



Environmental Appeal Board

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DECISION NO. 2016-EMA-066(a)

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

BETWEEN:	StewardChoice Enterprises Inc.	APPELLANT
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
AND:	Multi-Material British Columbia	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on April 20, 2016	
APPEARING:	For the Appellant: Robert M. Lonergan, Counsel For the Respondent: Stephen King and Angela Davies, Counsel For the Third Party: Lisa Constantine, Counsel	

PRELIMINARY ISSUE OF JURISDICTION

[1] On February 5, 2016, StewardChoice Enterprises Inc. ("StewardChoice") appealed a decision issued by Mark Zacharias, Assistant Deputy Minister, Ministry of Environment (the "Ministry"), acting as a Director under the *Environmental Management Act* (the "Director"). In that decision, the Director refused to approve a stewardship plan submitted by StewardChoice in relation to packaging and printed paper products under the *Recycling Regulation*, B.C. Reg. 88/2014 (the "*Regulation*").

[2] On March 4, 2016, the Third Party, Multi-Material British Columbia ("MMBC"), raised an objection regarding whether the Board has jurisdiction over the appeal. MMBC submits that StewardChoice's stewardship plan was not prepared in accordance with the *Regulation*, and StewardChoice had no standing to have its plan considered by the Director, such that the Director had no jurisdiction to consider the stewardship plan. MMBC further argues that StewardChoice has no standing to appeal the Director's decision, and the Board has no jurisdiction over the appeal.

[3] The Board requested submissions from all parties on the jurisdictional issue raised by MMBC. This preliminary matter was heard by way of written submissions.

BACKGROUND

Overview of the statutory scheme

[4] The *Regulation* is a regulation under the *Environmental Management Act* (the "Act"). Under section 138 of the *Act*, the Lieutenant Governor in Council may make regulations regarding recyclable materials.

[5] On May 19, 2011, the *Regulation* was amended by adding Schedule 5. As a result, producers of packaging and printed paper products became responsible for collecting and recycling their products in accordance with the *Regulation* effective May 19, 2014.

[6] Section 2(1) of the *Regulation* sets out the duties of producers of products that are covered by the *Regulation*. It states as follows:

Duty of producer

- 2 (1) Except as otherwise specifically provided in this regulation, a producer must
- (a) have an approved plan under Part 2 and comply with the approved plan,
or
 - (b) comply with Part 3
- with respect to a product in order to sell, offer for sale, distribute or use in a commercial enterprise the product in British Columbia.

[underlining added]

[7] This appeal is concerned with Part 2 of the *Regulation*, which addresses product stewardship plans. Section 9(2)(b) of the *Regulation* states that Part 3 of the *Regulation* does not apply to the packaging and printed paper product category. Consequently, producers of packaging and printed paper products in BC do not have the option of complying with Part 3 of the *Regulation*, and must comply with Part 2 of the *Regulation*.

[8] Section 2 of the *Regulation* also contemplates that producers may appoint an agency to carry out their duties under Part 2 of the *Regulation*. Under section 1 of the *Regulation*, "agency" is defined to mean "a corporation appointed by a producer to act as an agent on behalf of the producer". Subsections 2(1.1) through (5) of the *Regulation* address agencies.

[9] In Part 2 of the *Regulation*, section 4 addresses the submission of product stewardship plans, and it states as follows:

Submission of product stewardship plan

- 4 A producer must submit a product stewardship plan, at the time specified in the applicable Schedule, if any, and in a manner and format satisfactory to a director...

[underlining added]

[10] Schedule 5 of the *Regulation* applies to packaging and printed paper products. Section 3 of Schedule 5 of the *Regulation* states:

Transitional

- 3** A person who, on the date this section comes into force, is a producer of a product within the packaging and printed paper product category must
- (a) submit a product stewardship plan under section 4 of this regulation on or before the date that is 18 months after the date this section comes into force, if the person continues to be a producer on this date, and
 - (b) have an approved plan under Part 2 of this regulation, and comply with the approved plan, on or before the date that is 36 months after the date this section comes into force, if the person continues to be a producer on this date,

in order to sell, offer for sale, distribute or use in a commercial enterprise the product in British Columbia.

[underlining added]

[11] The legislative intent of section 3 of Schedule 5 of the *Regulation*, together with section 4 of the *Regulation*, is a key sub-issue in this preliminary matter.

[12] In Part 2 of the *Regulation*, section 5(1) provides that the Director “may approve” a product stewardship plan “submitted under section 4... if the Director is satisfied that” the applicable criteria listed in subsections 5(1)(a) through (d) of the *Regulation* have been met. The list of criteria under subsection 5(1) is lengthy, and generally includes requirements for a plan to address consumer education, and the collection and management of regulated products. It also includes a requirement that a plan adequately provides for “eliminating or reducing the environmental impacts of a product throughout a product’s lifecycle”, and “the management of the product in adherence to the order of preference in the pollution prevention hierarchy” (see subsections 5(1)(c)(vii) and (viii)). Further, the Director “may consider” the additional factors that are listed under subsection 5(2) of the *Regulation*.

[13] Other notable sections in Part 2 of the *Regulation* include the following. Under section 6 of the *Regulation*, a producer must review its approved plan, and submit any proposed amendments to a director, or advise a director that no amendments are necessary, no later than five years after the plan was approved. Under section 6.1 of the *Regulation*, a director may, at any time, rescind the approval of an approved plan. Under section 7 of the *Regulation*, a director must provide written reasons whenever a stewardship plan is not approved, a director amends an approved plan, an amendment to an approved plan is not approved, or the approval of a plan is rescinded. Under section 8 of the *Regulation*, a producer with an approved plan must provide an annual report to the director, and post the report on the internet, regarding various aspects of the plan’s performance and the stewardship activities that were conducted. Under section 8(3.1), and agency may provide and post one annual report on behalf of the producers that have appointed it to carry out their duties.

[14] Under section 16 of the *Regulation*, it is an offence to contravene certain sections of the *Regulation* including sections 2(1), (2), (3), 6, and 8, among others.

