Environmental Appeal Board

Citation: *KMS Tools and Equipment Ltd. v.*, Director, *Environmental Management Act,* 2024 BCEAB 12

Decision No.: EAB-EMA-23-A008(a)

Decision Date: 2024-05-22

Method of Hearing: Conducted by way of written submissions concluding on August 15, 2023

Decision Type: Final Decision

Panel: Linda Michaluk, Panel Chair

Appealed Under: *Environmental Management Act* SBC 2003, c. 53

Between:

KMS Tools and Equipment Ltd.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Stan Pridham, Representative

For the Respondent: Robyn Gifford, Counsel

FINAL DECISION

INTRODUCTION

[1] This is an appeal brought by KMS Tools and Equipment Ltd. (the "Appellant", or "KMS") of the March 7, 2023, Determination of Administrative Penalty (the "Decision") of the Respondent made under section 115 of the *Environmental Management Act*, SBC 2003, c. 53 (the "*Act*"). The Decision requires the Appellant to pay an administrative penalty of $19,000 for contravening section 2(1) of the *Recycling Regulation,* BC Reg. 449/2004, (the "*Regulation*") established under the *Act*.

[2] The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 100 of the *Act*. Under section 103 of the *Act*, the Board has the power to:

> a) send the matter back to the Director, with directions;
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> b) confirm, reverse, or vary the Determination; or
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> c) make any decision that the Director could have made, and that the Board considers appropriate in the circumstances.

[3] In its notice of appeal, KMS requests the following:

- that the fine be waived;
- that KMS receive an official exemption to the *Regulation*; or, in the alternative, an unofficial exemption to the *Regulation*;
- that the *Regulation* be reviewed and re-evaluated so as to determine who should be required to comply and why;
- to re-evaluate why businesses like KMS should be obligated to pay fees on packaging that is controlled by mega stores; and,
- to prevent future fiascos of this nature from happening in the future.

[4] The Respondent seeks dismissal of this appeal.

BACKGROUND

The *Regulation*

[5] The *Regulation* deals with recyclable materials.

[6] Section 1 of the *Regulation* defines "producer" as including someone who manufactures, sells, or distributes a product in British Columbia ("BC") under the manufacturer's own brand. The same section also defines "small producer" but no party argues that the Appellant satisfies this definition and, based on the available evidence, it does not seem to.

[7] Section 2 of the *Regulation* requires producers of packaging and printed paper products to have an approved extended producer responsibility plan (the "EPR Plan"), or to appoint an agency to carry out extended producer responsibility ("EPR") duties on its behalf. The *Regulation* contains five schedules which set out the product categories addressed by the *Regulation*. Schedule 5 concerns the "Packaging and Paper Product Category," the relevant schedule for the issue before me, and establishes that items such as bags, boxes, and food containers are deemed packaging products while items such as flyers, catalogues, and brochures are classed as paper products.

Factual Background

[8] The Appellant is a tool distributor with fourteen sales outlets, located mainly in industrially zoned areas, in BC and Alberta. The Appellant also operates KMS C.A.R. Parts (Custom and Restoration), KMS Tool Repair, an online store, and a distribution warehouse in Coquitlam.

[9] During September and October 2020, staff of the Ministry of Environment and Climate Change Strategy (the "Ministry") emailed and spoke with a representative for the Appellant, advising that as Ministry staff believed the Appellant may be an "obligated producer" under the *Regulation*, the Appellant was requested to provide information regarding packaging and paper products the Appellant produced. Ministry staff also provided information on how the Appellant, as a "producer" could comply with the *Regulation*, noting that there were two options: to develop its own EPR Plan for Ministry approval; or, to appoint an agency to act on its behalf. Ministry staff advised that most producers had chosen to use RecycleBC[1] as their appointed agency under the *Regulation*.

[10] Between February and April 2021, Ministry staff again requested information regarding packaging and paper products the Appellant produced in calendar year 2020, and suggested a process by which the Appellant could obtain that information.

[11] Throughout this period, the Appellant had maintained, alternatively and for various reasons, it did not consider it should be captured by the *Regulation*, it had an unofficial exemption to the *Regulation* and, in any event, it was impossible for the Appellant to comply with the *Regulation*.

