



Environmental Appeal Board

Citation: 0739024 BC Ltd. Regional Recycling Burnaby et al v. Assistant Deputy Minister, Ministry of Environment and Climate Change Strategy, 2026 BCEAB 44

Appeal Nos.: EAB-EMA-24-A017, EAB-EMA-24-A018, EAB-EMA-24-A019, EAB-EMA-24-A020

Decision Date: 2026-10-20

Method of Hearing: Conducted by way of written submissions concluding on May 28, 2026

Decision Type: Preliminary Decision on Document Production

Panel: Darrell Le Houillier, Chair

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

Between:

0739024 BC Ltd. Regional Recycling Burnaby, 534337 South Van Bottle Depot (Zim's) Ltd.,
524216 BC Ltd. Walnut Grove Bottle Depot, 0871499 BC Ltd. Regional Recycling Whistler

Appellants

And:

Assistant Deputy Minister, Ministry of Environment and Climate Change Strategy

Respondent

And:

Encorp Pacific (Canada)

Third Party

Appearing on Behalf of the Parties:

For the Appellants: Alanna Crouse and Monique Pongracic-Speier, Counsel

For the Respondent: Chris Rolfe and Brian Blunt, Counsel

For the Third Party: Tracey M. Cohen, Counsel

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INTRODUCTION

[1] This is a preliminary decision stemming from the Appellants' request that the Environmental Appeal Board (the "Board") order the other parties to this appeal each produce documents with respect to this appeal, which was filed under section 100(1) of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "EMA").

[2] In this appeal, the Respondent is the Assistant Deputy Minister, Ministry of Environment and Climate Change Strategy (the "Respondent") and the Third Party is Encorp Pacific (Canada) ("Encorp").

BACKGROUND

Recycling in British Columbia

[3] 0739024 BC Ltd., Regional Recycling Burnaby, BC0593405 South Van Bottle Depot (Zim's) Ltd., 524216 BC Ltd., Walnut Grove Bottle Depot, and 0871499 BC Ltd. Regional Recycling Whistler (collectively, the "Appellants") operate recycling depots in British Columbia.

[4] Recycling in British Columbia is regulated, in part, by the *EMA's Recycling Regulation*, B.C. Reg. 449/2004 (the "*Regulation*"). The producers of certain goods that are subject to the *Regulation*, such as ready-to-drink beverages, must provide extended producer responsibility plans ("Plans") to the Ministry of Environment and Climate Change Strategy (the "Ministry") for approval. Plans describe how containers and/or packaging are to be collected and managed for recycling.

[5] Producers subject to the *Regulation* have the option of designating a representative to provide Plans on their behalf (a "Representative"). Encorp is a non-profit corporation which serves as a representative for various producers of packaged, ready-to-drink beverages, who must submit Plans under the *Regulation*. It has described this program as the "Return-It" program. This program is run based on the terms of Encorp's Plan, the Beverage Container Stewardship Plan (the "Beverage Plan"). The Beverage Plan has been approved since July 19, 2007, and it addresses the recycling of beverage containers in British Columbia on behalf of a large number of producers, principally through recyclable container drop-off at recycling depots ("Return-It Depots").

[6] Not all recycling depots in British Columbia are necessarily Return-It Depots. A recycling depot may contract with Encorp to become a Return-It Depot, with Encorp requiring certain terms and operating standards of the Return-It Depots and offering

territorial exclusivity within the Return-It program. Return-It Depots may also contract with other Representatives, which are responsible for managing Plans filed on behalf of other producers in British Columbia (those not represented by Encorp, most notably producers of alcoholic beverage containers), but not all do.

Encorp's Beverage Plan

[7] The Beverage Plan, which was approved in 2007, is extensive and does not need to be described in full detail in this preliminary decision. Of relevance here, the Beverage Plan describes that recyclable containers covered under the Beverage Plan ("Encorp Containers") may be provided to Return-It Depots by members of the public. In return, the Return-It Depot pays a recycling refund based on the specific type and number of Encorp Containers given to the Return-It Depot. The Return-It Depot then provides the collected Encorp Containers to Encorp, which is responsible for their recycling.

[8] Encorp is required, as a Representative of producers under the *Regulation*, to reimburse the Return-It Depots for the costs associated with collecting and managing the Encorp Containers the Return-It Depots provide to Encorp. These costs are reimbursed in the form of variable fees that Encorp pays to the Return-It Depots (the "Handling Fees"). Handling Fees vary based on the Encorp Container and are adjusted in reviews which occur every five years or when required ("Handling Fee Reviews"), following consultation with stakeholders (including Return-It Depots) and a review of studies on recycling costs. Handling Fee Reviews are established in section 9 of the Beverage Plan ("Section 9").

