



BEVERAGE CONTAINER MANAGEMENT BOARD

**IN THE MATTER OF A HEARING OF
THE BEVERAGE CONTAINER MANAGEMENT BOARD
REGARDING PERMIT NO. 20-BCD-043
ISSUED TO 2145448 ALBERTA LTD.**

BCMB Hearing Panel:

Brian Moore, Chair
Owen Edmondson
Thomas Marr-Laing

**DECISION OF THE BCMB HEARING PANEL REGARDING
SANCTION, PUBLICATION AND COSTS**

INTRODUCTION

1. On July 7, 2023 this Hearing Panel of the Beverage Container Management Board (the "BCMB") rendered its decision arising from a hearing regarding Permit #20-BCD-043 issued by the BCMB (the "Permit").
2. In that decision, the Hearing Panel determined that Mr. Mohamed Rafat, the depot owner and operator of the Evansburg Bottle Depot (the "Depot") and Director of 2145448 Alberta Ltd. (the "Permit Holder), which held Permit No. 20-BCD-043:

1. accepted containers that could reasonably be identified by the depot operator as having been transported into Alberta (the "Containers"), contrary to section 11(1) of the Beverage Container Recycling Regulation 101/97(the "Regulation");

2. delivered the Containers to ABCRC for deposit refunds and handling commissions to which the Depot was not entitled, contrary to section 2.7 of Permit No. 20-BCD-043; and

3. failed to adhere to the highest standards of honesty, integrity, fair dealings and ethical conduct in all dealings with the Collection System Agent appointed under the Regulation and the BCMB, contrary to section 10.35 of the Depot Bylaw,¹

all of which is contrary to the requirements of Permit No. 20-BCD-043, the *Depot By-law*, the Regulation, and the Environmental Protection and Enhancement Act, RSA 2000 c.E-12.

3. The Hearing Panel requested written submissions concerning sanctions and costs orders and provided the parties with the opportunity for an oral hearing. Neither party requested an oral hearing. Counsel for the Complaints Director provided submissions dated August 4, 2023. Counsel for the Permit Holder provided submissions on August 18, 2023 and counsel for the Complaints Director provided submissions in reply on August 25, 2023.

¹ This was the section number at the time of the events giving rise to the allegations. The current section number is 10.34.



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4. This is the decision of the Hearing Panel on sanction and publication following its review of and deliberations regarding those submissions.

COUNSELS' SUBMISSIONS REGARDING SANCTION

5. Counsel for the Complaints Director referred to section 12.27 of the *Depot By-law* with respect to the powers of the Hearing Panel regarding sanction. That section provides that a Hearing Panel may:
 - 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 without limitation.
6. Counsel for the Complaints Director submitted that the appropriate sanction in this case was cancellation of the Permit. The Complaint Director's submissions in support of this sanction will be discussed further in the reasons for decision.
7. The Complaints Director took the position that a suspension would not be an appropriate penalty but submitted that if the Hearing Panel determined that something less than a cancellation was appropriate, the Hearing Panel could impose a condition on the Permit requiring the Permit Holder to reimburse the BCMB for the costs associated with the proceeding. The Complaints Director submitted that it would be reasonable to require the reimbursement of 65% of the costs incurred since the matter was referred to hearing on May 2, 2022.
8. Counsel for the Permit Holder proposed various orders by way of sanction including:
 - a. suspension of the Permit for 8 months subject to a stay if, following an expedited written hearing process a Hearing Panel made certain findings within 2 years from the date of the sanctions decision;
 - b. cooperation with random inspections of the Depot and audits of shipments for a 2-year period with the Permit Holder paying costs of inspections to a maximum of \$5,000;
 - c. an order that neither the Permit Holder, nor Mr. Mohamed Rafat would be permitted to be an owner, permit holder or operator of any other Alberta depot for 2 years;
 - d. an order that Mr. Wael Rafat would have no involvement in the operations of the Permit Holder in the future;
 - e. payment of 25% of the costs (\$37,500) within 5 years from the date of the sanction decision.
9. The submissions made by counsel for the Permit Holder in support of this sanction will be discussed further in the reasons for decision.

