

# Eco fee sham

## Experts say the eco fees charged for recycling are 'illegal'

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|              |                     |       |
|--------------|---------------------|-------|
| 053-0468-2   | VIM W/BLEACH 50 \$  | 2.59  |
| 5X098-0778-8 | ECO \$ 0.130 ea.    |       |
|              | ECO FEE \$0.13 \$   | 0.65  |
| 048-0666-4   | VB ENAML FLTBLK \$  | 2.49  |
| 098-0770-4   | ECO FEE \$0.06 \$   | 0.06  |
| 065-3017-0   | DUR/ALK BATT 9V \$  | 4.59  |
| 098-0765-8   | ECO FEE \$0.03 \$   | 0.03  |
| 053-0316-4   | CASCADE AP CB 2 \$  | 6.99  |
| 098-5045-2   | ECO FEE \$0.09 \$   | 0.09  |
| 2X053-0314-8 | ECO \$ 1.490 ea.    |       |
|              | COMET CLEANER 6 \$  | 2.98  |
| 053-5318-0   | PAL. MARINE 625/ \$ | 1.79  |
| 053-0398-8   | DIRAND MAX 900 H \$ | 3.99  |
|              | SUBTOTAL            | 26.26 |

### The bill. (VERONICA HENRI/Toronto Sun)

The new Ontario "eco fees" charged to consumers on thousands of products are illegal, consumer and legal experts say.

"It's an illegal fee," Mel Fruitman, vice president of the Consumers' Association of Canada, told the Toronto Sun. "It's an add-on fee and there is nobody in this country who is allowed to put on a tax except governments. As far as I can tell, unless they slipped through something quietly in the middle of the night when everybody else was asleep including me, they have no authority to do this."

Cyndee Todgham Cherniak, a sales tax counsel affiliated with Lang Michener LLP, said the fees are not permissible under the provincial government's own Waste Diversion Act or the Constitution of Canada.

"This smells like a tax, looks like a tax, how is this different from a sales tax?" Todgham Cherniak said. "What you've got is the tax being passed on from someone to the consumer which means it's an indirect tax, and under the Constitution Act... the province can only impose direct taxes, they can't impose indirect taxes."

Both Fruitman and Todgham Cherniak pointed to the tire tax, where the consumer pays a fee at the disposal site, as a legally acceptable way to recoup the cost of recycling a product.

Instead, under the program set up by Stewardship Ontario, a fee is charged to the "brand owner" or importer of a designated product and then passed onto the consumer either in the sticker price or as an eco fee added at the cash register.

Public complaints are already coming in that retailers are charging consumers more than the original fee set by Stewardship Ontario, which is illegal, according to Environment Minister John Gerretsen.

Amanda Harper Sevonty, a spokesperson for Stewardship Ontario, said it is up to the manufacturers and retailers to determine if and how their fees are passed onto customers.

"We strongly encourage our stewards if they are going to pass the fee onto retailers, and retailers onto consumers, that the fee that they pass on reflects the fee that they are charged," she said. "But we have no way of monitoring, and quite honestly, we cannot step in and tell them what to set the fees at because it violates the Competition Act. So one retailer may decide to charge something, another retailer may decide not to charge anything. We have no authority over that whatsoever."

Todgham Cherniak said Premier Dalton McGuinty should have been closely monitoring how Stewardship Ontario and industry were implementing the government's own legislation.

"McGuinty has not been watching what they're doing," Todgham said. "So you've got all these industry associations imposing these fees and there's no one watching the fox in the hen house."

Stewardship Ontario is an independent body set up by the Ontario government to deal with waste that should be diverted and recycled, or treated before going into a landfill site. Eco fees were introduced by Ernie Eves' Conservative government.

The program began charging fees for nine designated materials, such as paint, in 2008, but ramped it up to 22 materials on July 1, the same day the government brought in the harmonized sales tax.

Tory MPP Lisa MacLeod said the combination of the HST and what she calls the "Eco-tax" drove up the cost of 10,000 consumer items.

Sun block, vitamins, batteries, air conditions, travel alarm clocks, potting soil, laundry detergent and car wax are among the thousands of items subject to eco fees, in some cases doubling the cost.

Asked if the consumer eco fees are illegal, Gerretsen notes the program has been around for almost two years without public complaint.

"That is not an issue that has been raised with me so far over the last three years that I've been involved with setting up these various programs with Stewardship Ontario. If there is a legal issue then that should be tested in court," he said. "I can't comment on that."

Todgham Cherniak said the absence of a legal challenge is not an effective argument the fees are indeed legal.

"It doesn't make it legal just because people haven't figured it out yet," she said. "The Constitutional issue's there, regardless, and the inconsistencies with the (Waste Diversion) Act are there, regardless."

Eco fees could be subject to the HST, effectively a tax on a tax, and apply even if the consumer never intends to dispose of the product or, like detergent, it goes down the drain instead of the dump, she said.

There's also the possibility that many years down the road someone could be charged a second disposal fee for an item that included an eco fee at point of sale.

Gerretsen said people need to keep in mind the valuable goal of the program: To keep waterways and land clear of toxic and hazardous materials.

About 20,000 tonnes of potentially dangerous toxic waste has been diverted or treated and that number will grow to 60,000 tonnes with the addition of new materials, he said.

All of the money raised through fees to industry are used by Stewardship Ontario to deal with the waste. None of the money flows into government coffers.

The minister, however, insists fees are now being monitored.

Gerretsen said the retailers and manufacturers can pass on the Stewardship Ontario fees but cannot bump up the fees to make a profit.

"That's why we've got monitoring in place," the minister said. "We're already hearing some stores are charging too much, and we go right back to the Stewardship council which is made up of representatives of these various organizations that are part of it, and say, you know, you've got to sort that out."

Diane Brisebois, president and CEO of the Retail Council of Canada, and the retail representative on Stewardship Ontario, said the eco fee serves as a valuable tool to tell consumers they are purchasing a product that may be hazardous to the environment.

Stewardship Ontario fees charged to brand owners or importers, called stewards, also encourage industries to seek out ways to develop more environmentally-friendly products by driving up the cost of those that are not, she said.

However, Stewardship Ontario devoted all its energies to setting up the programs and not enough to informing the public about them, contributing to the sticker shock that many Ontarians are feeling right now, she said.

"Where I think we fell short, Stewardship Ontario, and the industry association, is to develop some material and guidelines for retailers to use in their stores so that they can better inform consumers," Brisebois said.

"We thought we should do it immediately following the program and that was a mistake."



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