

**IN THE MATTER OF A HEARING OF  
THE BEVERAGE CONTAINER MANAGEMENT BOARD  
REGARDING PERMIT #19-BCD-010 AND PERMIT #15-BCD-025 (now #20-BCD-018)  
ISSUED TO GRACIAN THAMBIMUTHU**

*BCMB Hearing Panel:*

Andrew Stephens, Chair  
Thomas Dore  
Brian Moore

*Counsel Appearances:*

Stacey McPeck and Ashley Reid for the Complaints Director  
Vivian Stevenson Q.C. for the Hearing Panel

*Appearances:*

Gracian Thambimuthu on his own behalf

*Date and Place of Hearing:*

October 20-21, 2021  
Via Zoom video conference

**DECISION OF THE BCMB HEARING PANEL**

**INTRODUCTION**

1. This is a decision arising from a hearing before a Hearing Panel of the Beverage Container Management Board (the “BCMB”) regarding Permit #19-BCD-010 and Permit #15-BCD-025 (now #20-BCD-018) issued by the BCMB.
2. The BCMB issued Permit #19-BCD-010 to Mr. Gracian Thambimuthu (the “Permit Holder”) for a depot operating in Castor, Alberta (the “Castor Depot”) on February 1, 2019. Permit #19-BCD-010 was issued to the Permit Holder for the period from February 1, 2019, to January 25, 2024.
3. The Permit Holder had previously been issued Permit #15-BCD-025 for a depot in Coronation, Alberta (the “Coronation Depot”) for the period from May 9, 2015, to May 20, 2020. That Permit was renewed as Permit #20-BCD-018 in May of 2020 for the period from May 11, 2020, to May 11, 2025.



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4. Mr. Thambimuthu is the Permit Holder and depot operator of both the Coronation Depot and the Castor Depot. Mr. Thambimuthu or the Depots may be referred to from time to time as the Permit Holder.
5. On June 3, 2021, the BCMB Complaints Director directed a Hearing be set in relation to the allegations set out in the Notice of Hearing as set out in paragraph 10 of this Decision.
6. The Hearing was originally scheduled to be held in person. Due to the heightened COVID-19 restrictions put in place in Alberta in September of 2021, the parties consented to the Hearing taking place by way of Zoom video conference, and the Hearing proceeded accordingly.

#### **JURISDICTION AND PRELIMINARY ISSUES**

7. The Hearing Panel was delegated to conduct the Hearing in relation to the Permits and was validly appointed according to the Depot By-law. There was no objection to the jurisdiction of the Hearing Panel in these proceedings, and no objection to the composition of the Hearing Panel.
8. The Permit Holder was self-represented at the Hearing. English is not his first language. The Chair of the Hearing Panel asked the Permit Holder to confirm that he was comfortable proceeding in English and the Permit Holder confirmed that he was. Notwithstanding the Permit Holder's confirmation, the Chair advised that the BCMB had arranged to have an interpreter present and advised the Permit Holder that if at any point he wanted the assistance of the interpreter, the interpreter would be made available. The Permit Holder was also advised that if, at any time he had any difficulty understanding anything that had been said, he should advise the Hearing Panel accordingly.
9. The Hearing proceeded in English, but at times the Permit Holder asked for the involvement of the interpreter and the interpreter participated in portions of the proceedings as requested. Even when the interpreter was involved, the Permit Holder would frequently answer questions or make statements in English, and at times would correct the interpreter on a translation.

#### **ALLEGATIONS AGAINST THE PERMIT HOLDER**

10. The Notice of Hearing contained the following allegations:
  - a. That on February 18 and 25, 2020, Gracian Thambimuthu, the Permit Holder and the depot operator of the Castor Bottle Depot, which held Permit No. 19-BCD-010:
    - a. accepted containers that could reasonably be identified by the depot operator as having been transported into Alberta contrary to Section 11(1) of the *Regulation*;
    - b. failed to adhere to the highest standards of honesty, integrity, fair dealings and ethical conduct in all dealings with customers, the collection system agent appointed under the Regulation, any collection service provider, the BCMB and the general public 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 10.35 of the Depot By-law;

and the above conduct contravened the requirements of Permit No. 19-BCD-010;

b. That on February 18 and 25, 2020, Gracian Thambimuthu, the Permit Holder and depot operator of the Coronation Bottle Depot, which held Permit No. 15-BCD-025:

- i. accepted containers that could reasonably be identified by the depot operator as having been transported into Alberta contrary to Section 11(1) of the *Regulation*;
- ii. failed to adhere to the highest standards of honesty, integrity, fair dealings and ethical conduct in all dealings with customers, the collection system agent appointed under the Regulation, any collection service provider, the BCMB and the general public 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 10.35 of the Depot By-law;

and the above conduct contravened the requirements of Permit No. 15-BCD-025;

all of which is contrary to the provisions of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, and the *Regulation*.

## EVIDENCE

11. The evidence before the Hearing Panel in relation to this matter consists of both documentary evidence and the oral testimony given at the Hearing. The documentary evidence is contained in the following Exhibits:

Exhibit 1: Notice of Hearing

Exhibit 2: Confirmation of Service of the Notice of Hearing

Exhibit 3: Complaints Director Written Submission

Exhibit 4: Appendices to the Complaints Director Written Submission

Exhibit 5: Complaints Director Written Submission, extra documents provided following initial submission

Exhibit 6: Castor & Coronation Shipping Volume Report (2014-2021)

Exhibit 7: Customer List submitted by Permit Holder

Exhibit 8: Depot Financial Statement (from ABCRC) submitted by Permit Holder

Exhibit 9: Image of customer containers submitted by Permit Holder

12. The Hearing Panel also heard oral testimony from Mr. Mark Emsden, the BCMB Complaints Director, Ms. Michelle Winmill, a BCMB Investigations Officer, and from Mr. Thambimuthu.

## Testimony of Mr. Mark Emsden

13. The Hearing Panel first heard evidence from Mr. Emsden. Mr. Emsden is currently the Complaints Director at the BCMB. He advised the Hearing Panel of his experience and background in investigations and law enforcement before providing the Hearing Panel with information about the nature of the beverage container collection system in Alberta and his initial involvement in the investigation into the Castor and Coronation Depots.
14. The functioning of the Alberta beverage container recycling system has been explained in previous decisions of the BCMB<sup>1</sup> and will not be discussed in detail here. By way of a brief description, the system is a closed loop system. All beverage containers sold in Alberta are required to be registered with the BCMB. Consumers pay a deposit when they purchase beverages in registered containers in Alberta. That deposit is returned to the consumer by a depot when the consumer returns the beverage container to it. By regulation only registered beverage containers can be accepted for return of the deposit at a depot and a depot can only be operated under a permit issued by the BCMB.
15. Depots collect the registered containers, and those containers are in turn collected from the depots by agents of the manufacturers. In the case of non-refillable containers, that agent is Alberta Beverage Container Recycling Corporation (“ABCRC”), also referred to as the Collection System Agent or CSA. The CSA pays the depot back the deposit refund it has paid out to the consumer. Since the manufacturers have already been paid the deposit by the consumer when the beverage container was purchased, this completes the deposit flow-through in the closed loop. The CSA also pays the depot a handling commission for each container. The handling commission is funded by the system in various ways.
16. Mr. Emsden explained that if containers are returned to a depot which have not been registered in Alberta and for which no deposit has been paid, and if the depot operator is paid a deposit by the CSA, that deposit is not a flow-through, but represents a cost to the system, or put another way, a flow of money out of the closed loop.
17. According to Mr. Emsden, these sorts of system losses could occur in situations such as (1) individual consumers traveling out of Alberta and bringing back and returning containers purchased elsewhere; (2) manufacturers failing to register beverage containers; and (3) large scale importations of beverage containers in a deliberate and fraudulent effort to extract money from the beverage container system.
18. As indicated in the previous Hearing decisions, the BCMB encountered the fraudulent importation of Beverage Containers in 2014 when it learned that bales of recycled material from

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<https://www.bcmb.ab.ca/uploads/source/Hearings/Decisions/2020.12.09.BCMB.Hearing.Decision.Permit.19-BCD-006.pdf>,

<https://www.bcmb.ab.ca/uploads/source/Hearings/Decisions/2019.02.20.Reason.for.Decision.Permit.18B-CD055.pdf>

<https://www.bcmb.ab.ca/uploads/source/Hearings/Decisions/2017.02.16.Decision.Reclaim.Recycling.Perm.13-BCD.081.pdf>



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other jurisdictions were being transported by container loads to a warehouse in Edmonton, Alberta. Those bales were then being ripped apart and the beverage containers removed and distributed to various depots for return to the CSA.

