforts are being made by the used oil EPR programs through the National Used Oil Management Association to harmonize and co-manage programs by employing, for example, single-window Web sites and shared administration, but fees can still be different between jurisdictions. Similarly, in electronics EPR programs, discussions are under way on the merits of organizing at a national level, given that most provinces either have programs in place or will do so within the next couple of years; but again, fees can be and commonly are different between jurisdictions.

The question here is whether the issue of fee harmonization could be more easily addressed by producers if the fees were not visible to the consumer and products were advertised nationally, eco fee included. This approach, however, would need to address the challenge of collection and recycling costs varying across the country and being dependent on such things as varied transportation and recycling costs, which are linked to issues of population density and economies of scale. In a truly harmonized national fee regime, there would need to be some cross-subsidization between regions. This presumably already happens in the pricing of nationally advertised products sold by large national retailers and companies, where the costs of distribution to different markets are shared across the country and apportioned equally to the product, whether it is sold in Leroy, Saskatchewan or in downtown Toronto.

Advocates of non-visible eco fees (the eco-fee-included camp) have not used or benefited from the arguments presented in economics and taxation circles for tax-inclusive pricing; instead, they have focused on non-visible fees as a way to encourage better product environmental performance by internalizing the end-of-life costs directly into the product price, in the same way that a product price reflects the producer's cost of manufacturing, distributing, marketing, and selling the product. The argument is that producers need to be accountable for the full life-cycle costs of the product and that the price to the consumer should reflect this. Traditionally, producers have accepted some after-sales responsibility for their products through warranties and guarantees of various sorts, but these are usually valid for only a few months or years, are limited in scope, and do not reflect any responsibility on the part of the producer for what happens to that product when it no longer functions, or when it has been surpassed by new technology. These costs of end-of-life management are the costs that are shifted from taxpayers and municipalities and "extended" to producers through EPR programs. The argument is that eco-fee-included pricing is a better mechanism and a stronger incentive for the producer to think about end-of-life management than is a visible, eco-fee-excluded funding mechanism that shows up at the point of sale.

The Recycling Council of Alberta (RCA) makes the point clearly and succinctly by arguing that "EPR should encourage Design for Environment by sending the appropriate economic signals to the producer. Ideally, the product should bear its

full life-cycle environmental costs.”³⁴ Furthermore, the RCA argues against eco-fee-excluded pricing by stating that “[f]low-through or retail fees download costs onto the consumer, rather than encouraging redesign, and should therefore be avoided.”³⁵

While most producers are happy to be part of a PRO collective and to use undifferentiated fees, there are indications that some companies are reviewing whether their competitive interests and environmental sustainability objectives could be better served by fulfilling their EPR obligations individually, not as part of the PRO. Canadian Tire’s Take Back the Light program is an interesting example of an individual producer responsibility approach, and it is also a program where the costs are being internalized and not made visible to the consumer. Starting on May 31, 2010, Ontario consumers can return any standard, compact, or specialty fluorescent light bulb to any Canadian Tire store for recycling. There are no eco fees charged on bulbs at the time of purchase, and there is no fee charged when a consumer returns a bulb for recycling.

Fees in EPR programs are addressed in the CCME’s action plan, but changes between the draft circulated for consultation in February 2009 (which was responded to by the RCC and many others) and the version approved by the CCME in October 2009 reflect the debate that occurred within government circles as the action plan was being developed. As noted above, the draft action plan stated that “[c]osts associated with an EPR program should be internalized as a factor of production of the product and not be visible to the consumer.”³⁶ This is clearly a statement of support for the eco-fee-included pricing camp. The final, approved version of the action plan, however, is considerably less clear on the issue and perhaps even deliberately vague. The section on fees in the final version states:

Costs associated with an EPR program should be internalized as a factor of production and be incorporated into (the) market price of the product—i.e., the costs for end-of-life management of products should be treated similarly to other factors of production (such as manufacturing, distribution, marketing and sales) and incorporated into wholesale and retail product prices. Jurisdictions may or may not choose to regulate the visibility or non-visibility of such fees at the point of consumer purchase.³⁷

That the CCME was willing to support price internalization but unwilling to support either the eco-fee-included pricing camp or the eco-fee-excluded pricing camp, instead leaving the decision up to individual jurisdictions, is perhaps a reflection of the opposition of stakeholders such as the RCC and the majority of producers. The CCME’s position also reflects the lack of consensus on the issue within the federal,

34 Recycling Council of Alberta, “Mission and Goals, Extended Producer Responsibility (EPR) Design Principles” (<http://www.recycle.ab.ca>).

