
ALBERTA ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Hearing - February 27, 1998
Date of Report and Recommendations - March 26, 1998

IN THE MATTER OF Sections 84, 85, 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 Mr. Wayne Henuset, with
respect to the refusal of Application No. BC 96-0028 for a Universal
Beverage Container Depot by the Director of Chemicals Assessment
and Management Division, Alberta Environmental Protection.

Cite as: Henuset v. Director of Chemicals Assessment and Management Division, Alberta
Environmental Protection.

HEARING BEFORE

Dr. John P. Ogilvie, Panel Chair
Dr. Ted W. Best
Mr. Ron V. Peiluck

APPEARANCES

Appellant:

Mr. Wayne Henuset and Mr. Steve Kamajian
representing the Willow Park Bottle Depot

Other Parties:

Mr. Gilbert Van Nes, Environmental Law Section,
Alberta Justice, counsel for the Director of Chemicals
Assessment and Management Division; Ms. Jean Eve
Mark and Mr. Arthur King, Alberta Environmental
Protection

Mr. Len Thom counsel for the Alberta Bottle Depot
Association (Mr. Dave Custer), Fish Creek Bottle
Depot (Mr. Dave Custer), Chinook Bottle Depot (Mr.
Amir Aly Patel), and Trail Bottle Exchange Inc. (Ms.
Anna Marie Kopp)

Mr. Norman Machida counsel for the Calgary Bottle
Exchange (Mr. Paul Lail)

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BACKGROUND

[1] On August 22, 1997, Mr. Wayne Henuset, (the Appellant) filed a Notice of Appeal with the Environmental Appeal Board (the Board) with respect to the failure of Mr. Jerry Lack, Director of Chemicals Assessment and Management Division, to approve Application No. BC 96-0028 for a Universal Beverage Container Depot. The Application submitted by the Appellant was for the operation of a new depot at 10801 Bonaventure Drive, S.E., Calgary, Alberta.

[2] The Board wrote to the Appellant on August 25, 1997, acknowledging receipt of the appeal and by copy of that letter requested all related correspondence, documents and materials from the Department of Environmental Protection (the Department).

[3] All requested correspondence was received from the Department on September 8, 1997 and a copy was forwarded to the Appellant with notification that a mediation meeting would be held on September 9, 1997, in Calgary.

THE MEDIATION MEETING

[4] The mediation meeting was held on September 9, 1997, in Calgary, Alberta. The facilitator from the Board was Mr. Max McCann.

[5] According to the Board's standard practice, the Board called the mediation in an attempt to mediate or to facilitate the resolution of the appeal or, failing that, to make arrangements for the oral hearing. The Board invited representatives from each party to participate.

[6] No resolution was reached at the mediation meeting, and it was decided by the parties that the file would be held in abeyance until November 10, 1997, and that the Department would

provide a status report to the Board and the Appellant due by October 10, 1997.

On November 7, 1997, a further request was made by the Department and subsequently granted by the Board for the file to be held in abeyance until December 10, 1997.

THE HEARING

[7] On December 23, 1997, the Board wrote to all parties informing them that a hearing would be held on February 27, 1998, in Calgary, Alberta. The parties were provided with a notice of public hearing being published in the Calgary Herald on December 31, 1997, informing any person, other than the parties who wished to make representations before the Board, to advise the Board office by January 9, 1998. The parties were also asked to provide the names of any other parties that might be interested in participating in this appeal.

[8] The Board received intervenor requests from the Fish Creek Bottle Depot and the Trail Bottle Exchange Inc. on January 16, 1998, from the Calgary Bottle Exchange and the Alberta Bottle Depot Association on January 19, 1998, and from the Chinook Bottle Depot on January 20, 1998.

[9] On January 30, 1998, the Board granted status to each of the individuals who had written to the Board allowing them to participate at the hearing through the mechanism of written submissions even though requests were received past the advertised deadline of January 9, 1998.