19. Despite that warehouse being located and that operation being shut down, Mr. Emsden testified that the BCMB has continued to find similar operations elsewhere in Alberta. The commonality between these operations is that the beverage containers being returned through depots had already been compacted as part of the recycling process in the other jurisdictions. According to Mr. Emsden only 11 depots in Alberta have agreements with the CSA to compact beverage containers that are being returned to the CSA. None of the other Alberta depots have compaction equipment. The appearance of large numbers of compacted containers in loads from depots without compaction equipment is therefore a possible indicator to the CSA and the BCMB that these containers have originated from outside of Alberta.
20. Mr. Emsden explained to the Hearing Panel the difference in appearance between containers that have been compacted by compaction equipment (compacted containers) and containers that have been crushed manually; either with a can crusher or by a consumer bending or stepping on a container (crushed containers). For one thing, compacted containers are much flatter. An aluminum can crushed with a can crusher or by being stepped on is flattened end to end like a hockey puck. If an attempt is made to deform the bottom or top ends by crushing the side of the can, the ends fold in towards the center. A can that has been compacted by hydraulic machinery on the other hand, can be flattened so that the ends remain intact, but fold back onto the sides of the can.
21. Mr. Emsden also testified that in other provinces, such as Ontario, beverage containers are not separated from other containers made of similar material during the recycling process. When beverage containers in those jurisdictions are compacted into bales, those bales inevitably also contain other types of containers. The force of compaction can fuse the beverage containers with other non-beverage containers. The presence of non-beverage containers fused to beverage containers or the presence of non-beverage containers among beverage containers collected from a depot act as a potential red flag that the containers may be unregistered containers that originated out of province.
22. According to Mr. Emsden's testimony, other provinces also require that plastic PET (polyethylene terephthalate) beverage containers have their lids removed before compaction. That has not been a requirement in Alberta for many years, although some consumers unaware of this, or out of habit still remove lids from beverage containers before returning them. Nevertheless, it is highly unusual to have all PET beverage containers in a shipment to the CSA with lids removed.
23. The Panel also heard that compacted containers that had been removed from a bale were often ripped or shredded because of the force that had to be used to separate them from other containers and this ripping or shredding was not normal in the case of crushed materials.
24. Container shipments are audited by the CSA. However, the sheer volume of containers means that the CSA cannot audit every shipment received from a depot. The BCMB therefore relies on

its own depot inspections and other monitoring and on the depot operators themselves to protect the system from fraud.

25. Mr. Emsden advised that the BCMB provides tools to depot operators to help identify registered containers by giving them access to an online beverage container registry. Depot operators can search for beverage containers and beverage types in an attempt to ascertain whether a container is registered in Alberta or whether it has been rejected for registration. The registry can be used for unusual containers or where there are other red flags about a container, such as its physical condition or the large number of a certain type or condition of containers in a single return.
26. Mr. Emsden explained that the BCMB also implemented a container validation process for depot operators to use when faced with returns of beverage containers that exhibit unusual characteristics. The depot operator is asked to complete a Container Validation Request form (“CVR”) which requires information about the containers and their origin and information about the customer presenting the beverage containers. The depot operator is asked to quarantine the material. The CVR is then provided to the BCMB who will then advise the depot operator whether the containers can be accepted, and a deposit refund paid. The CVR process is explained on the BCMB website.
27. Mr. Emsden testified that another way that the BCMB monitors for fraudulent shipments of out of province containers into Alberta is through monitoring the number of containers shipped from each depot. Because people generally consume the same number of beverages over time, and generally return them to the same depots, the number of beverage containers shipped by a depot in any given month does not tend to vary greatly from the same month in previous years. Small fluctuations are normal. If there are large fluctuations in the number of containers shipped from a depot, the BCMB may make inquiries to determine whether there is a clear explanation. Large fluctuations may be readily explicable as a result of a large bottle drive or several bottle drives around the same time, a large local event that draws visitors to a particular area, a change in collection activities or operating hours at a depot, or an increase in construction activities in the area.
28. In the absence of a clear explanation, the BCMB may decide to audit loads from a depot to see whether there are any containers that appear to have originated from outside of Alberta.
29. Mr. Emsden testified that in an effort to educate depot operators about shipments of unregistered containers from out of province, the BCMB had sent a number of notices to the depot network warning about these shipments and the red flags to watch for. Mr. Emsden testified that the BCMB sent 15 notices to depot operators about suspicious containers or the CVR process between January 2018 and January of 2020.
30. The Hearing Panel was provided with a copy of the last of these notices sent during this period, being a notice dated January 24, 2020, which contained a list of characteristics of containers that had been found to have originated outside of Alberta and images of these types of containers.<sup>2</sup>

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<sup>2</sup> Exhibit 4 Appendix 2G: BCMB notification to the Alberta depot network, January 24, 2020



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31. Mr. Emsden then referred the Panel to the Investigation Report of Ms. Winmill which contained a table showing the number of beverage containers shipped from the Castor and Coronation Depots in 2018 and 2019.<sup>3</sup> He drew the Panel's attention to an increase in the number of containers shipped from both depots between the months of June and December 2019 from the same period in the previous years. In December of 2019 those increases were in the order of 300% and 440%.
32. Mr. Emsden advised that he was unable to determine any obvious explanation for the increased shipments from the Castor Depot and Coronation Depot. There had been no population increases. Internet searches did not show any unusual events or bottle drives, there were no construction projects and there had been no change in operations or hours of operation. Based on those volume increases, Mr. Emsden directed that shipments from both depots be inspected by the BCMB. Mr. Emsden made it clear that he would not consider an increase in shipments in and of itself to be evidence of fraud but said that in this case the volume increase triggered a decision to perform an audit to ascertain whether further investigations were required.
33. Mr. Emsden advised that BCMB Compliance Officers attended at CSA premises and witnessed offloads from the Castor Depot and the Coronation Depot on February 18, 2020, and February 25, 2020.
34. The BCMB Compliance Officers observed compacted aluminum in the offloads. Material from the offloads was quarantined for audit. The quarantined material exhibited the same characteristics as the material found by the BCMB during investigations into other out of province shipments.
35. Accordingly, Mr. Emsden directed that the BCMB advise the Permit Holder of its findings and invite him to meet with BCMB staff to explain the origin of the compacted containers.
36. The Permit Holder met with Mr. Emsden and Ms. Michelle Winmill for an interview on June 22, 2020. A transcript of that interview can be found in an appendix to the BCMB Investigation Report.<sup>4</sup> At the interview the Permit Holder explained that the volume increase was the result of him picking up material from a scrap metal dealer in Edmonton. He advised that he had been introduced to the scrap metal dealer by the previous owner of the Castor Depot before it was purchased by him in 2019. He advised Mr. Emsden and Ms. Winmill that when he first purchased the Castor Depot, he had not had time to travel in order to collect the beverage containers from the scrap metal dealer, but in June of 2019 he started picking up material from the dealer about 2 times a month. The Permit Holder also explained that his collection volume had been lower the previous year and so the increase in 2019 was in part simply a return to normal levels. He also referenced bottle drives as part of the reason for the increase in the number of containers.
37. When asked about the compacted materials, the Permit Holder explained that the scrap metal dealer compacted containers before they were collected by the Permit Holder, and also that the Permit Holder obtained flattened materials from local farmers. He also explained that some of

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<sup>3</sup> Exhibit 4 Appendix 2 p. 21

<sup>4</sup> Exhibit 4 Appendix 3



his customers brought in containers cleaned out of ditches, and which had been flattened or damaged by cars or ditch-mowing equipment.

38. Mr. Emsden testified that after the interview with the Permit Holder he handed over the investigation to Ms. Winmill to complete, and that based on the Investigative Report that she provided at the end of her investigation, he directed the Hearing Director to set the matter for a hearing.