35 *Ibid.*

36 *Supra* note 32.

37 *Supra* note 14, at 29.

provincial, and territorial governments. This lack of consensus may be an indication of a healthy unwillingness to be too prescriptive with regard to the structure and funding of EPR programs, but perhaps more likely, and more importantly, it reflects uncertainty and the paucity of evidence on the relative merits of the two approaches. These considerations, coupled with widespread private sector support for the eco-fee-excluded approach, have left governments clearly on the fence and largely silent on the issue, as in the case of British Columbia's Recycling Regulation cited earlier.

THE CASE FOR AND PRINCIPLES OF ECO-FEE-INCLUDED PRICING

Notwithstanding the opposition of most producers to eco-fee-included pricing, on balance, given the objectives of EPR, including eco fees in the price posted and advertised to the consumer does seem more likely to send a stronger signal to a producer than is the case for visible fees. Visible fees are seen as no different than a tax on sales that is passed directly and visibly through to the consumer. With a visible eco fee, the producer acts solely as the fee collector and is less directly accountable because the consumer is the one who explicitly pays the fee. In this regard, the visible eco fee is not very different than the visible GST/HST. In both cases, accountability does not rest with the producer. The producer prices the product for the market through a complicated process of costing, with due regard for competitive and profit pressures, and then simply adds the fee. This is not a recipe for environmental accountability. It is a recipe for fee collection.

The argument for eco-fee-included pricing does run up against one of the stated advantages of the typical PRO structure—namely, taking EPR program decisions out of the boardrooms of the individual PRO members and allowing more flexible decision making by the PRO. If the invisibility of the eco fee makes the PRO member more accountable and makes the corporate head office think more about the operation of the PRO and the environmental challenges of the company's products, then the non-visible fee structure definitely helps to meet the objectives of EPR policy. The price-included eco fee model trades off the advantages of a more independent PRO, but this is a price worth paying if, in the process, individual producers become more accountable for the environmental design and performance of their products.

It might also be the case that eco-fee-included pricing would be valuable in helping to promote more harmonized programs. The issue of different fees in different jurisdictions is a challenge to manage in areas where populations share an interprovincial boundary, such as Ottawa and Gatineau, or Lloydminster, or in cases where there is easy access to the market of an adjoining province. Consumer purchases may be influenced if an alternative purchasing location with a lower fee is easily available. Differing fees also lead to higher administrative and management costs for producers that have to remit fees to PROs in different jurisdictions that use different fee-costing models. Visibility only exacerbates the issue. If the eco fee is included in the price, the producer will have more flexibility to harmonize prices between adjoining jurisdictions.

The Ontario MHSW case suggests strongly that governments run political risks if they are silent and provide no guidance on the issue of fee visibility. Silence on the issue effectively defaults to the typical producer and retailer view that eco fees should be visible. The silence of the Ontario Ministry of the Environment and its agency Waste Diversion Ontario on the visibility issue allowed the MHSW program to be built by Stewardship Ontario around the commonly used eco-fee-excluded model. If governments have learned anything from the Ontario experience, it is surely that silence on the visibility or non-visibility of eco fees is no longer a tenable or advisable position. The Ontario government took most of the public and media blame for the failure to successfully launch phase 2 of the MHSW program, and it was for this reason that the government cancelled that phase of the program. The cancellation decision reversed previous commitments to the EPR approach. This was unfortunate because it was producers and retailers who set the fees, it was producers and retailers who failed to communicate with the public, and it was producers and retailers who mishandled the implementation, not the provincial government.

To address the issues discussed above and to help assure the successful implementation of EPR programs using an eco-fee-included approach, there are a number of guiding principles that governments and producers should adopt or take into consideration when structuring both EPR regulations and operational practice.

Regulated Eco-Fee-Included Pricing

First and most importantly, eco-fee-included pricing should be prescribed in regulations governing the structure of EPR programs.

The current common government practice of remaining silent on the issue of the visibility or non-visibility of eco fees and thereby defaulting to producers and retailers, which generally prefer flowthrough visible fees, has weakened the policy objectives of EPR programs and was partially responsible for the failure of phase 2 of Ontario's MHSW program.

Communication with Consumers

In support of eco-fee-included pricing, producers should, at the outset of new EPR programs and for some time afterward, communicate to consumers that the advertised and posted shelf price includes a cost for the proper recycling and end-of-life management of the product.

