

**ALBERTA
ENVIRONMENTAL APPEAL BOARD
DECISION**

**Preliminary Meeting: January 13, 1998
Date of Decision: January 29, 1998**

IN THE MATTER OF Section 92.1 of the Environmental Protection and Enhancement Act, (S.A. 1992, ch. E-13.3 as amended);

- and -

IN THE MATTER OF a request for reconsideration filed by the Alberta Bottle Depot Association (Mr. David Custer, President), with respect to a Report and Recommendations issued by the Board regarding an appeal filed by Zeini Virji-Nurani and Nazmin Nurani.

Cite as: Alberta Bottle Depot Association request for reconsideration, *re: Nurani and Virji-Nurani v. Director of Action on Waste, Alberta Environmental Protection.*

PRELIMINARY MEETING BEFORE

Dr. John P. Ogilvie, Panel Chair
Dr. Steve E. Hrudey
Mr. Ron V. Peiluck

APPEARANCES

Parties Requesting
Review

Alberta Bottle Depot Association (Mr. David Custer,
President) represented by Mr. Ron Kruhlak

Bottle Bin Bottle Depot (Mr. Badur Kherani)
represented by Ms. Mary Henderson

Capilano Bottle Depot (Mr. Young Kil Kim)
represented by Mr. James Song

Strathcona and Mill Woods Bottle Depot (Mr.
Timothy Mastel-Marr) represented by Mr. Dennis
Thomas

Department

Ms. Joanne Esbaugh representing the Director of
Chemicals Assessment and Management Division,
Alberta Environmental Protection and Ms. Jean-Eve
Mark, Action on Waste Branch, Alberta
Environmental Protection

Respondent

Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani of the
Roper Bottle Depot represented by Ms. Jennifer
Klimek

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FINDINGS OF FACT

I. BACKGROUND

[1] On July 7, 1997, Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani, separately 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, Alberta Environmental Protection (the Director) to approve Application No. BC 97-0003 for a Universal Beverage Container Depot. The Application submitted by Mr. Nurani and Ms. Virji-Nurani was for a depot at Block 6, Lot 7, Plan 822-0320 (54 Street & 56 Avenue), Edmonton, Alberta, to be known as the Roper Bottle Depot.

[2] On August 22, 1997, the Environmental Appeal Board issued its Report and Recommendations¹ to the Minister of Environmental Protection recommending that an Approval be granted to Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani with respect to Application No. BC 97-0003. The Minister agreed with the Board's recommendations on September 2, 1997.

[3] On September 10, 1997, the Alberta Bottle Depot Association requested, pursuant to section 92.1 of the *Environmental Protection and Enhancement Act*², that the Board revoke its decision and direct a new hearing on this matter.

[4] On September 26, 1997, the Board wrote the parties setting a hearing date of October 6, 1997, to hear oral submissions from the parties currently involved as to why the Board should reconsider its decision. However, pending a court decision as to whether the Board had jurisdiction under the Act to reconsider its decision, the Board adjourned the hearing *sine die*.

¹ *Nurani and Virji-Nurani v. Director of Action on Waste, Alberta Environmental Protection*, August 22, 1997, EAB File No. 97-026.

² *Environmental Protection and Enhancement Act* (S.A. 1992, ch. E-13.3 as amended).

[5] The Director of Chemicals Assessment and Management Division, Alberta Environmental Protection, issued Approval No. 97-BCD-022 to Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani on October 3, 1997, for the operation of a Beverage Container and Recycling Depot.

[6] On October 6, 1997, a Notice of Appeal was filed with the Environmental Appeal Board by Mr. Ronald Kruhlak on behalf of the Alberta Bottle Depot Association (Mr. David Custer, President) appealing the decision of the Director and requesting that the Approval be revoked as well as making formal application for a stay of the decision.

[7] The Board advised the Department of Environmental Protection (the Department) on October 6, 1997, that the Approval had been appealed, and requested copies of all related correspondence, documents and materials from the Department. Documents received from the Department on November 4, 1997, were forwarded to counsel for the Appellant on November 5, 1997.

[8] On November 21, 1997, the Director issued Amending Approval 97-BCD-022-1 to the Nuranis.

