



BEVERAGE CONTAINER MANAGEMENT BOARD

**IN THE MATTER OF A HEARING OF
THE BEVERAGE CONTAINER MANAGEMENT BOARD
REGARDING PERMIT #19-BCD-006 ISSUED TO 656588 ALBERTA LTD.**

BCMB Hearing Panel:

Cheryl McLaughlin, Chair
Owen Edmondson
Brenda Smith

Counsel Appearances:

Aman Costigan and Leah Macklin for the Complaints Director
Natalie Tymchuk for the Permit Holder
Vivian Stevenson Q.C. for the Hearing Panel

Date and Place of Hearing:

November 19, 2020
Via Zoom Videoconference

DECISION OF THE BCMB HEARING PANEL

INTRODUCTION

1. This decision arises from a hearing before a Hearing Panel of the Beverage Container Management Board (the “BCMB”) regarding Permit #19-BCD-006 (formerly Permit #15-BCD-012) relating to a depot located in Fort Saskatchewan, Alberta (the “Depot”).
2. The BCMB issued Permit #19-BCD-006 (the “Permit”) to 656588 Alberta Ltd. in 2019. The operator of the Depot is Ho Hong Diep (“Mr. Diep.”), who is also a shareholder and director of 656588 Alberta Ltd. For ease of reference Mr. Diep, 656588 Alberta Ltd. and the Depot may be referred to from time to time in these reasons as the “Permit Holder”.
3. On November 12, 2019, the BCMB Complaints Director directed a hearing based on allegations that between February 20, 2018 and March 6, 2018 the Permit Holder contravened the *Beverage Container Recycling Regulation* 101/97 (the “Regulation”), the *Beverage Container Depot Operation and Administration By-law* (the “O&A By-law”) and the Permit. The O&A By-law is the relevant By-law for the purpose of this hearing, although after the hearing was directed, the O&A By-law was replaced by the *Depot By-law*.
4. This hearing was originally scheduled for March 19 and 20, 2020. The hearing was postponed because of the Covid-19 pandemic.



BEVERAGE CONTAINER MANAGEMENT BOARD

5. On September 25, 2020, the parties wrote to the Chair of the Hearing Panel indicating that they intended to present joint submissions and requesting that the hearing proceed by written submissions without an oral hearing, as permitted by the Hearing Panel Rules of Practice and Procedure.
6. The Hearing Panel agreed to proceed in writing and directed the hearing be held in private. A hearing date of November 19, 2020 was set for that purpose. A revised Notice of Hearing was issued to the Permit Holder on October 22, 2020.
7. The hearing proceeded on November 19, 2020 in private on the basis of an Agreed Statement of Facts and joint submissions from counsel for the parties with respect to the alleged contraventions and sanction.
8. The Hearing Panel has accepted the joint submissions of the parties for the reasons set out in this decision. The Hearing Panel has ordered the sanctions attached as Appendix "A" to the reasons for decision.

JURISDICTION

9. This Hearing Panel was delegated to conduct the hearing in relation to the Permit and was validly appointed according to the O&A By-law. The parties agreed to a written hearing in private and as part of their joint submissions agree that all the necessary jurisdictional and procedural requirements have been met.

ALLEGATIONS AGAINST AND ADMISSION BY THE PERMIT HOLDER

10. The Permit Holder and Mr. Diep admitted the allegations set out in the Revised Notice of Hearing, namely that between February 20, 2018 and March 6, 2018 Ho Hong Diep, the depot operator of the Depot and a Director of the Permit Holder failed to ensure the proper safeguards were in place to prevent:
 1. the acceptance of containers that could reasonably be identified by the depot operator as having been transported into Alberta contrary to Section 11(1) of the Beverage Container Recycling Regulation 101/97; and in doing so
 2. failed to adhere to the highest standards of honesty and fair dealings by accepting containers that were transported into Alberta and delivered to ABCRC for refunds and handling commissions to which the Depot was not entitled, contrary to Section 4.24 of the Beverage Container Depot Operation and Administration By-law;

and thereby the Permit Holder acted contrary to section 14(2) of the Beverage Container Recycling Regulation 101/97 when the Permit Holder failed to comply with the requirements of Permit 15-BCD-012, which required the Permit Holder to operate the Depot in compliance with the Beverage Container Depot Operation and Administration Regulation 101/97.

