Court of King's Bench of Alberta

Citation: 2145448 Alberta Ltd v Beverage Container Management Board, 2024 ABKB 113

Date:
Docket: 2303 19406
Registry: Edmonton

Between:

2145448 Alberta Ltd and Mohamed Rafat

Applicants

- and -

Beverage Container Management Board and Beverage Container Management Board (Complaints Director)

Respondents

Reasons for Decision
of the
Honourable Justice Tamara L. Friesen

Introduction

[1] 214448 Alberta Ltd (214) and Mohamed Rafat, the sole director and shareholder of 214 (collectively the Applicants) have applied for judicial review of two decisions of the Beverage Container Management Board (BCMB) involving the Evansburg Bottle Depot (Depot). 214 owns the Depot and the building in which it operates and holds the Depot's operating permit (Permit).

[2] In 2020, BCMB, acting on information from a confidential informant, investigated the Depot and found evidence suggesting the Depot had accepted non-registered and industrially compacted beverage containers transported into Alberta in contravention of the *Beverage Container Recycling Regulation,* Alta Reg 101/1997 (*Regulation*). The investigation further suggested that the Depot had then shipped the containers to the Alberta Beverage Container

Recycling Corporation (ABCRC) receiving payment of a deposit refund and handling commissions to which the Depot was not entitled.

[3] The matter was sent to hearing at which a BCMB Hearing Panel (Panel) determined that the Applicants had indeed contravened the *Regulation* and ultimately found that the appropriate sanction was cancellation of the Permit.

[4] The judicial review application has not yet been set down for hearing. In the present proceeding, the Applicants have applied for a "Stay of Decision under Review" pursuant to Rule 3.23 of the Alberta *Rules of Court* (*Rules*), in which they seek reinstatement of the Permit.

[5] For the reasons that follow, I decline to issue a stay of the Permit cancellation decision.

Applicable Statutes and Regulations

[6] BCMB is established pursuant to s 175(jj) of the *Environmental Protection and Enhancement Act,* RSA 2000, c E-12 (*EPEA*) and s 4 of the *Regulation* and is responsible for regulating various aspects of Alberta's beverage container recycling system. BCMB's Depot Bylaws (Bylaws) govern, among other things, the operation and administration of bottle depots, including the issuance, suspension, and cancellation of bottle depot operating permits.

[7] Alberta's beverage container recycling system is described in detail in the Affidavit of Emily Stanton, a Compliance Officer employed by BCMB.

[8] Beverage manufacturers must register beverage containers with BCMB before they can be sold. Thereafter, every entity involved in the sale, distribution, or recycling of beverages and beverage containers in Alberta pays a deposit and eventually receives a refund for that deposit. This is described as a "closed-loop registration and deposit recycling system."

[9] Retailers pay a deposit to the beverage manufacturer. Manufacturers provide those deposits to a Collection System Agent (CSA) appointed pursuant to the *Regulation*. Consumers purchase beverages in registered containers from retailers and pay a deposit to the retailer. The consumer's deposit refunds the retailer for the deposit paid to the manufacturer. Consumers return empty containers to a depot and the depot refunds the consumer's deposit. The depot ships the empty containers to a CSA and the CSA refunds the depot for the amount paid out to the consumer using the deposit funds collected from the manufacturers, completing the loop. In addition, the CSA pays depots a handling commission.

[10] The closed-loop system provides incentive to consumers to return empty bottles to depots and ensures that the total deposits paid into the system equals the total deposits refunded. Only beverage containers registered and sold in Alberta may be accepted for return at an Alberta depot (*Regulation* s 11(1)):

> **No refund payable**
>
> **11(1)** No depot operator or retailer shall accept a container or provide a cash refund for a container that can reasonably be identified by the depot operator or retailer as having been transported into Alberta
>
> **(2)** No person shall return to a depot or retailer for a refund a container that the person knows or ought reasonably to know has been transported into Alberta.
>
> . . .