[10] On February 27, 1998, the hearing took place at the Federal Court of Canada in Calgary, Alberta.

THE ISSUE TO BE DECIDED

[11] The issue to be decided in this appeal is whether or not the Director erred in refusing to issue an approval in response to Application No. BC 96-0028 for a Universal Beverage Container Depot. More specifically:

1. Did the Director follow the intent of the legislation as set forth in section 2 of the Act¹ in denying to issue the approval?
2. Did the Director have available to him sufficient accurate information to permit him to make a proper decision?

SUMMARY OF THE EVIDENCE

[12] At the outset of the hearing, the Board asked, as is the standard practice, whether there was anyone else who wished to speak at the hearing. At that time, Mr. Len Thom and Mr. Norman Machida requested they be allowed to speak. After deliberation and with agreement of the parties other than the Appellant, Mr. Len Thom was allowed to provide a witness on behalf of the Alberta Bottle Depot Association to give evidence, and both Mr. Thom and Mr. Machida were allowed closing arguments.

1. The Appellant

[13] Mr. Steve Kamajian testified for the Appellant. He stated that he had been employed in the bottle return business (that is in the business of accepting and paying for empty containers that

¹ *Environmental Protection and Enhancement Act*, Statutes of Alberta, 1992, Chapter E-13.3 as amended.

his employer had sold) for four years and that he is the manager of the Appellant's bottle return system. Six staff are employed; two full-time and four part-time. He noted that there are some 70,000 bottles returned to the depot each year.

[14] Mr. Kamajian noted that the Willow Park Liquor Store had originally been designated by the Alberta Government to serve not only as a retail store but as a warehouse facility for southern Alberta. Ample loading and storage space is available. He reported that trucks with 45 foot trailers are regularly unloaded in less than 45 minutes. He foresees no bottle necks arising when returned containers are picked up.

[15] Mr. Kamajian referred to the City of Calgary 1997 census which showed a population of some 201,159² for that part of the city south of Glenmore Trail (which is the overall market area for the proposed bottle depot). He noted that this region had increased in population by 42,000 over the past ten years. He noted that the targeted market area of the Willow Park depot contains 60 percent of the city's growth. He believes that there is ample population and continued growth prospects to support another depot.

[16] Under cross examination by the Department, Mr. Kamajian agreed that some of the targeted market area is outside the three kilometer radius around the Willow Park store but said that the radius is only a measure and that many of the people living in the area targeted do most of their shopping in the malls and stores near the proposed depot. He said that convenience of access and one-stop shopping are important to the users of the depot. He reported that many of the store's customers expressed satisfaction at being able to return their empty containers at the same time and in the same area when shopping.

2. The Department

²

Written submission of the Willow Park Liquor Store, page 6, data from the 1997 City of Calgary Civic Census.

[17] Mr. Arthur King, an Inspector with the Department, reported that he has carried out the physical inspection of the proposed depot. He noted that he considered the loading area to be congested and that a truck might have trouble backing into the loading dock. He also noted that the storage area is in the basement of the liquor store and stored material must be raised by elevator to the ground floor for loading onto trucks. He commented that there was a risk of delay if the elevator were to break down. He said that, in this inspection, he followed the guidelines closely and since the proposed depot did not meet them exactly he recommended that no approval be issued. Under cross examination he said that he did not consider convenience to the potential user of the depot in his inspection.

[18] Ms. Jean Eve Mark, the head of the container beverage management system, said that, in assessing the need for the proposed depot, the population of the area south of Glenmore Trail was taken as 173,000 based on the 1996 census figures. She agreed that the 1997 figures showed a population in the area of some 200,000. In the assessment, she said that convenience to the customer was taken into account, but she did not describe just how the Director considered this matter. It was not clear whether he was considering convenience to the customer or to the organization collecting the returned containers.

