

**IN THE MATTER OF A HEARING OF
THE BEVERAGE CONTAINER MANAGEMENT BOARD
REGARDING PERMIT # 18-BCD-055 (formerly 13-BCD-066) ISSUED TO
413955 Alberta Ltd.**

BCMB Hearing Panel:

Cheryl McLaughlin, Chair
Andrew Stephens
Patricia McLeod Q.C.

Counsel Appearances:

William Shores Q.C. for the Complaints Director
Grant Sprague Q.C. for the Permit Holder
Vivian Stevenson Q.C. for the Hearing Panel

Date and Place of Hearing:

February 4, 2019
EAB Hearing Room,
306 10011 109 St.
Edmonton AB, T5J 3S8

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”) regarding Permit # 18-BCD-055 (formerly Permit #13-BCD-066) issued to 413955 Alberta Ltd. relating to a depot located in Morinville, Alberta (the “Morinville Bottle Depot”).
2. 413955 Alberta Ltd. held Permit 13-BCD-066 for the Morinville Bottle Depot from September 2013 to September 2018. The Permit was renewed on September 1, 2018, while the Morinville Bottle Depot was under investigation.
3. Jamil El Kadry is a director and shareholder of 413955 Alberta Ltd. and the owner and depot operator of the Morinville Bottle Depot. For the purpose of this decision, Mr. El Kadry and 413955 Alberta Ltd. may be referred to as the Permit Holder or the Morinville Bottle Depot.

4. The BCMB Complaints Director directed this matter to a hearing on June 12, 2018, based on allegations that the Permit Holder had contravened certain sections of the *Beverage Container Recycling Regulation* (AR 101/1997) (the “Regulation”), a BCMB by-law and Permit No. 13-BCD-066. The allegations were contained in a Notice of Hearing issued by the Hearing Director on June 22, 2018. Those allegations are set out in Section III of this decision.
5. On the day of the hearing, the Hearing Panel was advised that counsel for the Complaints Director and counsel for the Permit Holder had reached an agreement as to liability and sanction and that the matter would be proceeding by way of a joint submission to the Hearing Panel.
6. After hearing the detailed joint submission from counsel and the answers to the questions posed by the Hearing Panel with respect to that joint submission, the Hearing Panel adjourned. The Hearing Panel then advised the parties that it had decided to accept the joint submission and that detailed written reasons for that determination would follow.
7. These are the detailed written reasons of the Hearing Panel with respect to its determination to accept the parties’ joint submission on liability and sanction.

II. JURISDICTION

8. The Beverage Container Management Board (the “BCMB”) is authorized by the Regulation to issue permits to beverage container depots in Alberta. The Regulation also gives the BCMB authority to regulate all aspects of those permits including their cancellation or suspension.
9. In accordance with the authority given to the BCMB by the Regulation, the BCMB has passed by-laws regulating beverage container depot permits. At the time of the matters related to this hearing, the relevant BCMB by-law was the Beverage Container Depot Operation and Administration By-law (the “O&A By-law”).¹
10. The O&A By-law required that matters be referred to the Hearing Director for a hearing if, in the opinion of the Complaints Director, there was a reasonable prospect of establishing that a Permit should be suspended or canceled, and it was in the public interest to proceed with such a hearing.

¹ The BCMB made significant revisions to the organization and content of a number of its by-laws, which revisions came into effect on February 1, 2019. The relevant by-law for the purpose of these proceedings was the O&A By-law, which has now been replaced by the Depot By-law. The revisions to the by-laws did not impact the process for or outcome of this hearing.

11. Under the O&A By-law, this Hearing Panel was delegated the authority of the BCMB to conduct the hearing in relation to this particular matter. 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 O&A By-law. The Hearing Panel consists of three voting Directors of the BCMB, a majority of whom represent the General Membership Sector.
12. A Notice of Hearing was sent to the Permit Holder on June 22, 2018.
13. At the opening of the hearing the parties were asked whether there were any objections to the jurisdiction of the Hearing Panel or any objections to its composition. There were no objections made to the members of the Hearing Panel, and no jurisdictional or procedural issues were raised by the parties.
14. The hearing was open to the public although at the request of counsel for the Complaints Director, some information contained in the Exhibits relating to third parties will be redacted and the Hearing Panel orders that those redactions be made where required.
15. Mr. El Kadry did not attend the hearing with his counsel. Mr. El Kadry's counsel advised the Hearing Panel that Mr. El Kadry was not present because of significant health issues and that Mr. El Kadry had asked him to convey to the Panel that his absence should not be taken as indicating any disrespect to the Hearing Panel or its process.

