

1995 ABEAB 2

Appeal No. 94-013
March 24, 1995

IN THE MATTER OF Sections 84, 86, 87, 91, 92, and 93 of the *Environmental Protection and Enhancement Act*, (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF an appeal filed by Douglas Blatter with respect to the refusal by Bruce W. Taylor, Director, Action on Waste Division, Alberta Environmental Protection of his application to operate a beverage container depot in Warner, Alberta.

Report and Recommendations

Cite as: Douglas Blatter v. Director, Action on Waste Division, Alberta Environmental Protection

HEARING BEFORE: William A. Tilleman, Chair
David FL Marko, Vice-chair
Joan C. Copp

APPEARANCES:

Appellant: Douglas Blatter

Other Parties: Director, Action on Waste Division, represented by William McDonald
Barons-Eureka-Warner Health Unit, represented by Blake Gruszie Crossroads
Container Depot, Milk River, represented by John Dobrocane Alberta Bottle
Depot Association, represented by Barry Reid

I. Factual Background and Procedural History

On June 23, 1994, Mr. Douglas Blatter (the "Appellant") submitted an application to Alberta Environmental Protection for a rural beverage container recycling depot to be located in Warner, Alberta. He acknowledged that Warner was approximately 20 kilometres from the existing depot at Milk River. He anticipated that his service area would extend to the north and east toward Taber and would have little or no effect on the Milk River depot.

By letter of September 29, 1994, Dr. Bruce W. Taylor, Director of the Action on Waste Division (the "Director") advised the Appellant that his "...application cannot be considered for approval [because as] stated in [their] guidelines for rural depots, a new operation must be 24 km away from an existing depot."

On October 21, 1994, the Appellant filed a Notice of Objection pursuant to section 84 (1) (b) with this Board appealing the letter of rejection issued by the Director. The Board notified the Director that the appeal was filed, and it requested a copy of the Appellant's application as well as any other information in the file that would be pertinent. On November 8, 1994, the Director complied with this request.

The Board made a determination on December 8, 1994 to proceed with a hearing. It placed notices of the hearing in two local newspapers, the Lethbridge Herald and the (Raymond) County Review, on December 13. The notice stated that any persons other than the parties who wished to make a representation before the Board must submit a request in writing by January 6, 1995. In addition, the Board sent copies of the hearing notice to the Alberta Bottle Depot Association, the Beverage Container Manufacturing Corporation and the Recycling Council of Alberta because of their potential interest. Following advertising, the Board received requests (to make representations) from Mr. John Dobrocane, the owner and

manager of the Crossroads Container Depot, in Milk River; Mr. Timothy Marr, the President of the Alberta Bottle Depot Association, and Mr. Blake Gruszie, Public Health Inspector with the Barons-Eureka-Warner Health Unit. It granted party status to all three applicants for the purpose of participation in the hearing, which the Board decided would be held at Warner on January 31, 1995.

II. Legislation, Regulations and Guidelines

Legislative History

Beverage containers have been regulated in Alberta since the *Beverage Container Act* came into effect on January 1, 1972. This Act ensured that a deposit refund would be paid on any soft drink container returned to a retailer selling that product. From that date, no soft drink containers could be considered "non-returnable". Depots were set up by the manufacturers to accept cans on behalf of the retailers; however, because of some difficulties this system became confusing to the consumer.

In April 1972 amendments were passed to alleviate many of the problems with the return system. Universal container depots were established throughout the Province. These universal depots were authorized to accept, on behalf of the manufacturers, all beverage containers as defined by the Act. In addition, liquor and wine bottles were included in the system. The consumer then had a central location to which he could take back all of his returnable containers and receive the full amount of the deposits he paid. When these amendments came into effect in January 1973, they were met with acceptance by consumers, who responded by returning millions of bottles and cans to the depots.

In 1989 the *Beverage Container Act* and Regulation were amended to bring them more in line with current conditions. The increase in the variety of products on the market led to problems between regulated and unregulated products in identical containers. The public had also expressed concern about the complex system of deposits with some deposits being based on container material and others, on container size.