[11] If a depot returns containers purchased outside Alberta and receives payment from the CSA, the depot has violated *Regulation* s 11 and extracted money from the closed-loop system because deposits for that container have not been paid in Alberta.

[12] A permit holder, the individual primarily responsible for operating a depot, and all individuals working at a depot shall, in all dealings with consumers, the CSA and collection service provided, BCMB, and the general public, are to adhere to the highest standard of honesty, integrity, fair dealings, and ethical conduct: Bylaws s 10.34.

[13] Permit holders and all individuals working at a depot must comply with any depot code of conduct approved by BCMB: Bylaws s 10.35. Any act or omission by a depot manager or Depot agents or employees occurring during the exercise of their depot duties is deemed to be the permit holder's act or omission: Bylaws s 8.6.

[14] Conduct of a depot that comes to the attention of BCMB shall be reviewed by the Complaints Director: Bylaws s 12.1. Following that review, the Complaints Director may send the matter for investigation, and depending on the outcome of that investigation, refer the matter for hearing. The Panel's authority to order sanctions is contained in Bylaws s 12.27, which states the Panel may, having determined that the *Regulation* has been violated:

- cancel a permit (Bylaws s 12.27.1);
- suspend the cancellation of a permit on conditions (Bylaws s12.27.2);
- suspend a permit (Bylaws s12.27.3); or
- instead of or in conjunction with the cancellation or suspension of a permit, impose terms and conditions on a permit without limitation (Bylaws s 12.27.4)

Facts

[15] On August 24, 2020, the Applicants obtained the Permit for the Depot from BCMB with a term that extended from August 24, 2020 to August 24, 2025. Mohamed Rafat has been the sole director and shareholder of 214 since July 8, 2020; however, according to his testimony, he left the supervision and management of the day-to-day operations of the Depot almost entirely in the hands of his father, Wael Rafat.

[16] On or about October 8, 2020, BCMB initiated an investigation based on information from a confidential informant who claimed to know about the transportation of containers into Alberta for sale to bottle depots, including to the Depot.

[17] The following evidence obtained by BCMB during its investigation suggested the Depot had accepted beverage containers transported into Alberta from out-of-province.

[18] Five Depot shipments made from the Depot to the ABCRC between November 2020 and May 2021 were targeted by BCMB investigative staff. In total, the shipments held 330,174 beverage containers of which only 72,000 were audited. Of those that were audited, 12,728 containers were flagged as "suspicious" as they appeared to have been previously industrially-compacted. BCMB investigative staff confirmed 47 non-registered beverage containers as originating from out-of-province.

[19] Upon reviewing the investigation report, the Complaints Director sent the following allegations to hearing:

... between November 2020 and May 2021, the Applicants:

1. accepted containers that could reasonably be identified as having been transported into Alberta contrary to section 11(1) of the *Regulation*;
2. delivered the Containers for deposit refunds and handling commissions to which the Depot was not entitled, contrary to the conditions of the Permit;
3. failed to adhere to the highest standards of honesty, integrity, fair dealings, and ethical conduct, contrary to section 10.35 of the Bylaws.

[20] During the oral hearing before the Panel between May 3 and 5, 2023, numerous witnesses testified on behalf of both parties (Merits Hearing). In a lengthy and detailed written decision dated July 7, 2023, which included a fulsome summary of the witnesses' testimony and documentary evidence, the Panel found on a balance of probabilities that all three allegations had been proven (Merits Decision).