#### **Evidence of Ms. Michelle Winmill**

39. Ms. Winmill was originally employed by the BCMB as a Compliance Officer. She was then promoted to the position of Investigations Officer. She testified that she took over the investigation into the Castor and Coronation Depots in May of 2020 when Mr. Emsden became Complaints Director and that following her investigation she wrote an Investigation Report which she submitted to Mr. Emsden.<sup>5</sup>
40. Ms. Winmill then testified about her investigation with reference to key portions of her Investigation Report. She confirmed that during a routine review of year-on-year shipment data from depots, the BCMB had identified an increase in the amount of material shipped from the Castor and Coronation Depots from June to December of 2019.<sup>6</sup> The overall increase reached its height in December of 2019 with a 441.3% increase for the Castor Depot and a 302.2% increase for the Coronation Depot.
41. Ms. Winmill advised that she attended at the inspections done of the shipments from the two Depots on February 18 and February 25, 2020. She testified that during the inspections a large number of compacted beverage containers and non-beverage containers were observed and as a result, various bags of containers were “quarantined” for further inspection.
42. Ms. Winmill explained that the compacted material that she saw during the inspection was similar to the compacted material that had been observed in previous investigations into fraudulent shipments to Alberta of non-registered containers.
43. Ms. Winmill also indicated that the BCMB had sent notices to the Permit Holder about this type of material between January of 2018 and January of 2020, and in particular she referred to Appendix G to her report which was a copy of a BCMB Memo dated January 24, 2020, to the Depot Network regarding out of province compacted material (the “January Memo”). In the January Memo the BCMB indicates that it had noticed a recent increase in efforts to introduce compacted, out of province material into the depot system. The January Memo warns of the financial risk to the deposit return system of accepting this type of material and reminds depot operators of the use of the CVR process to vet material brought to a depot. The January Memo also lists typical characteristics of the material in question and attaches as examples, 14 images of the material.

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<sup>5</sup> Exhibit 4 Appendix 2

<sup>6</sup> Exhibit 4 Appendix 2 p. 21





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44. Ms. Winmill testified that her inspection of the material quarantined from the shipments from the Castor and Coronation Depots revealed containers with the characteristics described in and shown in the images attached to the January Memo.
45. Ms. Winmill then showed the Panel specific examples of this material by referring to Appendix 2J to her Investigation Report. She specifically identified containers that were not registered in Alberta and could be identified through the online registry portal as such.<sup>7</sup> She also identified paper garbage mixed in with the containers that could easily be identified as originating out of province,<sup>8</sup> non-beverage containers such as cat food tins,<sup>9</sup> containers compacted that could not have been compacted other than by machines,<sup>10</sup> ripped and shredded cans<sup>11</sup> and containers that had been fused together with other containers or garbage.<sup>12</sup>
46. During her testimony Ms. Winmill also showed the Hearing Panel images depicting the sheer quantity of compacted material contained in the off-loaded bags<sup>13</sup> and showing how a number of compacted containers were found in “pockets” among non-compacted containers.<sup>14</sup> Other images depicted PET containers that had been compacted by being twisted, a type of compaction that Ms. Winmill testified was not used in Alberta and that was not possible manually.
47. Ms. Winmill testified as to the results of the audit of the quarantined material as detailed in her Investigation Report.<sup>15</sup> She testified that from the mega-bags<sup>16</sup> selected and audited from the Castor Depot and the Coronation Depot, the BCMB identified approximately 65,000 containers that were believed to have been previously baled together outside of the province and shipped into Alberta.
48. Ms. Winmill testified that the characteristics of the material from the quarantined material was the same as had been encountered in previous investigations that had gone to hearing in relation to the Morinville Depot and Fort Saskatchewan Depot. In her Investigation Report she noted that the quantity of suspected baled material also correlated to past cases, with aluminum compacted containers being found in multiples of 300 and Gable Top Over 1L compacted containers being found in multiples of 80.<sup>17</sup>
49. Ms. Winmill then advised the panel of the subsequent steps she took in her investigation, again with reference to, and highlighting portions of her written Investigation Report.

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<sup>7</sup> For example, a Zambroza container (p. 117), a Balistreri container (p. 141), a craft beer from Winnipeg (p. 144), a Whiteclaw container that was not registered at the time (p. 147)

<sup>8</sup> For example, a Tim Hortons receipt from Ontario (p.155), a pink card from an insurer that was confirmed to have been issued in Ontario (p. 159), a container with a label from metro in Sarnia, Ontario

<sup>9</sup> For example, the containers shown in Appendix 2J (p.90 and p.97)

<sup>10</sup> For example, Exhibit 4 Appendix 2J (p.91, p.93, p.132, p.145)

<sup>11</sup> For example, Exhibit 4 Appendix 2J (p.92, p.94, p.145)

<sup>12</sup> For example, Exhibit 4 Appendix 2J (p.92, p.94, p.97, p.107)

<sup>13</sup> For example, Exhibit 4 Appendix 2J (p.95, p.109, p.110, p.118,p.126)

<sup>14</sup> For example, Exhibit 4 Appendix 2J (p.99)

<sup>15</sup> Investigation Report Exhibit 4 Appendix 2 pp. 22-24.

<sup>16</sup> Mega-bags is the term used to describe the large bags used for shipping containers from depots

<sup>17</sup> Investigation Report Exhibit 4 Appendix 2 p. 30 s. 5.8



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50. On March 4, 2020, Ms. Winmill attended at the Castor Depot with BCMB Compliance Officer Emily Stanton. Ms. Winmill indicated that they observed at least two dozen garbage bags full of compacted materials and that the materials were already sorted into material streams.
51. Ms. Winmill asked the Permit Holder where the material came from and was advised that the bags were from a bottle drive and from a customer with a compactor who had been bringing in similar bags for 6 years.
52. Ms. Winmill and Ms. Stanton then drove to the Coronation Depot. Ms. Winmill was surprised that the Permit Holder was at the Coronation Depot and had arrived ahead of them, as Ms. Winmill drove what she thought was the most direct route. Ms. Winmill said when they arrived, she observed the Permit Holder moving bags around in the Depot.
53. At the Coronation Depot Ms. Winmill observed more garbage bags containing compacted material. She noted that some of the bags had mega-bags draped over them as if to conceal them. Ms. Winmill asked the Permit Holder about these bags and was told by the Permit Holder that these containers were from farmers and from businessmen and from a garbage picker, who would drop them off and leave them to count and sort. Ms. Winmill expressed to the Hearing Panel some difficulty with this explanation as it appeared that the material in the bags had already been sorted.
54. When Ms. Winmill asked the Permit Holder about why he was there, he advised that he had come back to the Depot because the female employee working there needed to leave at 2:00 pm and he was taking over her role. However, when Ms. Winmill left at 2:30 pm, the female employee was still at the Depot.
55. In her report Ms. Winmill indicated that from March 15, 2020, to the end of April, BCMB staff did not attend at Depots or at CSA plants due to the COVID-19 pandemic. No offloads or audits were conducted by the BCMB during this period.<sup>18</sup>
56. Ms. Winmill then reported to Mr. Emsden recommending that the compliance file in relation to the Castor and Coronation Depots be escalated to Compliance Review. The Permit Holder was advised and provided with an opportunity to respond to the BCMB's concerns.
57. Ms. Winmill attended the interview with the Permit Holder and Mr. Emsden on June 22, 2020 and directed the Hearing Panel to the transcript of that interview.<sup>19</sup> Ms. Winmill testified that during interview the Permit Holder stated that he had picked up the compacted material from a scrap metal dealer and that he had been picking up the material weekly, although he had not been doing this as frequently at the outset of his operation of the Castor Depot. He said that he had checked some of the cans through the BCMB online registration portal and they were registered. He advised that he had not used the CVR process at any time.
58. At the end of the interview the Permit Holder was asked whether he wanted to view the quarantined material and he declined.

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<sup>18</sup> Exhibit 4 Appendix 2 pp.13-14

<sup>19</sup> Exhibit 4 Appendix 3

59. Ms. Winmill testified that following the June 22, 2020, meeting the Permit Holder submitted 6 CVRs to the BCMB.<sup>20</sup> Some of these requests were accepted, and some were rejected as relating to similar types of compacted material as had been seen during the February inspections. No CVRs were received by the BCMB after August 11, 2020.
60. Another shipment from the Castor and Coronation Depots was inspected in January of 2021 and nothing of concern was found.
61. On questioning by the Permit Holder, Ms. Winmill confirmed that there were compacted beverage containers in the shipments that were sold nationally that would show up as registered on the BCMB online registry. She also conceded that the BCMB's conclusion that the compacted material came from out of province where there was no means of identifying the containers as not registered in Alberta, was based on a number of inferences drawn from the characteristics of the containers themselves, the existence of other garbage that came from out of province and their observations of similar material in garbage bags at the Castor and Coronation Depots.

