

**IN THE MATTER OF A HEARING OF
THE BEVERAGE CONTAINER MANAGEMENT BOARD
REGARDING PERMIT #13-BCD-081 ISSUED TO
ALBERTA RECLAIM & RECYCLING COMPANY INC.**

BCMB Hearing Panel:

Patricia McLeod, Q.C. Chair
Andrew Stephens
Elaine Noel-Bentley

Counsel Appearances:

William Shores, Q.C. for the Complaints Director, BCMB

Date and Place of Hearing:

January 27, 2017
Edmonton, Alberta

DECISION OF THE BCMB HEARING PANEL

I. INTRODUCTION

1. This decision arises from a hearing before a Hearing Panel of the Beverage Container Management Board (the "BCMB").

2. The BCMB Complaints Director directed this matter to a Hearing alleging that Alberta Reclaim & Recycling Company Inc. (the "Permit Holder") has breached the *Beverage Container Recycling Regulation* (AR 101/1997) (the "Regulation"), certain BCMB by-laws, the permit conditions and the Service Agreement entered into between the Alberta Bottle Depot Association (the "ABDA") and the Alberta Beverage Container Recycling Corporation ("ABCRC").

3. In essence it is alleged that the Permit Holder engaged in a systematic effort to defraud the Alberta beverage container recycling system by transporting significant numbers of beverage containers into Alberta from outside of the Province and introducing them into the system in order to obtain deposit monies and handling commissions to which it was not entitled.

4. The issues before the Hearing Panel are (1) whether the Permit Holder contravened the Regulation, BCMB by-laws, permit conditions and Service Agreement or any of them as alleged; (2) if so, whether Permit #13-BCD-081 issued to Alberta Reclaim & Recycling Company Inc. should be cancelled or suspended.

II. JURISDICTION

5. The Beverage Container Management Board (the "BCMB") is authorized by the *Beverage Container Recycling Regulation* (AR 101/1997) (the "Regulation") to issue permits to

beverage container depots in Alberta. The Regulation also gives the BCMB the authority to regulate all aspects of those permits including their cancellation or suspension.

6. In accordance with the authority given to the BCMB by the Regulation, the BCMB has passed by-laws regulating beverage container depot permits. Under section 7(4) of the BCMB *Administrative By-Law* the BCMB may cancel or suspend a permit provided that the cancellation or suspension follows the procedure set out in the *Beverage Container Depot Operation and Administration By-Law* (the "BCDOA").

7. Under the BCDOA, this Hearing Panel has been delegated the authority of the BCMB to conduct the hearing. The Hearing Panel was appointed by the Chair of the BCMB and the President of the BCMB in consultation with the BCMB Hearing Director as required by the BCDOA. The Hearing Panel consists of three voting Directors of the BCMB, all of whom represent the General Membership Sector of that organization.

8. Notice of the hearing was given to the Permit Holder and to Johnny Ha, the authorized representative of the Permit Holder. For the purpose of this decision, Mr. Ha and the Permit Holder may be referred to as the Permit Holder or as the Andrew Depot, since the Permit Holder operated a depot using that name. The Permit Holder retained counsel who participated in pre-hearing proceedings. However, prior to the hearing, counsel for the Permit Holder advised by email, copies of which were provided to the Hearing Panel, that the Permit Holder would not be attending the hearing and had instructed legal counsel not to attend, oppose or make any submissions.

9. The jurisdictional requirements for the Hearing Panel and the hearing were established through Exhibits 1 and 2 entered at the Hearing. At no time prior to the hearing was any objection raised by counsel for the Permit Holder regarding the jurisdiction of the Hearing Panel.

10. The hearing was held in public in accordance with s.5.2 of the *Hearing Panel Rules of Practice and Procedure* (the "Rules"), which can be found at Schedule A to the BCDOA.