It is likely that producers would want to do this anyway. It is less clear that retailers have a similar interest. Poor in-store promotion of EPR programs is a widespread problem, even with eco-fee-excluded pricing. This is an area of common complaint from the managers of PROs, who have legal obligations for a certain level of collection and recycling and are legally accountable to the governing jurisdiction for the program. Their challenge is making sure that retailers properly inform the consumer by using the PRO-provided in-store advertising and by properly training in-store staff to be able to explain the rationale for an eco fee.

Differential Fees

Eco-fee-included pricing should be built on and incorporate differential fees based on the different environmental management costs and environmental performance of products included in the program.

To support differential fees within an eco-fee-included pricing structure, producers have to be prepared to negotiate the fees associated with their products within the PRO. Similarly, the PRO should be prepared to charge appropriate fees if the particular product concerned has some properties that render it more expensive to recycle than other similar products in the same category. There should be no reason why the collective membership within a PRO should share the collective burden of paying extra to recycle egregious packaging or an otherwise problematic product. For a producer, even a small price point difference over a production run may provide enough incentive to rethink product design, particularly if the market is large and national in scope rather than regional. If fees were negotiated, the price point differences at the point of sale could encourage the consumer to make a more environmentally friendly purchasing choice.

While this approach may prove difficult, the packaging programs provide some precedent. A starting point would be to reward, through lower fees, producers whose products are simpler to recycle and do not require segregation and special handling. For example, within the PROs that manage used crankcase oil, debate is under way on how to handle one type of oil container that is made of a different plastic than all the others, requiring segregation and thus incurring added costs for both the program and the PRO membership as a whole.

Individual Producer Responsibility

Further encouragement of corporate environmental responsibility and support for differential fees can be achieved within a price-included EPR program if the extended producer responsibility is explicitly directed to the individual producer rather than to a collective of producers.

Under Ontario's proposals for revisions to the Waste Diversion Act, 2002,³⁸ which were released in October 2009, the Ministry of the Environment proposed "[m]aking individual producers fully responsible for meeting waste diversion requirements" and allowing individual producers "to meet their waste diversion requirements either by joining a materials management scheme or by developing their own individual waste diversion plan."³⁹ The current methodology in Ontario for EPR program formation is very process oriented and directed toward the formation of collective PROs such as Stewardship Ontario. If the 2009 proposals are adopted, producers will

38 SO 2002, c. 6.

39 Ontario, Ministry of the Environment, *From Waste to Worth: The Role of Waste Diversion in the Green Economy, Minister's Report on the Waste Diversion Act 2002 Review* (Toronto: Ministry of the Environment, October 2009), 16 and 17.

have more latitude to compete outside the collective PRO on the basis of their environmental performance.

Individual producer responsibility is also a way to support differentiated fees. If producers choose to set up a program independent from a PRO (as Canadian Tire did with its Take Back the Light program), it may be because they can differentiate their products and services from their competitors while at the same time encouraging consumers to visit their stores.

Demonstrable Linkage of Fees to Service Provided

The funds raised through eco-fee-included pricing, and in fact all such fees, must be directly linked to the services provided by the PRO in the implementation of its legal obligations under an EPR regulation.

The 1998 decision of the Supreme Court of Canada regarding provincial probate fees in the *Eurig Estate* case⁴⁰ defined the distinction between fees and taxes, and this case law must be respected in EPR programs. Proper accounting and reporting by the responsible PRO is key and should be a clear requirement in the governing legislation and in the mandate of the PRO.

Producer Responsibility for Stewardship Plans

Governments and government officials should not approve EPR stewardship plans or eco fees, whether visible or not. Accountability for stewardship plans and the funding mechanisms within them should rest exclusively with producers.

Governments are politically accountable to their electorates for the targets set by EPR regulations and the overall success of programs, but details of EPR program operation and funding are the responsibility of producers in the same way that producers are accountable for the functionality of the products they sell. Producers and PROs set fees, and relieving government of the responsibility for approval for the details of EPR stewardship plans will minimize suggestions that the government is responsible for the fees or that the fees are a tax. It is admittedly debatable whether such an approach would have served to distance the Ontario government from the eco fee decisions of Stewardship Ontario that caused such controversy in the MHSW case.

Pollution prevention plans that can be required under the Canadian Environmental Protection Act, 1999 and are directed to producers and industry sectors have been used to address the handling of waste such as mercury switches in vehicles in a similar fashion to an EPR program. Guidance is provided to the regulatees by the Environment Canada regulation as to what the pollution prevention plan should contain, but the plan itself is not actually approved by the minister. The minister is therefore not liable for the operational details of the plan. That responsibility resides with the regulatees—in the case of mercury switches, the vehicle manufacturers and the steel industry.