DECISION AND REASONS FOR DECISION REGARDING SANCTION

10. As noted by both counsel, previous BCMB Hearing Panels have considered various factors in determining sanction including:

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- a. the nature of the conduct at issue;
 - b. deterrence of similar conduct; and
 - c. the specific circumstances of the Permit Holder, including the 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.
11. Counsels' positions differed on how those factors applied in the circumstances of this particular case.

Nature of the Conduct

12. There is no dispute that the acceptance by a depot of out-of-province containers and the shipping of those containers to ABCRC creates a significant risk to the Alberta beverage container recycling system. Previous Hearing Panels have considered this type of conduct to warrant a severe sanction.
13. Counsel for the Permit Holder draws a distinction between the conduct of Mr. Mohamed Rafat as a depot operator and other cases where Hearing Panels have found intentional, deliberate, fraudulent and systemic actions on the part of a depot operator that have led to cancellation. Counsel for the Permit Holder notes that there was no evidence that Mr. Mohamed Rafat was engaged in the conduct at issue. Although Mr. Mohamed Rafat was found not to have exercised due diligence, he was not found to have participated knowingly in the deliberate conduct at issue.
14. The Hearing Panel will consider the circumstances of the Permit Holder and Mr. Mohamed Rafat further in its assessment of that factor below. However, the Hearing Panel is satisfied that all permit holders and depot operators have an obligation to protect the Alberta beverage container recycling system from fraud and that any conduct that fails to recognize that obligation is conduct of a serious nature that warrants a more severe sanction than other types of conduct.
15. In relation to this particular case, the Hearing Panel has found that an individual who had been given unlimited authority with respect to the operations of a depot by the Permit Holder was actively engaged in bringing out-of-province containers into Alberta and processing them through that depot for the financial benefit of the Permit Holder. The Permit Holder's complete lack of oversight over the Depot operations and cavalier attitude towards communications from the BCMB contributed to that situation and the Hearing Panel considers that conduct which warrants a severe sanction.

Deterrence

16. Again, there does not appear to be any disagreement between counsel that both specific and general deterrence are important factors in assessing sanction.
17. In terms of specific deterrence, counsel for the Permit Holder argues that a stayed suspension sends a clear message to the Permit Holder and Mr. Mohamed Rafat about the consequences of similar conduct and that in conjunction with the proposed costs order it provides sufficient deterrence.



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18. The Hearing Panel acknowledges that Mr. Mohamed Rafat testified that he now understands the importance of a permit holder's obligations and will act appropriately. The fact remains that before he became a permit holder Mr. Mohamed Rafat signed an application form in which he agreed to abide by the Regulation and by BCMB By-laws. It is unfortunate that he did not understand the importance of his obligations then.
19. The Hearing Panel was not particularly reassured by Mr. Mohamed Rafat's evidence on this point, particularly given the concerns that they had with other evidence that he gave which are referenced in the Decision. The Hearing Panel is not satisfied that a stayed suspension achieves specific deterrence.
20. Counsel for the Complaints Director submits that the goal of general deterrence requires cancellation of the Permit in order to send a message to permit holders that they are accountable for their operators and agents.
21. Counsel for the Permit Holder submits that the sanction proposed by the Permit Holder sends a strong deterrent message to other permit holders with respect to accountability.
22. The Hearing Panel notes that this is the fifth BCMB hearing dealing with the acceptance of out-of-province containers by a depot in circumstances where the containers should have been recognized as having been brought from out of province. The first hearing arose out of events that occurred in 2013 which also led to a significant Administrative Penalty being levied by Alberta Environment. The events giving rise to this present hearing occurred seven years and three further hearings later.
23. The Hearing Panel accepts the submission of the Complaints Director that anything less than a cancellation will not deter Permit Holders from taking an approach of plausible deniability to depot operations. The *Depot By-law* is clear in attributing the acts or omissions of a Depot Manager, agent or employee of the permit holder to the permit holder. A permit holder must understand that they cannot avoid the consequences of the actions of others by absenting themselves from the depot or abdicating authority to someone else without oversight.