MMBC's product stewardship plan

[15] MMBC has been appointed by many producers of packaging and printed paper products to carry out their responsibilities under Part 2 of the *Regulation*. Currently, MMBC has the only approved stewardship plan for the collection and recycling of packaging and printed paper products in BC. According to documents provided by the parties, MMBC is a not-for-profit agency incorporated under the *BC Society Act*, and operated by the Canadian Stewardship Alliance, Inc., which is itself incorporated under the *Canada Not-for-Profit Corporations Act*.

[16] MMBC submitted its stewardship plan to the Ministry on November 19, 2012, 18 months after section 3 of Schedule 5 of the *Regulation* came into force. MMBC's plan was subsequently revised and was finalized on April 8, 2013.

[17] In a letter dated April 15, 2013, David Lawes, the Ministry's Director, Waste Management, approved MMBC's plan. MMBC launched its stewardship plan on May 19, 2014, 36 months after section 3 of Schedule 5 of the *Regulation* came into force. Consequently, MMBC's approved plan must undergo a review under section 6 of the *Regulation* by no later than April 15, 2018.

StewardChoice's proposed plan and the Director's decision

[18] According to StewardChoice, it began discussions with representatives of the Ministry in late 2013 regarding submitting a stewardship plan. On June 26, 2014, StewardChoice submitted an initial version of its stewardship plan to the Ministry. The initial version was subsequently revised. The Director made his decision based on version 5.1 of StewardChoice's plan, which was submitted to the Director on December 7, 2015.

[19] On January 13, 2016, the Director issued a letter setting out his decision and his reasons for refusing to approve StewardChoice's plan. His letter states, in part, as follows:

Thank you for submitting the StewardChoice Enterprises Inc. packaging and printed paper (PPP) Stewardship Plan (referred to hereafter as the 'Plan') under Section 4 of the Recycling Regulation of the *Environmental Management Act*. ...

My review was conducted based upon version 5.1 of the Plan, submitted on December 6, 2015 and the final consultation report version submitted on August 7, 2015. I recognize that the Plan was originally submitted on June 26, 2014 and has since been revised a number of times.

My review centred on whether the Plan is consistent with Section 5 of the Recycling Regulation and Sections 5.1 and 5.2 in particular. I understand that each of the key issues identified by ministry staff in their assessment package were formally shared and discussed with you in November 2015.

Unfortunately, I am unable to approve the Plan as submitted for the reasons articulated below.

In terms of specific regulatory requirements, the Plan fails to meet the requirements under the Recycling Regulation in four key areas:

1. While StewardChoice Enterprises Inc. completed consultation process requirements relevant to Section 5.1(b) of the Recycling Regulation, key stakeholders were not provided with sufficient information in which to assess the potential implications of the Plan for their interests. ...
2. The Plan does not adequately ensure that producers will pay the full costs of collecting and managing 75 percent of their produced packaging and printed paper volumes, as required under Section 5.1(c)(i) of the Recycling Regulation. ...
3. As noted above (#2) the proposed Plan does not guarantee that producers will pay the full costs to collect and manage their obligated packaging and printed paper volumes, potentially leaving consumers/taxpayers to fund the remaining costs. Given that collection facilities are an integral part of an overall recycling collection and management system, the proposed Plan thus does not guarantee "reasonable and free consumer access to collection facilities" as per Section 5.1(c)(iii).
4. Section 5.1(c)(iv) of the Recycling Regulation requires that a stewardship plan make consumers aware of the producer's product stewardship program, the location of collection facilities and how to manage products in a safe manner. The Plan appears to delegate responsibility for consumer awareness to recycling service companies or building owners and managers with little coordination and inadequate commitments regarding how this will be undertaken.

In deciding whether to approve a submitted stewardship plan, Section 5(2) of the Recycling Regulation also provides for the statutory decision maker to consider factors such as the product stewardship programs of other producers for products in the same product category and the structure of financial and operational co-operation with other producers.

I have concluded that there would be significant implications for existing packaging and printed paper collection services in British Columbia and for the Ministry of Environment's role in overseeing these services if the Plan, in its current form, were to be approved and implemented. Specifically, implementation of the Plan would require negotiated revisions to the existing Multi-Material BC Plan, and the creation of appropriate procedures for ministry oversight of two or more competing plans within a single product category.

It is clear to me upon review of the Plan that the ministry must undertake significant policy work to fully assess how competitive stewardship plans within a single extended producer responsibility product category should be administered, and that this work would most appropriately be undertaken prior to the approval of new competing plans. I have asked staff to initiate

such policy work immediately and can assure you that StewardChoice Enterprises Inc. will be consulted as part of this effort.

...

StewardChoice's appeal and MMBC's preliminary application

[20] On February 5, 2016, StewardChoice appealed the Director's decision. In its Notice of Appeal, StewardChoice submits that the Director made a number of errors in refusing to approve its stewardship plan. StewardChoice requests that the Board approve its plan in accordance with section 5 of the *Regulation*, or remit its plan back to the Director for reconsideration.

[21] On March 4, 2016, the Board held a pre-hearing teleconference with the parties. During that teleconference, MMBC raised the preliminary issue of jurisdiction. Consequently, the Board requested written submissions from all parties on that issue.

[22] All parties provided written submissions. In general, their submissions included arguments about the proper interpretation and application of the *Regulation*, as well as the policy implications of different interpretations. All parties provided affidavit evidence and referred to legal authorities in support of their arguments. For the purpose of providing a background to this preliminary decision, the Panel has summarized their submissions as follows. The parties' submissions are discussed in more detail later in this decision.

[23] MMBC argues that StewardChoice submitted its stewardship plan to the Ministry long after the November 19, 2012 deadline specified in section 3(a) of Schedule 5 of the *Regulation* had expired, and the deadline is mandatory under section 4 of the *Regulation*. MMBC also argues that StewardChoice is not an "agency" for the purposes of the *Regulation*. MMBC submits that the Director had no authority to consider StewardChoice's plan under section 5 of the *Regulation*, and consequently, the Board has no jurisdiction over the appeal of that decision and StewardChoice has no standing to bring the appeal. MMBC requests that the Board dismiss the appeal for lack of jurisdiction.