[19] Ms. Mark had observed a sample loading of containers at the proposed depot. She said the loading area was tight and that when the truck was backing into the loading dock she had to move her vehicle to allow it room to back in. The loading took the normal amount of time. However, in addition to the liquor store, two other businesses have access to the loading dock. She said that this indicates that a truck might not be able to use the dock on arrival. A delay, she said, could cost an estimated \$30.

[20] She noted that the Fish Creek depot was established before 1993 as a result of a request for proposals. The Department believed that there was a need for a depot in south Calgary

and hence requested proposals for such a depot. Fish Creek submitted a proposal and was licensed. She explained that the close proximity of the Trail Bottle depot and the Calgary Bottle Exchange (which are only 0.5 kilometers apart) arose from an error on the part of the Department.³ However, she said that there is sufficient population in the area to support them both, but that the establishment of the Willow Park depot would result in that area being over-serviced.

[21] She said that the central purpose of the depots is to reduce the number of empty beverage containers going to the landfills. If the number of depots were not controlled, they would proliferate, would not succeed financially and would go out of business. The result would be increased numbers of containers entering the stream of waste to landfills.

[22] In answer to a question by the Board, Ms. Mark replied that population north of Glenmore Trail had not been considered. When asked why two of the depots that are considered to serve the south Calgary market are located just to the north of Glenmore Trail her answer was inconclusive. She agreed that the Glenmore Trail acts as a sort of barrier to travel between the northern parts and southern parts of the city.

3. Mr. David Custer

[23] The Alberta Bottle Depot Association called Mr. David Custer, the President of the Alberta Bottle Depot Association as a witness. He is associated with the Chinook and the Fish Creek bottle depots. Mr. Custer described the cost of operating a bottle depot. He said the fixed costs consist of the building and equipment which typically amount to some \$700,000. The variable costs are made up of labour and the operation of a depot is very labour intensive. The fixed commission paid on returned containers is the only income received. He argued that a small drop in the number of returned containers and hence in commission received has a marked effect on the profitability of

³ The guidelines for the establishment of urban depots used by the Department require a separation of 3 kilometers between depots. See page 9 of this Report & Recommendations.

the operation. He quoted the cost of depot operation as 0.8 cents per container returned which cost is paid by the beverage producer and included in its selling price. Therefore, the consumer pays the cost of recycling used containers.

[24] Mr. Custer noted that beverage container recycling in Alberta is very successful in that better than 80 percent of the containers sold are returned. He says this is because the system of returns is a managed system. If depots were allowed to establish at random they would not all be financially viable and there would be less than enough depots to serve the public. As a result, the number of containers going to the landfills would increase.

SUMMARY OF THE ARGUMENTS AND WRITTEN SUBMISSIONS

1. The Appellant

[25] The Appellant argued that as the nearby depots were still in business, they had not suffered severely during the 30 months that the Willow Park Liquor Store had been accepting returned bottles. He believes that the establishment of his bottle depot will improve the environment because of its convenience. He intimated that the existing bottle depots do not do a very good job and that this is evidenced by the fact that the largest single producer (the beer industry) pay organizations like the Willow Park Liquor Store to accept empty containers and pay them more than they do to the bottle depots. This points to a need for more and better depots. The Appellant wants to improve the system and minimize the number of empty beverage containers going to the landfills.

[26] The Appellant also noted the question raised by the Board that two of the five depots assumed to be serving south Calgary are north of Glenmore Trail. He argues that this fact strengthens his argument that there is ample population in south Calgary to support an additional depot.

2. The Department

[27] The Department argued that the establishment of the Willow Park Bottle Depot will do nothing to improve the environment. It will tend to endanger the viability of the system which is a managed system. It will have the effect of dividing the pie into three pieces instead of two. The premise behind the system is to have a depot located conveniently to a customer's home. The Willow Park proposed depot is not structurally accessible and will increase the cost of bottle pick-up due to the increased time to load the empty bottles.

