Environmental Appeal Board

Citation: *Revolution Organics Limited Partnership (now Good Guys Recycling Inc.) v. Director, Environmental Management Act*, 2024 BCEAB 8

Decision No.: 2017-EMA-004(d) and 2017-EMA-012(c)

Decision Date: 2024-04-05

Method of Hearing: Conducted by way of written submissions concluding on December 1, 2023

Decision Type: Preliminary Decision - Summary Dismissal

Panel: Norman M. Tarnow, Panel Chair

Appealed Under: *Environmental Management Act*, S.B.C. 2003, c. 53

Between:

Revolution Organics Limited Partnership (now Good Guys Recycling Inc.)

Appellant

And:

Director, *Environmental Managemental Act*

Respondent

And:

Nlaka'pamux Nation Tribal Council

Participant

Appearing on Behalf of the Parties:

For the Appellant:	Robert J.C. Deane, Counsel Mu Xin, Counsel
For the Respondent:	Stephen King, Counsel Fernando de Lima, Counsel
For the Participant:	Peter Millerd, Counsel

SUMMARY DISMISSAL DECISION

INTRODUCTION

[1] This matter concerns two appeals by Revolution Organics Limited Partnership (now Good Guys Recycling Inc., (the "Appellant") under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*"). The Appellant appealed two letters related to its Permit Application 108529: a February 14, 2017, decision of an Acting Director appointed under the *EMA* ("the First Decision") and a September 1, 2017, decision of the Delegate of the Director (the "Second Decision"). The First Decision and Second Decision are collectively defined as the "2017 Decisions"). On January 27, 2023, the Appellant filed an appeal of Permit 108529 (the "Permit"), which was, issued on December 30, 2022, and was the subject of a subsequent appeal (the "2023 Appeal").

[2] On October 13, 2023, the Director, Ministry of Environment (the "Respondent"), applied to dismiss the appeals of the 2017 Decisions (the "2017 Appeals") on the basis of mootness and that these appeals are no longer within the jurisdiction of the Environmental Appeal Board (the "Board") pursuant to sections 14(c) and 31(1)(a) of the *Administrative Tribunals Act*, SBC 2004, c. 45 (the "*ATA*").

BACKGROUND

[3] The Appellant owns and operates a commercial organic composting facility ("the Facility") which has a design capacity of 5,000 tonnes or more. The Facility is located approximately 8km north of Lytton, BC in the Lower Botanie Valley.

[4] The *Organic Matter Recycling Regulation*, B.C. Reg. 18/2002 (the "*OMRR*"), established under the *EMA*, governs the production, quality, and land application of certain types of organic matter.

[5] In 2016, the *OMRR* was amended. As a result of those amendments, composting facilities with a design capacity of 5,000 tonnes or more, such as the Facility, could be exempted from certain *EMA* waste disposal prohibitions if those facilities held a permit, approval, or operational certificate. Section 33 of the *OMRR* establishes that composting facilities which meet the requirements of the regulation must hold a permit on the date the *OMRR* comes into force, or no later than 60 days after this event.

[6] Applicants seeking a permit to operate a composting facility must comply with the provisions of the *Public Notification Regulation,* B.C. Reg. 202/94, also established under the *EMA*.

[7] The *Public Notification Regulation* requires applicants for a permit to give notice to municipalities, regional districts, and chairpersons of waste management planning committees as well as to other affected stakeholders. To affect notification, an applicant

must post their application in an Environmental Protection Notice ("EPN") on site, as well as in local newspaper(s), in post office(s) serving the area, and in the *British Columbia Gazette*.

[8] On June 29, 2016, the Appellant wrote to the Ministry of Environment that it did not have to obtain a permit under the new amendment to the *OMRR* because the Facility did not discharge waste. The Appellant also submitted that it received prior approval for the Facility on December 19, 2012, at which time the Ministry had approved an environmental impact study required by section 23(2) of the *OMRR*. On July 19, 2016, the Ministry of Environment advised the Appellant that it did not hold an approval and, therefore, a permit was required, and a permit application should be received by the Director prior to August 8, 2016.

[9] On August 4, 2016, the Appellant applied for an Authorization to Discharge Waste under the *EMA*. Under the heading "Purpose of Application," the Appellant described its submission as being made on a "without prejudice" basis, noting that: "this facility does not discharge any waste." Details of the waste discharge, including source, rate, and type of contaminants were left blank.