[24] The Director submits that he had the jurisdiction to consider StewardChoice's plan under section 5 of the *Regulation*, and the Board has jurisdiction over the appeal. The Director submits that section 3 of Schedule 5 of the *Regulation* is intended to provide a transitional period by which all producers as of the date when section 3 of Schedule 5 came into effect (i.e., May 19, 2011) had to, first, submit a stewardship plan, and second, have an approved plan. The Director submits that the legislation is silent regarding persons who do not fall within the narrow category of then-current producers. The Director maintains that StewardChoice is not bound by those timeframes because it was not a producer on the date when section 3 of Schedule 5 came into effect.

[25] StewardChoice agrees with the Director, and adopts the Director's submissions except as varied by its own submissions. StewardChoice submits that the *Regulation* does not expressly state that no new stewardship plans can be submitted after the date specified in section 3 of Schedule 5. StewardChoice maintains that it submitted its plan as an "agency" within the meaning of the

Regulation. StewardChoice further submits that the Director's decision acknowledges that its plan was a stewardship plan under section 4 of the *Regulation*. StewardChoice submits that the Director had the jurisdiction to consider its plan under section 5 of the *Regulation*, and the Board has the jurisdiction to consider the appeal.

RELEVANT LEGISLATION

[26] The relevant sections of the *Regulation* are reproduced in the body of this decision where they are referred to.

[27] Although the appeal provisions of the Act were not directly addressed in the parties' submissions, it is important to note that section 100(1) of the Act sets out the right of appeal to the Board. It states:

100 (1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.

[28] Section 99 of the Act defines the types of "decisions" that may be appealed:

99 For the purpose of this Division, "**decision**" means

- (a) making an order,
- (b) imposing a requirement,
- (c) exercising a power except a power of delegation,
- (d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,
- (e) including a requirement or a condition in an order, permit, approval or operational certificate,
- (f) determining to impose an administrative penalty, and
- (g) determining that the terms and conditions of an agreement under section 115 (4) [*administrative penalties*] have not been performed.

ISSUES

[29] Based on the parties' submissions, the Panel has framed the issues to be decided in this preliminary decision as follows:

1. Whether the Board is without jurisdiction over the appeal:
 - because the timelines in section 3 of Schedule 5 of the *Regulation* apply to StewardChoice's plan, such that the plan did not comply with section 4 of the *Regulation* and the Director had no jurisdiction to exercise his authority under section 5 of the *Regulation*; and/or
 - because StewardChoice did not submit its plan as an "agency" within the meaning of the *Regulation*.

[30] The Panel notes that none of the parties have argued that the Director's decision is not a "decision" within the meaning of section 99 of the Act. Also, none

of the parties have argued that StewardChoice is not a “person aggrieved” by the Director’s decision within the meaning of section 100 of the *Act*. Consequently, if the Panel rejects MMBC’s arguments regarding the intended meaning and application of the *Regulation*, the Panel will assume, for the purpose of deciding this preliminary matter, that the Director’s decision is an appealable “decision” under section 99 of the *Act*, and that StewardChoice is a “person aggrieved” by the Director’s decision.

DISCUSSION AND ANALYSIS

1. **Whether the Board is without jurisdiction over the appeal because the timelines in section 3 of Schedule 5 of the *Regulation* apply to StewardChoice’s plan, such that the plan did not comply with section 4 of the *Regulation* and the Director had no jurisdiction to exercise his authority under section 5 of the *Regulation*.**

The parties’ submissions

[31] MMBC refers the Panel to the general approach to statutory interpretation expressed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. [Rizzo & Rizzo Shoes], at paragraph 21; namely, that the words in a statute are to be read in context and in their grammatical and ordinary sense, keeping in mind the scheme and object of the Act and the intention of the Legislature. MMBC submits that this approach also applies to subordinate legislation such as the *Regulation*.

[32] MMBC submits that, pursuant to section 4 of the *Regulation*, any stewardship plan submitted to the Director is subject to the time requirement in the applicable schedule. MMBC submits that section 4 of the *Regulation* states:

4 A producer must submit a product stewardship plan, at the time specified in the applicable Schedule, if any...

[underlining added in MMBC’s submissions]

[33] MMBC submits that the word “must” in section 4 of the *Regulation* indicates a mandatory obligation.

[34] MMBC further submits that, in this case, Schedule 5 of the *Regulation* applies, and any stewardship plan for packaging and printed paper products must be submitted by no later than November 19, 2012 pursuant to section 3(a) of Schedule 5. Furthermore, the deadline for complying with an approved plan was May 19, 2014, pursuant to section 3(b) of Schedule 5. MMBC maintains that StewardChoice’s plan was submitted long after those deadlines had expired.

[35] In addition, MMBC argues that the Director is empowered under section 5(1) of the *Regulation* to only consider a plan that has been submitted in accordance with section 4 of the *Regulation*. MMBC notes that section 5(1) of the *Regulation* states:

5 (1) On receipt of a product stewardship plan submitted under section 4, the director may approve the plan if the director is satisfied that...

[underlining added in MMBC's submissions]

[36] MMBC argues that section 4 of the *Regulation*, together with section 3 of Schedule 5 of the *Regulation*, create a mandatory precondition for producers (or their agency) to submit a stewardship plan to the Director by November 19, 2012; StewardChoice failed to do so. MMBC submits that StewardChoice's plan was not submitted in accordance with section 4 of the *Regulation*. Consequently, StewardChoice had no standing to ask the Director to consider its plan. Furthermore, the Director's authority under section 5 of the *Regulation* is subject to the mandatory condition precedent in section 4, which was not met by StewardChoice. Therefore, the Director's decision was *ultra vires* the powers granted to him under section 5 of the *Regulation*.