[9] On November 27, 1997, the Court of Queen's Bench rendered its decision³. On the matter of rehearing Mr. Justice Gallant said:

“The Applicants have not satisfied me that under the facts of this case the Board does not have jurisdiction, by reason of being *functus officio* or otherwise, to hold a rehearing to reconsider its decision which resulted in the prior Report and Recommendations. Accordingly, I hold that the Board is not *functus* and does have jurisdiction to hold the rehearing. Having so decided, it is not necessary for me to deal with the balance of the issues raised.

For the above reasons, I will not exercise my discretion in favor of granting the order applied for. The application for an order in the nature of prohibition is refused.”

³ Reasons for Judgment of the Honourable Justice Gallant dated November 27, 1997, page 23.

[10] On December 23, 1997, a Notice of Appeal was filed with the Board by Mr. Ron Kruhlak on behalf of the Alberta Bottle Depot Association (Mr. David Custer, President) appealing the Amended Approval.

II. THE PRELIMINARY MEETING

[11] The Board held a preliminary meeting on January 13, 1998, in Edmonton to deal with whether or not the Board should proceed with reconsideration of the Board's prior Report and Recommendations on appeal 97-026 related to Roper Bottle Depot. This meeting was held pursuant to sections 87 and 92.1 of the Act.

III. ISSUE TO BE DECIDED

[12] The issue that had to be dealt with by the Board is whether or not the Board should, under section 92.1 of the Act, reconsider the Report and Recommendations it submitted to the Minister on August 22, 1997 and with which he agreed on September 2, 1997.

IV. SUMMARY OF THE MATTERS PRESENTED AT THE MEETING

A. Parties Requesting that the Board Reconsider its Report and Recommendations

[13] The parties taking this position were the Alberta Bottle Depot Association represented by Mr. Ron Kruhlak, 338802 Alberta Ltd. operating as the Millwoods Bottle Depot and the Strathcona Bottle Depot represented by Mr. Dennis Thomas, Y & S Recycling Ltd. operating as the Capilano Bottle Depot represented by Mr. James Song, and 425167 Alberta Ltd. operating as the Bottle Bin Bottle Depot represented by Ms. Mary Henderson. This summary covers the salient

points from their several similar presentations.

[14] These parties pointed out that section 92.1⁴ of the Act gives the Board the discretion to rehear the appeal but does not give any statutory direction as to under what circumstances this should occur except that the Board's discretion must be exercised subject to the principles of natural justice. This matter had been before the court⁵ and Justice Gallant decided that the Board does have jurisdiction to hold a rehearing if it finds it appropriate to do so.

[15] The major concern of these parties is that they were not given adequate notice of the hearing held on August 18, 1997. They stated that they did not learn that a hearing was to be held until August 15, 1997 when Ms. Jean-Eve Mark, Action on Waste Branch, Alberta Environmental Protection, telephoned them. They pointed out that in previous hearings involving appeals regarding bottle depots, the Alberta Bottle Depot Association had received notification of the hearing from the Board in ample time to participate if it wished to do so. They indicated that no such notification occurred in this case.

[16] These parties all stated that if they had received notice in time they would have presented new evidence at the hearing showing the economic effects of the proposed Roper Bottle Depot on nearby depots. As it was, there was not time to prepare such evidence. They also indicated that the economic effects that they could have presented would have shown that they were directly affected by the Director's decision and therefore would have been granted status.

⁴ 92.1 Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation, or ruling made by it.

⁵ See Reasons for Judgment of the Honourable Justice Gallant dated November 27, 1997 (page 23):

“Accordingly, I hold that the Board is not *functus* and does have jurisdiction to hold the rehearing.”

B. The Department

[17] The Department took a neutral stand in the matter of whether or not the Board should reconsider its Report and Recommendations stating that they were neither for or against such a proceeding. They stated that they had no position regarding whether or not adequate notice of the hearing had been given. Ms. Esbaugh noted that at the mediation meeting (which proceeding is confidential under the Board's Rules of Practice) when no resolution was attained, the parties, then present, agreed upon the August 18, 1997 hearing date. She noted that the Department believed that it was the Board's responsibility to notify those who had submitted a statement of concern regarding the hearing as the Board had received copies of these statements in the documentation sent it by the Department. The Board's letter of July 31, 1997, to Ms. Joanne Esbaugh and Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani stated:

“The Board will provide notice of this hearing to such other persons as, in the Board's opinion, may have potential interest in this matter. Please provide the names of other persons who in your opinion may have an interest.”