[12] On May 18, 2021, the Appellant was sent a Warning Letter which set out that Ministry staff had conducted an office review inspection and determined that while the Appellant had replied to the information requests, it had not provided the requested

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[1] RecycleBC (formerly Multi-Material BC) is responsible for residential packaging paper recycling in BC and is the only agency with an approved stewardship plan for non-beer printed paper products ("PPP") in BC. Circular Materials (formerly Resource Recovery Alliance and Canadian Stewardship Services Alliance) is a national non-for-profit organization that provides EPR compliance solutions for producers in North America and which administers the RecycleBC program.

information. The Appellant was found to be out of compliance with section 109(6)(b) of the *Act*, which requires the subject of an investigation provide to an inspecting officer with information relevant to the investigation when requested. The Appellant was requested to provide the information by June 2, 2021, in order to correct the non-compliance. The Warning Letter also set out that the Appellant would be prioritized for follow-up inspection and that failure to take action to achieve compliance could subject the Appellant to "escalating enforcement action."

[13] The Appellant responded to the May 18, 2021, letter on the same day confirming that it was not exempt as a "small producer" under the *Regulation* and did not have either an approved EPR Plan or an appointed agency as set out in the *Regulation.*

[14] Following a second inspection of the Appellant's regulatory compliance, Ministry staff determined that the Appellant was out of compliance with two sections of the *Regulation*: sections 2(1)(a), which requires a "producer" to have an approved EPR Plan, and 2(2), which imposes requirements if a "producer" appoints an agency to carry out EPR duties on its behalf. Ministry staff issued a Warning Letter to this effect on June 23, 2021.

[15] The Appellant was contacted on several occasions during July 2021 by Mr. David West of RecycleBC who advised that RecycleBC could be appointed to carry out the Appellant's EPR duties. Mr. West also provided information on how the Appellant could estimate the volume of packaging and paper products captured under the *Regulation*.

[16] On October 7, 2021, following an inspection assessing the Appellant's compliance with the *Regulation*, Ministry staff determined the Appellant remained out of compliance with section 2 of the *Regulation* and advised the Appellant the matter was being referred to a decision maker for consideration of if an administrative penalty would be issued.

[17] On December 13, 2022, the Respondent issued a "Notice Prior to Determination of Administrative Penalty" (the "Notice") to the Appellant. The Notice included a Penalty Assessment Form (the "PAF") which rated the nature of the contravention as "major" and the actual or potential for adverse effect as "medium," and which recommended a base penalty of $20,000 based on those factors and the maximum penalty amount established under the *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*APR*"). The application of penalty adjustment factors resulted in a recommendation of a further $18,000 ($4,000 as the contravention was deemed to be deliberate and $14,000 for the economic benefit derived by the Appellant from not complying with the *Regulation*), resulting in a total recommended penalty of $38,000. In the Notice, the Appellant was given 30 days to request an Opportunity to be Heard (the "OTBH"), which the Appellant did on January 12, 2023. A submission due date for the OTBH was set for February 13, 2023.

[18] While the Appellant did not file a specific written submission for the OTBH, the Respondent considered several emails which had been received from the Appellant following the Appellant's notice and acceptance of the OTBH as submissions responsive to the Notice.

[19] The Respondent issued his Decision on March 7, 2023.

The Decision

[20] The Respondent determined that between June 24, 2021, and November 22, 2022, the Appellant was a producer, but not a "small producer," of PPP under Section 1 of the *Regulation* and, as such, contravened Section 2 of the *Regulation* by not having an approved EPR Plan or by appointing an agency to act on its behalf.