[37] In addition, MMBC submits that StewardChoice had no standing to appeal the Director's decision, and the Board has no jurisdiction to grant the relief sought by StewardChoice; namely, to approve the StewardChoice plan or remit the matter back to the Director for reconsideration. MMBC maintains that the Board has no greater authority than the Director: the Board may only consider matters that are within the Director's jurisdiction, and may only make orders that the Director had the power to make.

[38] In support of those submissions, MMBC refers to an affidavit that includes several exhibits, including a June 28, 2011 letter from the Ministry's Manager, Community Waste Reduction Section, to all packaging and printed paper producers. MMBC submits that this letter confirms the November 19, 2012 and May 19, 2014 deadlines.

[39] The Director agrees that the general principles of statutory interpretation set out in *Rizzo & Rizzo Shoes* apply to the interpretation of the *Regulation*. However, the Director submits that the interpretation of the *Regulation* must take into account not only the text, context and purpose of the *Regulation* itself, but also the intent of the (parent) statute, which in this case is the *Act*. In addition, the Director submits that MMBC's interpretation of sections 4 and 5, and Schedule 5, of the *Regulation*, fails to properly take into account the text and context of those provisions.

[40] In particular, the Director submits that the requirement for a producer to have a stewardship plan is found in section 2 of the *Regulation* rather than section 4, and therefore, the mandatory language in section 4 does not require a producer to have a stewardship plan. The Director maintains that section 4 of the *Regulation* sets out a mandatory requirement that a "producer" must meet prior to having a plan approved, and the word "must" in section 4 of the *Regulation* attaches to producers, who are the object of that section. The Director submits that StewardChoice is not a "producer" as defined in section 1 of the *Regulation*. Rather, StewardChoice is an "agency", and agencies are distinguished from producers in section 2 of the *Regulation*. The Director submits, therefore, that the mandatory language in section 4 of the *Regulation* does not apply to StewardChoice.

[41] Moreover, the Director argues that section 4 of the *Regulation* refers to the applicable Schedule "if any", and those words indicates that the timelines in

Schedule 5 may not apply to all producers. The Director notes that section 3 of Schedule 5 of the *Regulation* is preceded by the heading "Transitional". The Director submits that, although headings in enactments do not alter the text of legislation, they can provide context and an indication of the legislative intention behind the enactment. In any event, the Director submits that the following language in section 3 of Schedule 5 clearly indicates an intention to provide a transitional period by which the then-current producers had to submit a plan:

Transitional

- 3** A person who, on the date this section comes into force, is a producer of a product within the packaging and printed paper product category must
- (a) submit a product stewardship plan under section 4 [submission of product stewardship plan] of this regulation on or before the date that is 18 months after the date this section comes into force, if the person continues to be a producer on this date, and ...

[underlining added in the Director's submissions]

[42] The Director submits that the intention of section 3 of Schedule 5 of the *Regulation* is to impose timeframes on persons who were producers on the date that section 3 of Schedule 5 came into force. The Director argues that the legislation is silent regarding persons who do not fall within that narrow category, and StewardChoice is not bound by those timeframes because it was not a producer on the date stipulated in section 3 of Schedule 5.

[43] Moreover, the Director submits that, if MMBC's argument was accepted, the Director would have no jurisdiction to consider any stewardship plan submitted after November 19, 2012, which would render it impossible for any new producer to submit a plan for the Director's consideration. The Director submits that this would have the effect of preventing a new producer from operating in BC, or forcing a new producer to appoint the current agency (i.e., MMBC) to undertake their obligations under Part 2 of the *Regulation*. To the contrary, the Director maintains that section 2 of the *Regulation* indicates that a producer has the option to submit a stewardship plan on its own behalf, or appoint an agency for that purpose.

[44] In addition, the Director notes that section 6.1 of the *Regulation* empowers the Director to rescind the approval of an approved plan. The Director submits that, if MMBC's interpretation was applied and the Director rescinded an approved plan that was submitted before November 19, 2012, the affected producer could neither submit a new plan on its own behalf nor appoint MMBC to fulfill their Part 2 obligations. The Director argues that such an interpretation is inconsistent with the environmental protection purpose of the *Regulation* and the *Act*.

[45] StewardChoice submits that, together, section 4 of the *Regulation* and section 3 of Schedule 5 impose a requirement on any person who was, on the date that section 3 of Schedule 5 came into force (i.e., May 19, 2011), a producer of packaging and printed paper products, to submit a stewardship plan by a specific date (i.e., November 19, 2012), and to comply with an approved plan by another date (i.e., May 19, 2014). Thus, section 3 of Schedule 5 provided for a transition to

the new regulatory scheme, so that producers who were operating on the day that Schedule 5 came into force would not be instantaneously in breach of section 2(1) of the *Regulation*. StewardChoice maintains that nothing in the *Regulation* expressly prevents a person from submitting a new plan at any time, or prevents the Director from considering such a plan.

[46] StewardChoice adopts the Director's submissions regarding the principles of statutory interpretation. StewardChoice further submits that additional principles of statutory interpretation ought to be applied, including the proposition that statutes should be interpreted in accordance with the *Interpretation Act*, and that the essential purpose of the *Act* ought to be taken into account.

[47] Specifically, StewardChoice submits that environmental legislation has a remedial purpose which ought to be taken into account when interpreting the *Regulation*. In support of that proposition, StewardChoice cites the BC Supreme Court decision in *Beazer East, Inc. v. Environmental Appeal Board et al*, 2000 BCSC 1698 [*Beazer East*], at paragraphs 56 to 57, which discussed the purposes of the *Act's* predecessor, the *Waste Management Act*. At paragraph 56, the Court stated that the "purposes of the [Waste Management] Act are the prevention of pollution and the identification and remediation of contaminated sites." StewardChoice argues that MMBC's interpretation is inconsistent with the underlying purposes and policy objectives of the *Act* and the *Regulation*, as the Director would be prevented from considering any new stewardship plans even if the stewardship of packaging and printed paper products could be improved, or the current approved plan is found to be deficient.