[9] Historically, there had been a dispute, between Encorp and one or more Return-It Depots that processed a relatively small number of Encorp Containers per year, as to the appropriateness of the Handling Fees to cover the depots' associated costs. The matter proceeded to arbitration as set out in the Beverage Plan, and Encorp began paying a "presence grant" to Return-It Depots processing fewer than 1.5 million Encorp Containers per year (the "Small-Volume Depots"). The presence grant was to account for circumstances where the costs of collecting and managing Encorp Containers do not scale proportionately to the quantity of Encorp Containers received, and so the revenue available for the Small-Volume Depots is insufficient to cover the costs of collecting and managing Encorp Containers (as required under the *Regulation*) without the presence grant. This grant has historically been adjusted to account for inflation.

[10] Encorp also pays an additional handling fee per Encorp Container collected through a voluntary, express, in-depot container drop-off program (the "Express Program"). Under the Express Program, customers drop off unsorted bags of containers, which are then sorted by staff of the relevant participating Return-It Depot. The customer receives a credit to an account to reflect the recycling deposits they are owed. Under the Express Program, more revenues are generated when compared with standard collection of Encorp Containers, but approximately a third of the containers submitted in the Express Program are not Encorp Containers. This means participating Return-It Depots may incur

additional sorting, storage, and equipment costs, and they may be required to handle recyclable containers which are the responsibility of other producers or their Representatives, with whom any given depot may or may not have a contractual relationship.

[11] The Beverage Plan is amended from time to time. The latest version (before the decision under appeal was issued) was approved on September 1, 2021. Section 9 of this version of the Beverage Plan describes five “key elements” the Handling Fee Reviews:

- The Handling Fee Reviews feature a series of meetings over 12 – 14 months between Encorp and all Return-It Depots.
- Encorp collects and distributes information to Return-It Depots on factors that influence costs, such as local inflation rates, changes to minimum wage, feeds paid in other provinces, and occupancy costs. These are discussed in the meetings, in which Return-It Depots may advance for consideration any other metrics they think are relevant.
- Encorp contracts an independent consultant (the “Consultant”) to study the average costs for Return-It Depots to meet the program requirements. The Consultant reviews financial, labour, and space costs for a representative sample of Return-It Depots that it selects (the “Sample Depots”). The Consultant then allocates the revenues and costs between Encorp’s recycling program and any other programs operating within the Sample Depots.
- The Consultant collects relevant data from Sample Depots, carries out site visits, and interviews employees of Sample Depots. The Consultant then assesses the profitability of the Encorp Container program in an “average” Return-It Depot. The Consultant assesses the relative profit generated by Encorp’s program as compared with any other revenue-generating activity of the Return-It Depots. The Consultant shares the information and results with all participants and responds to questions from Return-It Depots.
- At the end of the process, Encorp makes “an offer” to Return-It Depots, to set the revised Handling Fees.

The 2021 Handling Fee Review

[12] Under the Beverage Plan, Encorp was required to conduct a Handling Fee Review in 2021, which was to inform Handling Fees payable to Return-It Depots starting in 2022.

[13] This involved Encorp holding a series of consultations, to which all Return-It Depots were invited. These consultations included presentations by Encorp and the Consultant (for the 2021 Handling Fee Review, accounting firm KPMG) on the methodology used in, the data used in, and the results calculated from, the Handling Fee Review. Of note in these presentations:

- Encorp did not present information on fees paid to recycling depots in other provinces, although the Beverage Plan required Encorp to do so;
- KPMG was not available and did not respond to all inquiries from Return-It Depots (only being available for questions from Sample Depots), despite the Beverage Plan requiring any Consultant to do so;
- KPMG reported that it selected the Sample Depots based on the volume of Encorp Containers each processed and on its geographic location in the province, in an attempt to select a representative sample of Return-It Depots;
- Encorp completed analyses for the Handling Fee Review, such as estimated changes in revenue based on population growth and an expanding scope of the Beverage Plan, projected increases of the Handling Fee, estimated increases in costs based on its assessment of labour and occupancy costs as well as based on the forecasted Consumer Price Index, and handling fees paid by other Representatives to recycling depots in British Columbia; and
- at least one Return-It Depot expressed a concern that there was a profit differential which favoured “higher end Depots” over Small Volume Depots, the latter of which “do not show profits.” Encorp’s reply was that if a Return-It Depot believes it is not doing well financially, it “should have participated in the study and should have been looked at.” Encorp made clear that not all Return-It Depots “may not get the ... overall profit,” in setting the Handling Fee, Encorp is “only looking at the average.”¹