[21] Specifically, the Panel found:

- With respect to the first allegation, the 47 non-registered beverage containers, and the industrially-compacted beverage containers shipped to the ABCRC by the Depot were transported into Alberta and accepted at the Depot contrary to s 11(1) of the *Regulation*.
- With respect to the second allegation, the Depot unlawfully claimed refund and commission payments from the ABCRC for these non-eligible containers.
- The specific number of out-of-province containers accepted by the Depot was irrelevant to the question of illegality; however, based on the context of the investigation, the Panel did not agree that the number of containers from out-of-province was small.
- With respect to the third allegation, Wael Rafat was knowingly involved in the purchase of bales of aluminum and plastic from a recycling facility called Recycle Action located in Hawkesbury, Ontario between October of 2018 and May of 2021.
- Wael Rafat was knowingly involved in accepting and shipping out-of-province containers to the ABCRC, in breach of Bylaws s 10.35 that requires depot agents and employees to act ethically and honestly.
- Mohamed Rafat was the sole shareholder and director of the Depot's permit holder, 214. While Mohamed Rafat may not have knowingly participated in Wael Rafat's activities, he failed to exercise the due diligence required of a permit holder.
- Because Wael Rafat breached Bylaws s 10.35, and because he was the Applicants' agent at the time, per Bylaws s 8.6, the Applicants were equally responsible for the breach.

[22] On September 26, 2023 the Panel issued its sanction decision (Sanction Decision), observing that Wael Rafat had been given unlimited authority with respect to the operations of

the Depot and that Mohamed Rafat had essentially abdicated any responsibility associated with the Depot's operations.

[23] The Panel agreed with the Complaints Director that considering the circumstances, the public interest, and the goals of specific and general deterrence, permit cancellation was the appropriate remedy. The Panel directed that the Permit be cancelled within 30 days.

[24] The Merits and Sanction Decisions were later posted to BCMB's website.

[25] The Permit was scheduled to be cancelled on October 6, 2023. On October 3, 2023, BCMB delayed cancellation to October 26, 2023 (extension period). The Depot continued to operate in the meantime. On October 26, 2023, BCMB cancelled the Permit and Notice of Closure was posted on the Depot's front door.

[26] The Applicants filed an Originating Application for Judicial Review in respect of both decisions on October 26, 2023.

[27] On October 30, 2023, the Applicants filed an "Application for a Stay of Decision under Review" (Application) pursuant to Rule 3.23 of the *Rules* seeking reinstatement of the Permit and removal of the Merit and Sanction Decisions from BCMB's website pending the judicial review hearing.

[28] As of the date of the stay application, the judicial review hearing had not been scheduled.

Applicable legal test

[29] Pursuant to Rule 3.23(1) of the *Rules*, the Applicant's asked this Court to stay the operation of the Sanction Decision pending final determination of the originating application for judicial review of both the Merits and Sanction Decisions. Rule 3.23(2) of the *Rules* states that "no order to stay is to be made if, in the Court's opinion, the stay would be detrimental to the public interest or to public safety."

[30] The test for an interlocutory stay is the tripartite test set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 334 [***RJR***]:

> (a) Is there is a serious question to be tried?
>
> (b) Would irreparable harm be suffered if the stay is not granted?
>
> (c) Does the balance of convenience favors granting a stay, pending a decision on the merits?
>
> See also: ***Musaskapeo v Alberta (Director of Saferoads)***, 2021 ABQB 1018 at para 12 [***Musaskapeo***]

[31] The Applicants submit that the first-stage threshold is low: proof on a balance of probabilities that the issue to be tried is not frivolous or vexatious: ***RJR*** at 338. The Court must perform a preliminary assessment of the merits to determine whether that threshold has been met; however, a prolonged and detailed examination is not necessary: ***Sobeys West Inc v Alberta College of Pharmacists,*** 2014 ABQB 333 at para 21; ***Musaskapeo*** at para 12.

[32] The Respondents argue that while described as an application for a stay or prohibitive injunction, the relief sought here is in substance a request for a mandatory interlocutory injunction. The Applicants did not apply for a stay in this case until *after* the extension period

expired on October 26, 2023. The Applicants are therefore asking the Court to compel BCMB to *reinstate* the cancelled operating permit, and to *remove* the Merit and Sanction Decisions posted to BCMB's website rather than seeking a prohibition on enforcement.

