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MEMORANDUM

Subject to Solicitor-Client Privilege

**TO: P.K. Misra
Director, Waste Management Policy Branch
Ministry of the Environment**

**FROM: Mario Faieta
Solicitors Team Leader
Legal Services Branch
Ministry of the Environment**

RE: Proposed Scrap Tire Diversion Program Plan

The purpose of this memo is to confirm our discussion today regarding the proposed Scrap Tire Diversion Program Plan submitted by Waste Diversion Ontario.

The Plan proposes that tire retailers pay a fee for each tire sold by the retailer. The amount of that fee primarily reflects the estimated cost of ensuring that scrap tires are primarily recycled or re-used and thereby diverted from disposal at a landfill. However, it also includes an amount for “stockpile remediation” in order to fund the recycling, re-use or disposal of current stockpiles of scrap tires.

There is nothing in the proposed Plan that demonstrates that the stewards (ie. current tire retailers) are, in any way, historically responsible for the creation of the existing scrap tire stockpiles.

As a result it is my view that the proposed fee is neither constitutionally nor statutorily authorized.

As a matter of constitutional law a regulatory charge can be made for the purpose of defraying a regulatory program. However, there must be a connection between the payor and the regulated activity. If that element is lacking as it is in this instance, then the regulatory charge takes the appearance of a tax (ie. a re-distributive levy) rather than a regulatory charge (ie. a cost recovery levy).

Further, subsection 30(3) of the *Waste Diversion Act* (“WDA”) states that:

The fee paid by a steward should fairly reflect the proportion of the sum referred to in paragraph 1 that is attributable to the steward.

Given the lack of a demonstrated connection between those historically responsible for the creation of existing tire stockpiles and stewards, it is my view that the proposed fee neither satisfies the constitutional law requirements for a regulatory charge nor does it satisfy the requirements of subsection 30(3) of the WDA.

Mario Faieta