[48] In addition, StewardChoice submits that the *Regulation* curtails the rights of producers by prohibiting them from conducting business in BC except in accordance with an approved stewardship plan. StewardChoice argues that MMBC's interpretation would force producers to appoint MMBC in order to operate lawfully in BC. StewardChoice submits that the *Regulation's* curtailment of producers' rights ought to be construed strictly: *Norenger Development (Canada) Ltd. v. The Owners, Strata Plan NW 327*, 2016 BCCA 118, at paragraphs 59 and 60, where the Court whether section 174(7) of the *Strata Property Act* empowers a court to dispense with the need for voter approval of a resolution. At paragraph 60, the Court held that "It is a general rule of statutory interpretation that legislation which curtails rights must be strictly construed."

[49] Regarding the Director's decision letter, StewardChoice submits that although he did not expressly refer to the timing requirements in the *Regulation*, he stated that he "considered all relevant information that was presented to me, whether or not it is specifically referred to in this letter." In that regard, StewardChoice submits that MMBC provided the Director with a submission dated November 7, 2014, after reviewing the stewardship plan that was proposed by StewardChoice. In that review submission, MMBC raised the issue of timelines and compliance with the *Regulation's* deadlines for stewardship plans. In support of that submission, StewardChoice refers to an affidavit with several exhibits, including MMBC's November 7, 2014 submission to the Director.

[50] In reply, MMBC notes that the *Regulation* contains five schedules which apply to producers of different types of products. MMBC submits that Schedules 1, 3, and

4 do not specify deadlines for submitting stewardship plans, and therefore, the words "if any" in section 4 of the *Regulation* are consistent with the absence of deadlines in those schedules. In contrast, Schedules 2 and 5 do specify deadlines for submitting stewardship plans.

[51] Moreover, MMBC argues that, even if StewardChoice is characterized as an agency for the purposes of the *Regulation* (which is addressed in this decision under Issue 2), agencies must comply with the mandatory condition precedent in section 4 of the *Regulation*, just as producers must do. MMBC submits that the *Regulation* does not provide different deadlines for producers who appoint agencies to carry out their duties under Part 2 of the *Regulation*, and therefore, StewardChoice was subject to the November 19, 2012 deadline even as an agent.

[52] In reply to MMBC's submissions, the Director provided an affidavit which includes exhibits consisting of two letters exchanged between MMBC and the Minister of Environment during August and September 2012. In its letter, MMBC requested an extension of the deadlines in Schedule 5 of the *Regulation*. In response, the Minister advised that he might consider extending the legislated timelines but he needed further information about why MMBC sought the extension.

The Panel's findings

[53] The Panel has adopted the general approach to statutory interpretation that is set out in *Rizzo & Rizzo Shoes* at paragraph 21, as follows:

... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[underlining added]

[54] In addition, the Panel finds that the interpretation of the *Regulation* must take into account not only the words in their context within the *Regulation* and based on the scheme and object of the *Regulation*, but also the purposes and objects of the *Act* under which the *Regulation* is made. The Panel finds that one of the purposes of the *Act* (and its predecessor, the *Waste Management Act*) is the prevention of pollution: *Beazer East*, at paragraphs 56 to 57. However, the Board has previously held that the scheme created by the *Act* is more complex than that, as it also authorizes statutory decision-makers to permit the introduction of waste into the environment¹. As the Board stated in *Xats'ull First Nation v. Director*,

¹ For example: *Shawnigan Residents' Association et al v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-015(c), 2013-EMA-019(d) 2013-EMA-020(b), and 2013-EMA-021(b), March 20, 2015; and *Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-007(g) and 010(g), December 23, 2015.

Environmental Management Act (Decision No. 2006-EMA-006(a), May 9, 2008), at paragraph 111:

... the *Act* is not an example of a zero tolerance, or zero harm approach. Permits may be issued allowing waste into the environment The environmental impact of the waste is to be controlled, ameliorated and, where possible, eliminated.

[55] In the background to this decision, the Panel has provided an overview of the statutory scheme in the *Regulation*, and particularly, the product stewardship requirements in Part 2 of the *Regulation*. The Panel finds that the requirements in the *Regulation* for product stewardship plans that address the collection and management of recyclable products are consistent with the *Act's* purposes of preventing pollution, as well as controlling, ameliorating and, where possible, eliminating the environmental impacts of waste. Notably, subsections 5(1)(c)(vii) and (viii) of the *Regulation* require, respectively, that a stewardship plan adequately provides for "eliminating or reducing the environmental impacts of a product throughout a product's lifecycle", and "the management of the product in adherence to the order of preference in the pollution prevention hierarchy". The pollution prevention hierarchy is set out in section 5(3) of the *Regulation*.

[56] Under section 2(1) of the *Regulation*, a producer "must" have an approved plan under Part 2 of the *Regulation*. A failure to do so is an offence under section 16(a) of the *Regulation*. Thus, it is mandatory for a producer to have an approved product stewardship plan. However, the Panel finds that section 2(1) contains no reference to a timeline for doing so. It simply requires a producer of products covered by the *Regulation* to have an approved plan if they operate in BC. The statutory requirements regarding submitting a plan, the director approving (or refusing to approve) a plan, the five-year review of an approved plan, the director rescinding an approved plan, and annual reporting are found in Part 2 of the *Regulation*.

[57] Within Part 2 of the *Regulation*, section 4 states that a producer "must submit a product stewardship plan, at the time specified in the applicable Schedule, if any...". The Panel finds that the word "must" in section 4 indicates a mandatory requirement on producers to submit a product stewardship plan at the time specified in the applicable Schedule "if any". In this case, Schedule 5 of the *Regulation* applies to the packaging and printed paper product category, but the question is whether the timelines in Schedule 5 apply to all producers of those products (and their agencies). The Panel notes that, in contrast to section 2(1) of the *Regulation*, it is not an offence to contravene section 4 of the *Regulation* or any section within Schedule 5 of the *Regulation*.