The amendments made in January 1989 broadened the legal definition of a "beverage" to include such additional goods as carbonated and/or flavoured waters, fruit and vegetable juices and prepared teas. As a result, the only products not covered were milk, domestically brewed beer and products sold in drinking boxes (i.e. Tetra Brik).

Manufacturers are required to pick up their containers from every depot in Alberta. In the case of most non-refillables, the manufacturers have contracted with a private company whose sole business is to pick up and dispose of these containers, most often by recycling them.

The beverage container recovery system has now grown to include approximately two hundred depots located throughout the Province. Over 100 manufacturers and distributors have registered products with Alberta Environment. When liquor products registered by the Alberta Liquor Control Board are included, over 7,000 separate products have been registered. The returning of containers to depots has become a commendable routine for most Albertans and there is every indication that the system will continue with success.

In 1990, the Alberta Government embarked on a program to consolidate its environmental legislation, including the *Beverage Container Act*, into one piece of legislation, the *Environmental Protection and Enhancement Act* (the Act). Therefore, new regulations under the latter Act were passed (effective September 1, 1993). The new Beverage Container Recycling Regulation requires manufacturers to set up and operate a common collection system to recover containers from the depots. The new system will reduce container sorting in the depots and provides an opportunity to develop material-based handling commissions in the future. With the passage of the Act, there is an increased emphasis on recycling containers, since landfill is essentially eliminated as a disposal option, for environmental considerations.

A collection system involving the establishment of depots throughout the province is clearly a regulatory requirement.' A deposit is paid by the consumer at the time of purchase, and it is refunded by the depot operator when the consumer returns the container to a depot.

Manufacturers provide a system of collection through an agent, hired by the Alberta Beverage Container Recycling Corporation. The manufacturers reimburse the depots for the deposits, plus commissions for handling the containers.

The original legislation, enacted in 1972 as an anti-littering law, has apparently been quite successful in reducing this type of waste. Guidelines with respect to depots were therefore established because this business was originally viewed as being too financially risky by potential depot operators.

Under the new Act, the Director is given authority (in section 18 of the Beverage Container Regulation) to:

- (a) *establish guidelines governing the operation of depots, including but not limited to the general operation and administration of depots including the hours that they must remain open to receive empty containers;*
- (b) *limit the number of depots in all or any part of Alberta.*

Guidelines (Standards for Rural Depots)

The portion of the Standards for Rural Depots that is applicable to this appeal reads:

- 1. *[The minimum standards are that new depots] shall be 24 km from an existing depot. However, depots will be considered closer than 24 km if:*
 - a) *the existing depot is open for very limited hours during the week; or*

'Beverage Container Regulation, s. 5 (Alta. Reg. 128/93).

3. Depot service has been continually requested (by store patrons) in Warner. The aging population requires a service not presently being provided.
4. Warner houses the County offices and the Health Unit; therefore, outside residents doing business in Warner will automatically be drawn to the new depot.
5. The depot would provide an opportunity for part-time youth employment.
6. Finally, an additional depot in Warner would significantly augment the recycling efforts for his community.

At the hearing, the Appellant stressed that he did not wish to put the Crossroads Depot in Milk River out of business, or take away its business. He simply wanted to promote Warner's recycling initiative. Currently, Warner has established recycling bins for plastic, paper and glass -- directly across the street from the Appellant's grocery store.

Further, the Appellant has been encouraged by the Village to take this initiative; particularly, he received support from the Mayor. People are currently dropping off bags of cans at the Appellant's store. And, when he conducted an informal survey of twenty Warner residents, he found that only one resident took cans and bottles to a depot in Lethbridge, while the other nineteen save them for groups such as Scouts or the 4H Club, or they throw them into the garbage. As it turns out, an annual bottle drive in Warner collected \$1,200 in containers - which were eventually returned to the Milk River depot.

**B. MR BLAKE GRUSZIE, PUBLIC HEALTH INSPECTOR FOR
BARONS-EUREKA-WARNER HEALTH UNIT**

Having undertaken numerous inspections at the regional landfill sites, Mr. Gruszie reached the conclusion that there are still too many containers in landfills.