SUMMARY OF KEY EVIDENCE

11. The evidence before the Hearing Panel in relation to this matter consists of the Agreed Statement of Facts and Tabs 1-7 attached to the Agreed Statement of Facts. In submitting these materials, the parties agree that the Hearing Panel is permitted to rely on any agreed upon document, fact or statement of law and put such weight on that document, fact or statement of law the Hearing Panel sees fit.
12. The Hearing Panel has considered all of the material before it. In order to give context for the Hearing Panel's decision to accept the joint submission, the key evidence is summarized in this portion of the reasons for decision.
13. The investigation into the Depot which led to this hearing began in February of 2018.
14. On February 20, 2018 the BCMB Compliance Department witnessed offloads from the Depot at an Alberta Beverage Container Recycling Corporation ("ABCRC") warehouse. The BCMB Compliance Officer identified suspicious material in mega-bags shipped to the warehouse by the Depot and quarantined 11 mega-bags.
15. On February 22, 2018 the BCMB notified the Permit Holder of the observations of the Compliance Officer and requested a meeting with the Permit Holder. The BCMB indicated that it would continue to monitor future shipments from the Depot.
16. On March 6, 2018 the BCMB witnessed further offloads from the Depot at the ABCRC warehouse and identified suspicious product in three mega-bags. The BCMB did not quarantine any of those mega bags.
17. On March 8, 2018 the BCMB Compliance Department met with Mr. Diep.
18. On March 9, 2018 the BCMB notified the Permit Holder that the BCMB was conducting a Compliance Review in relation to the Depot.
19. On March 16, 2018 the BCMB Compliance Department witnessed further offloads from the Depot at the ABCRC warehouse. No suspicious product was identified.
20. On March 26 and 27, 2018, the BCMB Compliance Department audited the quarantined mega bags and undertook a detailed review of their contents.
21. The BCMB Compliance Department made the following observations from the Depot offloads and audits:
 - a. There was compacted aluminum, gable top, PET, HDPE and other plastics products;
 - b. The containers were crushed with some containers fused together; as well as scrap product fused to containers;
 - c. There were shredded containers and fragments of containers;
 - d. There was compacted scrap material in the shipments, recyclable non-beverage

- container product was observed loose or fused to compacted beverage containers;
- e. There were compacted unregistered beverage containers from outside Alberta; and
 - f. There was garbage associated with Ontario.
22. The nature of the material observed by the BCMB indicated to the Compliance Department that the product had been ripped or torn from bales of material and the bales had originated from outside of Alberta.
23. When asked about the suspicious product, Mr. Diep indicated that he was semi-retired and not often at the Depot. He said that he relied on his staff to collect the containers and prepare the mega-bags for shipment to ABCRC. Mr. Diep said that after he was notified of the suspicious product, he became more hands-on at the Depot and that he fired a supervisor who was doing a poor job of supervising and training employees. Mr. Diep also told the BCMB Compliance Department of the changes he implemented in the Depot to stop unlawful conduct from occurring at the Depot in the future.
24. The period of review of the Depot by the BCMB Compliance Department was from February 20, 2018 to April 29, 2019. The Compliance Officer responsible for the review did not review shipments from the Depot prior to February 20, 2018 and did not review all shipments from the Depot during the period of review. For that reason, the Compliance Officer was not able to identify whether other shipments contained similar product.

DECISION AND REASONS

25. The parties submitted that the Hearing Panel should give significant deference to their joint submissions on liability. The parties referenced the Supreme Court of Canada's decision in *R. v. Anthony-Cook* 2016 SCC 43, in which the Supreme Court stated that an adjudicator may only depart from a joint submission if the proposed sentence would "bring the administration of justice into disrepute or would otherwise be contrary to the public interest" and that a joint submission may only be rejected if it is "so unhinged from the circumstances of the offence and the offender and its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances...to believe that the proper functioning of the...system had broken down."
26. The Hearing Panel recognizes that these statements were made by the Supreme Court in the criminal law context but accepts that there is a high threshold for rejecting a joint submission in the administrative law context as well. Joint submissions foster cooperation between the parties and encourage an efficient use of resources. That result would be undermined if the parties to a joint submission did not have some degree of confidence the submission would be upheld.
27. Accordingly, the Hearing Panel proceeded on the basis that even if it disagreed with the sanction proposed by the parties, that alone would not entitle it to reject the joint submission. The Hearing Panel accepted that it should only reject the joint submission if it considered the result to bring the hearing proceedings into disrepute or otherwise be contrary to the public interest.