[58] Three of the five schedules in the *Regulation* do not specify timelines for submitting a product stewardship plan, whereas Schedules 1 and 5 do specify such timelines. The question then becomes: what is the intended meaning of the words "if any" in section 4 of the *Regulation*, when read together with the timelines in section 3 of Schedule 5? The Panel finds that the words "if any" in section 4 of the *Regulation* are consistent with not only the absence of timelines in some of the schedules in the *Regulation*, but are also consistent with timelines that are intended to be transitional and have limited application.

[59] The Panel finds that the language in section 3 of Schedule 5 indicates an intention to provide a transitional period by which all then-current producers of packaging and printed paper products had to submit a stewardship plan and then comply with an approved plan. In particular, the Panel relies on the following language in section 3 of Schedule 5:

Transitional

- 3** A person who, on the date this section comes into force, is a producer of a product within the packaging and printed paper product category must
- (a) submit a product stewardship plan under section 4 of this regulation on or before the date that is 18 months after the date this section comes into force, if the person continues to be a producer on this date, and
 - (b) have an approved plan under Part 2 of this regulation, and comply with the approved plan, on or before the date that is 36 months after the date this section comes into force, if the person continues to be a producer on this date,

[underlining added]

[60] It is clear from the language in section 3 of Schedule 5 that the 18-month period for submitting a product stewardship plan applies to any person who was a producer as of May 19, 2011, if the person continued to be a producer at the end of the 18-month period. Similarly, any person who was a producer as of May 19, 2011 had 36 months to comply with an approved plan, if the person continued to be a producer at the end of the 36-month period. As a result, section 3 of Schedule 5 provided for a period of transition to the new regulatory requirements, so that producers who were operating on May 19, 2011 were not immediately in breach of the *Regulation*.

[61] The Panel finds that this interpretation is reinforced by the fact that section 3 of Schedule 5 of the *Regulation* is preceded by the heading "Transitional". Similarly, sections 12 and 13 of Schedule 1 of the *Regulation* (which is the other schedule that contains deadlines for submitting product stewardship plans) are also preceded by the headings "Transitional – July 1, 2011". Although headings in a statute do not alter the text of the statute, the Panel finds that these headings provide context and an indication of the legislative intention behind section 3 of Schedule 5.

[62] Moreover, the Panel has found that the purposes of the *Act* inform the product stewardship scheme created by the *Regulation*, and the Panel finds that MMBC's interpretation is inconsistent with that purpose of the *Act* and the scheme of the *Regulation*. For example, MMBC's interpretation would prevent the Director from considering any new stewardship plans submitted after November 19, 2012, even if, for example, the Director determines after the mandatory five-year review of MMBC's approved plan (under section 6 of the *Regulation*) that the MMBC plan or any amendments proposed by MMBC are inadequate under section 5 of the *Regulation*. If the Director rescinded his approval of MMBC's plan pursuant to

section 6.1 of the *Regulation*, which he may do “at any time”, MMBC’s interpretation would lead to producers of packaging and printed paper products having no approved product stewardship plan whatsoever, which is inconsistent with the objectives of pollution prevention and reducing the environmental impacts of these products, and these producers would be in breach of section 2(1) of the *Regulation*.

[63] In summary, the Panel finds that section 3 of Schedule 5 of the *Regulation* is intended to impose transitional timelines for compliance with Part 2 of the *Regulation*, and those timelines applied to persons who were producers on the date that section 3 of Schedule 5 came into force, i.e., May 19, 2011, and who remained producers on the 18-month and 36-month deadlines. Furthermore, the Panel finds that nothing in the *Regulation* expressly prevents a person who does not fit within that specific category of persons from submitting a stewardship plan after those timelines have passed, and nothing in the *Regulation* (including sections 4 and 5 of the *Regulation*) expressly prevents the Director from considering such a plan.

[64] It is clear that StewardChoice was not, and is not, a producer that is captured by the timeframes in section 3 of Schedule 5 of the *Regulation*. Moreover, there is no evidence that StewardChoice was, on May 19, 2011 or at any time in the 36-month transition period, appointed as an agency to act on behalf of a producer. StewardChoice did not submit its stewardship plan to the Director until months after the expiry of both the 18-month and 36-month deadlines that applied to producers (and their agencies) who were captured by section 3 of Schedule 5. As such, the Panel concludes that StewardChoice is not a person that falls within the specific category of persons who were subject to the timelines referred to in section 3 of Schedule 5, and section 4, of the *Regulation*.

[65] For all of these reasons, the Panel rejects MMBC’s submission that the deadlines in section 3 of Schedule 5, together with section 4, of the *Regulation* apply to StewardChoice’s plan such that the Director had no jurisdiction to exercise his statutory authority under section 5 of the *Regulation*. The Panel finds that this submission does not provide a basis for concluding that the Board is without jurisdiction over the appeal.

[66] As a final point under this Issue, the Panel will address MMBC’s arguments that the Board has no greater authority than the Director, the Board may only consider matters that are within the Director’s jurisdiction, and the Board may only make orders that the Director had the power to make. The Panel finds that this approach is inconsistent with the Board’s powers as set out in the *Act*. As the Board has noted in many previous decisions, section 102 of the *Act* provides the Board with the authority to conduct an appeal by way of a new hearing of the matter, and the Board has broad remedial powers in deciding an.

2. Whether the Board is without jurisdiction over the appeal because StewardChoice did not submit its plan as an “agency” within the meaning of the *Regulation*.

The parties' submissions

[67] In its stewardship plan, StewardChoice purports to be an agency that will carry out the duties of producers under the *Regulation*.

[68] As stated above, the Director submits that StewardChoice is an "agency" under the *Regulation*, and agencies are distinguished from producers in section 2 of the *Regulation*.