III. ALLEGATIONS AGAINST AND ADMISSION BY THE PERMIT HOLDER

16. The Notice of Hearing to the Permit Holder in relation to this matter contains the following allegations against the Permit Holder:
 - a. Contravention of Section 11(1) of the Beverage Container Recycling Regulation 101/97;
 - b. Failed to comply with Section 14(2) of the Beverage Container Recycling Regulation 101/97;
 - c. Failed to comply with Section 4.24 of the Beverage Container Depot Operation and Administration By-law; and
 - d. Contravened Section 3(1) of the Morinville Bottle Depot Permit No. 13-BCD-066.
17. The Permit Holder admitted all of the allegations by way of a signed admission under seal, which signed admission was marked as an exhibit in the proceedings.

IV. EVIDENCE

18. The evidence before the Hearing Panel consisted of the following materials which were entered with the consent of both parties:
 - a. **Exhibit 1:** 11 binders of records tabbed 1-81 and Bates numbered 1 to 3053, and containing an index to those records;
 - b. **Exhibit 2:** Admission of the Permit Holder and Depot Operator of Morinville Bottle Depot;
 - c. **Exhibit 3:** Joint Submission on Consent Order;
 - d. **Exhibit 4:** Agreed Statutory Framework, Documents and Facts;
 - e. **Exhibit 5:** Acknowledgement Under the Terms of an Order of a Hearing Panel of the Beverage Container Management Board (“BCMB”)
 - f. **Exhibit 6:** Will-Say statements of Blaire Charlton-Gaalaas, Laura Buchan, Daniel White, Nathan Lyall, Michelle Winmill, Vincent Moroz and Cst. Andrea Legaarden.
19. Exhibits 1 to 6 were entered into evidence on the basis that, with the exception of anything said by Mr. El Kadry, everything contained in those Exhibits could be accepted by and relied upon by the Hearing Panel for the truth of their contents.
20. Accordingly, the Hearing Panel proceeded on the basis that where documents contained references to facts, those facts were true, that all communications had been sent and received as indicated, that all photographs and graphical representations were accurate depictions of what was shown in those photographs and graphical representations and that the will-say statements marked as Exhibit 6 could be relied upon as if the witnesses making those statements had given that evidence at the hearing and that evidence was uncontroverted.
21. There were no witnesses called at the hearing.

V. SUMMARY OF KEY EVIDENCE

22. Given the volume of the evidence entered by consent and the basis upon which it was entered, the Hearing Panel will not be outlining specific findings of fact, but instead will summarize some of the facts from that evidence in order to provide context for the Hearing Panel’s decision to accept counsels’ joint submissions on liability and on sanction.
23. Mr. El Kadry has been a depot owner and operator since 1990. In 2018 he was the owner and depot operator of the Morinville Bottle Depot.

24. On February 9, 2018, Colin Carter, Vice President Operations at the Alberta Beverage Container Recycling Corporation (“ABCRC”) notified Daniel White, BCMB Complaints Director, that ABCRC had received questionable material from the Morinville Bottle Depot.
25. Daniel White requested that Laura Buchan, BCMB Investigations Officer attend at the ABCRC plant to view the suspicious material. Laura Buchan met with Vincent Moroz who advised her that Morinville Bottle Depot was shipping mega bags to ABCRC nearly every day, which was unusual as winter is a slow time of year for most depots. They briefly examined mega bags shipped by Morinville Bottle Depot, noting:
 - a. Morinville Bottle Depot’s mega bags were only partially filled. Mega bags are normally completely filled when they are shipped to ABCRC.
 - b. There was a significant number of compacted containers in the mega bags. This was suspicious as Morinville Bottle Depot does not have compacting equipment or a compacting agreement with ABCRC.
 - c. There were a significant number of beverage containers readily associated with Ontario.

Laura Buchan reported these observations to Daniel White.

26. On February 16, 2018, Laura Buchan and Daniel White witnessed an offload of mega bags from Morinville Bottle Depot at ABCRC and briefly examined their contents. They observed further evidence that containers and other material in the mega bags had been baled and then broken or torn from a bale and were from outside Alberta. Most of the mega bags offloaded at ABCRC contained suspiciously compacted material. They directed that a sample of 15 mega bags from the offload be quarantined for audit.
27. Following their attendance at ABCRC, Daniel White appointed Laura Buchan to investigate the Morinville Bottle Depot. She conducted her investigation with the assistance of BCMB Compliance Officers Michelle Winmill and Nathan Lyall.
28. Laura Buchan witnessed offloads and conducted another review of mega bags on February 20, 2018 (with Nathan Lyall).
29. On February 22, 2018, the BCMB notified the Permit Holder of the suspiciously compacted product, noting that the mega bags contained suspicious materials and unregistered aluminum beverage containers not sold in Alberta.