[10] On January 18, 2017, the Ministry informed the Appellant that the next step with respect to the permit application would be to undertake public notification in accordance with section 33 of the *OMRR* and the provisions of the *Public Notification Regulation*, including First Nations consultations.

[11] On February 14, 2017, the Frist Decision was issued, advising the Appellant that its EPN was insufficient in its description of the characteristics and volume of waste discharged from the Facility, and set out the steps and timelines required for the Appellant to comply with the notification process.

[12] The Appellant appealed the First Decision to the Board, alleging various errors. The Appellant sought the following:

a. that the First Decision be set aside;

b. in the alternative, that the First Decision be varied to permit the Appellant to publish or post, as the case may be, for the purpose of the *Public Notification Regulation*:

    i. the form of notice the Appellant submitted to the Director on or about February 10, 2017; or

    ii. the application submitted by the Appellant to the Director on or about August 4, 2016;

    iii. all within a reasonable time period.

c. that the February 2017 Letter, including any compliance or enforcement action in relation to the decision or the application for a permit submitted by

the Appellant under the *OMRR* and the *EMA* be stayed pending the determination of the appeal; and

d. that the Appellant recover its costs of its appeal, including under section 47 of the *ATA*.

[13] The Ministry of Environment issued the Second Decision on September 1, 2017, imposing a new deadline of September 22, 2017, for the Appellant to provide notice of, to post, and to publish the permit application in accordance with *OMRR* and the *Public Notification Regulation*.

[14] On September 7, 2017, the Appellant filed an appeal of the Second Decision. The Appellant alleged that there were various errors related to the Second Decision requiring the Appellant to publish an EPN. The Appellant sought the same relief in relation to the Second Decision as was sought with respect to the First Decision.

[15] Between September 29 and October 5, 2017, the Appellant complied with the notification process requirements set out in the 2017 Decisions.

[16] By October 2017, the Appellant had completed the steps required to comply with the notification requirements set out in the 2017 Decisions. Following the Appellant's compliance with the notification process requirements, its permit application continued to be processed by the Ministry. Due to a series of abeyances and adjournments granted by the Board to allow the permit application to be processed, the 2017 Appeals were not heard by the Board.On December 30, 2022, in concluding the permit application, the Director issued Permit 108529 ("the Permit") to the Appellant under the *EMA*.

[17] On January 27, 2023, the Appellant filed the 2023 Appeal. In it, the Appellant seeks the following relief:

a. the appeal be allowed, and the Permit be set aside;

b. a preliminary stay of the Permit pending the determination of the appeal; and,

c. recovery of its costs of the appeal.

SUBMISSIONS

The Respondent's Submissions

[18] On October 13, 2023, the Respondent filed an application that the Board summarily dismiss the 2017 Appeals.

[19] The Respondent submitted that none of the grounds for the 2023 Appeal or remedies sought in that appeal relate meaningfully to the notification process requirements which were the subject matter of the 2017 Decisions. It also submitted that the conditions imposed in the 2017 Decisions ceased to be operable when the Appellant

met those conditions and, therefore, no live issue remains in dispute between the parties to the appeals with respect to the 2017 Decisions. As no live issue remains in dispute between the parties, the Board no longer retains jurisdiction over the 2017 Appeals.

[20] The Respondent argued that as the Appellant has complied with the notification process requirements, the Appeals have been rendered moot. The Respondent relies upon the authority of *Borowski v. Canada* (*Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 ("*Borowski*"), in making this assertion. At page 353 of *Borowski,* Sopinka, J. described mootness as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.
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> ...
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> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[21] The Respondent submitted, amongst other things, that compliance by the Appellant with the notification process requirements in September and October 2017 is the type of event contemplated in *Borowski* which affects the relationship of the parties such that no live controversy or tangible and concrete dispute remains affecting the rights of the parties in the 2017 Appeals. Alternatively, the issuance of the Permit and the subsequent filing of the 2023 Appeal leaves no live controversy for the Board's adjudication in relation to the notification process requirements: the subject-matter of the 2017 Appeals.