BEVERAGE CONTAINER MANAGEMENT BOARD

28. Dealing first with the admission of liability, the Hearing Panel accepted the admission that the acceptance and shipping of materials such as the ones observed in the Depot offloads and audits constituted a breach of section 14(2) of the Regulation, Section 4.24 of the O&A By-law and of the Permit.
29. The same conclusion has been reached by other BCMB Hearing Panels. Those other Hearing Panels have described the “closed loop” nature of the beverage container recycling system in Alberta and explained why these types of activities by Depots pose a serious threat to the integrity of the system. These decisions can be found on the BCMB website at <https://www.bcmb.ab.ca/whats-new/bcmb-hearings/> with reference to Permit numbers 13-BCD-081 and 18-BCD-055. The Hearing Panel does not consider it necessary to comment further on these matters.
30. Mr. Diep has also properly admitted that as the Depot operator he is personally responsible to ensure compliance with the Regulation, BCMB By-laws and the terms and conditions of the Permit. The O&A By-law confirms that Mr. Diep is jointly and severally liable with the Depot for regulatory compliance and was responsible to ensure compliance by appropriate supervision of the Depot operations. A depot operator does not avoid that responsibility by not being physically present at a depot when materials are bagged and shipped.
31. In terms of sanction, the Hearing Panel notes that the Permit Holder accepted that the admitted conduct was serious and that a serious sanction is appropriate. The Hearing Panel agrees with that submission and considered each element of the proposed sanction as well as its combined effect in assessing the seriousness of the proposed sanction.
32. The first element of the sanction is an 8-month suspension of the Permit.
33. The Hearing Panel is aware that findings of similar conduct by other depots and depot operators have led to a permit cancellation as opposed to a permit suspension. The Hearing Panel drew a distinction between the evidence of repeated, deliberate and dishonest conduct on the part of the Permit Holders in those other cases and the limited evidence of suspicious shipments that was before the Hearing Panel here.
34. The Hearing Panel also considered it significant that Mr. Diep had cooperated with the BCMB in its investigation and that after being notified of the suspicious material, it appears that Mr. Diep took steps to address the issue, as further material was not observed in subsequent shipments.
35. These two behaviours stand in sharp contrast to the conduct of the Permit Holders in the cases where a cancellation was imposed.
36. In terms of the length of the suspension, while the Hearing Panel may have been inclined to impose a lengthier suspension had the matter proceeded to a hearing, as noted above, the Hearing Panel accepts that does not justify rejecting the length of suspension jointly proposed. The Hearing Panel found no reasonable basis to consider an 8-month suspension unreasonable or incompatible with the public interest, particularly given that the allegations only relate to two non-compliant offloads within a two-week time frame.