#### **Evidence of the Permit Holder**

62. The Permit Holder testified on his own behalf. As the Permit Holder was self-represented, he also made statements of fact when questioning Mr. Emsden and Ms. Winmill and in argument that he did not testify to during his testimony. The Hearing Panel has attempted to capture that latter information here. The Hearing Panel is not bound by the rules of evidence and wanted to ensure that as much as possible it considered any information that the Permit Holder wanted the Hearing Panel to consider, even if not properly put into evidence. However, the Hearing Panel also recognizes that some of this information is information that counsel for the Complaints Director did not have an opportunity to challenge through cross-examination. The Panel has considered this in assessing the weight to give that information in making the findings it has made.
63. The Permit Holder came to Canada in 2011 and moved to Alberta in 2014. He obtained a permit to operate the Coronation Depot in May of 2015. He testified that he operated the Coronation Depot for 4 years without any issues with the BCMB.
64. The Permit Holder testified that he knew the previous owner of the Castor Depot and that before he applied for a permit to operate the Castor Depot, he spent some time with the previous owner observing the operations of the Castor Depot. He said that the previous owner had picked up material from other locations and brought it back to the Castor Depot and that the previous owner had introduced him to the Castor Depot's regular customers including the ones from whom he would pick up containers.
65. The Permit Holder testified that he had been getting containers from certain customers for years.
66. The Permit Holder also testified that he had seen information about the volume of containers shipped by the Castor Depot before he obtained his permit. He entered into evidence a copy of a

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<sup>20</sup> Exhibit 5

document showing amounts paid to the Castor Depot by the CSA in 2017 broken down by material stream.<sup>21</sup>

67. The Permit Holder decided to operate the Castor Depot himself, and he was issued a permit in February of 2019.
68. The Permit Holder said that he received a large number of containers from farmers and that farmers would store up containers over several months and then bring in a large drop-off. He testified that they would drop the material with him in garbage bags and then when he had a chance to count and sort it, he would do so.
69. The Permit Holder also presented the Panel with a customer list listing some of his regular customers and amounts paid to them for a single drop-off.<sup>22</sup> The list was dated October 14 and shows payments to some of the customers in amounts as high as \$427.50.
70. The Permit Holder also showed the Panel examples of containers that he had recently received at his Depots that were damaged and shredded. He said that these containers had been brought in by customers that he knew and trusted and so he accepted the containers even though they were damaged. For example, he showed the Panel a container that a customer told him had been damaged by her dog. He also showed the Panel containers that he testified looked similar in characteristics to containers that the BCMB witnesses had identified as out of province compacted material in the loads audited from his Depots in February of 2020. He said these containers had come from his regular customers and not from out of province.
71. The Permit Holder testified that he had told some of his farming customers that they could crush their containers before bringing them in because they delivered them in larger drop offs. He said that he accepted this crushed material because he knew the farmers and trusted them. He said that when the BCMB Compliance Officers attended at his Depots in March of 2020 there were crushed containers like these from farmers in the garbage bags on the premises.
72. The Permit Holder said that he did not ever accept containers that he thought were from out of the province. He testified that he believed that the compacted beverage containers came from Alberta and were registered in Alberta. His belief was based on his trust in his customers. He also said that he was shipping the same material as the previous operator of the Castor Depot and that if there had been an issue with the material that he would have expected the BCMB to have notified the previous operator or him.
73. The Permit Holder denied any prior knowledge of the other investigations or Hearings in relation to other depots alleged to have accepted out of province material. Although he clearly knew about those matters at the time of the Hearing, as he corrected counsel for the Complaints Director as to the date of the proceedings in relation to the Andrew Depot, the Hearing Panel was unclear as to when he gained that knowledge.

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<sup>21</sup> Exhibit 8

<sup>22</sup> Exhibit 7



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74. The Permit Holder also testified that the drop in container volumes shipped from his Depots since he was contacted by the BCMB about the compacted material was due to COVID-19.
75. On cross-examination the Permit Holder acknowledged that when he obtained the permits for the Coronation Depot and the Castor Depot, he signed a document that said that he had read and agreed to abide by the relevant legislation and BCMB by-laws and guidelines. He said however, that he had not read them.
76. The Permit Holder also acknowledged that he understood that depots in Alberta could only accept registered containers, and that if depots accepted non-registered containers that this could undermine the beverage container collection system. However, he stated that the volumes shipped by his depots represented less than .5% of the system volume so that any out of province material shipped from his depots would not have a significant impact on the Alberta collection system.
77. The Permit Holder agreed that he had received the January Memo from the BCMB and that he read it and saw the images that were included. He testified that he knew about the CVR process described in the January Memo.
78. Counsel for the Complaints Director then asked the Permit Holder about some of the evidence that he gave during his June 22, 2020, interview with the BCMB. She pointed out that in the interview he had advised the BCMB that the garbage bags they observed at the Depot on March 4, 2020, were bags that he had picked up from a scrap metal dealer in Edmonton, and not that they were from his regular drop-off customers.
79. The Permit Holder also acknowledged on cross-examination that some of the compacted materials that he picked up from the scrap metal dealer looked like the materials in the images included in the January Memo, although he testified that it was only a few of the containers and they did not look exactly the same.
80. Counsel for the Complaints Director referred the Permit Holder to the portion of his interview transcript where he advised Mr. Emsden and Ms. Winmill that he could distinguish between containers that had been manually crushed, like the material brought in and dropped off by his customers who were farmers, and material that had been compacted by machine.<sup>23</sup> The Permit Holder confirmed that he was able to tell the difference between crushed material and compacted material and that the crushed containers he received from the farmers were not the same as the compacted material in the pictures that the BCMB had shown him during his interview.
81. The Permit Holder testified under cross-examination that he received compacted beverage containers from landfill workers. He said that the landfill workers would bring in flattened containers and containers that had been damaged by mowers or otherwise. He said that again, some of these containers looked like the compacted material in the pictures included in the January Memo but said he did not question the customers about them because he knew the customers and that they collected the containers from the landfill.

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<sup>23</sup> Exhibit 4 Appendix 3 p. 211

82. When asked to estimate the number of compacted containers he would receive from these various sources in relation to each shipment to the CSA, the Permit Holder suggested that containers from farmers and from landfill and from bottle drives would probably account for approximately 2,000 containers. He also confirmed that there had been no bottle drives in February of 2020 prior to the shipments that were inspected in February by the BCMB.
83. The Permit Holder acknowledged that he had a responsibility as a depot operator to report certain containers to the BCMB but said that when he knows the customers returning the containers, he considered it a matter of trust. He said he would exercise his honest judgment and that he did not think that he had to fill out a CVR for everybody.
84. The Permit Holder also said that when he had been training with the previous owner of the Castor Depot, he saw the previous owner dealing with damaged material that had been found in a ditch and that the previous owner had not completed a CVR so he did not either. He said if he had a customer that he did not know then he would ask about containers and if there were more than 50 cans involved, he would complete a CVR, but that he could not do this for every individual as he was busy doing other things at his Depots.
85. When it was pointed out to the Permit Holder that he had never completed a CVR prior to the June 22, 2020, interview, he conceded that was the case. It was put to him that the first time that a customer had brought him this type of material it would have been logical to complete a CVR, but the Permit Holder did not agree to that and said that he had not had any new customers prior to the interview.
86. At the conclusion of his cross-examination the Permit Holder agreed that he had shipped some out of province containers but said that he did not realize that they were from out of province until the BCMB had told him.
87. The Permit Holder was questioned by counsel for the Complaints Director about his arrangement with the scrap metal dealer. He said that two months before he began operating the Castor Depot, he had been introduced to the scrap metal dealer and that he had been to pick up materials at the scrap metal dealer before he got his permit. He said that he stopped going to pick up material after his interview with the BCMB because the BCMB had told him the material was a problem and so he did not want to pick up the material anymore.
88. For clarification purposes the Hearing Panel asked the Permit Holder where the compacted material in the audits performed by the BCMB on the loads from the Castor Depot and Coronation Depot had come from. The Permit Holder testified that they came from several places. He said they came from his farmer customers, from bottle drives and from businesses. He said they also came from ditches and from the landfill, and when questioned further added that they also would have come from the scrap metal yard.
89. The Panel also asked the Permit Holder whether he was shipping compacted material before and after the February off-loads or whether the off-loads were a “one-off” event. The Permit Holder said that it was not on a regular basis and that it would depend on what was brought to him.