III. ALLEGATIONS AGAINST THE PERMIT HOLDER AND MR. HA

11. The BCMB issued a Notice of Hearing to the Permit Holder on August 30, 2016 in relation to this matter alleging that between January 5, 2012 and February 26, 2013, the Permit Holder, under the direction of Mr. Ha,

- a. contravened sections 11(1), 11(2), 14(1) and 14(2) of the Regulation;
- b. breached sections 7(4) and 7(5) of the BCMB Administrative By-law;
- c. contravened Term 3(1) of Permit No. 13-BCD-081;
- d. failed to comply with sections G(2), J(1a, b and g) and J(2.1,2.2,2.3 and 2.4) of the *Beverage Container Depot Criteria*; and
- e. failed to comply with Schedule "H", Section 2.3.1 of the ABCRC and ABDA Service Agreement.

IV. EVIDENCE

12. The evidence before the Hearing Panel consisted of the records marked as Exhibits 1-4 at the hearing and of the oral evidence from three witnesses called by counsel for the Complaints Director. The bulk of the documentary evidence was contained in Exhibit 3, which had been disclosed to the Permit Holder and to the Hearing Panel prior to the hearing as part of

the requirements relating to disclosure and written submissions in the Rules. The documentary evidence was voluminous and only the key documents and evidence will be specifically referenced in this decision.

History and Outcome of Previous Proceedings Involving the Permit Holder

13. Part of the reason for the extensive documentation available to the Hearing Panel is that there were previous proceedings instigated by Alberta Environment and Parks ("AEP") against the Permit Holder and Mr. Ha arising out of similar allegations. At the time the investigation was commenced the name of the Department was Alberta Environment and Sustainable Resource Development but, for ease of reference, this decision will refer to AEP.

14. A detailed account of the history of the AEP proceedings is contained in the Investigation Report of Ms. Lauren Moran, the Lead Compliance Officer and Investigator, BCMB [Exhibit 3 Tab 1 pp. 6-11]. The Records of the Director relating to the AEP investigation were provided to the Hearing Panel in electronic format as part of Exhibit 3. The Hearing Panel will not repeat the history of those proceedings in detail, but will set out a brief chronology and summary of the key events.

15. The activities giving rise to this hearing were first brought to the attention of the BCMB on February 22, 2013. Because it was apparent that the matter could involve breaches of the Regulation, and jurisdiction over offences committed under the Regulation resided in AEP, the matter was immediately reported to them. In the early stages of the matter, the BCMB provided information to AEP to assist in its initial inquiries. However, once the AEP commenced its formal investigation, the BCMB was not included in that investigation and was not provided with information gathered in the course of that investigation.

16. On February 13 and 15, 2015, Michael Aiton, the Regional Compliance Manager for AEP (the "Director") issued Preliminary Administrative Penalty Assessment 15569 to the Permit Holder, Mr. Ha and another individual regarding contraventions of sections 11(1), 11(2), 14(1) and 14(2) of the Regulation.

17. The counts that were before the Director are relevant to these proceedings and are reproduced here for ease of reference:

Count 1: On or about January 4, 2012, Alberta Reclaim and Recycling Company Inc. contravened Section 11(2) of the *Beverage Container Recycling Regulation* by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 34 bales of containers weighing 25364 pounds (11414 kg).

Count 2: On or about February 1, 2012, Alberta Reclaim and Recycling Company Inc. contravened Section 11(2) of the *Beverage Container Recycling Regulation* by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 43 bales of containers weighing 40685 pounds (18455 kg).

Count 3: On or about March 8, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the *Beverage Container Recycling Regulation* by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 45 bales of containers weighing 33108 pounds (14969 kg).

Count 4: On or about April 18, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 26 bales of containers weighing 24461 pounds (11096 kg).

Count 5: On or about April 26, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 38 bales of containers weighing 23584 pounds (10698 kg).

Count 6: On or about May 22, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 48 bales of containers weighing 30245 pounds (13697 kg).

Count 7: On or about June 20, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 45 bales of containers weighing 31740 pounds (14410 kg).

Count 8: On or about July 18, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 34 bales of containers weighing 31347 pounds (14231 kg).