Mr. Gruszie stated that recycling aluminum and bi-metal cans use 95% less energy than the manufacture of raw materials. Further, depositing bottle containers in the garbage reduces the life expectancy of costly landfills. At present, the landfill in Warner is full.

He also pointed out the convenience of one-stop recycling in Warner and his view that many people do not use the Milk River depot because it is out of their way.' Also, people have other priorities when leaving Warner for businesses elsewhere; accordingly, many containers are discarded into the trash. In his opinion, a local recycling depot will meet environmental goals (waste minimization).

**C. DIRECTOR OF ACTION ON WASTE DIVISION,
ALBERTA ENVIRONMENTAL PROTECTION**

According to the Director, the legislation, regulations and guidelines were put in place after many years of experience since 1972. Extensive consultation with manufacturers, the depot operators and public has occurred. This has resulted in an efficient recycling system and a high rate of return of containers.

'Warner is a small community, north of Milk River. The Board heard evidence that major shopping for Warner residents occurs to the north, in Lethbridge.

Regarding Mr. Blatter's application, the Director relied on this conclusion reached by his officials on September 22, 1994⁴:

"Earlier this summer I spoke with Mr. Blatter regarding opening a bottle depot in Warner, Alberta. At the time of his inquiry, I advised him of the minimum requirement of a new operation being 24 km away from an existing depot. By looking at the distance on the map, it appeared to me that Warner is within 24 km of the depot in Milk River. Mr. Blatter said that he believed it may actually be 24 km from his location to the Milk River depot. I told Mr. Blatter that he could submit an application and that we would evaluate it based on our minimum requirements. If the proposed location is within 24 km, we will not approve his application. However, if our requirements change, we would consider an application for a depot there.

I asked Arthur to check the distance between Warner and Milk River the next time he was in the area. In the meantime, we received an application from Mr. Blatter. The original submission was incomplete so I sent him a letter requesting additional information. On September 27, we received further information on this application. The application is still incomplete.

On September 28, Arthur submitted his recommendation including his findings regarding the distance between the two towns. **The end result is a recommendation to reject this application based on the fact that the proposed location is within 24 km of an existing depot.**
(Original emphasis)

This letter was accepted and approved by Jean-Eve Mark, who is the Head of the Beverage Container Section of the Material Management Branch and also a Director's witness at the hearing.

Memo from Betty Teichroeb of the Material Management Branch to Jean-Eve Mark, Head of the Beverage Container Section, Action on Waste Division.

D. JOHN DOBROCANE, CROSSROADS CONTAINER DEPOT, MILK RIVER

Mr. John Dobrocane, owner of the Milk River Depot, stated that his break-even volume was 400,000 containers and he had only begun to surpass that volume in the past 3 to 4 years. He is now operating at a volume of approximately 530,000 containers per year. Even so, with respect to transportation, he waits until he has a full load of containers before ordering the truck for pick-up.

He stated that approximately 25 to 30% of his business comes from Warner and a reduction of that amount in his business would effectively put him back at or below the break-even point, in which case he would go out of business. He has recently invested in more efficient equipment, and he testified that he would not have done so without some territorial protection.

He stated that although he had been open three days per week in the beginning, he found it was not cost effective. Accordingly, he reduced his operation to two days a week. He also testified that the population of the area which he serves is about 3,700 but that only approximately one-quarter reside in Milk River.

Significantly, Mr. Dobrocane stated that the 24 kilometre radius is not a helpful evaluative criteria for the estimated success of a depot; in his opinion, the most important factor is the number of people that a depot can service.

E. ALBERTA BOTTLE DEPOT ASSOCIATION

Mr. Timothy Marr, President of Alberta Bottle Depot Association (the "Association") and owner of two depots in Edmonton, stated that he believed the Appellant could obtain the returns listed in his application, but only if he marketed aggressively. He also stated that the Milk River depot's annual gross was \$19,000 which would be reduced by about \$9,500 if Warner obtained a depot.

He stated that the present system is built around efficiency and effectiveness in order to obtain the highest return rates and the lowest cost to the consumer. The container deposit is the main motivator for recycling for the public. Mr. Marr likened the depots to a franchise-like arrangement, with the Government essentially holding or supervising the master franchise agreement. Controlling the trading area ensures the efficiency and the economic viability of each depot.