90. The Panel asked the Permit Holder whether he had provided deposit refunds for the containers in the plastic garbage bags that the Compliance Officers had seen at the Castor Depot and the Coronation Depot. The Permit Holder said that he did not provide refunds when the containers were dropped off, but that he would sort and count the containers and then pay the deposit refunds. He said that he would have counted all of the containers that were put in mega-bags and shipped to the CSA.
91. Throughout his testimony the Permit Holder took issue with any suggestion that all of the compacted material identified by the BCMB during the February off-loads was from the scrap metal dealer or that all 65,000 compacted containers identified from those off-loads were from out of province. He also testified that not all of the containers picked up from the scrap metal dealer was compacted material. As noted above, the potential sources of the compacted material identified by the Permit Holder only accounted for approximately 2000 containers.

#### **DECISION AND REASONS: ALLEGED CONTRAVENTIONS**

92. The Hearing Panel considered each allegation in the Notice of Hearing with respect to both the Castor and Coronation Depots together as they were based on the same facts.

*Allegations that the Permit Holder accepted containers that could reasonably have been identified by him as having been transported into Alberta contrary to s. 11(1) of the Regulation*

93. The Hearing Panel first considered whether the Complaints Director had established on a balance of probabilities that the Permit Holder had accepted containers that had been transported into Alberta contrary to the *Beverage Container Recycling Regulation*.
94. The Hearing Panel was satisfied based on all of the evidence this was the case.
95. First of all, the Permit Holder admitted that based on what he had been shown by the BCMB, some of the containers that he accepted were not registered for sale in Alberta. The Hearing Panel also accepted the testimony of Ms. Winmill that some of the beverage containers could be clearly identified as having been manufactured and sold only in jurisdictions outside of Alberta.
96. The Hearing Panel accepted the photographic and oral evidence that there was paper garbage mixed in with the containers that clearly originated outside of Alberta and was prepared to accept that the presence of that garbage was supportive of the inference that all of the associated compacted beverage containers also came from elsewhere.
97. The Hearing Panel also based its conclusion on the evidence that there were non-beverage containers mixed in with and, occasionally fused to the beverage containers in the loads from the Coronation and Castor Depots and that this was consistent with recycling practices outside of Alberta, but not in Alberta. The evidence that there were large numbers of containers grouped together with no lids, another recycling practice for beverage containers outside of Alberta, was also relevant to the Hearing Panel's determination on this point, although the Hearing Panel





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accepts that there would also be containers without lids that would be returned in Alberta from customers who were unaware that lid removal was no longer necessary.

98. The Hearing Panel also accepted the evidence from the BCMB witnesses that the compacted material shipped by the Permit Holder's two depots was indistinguishable from the material that had been observed in the course of the previous investigations relating to breaches of s. 11(1), which material had been determined to originate outside of Alberta.<sup>24</sup>
99. The Panel then considered the position of the Permit Holder that it was only a few containers in the February shipments that had originated outside of Alberta, but that the majority of the containers identified by the BCMB Compliance Department in those shipments as containers that had been previously compacted in another jurisdiction and shipped into Alberta, were containers that had been registered and purchased in Alberta and returned to him by his regular customers.
100. The Hearing Panel understands that many of the compacted containers were containers manufactured by large manufacturers who sell their beverages across Canada and these containers would show up on the BCMB online registry as containers registered in Alberta. The Hearing Panel weighed against this information that the containers had clearly been mechanically compacted before they were shipped from the Castor and Coronation Depots and so their physical appearance was inconsistent with them having originated in Alberta.
101. The Panel also gave careful consideration to the Permit Holder's evidence about the origin of these containers, but found his evidence to be unclear, inconsistent and on occasion contradictory of the previous explanations that he had provided to the BCMB.
102. According to Ms. Winmill, on March 4, 2020 when the Permit Holder was asked about the source of the black garbage bags containing compacted containers observed at the Castor Depot, he advised that the bags were from a bottle drive and from a customer with a compactor who had been bringing in bags like that for the past 6 years.<sup>25</sup> When asked about the garbage bags at the Coronation Depot, the Permit holder said that 90% of customers, farmers and businessmen simply dropped off their containers to be counted and sorted and that these were the drop-offs.
103. Later, when interviewed by Mr. Emsden and Ms. Winmill on June 22, 2020, the Permit Holder said that the black garbage bags at the two Depots containing the compacted containers had come from the scrap metal dealer in Edmonton. When asked why he had said previously they were from a farmer with a compactor, he said that the clear bag was from a farmer, but that the black bags were the ones he had picked up from the scrap metal dealer.<sup>26</sup>
104. The Permit Holder's evidence about the origins of the compacted material in the February shipments was unclear and inconsistent. During the July 2020 interview he was asked about the increased number of containers that had been shipped by the Castor Depot and the Coronation Depot from June to December of 2019. He explained that this increase was because he had

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<sup>24</sup> For example, the determinations by AEP and the BCMB in their proceedings relating to the Andrew Bottle Depot, and the admissions made by the Operator of the Morinville Depot.

<sup>25</sup> Investigations Report Exhibit 4 Appendix 2 p.26.

<sup>26</sup> Exhibit 4 Appendix 3, p 217



started doing regular pick-ups from a scrap metal dealer in Edmonton. He suggested that this was a customer that the previous owner had been picking up material from since 2012.<sup>27</sup>

- 105. Later in the interview, the Permit Holder said that when he picked up material from the scrap metal place the material had been squeezed flat.<sup>28</sup> He pointed out that the farmers also crushed their materials but said this was a “manual crush” and that he could tell the difference between manually crushed material and material compacted by machine.<sup>29</sup>
- 106. During the interview, the Permit Holder was shown images of the containers that the BCMB had audited from the Castor and Coronation Depots. The Permit Holder identified the very flat containers as coming from the scrap metal dealer and said that he had seen the compacted containers in a net container being sorted by the scrap metal dealer.<sup>30</sup> He also identified containers in the images that he said came from regular customers that had been flattened<sup>31</sup> and said that he could tell what came from the scrap metal yard and what might have come from regular customers.<sup>32</sup>
- 107. However, at the Hearing itself, the Permit Holder made very little mention of the scrap metal dealer as the source of the compacted containers. He testified that the containers had come from several places, but identified the sources as farmers, bottle drives, businesses, ditches and landfill.
- 108. In conjunction with all of this evidence, the Panel also considered the evidence presented by Mr. Emsden and Ms. Winmill about the volume increase in containers shipped from the Castor Depot and from the Coronation Depot in the latter part of 2019. The volume totals and year over year percentage increases for the Castor Depot and Coronation Depot from June 2019 to January of 2020 were as follows:

	Jun-19	Jul-19	Aug-19	Sep-19	Oct-19	Nov-19	Dec-19	Jan-20
Castor Bottle Depot	86,335	208,905	189,130	208,949	206,540	126,245	179,990	149,430
Castor Bottle Depot	19.0%	41.1%	66.1%	43.0%	18.1%	57.1%	441.3%	16.4%
Coronation Bottle Depot	93,692	212,326	176,955	232,505	222,060	129,460	166,350	182,625
Coronation Bottle Depot	22.2%	13.8%	61.0%	81.5%	4.0%	82.4%	302.2%	69.8%

- 109. The Hearing Panel also asked to be provided with volume data for both of the Depots going back to previous years, and this information was provided and marked as Exhibit 6.
- 110. The Panel understands that evidence of increased container shipments from a depot compared year over year is not in and of itself evidence that the depot is accepting containers from outside

<sup>27</sup> Exhibit 4 Appendix 3, pp 203-204  
<sup>28</sup> Exhibit 4 Appendix 3, p. 210  
<sup>29</sup> Exhibit 4 Appendix 3, p.211  
<sup>30</sup> Exhibit 4, Appendix 3, p.225  
<sup>31</sup> Exhibit 4 Appendix 3, p.228  
<sup>32</sup> Exhibit 4 Appendix 3, p.230

of the province. However, the Panel would have expected the Permit Holder to be able to provide some sort of credible explanation for the increase. The Hearing Panel was unable to determine what the Permit Holder's explanation was.