[22] The Respondent submitted that once the notification process requirements were complied with and the permit application process proceeded, the tangible and concrete dispute between the parties in the 2017 Appeals — namely the nature and scope of the notification process requirements and the deadlines for compliance —disappeared.

The Appellant's Submissions

[23] The Appellant submits that the 2017 Appeals and the 2023 Appeal are inextricably bound together. There are common facts, common issues, and there will be common evidence. Separating the 2017 Appeals from the 2023 Appeal is not only inefficient—no time or other resources whatsoever will be saved—but risks putting the Board in a complicated position where it must make factual and legal findings regarding events arising in respect of appeals which it has earlier dismissed as moot. Fundamentally, there is no reason to take that risk and create a proceeding that may become legally embarrassing and subject to reversal.

[24] The Appellant submits the Board ought to reject the Respondent's effort to undermine the Board's duty and authority to determine disputes on their merits, using the flexible procedures that are the hallmark of the Board as an administrative tribunal.

[25] On February 16, 2017, the Appellant appealed the First Decision in which the Director decided, amongst other things, that the Appellant was required to publish and post a notice in its own voice which communicated facts that the Appellant considered to be untrue.

On April 13, 2018, the parties wrote to the Board jointly advising of their intention that the 2017 Appeals be adjourned generally with all timelines set aside to allow for continued discussions. Since then, the 2017 Appeals have been the subject of successive decisions that they be held in abeyance while the "without prejudice" permit application process unfolded.

[26] The Appellant argues that the Permit also contains terms that are not acceptable to it. The Appellant asserts that, since the permitting process was conducted on a "without prejudice" basis, this means that—as a matter of law—the Permit is not agreed and is therefore a nullity. The Appellant submits that when parties engage in a "without prejudice" dispute resolution process, one party cannot impose a "settlement" which the other party does not accept.

[27] On January 27, 2023, the Appellant commenced the 2023 Appeal on the grounds that, in issuing the Permit, the Director failed to appropriately consider the application for the Permit to be "without prejudice;" made numerous errors with respect to factual and legal conclusions that made the Facility subject to the Permit; improperly exceeded his authority by attempting to prescribe elements of the Facility's construction, operation, and closure; made errors in the evidence considered and weighed; had undefined ulterior motives in issuing the Permit; and improperly considered that any noncompliance with the Permit could be considered an offense under the *EMA* and be subject to compliance and enforcement actions.

[28] The Appellant submits that the concept of "mootness" requires an assessment of whether the required tangible and concrete dispute has disappeared, and the issues have become academic: whether there remains a "live controversy" between the parties. The

mere fact that the remedy sought is no longer available or has already been obtained does not by itself mean that a proceeding is moot.

[29] The Appellant argues there are many cases in which a proceeding has been permitted to continue despite the specific relief sought being of less practical significance. This is typically because the findings and determinations required to be made may have application in related circumstances or related proceedings.

[30] The Appellant asserts there is significant overlap between the 2017 Appeals (which the Respondent seeks to have summarily dismissed) and the 2023 Appeal (which the Respondent acknowledges must and will proceed to a hearing on the merits). For example, and without limitation, in both the 2017 Appeals and the 2023 Appeal, the Board will be required to decide, on a common body of evidence:

(a) whether the Facility has ever, or would ever, discharge waste or pollution for the purposes of the *Environmental Management Act* and the *OMRR*; and,

(b) whether the Appellant obtained an approval under the *Act* to operate the Facility in 2012, such that a permit was not required.

[31] The Appellant says there is a third common question: whether it requires a permit under section 3.1 of the *OMRR*. That issue remains a live controversy and continues to impact the Appellant. There are serious questions raised in both the 2017 Appeals and the 2023 Appeal about whether the Director exercised his power unlawfully.

[32] The Appellant says these questions impact the appropriateness of the First Decision and the Permit.

[33] The Board ought not to put itself in a position where half of the proceeding in which this issue is squarely engaged has been dismissed as moot without a determination on its merits. The only reason the Permit exists at all, the Appellant argues, is that it participated in the permit application process on a "without prejudice" basis. If the Appellant argues that if the Permit needs to be done anew, there would have to be another permit application. All of the same issues would have to be addressed.

[34] The Appellant argues the overlapping issues in the 2017 Appeals and the 2023 Appeal are not "extinguished by the issuance of the Permit and its subsequent appeal" as alleged by the Respondent. The same issues arise in both. Nothing is extinguished by the 2023 Appeals.