[21] The Decision sets out that the Respondent considered the information before him within the context of section 7(1) of the *APR*, and was guided by the Ministry Administrative Penalties Handbook – *Environmental Management Act* and *Integrated Pest Management Act* (the "Handbook"). The Respondent considered the following factors in establishing a penalty:

- **nature of the contravention**: the contravention was "major" as this kind of contravention undermines the basic integrity of the regulatory scheme and significantly interferes with the Ministry's capacity to protect and conserve the natural environment.
- **actual or potential adverse effects**: although the PAF proposed that the contravention was "medium," the Respondent rated the contravention as "low" which was in accordance with both the Handbook and with previous findings of the Board.[2] This resulted in the Respondent setting the base penalty at $10,000 as opposed to the $20,000 recommended in the PAF.
- **previous contraventions, penalties, or orders**: there were no previous contraventions, penalties, or orders.
- **whether the contravention was repeated or continuous**: the ongoing nature of the contravention (June 2021 to November 2022) did not warrant an increase to the base penalty.
- **whether the contravention was deliberate**: the PAF proposed a 20% increase to the base penalty because the contravention was deliberate. The Respondent determined that the Appellant's continued non-compliance with the *Regulation* was intentional and that a 20% increase (+$2,000) to the base penalty was appropriate in the circumstances.
- **economic benefit derived by the Appellant from the contravention**: the PAF proposed the base penalty be increased by 70% because the Appellant had avoided the annual fees associated with appointing RecycleBC as its agency and had therefore derived an economic benefit by not meeting its obligations

[2] *MTY Tiki Ming Enterprises Inc. v. Director, Environmental Management Act*, 2016 BCEAB 13 (CanLII), ("*MTY Tiki Ming*") at para. 83.

under the *Regulation*. As the Appellant had not provided the information upon which annual fees are based, i.e. the annual volume of packaging and paper products, the Respondent considered and employed the "applied value" method set out in the Economic Benefit Guidance Supplement (version 1.0, May 25, 2022, the "EBGS") to the Handbook. The Respondent consequently determined that the Appellant, a "Class 2" regulated entity, derived a "medium cost" economic benefit which included permit applications, plans, and specialized contracted services, and confirmed a 70% addition (+$7,000) to the base penalty.

[22] Finally, the Director determined that as Appellant did not exercise due diligence to prevent the contravention, or make any efforts to correct or prevent the contravention, an administrative penalty of $19,000 (base penalty of $10,000 + additional factors of $9,000) was fair and reasonable in the circumstances.

[23] The Appellant filed its appeal against the Decision on April 2, 2023.

ISSUES

[24] In deciding this appeal, I have considered two issues:

Issue 1: Should the Administrative Penalty determined by the Respondent be varied or cancelled?

Issue 2: What is the scope of the Board's jurisdiction over the other remedies sought by the Appellant?

DISCUSSION AND ANALYSIS

Issue 1: Should the Administrative Penalty determined by the Respondent be varied or cancelled?

Appellant's Submissions

[25] The Appellant submits that the Decision is based on false information and therefore should be overturned. The Appellant does not, however, dispute the fact that it is not in compliance with section 2(1) of the *Regulation.*

[26] The Appellant submits that this matter has been ongoing for the past 10 years and has involved people from RecycleBC in BC and Ontario, numerous members of the legislative assembly ("MLAs"), bureaucrats from the Ministry, staff from the Minister's office, the Canadian Federation of Independent business, several Mayors, business leaders, Chambers of Commerce, and others who agree that section 2(1) of the *Regulation* should not apply to it.

[27] The Appellant submits that, 10 years ago, it received a letter from Multi-Material BC threatening it with a $200,000 fine if it did not comply with the *Regulation*. The Appellant says that it determined that it and most BC businesses could not comply, and it became involved with a “fight” for exemptions. The Appellant submits that it won the fight, and that “99.75%” of BC businesses, including their competitors, were exempt from the *Regulation*. The Appellant asserts it seems to have “slipped through the cracks” and has been harassed off and on for the past 10 years over its non-compliance.

[28] The Appellant submits that it has never been shown how it could comply with the *Regulation* or why it should comply when almost all BC businesses are exempt. The Appellant submits that “the program” is centered around the food industry, as opposed to businesses similar in nature to itself, and that while it has offered to work with the Ministry to come up with a viable solution, no one is interested. The Appellant asserts that most of its marketing material is mailed directly to individuals who use tools to make a living, and that it is an industrial distributer. The Appellant submits that an example of the false information relied upon by the Respondent in coming to the Decision includes the fact that contrary to the Respondent’s statement in the Decision that the Appellant has 13 retail locations, it actually has 14 locations, the majority of which are located in industrially zoned areas which do not allow retail stores. The Appellant submits that there has been some discussion about estimating how much of its marketing material is disposed of in the residential waste stream and about paying a fee based on that volume, but that this discussion did not “go anywhere.” When discussing packaging materials, the Appellant submits that it cannot change the nature of its packaging, as this is controlled by the mega stores which retail its product.