111. At the Hearing, the Permit Holder suggested that the compacted material in the audited shipments came from his regular customers. He did not suggest that he had secured a number of new customers in late 2019, and in fact during his testimony said he had no new customers since he started operating the Castor Depot. The Permit Holder did not provide the BCMB or the Hearing Panel with any records to show where the compacted containers in the February audited shipments had come from, by way of till tapes, duplicate receipts or otherwise.
112. The Panel might have accepted that the Permit Holder had simply failed to appreciate the significance of back up documentation to explain the origin of the containers, had Mr. Emsden not made that significance very apparent during the June 22, 2020, interview.
113. At one point the Permit Holder suggested part of the explanation for the increased shipments in 2019 and for the compacted containers was bottle drives, but then admitted on cross-examination that there had been no bottle drives in the fall or winter of 2019/2020 prior to the February shipments.
114. The evidence from the Complaints Director was that the Investigations Officer had researched population trends in Castor and Coronation and found no significant increases in population in 2019. In addition, the town websites including social media community pages and internet searches of both the Castor Depot and the Coronation Depot did not disclose any events, fundraisers or bottle drives during the relevant period.
115. After considering all of the evidence in relation to the volume increases, the Panel can only conclude that the increased volume was the result of the pick-ups from the scrap metal dealer, or that the Permit Holder had also been obtaining compacted containers from a source that he did not disclose either to the BCMB Compliance Department or to the Hearing Panel.
116. In either event, the Hearing Panel is satisfied on a balance of probabilities that the compacted material identified by the BCMB Compliance Department in the February shipments originated outside of Alberta and was transported into Alberta before being accepted by the Permit Holder and shipped to the CSA.
117. Based on the Permit Holder's admissions that the crushed material from his regular customers would represent approximately 2,000 containers, the Panel is satisfied that the Permit Holder accepted a large number of out of province containers and shipped to the CSA approximately 63,000 to 65,000 of those containers in the shipments that were audited in February of 2019.
118. The Hearing Panel is also satisfied on a balance of probabilities that the February shipments were not the only two shipments of out of province material made by the Permit Holder in 2019 and 2020. By the Permit Holder's own account, the increased volume in 2019 was the result of him making regular pick-ups from the scrap metal dealer from June of 2019 to January of 2020.



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119. The Hearing Panel considered the volume information provided by Mr. Emsden at its request.<sup>33</sup> Based on that information the Castor Depot had averaged approximately 121,000 containers per month in 2018 and averaged approximately 181,000 containers per month from June 2019 to January 2020 before dropping back to historical levels. Similarly, the Coronation Depot had averaged shipments of approximately 121,000 containers per month in 2018 and approximately 189,000 per month from June 2019 to January 2020 before dropping back to historical levels. It is therefore possible, although the Panel makes no finding in this regard, that the Permit Holder shipped as many as 895,000 out of province containers in 2019 with a corresponding potential cost to the system of over \$125,000.
120. Having determined that the Permit Holder accepted containers that had been transported into Alberta contrary to s. 11(1) of the Regulation, the Hearing Panel considered whether those containers could reasonably have been identified by the Permit Holder as having been transported into Alberta contrary to that section.
121. In considering whether the Permit Holder could reasonably have identified the containers as having been transported into Alberta, the Hearing Panel applied both a subjective and objective test. In other words, the Hearing Panel considered the Permit Holder's particular circumstances and his evidence that he believed the containers originated in Alberta and considered whether the Permit Holder honestly and reasonably held that belief.
122. The Hearing Panel concluded that the Permit Holder did not honestly or reasonably believe that the containers had not been transported into Alberta.
123. By February of 2020 when the shipments from his Depots were inspected, the Permit Holder had been operating a depot in Alberta for 6 years. He was not new to the system. Since he worked directly in the Depots, he had considerable experience in accepting beverage containers and familiarity with the typical characteristics of those containers when they were returned.
124. The Permit Holder also had received notices relating to "suspicious containers" and the CVR process that the BCMB required depot operators to follow. The evidence was that he would have received 15 notices about these matters from 2018 to February of 2020.
125. In particular, the Permit Holder acknowledged receiving and reviewing the January Memo sent out by the BCMB in 2020. In that memo the BCMB advised of attempts to introduce compacted out of province material into the Alberta collection system and pointed out the following warning signs that a depot might be dealing with such material:
  - a. Typically, the material is pre-sorted so each bag contains one specific material stream and size, which would not be consistent with a typical customer order;
  - b. Out of province brands or unregistered material;
  - c. Signs of industrial compaction:

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<sup>33</sup> Exhibit 6

- i. Containers are completely flattened
  - ii. Containers are folded and compacted onto themselves
  - iii. Containers are fused to other containers
  - iv. Containers are shredded or worn as though pulled apart from a bale
  - v. Necks of plastic bottles are flat/crushed
- d. The presence of non-beverage material or garbage stuck to containers.
126. The January Memo also included images of containers exhibiting these characteristics.
127. The Permit Holder maintained that only some of the containers identified by the BCMB Compliance Officers in his shipments exhibited those characteristics, but the evidence of Ms. Winmill and the photographs of his shipments in Appendix 2D and 2J to the Investigative Report showed otherwise.
128. The Permit Holder also suggested that the characteristics of the flattened and damaged containers were consistent with the typical shipments received from his regular customers which often contained crushed or damaged materials.
129. However, the Permit Holder himself conceded that he could tell the difference between a manually crushed container and an industrially compacted one. Furthermore, even if some of the containers he received had been shredded or damaged by pets or by cars or mowers in the case of materials from the ditch or the landfill, this could not account for the sheer number of flattened and shredded containers, the presence of non-beverage containers in the shipments or the amount of garbage.
130. The Permit Holder did not suggest that he had simply taken the bags that were dropped off and transfer them into mega-bags without looking at them. Rather, he specifically testified that he emptied out the garbage bags of material and went through and counted them. Accordingly, he could not and did not maintain he did not actually see the compacted containers and garbage himself. The Hearing Panel does not accept that the Permit Holder simply failed to recognize the similarities of the containers he was counting to the material identified and pictured in the January Memo.
131. Furthermore, in the June 2020 interview with the BCMB, the Permit Holder made it clear that he was aware that he should not be accepting out of province material. He said that because the material was crushed, he asked the person providing it and that person said the BCMB had already questioned him and the previous owner said everything was fine so he trusted the person although he still decided just to deal with the aluminum cans first.<sup>34</sup>

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<sup>34</sup> Exhibit 4 Appendix 3 p.194



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132. Then later in the interview the Permit Holder stated that even though the previous owner had been dealing with this person (or people) since 2012, in the beginning the Permit Holder took every single can and checked it against the BCMB online registration portal and everything came through okay.<sup>35</sup> The Hearing Panel does not find this evidence credible for a number of reasons, including the fact that it would have been practically impossible for the Permit Holder to have put every single container through the portal, that there almost certainly would have been some containers that would not have been registered, and that during this process the Permit Holder would also have encountered the sort of paper evidence of an out of province origin seen in the February shipments.
133. The Hearing Panel was also concerned about actions of the Permit Holder that demonstrated his own awareness that the compacted material was problematic.
134. First of all, after the BCMB Compliance Officers visited the Castor Depot, the Permit Holder left the Castor Depot and drove to the Coronation Depot before them. The evidence of Ms. Winmill was that they left the Castor Depot at 1:50 in the afternoon and the Castor Depot was open until 2:00. The fact that the Permit Holder made it to Coronation before them suggests that he left the Castor Depot immediately and before it was due to close.<sup>36</sup>
135. Secondly, when asked during his interview why he had travelled to the Coronation Depot so quickly, the Permit Holder said that it was because the worker at the Coronation Depot had told him she had to leave by 2:00.<sup>37</sup> However, the evidence of Ms. Winmill was that the worker was still there when they arrived and when they left at 2:30.
136. Thirdly, it was the evidence of Ms. Winmill that when they arrived at the Coronation Depot the Permit Holder was moving garbage bags and several garbage bags had been placed in the corner of the depot and mega-bags draped over them. The Permit Holder stated that he was trying to make everything easier for the BCMB Compliance Officers to look at, but to the Compliance Officers it appeared that he was trying to hide the material, and the Hearing Panel agrees that explanation is more consistent with what the Permit Holder was doing. There would be no reason to hide the material if the Permit Holder thought that it was legitimate.
137. Fourthly, despite the fact that the Permit Holder knew about the CVR process for suspicious containers, he never followed that process with respect to the compacted material. The Permit Holder said this was because he trusted his regular customers and because the previous owner had never followed the CVR process for this material. However, the Permit Holder had also said that he checked all of the material initially, and it would have been easy for him at any time after he received one of the 15 notices between 2018 and 2020 to follow the CVR process and obtain assistance from the BCMB in identifying whether there was a problem.
138. Fifthly, the evidence showed that the compacted material had been arranged in some of the mega-bags so that they were beneath a layer of uncompacted containers and not immediately visible until the mega-bags were emptied out by the BCMB Compliance Department during their

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<sup>35</sup> Exhibit 4 Appendix 3 p. 204

<sup>36</sup> Exhibit 4 Appendix 2 p. 27

<sup>37</sup> Exhibit 4 Appendix 3 p. 219





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inspections and audit. The Permit Holder attempted to explain this by saying that the compacted material was heavier, and it was easier to lift the mega-bags if they contained a mixture of compacted and uncompact containers. The Hearing Panel accepts that might be the case, but the same thing could be accomplished if the compacted cans were on top, and not hidden by a layer of uncompact material.