Count 9: On or about July 25, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 48 bales of containers weighing 22183 pounds (10071 kg).

Count 10: On or about August 16, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 48 bales of containers weighing 32979 pounds (14972 kg).

Count 11: On or about October 4, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 39 bales of containers weighing 22311 pounds (10129 kg).

Count 12: On or about October 11, 2012, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 34 bales of containers weighing 29662 pounds (13466 kg).

Count 13: On or about January 8, 2013, Alberta Reclaim and Recycling Company Inc. contravened section 11(2) of the Beverage Container Recycling Regulation by accepting containers that were transported from Yukon into Alberta and returning them for a refund. The amount transported to 14318-140 Street, Edmonton, Alberta consisted of 34 bales of containers weighing 29,535 pounds (13409 kg).

Count 14: On or about January 5, 2012 to February 26, 2013 Alberta Reclaim and Recycling Company Inc. acted contrary to section 14(1) of the Beverage Container Recycling Regulation, by operating a bottle depot without a permit at 14318-140 Street, Edmonton, Alberta.

Count 15: Between October 15, 2012 and February 26, 2013 the Andrew Bottle Depot, operated by Alberta Reclaim and Recycling Company Inc. contravened section 14(2) of the Beverage Container Recycling Regulation by not complying with the terms and conditions of the issued permit.

18. The Permit Holder, Mr. Ha and the other party were provided notice of the proposed Administrative Penalty. On February 20, 2015, the Director issued a final decision finding against the parties on all counts and assessing a \$75,000 base penalty and a penalty of \$769,778 for economic benefit derived from the contraventions for a total Administrative Penalty of \$844,778 [Exhibit 3 Tab 1A].

19. The parties appealed the Director's decision to the Alberta Environmental Appeals Board (the "EAB"). The appeal before the EAB proceeded on July 19, 2016. The EAB rendered its decision on August 18, 2016. The EAB upheld the Director's decision, but varied the Administrative Penalty by increasing it from \$844,778.00 to \$871,928 [Exhibit 3 Tab 1C].

20. The evidence before the Hearing Panel, through the written and oral evidence, was that the Permit Holder and Mr. Ha conceded liability for all 15 counts before the EAB and the only issues before the EAB related to the amount of the Administrative Penalty that should be imposed as a consequence. The EAB decision indicates that Mr. Ha did not testify before the EAB on the appeal and that although Mr. Diep attempted to argue that he was not a director of the Permit Holder at the relevant times, ultimately he conceded responsibility for Counts 1 to 6. There was no evidence called on behalf of the Permit Holder or Mr. Ha in relation to the remaining Counts.

21. The compliance department of the BCMB commenced its own investigation immediately after the decision was given by the EAB. The investigation was conducted by Ms. Moran. Ms. Moran reviewed the Director's Record of Proceedings as well as the decisions of the Director and the EAB. Ms. Moran also reviewed BCMB records and documentation as outlined in the Investigator's Report [Exhibit 3 Tab 1].

22. On August 4, 2016, Ms. Moran wrote to the Permit Holder, to the attention of Mr. Ha, to advise that conduct of the Andrew Depot was under review and providing an opportunity to respond to the matters raised in her correspondence [Exhibit 3 p.175]. On August 22, 2016, the BCMB received a response by fax from the fax number on record at the BCMB for the Permit Holder. The fax was unsigned, but purported to be from the Permit Holder and Mr. Ha. In that letter, the Permit Holder asked that Permit not be cancelled or suspended. Nowhere in the letter did the Permit Holder deny that it had engaged in the alleged conduct. Rather, the letter indicates that "we have been issued the fines and we have learned from our mistakes" and that "we respectfully regret everything we did wrong and request that you allow us to continue to do business and prove to you that we have learned from our mistakes." [Exhibit 3 p. 106].

23. Although the Permit Holder retained counsel, the Permit Holder never provided any further information or explanation to the BCMB regarding the allegations against it.