[29] The Appellant states there are two ways for companies to comply with the *Regulation*: to have an approved EPR Plan, or to appoint an agency to act on the producer’s behalf. The Appellant argues an approved EPR Plan is not appropriate for its business, and RecycleBC, the Ministry-approved agency, has been unable or unwilling to answer its questions as to how to achieve compliance with the *Regulation*.

[30] The Appellant asserts section 2(1) of the *Regulation* should not apply to it, and that it has not been provided the names of any other industrial distributors who are their direct competitors who have “signed up.” The Appellant further submits it has never been told how it could comply with the options in the *Regulation*: only that it must comply. The Appellant submits that it has never been told why 99.75% of BC businesses are exempt from the *Regulation* but it was not provided with an exception. The Appellant asserts that as its direct competitors are not “signed up” but it was captured by the *Regulation*, the Appellant would be at an “unfair disadvantage.”

[31] The Appellant submits that the information referenced by the Respondent in the Decision regarding a list of businesses[3] similar to that of the Appellant that are registered with RecycleBC is false, in that:

- Busy Bee Tools is not, in fact, on the list of registered stewards; and,
- Lee Valley, Home Depot, and Canadian Tire are not businesses similar to the Appellant.

[32] The Appellant submits that a number of its direct competitors, including Busy Bee Tools, are not on the steward list and do not meet the criteria for official exemption. The Appellant submits that when it asked RecycleBC how Lordco complied with the *Regulation*, it was advised that this was private information.

[33] The Appellant submits that the list of stewards provided by the Ministry (the "Stewardship List") indicates less than ¼ of 1% of BC businesses are signed up. In explaining the origin of its assertion that 99.75% of BC businesses are exempt from the *Regulation*, the Appellant submits that there are currently about 520,000 businesses in BC and less than 1,300 businesses are signed up.

[34] The Appellant disputes that the nature of the contravention was "major" given the number of BC businesses that are exempted from the program. Further, whether or not the contravention is major, it is impossible for the Appellant to comply with the *Regulation*. The Appellant asserts that over 99.75% of BC businesses, including direct competitors of the Appellant, were given exemptions because it was too hard to comply.

[35] The Appellant submits that it has corresponded with many bureaucrats, MLAs, and others who agree that the *Regulation* should not apply to its business.

[36] The Appellant submits that the Decision, which has nothing to do with actual recycling, has led people to believe that the Appellant does not recycle, damaging its business and reputation. The Appellant submits it has not received an answer to the question "…how will the planet be a better place if we were part of the program?"

Respondent's Submissions

[37] The Respondent submits the Appellant:

- does not dispute that it is a "producer" as set out in the *Regulation*;
- does not dispute it is not a "small producer" of the "packaging and paper product category;"

[3] The list of similar businesses provided in the Decision included: Lee Valley Tools, Snap-On Tools, Busy Bee Tools, Canadian Tire, Home Depot, and Lordco.

- does not dispute that it has neither an approved EPR Plan nor an agency appointed to work on its behalf, as required by the *Regulation;* and
- contravened section 2(1) of the *Regulation* from June 24, 2021, to November 22, 2022.

[38] The Respondent submits that in determining the amount of the administrative penalty, he considered the factors set out in section 7(1) of the *APR* and guidance provided in the Handbook, as set out in his Affidavit. The Respondent submits that the Board has previously held that the Handbook is a "reasonable guide" for determining the appropriate amount of a penalty and that its use "fosters consistency and predictability in decision-making."[4]

[39] The Respondent submits that the Board has held that an important consideration in assessing the appropriate amount of a penalty is whether the penalty will serve as an effective deterrent and promote future compliance by both non-compliant and other regulated persons.[5] Additionally, a penalty must go beyond simply restoring compliance in order to be a true deterrent. If the quantum is set too low, companies may be more likely to take their chances and only comply after they are caught.[6]