139. Furthermore, the Hearing Panel had difficulty understanding why the Permit Holder would have bags of containers sitting at the Castor and Coronation Depots as observed by the Compliance Officers on March 4, 2020. The Permit Holder said that he would leave dropped off containers until he had time to sort and count them, but the evidence of Ms. Winmill was that the bagged containers appeared already to have been sorted into material streams.
140. Finally, the Hearing Panel took into consideration the Permit Holder's demeanor and the nature of his responses during the Hearing. The Hearing Panel was of the view that the Permit Holder's answers to many questions from counsel for the Complaints Director and the Panel were non-responsive and at times evasive. He seemed unable to respond directly to fairly straightforward questions about critical issues, even questions capable of a yes or no answer. On the other hand, he seemed able to answer procedural questions and background questions briefly and directly.
141. The Hearing Panel appreciates that the Permit Holder would have found the Hearing process stressful and that this may have contributed to his demeanor, but on the whole was not satisfied that the Permit Holder was being truthful in his evidence, particularly given the contradictory responses he had provided to the same questions when interviewed in June of 2020.
142. Even if the Hearing Panel were prepared to accept that the Permit Holder mistakenly believed that the compacted material had been registered and sold in Alberta, for the reasons set out above, the Hearing Panel does not accept that such a belief could reasonably be held by a reasonable depot operator with the knowledge and experience of the Permit Holder.
143. Accordingly, the Hearing Panel finds that the actions of the Permit Holder in this case constituted a breach of s. 11(1) of the Regulation.
144. For the reasons set out below, the Hearing Panel has also concluded that the Permit Holder has not established a defense of due diligence in relation to this breach.

*Allegations that the Permit Holder failed to adhere to the highest standards of honesty, integrity, fair dealings and ethical conduct in all dealings with customers, the collection system agent appointed under the Regulation...the BCMB and the general public 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 10.3 of the Depot By-law.*

145. The Hearing Panel agrees with the conclusions of previous Hearing Panels that a finding of a breach of section 11(1) necessarily leads to the conclusion that the Permit Holder has breached what is now s. 10.3 of the Depot By-law because in accepting and shipping unregistered containers the Permit Holder has not acted honestly and fairly with the BCMB and the CSA.





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146. In addition, in this case the Hearing Panel has found that the Permit Holder not only ought to have reasonably identified the out of province material, but that he actually knew that the material came from out of province and took steps to hide the origins of the container from the CSA and the BCMB.
147. The Hearing Panel finds the wording of s. 10.3 less than ideal in the sense that honesty, integrity, fairness and ethics are absolute concepts, and represent values rather than measurable standards.
148. Regardless, the Hearing Panel had no difficulty finding that in accepting and shipping the compacted material as he did, the Permit Holder did not act honestly, with integrity, fairly or ethically. It is not necessary for the Hearing Panel to try to define what the “highest standards” of these things might be.
149. The Hearing Panel also finds that the Permit Holder did not act honestly in his dealings with the BCMB Compliance Department and with the Hearing Panel.
150. The Permit Holder gave inconsistent explanations for the origins of the compacted material when he was asked about compacted material at the depots on March 4, 2020, when he was interviewed on June 22, 2020, when he testified on his own behalf, and on cross-examination.
151. The Permit Holder maintained that the compacted material in the February shipments from his Depot had come from his regular drop-off customers despite acknowledging that none of his customers except the scrap metal dealer supplied mechanically compacted containers. He acknowledged only a few out of province containers in the February shipments despite the BCMB’s evidence that there were approximately 65,000 compacted containers in those shipments and the number of containers from the customers who brought compacted containers in from landfills or ditches would be approximately 2,000.
152. The Hearing Panel accepts the submissions of counsel for the Compliance Director that in breaching s. 11(1) of the Regulation and s. 10.3 of the By-law, the Depot Operator also breached the terms and conditions of his Permits, which require him to adhere to the Regulation and BCMB By-law and the breach of the By-laws. The Hearing Panel also accepts that this conduct also breached s. 2.6 of the Permits which restricts a depot to paying a deposit refund only for used registered containers and s. 2.7 which prohibits a depot operator from unlawfully claiming payment of a deposit refund or handling commission. The Hearing Panel does not consider it necessary to address these breaches individually as the conduct comprising those breaches is the same as that which breaches s. 11(1) and s.10(3) in any event.

#### *Due Diligence*

153. The Hearing Panel also considered whether the Permit Holder had put forward information which, if believed could establish a defense of due diligence. The Panel accepts the submission of counsel for the Complaints Director that in order to establish due diligence the Permit Holder has to prove that either:



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- a. He reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent; or
- b. He took all reasonable steps to avoid the particular event

The Hearing Panel also accepts that the reasonableness of the Permit Holder's conduct is relevant to both branches of the defense.

154. In his interview with Mr. Emsden and Ms. Winmill, the Permit Holder seemed to be suggesting that when he started operating the Castor Depot and met one of the previous customers that was supplying compacted material to the previous owner, that he made inquiries of the customer to confirm that the materials came from inside Alberta. He said that he understood that the material came from garbage that had been disposed of by people in Red Deer.<sup>38</sup> He said that he relied on the fact that the previous owner had not had any issues, and he said that in the beginning he checked every single can.<sup>39</sup>
155. During his testimony in chief at the Hearing, the Permit Holder did not mention the scrap metal dealer or try to attribute the compacted material to the scrap metal dealer. Rather he seemed to suggest that he got the material from his regular customers and that he had been dealing with those customers for a long time and trusted them.
156. When asked why he did not use the CVR process when these customers brought in containers that were compacted or shredded, he suggested that he did not want them to have to go through the CVR process and maybe take the containers to a different depot and that he thought he was entitled to use his honest judgment about those customers. The Hearing Panel did not accept the Permit Holder's evidence that the compacted material identified in the February shipments came from regular customers. Even if it had, the Hearing Panel would not have accepted that it is due diligence for a depot operator to simply take the word of a customer about containers that exhibited the characteristics of the material identified by the BCMB in the February shipments.
157. The Permit Holder also seemed to suggest that he was entitled to rely on the fact that the BCMB had not identified any problems with his shipments until February and that the onus was on the BCMB or the CSA to find and identify out of province containers before he had any responsibility to act. The Hearing Panel rejects this suggestion. As set out in detail in previous decisions of BCMB Hearing Panels, the BCMB and the CSA are not in a position to audit every mega-bag shipped to the CSA, and the BCMB and the CSA reasonably rely on the depot operators as first line of defense for the container collection system. That reliance is made clear through the communications from the BCMB to the depot network, including through memos such as the January 24, 2020, Memo.
158. Having already concluded that the Permit Holder knew that the containers were from out of province the Hearing Panel cannot find that the Permit Holder has a due diligence defense based on the first branch of the defense. Even if the Permit Holder honestly believed that the material

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<sup>38</sup> Exhibit 4 Appendix 3 p.198

<sup>39</sup> Exhibit 4 Appendix 3 p. 204



came from within Alberta, he did not establish any facts upon which that belief could reasonably be based.

159. The Permit Holder also could not establish that he took all reasonable steps to avoid what occurred. The Permit Holder never followed the CVR process, never contacted the BCMB outside of the CVR process, and never spoke to another depot operator about the situation. There is no evidence that the Permit Holder did anything to try to verify what he says he was told by his customers, including the scrap metal dealer.

160. The Permit Holder did not establish a defense of due diligence on the second branch of the defense.

### **DECISION AND REASONS: SANCTION**

161. Under Section 12.27 of the Depot By-Law, the Hearing Panel has the authority to:

- a. Cancel a Permit;
- b. Suspend the cancellation of a Permit on conditions;
- c. Suspend a Permit; or
- d. Instead of or in conjunction with the cancellation or suspension of a Permit impose terms and conditions on a Permit.