30. Laura Buchan and Daniel White met with Mr. El Kadry on February 26, 2018, to discuss the concerns that had been raised and provide him with an opportunity to respond. Mr. El Kadry advised that he had six (6) or seven (7) customers that came with compacted containers, and one main customer from Fort McMurray who brought around one (1) to 3000 containers. Mr. El Kadry said he did not know this customer's name. He said the compacted containers came from general customers and farmers and suggested that containers were being stolen from ABCRC. Mr. El. Kadry did not provide a direct response when asked about the unregistered containers and foreign material that appeared to originate from Ontario.
31. On March 1, 2018, Laura Buchan sent Mr. El Kadry a letter indicating that the BCMB would be conducting a Compliance Review under section 7.3 of the BCDOA into the procedures in place at the Morinville Bottle Depot with respect to the acceptance and shipment to ABCRC of suspiciously compacted material.
32. On March 2, 2018, Laura Buchan received a phone call from Mr. El Kadry who stated that:
- a. a customer "Mike" had come in with six or seven thousand cans on February 27, 2018;
 - b. "Mike" kept the cans in bags of 300 containers per bag;
 - c. When "Mike" was asked to sign a Container Validation Request ("CVR") he got angry and took his cans to Edmonton;
 - d. "Mike" compresses cans with a 5-pound hammer; and
 - e. "Mike" travels a long way and wants to make his trip worthwhile.
33. On March 2, 2018, Daniel White received a fax from "Mike". The fax indicated that "Mike" had been at the Morinville Bottle Depot on February 27 with "good crushed cans" and that he was asked to fill a container request and that he "was not happy." The customer indicated that he then went to the City of Edmonton and "it was no problem and no questions asked." The fax also indicated that "Mike" worked as a Janitor in a school and that he crushed the cans because he had a small car. Finally, the fax asked Mr. White to call the Morinville Bottle Depot to take the cans so "Mike" did not have to travel to the City.
34. On March 4, 2018, Daniel White received a voice mail from a purported customer of Morinville Bottle Depot who expressed concern that the depot did not accept his crushed cans. The purported customer asked for a return call but did not leave a return number.

35. Laura Buchan (with Michelle Winmill) witnessed a further offload and conducted an initial review of mega bags shipped to ABCRC from the Morinville Bottle Depot on March 16, 2018.
36. On March 20, 2018, the BCMB sent Mr. El Kadry a letter advising that suspicious material similar to that already identified had been found in a March 16, 2018, shipment to ABCRC and provided Mr. El Kadry with an opportunity to provide an explanation. No additional explanation was provided
37. Laura Buchan (with Michelle Winmill) witnessed a further offload and conducted an initial review of mega bags shipped to ABCRC from the Morinville Bottle Depot on March 21, 2018.
38. Laura Buchan's reviews of the contents of the mega bags on February 20, March 16 and March 21, 2018, reaffirmed what she had observed on February 9 and 16, 2018. The manner in which the containers in the mega bags were compacted was consistent with containers that had been baled and then broken or torn from the bale. There were suspiciously compacted aluminum containers and other containers e.g. gable top, HDPE. There were containers that were evidently from Ontario and garbage readily identifiable as from Ontario.
39. A number of mega bags were quarantined and were then subjected to a detailed audit between March 16, 2018, and April 3, 2018. The results of the audits and photographs of the audited material are detailed in the Investigator's Report and Exhibit 1. On the basis of the evidence gathered during the detailed audits, Laura Buchan was of the view that the mega bags contained containers that had been baled outside of Alberta and that the containers had then been broken or torn from the bales before being placed in the mega bags.
40. The evidence that the containers had been taken from bales of material that had originated from outside of Alberta is contained in the photographs in Exhibit 1.
41. On March 23, 2018, the BCMB advised Mr. El Kadry that product consistent with previously observed compacted and baled material had been found in mega bags shipped from the Morinville Bottle Depot.
42. On April 5, 2018, Mr. El Kadry was provided an opportunity to view the suspicious product and was provided with photographs of samples of the product. Mr. El Kadry declined to view the suspicious product.