[33] The Respondents submit that the difference between a request for a prohibitive or mandatory injunction is important. Although the Applicants may have surpassed the threshold issue of proving a "serious issue to be tried" with respect to some of their grounds for judicial review, they have not surpassed the higher threshold of "a strong *prima facie* case that is likely to succeed on judicial review" applicable to requests for mandatory injunctions: ***R v Canadian Broadcasting Corp,*** 2018 SCC 5 at para 15 [***CBC***].

[34] Distinguishing between mandatory and prohibitive injunctions requires the Court to "look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought": ***CBC*** at para 16; see also ***Chehade v Crossroads Capital Corporation***, 2019 ABCA 48. Put more simply: "[a] mandatory injunction requires the respondent to *do* something rather than *refrain from doing* something": ***CBC*** at para 16; ***Cleanit Greenit Composting System Inc v Director (Alberta Environment and Parks),*** 2022 ABQB 582 at para 35 [***Cleanit***].

[35] The Respondents argue that because the relief sought by the Applicants compels BCMB to take positive action, the higher threshold of proof applies at the first stage of the test. Bringing this application under Rule 3.23 of the *Rules* does not transform a request for what is in substance a "mandatory injunction" into a "stay" application in the context of administrative penalty proceedings. It is also no answer to assert that the lower threshold should apply because the application was made just "a few days" after the Permit was cancelled. The fact of the Permit cancellation is critical: a bid for relief made in advance *would* properly have been characterized as a stay. The bid for relief now is necessarily mandatory because it is the reversing of a completed step.

[36] While it is important to identify the true nature of the extraordinary remedy requested, the fundamental question before this Court is always fairness: would the relief sought be just and equitable in all the circumstances?: ***Cleanit*** at para 33.

[37] It may seem unduly technical and therefore potentially unfair to apply the ***CBC*** standard here, where the prejudice to BCMB seems to be minimal and the impact on the Depot apparently severe: see for example ***Plains Midstream Canada ULC v Keyera Partnership,*** 2021 ABQB 871 at paras 49-67.

[38] I find that no unfairness results from the application of the higher standard in this case. BCMB is presumed to have been acting in the public interest pursuant to the legislative duties assigned to it in both granting and cancelling the Permit. Requiring the Applicants to prove "a strong *prima facie* case that is likely to succeed on judicial review" before having the Permit reinstated is entirely fair.

a. Serious issue

[39] The first stage of the ***CBC*** test requires the Applicants to establish a strong *prima facie* case that they will succeed on judicial review. This is not an easy burden to discharge, nor is it intended to be: ***CBC*** at para 28. It entails "showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice": ***CBC*** at paras 17 and 18. If the Applicants cannot

discharge that burden, the application fails, and the other two stages of the ***RJR*** test would not be considered: ***CBC*** at para 32.

[40] The Applicants have applied for judicial review on several grounds, which they argue are sufficient to surpass the threshold of "serious issue to be tried."

[41] The Respondents concede there is a serious issue to be tried on judicial review with respect to the issue of sanction; however, they contend that none of the Applicants' arguments pass the threshold of establishing a strong *prima facie* case.

i. Lack of procedural fairness

[42] The Applicants assert that it was procedurally unfair for BCMB to fail to disclose and further, produce the confidential informant for cross-examination. The Applicants submit that the confidential informant's information was "the linchpin for many of the [Panel's] inferences and was the impetus for the BCMB's investigation."

[43] The content of a duty of procedural fairness is "eminently variable" and changes depending on the circumstances of the case and what is required to prove or defend it: ***Baker v Canada (Minister of Citizenship and Immigration)***, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at 837.

[44] During the hearing process, the Complaints Director did not include or rely on the testimony of the confidential informant, nor were they legally required to do so. The confidential informant was not the "linchpin" of the Complaints Director's case, and the issue of "impetus for the investigation" was irrelevant to the outcome of the investigation. Further, disclosure of a complainant's name is not required pursuant to the Bylaws.

[45] Accordingly, there is no possible prejudice to the Applicants' case arising from the inability to cross-examine the confidential informant, and no procedural unfairness arising from the failure to produce the confidential informant as a witness.

