Environmental Appeal Board

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DECISION NO. EAB-WIL-21-A006(a)

In the matter of an appeal under the *Wildlife Act*, RSBC 1996, c. 488

BETWEEN:	Mountainside Quarries Group Inc.	**APPELLANT**
AND:	Resource Manager, Ministry of Forests, Lands, Natural Resource Operations and Rural Development	**RESPONDENT**
BEFORE:	A panel of the Environmental Appeal Board, David Bird, Panel Chair	
DATE:	Conducted by way of written submissions concluding on December 10, 2021	
APPEARING:	For the Appellant:	Christopher Becker, Counsel Ted Lewis, Counsel
	For the Respondent:	Sonja Sun, Counsel

SUMMARY DISMISSAL DECISION

APPEAL

[1] This appeal involves a decision suspending permit SU20-609433 (the "Permit"), and imposing conditions on its reinstatement. Issued on January 13, 2021, the Permit exempts Mountainside Quarries Group Inc. (the "Appellant") from section 34(b) of the *Wildlife Act*, R.S.B.C. 1996, c. 488 (the "*Act*"), with respect to peregrine falcon nests located on a rock and gravel quarry that the Appellant operates. The Permit authorizes the Appellant to destroy a peregrine falcon nesting site at the end of the 2021 breeding season.

[2] The Respondent has applied for the Board to summarily dismiss the appeal. This decision addresses that application.

BACKGROUND

[3] On June 22, 2021, Ms. Lensky, Resource Manager, Stewardship South Coast Region, and Deputy Regional Manager under the *Act* (the "Respondent"), suspended the Permit. Written reasons for suspending the Permit were issued on July 22, 2021. The Permit was suspended due to allege non-compliance with the Proponent Obligation 1(a)(vi), which states:

> If the Peregrine Falcons nest onsite in 2021, establish a 50-metre no-disturbance buffer zone around the nest site until the end of the breeding season (March 30-July 20, 2021).

[4] The July 22, 2022 reasons state that this was the second time the Permit was suspended due to the Appellant's non-compliance of a 50-meter buffer zone around the nesting site. The decision letter set conditions that the Appellant had to meet before the Permit would be reinstated. The suspension stopped the Appellant's ability to mine material in the quarry.

[5] The Appellant filed its notice of appeal with the Environmental Appeal Board (the "Board") on August 20, 2021. On August 25, 2021, the Board acknowledged receipt of the notice of appeal, and notified the Respondent about the appeal.

[6] In its notice of appeal, the Appellant asks the Board to "quash" the July 22, 2022 decision to suspend the Permit, lift the suspension, and order compensation for lost revenues while the Permit was suspended.

[7] The Board convened a pre-hearing conference call with the parties on September 24, 2021, to discuss a procedural framework to hear the appeal. At that time, the Respondent indicated that she would be filing an application to summarily dismiss the appeal, because the suspension of the Permit had been lifted and the appeal was now moot.

[8] On October 29, 2021, the Respondent applied for the Board to summarily dismiss the appeal. This application was heard by written submissions. The Appellant responded to the application on November 26, 2021. The Appellant objects to part of the Respondent's submissions. The Respondent's final reply was received on December 10, 2021.

ISSUES

[9] The issues to be decided in this decision are as follows:

1. Should part of the Respondent's submissions be struck from the record?
2. Does the Board have jurisdiction to hear the appeal now that the suspension has been lifted?
3. Is the appeal now trivial because the suspension was lifted?
4. Is the appeal moot and, if so, should the Board hear the appeal in any event?

RELEVANT LEGISLATION

[10] Section 34(b) of the *Act* states that a person commits an offence if they possess, take, injure, molest or destroy the nest of a peregrine falcon, except as provided by regulation. Section 3 of the *Permit Regulation*, B.C. Reg. 253/2000 (the "*Regulation*"), allows a regional manager to issue a permit exempting someone from section 34 of the *Act*.

[11] The Permit was issued pursuant to section 19 of the *Act*, which allows a regional manager or delegate to exempt someone from prohibitions under the *Act* or its regulations by issuing a permit.

[12] The decision to suspend the Permit was issued under section 25 of the *Act*, which provides that a regional manager, for any cause he or she considers

sufficient, may suspend or cancel a permit and may order that the permit holder is ineligible to obtain or renew a permit for a period.