162. The Hearing Panel agrees with the approach taken by previous BCMB Hearing Panels in determining sanction. The appropriate considerations include the nature of the conduct, the deterrence of similar conduct and the specific circumstances of the Permit Holder. The Hearing Panel assessed each of these matters in the context of this case and whether they called for a more severe or less severe sanction or were neutral.

163. For the reasons set out in paragraphs 55 to 58 of the Hearing Panel's decision in relation to the Andrew Bottle Depot,<sup>40</sup> the Hearing Panel agrees with that Hearing Panel and with counsel for the Complaints Director's submissions that by accepting and shipping large quantities of out of province material the Permit Holder engaged in conduct that creates a significant risk to the system and this high-risk conduct warrants a more severe sanction than might be warranted by other types of conduct.

164. In terms of deterrence, the Hearing Panel considered the need to deter the Permit Holder from similar conduct (specific deterrence), and the need to deter other Permit Holders in Alberta from similar conduct (general deterrence).

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<https://www.bcmb.ab.ca/uploads/source/Hearings/Decisions/2017.02.16.Decision.Reclaim.Recycling.Permits.13.BCD.081.pdf>



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165. The Hearing Panel accepts the Permit Holder's evidence that he had operated depots in Alberta for several years prior to this investigation and had no prior relevant compliance history. The Hearing Panel also accepts that the Permit Holder now understands that the acceptance and shipping of large quantities of out of province materials is a serious matter with significant consequences. The Hearing Panel did not consider specific deterrence as calling for either a more or less severe sanction.
166. The Hearing Panel agrees with the previous Hearing Panels that general deterrence of this type of conduct calls for a more severe sanction. The Hearing Panel notes that despite several investigations and three previous hearings involving breaches of s. 11(1) of the Regulation, the BCMB continues to find evidence of the importation into Alberta of beverage containers other than as permitted by the Regulation and continues to find evidence that these out of province containers are entering the Alberta beverage container collection system. The need to deter other Permit Holders and depot operators from participating in any way in this breach of the system is clear.
167. The Hearing Panel then considered the specific circumstances of the conduct of this Permit Holder as found by the Hearing Panel including the nature of that conduct, the Permit Holder's level of intent, the number of incidents, the length of time involved, any admissions made by the Permit Holder, and evidence of remorse or potential rehabilitation.
168. The Hearing Panel has concluded that not only should the Permit Holder reasonably have identified the compacted containers that he shipped to the CSA in February as coming from out of province, but that he knew that to be the case. While the Permit Holder may not have deliberately intended to undermine the entire Alberta container collection system, that does not render his conduct any less serious or culpable.
169. The Hearing Panel does not know whether the Permit Holder was motivated by personal financial gain, financial hardship or other reasons. That does not matter. The fact that the Permit Holder knowingly and intentionally accepted and shipped the material and collected deposit refunds and handling commissions for this material to which he was not entitled, warrants a more severe sanction.
170. The Hearing Panel also considered the number of times the high-risk conduct occurred and the length of time over which it occurred. The allegations before the Hearing Panel only specifically referenced the four shipments from the Castor and Coronation Depots that occurred in February of 2020. There is no evidence that any shipments from the Castor Depot or Coronation Depot while being operated by the Permit Holder were inspected before then, or if they were audited, that any problematic material was found. The only inspection after February 2020 did not disclose compacted material.
171. However, as noted above, the Hearing Panel has concluded that these February shipments were not the only shipments made by the Permit Holder in breach of s. 11(1). On the Permit Holder's own evidence at the Hearing, he had been shipping the same material during the time that he was operating the Castor Depot. Based on the Permit Holder's statements to the BCMB in his June 2020 interview, the Permit Holder had been shipping this material in increased quantities



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since June when he started doing regular pick-ups from the scrap metal dealer. These latter statements are consistent with the increase in the container shipments presented in the evidence on behalf of the Complaints Director.

172. The Hearing Panel also is prepared to conclude that had the BCMB not initiated the off-loads of the Permit Holder's shipments and called for an explanation from the Permit Holder, that the Permit Holder's conduct would have extended over a longer period of time. This is the only reasonable conclusion to draw given that the Permit Holder is still unprepared to concede that all or the majority of the compacted material identified by the BCMB consisted of out of province containers, and that inspections of the Permit Holder's Depots after February disclosed additional unshipped out of province material. While counsel for the Complaints Director submitted that the number of incidents and length of time over which they occurred were neutral in terms of the sanction, the Hearing Panel considered these things as calling for a more severe sanction.
173. Unlike in the previous hearings, the Permit Holder in this case made no admissions and actively defended the allegations against him. The Hearing Panel appreciates that the Permit Holder seemed to acknowledge that he had made some kind of mistake. However, it appeared he considered that mistake to have been letting a few out of province containers into his shipments by accident. The Hearing Panel would have been prepared to consider admissions as a mitigating factor but cannot do so here. The Hearing Panel accepts the submissions of counsel for the Complaints Director that the Permit Holder was fully entitled to defend himself against allegations and that the lack of admissions should be treated as a neutral factor.
174. The Hearing Panel also considered whether the Permit Holder showed any remorse and whether he was capable of rehabilitation, both of which might have been mitigating factors in terms of sanction.
175. The Hearing Panel was unable to conclude that the Permit Holder felt remorse for his conduct, as opposed to remorse at having his conduct discovered by the BCMB Compliance Department. The Hearing Panel was not prepared to conclude that the Permit Holder was clearly capable of rehabilitation in these circumstances either. The Hearing Panel was not prepared to treat either of these things as mitigating factors in terms of sanction.
176. In considering the circumstances of the Permit Holder, the Hearing Panel also took into account the fact that the Permit Holder appeared to have paid no or little notice to the BCMB's notices regarding the need for depot operators to follow the CVR process and warnings about compacted material. The January Memo not only provided clear assistance in identifying suspicious containers, but also stated:

It is important to note that if any Depot is found to be knowingly accepting and processing this material, without following CVR processes, they could find themselves subject to investigation by the BCMB. This could eventually lead to a hearing where a review of their operating permit may result in suspension or cancellation of the said permit.



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177. Despite having read the January Memo and having received clear guidance and notice of the consequences, the Permit Holder did not contact the BCMB or follow the CVR process prior to the February shipments. The Hearing Panel considered this additional circumstance as calling for a more severe sanction in this case.
178. Finally, the Hearing Panel reviewed the other three decisions considering similar conduct and the sanctions that were imposed in those cases. The Andrew Bottle Depot Permit was cancelled, as was the Permit for the Morinville Depot. The Hearing Panel is aware that there was a joint submission in relation to sanction in the Morinville Depot Hearing and was alive to the possibility that this could have impacted the sanction that the Hearing Panel in that matter might otherwise have imposed. Finally, the Hearing Panel considered that the Permit Holder in that case had voluntarily paid \$250,000 towards BCMB compliance costs in relation to the investigation and hearing in that matter.
179. The other sanction imposed in the three decisions was the 8-month suspension and conditions imposed in the Fort Saskatchewan matter. The Hearing Panel drew a distinction between the conduct of the Permit Holder in that case and this one because there appeared to be no direct evidence of the Fort Saskatchewan Permit Holder's knowledge of the conduct in question. In the Fort Saskatchewan case the evidence indicated that a supervisor at the depot had been involved, and the supervisor was fired as a result. The Hearing Panel again noted the joint submissions on liability and sanction in that case and the voluntary payment of \$50,000 by the Permit Holder towards BCMB compliance costs.
180. After considering all of these matters, the Hearing Panel has concluded that the only appropriate sanction is the cancellation of Permit #19-BCD-010 and Permit #20-BCD-018.
181. The Hearing Panel appreciates that a short period of time may be required so that the BCMB can assist in ensuring that any registered containers that have been returned to the Castor Depot or the Coronation Depot to this point in time can be shipped to the CSA and so that the customers of these Depots receive appropriate notice of the Permit cancellations.

## CONCLUSION

182. The Hearing Panel directs the cancellation of Permit #19-BCD-010 and Permit #20-BCD-018 as soon as BCMB Administration considers it reasonable and practical to do so, but in any event no later than 30 days after the date of this Decision.

Dated this 9<sup>th</sup> day of November, 2021.

**Andrew Stephens – Hearing Panel Chair**