[46] In any event, procedural fairness in administrative hearings does not necessarily require an opportunity for cross-examination of witnesses, and a lack of cross-examination does not necessarily indicate a breach of procedural fairness: ***Stubicar v Calgary (Subdivision and Development Appeal Board)***, 2022 ABCA 299 at para 54 and ***McLeod v Alberta Securities Commission***, 2006 ABCA 231 at para 54.

[47] The Applicants had the opportunity to respond to the evidence presented by the Complaints Director during the hearing. The Applicants have not established a breach of the duty of procedural fairness as a result of their "inability" to cross-examine the confidential informant, upon whose evidence the Complaints Director did not rely at the hearing.

[48] Even applying the threshold of "not frivolous or vexatious" this argument is bound to fail on judicial review.

ii. Weighing of the evidence

[49] The Applicants contend the Panel unreasonably weighed the evidence before it, and drew conclusions based on speculation and conjecture.

[50] The weight given to pieces of evidence is for the trier of fact to determine: ***Edmonton (City) v ATU, Local 569***, 2017 ABQB 59 at para 263. Absent exceptional circumstances, a reviewing court should not reweigh or reassess evidence or interfere with a decision maker's

findings of fact: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 125 [***Vavilov***].

[51] The Merits Hearing took place over the course of three days. The parties presented different versions of events, with supporting witnesses. While the full record of proceedings was not available for the Court's review on this application, it is clear from the decision itself that the Panel issued its reasons after summarizing and considering the evidence and arguments presented. The Panel ultimately preferred the Complaints Director's version of events over the Applicants' version and gave clear reasons for so doing. Decision makers are often presented with contradictory yet believable versions of events. Where there is contradictory believable evidence presented, it is not internally incoherent or unreasonable for a decision maker to select some of that evidence over other evidence: ***Intact Insurance Company v Parsons***, 2021 ABCA 123 at para 18.

[52] I agree with the Respondents that proof of a strong *prima facie* case requires more than general submissions and requires connecting those submissions to evidence. The Applicants have not identified which of the Panel's statements are alleged to be speculation or conjecture, and so have not demonstrated a strong *prima facie* case.

[53] A judicial review hearing on the record, like an appeal, is not an opportunity to simply re-argue the case before a new decision maker. The reviewing Court will understand that the Panel's findings of fact are entitled to deference. The Applicants have not demonstrated a strong likelihood on the law or the evidence that the Panel's weighing of evidence or findings of fact was unreasonable.

iii. Reasonableness of penalty

[54] The Applicants submit that the reasonableness of a penalty issued by a regulatory body is *de facto* sufficient to meet the threshold issue. In this case, BCMB imposed the penalty of a permanent license cancellation, which the Applicants describe as "capital punishment" for a bottle depot. The Applicants submit that BCMB cancelled the Permit despite the evidence not demonstrating that Mohamed Rafat had knowingly or intentionally transported out-of-province containers to the Depot. Accordingly, the question of the reasonableness and proportionality of the Permit cancellation is a serious issue to be tried.

[55] Deference is owed to professional disciplinary bodies on the fitness of sanctions and the fact findings underpinning them: ***Law Society of New Brunswick v Ryan***, 2003 SCC 20 at para 42; ***Groia v Law Society of Upper Canada***, 2018 SCC 27 at para 43. It is not the role of the Court to reweigh the relevant factors and adjust the sanction imposed absent a reviewable error: ***Byun v Alberta Dental Association and College***, 2021 ABCA 272 at para 36. The same reasoning applies to administrative licensing bodies.

[56] Deference is owed to BCMB, which has been tasked by the Government of Alberta to oversee all dimensions of beverage container recycling in the province. It is not the role of the Court to reweigh factors and adjust penalties imposed by the Panel – penalties clearly within its authority pursuant to s 12.27 of the *Regulation* – absent identification of a significant reviewable error.