[13] Under the section 14 of the *Administrative Tribunals Act* (the "*ATA*")[1], the Board has the general authority to make orders necessary to "… facilitate the just and timely resolution of an application[2]," including in relation to any matter the Board considers necessary for purposes of controlling its own proceedings. As discussed later in this decision, the Respondent says section 14 is relevant to the Board's ability to dismiss an appeal that is moot.

[14] Under section 31(1) of the *ATA*, the Board can dismiss all or part of an appeal any time after it is filed, for reasons which are listed in subsections (a) through (g). In this case, the Respondent says the appeal should be summarily dismissed under subsections (a) and (c). Under subsection (a), an appeal can be dismissed if it is not within the jurisdiction of the Board. Under subsection (c), an appeal can be dismissed if it is frivolous, vexatious or trivial or gives rise to an abuse of process. Section 31(2) of the *ATA* requires the Board to give the appellant an opportunity to be heard prior to dismissing some or all an appeal.

[15] The Board's Manual of Practice and Procedures (the "Manual"), at page 15, outlines the procedure to file an application requesting that the Board summarily dismiss an appeal.

DISCUSSION AND ANALYSIS

Summary of the Respondent's Submissions

[16] The Respondent applied to summarily dismiss the appeal on the basis that:

- the Board lacks jurisdiction to hear the appeal;
- the appeal is now trivial; and
- the appeal is now moot and the Board should not proceed to hear the appeal.

[17] The Respondent submits that the Appellant's notice of appeal requests that the Board lift the suspension and order compensation for lost revenue resulting from the suspension. The Respondent submits the Board has no jurisdiction to grant the Appellant compensation under the *Act*, and the suspension of the Permit was lifted on September 23, 2021, rendering the appeal moot.

[18] The Respondent submits the suspension was lifted because the fledgling peregrine falcon left the nesting site and the 2021 breeding season was considered complete. Therefore, the rest of the reinstatement conditions were no longer applicable.

[19] Given that the suspension is no longer in effect, the Respondent submits there is no need for the Board to reverse or vary the suspension or to send the matter back to the Respondent, as provided under section 101.1(5) of the *Act*.

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[1] Certain sections of the *ATA* apply to the Board through Division 1 of Part 8 of the *Environmental Management Act*, as set out in section 101.1(3) of the *Act*.
[2] Section 31 of the *ATA* uses the word "application" instead of "appeal", but section 1 of the *ATA* defines "application" as including an appeal.

[20] The Respondent submits that the Board has no jurisdiction to order compensation to the Appellant for alleged damages resulting from suspension, because an order for compensation is not a remedy available under section 101.1 of the *Act*.

[21] For these reasons, the Respondent submits that the appeal falls outside of the Board's jurisdiction, and the appeal is now trivial since the Board cannot provide the Appellant with a meaningful remedy. Therefore, the appeal should be dismissed under sections 31(1)(a) and (c) of the *ATA*.

[22] The Respondent also submits that the Board has the general authority to dismiss an appeal that is moot under its power to control its own proceedings under section 14 of the *ATA*. The legal test commonly used by the Board is set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*]. The Respondent notes that in *Gibsons Alliance of Business and Community Society and Marcia Timbres v. Director, Environmental Management Act*, Decision No. 2017-EMA-010(c), [*Gibsons*], at paragraph 26, the Board identified the two-step test for mootness in *Borowski*. The first step is to determine whether there is no longer a "live controversy" between the parties and the issues in dispute have become academic. If so, the second step is to decide if there is any compelling reason to hear the appeal even if there is no longer a live controversy.

[23] The Respondent also notes that in *Borowski*, the court expressed three basic reasons why cases that have become moot should not be heard:

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.

[24] Addressing step one in *Borowski*, the Respondent submits that no controversy exists now that the suspension of the Permit has been lifted. The Appellant has, in effect, received the remedy available to it under appeal, and the Board deciding any of the issues will have no practical effect. The Respondent submits there is no practical reason for the Board to determine whether the Respondent acted beyond her discretion in imposing conditions, or whether the suspension conditions were reasonable or within the Respondent's discretion to impose, or whether the Appellant complied with the Permit. This is because even if the Board agreed with the Appellant on the issues, no remedy can be ordered that was not already provided by the Respondent lifting the suspension.