3. The Written Submissions

[28] The written submissions of the Alberta Bottle Depot Association, the Chinook Bottle Depot, the Trail Bottle Exchange, the Fish Creek Bottle Depot and the Calgary Bottle Exchange presented basically the same argument and are, therefore, not treated separately.

[29] The Alberta Bottle Depot Association, the Chinook Bottle Depot, the Trail Bottle Exchange, the Fish Creek Bottle Depot and the Calgary Bottle Exchange argued that the Director followed the guidelines in refusing the application. He is directed to oversee a managed franchised system which has been effective in the past and should not be changed. The established depots in south Calgary will all suffer loss of business if the Willow Park Bottle Depot is allowed to open.

CONSIDERATIONS OF THE BOARD

1. Jurisdiction

[30] As of December 1, 1997, the new regulations covering the operation and approval of bottle depots came into effect and now the Director no longer has the power to approve or refuse

approval of applications for the establishment of new bottle depots. Application No. BC 96-0028 was refused on July 21, 1997. An appeal of this refusal was filed with the Board on August 22, 1997 and since this date is prior to the date of effectiveness of the new Regulation, the Board has jurisdiction. No party expressed any doubt as to the Board's jurisdiction.

2. Reasonableness of the Director's Decision

[31] As provided in section 18 of Regulation 128/93⁴, the Director has established guidelines which he follows in making a decision to approve or disapprove an application for a new depot. These guidelines provide, among other things:

Unless approved by the Director:

1. Depot must be a minimum of 3 km. radius away from an existing depot when serving a population equal to or greater than 40,000 (Urban).
2. Depot must be a minimum of 24 km. away from an existing depot when serving a population of less than 40,000 (Rural).

The Department has given no formal explanation as to how these distances were arrived at. The witnesses merely state that they were selected to provide a population of potential customers around the depot. The Board concludes that they should not be applied rigorously in every case.

[32] It must be remembered that guidelines are only intended to *guide* the Director not to steer him. In prior decisions the Board has recognized this fact. In the Blatter decision⁵ the Board said "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."

[33] The Director's decision in implementing the guidelines, must take into account the purposes of the Act. Section 2 sets forth the purposes of the Act and the pertinent parts of that section in this case are:

⁴ Beverage Container Recycling Regulation, Alta. Reg. 128/93.

⁵ *Douglas Blatter v. Director, Action on Waste Division, Alberta Environmental Protection*, March 24, 1995, page 12.

- 2 The purpose of this Act is 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;
...

[34] The Board interprets this section to mean that the Director, in making his decision, must consider environmental as well as economic factors but with weighting towards environment protection and enhancement.

[35] The Director submitted a list of factors that he considered in making his decision to deny the application. In the following, the Board examines the pertinent factors in light of achieving the proper balance between economic growth and environmental protection.

[36] The Director considered the population of south Calgary (that part of the city lying south of Glenmore Trail) to be approximately 173,000, based on the 1996 census. South Calgary is, according to the Director, served by five depots. However, evidence presented showed that two of these depots are north of Glenmore Trail. One, the Chinook Bottle Depot, is off Macleod Trail immediately north of Glenmore Trail. The Board concludes that Chinook would not draw all its business from the area south of Glenmore Trail but could draw significant business from that area. The other depot, the Marklan Bottle Depot, lies north of Glenmore Trail and on the east side of the Bow River. The Board believes that it will draw very little business from the area of south Calgary. In the Board's opinion, south Calgary is only served by three and a half depots.

[37] The Appellant presented evidence that the population of south Calgary (that part of the city lying south of Glenmore Trail) is 201,159⁶ according to the 1997 city census. The Department accepted this figure. However, while accepting this figure, the Department indicated that their assessment of the need for the new depot was based upon the lesser figure used in the application. The Board concludes, therefore, that south Calgary could sustain another bottle depot based on the latest population statistics and the Department's guideline of 40,000 people per depot.