[40] The Respondent submits that the classification of the contravention as "major" is consistent with guidance provided in the Handbook, which sets out that "major" contraventions include a non-compliance that undermines the basic integrity of the overarching regulatory regime and significantly interferes with the Ministry's capacity to protect and conserve the natural environment. The Respondent asserts that by failing to have an EPR Plan or appointed agency in place, the Appellant interfered with the Ministry's ability to ensure appropriate systems were in place to address the collection and management of PPP waste, which undermines the integrity of the *Regulation* and is "major" in nature.

[41] The Respondent submits that the determination of "low" in assessing the real and potential adverse effects of the contravention is consistent with the Board's decision in *MTY Tiki Ming.*[7] The Respondent submits that the base penalty amount of $10,000 was appropriate in the circumstances.

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[4] *United Concrete & Gravel Ltd. v. Director, Environmental Management Act,* 2021 BCEAB 21 (CanLII), ("*United Concrete*"), at para. 72; *Nordstrom Enterprises Ltd. v. Director Environmental Management Act*, 2022 BCEAB 8 (CanLII) ("*Nordstrom Enterprises*"), at para. 32; *93 Land Company v. Director, Environmental Management Act,* 2022 BCEAB 37 (CanLII) ("*93 Land*"), at paras. 106-107.

[5] *MTY Tiki Ming,* at para. 92; *Pacesetter Mills Ltd. v. Director, Environmental Management Act,* 2021 BCEAB 9 (CanLII) ("*Pacesetter Mills*"), at para. 60; *Nordstrom Enterprises,* at para. 64.

[6] *93 Land*, at para. 105; *MTY Tiki Ming,* at para. 92.

[7] *MTY Tiki Ming*, at para. 83.

[42] In assessing the Appellant's contravention of section 2(1) of the *Regulation* as deliberate, the Respondent submits the Appellant acknowledges in its submissions it was aware of its non-compliance of the *Regulation* since 2013. Despite repeated warnings and directions from the Ministry between September 2020 and October 2021, the Appellant continued to contravene the *Regulation*. The Respondent submits that the Appellant's knowledge, and continued failure to comply with the requirements, of the *Regulation* was a result of deliberate actions and inactions.[8] The Respondent submits an increase of 20% ($2,000) to the base penalty in response to the deliberate nature of the contravention is appropriate in the circumstances.

[43] The Respondent submits that the Appellant benefited economically from the contravention by not paying annual fees associated with meeting its obligation under the *Regulation*. The Appellant's refusal to engage with RecycleBC to determine the fees that would accrue if RecycleBC were appointed as the Appellant's agent under the *Regulation* prevented the Respondent from determining or estimating the economic benefit derived from the contravention. As a result, the Respondent used the applied value method as set out in the EBGS and assessed the appropriate percentage increase as 70% ($7,000) of the base penalty. The Respondent submits that, given the Appellant's behaviour, use of the applied value method was reasonable and appropriate in the circumstances.

[44] The Respondent argues the Appellant gave no indication that it had exercised due diligence to prevent the contravention: that it took all reasonable care in trying to prevent the contravention based on what a prudent person would have known or done. The Respondent submits that the Board has confirmed that the Appellant bears the burden of proof to demonstrate it was duly diligent.[9]

[45] The Respondent submits that while the Appellant made several assertions in its submission in this appeal, it did not provide any evidence to support those assertions: the impossibility of it complying with the *Regulation*, that the program was designed for the food industry or companies with primarily retail customers, that determining the weight of packaging captured under the *Regulation* would be too costly and time consuming, and that the Appellant has offered to work with the Ministry to come up with a viable solution. The Respondent submits that Ministry correspondence indicates that the Appellant failed to engage in good faith with RecycleBC: merely reiterated its complaints with the scheme in general and asked questions irrelevant to how the Appellant could comply with the *Regulation*.

[46] The Respondent submits that, as shown in his affidavit, RecycleBC provided the Appellant, as recently as July 2021, with a variety of ways to determine which PPP the Appellant is responsible for under the *Regulation* and how to estimate the weight of

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[8] *Pacesetter Mills,* at para. 48; *Nordstrom Enterprises,* at para. 49.