Specific Circumstances of the Permit Holder

Intent

24. Counsel for the Permit Holder directed the Hearing Panel to its July 7, 2023 decision regarding Mr. Mohamed Rafat including that:
 - a. in relation to Allegation 1 the Hearing Panel did not find that Mr. Mohamed Rafat himself knowingly accepted any out-of-province containers or knowingly allowed any of its employees or agents to accept such containers;
 - b. in relation to Allegation 2 there was no finding of any intent or knowledge on the part of Mr. Mohamed Rafat to the delivery of out-of-province containers to ABCRC and claiming of payment for those containers;
 - c. in relation to Allegation 3 the Hearing Panel did not find that Mr. Mohamed Rafat was directly involved in Mr. Wael Rafat's dealings with Recycle Action and was



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unable to conclude there was sufficient evidence to find that Mr. Mohamed Rafat knew Mr. Wael Rafat was accepting and shipping out-of-province containers.

25. Counsel for the Permit Holder submits that it is Mr. Mohamed Rafat's level of intention and his knowledge of Mr. Wael Rafat's that are relevant, not the finding of intentional conduct on the part of Mr. Wael Rafat. She argues that Mr. Mohamed Rafat's lack of due diligence is very distinct from the deliberate and dishonest conduct found in other cases where cancellation has been ordered.
26. Counsel for the Complaints Director asks the Hearing Panel to consider the intentions of both Mr. Mohamed Rafat and Mr. Wael Rafat. She submits that Mr. Wael Rafat's conduct was found to be deliberate, and that conduct is deemed to be the actions of the Permit Holder. Counsel for the Complaints Director also points to Mr. Mohamed Rafat's lack of due diligence and the fact that lack of due diligence is a marked departure from the conduct expected of a reasonable depot operator.
27. The Hearing Panel did not have evidence from which to conclude that Mr. Mohammed Rafat knew and participated in the activities of Mr. Wael Rafat. The Hearing Panel agrees that a finding of deliberate intent generally warrants a more severe sanction than a lack of due diligence. However, Mr. Wael Rafat's intention is deemed to be that of the Permit Holder and accordingly his level of intent calls for a more severe sanction.
28. The Hearing Panel is also satisfied that the complete lack of any oversight by Mr. Mohammed Rafat is more than a failure to demonstrate due diligence. Mr. Mohamed Rafat's evidence was that he essentially abdicated any responsibility associated with the operations of the Depot. That shows a level of neglect that calls for a more severe sanction in and of itself.

Number of Incidents and Length of Time

29. Counsel for the Complaints Director suggests that evidence of six shipments in six months, all of which contained a significant number of out-of-province containers should be considered as significant and calling for a more severe sanction.
30. Counsel for the Permit Holder says that there were only 5 audited Mega Bags, that some Mega Bags had no problematic containers, and that the number of problematic containers shipped was significantly lower than in other cases. Counsel for the Permit Holder says the shipments were for a relatively short period of time and that they stopped once Mr. Mohamed Rafat was aware of the concerns and implemented safeguards.
31. The Hearing Panel was concerned about the fact that the quantity of problematic containers found, while perhaps fewer than in some other cases, were only those found in the bags audited and were from a relatively small sample of the entirety of containers shipped during that period. The Hearing Panel is further concerned that the shipments of out-of-province containers occurred almost immediately after the Permit was issued and continued until around the time the BCMB conducted a depot inspection. The Hearing Panel's findings as to Mr. Wael Rafat's conduct are entirely inconsistent with the suggestion that the conduct ended as a result of safeguards being implemented by Mr. Mohamed Rafat. The Hearing Panel has no basis on which to conclude that the conduct



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would not have continued as long as Mr. Wael Rafat was involved in the Depot operations. His evidence was that he ended his own involvement because of his stress around the BCMB investigation.