37. The second key element of the proposed sanction is the stay of the Permit suspension for 2 years, pending compliance with a number of conditions.
38. The Hearing Panel considered each of the various conditions to consider whether they were sufficiently rigorous to underscore the serious nature of the sanction being imposed and were in the public interest.
39. A significant consideration for the Hearing Panel in this regard was the Permit Holder's voluntary agreement to pay \$50,000 in costs to demonstrate remorse and an acceptance of responsibility by Mr. Diep for the unlawful conduct that occurred at the Depot.
40. A second important consideration was the Permit Holder's agreement to an expedited process for suspension in the event of evidence of the shipping of "Non-System Beverage Containers".
41. The Hearing Panel had some difficulty understanding the nature of the threshold to trigger the expedited process because the parties agreed to their own definition of "Non-System Beverage Container".
42. "Non-System Beverage Container" is not a term which currently exists in the BCMB compliance framework. In reviewing the parties' definition, the Hearing Panel was not sure whether it was intended to include non-beverage containers. The Hearing Panel was also not familiar with an "unregistered" tab in the Registration Database referenced in section 7.a of the definition. The Hearing Panel considered seeking clarification from the parties on these points, but decided that having agreed to the definition, the BCMB would be comfortable with its enforcement and must have considered it to be an appropriate level of scrutiny for its purposes. The Hearing Panel had no basis for considering the threshold to be unreasonable or contrary to the public interest.
43. In accepting the stay of the suspension as part of the sanction the Hearing Panel also accepted that it is in the public interest to maintain uninterrupted access to a beverage container depot where that is possible, particularly where there are no alternative depots in the vicinity. That being said, the BCMB can make alternate arrangements to accommodate the public where a depot closure is necessary, and this was not a key consideration for the Hearing Panel in terms of accepting the sanction jointly proposed by the parties.
44. Although the Hearing Panel carefully considered all elements of the joint submission, an overriding consideration for the Hearing Panel in accepting the joint submission was the desire to encourage permit holders to attempt to jointly resolve compliance issues with the BCMB without a hearing where appropriate and reasonable. Among other things, hearings consume considerable time and resources, and the cost is ultimately borne by the beverage container recycling system.
45. After considering the individual elements of the sanction and its overall impact on the Permit Holder, the Hearing Panel accepts the sanction as jointly proposed.



BEVERAGE CONTAINER MANAGEMENT BOARD

CONCLUSION

46. The Hearing Panel accepts the joint submission and makes the order requested by the parties in the form attached as Appendix "A" to these reasons.

47. The Hearing Panel also directs BCMB administration to redact any information contained in the Agreed Statement of Facts and Tabs 1-7 to the Agreement Statement of Facts relating to third parties. The Hearing Panel also directs the redaction, as appropriate of any information which specifically identifies BCMB compliance staff.

Dated this 9th day of December, 2020.

A handwritten signature in blue ink, appearing to read 'Cheryl McLaughlin', is written above a horizontal line.

Cheryl McLaughlin - Chair

APPENDIX A

Sanctions

**IN THE MATTER OF A HEARING OF
THE BEVERAGE CONTAINER MANAGEMENT BOARD
REGARDING PERMIT #19-BCD-006 ISSUED TO 656588 ALBERTA LTD.**

BCMB Hearing Panel:

Cheryl McLaughlin, Chair
Owen Edmondson
Brenda Smith

Date and Place of Hearing:

November 19, 2020
Via Zoom Videoconference

UPON this matter coming before a BCMB Hearing Panel in private on the basis of an Agreed Statement of Facts and Joint Submissions from the Parties; AND UPON reviewing the material submitted to the PANEL; IT IS HEREBY ORDERED THAT:

Orders

1. Permit #19-BCD-006, being the Permit to Operate a Beverage Container Depot issued to 656588 Alberta Ltd. (the "Depot Permit"), shall be suspended for a period of 8 months.
2. 656588 Alberta Ltd. and Ho Hong Diep shall cooperate with inspections of the Fort Saskatchewan Bottle Depot (the "Depot") by the Beverage Container Management Board ("BCMB") for a period of 2 years from the date this Order is issued. For the purpose of paragraph 2 of this Order, the BCMB may:
 - a. visit the Depot at any reasonable time to conduct random inspections to determine whether the Depot is complying with the Beverage Container Recycling Regulation, the BCMB By-laws, policies, guides and the Depot Permit;
 - b. conduct random inspections and audits of offloads shipped to the Collection System Agent; and
 - c. quarantine shipments from the Depot to the Collection System Agent pending a review or an investigation.
3. 656588 Alberta Ltd. and Ho Hong Diep shall be responsible for the costs incurred by the BCMB in conducting each inspection set out in paragraph 2, up to a maximum total of \$5,000 for all inspections over the 2 year period. The BCMB may issue invoices to 656588 Alberta Ltd. and Ho Hong Diep for the inspections as they are conducted. 656588 Alberta Ltd. and Ho Hong Diep shall pay the BCMB for the amount invoiced within 30 days of the BCMB emailing the invoice to the Depot's industry email address on file with the BCMB.