Although manufacturers dislike the system, and would prefer that the deposit didn't exist, he believes no other province can boast the container return rates like Alberta.

In short, the Association felt that the existing legislation, regulations and guidelines are necessary to maintain the system and to protect the investments of the current operators.

V. Findings of the Board

The Appellant has failed to provide persuasive evidence to support his appeal,' although the Board finds persuasive, the arguments made by the Appellant and Mr. Gruszie regarding the negative environmental impact from the accumulation of containers in landfills

'Regarding the burden of persuasion and the standard of proof; the Rules of Practice s. (N) (k) of the Board state:

In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.

The Appellant's evidence respecting the potential impact on the Milk River depot from an additional depot was contradicted by the evidence of Mr. Dobrocane, Mr. Marc and Mr. Tymko. To some extent, the Appellant supported the position of Mr. Dobrocane when the Appellant conceded that the containers collected in the annual Warner bottle drive were sent to the Milk River depot. Undoubtedly, at least *that* quantity of Milk River's business would be lost to a new Warner depot.

The Board believes Mr. Dobrocane's evidence, that his depot barely had sufficient volume in the past four years to exceed his break-even point. The Board believes also that he would lose a considerable amount of his business to the proposed depot, as many Warner residents do patronize his operation.

The Board finds that the *only* criteria used by the Director in rejecting Mr. Blatter's application was the 24 kilometre rule; Ms. Mark used this rule as an "on/off switch" and the Board believes nothing else (such as the number of people served, recycling goals, or the landfill situation) triggered the Director's decision to reject the application.

VI. Conclusion

A. Disposition of Mr. Blatter's Appeal

On the merits of the appeal (and without treating the 24 kilometre guideline as inflexibly dictating the outcome), the Board believes Mr. Blatter's appeal should be dismissed.

B. Reviews by the Director

The Director established the 24 kilometre standard for rural depots in accordance with section 18 of the Regulation. However, the Director appears to have treated this guideline as an inflexible rule which could not be broken. By their very nature, guidelines are *not* inflexible rules. They are merely indicators of the factors which the Director will take into account in exercising his discretion about whether to permit new bottle depots. Each exercise of discretion must be made individually, taking into account all of the circumstances of each particular case.

Additionally, the guidelines -- and the implementation of the guidelines -- must take into account *all* of the purposes of the Act. These purposes are critical because they set the framework within which any discretion must always be exercised.

The purposes of the Act as found in section 2 are to:

...support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) *the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;*
- (b) *the need for Alberta's economic growth and prosperity in an environmentally responsible manner, and the need to integrate environmental protection and economic decisions in the earliest stages of planning;...*
- (f) *the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions.*

To the extent that any legislative intent can be discerned from section 2, it is clear to the Board that the predominance of environmental goals found in sections (2) (a) and (f) are intended to enlarge, rather than to confine, the environmental direction given to the Director as he makes decisions within his sphere of responsibility. To be sure, the discretion is left to the Director. The Director can impose reasonable guidelines and restrictions on the beverage

container market in which the department is the regulator, but this does not mean that the Director can single out any particular rule or guideline if the result or effect is one that does not achieve all of the purposes of the Act.

Subsections (a) and (0 of section 2 of the Act relate specifically to environmental concerns. These were argued by the Appellant and particularly by Mr. Gruszie.⁶ For the issues in this appeal, the environmental concern is the need to encourage citizens to recycle empty beverage containers, rather than disposing of them in the garbage or in roadside ditches. This goal would be more easily met if citizens have extremely easy access to recycling facilities.

By contrast, section (2) (b) relates to economic concerns. With respect to this appeal, the economic concern is that the recycling system must be economically viable for all of the persons or organizations involved in it and served by it.

The evidence of Mr. Marr on behalf of the Association dated January 19, 1995 made references to two separate economic concerns. First, there is the global concern that manufacturers, and ultimately consumers, require a "fixed, efficient network that serves the greatest population for the lowest cost." Additionally, there is the depot-specific concern, which is that too many depots "divides an already too small pie into even smaller pieces." A Government authorized oligopoly is protective of the economic concerns, particularly of the depot-specific concern. Yet, if economic concerns were the only consideration, it seems doubtful that the government is best positioned, or even appropriately staffed, to make those determinations. And somehow, the environmental concerns that promote additional recycling must be addressed.