[25] In addition, the Respondent submits that there is no live controversy because any determinations by the Board about the conditions imposed to lift the suspension will now have no practical effect on the Appellant. The requirement for a buffer zone around the nest site is no longer applicable since the breeding season has ended.

[26] Addressing step two in *Borowski*, the Respondent submits that the Board should not exercise its discretion to hear this moot appeal. The Respondent argues there are no policy considerations to justify hearing the appeal, and there are no

collateral consequences raised by the appeal that would be advanced by deciding this appeal.

[27] The Respondent submits that the most relevant criterion articulated in *Borowski* is the concern for judicial economy, and the context and specific facts of this case do not include special circumstances that make it worthwhile to utilize the Board's scarce resources to hear this appeal.

[28] The Respondent also submits that the issues put forward by the Appellant's relate to the conditions required to reinstate the Permit, and are not of public interest or importance. The Respondent imposed those requirements based on the context and specific facts that are relevant to the Permit, and they are unlikely to be of a recurring nature which might warrant deciding an important question that would otherwise evade review by the Board.

[29] In summary, the Respondent submits that all three reasons set out in *Borowski* not to address moot cases exist in the circumstances, and therefore, the Board should not exercise its discretion to hear the appeal.

[30] As a result, the appeal should be summarily dismissed.

Summary of the Appellant's Submissions

[31] The Appellant submits that the Board retains the jurisdiction to "quash" the decision to suspend the Permit, and the Board ought to:

- decide whether the Appellant committed an offence under the *Act*;
- make findings of fact as to whether the Appellant satisfied the conditions of the Permit at all relevant times; and,
- determine whether the Respondent's July 22, 2021 decision was reasonable.

[32] The Appellant submits the Board must apply the modern principles of statutory interpretation as outlined in *Rizzo & Rizzo Shoes Ltd. (Re)*, (1998) CanLII 837 (SCC) [*Rizzo & Rizzo*]. The Appellant submits the language in section 101.1(5)(c) of the *Act* supports its argument that the Board has jurisdiction over the appeal. Section 101.15(c) states that, on an appeal, the Board "may make any decision that the [Respondent] could have made, and that the board considers appropriate in the circumstances."

[33] The Appellant submits that lifting the suspension of the Permit is not determinative that the appeal is moot. The Appellant disputes the Respondent's argument that no remedy is available since the suspension was lifted. The Appellant seeks to have the suspension decision quashed on several grounds, and as a result, there continues to be live, and important, issues between the parties.

[34] The Appellant argues that the impact of the Respondent's decision on its operations "constitutes both a serious live issue, and an issue of sufficient importance, to be determined in the context of this appeal." The Appellant claims that the suspension decision caused it to cease operations for an extended period of time, lose significant revenue and contracts, and lose its good reputation with customers because of its inability to deliver product on time or at all.

[35] The Appellant says these impacts are similar to the those in *College of Physicians & Surgeons of Alberta v. Collett*, 2019 ABCA 461 [*Collett*]. At paragraph 127 of *Collett*, the court found that although the suspension of a doctor's licence

had been lifted, the case was not moot because the "publication of his suspension [had] diminished [the doctor's] reputation in the community and…caused him emotional distress and financial loss."

[36] The Appellant also submits that an issue to be decided is whether it committed an offence under the *Act*. Although the Appellant denies that it committed an offence under the *Act*, it submits that the Respondent made such a finding "by operation of law" when she suspended the Permit based on the Appellant's alleged failure to comply with the Permit. The Appellant notes that the *Permit Regulation* states, "[a] person who holds a permit under the Act or this regulation commits an offence if the person fails to comply with a term of the permit." The Appellant does not dispute that the Respondent is a regional manager as defined by the *Act*, and she exercised powers of a regional manager under section 25 of the *Act* when she suspended the Permit. The Appellant submits that, by finding that the Appellant failed to comply with the Permit, the Respondent summarily determined that the Appellant committed an offence under the *Act* by operation of the *Permit Regulation*.