43. On April 9 and April 12, 2018, the BCMB provided Mr. El Kadry with further opportunities to provide information about the suspicious product. Mr. El Kadry declined to provide any additional information but did state that his customers were unhappy and were taking their containers to Edmonton to sell them.
44. On May 31, 2018, Laura Buchan submitted her Investigator's Report to Daniel White.
45. Evidence that there was a change in the volumes of materials shipped from the Morinville Bottle Depot after the BCMB notified Mr. El Kadry of the suspiciously compacted product and met with him to discuss it is contained in Exhibit 1, Tabs 57, 79 and 80.
46. Mr. El Kadry subsequently admitted having written and sent the letter from "Mike" and having made the phone call from a customer expressing concern about the Morinville Bottle Depot not accepting his crushed cans.
47. The evidence before the Hearing Panel established, and it was admitted that the Morinville Bottle Depot and its operator, Jamil El Kadry, accepted beverage containers that had been transported into Alberta and delivered them to ABCRC for refunds and handling commissions to which the Permit Holder was not entitled. The sole beneficiary of those refunds and handling commissions was the Morinville Bottle Depot and its owners, Mr. El Kadry and his wife.

VI. DECISIONS AND REASONS: CONTRAVENTIONS

48. The Permit Holder, 413955 Alberta Ltd. (Holder of Permit 18-BCD-055, formerly Permit 13-BCD-066) and Jamil El Kadry, Depot Operator, have each admitted that they:
 - a. contravened Section 11(1) of the Beverage Container Recycling Regulation 101/97;
 - b. failed to comply with Section 14(2) of the Beverage Container Recycling Regulation 101/97;
 - c. failed to comply with Section 4.24 of the Beverage Container Depot Operation and Administration By-law; and
 - d. contravened Section 3(1) of the Morinville Bottle Permit No. 13-BCD-066.
49. Because of these admissions and the facts supporting these admissions that have been agreed to in these proceedings, it is not necessary for the Hearing Panel to provide the type of detailed examination of the evidence and reasons for decision that it would normally provide. However, the Hearing Panel wishes to provide some additional commentary with respect to the allegations and admissions in order to explain and

highlight the serious nature of the conduct to which the Permit Holder has admitted, and to provide some context for the decision relating to sanction.

50. This is not the first BCMB hearing involving allegations against a depot operator arising out of the transportation of bales of compacted material into Alberta, the dismantling of those bales into individual beverage containers and the shipping of those beverage containers to ABCRC. In 2017, a BCMB Hearing Panel issued a decision in a similar case involving a depot in Andrew, Alberta.

51. As previously stated by the Hearing Panel in the Andrew Depot case:

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.

52. One of the mandatory compliance obligations of depots is set out in section 11(1) of the Regulation which makes depot operators responsible for ensuring that beverage containers from out of province do not enter the Alberta system. The Regulation provides:

11(1) No depot operator or retailer shall accept a container or provide a cash refund for a container that can reasonably be identified by the depot operator or retailer as having been transported into Alberta.

53. Depots are the first line of defence in the Alberta beverage container system in preventing out-of-province product from entering the system. Accordingly, section 11(1) of the Regulation is critical to the effective operation and sustainability of the Alberta beverage container system.

54. When a depot ships out-of-province beverage containers to ABCRC for deposit refunds and payment of handling commissions, it extracts money from the closed loop system. This poses a significant financial risk to the system and merits significant consequences.

55. All of the participants in the beverage container system in Alberta, including ABCRC and the BCMB, rely on the honesty and integrity of depot operators to accurately report the number of containers they ship to ABCRC and to only ship containers that are registered and were sold in Alberta.

56. Section 14(2) of the Regulation and section 4.24 of the O&A By-law work together to require depot operators to adhere to the highest standards of honesty, integrity, fair dealing, and ethical conduct.

57. Section 14(2) of the Regulation provides:

14(2) A permit holder shall comply with the terms and conditions to which the permit is subject.

A breach of a term or condition of a depot's permit is therefore a breach of the Regulation.

58. Permit No. 13-BCD-066 contains, and at all material times contained, the following condition:

3.(1) The Permit Holder shall operate the depot in compliance with the Environmental Protection and Enhancement Act, the Regulations made under that Act (including the Beverage Container Recycling Regulation (Alta. Reg 101/97) as amended) *and all by-laws and policies established by the Board from time to time.* (emphasis added)

59. The relevant by-law in this case, the O&A By-law, imposes a critical obligation on depot operators, managers and staff to uphold the integrity of the System. Sections 4.21 and 4.24 of the O&A By-law provide:

4.21. All staff working at a Depot must be knowledgeable about products being handled and refunds being paid to customers.