[38] The Appellant submitted evidence of significant past growth and arguments for continued future growth in the southern portion of Calgary. There appeared to be no disagreement with this information. To counter the strong growth argument, the Department took the position that the population in the target area or 3 kilometer radius as defined by the managed system was actually decreasing. In view of the obvious and significant popularity of the bottle return program at the Willow Park store over the past 30 months, the Board cannot help but conclude that the evaluation criteria used in the managed system is imperfect.

[39] The Department argues that the fact that there are no complaints from the target market area indicates that there is no need for a new depot. This is consistent with the strong support of the managed system. However, it is easier to conclude that no complaints mean consumer satisfaction with the status quo which now includes the current operations of the Willow Park store. Regardless of the justification, the public's strong preference is to use this store -- regardless of the location of their residence.

[40] The Board notes that the basis for establishing certain population statistics are derived from bounded census tracts. Under cross examination, the Department admitted that establishing the so called east-west or south-north boundary of Calgary for the purposes of their arguments, was not as clear. In fact there was agreement with the Board that moving the north-south line could generate significantly different results with reference to the 40,000 population criteria. Once again

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See Footnote 2.

the Board concludes that the managed system has an element of subjectivity which is not necessarily always consistent with protecting and enhancing the environment.

[41] Ms. Mark was asked if the Director considered convenience to the consumer in considering the site of a proposed depot. Her answer was indeterminate and the Board is not clear how much weight, if any, the Director placed on this matter. What is clear is that the Board cannot place weight on evidence that is indeterminable. The Appellant noted that the ability of being able to carry out a series of errands in one stop or in one location would tend to improve the ratio of returned empty containers. The Board agrees.

[42] The Department admitted that they had not conducted user profile studies. In other words there is little or no knowledge on the motivations or decision making process involved in the return of containers. The managed system seems to be weighted towards the premise that stores are primarily supported by populations in areas defined by a specified radius. While there is some logic to support the argument that at least some of the bottle return business might be local, the system defies the oldest rule in marketing that **location is the key issue**. In other words, being close to major traffic routes, having convenience of access and availability of other goods and services in the immediate area, are also important considerations by the public. In the end, the Board must deal with reality; the public has been returning bottles in significant numbers over the past 30 months to the Willow Park store thereby promoting economic growth and environmental protection.

[43] Another reason which prompted the Director to refuse the application was that the proposed Willow Park Bottle Depot is less than three kilometers from two nearby depots. These two depots are only 0.5 kilometers apart clearly violating the Department's guidelines⁷. The Department admitted that this situation had arisen as a result of a Departmental error. Mr. Machida noted that these depots had lost 8.5% of their business in the 30 months that the Willow Park Liquor Store had been accepting bottles returned to the retailer. However, Mr. Custer testified that his business had

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See page 9 of this Report and Recommendations.

steadily increased over the same period. The Fish Creek Bottle Depot is located south of these two depots and would be expected to capture some business from people in the south who formerly used one of the two depots.

[44] Some evidence was presented by the Department on the possible difficulties of loading the returned containers to the trucks used by the pick-up service. It was noted that, in the Department's opinion, the area was inadequate for ease of truck manoeuvring and that, since returned containers would be stored in the basement, loading them would be disrupted if the elevator broke down. The Board notes that the Department did not offer any form of expert testimony on this matter nor does it explain why the Appellant had no complaints. In addition, the facility was designed as a distribution centre by the former Alberta Liquor Control Board and operated as one of its most popular stores. Speculating on what might happen if the elevator broke down is a weak argument as any equipment can fail causing delays. In conclusion, there was no solid evidence presented by the Department that the loading dock would cause increases to the cost of the bottle return system.

[45] In considering the balance of environmental factors versus economic factors the Board is reminded of the testimony given by Mr. Blake Gruszie, Health Inspector for the Barons-Eureka-Warner Health unit reproduced in the Blatter decision⁸:

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 of 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 at 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.

⁸

See Footnote 5.

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).