[37] The Appellant argues that since a regional manager under the *Act* has the power to determine whether an offence has been committed, the Board has the same power by virtue of its powers under section 101.1(5)(c) of the *Act*.

[38] In the Appellant's submission, lifting the suspension does not resolve the finding of fact that it breached the Permit. This finding of fact remains a live controversy that the Board has jurisdiction to hear and remedy. The Appellant submits that having an offence registered on its record is a collateral consequence of the suspension decision, and provides a further compelling reason to hear the appeal.

[39] The Appellant notes that the Respondent did not retract this finding; rather, the Respondent has "doubled down in stating that "[the Appellant] did not meet the conditions originally set out for lifting this suspension."

[40] The Appellant submits it always satisfied the conditions of the Permit, and the findings of fact regarding whether it breached the Permit are within the Board's jurisdiction to determine, even though the suspension is no longer relevant.

[41] In addition, the Appellant submits that the Respondent's decision was unreasonable, and the appeal is within the Board's jurisdiction "by virtue of the fact that the board clearly has the authority to make determinations with respect to permit conditions and other matters that fall within the jurisdiction of the regional manager."

[42] The Appellant submits that dismissing its appeal will "signal that a decision maker may make decisions of extremely adverse consequence to permit-holders without further review, so long as the decision maker reinstates the relevant permit at some later point." The Appellant submits that this raises an important issue that is of public interest. The Appellant acknowledges that efficient use of the Board's resources is important, but it is equally important not to summarily dismiss appeals where there are live issues or important public interest issues.

[43] The Appellant acknowledges that it did not expressly identify, in its notice of appeal, the implicit decision that it had committed an offence. The Appellant argues, however, that this is an "originating issue". I note that the Appellant did not

expressly explain what it means by saying this is an originating issue, but I infer the Appellant means the question of whether it committed an offence is an appealable issue and implicit in its notice of appeal. The Appellant further argues that the unjustifiable suspension constitutes an important issue and is implicit in its notice of appeal. However, the Appellant requests that, if the Board disagrees, it be granted leave to amend its original notice of appeal.

[44] The Appellant raises concerns about the Respondent's submissions at paragraph 6 and the last two sentences in paragraph 19. The Appellant submits the matters referenced are outside of the scope of the appeal and irrelevant to the issues. The Appellant submits these sentences seek to minimize the impact of the decision to suspend the Permit and could be prejudicial to the Appellant. The Appellant does not elaborate how or why it is concerned that these portions of the Respondent's submissions may be prejudicial to it.

Summary of the Respondent's Reply Submissions

[45] In reply, the Respondent submits that the Board has no power to "quash" the decision, as requested by the Appellant. The appeal before the Board is not a judicial review, and the Board can only provide remedies set out in section 101.1(5) of the *Act*.

[46] The Respondent submits that the Appellant misunderstood the *Act* and the *Permit Regulation* when it submitted that a consequence of the suspension decision is that the Appellant committed an offence by operation the *Permit Regulation*. The Respondent submits the Appellant has misunderstood the difference between administrative decisions and regulatory offences. The Respondent suspended the Permit under section 25 of the *Act* for causes considered sufficient, but this is distinct and separate from operation of section 8 of the *Permit Regulation.* While an offence under section 8 of the *Permit Regulation* could provide the grounds for a regional manager to suspend a permit under section 25, other causes which do not amount to an offence can also be sufficient to suspend a permit under section 25.

[47] The Respondent submits that a regional manager, and the Board, lack the jurisdiction to determine whether a person has committed an offence under section 8 of the *Permit Regulation*. Only a court can make this determination.

[48] The Respondent argues that a live controversy only exists where "there is a tangible and concrete dispute", and the "issues on appeal have not become academic." The continued difference of opinion between the Respondent and the Appellant as to whether there was a breach of the Permit warranting a suspension does not make the issue tangible and concrete. There is no tangible or concrete issue because the suspension has already been lifted. The Board making findings of fact as to whether the Appellant breached the Permit would not affect the practical rights of the parties.

[49] The Respondent argues that impacts resulting from the suspension of the Permit are not issues that can be appealed, and do not constitute live issues. These issues were not included in the original notice of appeal and are not determinative of whether there is a live controversy for the Board to consider. The impacts to the Appellant's business operations do not always constitute special circumstances to warrant the Board using its scarce resources to hear a case that has become moot. In addition, the Appellant has not demonstrated or proven actual impacts from the

decision to suspend the Permit, nor is the Board able to undo any loss related to the suspension or grant any other relief.