[9] *United Concrete,* at para. 91; *93 Land,* at paras. 151-152.

packaging for those products. The Respondent asserts RecycleBC confirmed the Appellant was not required to weigh individually every product.

[47] The Respondent submits that while the Appellant may have disagreed with the regulatory scheme, it chose to be a producer of PPP. The Respondent argues that once informed of its obligations by the Ministry in September 2020, the Appellant should have immediately engaged with the Ministry and with RecycleBC to fulfill its duties under the *Regulation*.

[48] The Respondent submits that administrative penalties are a vital tool to encourage compliance, and that if the quantum is set too low, companies may be more likely to take their chances and meet their obligations under the *Regulation* only after they are caught.[10] The Respondent submits this concern is clearly evident in this particular matter where the Appellant, despite receiving repeated notices and warnings from the Ministry, has decided to continue contravening the *Regulation*.

[49] The Respondent submits that the Appellant has failed to meet its burden of establishing that it took all reasonable care to avoid the contravention, and that a decrease is not appropriate for this particular factor.

Appellant's Reply Submissions

[50] The Appellant replies that it has never been shown how it could viably comply with the *Regulation*, and that over the past 10 years it has consistently held, and communicated, that it could not comply. In responding to the Respondent's submission that it has had its questions regarding how to comply addressed, the Appellant replies that the answers received have been "the same old rhetoric." The Appellant asserts that it has fought for, and won, exemptions that apply to 99.75% of BC businesses but not to itself.

[51] In addressing the Respondent's submission that by not complying with the *Regulation* the Appellant has interfered with the Ministry's ability to ensure that appropriate systems are in place to address the collection and management of PPP waste, the Appellant replies that as 99.75% of BC businesses are exempt: less than ¼ of 1% of BC businesses support the program. As a result, the Appellant argues it has not interfered with the Ministry's ability to ensure that appropriate systems are in place.

[52] Regarding the Respondent's submission that the Appellant has benefitted financially from the contravention, the Appellant replies that it has paid just as much in annual fees as have their competitors and the 99.75% of BC businesses who are exempt from the *Regulation*.

[53] The Appellant argued in reply that reducing the administrative penalty to zero would be a fair outcome. It asserts this as, considering its position that neither the

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[10] *93 Land* at para. 105; *MTY Tiki Ming,* at para. 92; *Pacesetter Mills,* at para. 60.

Ministry nor RecycleBC can explain the purpose and objectives of the *Regulation* or how to make it work, it should be placed in the same exempted position as almost all BC businesses. The Appellant asserts that it has been unofficially exempted from the *Regulation* for much of the last 10 years.

Panel's Findings

[54] In an appeal before the Board, an appellant generally bears the burden of proving their case. The Appellant in this instance bears the onus of proving, on a balance of probabilities, the positive assertions it made in its Notice of Appeal, and which it relies on in making its argument.

[55] I understand from its submissions that the Appellant does not like the *Regulation* and does not like the answers received when it has asked questions concerning how compliance with the *Regulation* might be achieved. I also understand that the Appellant has engaged in correspondence and discussion with many individuals who would seem to share its view of the *Regulation*, and that it has formed a conclusion that it ought to be exempted from the *Regulation*.

[56] The Appellant does not dispute that it is captured by the *Regulation*. Rather, the Appellant argues: 99.75% of BC businesses are exempted from the *Regulation*; it has been unofficially exempted from the *Regulation* for much of the last 10 years; and, compliance with the *Regulation* is impossible, as evidenced from the lack of assistance it has received from the Ministry and from RecycleBC in that regard.

[57] The Appellant has seized on the fact that only a small percentage of businesses registered in BC appear on the Stewardship List to be proof that the vast majority of BC businesses have been exempted from meeting the requirements of the *Regulation*. I would add that this appears to have become a sticking point for the Appellant.