[69] In its reply submissions, MMBC argues that StewardChoice is not an "agency" because it has not yet been "appointed by a producer to carry out duties of the producer under Part 2 on behalf of the producer" pursuant to section 2(2) of the *Regulation*. MMBC submits that an agency relationship cannot exist until one party (the principal) appoints another party (the agent) to act on its behalf. MMBC maintains that StewardChoice's plan does not identify a single producer on whose behalf StewardChoice purports to act, and the *Regulation* does not contemplate the submission of plans by a person who has not been appointed as an agency to act on behalf of a producer. In support of those submissions, MMBC refers to "Halsbury's Laws of Canada" (online), *Commercial Law I (Agency)*(2015 Reissue) [*Halsbury's*], which discusses the general law of agency.

[70] MMBC also argues that the *Regulation* does not provide for the submission of a plan by a "new" agency on behalf of existing producers after November 19, 2012, and an amendment to the *Regulation* is needed if the Ministry wishes to create a window for a new agency to submit a plan on behalf of existing producers. Had multiple agencies submitted plans within the deadline, and had those plans been approved, producers would have had more than one agency to choose from.

[71] MMBC maintains that policy considerations supporting MMBC's interpretation can be found in the Director's decision letter. MMBC notes, for example, that his letter states:

I have concluded that there would be significant implications for existing packaging and printed paper collection services in British Columbia and for the Ministry of Environment's role in overseeing the services if the [StewardChoice] Plan in its current form, were to be approved and implemented. Specifically, implementation of the Plan would require negotiated revisions to the existing Multi-Material BC Plan, and the creation of appropriate procedures for ministry oversight of two or more competing plans within a single product category.

[72] MMBC submits that approving StewardChoice's plan now would undermine the objectives of the *Regulation*.

[73] In reply to MMBC's submissions, StewardChoice argues that it is an "agency" because it submitted its plan for at least one producer, London Drugs. In support of that proposition, StewardChoice provided a letter dated August 15, 2014, in which an authorized signatory for London Drugs states:

We have reviewed the Stewardship Plan posted by StewardChoice which is anticipated to be submitted to the Ministry of Environment (MoE) for approval. London Drugs is a producer as defined in Part 1 Section 1 of the British Columbia Environmental Management Act and the Recycling Regulation and

with this letter is making known its intention to appoint StewardChoice to act on its behalf in carrying out its duties under part 2 of the Recycling Regulation as soon as the StewardChoice plan is approved by the Ministry of Environment.

...

Based on this correspondence, we request that StewardChoice notify the Director of the Ministry of Environment regarding our interest to explore the option of appointing StewardChoice to carry out London Drugs obligations as required under the Environmental Management Act and the Recycling Regulation.

[74] StewardChoice submits that this letter infers that London Drugs was authorizing and instructing StewardChoice of London Drugs' interests for the purposes of approving the StewardChoice plan. StewardChoice argues that London Drugs' interest provides sufficient basis to conclude that the StewardChoice plan was submitted in accordance with section 4 of the *Regulation*.

[75] Moreover, StewardChoice argues that, to the extent that it submitted a stewardship plan that would be adopted by a producer after approval, it is in the same position that MMBC was in 2012. In that regard, StewardChoice refers to Appendix B of MMBC's stewardship plan dated November 19, 2012, which states at page 27:

A total of 215 producers have signed letters of intent with MMBC as of submission of the PPP Stewardship Plan. ... these companies have indicated that they intend to join the MMBC PPP Stewardship Plan once it is approved.

...

... Recruitment efforts will continue past the stewardship plan submission date.

[76] In its final reply, MMBC argues that StewardChoice is not in the same position that MMBC was in 2012 when it submitted its stewardship plan to the Ministry. MMBC submits that numerous producers had selected it to act on their behalf as an agency, as indicated by the language in MMBC's stewardship plan dated November 19, 2012. MMBC argues that, in contrast, there is no indication on the face of StewardChoice's plan that any producer had selected StewardChoice to act as its agency. MMBC also submits that the language in the August 15, 2014 letter from London Drugs does not support the proposition that StewardChoice has been appointed to act as London Drugs' agency for the purposes of Part 2 of the *Regulation*.

The Panel's findings

[77] Although MMBC raises arguments about the potential implications of approving StewardChoice's plan, and whether doing so would undermine the objectives of the *Regulation*, the question presently before the Panel is not whether StewardChoice's plan should be approved. The Panel will make no findings in this preliminary decision regarding the merits of StewardChoice's plan, as that would properly be decided following a hearing on the merits of the appeal.

[78] The Panel has reviewed the sections of the *Regulation* that address agencies. Section 2 of the *Regulation* contemplates that producers may appoint an agency to carry out their duties under Part 2 of the *Regulation*. Under section 1 of the *Regulation*, “agency” is defined to mean “a corporation appointed by a producer to act as an agent on behalf of the producer”. Based on that definition, the Panel finds that the phrases “appointed by a producer” “to act as an agent” on the producer’s behalf are key to this definition of “agency”. In terms of what constitutes being “appointed” and “acting as an agent” in the context of the *Regulation*, the Panel has considered the use of the words “agency” and “appointed” in sections 2(2) through (5) of the *Regulation*, which address agencies. Those sections state:

- 2 (2) If a producer appoints an agency to carry out duties of the producer under Part 2 on behalf of the producer, the producer, before the agency begins to carry out those duties, must notify the agency in writing of the appointment, specifying the duties under Part 2 that the agency will perform on behalf of the producer.
- (3) Before an agency begins to carry out duties on behalf of a producer, the agency must
 - (a) confirm in writing to a director the duties under Part 2 that the agency will perform on behalf of each producer that has joined the agency, and
 - (b) comply with Part 2 in respect of the duties referred to in paragraph (a).
- (4) On the request of a director, an agency must provide the director with either or both of the following:
 - (a) a list of producers the agency currently represents;
 - (b) a copy of any notification the agency received under subsection (2).
- (5) An agency appointed by a producer under subsection (2) must, as soon as practicable, notify the producer of the following:
 - (a) any written notices, or written reasons provided under section 7, sent by a director to the agency alleging non-compliance with one or more requirements of this regulation;

[underlining added]

[79] Regarding the reference in subsection 2(5)(a) of the *Regulation* to “written reasons provided under section 7”, the Panel notes that section 7(a) requires a director to provide written reasons to a producer whenever a product stewardship plan is not approved under section 5.