The Board appreciates the evidence from health officials, particular in light of section 11 of our Act which states:

The Minister shall, in recognition of the integral relationship between human health and the environment, co-operate with and assist the Minister of Health in promoting human health through environmental protection.

Pursuant to section 2 (b) of the Act, the environmental concern and the economic concern, in this case, suggest a spectrum of alternative guidelines. The former suggests that citizens should be encouraged to establish many bottle depots in order to best encourage bottle recycling by individuals. The economic concern suggests fewer container depots, carefully limited geographically, in order to ensure that existing depots remain viable and stay in business.

A fixed, inflexible guideline cannot facilitate each of those concerns simultaneously. Thus, the Director's decision must reveal how he exercised his discretion in each case in a way that takes those competing goals into account.

Undoubtedly, this guideline and the 24 kilometre rule have been used to protect the existing recycling businesses. Under questioning by the Board, the Director admitted there was no magic to the 24 kilometre rule; it was simply a method that the Director had used in the past. If this is true, the rule is clearly arbitrary, unless used by the Director in connection with other valid purposes. True, the original purpose for setting up the guidelines were based on understandable fiscal goals and objectives. But, we question the current usefulness of the guidelines as a perpetual "turf protector," given the more recent enactment of our legislation.

As a guideline and not an inflexible rule, the 24 kilometre guideline for rural bottle depots' proximity could provide *a starting* point for evaluating the competing goals of the Act. However, the 24 kilometre guideline is not sufficient as a stand-alone factor, or as an "on/off switch," for whether the application will be considered by the Director. Distance is only one of several factors that is relevant to the exercise of the Director's discretion. Even distance is a confusing factor; for example, where do you start the measurement? Do you measure "as the crow flies"? What road(s) do you use? How do you measure where there are rural-rural, rural-urban and urban-urban interface situations? And, who determines the transition zone?

Other factors are the population base, the road configuration, demographics, whether or not there are other attractive government or commerce features to a village or town (a county seat provides both); seasonal variation in population; and the recycling wishes and business direction provided by the elected leaders for their constituents.

Table C of the material submitted by the Director in his letter dated February 8, 1995 suggests that in some of the remote areas of Alberta, the 24 kilometre guideline is too small; conversely, there may be other areas of Alberta where the 24 kilometre guideline is too large. Again, factors which might affect the application of the 24 kilometre guideline are: practical distance by road versus physical distance between depots; and whether the proposed or existing bottle depots are operating as public-service, non-profit enterprises or as profit-making operations.

In the Board's opinion, the Director must exercise his discretion in light of *all of* those competing purposes of the Act. Each individual application for a bottle depot must be considered taking *all* factors into account, including, but *not* limited to, whether there is another bottle depot within 24 kilometres.

VII. Recommendations of the Board

The recommendations of the Environmental Appeal Board are as follows:

1. The Board recommends that the appeal by Mr. Blatter be dismissed and the Director's decision to deny a bottle depot approval to Mr. Blatter be affirmed.
2. The Board recommends that this Report and Recommendations and the Minister's decision be published by the Environmental Appeal Board.

The Board recommends that the Director be instructed to reconsider the decision-making process for dealing with applications for beverage container depot approvals and to exercise his discretion taking into account appropriate guidelines and also individual factors relevant to the competing purposes of the Act.

Dated on March 24, 1995 at Edmonton, Alberta

“original signed by”

William A. Tilleman, Chair

“original signed by”

David H. Marko, Vic-Chair

“original signed by”

Joan C. Copp, Board Member

ORDER

I, Ty Lund, Minister of Environmental Protection, make the following Order:

X I agree and accept the Board's Recommendations.

I do not agree or accept the Board's Recommendations and I direct that:

Dated at Edmonton this 28. day of March, 1995.

“original signed by”

Honourable Ty Lund
Minister of Environmental