40 *Eurig Estate (Re)*, [1998] 2 SCR 565.

Transparent Reporting

EPR programs and the producers that run them should report in a clear and transparent way on how they have addressed their obligations, what the costs are, and what the program has achieved.

Standards do exist for reporting on EPR programs,⁴¹ and the CCME action plan speaks of working with stakeholders to “identify protocols, responsibilities and timelines for producing a national annual status report on the performance of the priority EPR programs.”⁴²

THE NEW BRUNSWICK AND QUEBEC APPROACHES TO ECO FEES

Notwithstanding that most EPR programs use eco-fee-excluded pricing, that the CCME has not adopted any clear guidance on the visibility/non-visibility issue, and that most jurisdictions in Canada are silent on the question, two provinces have shown some leadership in support of eco-fee-included pricing and have adopted some of the principles outlined above. In both New Brunswick and Quebec, waste paint EPR programs operate using the eco-fee-included pricing approach.

New Brunswick

New Brunswick is the one jurisdiction in Canada that has explicitly tackled the issue of eco fee inclusion/exclusion in its environmental legislation. Under the province’s Clean Environment Act, the lieutenant governor in council may make regulations “prohibiting industry from charging separate fees to consumers with respect to the costs associated with implementing and operating a product stewardship plan.”⁴³ In addition, wide-ranging authority exists respecting fees, deposits, and refunds and with regard to the “administrative costs of a stewardship board.”

This authority has been used by the province to mandate eco-fee-included pricing for its waste paint EPR program. New Brunswick regulation 2008-54 states:

No brand owner shall charge a retailer and no retailer shall charge a consumer any separate fee with respect to the costs associated with implementing or operating a paint stewardship plan, or with respect to supplying material under section 46.⁴⁴

The same regulation mandates the communication to the consumer of information about the EPR paint program and requires retailers

41 Stratos Inc., *Performance Measurement and Reporting for Extended Producer Responsibility Program*, reporting guidance document prepared for Environment Canada by Stratos Inc. (Ottawa: Stratos, October 2007).

42 *Supra* note 14, at iv.

43 New Brunswick Clean Environment Act, RSNB 1973, c. C-6, as amended, section 32(r.26).

44 New Brunswick Designated Materials Regulation, NB reg. 2008-54, filed April 25, 2008, section 47.

to post or distribute the educational and consumer material that it receives from the brand owners at the area inside the retailer's premises where paint is displayed and

- a) at the main entrance of the retailer's premises, or
- b) at the area inside the retailer's premises where the transaction to purchase the paint takes place.⁴⁵

New Brunswick has therefore fulfilled two key principles, first, by mandating eco-fee-included pricing and, second, by mandating a visible communications program for the consumer. Indications are that the province will follow a similar approach for its used oil regulation, which is currently under consideration.

Quebec

As far as the consumer is concerned, Quebec's Éco-peinture EPR program runs the same way as the waste paint program in New Brunswick, although the regulatory framework supporting the approach is different. The regulation governing the Quebec program⁴⁶ is silent on the issue of the internalization of costs and the visibility of fees. The costs of the program are borne by the 46 members of the PRO, Éco-peinture, through the levying of an eco fee of \$0.25 per paint container on all paint sold in the province. The eco fee is not added to the cost of the paint at the cash register, and prices are posted and advertised with the eco fee included. The waste paint initiative is supported by a communications plan developed by Éco-peinture, which explains the program and how it is funded.

The actual operation of Éco-peinture is governed by an accreditation agreement between the PRO and Recyc-Québec, a provincial agency mandated by the province to provide authority to the PRO and to otherwise support recycling and waste diversion in Quebec. The accreditation agreement with Éco-peinture, which was negotiated in 2001, obligates the PRO to internalize the eco fees so that they are not visible to the consumer at the point of purchase.

A similar structure governs the operation of Quebec's used oil EPR program, but in this case, an agreement on the internalization of fees was not reached and members of the used oil PRO are free to post prices either including or excluding the eco fee. This has resulted in a somewhat confusing situation in the marketplace, with some producers and retailers adding the eco fee at the point of purchase and some not.

There is nothing under the current Quebec regulations to prevent separate identification of the eco fee in the final bill for a product at the cash register, along with the Quebec sales tax and the GST, prior to showing the total amount. However, under both the paint and the used oil programs, it is the producers, not the retailers, who are responsible for the eco fees and for fee setting, collection, and payment to the PRO. This is a key difference between the Quebec programs and the approach adopted in Ontario, where retailers appear to have a larger role and responsibility.