32. The Hearing Panel heard evidence from BCMB staff about the difficult balance between collecting sufficient evidence in the course of an investigation and protecting the system. In the circumstances of this case, the Hearing Panel considers the conduct at issue to call for a more severe sanction, even though the actual number of containers shipped may have been fewer than in other cases. That appears to be simply a function of how quickly the shipments were discovered and the sample quantity that was audited.

Permit Holder Admissions

33. The Hearing Panel accepts the submissions of both counsel that the Permit Holder's decision to proceed to a hearing should not impact the sanction. The Permit Holder was entitled to defend itself through the Hearing Process.

Evidence of Remorse or Rehabilitation

34. Counsel for the Permit Holder submits that Mr. Mohamed Rafat was candid about his absence from the Depot and that his evidence showed that he had clearly come to acknowledge his responsibilities as a depot operator. She also submits that his willingness to pay costs as a sanction also demonstrates his remorse and acceptance of responsibility.
35. Counsel for the Complaints Director argues that evidence of a change in behaviour should not be a mitigating factor if the change results from steps taken to avoid a penalty, rather than true rehabilitation.
36. The Hearing Panel considered this factor to be a neutral factor in its evaluation.

Sanctions in Similar Cases

37. The Hearing Panel is not bound by decisions as to sanction made in other cases by other Hearing Panels, but consistency is important and the Hearing Panel took into consideration the sanctions that had been imposed in the other BCMB hearings related to the acceptance and shipment of out-of-province containers.
38. As noted above, there have been four previous Hearing Panel decisions relating to the acceptance of out-of-province containers.
39. Three of the four hearings resulted in a permit cancellation (in one case that cancellation was stayed to a specified date). In the fourth case, the Hearing Panel imposed an 8-month suspension, stayed to a specified date and subject to certain conditions including the payment of hearing costs. This last sanction is similar to the sanction being proposed by the Permit Holder here.
40. Counsel for the Complaints Director submits that a cancellation is in keeping with the previous cases. Counsel for the Permit Holder submits that this case is consistent with



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the case in which the sanction was a stayed suspension (the “Fort Saskatchewan Decision”) as the Permit Holder proposes here.

41. The Fort Saskatchewan Decision was rendered after a hearing which proceeded by way of written submissions on the basis of an Agreed Statement of Facts and joint submissions with respect to the allegations and sanction.
42. The Hearing Panel in that case proceeded on the basis that even if it did not agree with the sanction, it could only reject the sanction if the result would bring the hearing proceedings into disrepute or be contrary to the public interest. In reaching its decision, the Hearing Panel stated that it was an “overriding consideration” for the Hearing Panel in accepting the joint submission that the BCMB encourage permit holders to jointly resolve compliance issues where appropriate and reasonable.
43. The Hearing Panel considers that circumstance alone to be sufficient to distinguish the Fort Saskatchewan Decision. The Hearing Panel was of the view that there were other reasons why the Fort Saskatchewan Decision is very different on its facts, even though the depot operator in that case also relied on his absence from the depot as a mitigating factor in terms of sanction.
44. The facts set out in the decision taken from the Agreed Statement of Facts are fairly sparse. There is no information in the Fort Saskatchewan Decision as to how the material at issue was introduced into the shipments. Although there is mention of a supervisor being fired, there is no admission that the supervisor was involved in deliberately adding the material to shipments. There was no finding by the Hearing Panel of deliberate conduct by a depot employee or agent that could be imputed to the Permit Holder as is the case here.
45. Counsel for the Permit Holder also pointed to the volumes involved in some of the other cases and that the volumes here were less. The Hearing Panel dealt with the Permit Holder’s position as to the volume of containers at issue in this case in its decision on the merits and did not agree that only some 12,000 containers were involved as argued.
46. Furthermore, although the number of incidents and length of time are considerations in sanction, the number of incidents and volume of containers are more relevant to whether or not the conduct was deliberate. Once deliberate conduct has been determined, the actual volume of containers fraudulently introduced into the system is less important than the conduct that allowed that introduction to incur.
47. To the extent it has some relevance to sanction, the Hearing Panel notes that the Fort Saskatchewan decision was based on suspicious material being found in two shipments over the space of two weeks. There is no information in the decision as to the number or percentage of containers in each shipment or any particular Mega Bag that were identified as coming from out of province as there was in this case.