[50] The Respondent submits that *Collett* is distinguishable from the Appellant's appeal, particularly because a reviewing court has the authority to make declarations with respect to the decision being reviewed.

[51] The Respondent submits that neither the issues in the Appellant's notice of appeal nor the further issues added as part of its submissions on this application raise issues of public interest or importance. The Respondent disputes the Appellant's contention that, if the appeal is dismissed, this will allow decision makers who suspend permits and then lift the suspensions to evade review. Each decision to issue a permit and suspend a permit is considered separately and is context specific. Any decisions by the Board to summarily dismiss an appeal are also considered separately, and are context specific and subject to potential judicial review.

[52] The Respondent argues that its submissions in paragraph 6 and the last two sentences of paragraph 19 support its argument that the appeal is moot. The Respondent submits that the content demonstrates that lifting the suspension has rendered the appeal moot. The submissions are relevant to the issue being adjudicated, and not prejudicial to the Appellant.

Panel's Findings

1. *Should part of the Respondent's submissions be struck from the record?*

[53] To begin my analysis, I will address the Appellant's request to strike from the record paragraph 6 and the last two sentences of paragraph 19 in the Respondent's application.

[54] The disputed portions of the Respondent's submissions contain statements related to: (1) the fact that the Permit allows the Appellant to destroy a nest site in the quarry, and the Appellant plans to do so; and (2) the fact that the Permit has been reinstated, despite a subsequent suspension of the Permit for reasons that have not been provided to the Board.

[55] Although not referenced by the parties, I am guided by section 40(1) of the ATA which states that the Board "may receive and accept information it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law."

[56] In addition, I note that the Board's Manual discusses the admissibility and exclusion of evidence beginning on page 42. The Manual explains that relevance is the primary consideration, based on whether the evidence or information can shed some light on a disputed matter or tends to prove or disprove a fact in issue. While the Board can exclude evidence under section 40(2) of the ATA if it is unduly repetitious, and the common law also provides that the Board can exclude evidence if it is of minimal relevance, unreliable, confuses the issues, or may be prejudice the other party, I am not persuaded that these considerations apply in this case.

[57] I acknowledge that the Appellant has submitted the Respondent's submissions could be prejudicial to it, but it has provided no compelling rationale or evidence in support of this assertion.

[58] Regarding the first aspect of the Respondent's submissions, which I summarized above, there is no dispute that the purpose of the Permit is to allow the Appellant to destroy the nest, subject to certain conditions, and that the Appellant sought the Permit so that it could carry on its quarry operations. I find that the purpose of the Permit is relevant to, and is part of the factual context of, the present appeal. Moreover, those undisputed facts were public information before this appeal was filed. The Permit was the subject of a separate appeal which the Board dismissed in a decision that was published on the Board's website (Christopher Shawn Kitt v. Deputy Regional Manager, Recreational Fisheries and Wildlife Programs, Decision No. EAB-WIL-21-A001(a), April 16, 2021). Section 50(4) of the ATA requires the Board to make its decisions accessible to the public. It is unclear how the Respondent's statements regarding undisputed and public facts could somehow prejudice the Appellant's interests. It would serve no purpose to strike those aspects of the Respondent's submissions from the record in this appeal.

[59] Regarding the second aspect of the Respondent's submissions, which I summarized above, I find that there is no dispute that the Permit has been reinstated, and this undisputed fact is also relevant to the present appeal. On the other hand, I find that the Respondent's statement that the Permit was suspended for another reason, which is unknown to the Board, is vague and irrelevant to the present appeal. Despite this, I find that the Appellant has provided no evidence as to how that statement is prejudicial to it. I note that if the Appellant was concerned about that suspension decision, it could have appealed the decision, but it did not do so. In any case, given that the statement about the subsequent suspension is vague and irrelevant, I have given it no weight in deciding the matter before me. For these reasons, I find that the Appellant has not provided sufficient basis to strike these aspects of the Respondent's submissions from the record.