4.24 A Depot Operator, Depot Manager, and all Depot staff shall, *in all dealings* with customers, the collection system agent appointed under the Regulation, any collection service provider and the general public, *adhere to the highest standards of honesty, integrity, fair dealing, and ethical conduct.* (emphasis added)

60. The Hearing Panel understands that in relation to regulatory offenses such as these, the depot operator could have tried to establish a defense of due diligence. The Permit Holder could have tried to establish that he or she reasonably believed in a mistaken set of facts which, if true, would have rendered the act or omission innocent or that he or she took all reasonable steps to avoid the particular event.

61. Because of the admissions that were made, the Permit Holder did not attempt to establish a reasonable due diligence defence. In addition, based on the evidence before the Hearing Panel, it appears that there was no reasonable basis for the Permit Holder to believe that the suspiciously compacted material could have come into the Morinville

Bottle Depot lawfully. The evidence also supports the conclusion that the depot operator could not have established that he took “all reasonable steps” to avoid the introduction of containers from outside of Alberta into this Province.

62. The audit results of the mega bags shipped by Morinville Bottle Depot on February 16 and 20, 2018, reveal that more than 77% of the contents of the mega bags were previously compacted baled cans from Ontario. In some of the mega bags, 100% of the cans were previously compacted baled cans from Ontario.
63. As noted above, the importation of compacted material into Alberta and shipping of that material to the ABCRC was the subject of a previous decision of the BCMB. The evidence before the Hearing Panel included sample notifications that had been sent to depots in Alberta (1) highlighting the role of Depots in detecting and preventing fraudulent containers from entering the beverage container system; (2) listing “red flags” that might indicate potentially fraudulent containers; and (3) advising depots to follow the Container Validation Request process with respect to those containers.
64. The Hearing Panel would not have expected a diligent depot operator to accept and ship to ABCRC massive volumes of suspiciously compacted containers with Ontario connections without engaging the CVR process.
65. The Hearing Panel would not have expected a diligent depot operator to miss the volume of suspicious material and its association with Ontario.
66. When directly confronted with the BCMB’s concerns about the suspiciously compacted material, the Hearing Panel would have expected a diligent depot operator to have taken active steps to ensure no further such material was accepted and shipped to ABCRC.
67. Instead, after Jamil El Kadry was personally alerted to the presence of the suspicious material by Laura Buchan and Daniel White, the evidence demonstrates that compacted material from Ontario continued to be mixed in and hidden amongst legitimate containers and shipped to ABCRC in significant volumes.
68. Furthermore, Mr. El Kadry provided explanations to the BCMB that were untrue and has admitted attempting to manufacture evidence to substantiate these explanations.
69. Given the admissions by the Permit Holder and the wording of the Regulation, it is not necessary for the Hearing Panel to reach any conclusions as to whether Mr. El Kadry actually knew that the beverage containers being accepted by his depot had been transported into Alberta from another province.
70. In any event, the Hearing Panel is satisfied from the evidence that the volume and condition of the compacted material was such that Mr. El Kadry ought reasonably to

have known that the beverage containers being accepted at the Morinville Bottle Depot had been transported into Alberta from another province.

71. In short, the evidence compiled by the Investigator and submitted before this Hearing Panel with the consent of the Permit Holder demonstrates repeated, deliberate, dishonest and unethical conduct on the part of the Permit Holder, which conduct contravened the Regulation, the O&A By-law and Permit 13-BCD-066 as alleged and which served to undermine the integrity of the beverage container system in Alberta.

VII. DECISION AND REASONS: SANCTION

72. In their joint submissions, counsel for the BCMB and for the Permit Holder requested that the Hearing Panel of the BCMB issue the following order:

- I. An order cancelling Permit # 18-BCD-055, being the Permit to Operate a Beverage Container Depot issued to 413955 Alberta Ltd. (the “Morinville Bottle Depot Permit”), but, subject to the terms of paragraphs II, III, IV and V below, staying the coming into force of that order until 4:30 p.m., Thursday, May 30, 2019.
- II. In the period between the granting of this order and 4:30 p.m., Thursday, May 30, 2019, 413955 Alberta Ltd. and Jamil El Kadry
 1. may continue to operate the Morinville Bottle Depot, but shall do so in accordance with all legislation, regulations and by-laws applicable to the operation of the Morinville Bottle Depot; and
 2. may seek to sell the business and property of the Morinville Bottle Depot to a party who is completely independent of, has no association with or relationship to 413955 Alberta Ltd. or Jamil El Kadry, on the condition that 413955 Alberta Ltd. and Jamil El Kadry first acknowledge, in writing, to the BCMB that
 - a. while they may sell the business and property of the Morinville Bottle Depot, whether by asset sale or share sale, they have no right or ability to sell, offer to sell or hold out that they can sell or transfer the Morinville Bottle Depot Permit or any permit to operate a beverage container depot;
 - b. while a proposed purchaser may apply to the BCMB for a permit to operate a beverage container depot at 9903-100 Street, Morinville Alberta, the site of the current location of the Morinville Bottle Depot, the BCMB must determine whether to issue a permit to operate a beverage container depot in