Other Considerations

48. In its submission, the Permit Holder took the position that the sanction that the Permit Holder proposed was in the broader public interest because it would provide the residents of Evansburg and surrounding area uninterrupted access to depot services.



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49. The Hearing Panel agrees that convenient access by the public to a depot is an important part of the Alberta beverage container recycling system and an important consideration. However, in the circumstances of this case the Hearing Panel did not consider that factor to outweigh the factors that called for a cancellation. The Hearing Panel has confidence that BCMB Administration will take reasonable steps to address this issue on behalf of the Albertans who will be impacted by a cancellation on an expedient basis to the extent that it is able to do so.

Sanction - Conclusion

50. Based on all of the factors and for the reasons outlined above, the Hearing Panel considers the appropriate sanction in this case to be cancellation of Permit No. 20-BCD-043 issued to 2145448 Alberta Ltd. This cancellation is to take effect promptly and no later than 30 days after the issuance of this decision.

DECISION AND REASONS FOR DECISION REGARDING PUBLICATION

51. After the decision was rendered, counsel for the Hearing Panel asked counsel for the Complaints Director and counsel for the Permit Holder about the use of initials in relation to individuals referenced in the decision who had not appeared as witnesses.

52. In response to that inquiry, counsel for the Permit Holder suggested that the Permit Holder's witnesses and their companies should also be anonymized. She requested the opportunity to make submissions in relation to that and the publication of the name of Mohammed Rafat.

53. Counsel for the Complaints Director identified some other names that could be anonymized and asked that she be entitled to reply to any submissions made by counsel for the Permit Holder in relation to publication.

54. The Hearing Panel agreed to receive written submissions on this issue and received them on the same dates as the submissions as to sanction.

55. The Hearing Panel does not consider publication of the decision to be a sanction ordered by the Hearing Panel although it understands the perspective of counsel for the Permit Holder that it may have a negative impact from the perspective of the Permit Holder.

56. The BCMB has made a policy decision that as a regulator under the *Environmental Protection and Enhancement Act* with accountability to the Government of Alberta, its hearings should be open to the public. A hearing panel has the ability to close the proceedings at the request of any party or witness if there is appropriate justification for that to occur. Examples of such justification could be safety concerns or concerns around the disclosure of confidential information.

57. In accordance with its normal procedure, the Hearing Panel asked at the outset of the hearing whether either party wished to apply to have the hearing or any part of the hearing held in private. There was no application.



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58. The Hearing Panel considers it important that its proceedings be open to the public to the extent possible.
59. The Hearing Panel is not satisfied that any of the reasons put forward by counsel for the Permit Holder warrant a departure from the previous practice of publishing hearing decisions, including the names of the parties in their entirety, on the BCMB website. This is information that should be available to anyone who might have an interest in the beverage container recycling system either as a participant or a member of the public.
60. Since neither counsel requested the closing of the hearing during testimony of any witnesses, there is no obvious reason to subsequently anonymize those names.
61. That simply leaves the individuals who did not testify but to whom reference is made in the decision. The decision made no findings in relation to those individuals or the accuracy of any of the testimony regarding their conduct and the Hearing Panel is content to leave those names in the published decision.

DECISION AND REASONS FOR DECISION REGARDING COSTS

62. Given the fact that the BCMB has not been given the express authority under the Regulation to award costs and given its decision to cancel the Permit, which means there is no longer any Permit to which it could attach conditions, the Hearing Panel makes no order in relation to costs.

CONCLUSION

63. The Hearing Panel directs the cancellation of Permit # Permit No. 20-BCD-043 issued to 2145448 Alberta Ltd. as soon as BCMB 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 26th day of September, 2023

Brian Moore – Hearing Panel Chair