V. FINDINGS OF FACT

24. As noted previously, the Hearing Panel had extensive background information and evidence relating to the activities of the Permit Holder during the relevant time period because of the AEP proceedings. Because the Permit Holder conceded liability before the EAB with respect to all counts that had been put forward, did not attend the hearing and made no submissions on any aspect of the proceedings before the BCMB, none of this evidence has been challenged.

25. On the basis of the evidence before it, including the decisions of the Director and the EAB and the oral evidence from the witnesses called on behalf of the BCMB Complaints Director, the Hearing Panel has made the findings of fact set out in this section of the Decision.

The Beverage Container Recycling System in Alberta

26. In order to understand the nature of the allegations against the Permit Holder it is important to have a basic understanding of the beverage container recycling system in Alberta.

27. BCMB Complaints Director Daniel White (also Director, Compliance BCMB) provided evidence about the beverage container recycling system in Alberta. He testified that Alberta manages its beverage containers through a regulated deposit system established under the Regulation. He explained that the system begins when a retailer sells a beverage and collects a deposit fee from a consumer. When the consumer returns the beverage container to a bottle depot, the depot returns the deposit to the consumer; and in turn the beverage container is collected by the collection system agent who (a) refunds the depot for the deposit and (b) pays the depot a handling commission in accordance with the Regulation.

28. The Alberta beverage container recycling system is a closed loop system designed to protect Alberta's environment. System participants have a variety of mandatory and voluntary compliance obligations which, collectively, create the safeguards to manage the system cash flow and the beverage container flow to keep the beverage container recycling system in balance and effectively serve the public interest to significantly reduce the amount of beverage containers in landfills and waste collection sites in Alberta.

The Permit Holder

29. The Permit Holder holds Permit 13-BCD-081 for Andrew Depot, located in Andrew, Alberta. The Permit Holder has held Permit 13-BCD-081 since October 2013.

30. Mr. Ha has been the sole director and shareholder of the Corporation since May 2012 when he bought the Corporation from an individual by the name of Shawn Diep. On May 26, 2012, Mr. Ha signed BCMB documentation agreeing to "abide by all by-laws, guidelines and policies of the Beverage Container Management Board."

The Activities of the Permit Holder between January 5, 2012 and February 26, 2013

31. The Appeal Panel heard evidence from the BCMB Complaints Director Mr. Daniel White that in the month of January 2011, the Andrew Depot processed 95,448 beverage containers.

The number of beverage containers processed at the Andrew Depot each month from February 2011 to March of 2013 was significantly higher than this amount. In fact, in November of 2012 the number of beverage containers processed at the Andrew Depot was 1,097,304. This means that there was an approximate 1,070 percent increase in the volume of beverage containers processed by the Andrew Depot between 2010 and 2012, since the annual returns increased from 564,770 containers in 2010 to over 6,440,010 containers in 2011 and 6,608,595 containers in 2012. [EAB p. 50 paras 14-15].

32. For some period of time, including January 5, 2012 to February 26, 2013, the Permit Holder leased a warehouse in Edmonton, Alberta (the "Warehouse"). A search of the Warehouse by AEP on February 26, 2013 revealed approximately 109 bales of empty beverage containers and empty beverage containers loosely scattered throughout. An estimated 2.08 million containers with an estimated deposit value of \$255,295.00 were seized from the Warehouse. Other items seized from the Warehouse included a partial roll of ABCRC beverage containers labels for aluminum cans with the word "Andrew" written in the box titled "Bottle Depot Name", a roll of unused ABCRC labels and assorted ABCRC tags with "Andrew Bottle Depot" printed on the label [EAB paras 11-13].

33. The AEP investigators interviewed the Landlord and employees of the Permit Holder who confirmed that bales of containers were delivered to the Warehouse and that the bales were broken apart and the containers sorted into bags with "ABCRC" printed on the side and the bags were hauled away in a truck [EAB paras 7 and 11].