accordance with the legislation, regulations and by-laws that govern the BCMB's operations and is not bound to issue a permit to anyone, including a proposed purchaser, and nothing in this order fetters any discretion that the BCMB may have under the legislation, regulations and bylaws that govern the BCMB's operations respecting the issuance of a permit to operate a beverage container depot;

- c. the BCMB may, as part of the process in determining whether to issue a permit to operate a beverage container depot to a proposed purchaser, take all steps it considers necessary to confirm that
 - i. the proposed purchaser is completely independent of, has no association with and is not related to Jamil El Kadry or 413955 Alberta Ltd.; and
 - ii. Jamil El Kadry, 413955 Alberta Ltd. or any person who is a person related to or associated with Jamil El Kadry or 413955 Alberta Ltd. has no interest whatsoever in the business of the depot that will be located at 9903-100 Street, Morinville Alberta, whether in law or in equity; and
- d. the BCMB may impose a condition on any new permit that may be issued to a purchaser that the permit will automatically be cancelled if it is discovered that Jamil El Kadry, 413955 Alberta Ltd. or any person who is a person related to or associated with Jamil El Kadry or 413955 Alberta Ltd., has any interest in law or equity, in the business of the depot located at 9903-100 Street, Morinville Alberta.

For the purpose of this sub paragraph (c) and (d), the terms associated with and related to derive their meaning from the Income Tax Act (Canada), with all necessary modifications.

- III. 413955 Alberta Ltd. and Jamil El Kadry, jointly and severally, enter into a legally binding agreement or agreements with the BCMB to make effective the commitments of and representations from 413955 Alberta Ltd. and Jamil El Kadry that persuaded the Complaints Director to agree to this Joint Submission and in particular, the stay contemplated in paragraph II, rather than proceeding with the hearing and seeking immediate cancellation of the Morinville Bottle Depot Permit followed by the issuance of "a request for applications for a beverage container depot" to serve the area of the Town of Morinville. The legal agreement or agreements referred to in this paragraph III must include

- a. an agreement by 413955 Alberta Ltd. and Jamil El Kadry to pay to the BCMB the sum of \$250,000.00 on or before 4:30 p.m. on May 30, 2019, (which sum 413955 Alberta Ltd. and Jamil El Kadry have willingly agreed to pay) to indemnify the BCMB for all costs incurred in relation to this matter, including costs of staff and costs of legal counsel on a solicitor and own client basis, and as a means of demonstrating to the Complaints Director and the Hearing Panel that 413955 Alberta Ltd. and Jamil El Kadry
 - i. are remorseful;
 - ii. do not wish the BCMB and ultimately the industry to bear the costs of this matter; and
 - iii. warrant an opportunity to try to sell the business and property of the Morinville Bottle Depot rather than having the BCMB seek immediate cancellation and then proceed immediately with a request for applications for a permit to operate a beverage container depot to serve the area of the Town of Morinville;
 - b. security from Jamil El Kadry and 413955 Alberta Ltd. for payment of the sum of \$250,000.00 in full, which security may include a charge on the land of the Morinville Bottle Depot, personal guarantee or other form of security all or any of which must be satisfactory to the BCMB;
 - c. an acknowledgement that
 - i. unless the amount of \$250,000.00 is paid in full, to the BCMB, the BCMB is not required to consider any application for a permit to operate a beverage container depot at 9903-100 Street, Morinville, Alberta, from any person, who acquires or intends to acquire the Morinville Bottle Depot from 413955 Alberta Ltd., Jamil El Kadry, or anyone related to or associated with 413955 Alberta Ltd. or Jamil El Kadry; and
 - ii. if Jamil El Kadry and 413955 Alberta Ltd. do not pay the sum of \$250,000.00 in full, to the BCMB on or before 4:30 p.m. May 30, 2019 the BCMB may on or after May 31, 2019 issue a request for applications for a beverage container depot to serve the area of the Town of Morinville.
- IV. At 12.01 a.m. on May 31, 2019, the Morinville Bottle Depot Permit is cancelled regardless of whether, by that time and date, Mr. El Kadry and 413955 Alberta Ltd. have been able to sell the business and property of the Morinville Bottle Depot or whether any permit has been applied for or granted to any person for

the operation of a beverage container depot at 9903-100 Street, Morinville Alberta.