[57] The Panel asked the parties to make written submissions on sanction and invited the parties to engage in an oral hearing on sanction even though neither party requested an oral hearing. The Complaints Director's position was that cancellation of the Permit was the

appropriate sanction. The Applicants argued for an eight-month "stayed" suspension, in combination with other orders.

[58] The Panel determined that cancellation of the Permit was the appropriate sanction and was not satisfied a stayed suspension would achieve specific or general deterrence. The Panel was adamant that permit holders and depot operators have an obligation to protect the Alberta beverage container recycling system from fraud and that any conduct breaching that obligation is serious and warrants a severe sanction.

[59] The Panel found that Wael Rafat knowingly acted in breach of the Bylaws and deemed his intention to be that of the Permit holder, Mohamed Rafat: that level of intent called for a severe sanction. The Panel was further satisfied that the complete lack of any oversight by Mohamed Rafat was more than a simple lapse in due diligence, further anchoring the need to deal with the breach through issuance of a severe sanction.

[60] Although not required to do so, in deciding on the appropriate sanction, the Panel considered that in the four previous BCMB hearings where permit holders had accepted and shipped of out-of-province containers, three had also resulted in permit cancellation.

[61] The Panel explained at para 23 of the Sanction Decision:

[62] ...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 consequence of the actions of others by absenting themselves from the depot or abdicating authority to someone else without oversight.

[63] On judicial review, the applicable standard of review will be reasonableness. As described in ***Vavilov*** at para 100:

[64] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[65] The Applicants have not identified any such flaws in the Board's reasoning, and it is highly *likely* that it will be afforded deference on judicial review.

[66] The Applicants have therefore not established a *prima facie* case, likely to succeed on judicial review, that the Panel issued an unreasonable sanction based on the severity of the penalty imposed. Nor have the Applicants established a *prima facie* case, likely to succeed on judicial review, that the Panel otherwise committed errors in reasoning or weighing of relevant factors in determining sanction such that intervention on judicial review based on unreasonableness would be warranted.

[67] The Applicants have not demonstrated a strong *prima facie* case that any of the arguments it has proposed to make in relation to the Merits or the Sanction Decisions are likely

to succeed on judicial review. Therefore the Applicants have failed on the first branch of the modified test outlined in ***CBC***. As this is the threshold issue, I decline to consider the parties' arguments with respect to the second two branches of the case.

Conclusion

[68] The application for reinstatement of the cancelled Permit pending judicial review is denied.

[69] The application for removal of the Decisions from the BCBM website is also denied, with the following additional comments.

[70] The open court principle holds that court proceedings should be conducted in public and should become part of the public record. An open court is more likely to be an independent and impartial court. Justice seen to be done is in that way justice more likely to be done: ***Named Person v Vancouver Sun,*** 2007 SCC 43 at para 32. In quasi-judicial tribunal hearings, there is a general rule that the proceedings are in the public interest, and the open court principle also applies to them: see D. Jones & A S de Villars, *Principles of Administrative Law*, 7th ed. Thomson Carswell, at p 330; see also ***Southam Inc v Canada (Minister of Employment and Immigration)***, 1987 CanLII 9001 (FC).

[71] Even if the Applicants had surpassed the threshold issue, I would have found that the harm that could potentially be done to the open court principle by removing the Decisions from the BCBM website outweighs any potential impact to the Depot's reputation that might result from the Decisions being publicly available pending the outcome of the judicial review. Furthermore, application of the open court principle means that success on appeal, or judicial review, will almost never result in a previously published legal decision being removed from the public realm.

[72] The application to have the Decisions removed from the Website is also denied.

[73] This judgment takes effect as of March 1, 2024.

[74] If the parties cannot agree on costs they may provide me with written submissions within 30 days of this judgment.

Heard on the 23rd day of December, 2023.
Dated at the City of Edmonton, Alberta this 28th day of February, 2024.

Tamara L. Friesen
J.C.K.B.A.

Appearances:

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