34. The Appeal Panel also heard evidence from Ms. Moran regarding an audit that she witnessed of a load from Andrew Depot that had been received at ABCRC and which consisted of containers that had been crushed, even though Andrew Bottle Depot did not have a can crusher. Ms. Moran also testified that based on her experience in the industry, the degree of the compaction and the condition of the containers was not consistent with the type of container compaction that was standard in the industry.

35. The investigation by AEP revealed that the Permit Holder received delivery of 376,684 pounds of crushed, baled beverage containers from the Yukon at that Warehouse between January 5 and October 5, 2012 [EAB p. 50 para 9] and that the increase in returns at the Andrew Depot roughly corresponded to the number of beverage containers estimated to have been brought from the Yukon to the Warehouse [EAB para 15].

36. The activities at the Warehouse came to the attention of the BCMB and AEP in February of 2013 and by March of 2013 the Permit Holder was aware that AEP was investigating these activities. Mr. White testified that from March 2013 to July of 2016 the Andrew Depot processed an average of 69,000 containers a month, which represented a significant decline from the volumes processed from January 2011 to March of 2013.

37. Based on the evidence before it, the Hearing Panel finds that during the relevant time period the Permit Holder shipped bales of beverage containers into Alberta from the Yukon and stored those bales at the Warehouse. The Hearing Panel also finds that the Permit Holder employed individuals to separate the bales back into individual beverage containers and then introduced those beverage containers into the Alberta Beverage Container System through the Andrew Depot.

VI. DECISION AND REASONS: ALLEGED CONTRAVENTIONS

38. The BCMB Complaints Director is alleging that the activities of the Permit Holder constitute contraventions of the Regulation, various BCMB by-laws, the terms of its Permit and the Service Agreement entered into with ABCRC by the ABDA on behalf of the Permit Holder.

Breaches of the Regulation and Permit

39. The Director and the EAB both specifically considered whether the activities at issue breached sections 11(1), 11(2), 14(1) and 14(2) of the Regulation and breached the permit.

40. Counsel for the Compliance Director submitted in argument that the Hearing Panel was entitled to rely on the findings of the Director and the EAB in assessing whether or not the contraventions alleged against the Permit Holder had been proven. The Hearing Panel accepts this submission, but would have been prepared to find contraventions of all of these sections in the absence of those findings.

41. In relation to section 11(1) of the Regulation, the evidence is clear that in its capacity as a depot operator, the Permit Holder accepted beverage containers that could reasonably be identified by the Permit Holder as having been transported into Alberta. The Permit Holder knew that the containers had been transported into Alberta, having shipped them itself.

42. Similarly, in relation to section 11(2) of the Regulation, the evidence is clear that the Permit Holder returned containers to a depot that the Permit Holder knew had been transported into Alberta.

43. The Permit Holder conceded before the EAB it had breached these sections.

44. Section 14(1) of the Regulation prohibits a person from operating a depot unless that person holds a permit. "Depot" is defined in the Regulation as a place operated as a business for the collection of empty containers. The Hearing Panel has no difficulty concluding, as did the Director and the EAB, that the Permit Holder was operating the Warehouse as a "depot" as defined in the Regulation. The Permit Holder also conceded before the EAB this section of the Regulation had been breached.

45. Section 14(2) of the Regulation requires a permit holder to comply with the terms and conditions of its permit. Section 3(1) of the permit issued to the Permit Holder states that the Permit Holder shall operate the depot in compliance with the Regulation and all bylaws and policies established by the Board from time to time. The Hearing Panel has already concluded that the Permit Holder did not operate the Andrew Depot in compliance with the Regulation. The Permit Holder conceded this contravention before the EAB as well.

Breaches of BCMB By-laws

46. The BCMB Compliance Director also alleged that the Permit Holder has breached section 7(5) of the Administrative By-law and sections G(2), J(1a, b and g) and J (2.1, 2.2, 2.3 and 2.4).

47. Section 7(5) of the Administrative By-law provides that a permit is valid only for the location specified in it. As noted by Counsel for the BCMB Complaints Director, the breach of this section is related to the breach of section 14(1) of the Regulation because the essence of

the breach is that the Permit Holder was not permitted to operate a depot out of the Warehouse when its Permit was issued for a different location. For the reasons set out previously, the Hearing Panel agrees that the Permit Holder was in breach of this section of the By-law.