- V. If 413955 Alberta Ltd. and Jamil El Kadry, or either of them, fail to comply with the requirement of paragraph II (1), the Complaints Director may apply to the Hearing Panel in writing, with a copy to 413955 Alberta Ltd. and Jamil El Kadry to cancel the Morinville Bottle Depot Permit and the Hearing Panel reserves jurisdiction to hear and decide that application.
- VI. The BCMB may, in writing, extend any of the time limits set out in subparagraph III(a) or IV in its sole and unfettered discretion if in its view it would serve the public interest to do so; but it shall not be obligated to do so or consider doing so at the request of Jamil El Kadry or 413955 Alberta Ltd. or any person related to or associated with Jamil El Kadry or 413955 Alberta Ltd.

- 73. The Hearing Panel was also provided with a signed acknowledgment of the joint submissions on sanction from Mr. El Kadry in accordance with paragraph II. 2 of the proposed order (Exhibit 5).
- 74. In summary, the parties sought an order from the Hearing Panel that would cancel the permit effective May 31, 2019, prevent any further involvement of the Permit Holder in the business after that date, indemnify the BCMB for its costs of the investigation and hearing to the amount of \$250,000, and leave open the possibility of uninterrupted beverage container depot service to the residents of Morinville and the surrounding area.
- 75. Counsel for the Complaints Director made it clear that the Hearing Panel was not obligated to accept the joint submissions on sanction. However, counsel for the Complaints Director referenced case law relating to joint submissions to the effect that a hearing tribunal should give deference to a negotiated agreement made between the parties to a proceeding unless the agreement is unreasonable or contrary to public interest and should not depart from that agreement unless there are good or cogent reasons for doing so.
- 76. Counsel for the Complaints Director submitted that the agreement was in the public interest in this case for a number of reasons.
- 77. Counsel for the Complaints Director argued that the cancellation of the Permit was the appropriate sanction and that the proposed order and the resulting cancellation of the Permit would send the appropriate deterrent message regarding the conduct engaged in by the Permit Holder in this case.

78. Secondly, the proposed order would avoid a lengthy hearing (the hearing had been scheduled for three days and there was some doubt expressed as to whether it could have been concluded within that time frame), save resources and provided finality to the parties with respect to any further potential proceedings.
79. It was submitted that the agreement would resolve the matter in the public interest because it would remove the Permit Holder from any future potential involvement in the Morinville Bottle Depot after May 30, 2019.
80. The staying of the cancellation until May 31, 2019, would also serve the public interest by maintaining depot service to Albertans, while ensuring that depot service was provided in accordance with the Regulation and BCMB By-law.
81. Counsel for the Complaints Director also argued that the Permit Holder's agreement to indemnify the BCMB for the costs of the Investigation and Hearing in the amount of \$250,000 would serve to reinforce the seriousness of the Permit Holder's conduct.
82. Furthermore, that agreement to pay also demonstrated the Permit Holder's remorse for the conduct at issue and ensured that the regulatory cost was borne by the Permit Holder and not by the BCMB (and ultimately the industry).
83. Counsel for the Permit Holder agreed with these submissions and reiterated that the proposed sanction would send a strong message to the industry regarding the regulatory system in place around beverage container recycling, as well as avoiding the expenditure of further resources, removing the uncertainty of the litigation and providing a deterrent to others in the industry who might consider engaging in similar conduct.
84. Counsel for the Permit Holder also emphasized the significant personal and corporate consequences of the proposed sanction to his clients in terms of the costs payment and Mr. El Kadry's inability to continue with a business that he had been operating since the 1990s.
85. Counsel for the Complaints Director concluded by requesting that the Panel accept the joint submissions and asking that if the Hearing Panel had concerns about the joint submission, that counsel be given an opportunity to address those concerns before a final decision was made.
86. The Hearing Panel then asked a number of questions of counsel regarding (1) the jurisdiction of the Panel to impose conditions on an incoming Permit Holder; (2) the nature of the security being obtained; (3) the significance of remorse in assessing sanction and how remorse was to be assessed; (4) the BCMB's potential involvement in related proceedings; (5) the breadth of the Income Tax Act definitions in terms of limiting Mr. El Kadry's involvement with any new Permit Holder and (6) the

consequences of the Morinville Bottle Depot triggering any progressive enforcement actions prior to May 31, 2019.