[46] While this testimony was given regarding a rural situation, the same principles apply in urban areas - possibly even to a greater extent. Therefore, the Board believes that any steps that can be taken to efficiently remove containers from the waste stream that is destined for the regional landfill promotes environmental protection. The Board believes that the Director should have approved the application for the Willow Park Bottle Depot; among other things, the environmental benefits to Albertans and the economic benefits to the Appellant outweigh the minor economic detractions from the two competing depots.

[47] The Board recognizes that the evidence on population that the Appellant presented was not available to the Director when he made his decision to deny the Application. The matter of the consideration of evidence arising after the Director made his decision but before the appeal hearing was discussed by the Board in the Williams case:⁹

This appeal requires the Board to consider its powers to receive evidence in an appeal of a Reclamation Certificate based upon facts or changes that occur *after* the issuing of the certificate, but *before* the hearing of the appeal. The Board finds that it has been granted a broad power to receive evidence, and that this includes the ability to receive new evidence up to the time of the hearing. Thus, the Board has included in its consideration, Mr. and Mrs. Williams' evidence that the land continued to demonstrate poor growth after they discontinued any productive use of the land, including grazing use.

[48] That particular decision was appealed on the basis that the Board used new evidence in coming to its decision and that this evidence was not available to the Inspector when he made his decision. Madam Justice C. L. Kenny ruled:¹⁰

⁹ *Murray and Kathleen Williams v. Inspector, Land Reclamation Division, Alberta Environmental Protection*, July 7, 1995, page 11.

¹⁰ *Gulf Canada Resources Limited v. Alberta (Minister of Environmental Protection)* (1996), 42

In summary, the Board and the Minister were entitled to consider new information before them, the information was relevant and caused the Board to consider whether, in fact, the land had been properly reclaimed. The appeal of the issuance of the Reclamation Certificate was therefore properly granted with additional requirements inserted for the applicant upon reapplication.

CONCLUSION

[49] The Board concludes that the Director did not act in the best interests of balancing the economic and environmental effects of the proposed Willow Park depot when he refused Application No. BC 96-0028. The Board recognizes the fact that two nearby depots are only 0.5 kilometers apart and are operating successfully.¹¹ The Board, therefore, concludes that the Willow Park depot should have been approved.

RECOMMENDATIONS

[50] The Board recommends that the appeal be allowed and the Director be directed to issue an Approval for the Willow Park Bottle Depot.

[51] With respect to section 92(2) and 93 of the *Environmental Protection and Enhancement Act*, the Board recommends that copies of this Report and Recommendations be sent to the following parties:

- Mr. Wayne Henuset and Mr. Steve Kamajian representing the Willow Park Bottle Depot;
- Mr. Gilbert Van Nes, Environmental Law Section, Alberta Justice, counsel for the Director of Chemicals Assessment and Management Division, Alberta Environmental Protection;
- Mr. Len Thom counsel for the Alberta Bottle Depot Association (Mr. Dave Custer), Fish Creek Bottle Depot (Mr. Dave Custer), Chinook Bottle Depot (Mr. Amir Aly Patel) and Trail Bottle Exchange Inc. (Ms. Anna Marie Kopp);
- Mr. Norman Machida counsel for the Calgary Bottle Exchange (Mr. Paul Lail).

Dated March 26, 1998, at Edmonton, Alberta.

¹¹ See page 12 of this Report & Recommendations, paragraph 43.

“original signed by”
John P. Ogilvie, Panel Chair

“original signed by”
Ted W. Best

“original signed by”
Ron V. Peiluck

ORDER

I, Ty Lund, Minister of Environmental Protection:

 yes Agree with the Recommendations of the Environmental Appeal Board and order that they be implemented.

_____ Do not agree with the Recommendations of the Environmental Appeal Board and make the alternative Order set out below or attached.

Dated at Edmonton this 26 day of March 1998.

“original signed by”
Honourable Ty Lund
Minister of Environmental Protection

_____ Refer to Attachments (only if applicable)