48. Section G(2) of the *Beverage Container Depot Criteria* which was in effect during the relevant time period requires all depot owners or operators to adhere to the highest standards of honesty, integrity, fair dealings and ethical conduct in all dealings with customers, the collection agent and the general public. The actions of the Permit Holder clearly breach this section.

49. Section J of the Beverage Container Depot Criteria reiterates the Permit Holder's obligation to comply with the Regulation, BCMB by-laws and the permit. Those breaches have already been established.

Conclusion

50. Although the Hearing Panel was satisfied that the evidence presented on behalf of the Complaints Director was sufficient to establish contraventions of the Regulations, by-laws, permit conditions and Service Agreement, ultimately all of these contraventions stem from the same conduct. Accordingly, the Hearing Panel only considers it necessary to find the Permit Holder breached sections 11(1) and (2) and 14(1) and (2) of the Regulation.

51. Having concluded that the Permit Holder has committed the breaches of the Regulation alleged by the Complaints Director, it is necessary for the Appeal Panel to consider the nature of the sanction that should be imposed.

VII. DECISION AND REASONS: SANCTION

52. The appropriate sanction in this case must be considered in the context of the BCMB's mandate to regulate and enhance a leading beverage container system that protects Alberta's environment. The BCMB approaches regulatory compliance through a progressive enforcement model based on a variety of factors, including the potential risk that non-compliance presents to the effectiveness and validity of the beverage container system and therefore to the public who rely on that system to protect the environment. Accordingly, the need to maintain the public's confidence in the system is an important factor for the Hearing Panel to consider in determining sanction.

53. A second factor that the Panel considers relevant to determining a sanction in cases brought forward under the BCDOA is deterrence. It is important to consider deterrence both in terms of the Permit Holder whose conduct is at issue, and in terms of other Permit Holders who might consider engaging in similar conduct.

54. Finally, the Hearing Panel must consider the particular position of the Permit Holder in the case before it, including the nature of the conduct at issue, the level of intent, the impact of the conduct, the number of incidents or length of time involved and whether or not the Permit Holder admitted guilt, showed any remorse, and can be rehabilitated.

55. From the public interest perspective, the conduct proven in this case created a significant risk to the beverage container system in a number of ways. First of all, the introduction of out-of-province containers into the beverage container system created a financial risk to that system. This financial risk was highlighted by the Director who stated that the recycling system would be negatively impacted, possibly to the extent of bankrupting the

recycling fund, if the illegal return of beverage containers was allowed to continue unchecked. The Director concluded the closed loop nature of the beverage container system supported his classification of the Permit Holder's conduct as a "major contravention of the legislation with a major adverse effect". The EAB found the Director's argument regarding the severity of the potential impact on the Alberta closed-loop recycling program to be persuasive [EAB decision para. 68]. The Hearing Panel is also of the view that the Permit Holder's conduct posed a significant financial risk to the Alberta beverage container system that warrants a significant sanction.

56. The second risk presented by the conduct of the Permit Holder is the reputational risk to the system. The BCMB expects all of the system stakeholders to conduct themselves in an honest, fair and ethical manner and the Alberta public should be entitled to interact with beverage container depots on the same basis. The Permit Holder in this case acted in a deliberate, systematic and dishonest fashion to mislead the BCMB and the Collection System Agent and to misappropriate funds that would otherwise have been available for the benefit of all Albertans. It is a critical accountability of depot owners and permit holders to participate in the monitoring and detection of fraud in the Alberta beverage container system. The Permit Holder participated knowingly in both sourcing the out-of-province containers and in the submission of those containers to the ABCRC through its operations at the Andrew Depot, thereby escalating the significant harm.