[80] Sections 2(2) and (3) of the *Regulation* set out certain requirements that must be met “before an agency begins to carry out duties on behalf of a producer” under Part 2. The Panel finds that those requirements are preconditions to the agency carrying out those Part 2 duties, but are not preconditions to being appointed as an “agency” for the purposes of the *Regulation*.

[81] Specifically, under section 2(2) of the *Regulation*, a producer must notify the agency in writing of its appointment, specifying the duties to be performed under

Part 2, “before the agency begins to carry out those duties”. However, this requirement is only triggered “If a producer appoints an agency to carry out duties of the producer under Part 2...” This language indicates that the notice requirement in section 2(2) is triggered once a producer appoints an agency. The notice requirement is a precondition to the agency carrying out the producer’s duties under Part 2, but is not a precondition to appointing an agency. Section 2(2) of the *Regulation* does not specify how a producer may go about appointing an agency.

[82] Under section 2(3) of the *Regulation*, before the agency can carry out the duties under Part 2, the agency must confirm to a director the duties that the agency will perform on behalf of each producer, and must comply with Part 2 in respect of those duties. Again, this notice requirement is triggered once a producer appoints an agency, and is a precondition to an agency acting under Part 2, but is not a precondition to appointing an agency. Section 2(3) of the *Regulation* does not specify how a producer may go about appointing an agency.

[83] The Panel also finds that the requirement in section 2(4)(a) of the *Regulation* to provide the Director with a list of producers that the agency represents is only triggered “on the request of a director”. An agency is not automatically required to provide such a list. Thus, the fact that StewardChoice’s stewardship plan did not contain such a list is not decisive of whether StewardChoice was acting as an agency when it submitted its plan.

[84] The Panel also notes that section 2(5)(a) of the *Regulation* requires “an agency appointed under subsection (2)” to notify that producer of a director’s written reasons for not approving a stewardship plan that has been submitted under section 4 of the *Regulation*. The Panel finds that this confirms that, if a producer appoints an agency to submit a plan on the producer’s behalf (under Part 2), that appointment occurs before the stewardship plan is submitted for approval. However, section 2(5)(a) is silent on how a producer goes about appointing an agency.

[85] In summary, the Panel finds that the *Regulation* does not expressly address the process for, or requirements of, being “appointed” as an agency. Thus, the Panel has considered the common meaning of “agent” and “appointed”. MMBC refers to *Halsbury’s*, which describes the three essential elements of an agency relationship as follows:

1. The consent of both the principal and the agent.
2. Authority given to the agent by the principal, allowing the former to affect the latter’s legal position.
3. The principal’s control of the agent’s actions.

[86] *Halsbury’s* also states:

An agency relationship may be created by an express or implied agreement. It appears that in addition to being either express or implied from conduct or the situation of the parties, the agreement creating the agency may be contractual or not. The relationship may also be constituted retrospectively, by subsequent ratification by the principal of acts done on his or her behalf.

[87] To determine whether StewardChoice has been “appointed” by a producer to act as an “agent” on behalf of the producer for the purposes of the *Regulation*, the Panel has considered the language in the August 15, 2014 letter from London Drugs.

[88] London Drugs’ letter states that “London Drugs is a producer as defined in” the *Regulation*. Indeed, London Drugs is listed as a producer in Appendix D of MMBC’s approved plan. The Panel finds that, on the face of the documents before the Panel, London Drugs is a “producer” within the meaning of the *Regulation*, and as such, has the capacity to appoint an agency to carry out its duties under Part 2 of the *Regulation*.

[89] London Drugs’ letter also states that London Drugs has reviewed StewardChoice’s plan that was submitted to the Director, “and with this letter is making known its intention to appoint StewardChoice to act on its behalf in carrying out its duties under part 2 of the Recycling Regulation as soon as the StewardChoice plan is approved...” London Drugs also addresses the requirement of section 2(2) of the *Regulation*, by asking StewardChoice to “notify the Director ... regarding our interest to explore the option of appointing StewardChoice to carry out London Drugs obligations as required under ...” the *Regulation*.

[90] The Panel finds that, although London Drugs’ letter uses the words “intention to appoint” rather than “appoints” or “is appointed”, an agency relationship need not be formed by a contractual agreement. An agency may be implied from the parties’ actions, and may be constituted retrospectively by subsequent ratification by the principal of acts done on his or her behalf. The Panel finds that London Drugs’ use of the words “intention to appoint” recognizes that MMBC currently acts as London Drugs’ agency for the purposes of Part 2 of the *Regulation*, but confirms that London Drugs will appoint StewardChoice (instead of MMBC) once StewardChoice’s plan is approved. This indicates a course of action that implies an agency relationship which will be formed retrospectively, once the StewardChoice plan is approved. Thus, the Panel finds that, to the extent that StewardChoice submitted a plan that would be adopted by at least one producer (London Drugs) upon approval of the plan, it had been appointed to act as an agent for a producer.

[91] Moreover, the Panel finds that StewardChoice appears to be in the same position that MMBC was in when MMBC submitted its plan for approval, given that MMBC’s plan dated November 19, 2012 states that numerous producers had signed “letters of intent with MMBC” as of that date, and that those producers “indicated that they intend to join the MMBC PPP Stewardship Plan once it is approved.”

[92] For all of these reasons, the Panel concludes that StewardChoice was “appointed by a producer to act as an agent on behalf of the producer” within the meaning of the *Regulation* when it submitted its plan to the Director for approval. Consequently, the Panel rejects MMBC’s argument that StewardChoice was not acting as an agency and that the Board is without jurisdiction over the appeal.

DECISION

[93] In making this decision, the Panel has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

[94] For the reasons provided above, the Panel finds that the application to dismiss the appeal for lack of jurisdiction is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

May 2, 2016