4. 656588 Alberta Ltd. or Ho Hong Diep shall not be an owner, permit holder, or depot operator of any other depots in Alberta for a period of 2 years from the date this Order is issued. This includes, but is not limited to:
 - a. acting as a Director or Shareholder of any other depot;
 - b. gaining profits from any other depot;
 - c. having any ownership or rights in any other depot;
 - d. assisting any other depot with operation; and
 - e. assisting any other depot with applying for a permit.

5. 656588 Alberta Ltd. and Ho Hong Diep jointly and severally agree to pay on or before the date of the hearing (written or in-person) the amount of \$50,000.00 into Emery Jamieson LLP's trust account. If the Hearing Panel accepts this Consent Order, the \$50,000.00 will be paid to Shores Jardine LLP's trust account. Shores Jardine LLP will then provide the \$50,000.00 to the BCMB. 656588 Alberta Ltd. and Ho Hong Diep have willingly agreed to pay the amount of \$50,000.00 to the BCMB to indemnify the BCMB for costs incurred in relation to this matter, including costs of staff and costs of legal counsel, as a means of demonstrating to the Complaints Directors and the Hearing Panel that 656588 Alberta Ltd. and Ho Hong Diep are remorseful and do not wish the BCMB and ultimately the industry to bear the costs of this matter.

Stay of the suspension order

6. The suspension in paragraph 1 of this Order is stayed but shall come into effect only if and when the BCMB establishes to the satisfaction of a Hearing Panel that, within a 2 year period from the date this Order is issued, any of the following have occurred:
 - a. the BCMB conducted an inspection of the Depot and located 40 or more Non-System Beverage Containers at the Depot premises;
 - b. the Depot shipped a mega bag to the Collection System Agent that included 10 or more Non-System Beverage Containers;
 - c. 656588 Alberta Ltd. or Ho Hong Diep failed to comply with paragraph 2, 3, 4 or 5 of this Order.

7. For greater clarity, a Non-System Beverage Container in this Order means a container that has not been registered by the BCMB and is not deposit bearing. These include:
 - a. out-of-province beverage containers (not sold or distributed in Alberta) and may be identified in the unregistered tab of the Beverage Container Registration Database;



BEVERAGE CONTAINER MANAGEMENT BOARD

- b. beverage containers that are exempt from the Beverage Container Recycling Regulation or not yet included in the Beverage Container Recycling Regulation (pending registration review); and
- c. off-spec containers which are beverage containers that have not been filled or used and therefore are not registered for sale as ready-to-serve beverages in Alberta.

Application Process

- 8. If the Depot, 656588 Alberta Ltd. or Ho Hong Diep has engaged in the conduct outlined in paragraph 6 of this Order:
 - a. The Complaints Director will make an application to the Hearings Director of the BCMB, with a copy to 656588 Alberta Ltd. and Ho Hong Diep by email to the Depot's industry email address. The application will include evidence of the alleged conduct and any written submissions. The Hearings Director will provide the Complaints Director's application to a Hearing Panel;
 - b. 656588 Alberta Ltd. and Ho Hong Diep will have 10 business days from the date the Complaints Director makes his application to provide a response to the application. The response to the application will include evidence and any written submissions. 656588 Alberta Ltd. and Ho Hong Diep will provide the response to the application to the Hearings Director with a copy to the Complaints Director by email. The Hearings Director will provide 656588 Alberta Ltd. and Ho Hong Diep's response to the application to the Hearing Panel;
 - c. The Complaints Director will have 10 business days from the date 656588 Alberta Ltd. and Ho Hong Diep provides their response to the application to provide any reply submissions to the Hearings Director with a copy to 656588 Alberta Ltd. and Ho Hong Diep by email to the Depot's industry email address. The Hearings Director will provide the Complaints Director's reply submissions to the Hearing Panel;
 - d. Notwithstanding the Hearing Panel's authority to order an oral hearing under the Depot By-law, the application will proceed by way of a written hearing; and
 - e. If the Hearing Panel finds that the alleged conduct is proven on a balance of probabilities, the Depot's Permit will be immediately suspended for a period of 8 months from the date of the Hearing Panel's decision.