[35] It is no answer at all, the Appellant asserts, to say that the Board can simply resolve those issues in the course of the 2023 Appeal and ignore the 2017 Appeals. With the 2017 Appeals dismissed as moot, there will be serious issues about the body of evidence the Board may lawfully take into account, and the grounds it is lawfully able to (or required to) address. While the Respondent does not address this outcome of a determination of mootness, the Appellant argues this should be at the forefront of the Board's analysis. As a practical matter, and having regard to the efficient use of the Board's and the parties'

resources, there is nothing to be gained from dismissing the 2017 Appeals. There are, however, serious real-life and legal complications potentially arising from doing so.

The Respondent's Final Reply

[36] The Respondent characterizes the Appellant's submissions as describing two live issues: 1) whether the Appellant discharges waste into the environment; and, 2) whether it has a prior approval.

[37] The Respondent submits a debate on the form, content, and timelines of the now spent public notification process, which forms the basis of the 2017 Appeals, would only distract the parties and the Board from the remaining, live, issues. The Respondent argues the two issues identified by the Appellant are within the scope of the 2023 Appeal. These issues are not connected to any of the relief sought by the Appellant in the 2017 Appeals.

[38] The Respondent asserts that the case law the Appellant's submissions on mootness discuss, including *Yeager* [1]and *Pieper*[2], are distinguishable from the particular facts of this application. In the cases presented by the Appellant, the courts were faced with deciding whether a matter was moot even though live issues remained between the parties. In the present application, the live issues between the parties will be fully adjudicated within the confines of the 2023 Appeal without the need to adjudicate the 2017 Appeals. There are no live issues between the parties with respect to any potential remedy arising from the 2017 Appeals.

[39] The Respondent argues the Appellant's submissions imply that, depending on the outcome of the 2023 Appeal, it may need to submit another permit application. It does not follow that the issues raised in the 2017 Appeal will form any part of that process. A potential new permit application will not be impacted by specific administrative directions which were communicated to the Appellant in 2017 for a different permit application which was granted.

[40] The Respondent recognizes the Appellant's concern that there will be issues with the body of evidence the Board may lawfully take into account in its consideration of the 2023 Appeal if the 2017 Appeals are dismissed. The Respondent asserts the dismissal of the 2017 Appeal will not mean that evidence from that timeframe can't be considered by the Board. It will only mean the Board does not have to adjudicate dated appeals which no longer have any practical remedy which the Board may order.

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[1] *Yeager v. Canada (Attorney General),* 2018 FCA 187 (CanLII)

[2] *Pieper v. Kokoska and BCSPCA*, 2004 BCSC 1547 (CanLII)

[41] The Respondent maintains the position that dismissing the 2017 Appeals as moot and as being no longer under the jurisdiction of the Board is the most pragmatic approach in the circumstances "having regard to the efficient use of Board and parties' resources."

The Participant's Submissions

[42] The Participant Nlaka'amaux Nation Tribal Council takes no position on the application to summarily dismiss the 2017 Appeals.

ANALYSIS AND DISCUSSION

[43] The authority of the Board to summarily dismiss an appeal is found within section 31 of the *ATA:*

> Summary dismissal
>
> 31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
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> (a) the application is not within the jurisdiction of the tribunal;

[44] For the reasons set out below, I find that none of the grounds for, or remedies sought in, the 2023 Appeal meaningfully relate to the notification process requirements that are the subject matters of the 2017 Decisions and of the 2017 Appeals.

[45] The conditions imposed in the 2017 Decisions ceased to be operable when the Appellant met those conditions between September 29, 2017, and October 5, 2017. Therefore, no live issue remains in dispute between the parties with respect to the conditions imposed by the 2017 Decisions. This does not mean that there are no longer any live issues between the parties, as evidenced by the 2023 Appeal. However, these remaining issues do not overlap with those present in the 2017 Appeals.