87. After hearing responses to those questions and adjourning to consider the joint submission, the Hearing Panel advised that it had determined to accept the joint submission as being in the public interest and that it would provide detailed reasons for that acceptance in due course.
88. The Hearing Panel confirms that its determination was made on the basis that it should defer to the negotiated agreement of the parties unless it was of the view that the resulting sanction was unreasonable or not in the public interest. The Hearing Panel understands that parties to a proceeding know the strengths and weaknesses of their respective cases and are generally in a good position to arrive at a resolution that appropriately addresses the interests of both parties.
89. In determining whether or not the joint submission was reasonable and in the public interest, the Hearing Panel then considered a number of issues.
90. As a starting point, the Hearing Panel considered cancellation to be an appropriate sanction for conduct of this nature. The Hearing Panel notes that this sanction is consistent with the sanction imposed by the Hearing Panel with respect to the Permit Holder at the Andrew Depot, with the exception of the 120 day stay requested here.
91. In terms of the stay, the Hearing Panel was asked to consider the fact that there was a slight difference here from the circumstances involving the Andrew Depot in that the Permit Holder in Andrew Depot case was found to have been involved in the transportation of the compacted material into the Province as well as in the shipping of that material to the ABCRC. The Hearing Panel does not consider this a significant distinction in terms of the equally egregious nature of the parties' conduct in both cases, but it is a distinction that the Hearing Panel recognizes in accepting the joint submission.
92. The Hearing Panel had concerns about the impact that the proposed stay might have in terms of the deterrent effect of the cancellation. The Hearing Panel notes that both counsel took the position that the deterrent effect remained strong. As further discussed below, in the overall context of the negotiated agreement and the objectives it achieved, and in the face of the deferential approach required by law, the Hearing Panel was not prepared to conclude that the 120 day stay of the permit cancellation leads to an unreasonable result or a result that is contrary to the public interest.
93. Although the Hearing Panel decided that its hesitation on this issue did not warrant rejecting the joint submission in its entirety, the Hearing Panel wanted to make it clear in these reasons that it did not make this decision lightly.

94. The Hearing Panel's concerns about the deterrent effect of the stay were also moderated by the relatively brief length of the stay, by the fact that cancellation is the most stringent penalty that the BCMB can impose, and by the conditions of the order that ensure Mr. El Kadry's ongoing removal from the business.
95. The Hearing Panel also recognizes that the 120 day stay is in the public interest to the extent that it may allow for the orderly transition of the existing depot into the hands of a new Permit Holder, which would limit the disruption to the public and limit the risk of additional beverage containers ending up in Alberta landfills.
96. The Hearing Panel notes that the fact that the Permit Holder has the ability to continue to operate the Morinville Bottle Depot for up to an additional 120 days does not pose a risk to the public directly during this period of time as there was no evidence that the Permit Holder engaged in improper conduct with respect to its transactions with its customers (albeit the improper conduct had an indirect impact on customers through its impact on the system as a whole).
97. Furthermore, the Hearing Panel notes that it has retained jurisdiction to cancel the Permit at an earlier date in the event that the Morinville Bottle Depot is not operated in accordance with all applicable legislation, regulations and by-laws during the stay.
98. The Hearing Panel also considers the joint submission to be in the public interest to the extent that it includes additional safeguards to ensure that any new permit holder approved by the BCMB is completely independent of, has no association with, and is not related to Mr. El Kadry or his company and that Mr. El Kadry and his company have no interest whatsoever in the new business.
99. The Hearing Panel also noted the clear terms of the order that any proposed applicant for a permit for a depot in the location of the existing depot is subject to the BCMB's established application process and the BCMB's discretion as to whether or not to grant an application remains unfettered.
100. Finally, the Hearing Panel recognized that in the context of the overall resolution of this matter, the Permit Holder had voluntarily agreed to indemnify the BCMB for its costs of the Investigation and the hearing in the amount of \$250,000. This is not an insignificant sum in terms of this type of proceeding. The Hearing Panel considered it to be in the public interest that the costs of the proceedings be borne by the Permit Holder rather than by industry.

VIII. CONCLUSION

101. The Hearing Panel accepts the joint submission and makes the order requested by the parties in the form submitted to the Hearing Panel and marked as Exhibit 2 in these proceedings.

Dated this 20th day of February, 2019.



Cheryl McLaughlin - Chair