45 Ibid., at section 46(3).

46 Regulation Respecting the Recovery and Reclamation of Discarded Paint Containers and Paints, RQ, c. Q-2, r. 20.01 (Environment Quality Act), June 2000.

In Quebec, the Consumer Protection Act⁴⁷ also has a bearing on the issue of eco fees. Section 224 of the act states:

[T]he price advertised must include the total amount the consumer must pay for the goods and services. However, the price advertised need not include the Québec sales tax or the Goods and Services Tax. More emphasis must be put on the price advertised than on the amounts of which the price is made up.

The section further states:

No merchant, manufacturer or advertiser may, by any means whatever,
 (a) lay lesser stress, in an advertisement, on the price of a set of goods and services than on the price of any goods or services forming part of the set.

Both of these provisions support the practice followed in the Éco-peinture program of having only one posted price that includes the eco fee.

Under proposals for a generic omnibus EPR regulation currently being discussed in Quebec, consideration is being given to making the individual producer the responsible party, accountable for meeting the targets for recovery and recycling and for meeting the regulatory obligations. Consideration is also being given to requiring the internalization of eco fees through eco-fee-included pricing, similar to the approach adopted in New Brunswick's Clean Environment Act.

CONCLUSIONS

Eco-fee-included pricing has much to recommend it, and it is supported by some of the arguments made for tax-inclusive pricing with respect to the GST/HST.

Those in favour of the inclusion of eco fees in posted prices believe that the exclusion of prices fails to give the necessary signals to industry to internalize end-of-life costs and improve the environmental performance of their products, because those costs are demonstrably passed on to the consumer at the point of purchase. Those supporting the visibility of eco fees, which is generally a position aligned with most producers and retailers covered by EPR programs, argue that the management of fees is best left to the producers and that the visibility of fees sends a clear signal to consumers that there are environmental and financial costs associated with their purchase of products that have hazardous or other special characteristics requiring environmentally sound recycling or end-of-life disposal.

Regardless of the arguments presented, the fact that most EPR programs use the eco-fee-excluded approach means that there has been little or no opportunity to test the thesis that environmental benefits derive from fee-included pricing. Most eco fees are visible and are flowed through to the consumer. Only in the case of Quebec's Éco-peinture and the New Brunswick programs described above are fees included in the posted price. Research in this area would therefore be valuable.

47 RSQ, c. P-40.1.

Furthermore, it has been suggested in more recent thinking about EPR that the extension of responsibility, regardless of how costs are recovered and managed, may not, in and of itself, be sufficient to drive the environmental product redesign agenda advocated by EPR proponents. In an international marketplace dominated by large multinational companies with globally branded products, even EPR program costs and eco fees on a national scale may not be enough to drive the changes that environmental policy makers are seeking. In this respect, the CCME action plan, which includes a whole section on supportive policies and regulations, argues that

[t]o ensure the environmental objectives are met, particularly as they relate to design for the environment, jurisdictions will have to think comprehensively and package EPR regulations and policies with other complementary initiatives and regulatory instruments.⁴⁸

None of this discussion, however, detracts from the key points in favour of an eco-fee-included pricing approach supported by a communications plan to inform consumers that the environmental externalities are included in the shelf and cash register price. In summary, eco-fee-included pricing

- would advance EPR objectives by making producers more directly accountable for environmental design considerations in their products;
- would make producers more accountable for EPR program financing and operation, and would serve to help avoid the kind of controversy that ensnared Ontario;
- would give consumers considerably clearer information as to the full cost of the products they are purchasing;
- when supported by a communications plan, would raise consumer awareness of environmental costs;
- could be compatible with a differential fee mechanism that would reflect environmental and recycling costs; and
- would serve to support moves toward increasing harmonization of programs across the country.

It is unclear whether the New Brunswick and Quebec approaches will be followed by other jurisdictions in Canada. They do, however, serve as an example of a workable eco-fee-inclusive pricing model. Given the failure of phase 2 of Ontario's MHSW program, it is suggested that Ontario as well as other jurisdictions should look to the examples of New Brunswick and Quebec and seriously consider reviewing their EPR regulations, to avoid defaulting to the prevailing producer and retailer positions, which favour eco-fee-excluded pricing, and instead promote cost internalization and eco-fee-included approaches.

48 Supra note 14, at 18.