57. The third risk presented by the conduct of the Permit Holder is a risk to the environment. The actions of the Permit Holder created a substantial negative impact to the recycling program which, if left unchecked, could have resulted in the bankrupting of the recycling fund and potentially impairing the ability of the public to recycle and dispose of containers at recycling depots. The financial failure of the Alberta beverage container recycling system would therefore result in millions of beverage containers being deposited into landfills each year, thereby defeating the purpose of the environmental objectives of the system.

58. The Hearing Panel is satisfied that the high-risk nature of the conduct of the Permit Holder in importing a large volume of beverage containers into the province and introducing them into the Alberta beverage container system and in operating an unpermitted depot requires the imposition of a severe sanction by the BCMB. Tolerance of this type of conduct would not only undermine the system, but would undermine public confidence in the BCMB's ability to regulate the system.

59. The Hearing Panel also considers it necessary to impose a significant sanction in order to act as a deterrent to this Permit Holder and to any other Permit Holders from engaging in this conduct.

60. Finally, the Hearing Panel has considered the position of this particular Permit Holder in reference to the factors listed above.

61. In terms of an admission of guilt, although the Permit Holder ultimately did not contest liability before the EAB, the EAB decision reveals that the admission of guilt did not occur until the eve of the Appeal Hearing or at the Appeal Hearing itself. The Permit Holder appealed the Administrative Penalty issued by the Director on February 28, 2015. It appears efforts were made between March of 2015 and December of 2015 to mediate the matter. It is unclear why this process took so long. An Appeal Hearing was then set for March of 2016, which was rescheduled at the request of counsel to April. A subsequent adjournment was at the request of the Director. It was only in May of 2016 that the Appellants identified that the issues on the

appeal were limited to the penalties imposed and to the guilt of Mr. Diep, and this position was confirmed at the Appeal Hearing.

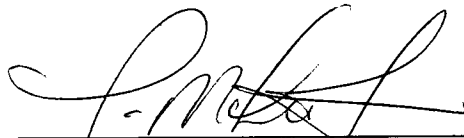
62. The Appeal Panel accepts that the Permit Holder never denied having engaged in the conduct at issue for the purposes of these proceedings, and that in correspondence to the BCMB received on August 22, 2016 indicated "We respectfully regret everything we did wrong and request that you allow us to continue to do business and prove to you that we have learned from our mistakes". However, this fact is tempered by the evidence before the Hearing Panel that it was only shortly before the scheduled Hearing that the Permit Holder formally advised that it would not be contesting the allegations.

63. The Permit Holder was advised by Notice of Hearing dated August 30, 2016 of a November 2, 2016 Hearing date. The Permit Holder was served with the written submissions and evidence of the Complaints Director on October 18, 2016. The Permit Holder then requested an adjournment of the Hearing which was granted, and the matter was adjourned to January 27, 2017 with timelines imposed on the Permit Holder for the delivery of its submissions and evidence. The Permit Holder did not comply with the timelines and was given an extension of time for providing those materials to January 3, 2017. It was on January 3 that counsel for the Permit Holder indicated that he had been instructed "not to appeal, pursue, or oppose this particular matter" and that "it is our opinion that the January 27, 2017 hearing date is...no longer required". On January 27, counsel for the Permit Holder clarified that this meant that he was instructed "not to attend, oppose or make any submissions with respect to the hearing to determine whether or not to suspend or cancel (his client's) permit". Much time, inconvenience and expense could have been avoided had the Permit Holder taken this position at the outset.

64. In considering the position of the Permit Holder, the Hearing Panel also took into consideration the clear evidence that this was not negligent or incidental conduct, but that the Permit Holder had blatantly and systematically acted to defraud the Alberta beverage container recycling system and had done so repeatedly over an extended period of time.

65. Taking into account all of these factors, the Hearing Panel has unanimously concluded that the only appropriate sanction that is available in this case is the cancellation of the Permit Holder's Permit and the Hearing Panel directs that Permit #13-BCD-081 be cancelled by the BCMB effective immediately.

Dated this 16th day of February, 2017.



PATRICIA McLEOD, Q.C. – Chair