[58] The questions of how many businesses in BC are captured by the *Regulation* and whether the Stewardship List accurately reflects all businesses in BC that should be captured by the *Regulation* are not, however, before me. The issues before me for decision are whether the Appellant is captured by the *Regulation* and, if so, has it contravened the *Regulation*. The evidence in this appeal demonstrates the Appellant is a business that is captured by the *Regulation.* Indeed, the Appellant does not dispute this.

[59] The Appellant also does not dispute that it has not complied with the *Regulation*. Rather, the Appellant argues both that it ought to be exempted from complying and that it has been unofficially exempted from complying for much of the last 10 years.

[60] I note that there was no evidence presented to show that the Appellant's efforts "fighting" the *Regulation* led to vast numbers of BC businesses being exempted. Nor was there evidence presented to show that the Appellant was officially or unofficially exempted from the *Regulation* at any time. However, neither of these issues are relevant to the issues under appeal before me.

[61] The fact that the Ministry did not take formal action against the Appellant for some time after the *Regulation* was enacted is not evidence of an exemption – official or otherwise. The evidence demonstrates that Ministry staff repeatedly advised the Appellant of its obligations under the *Regulation* for some time before initiating the formal action which led to the Decision. I accept that the Appellant asserts it had conversations with MLAs and others who seem to support the Appellant's contention that it be exempted, but there was no evidence of any official undertaking in this regard. It is clear to me, and I find, that the Appellant was not, and is not, exempt from complying with the *Regulation*.

[62] The Decision sets out the Respondent's considerations in determining the amount of the administrative penalty. One factor in assessing the amount of the penalty is focused on the lack of demonstrated good faith efforts by the Appellant to determine how it could achieve compliance. The evidence before me shows that short of continuing to make assertions concerning why it should be exempted and why it was difficult to comply, the Appellant did not, in fact, make any attempt to work with RecycleBC, for example, to take the actions necessary to comply with the *Regulation*.

[63] The Appellant did not provide any evidence to show that the Respondent improperly applied the *Act*, the *Regulation,* or any of the guidance information used to determine the penalty amount. In short, the Appellant provided no persuasive evidence to cause me to depart from the analysis offered by the Respondent in the Decision or to alter the outcome of the Decision. I have reviewed the Decision and, absent any compelling argument from the Appellant—which there has not been—I agree with the rationale in the Decision.

[64] The Appellant provided no persuasive evidence to cause me to supplant or alter the Respondent's Decision. The Appellant did not meet the burden of proof in this appeal, and there is therefore an insufficient basis to alter the penalty amount.

Issue 2: What is the scope of the Board's jurisdiction over the other remedies sought by the Appellant?

[65] The Appellant seeks an official exemption or, in the alternative, an unofficial exemption to the *Regulation*. The Appellant also seeks a review and re-evaluation of the *Regulation* so as to determine who should be required to comply with it, and why business should be obligated to pay fees on packaging that is controlled by mega stores.

[66] The Respondent submits that the remedies sought by the Appellant are beyond the scope of the Board's jurisdiction in this appeal.

[67] As noted at the start of this decision, section 103 of the *Act* limits the jurisdiction of the Board to: sending a matter back to the person who made the decision; confirming, reversing, or varying the decision under appeal; or making a decision that the original decision maker could have made that the Board considers appropriate in the circumstances.

[68] I note that the *Regulation* does not have a provision that would allow a decision maker to exempt a producer from one of its requirements. Therefore, in making a decision under the *Regulation*, the Respondent could not have exempted the Appellant from a requirement under the *Regulation*. Consequently, that remedy is not available to me.

[69] As the Board has explained previously:

> Section 103 of the *Act* does not grant the board the Authority to excuse appellants from regulatory requirements generally, inquire into or change previous decisions that were not appealed or compel the Ministry to do anything outside of the scope of the appeal.[11]

[70] I agree with, and adopt, this previous reasoning of the Board. I find I therefore do not have the authority to address the additional remedies sought by the Appellant. As I do not have the authority to grant these outcomes sought by the Appellant, they must be dismissed as being outside of the jurisdiction of the Board.

DECISION

[71] In making this decision, I have carefully considered all of the relevant evidence before me, whether or not I specifically referred to it within these reasons.

[72] I dismiss the appeal.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board

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[11] *United Concrete,* at para. 43.