[18] The Department took no position regarding the matter of directly affected or whether the parties requesting a reconsideration should have status.

C. The Respondent

[19] The Respondent, Mr. Nazmin Nurani, argued that the Board should not reconsider their Report and Recommendations because, first, the notice requirements under the Act and the Regulation have been met, second, the objecting parties were represented at the hearing but made no effort to object even though they were asked if any parties other than those participating in the hearing wish to make any statements, and third, none of the objecting parties were directly affected.⁶

⁶ Excerpts of transcript from hearing of August 18, 1997:

...

The Chairman: Is there anyone else who wishes to make a statement at this hearing? Not. Okay, thank

[20] Regarding the first point, the Respondent noted that the hearing date was set at the mediation meeting and that the Board member who conducted that meeting has the authority to set a hearing date under the Regulation. The date was agreed to by both parties in the mediation. The mediation meeting was advertised so the objecting parties should have realized that an appeal process was underway. Instead, regarding the second point above, the Respondent argued, these parties waited until the decision was announced and when it was adverse to them, they requested reconsideration. The Respondent argues that they should have objected at the first opportunity.

[21] Regarding the third point, the Respondent argues that the objecting parties are not directly affected from an environmental point of view. In their argument for reconsideration, the objecting parties presented only economic reasons. Therefore, they should not have standing.

V. CONSIDERATIONS OF THE BOARD

[22] In making a determination as to whether or not to review the Report and Recommendations, the Board must consider the claim of the parties requesting reconsideration that they received insufficient notice to allow them to present their case. The date of the hearing, August 18, 1997, was decided by the parties at the mediation meeting when that meeting failed to produce agreement. At that time, the only parties that the Board was aware of were the Appellant and the Department. These parties had agreed to waive the 45 day notice period required by the Act and the Board proceeded to advertise the hearing date in the Edmonton papers on August 3, 1997. No responses from other parties were received.

you. We can then proceed. I think we can begin the hearing. Opening statements. Will you or Mr. Nurani make the opening statement?

Ms. Klimek: I will make the opening statement, Sir. ...

...

The Chairman: Thank you. Before I close **is there any comments, anybody?** Okay, this meeting is closed.
 ... (Emphasis added)

[23] In two previous cases involving bottle depot approvals⁷, the Board, as is its standard practice, had asked the parties to name any other persons that might have an interest. In those cases, the Department named the Alberta Bottle Depot Association, among other parties, and the Board notified the Association of the up-coming hearing. More recently in hearings the Department has not named the Association and it has not been officially notified of hearings. Moreover, it has not been the practice of the Board to notify people simply because they submitted a statement of concern to the Director except when the Director advised the Board of that person's interest.

[24] The evidence of the Department was that Ms. Mark telephoned Mr. Kim and Mr. Mastel-Marr on the afternoon of August 15, 1997 to advise them of the hearing. Furthermore, Ms. Mark testified that it was her understanding that Mr. Mastel-Marr would notify Mr. Kherani. Although the call to Mr. Mastel-Marr was disputed in his submission to the Board and Mr. Kherani claimed that Ms. Mark had called him directly, the actions of calling some or all of these parties suggest that the Department viewed the neighbouring bottle depots as parties who had a potential interest in the hearing. The Department submitted that it did not respond to the Board's request to identify such parties, on the presumption that the Board would have already identified these parties because the Department had forwarded statements of concern from them to the Board. However, the Department's subsequent attempts at notifying these parties clearly indicates the Department's concern that these parties had a potential interest in the hearing. Whether these initiatives resulted from a realization of having failed to take direct action on the Board's written request to identify parties who they believed have a potential interest in the hearing, is not the issue. It is the fact that these parties only received notification in person and by telephone on the afternoon of August 15, 1997, less than one business day before the hearing.