The Panel finds that, due to the steps the Appellant undertook in September and October 2017 to meet its obligations regarding the notification process described in the 2017 Decisions, there is no longer a dispute over which the Board retains jurisdiction in relation to the 2017 Appeals. Having satisfied the notification requirements contained in the 2017 Decisions, there are no remedies the Board would be capable of making in relation to the 2017 Appeals. To make any order that would affect the requirements of the 2017 Decisions, with which the Appellant has already complied, would be tantamount to imposing a fresh obligation on the Appellant, something that the Board has no jurisdiction to do in these circumstances. Put simply, the Appellant's compliance with the notification process requirements rendered the 2017 Appeals moot.

[46] The Appellant's compliance with the notification process requirements in September and October 2017 is the type of event contemplated in *Borowski*. These events affect the relationship of the parties such that no live controversy or tangible and concrete dispute remains affecting the rights of the parties in the context of the 2017 Appeals. I find that this is what has occurred here. The issuance of the Permit and the subsequent filing of the 2023 Appeal leaves no issue within the 2017 Appeals for this Board to determine.

[47] After the notification process requirements were complied with and the Permit application process concluded with the issuance of the Permit in December 2022, the particular dispute between the parties as to whether the Appellant must comply with the notification process requirements in the context of that application ended. Therefore, on the first step of the test set out in *Borowski*, the interim event of the Appellant's compliance has rendered the 2017 Appeals moot.

[48] However, the second step in *Borowski* requires consideration of whether this Board should exercise its discretion to hear a matter despite the reality of the dispute being moot. The Board in *Gibsons Alliance of Business and Community Society v. Director, Environmental Management Act*, 2019 BCEAB 16 (CanLII) ("*Gibsons*"), summarized *Borowski*'s three basic reasons for dismissing expired controversies as:

1. recognition of the importance of an adversarial context to the competent resolution of legal disputes;
2. concern for conserving scarce judicial resources; and
3. concern that the Court not be seen to be intruding into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of the parties.

[49] I find the Board's analysis in *Gibsons* to be of assistance in assessing the matter before me, and I adopt it here. Similar to the situation in *Gibsons*, the subject of the decisions appealed here is no longer relevant and it would not be an effective use of Board resources to hear them, especially given the opportunities for the parties to dispute live controversies within the 2023 Appeal.

[50] Further, the Board lacks jurisdiction to grant any of the remedies the Appellant sought in the 2017 Appeals. As there remains no live controversy between the parties the Board retains jurisdiction over, the Board cannot remit the decision back to the Director, nor can it exercise its discretion to make a decision that the Director could have made. As set out previously, to make such an order would be to make a decision in the first instance, as there no longer remains any notification process that an order of the Board could affect. This is not the role of the Board.

[51] I agree with the parties that the question of whether the Appellant discharges waste into the environment and whether it obtained a prior approval are issues which

remain in dispute. These issues are to be addressed in the 2023 Appeal. Notably, however, these issues are not connected to the relief sought by the Appellant in the 2017 Appeals concerning the administrative steps it was required to undertake as part of the now completed public notification process.

[52] I agree with the submission of the Respondent that the dismissal of the 2017 Appeals does not render evidence from that timeframe incapable of being considered by the Board within the 2023 Appeal. Any connection between evidence sought to be included in the 2023 Appeal and the 2017 Appeals is irrelevant. The test for whether evidence should be admitted in the course of an appeal remains as it always has: relevance to the issues under appeal. As any determination of the relevance of evidence in the 2023 Appeal lies with the panel of the Board hearing that matter and not with me, I will not expand on this issue further. However, the settled case law for this test has been applied by the Board on numerous occasions, and I commend these examples of the application of the principle of relevance to the parties.

[53] Based on the preceding analysis, I find that this Board should not exercise its discretion to hear a matter despite the reality of the dispute being moot. The subject of the decisions appealed here is no longer relevant and the resources of the Board are not best served in opining on matters over which the Board has no jurisdiction and which it retains no practicable remedy which it can exercise to the benefit of either party. I find that the Board retains no jurisdiction over the issues raised in the 2017 Appeals. Therefore, as empowered by section 31(1)(a) of the *ATA*, I dismiss the 2017 Appeals.

DECISION

[54] In reaching this decision, I have carefully considered all the arguments, relevant documents, evidence, and submissions before me, whether or not they are specifically referred to.

[55] For the reasons stated above, I grant the Respondent's application. The appeals are dismissed.

"Norman M. Tarnow"

Norman M. Tarnow, Panel Chair
Environmental Appeal Board