[60] For the foregoing reasons, I deny the Appellant's request to have paragraph 6 and the last two sentences of paragraph 19 of the Respondent's submissions struck from the record.

2. *Does the Board have jurisdiction to hear the appeal now that the suspension was lifted?*

[61] The Board's jurisdiction to hear and decide appeals under the Act is set out in section 101.1 of the Act. The Board only has the authority conferred on it by its enabling statues, and it can only provide the remedies available through those statutes.

[62] There is no dispute that the suspension decision could be appealed to the Board. In that sense, the appeal was within the Board's jurisdiction. However, the parties disagree regarding whether the Board has any jurisdiction to provide a remedy, now that the suspension of the Permit has been lifted.

[63] If the Board lacks the jurisdiction to provide any of the remedies sought by the Appellant, the Board may dismiss the appeal due to lack of jurisdiction under section 31(1)(a) of the *ATA*.

[64] I agree with the Appellant that the *Act* should be interpreted based on the principles of statutory interpretation discussed in *Rizzo & Rizzo*. My role in interpreting the *Act* is to read it in its entire context, and to consider the relevant

provisions in their ordinary and grammatical sense, harmoniously with the objects and schemes of the *Act* and the intention of the Legislature in passing it. I also note that section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, requires that I read the *Act* in a liberal and remedial manner.

[65] I also agree with the Appellant that section 101.1(5)(c) of the *Act* gives the Board the authority to make any decision on appeal that the Respondent could have made. The question is whether the Board can provide a remedy that the Appellant is seeking given that the suspension of the Permit has been lifted.

[66] I find that reading the relevant portions of the *Act* in their context and in their ordinary and grammatical sense, the Board could have lifted the suspension of the Permit, if the Respondent had not already done so and if the appeal was successful. This is a remedy that falls within the Board's powers under section 101.1(5)(c).

[67] Similarly, although the Board's function is not akin to the role of a court in a judicial review, and the Board has no authority to "quash" decisions, the Board does have the authority to reverse a decision, which is a similar type of remedy. However, the Respondent has already reversed the suspension decision. Therefore, the Board can no longer provide this remedy. In addition, the Board clearly has no authority under the *Act* to order compensation to the Appellant for losses associated with the suspension. Compensation was never a remedy that the Board could have provided.

[68] I am not persuaded by the Appellant's argument that the Board retains jurisdiction to examine the Respondent's reasons for the suspension decision. While I appreciate that the Appellant disputes the Respondent's reasons for the suspension, the Board does not have the powers of a superior court. Unlike the BC Supreme Court in a judicial review of a statutory decision, the Board has no jurisdiction to make declarations about the reasonableness of the Respondent's suspension decision or her reasons for that decision.

[69] As I will discuss below, I also find that the Board has no jurisdiction to decide whether the Appellant committed an offence. I find that the Appellant has misunderstood the operation of section 25 of the *Act*. I am not persuaded by the Appellant's reasoning that its interpretation of section 25 and the *Permit Regulation* brings the matter within the Board' jurisdiction.

[70] As a result, I find that the Board has no jurisdiction to hear this appeal, because the Board cannot provide any of the remedies that the Appellant is seeking. Therefore, the appeal should be dismissed under section 31(1)(a) of the *ATA*.

3. Is the appeal now trivial because the suspension was lifted?

[71] Since I have found that the Board does not have jurisdiction to hear this appeal and it should be dismissed under section 31(1)(a) of the ATA, it is not necessary for me to analyze whether the appeal is also trivial.

[72] Also, the Respondent did not identify how an appeal that is moot or academic is the same as an appeal that is considered trivial under section 31(c) of the *ATA*. The Respondent did not set out what legal test the Board should apply to consider whether the appeal is now trivial or reference any authorities to support its

submission that this appeal should be dismissed because it is now trivial. The Appellant's submissions also do not directly address this issue.

[73] Given that the parties did not explain the test the Board should apply to determine whether an appeal is trivial, and how that is different or the same as being moot or academic under *Borowski*, I find that I do not have to resolve this question because I have concluded the appeal will be dismissed for other reasons.

4. Is the appeal moot and, if so, should the Board hear the appeal in any event?

[74] The doctrine of mootness described in *Borowski*, as quoted by the British Columbia Court of Appeal in *McKenzie* at paragraph 22, is as follows:

> … 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. The 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.
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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 as 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.