[25] If those people who attended the hearing on August 18, 1997 particularly Mr. Kherani and Mr. Mastel-Marr, had spoken up and reported the events of August 15, 1997 to the Board when

⁷ *Darryl Sawatzky*, September 20, 1994, EAB File No. 94-005, and *Douglas Blatter v. Director, Action on Waste Division, Alberta Environmental Protection*, March 24, 1995, EAB File No. 94-013.

asked if anyone was interested in making a statement, the Board might well have taken a different approach to its procedure and adjourned the hearing to allow them time to prepare their new evidence. Had the period of notice been slightly longer, the Board may have denied this reconsideration request, at least as far as those present at the original hearing were concerned because of their failure to speak up when given the opportunity to do so.

[26] The Board is not ruling that any “potentially interested” party is entitled to direct notification of a hearing. It is impossible to identify such a list. In this case, the Board’s standard practice of requesting the Department and the Appellant to identify parties potentially affected whom the Board would then notify, had not been implemented in this case. The Board did publish a newspaper advertisement but the period of time allowed for the parties to respond was quite short given the overall circumstances. The notice was published on August 3, 1997 calling for interventions by August 10, 1997 and setting the hearing for August 18, 1997. The Board clearly decided to reduce the normal 45 days notice which it is entitled to do in appropriate circumstances. Interested persons in this case appear to have assumed the former practice would be followed and that they would automatically receive notification. Parties in future should not rely on direct notification. However, in this case the confusion regarding the assumed practice, combined with the short notice period in the advertisement, convinces the Board that it is appropriate to reconsider so as to allow these persons opportunity to make representations.

[27] The Board is not persuaded that the proposed submissions must be rejected because they relate to “economic” rather than “environmental” matters. As set out in the Board’s earlier Report and Recommendations at page 6, the applicable Regulation provide for guidelines for establishing bottle depots. Those guidelines include questions of depot viability which are more directly economic than environmental matters. However, if depots proliferate to the point of being unsustainable that may have, at least indirectly, an environmental impact. The Director is obliged to take these guidelines into account in arriving at a decision. The appeal to the Board from the Director’s decision must consider these same matters. The Act does not narrow the focus of the appeal down to strictly environmental matters. It provides for an appeal from the Director’s decision

subject only to any restriction on issues imposed by the Board under section 87(2)⁸ of the Act. The appeal may deal with the environmental aspects of the matter as well as the economic aspects as urged by the appellants in the original hearing but it is not confined solely to environmental matters.

[28] Based on the evidence that the Board heard on January 13, 1998, those operating as bottle depots who are economically affected by the new depot are entitled to make representations. However, there is some question as to whether the Association is sufficiently affected because while it represents some 170 bottle depots few of them are likely to be affected by this Approval. The Board will, however, entertain written submissions from the Association.

DECISION

[29] The Board has decided to reconsider its earlier Report and Recommendations and to that end will be proceeding with a new (*de novo*) hearing. The Board is doing this because it believes that the parties who claim that they received either no notice or insufficient notice to prepare

⁸ 87(2) Prior to conducting a hearing of an appeal the Board may in accordance with the regulations determine which matters included in notices of objection properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:

- (a) whether the matter was the subject of a public hearing or review under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of objection received notice of and participated in or had the opportunity to participate in the hearing or review;
- (b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);
- (c) whether the Director has complied with section 65(4)(a);
- (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
- (e) any other criteria specified in the regulations.

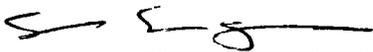
their case may have new evidence to present to the Board. At this new hearing the Board will also consider the merits of the appeals against Approval No. 97-BCD-022 and its amendment, Approval No. 97-BCD-022-1. The Board will address all the appeals on the scheduled date and decide the appropriate order of proceedings at the outset.

[30] The Board has directed the Registrar to arrange with the parties a date in which to hear this appeal. The Board also encourages the parties to discuss and agree, if possible, upon means of expediting the submission of that evidence introduced into the earlier proceedings.

Dated on January 29, 1998, at Edmonton, Alberta.



Dr. John P. Ogilvie



Dr. Steve E. Hrudehy



Mr. Ron V. Peiluck