[75] Although the Appellant has attempted to argue that its dispute with the Respondent's decision to suspend the Permit remains a live controversy, I find that the evidence supports the conclusion that the issues on appeal have become academic.

[76] I am not persuaded by the Appellant's submission that there is an offence on its record because of the decision to suspend the Permit under section 25 of the *Act*. I find that a conviction for an offence under the *Act* or the *Permit Regulation* results from a distinct and separate process than a decision to suspend a permit under section 25. The suspension of a permit under section 25 for noncompliance with the permit is an administrative decision made by a regional manager. In contrast, a conviction for an offence under section 8 of the *Permit Regulation* due to noncompliance with a permit is a criminal matter.

[77] Based on section 103 of the *Act*, I understand that "laying an information" is one way to initiate the process that can lead to a conviction for committing an offence. Under section 11 of the *Offence Act*, R.S.B.C. 1996, c. 338, offence proceedings are commenced by the laying of an information or by issuing a violation ticket. There is no evidence before me that the Appellant has received a violation ticket or been charged with an offence, or that any proceeding in court has been initiated. As a result, I am not persuaded that the Respondent's finding that the Appellant breached the Permit automatically means that the Appellant committed an offence by "operation of the law".

[78] I am also not persuaded that the Appellant's legal rights continue to be impacted by the Respondent's finding that it breached the Permit warranting the

suspension under section 25. If, in the future, the Appellant is charged with an offence because of breaching the Permit, the Appellant has a right to defend itself against such charges through the court process. In terms of the Appellant's ability to do what is authorized by the Permit, the question of whether the Appellant complied with the Permit at all relevant times has become academic now that the suspension has been lifted.

[79] I appreciate that the Appellant still argues that it did not breach the Permit, and that this remains a live controversy from the Appellant's perspective. However, the existence of those disputed facts does not establish a live controversy for the purposes of the appeal process, because the Board's determinations on these matters would have no practical effect now that the suspension has been lifted.

[80] I find that the same reasoning applies to the question of whether the Respondent's decision was unreasonable. This would only be a live controversy if the Board could provide a remedy that impacts the legal rights of the parties. Since the Board can provide no remedy that affects the parties' legal rights, this issue is academic.

[81] The same reasoning applies to the Appellant's submission that the impact of the suspension on the Appellant's operations and reputation constitutes an important issue the Board should determine for the purpose of ordering compensation. I have already found that this remedy is outside of the Board's jurisdiction, and the Appellant's circumstances are not analogous to the facts in *Collett* because the Appellant's alleged financial loss is a result of its inability to fulfil deliveries of product not due to loss of reputation resulting from the suspension of the Permit. In addition, in *Collett* the court had jurisdiction to address that issue and remedy. For the reasons provided above, I have found the Board does not have the same jurisdiction.

[82] In summary, I conclude that there is no live controversy to be decided. Next, I must consider whether the Board should hear the appeal in any event.

[83] I am not persuaded that the Board should hear this appeal when there is no longer a live controversy. I find that the issues raised by the Appellant are not of public interest and do not raise any significant policy consideration which would justify expending the Board's and the parties' resources. The issues are specific to the Appellant's circumstances and interests. They are unlikely to be of a recurring nature which might justify the Board deciding issues about Respondent's decision-making that would otherwise evade review by the Board. Without a live controversy, there is no compelling reason to hear this appeal.

[84] The Appellant sought leave to file an application to amend its notice of appeal to further to the new issues it raised in its submissions. For the reasons provided above, I find it unnecessary to require an application from the Appellant to amend its notice of appeal. Even if I allowed these issues to be added to its notice of appeal, I have concluded it would not change the outcome of my decision to summarily dismiss the appeal.

DECISION

[85] In reaching my decision, I considered all the submissions and relevant evidence provided by the parties, whether specifically referenced in my reasons or not.

[86] For the reasons provided above, I summarily dismiss the Appellant's appeal under section 31(1)(a) and (c) of the *ATA* and on the basis that the appeal is moot.

[87] The Board will close the appeal and take no further action.

"David Bird"

David Bird, Panel Chair
Environmental Appeal Board

March 2, 2022