[14] During this consultation, Encorp also engaged another professional services firm, Propel Solutions (“Propel”), to perform a time and motion study aimed at validating efficiencies and cost savings that could be gained with a proposed new sorting procedure: simplified sorts. The procedure was tested in pilot programs at select Return-It Depots in 2021 and the results suggested this would result in cost savings and improved efficiencies. Encorp factored these projected cost savings and efficiencies into the Handling Fees calculated in the 2021 Handling Fee Review. Encorp noted this Handling Fee supported an increased profit margin that exceeded some unspecified standards outlined by Statistics Canada.

[15] As part of this process, both KPMG and Propel drafted studies, collectively referred to as the “Financial Studies.”

The Beverage Plan Five-Year Review and Requested Amendments

[16] Section 6 of the *Regulation* requires that a producer subject to the *Regulation*, or its Representative, must review its Plan every five years and either propose amendments to it

¹ See Encorp’s Section 9 consultation summary dated February 25, 2022, page 75.

or advise the Ministry, in writing, that no amendments are needed. Because the Beverage Plan had been in place since July 19, 2007, section 6 of the *Regulation* required that Encorp propose amendments to the Plan to the Ministry by July 19, 2022, or advise in writing that no amendments were necessary.

[17] After the September 1, 2021, version of the Beverage Plan was approved, Encorp contemplated submitting an additional request for amendment of Section 9 and invited all Return-It Depots to engage on the issue.

[18] On December 21, 2021, Encorp submitted a proposed amendment to Section 9 (the “2021 Amendment Proposal”). Not all elements of the requested amendment are relevant for the purposes of this preliminary decision. The relevant changes from the August 30, 2021, version of Section 9 then in force were:

- where the process followed in the 2021 Handling Fee Review deviated from that which was described in the Beverage Plan, the process followed in the 2021 Handling Fee Review was to be the appropriate process for Handling Fee Reviews going forward;
- In meetings with Return-It Depots, Encorp will not provide information on fees paid to recycling depots in other jurisdictions; and
- the term “negotiation” was replaced with “process.”

[19] On May 17, 2022, Roberto Melfi, an Environmental Management Specialist in the Ministry’s Extended Product Responsibility Section (the “EPR Section”), wrote Encorp in response to the 2021 Amendment Proposal. He was concerned about the adequacy of stakeholder consultation during the 2021 Handling Fee Review, specifically with respect to all depots having enough time to review materials and provide feedback, having information that was sufficiently transparent to allow Return-It Depots to determine the implications to their interests and provide feedback, as well as having the opportunity to ask questions and make comments and to receive thorough answers.

[20] Mr. Melfi was also concerned about the 2021 Handling Fee Review process, insofar as only Sample Depots could ask questions and/or provide feedback and limitations on the scope of KPMG’s engagement were not made clear to all depots. Mr. Melfi queried whether the KPMG study adequately represented the geographic diversity of Return-It Depots and whether Encorp had sufficiently addressed barriers to participation, given the low number of Sample Depots. Mr. Melfi also expressed concern that Encorp may not be paying complete and prompt compensation to Return-It Depots for their handling of Encorp Containers.

[21] On June 21, 2022, Encorp submitted a revised Section 9 amendment proposal (the “June 2022 Amendment Proposal”) for consideration. In support of this proposal, Encorp provided a consultation report. Page 26 of this report documents a comment made by a representative of Encorp to Return-It Depots, describing the Handling Fee Review process set out in the June 2022 Amendment Proposal: “What is different is the amount of detail

that has been laid out in this new document. Nothing has changed in the way that Encorp is setting the methodology.”

[22] The key changes in the June 2022 Amendment Proposal, when compared to the approved Beverage Plan at that time, were:

- in the first phase of the Handling Fee Review, Encorp is to provide the Consultant with anonymized information from the previous five years, on container volumes processed by, Handling Fees and other payments provided to, and financial forecasts for, Return-It Depots, as well as receiving information from the Consultant on economic indicators and independent studies; and
- in meetings between Encorp and the Return-It Depots, Encorp is to discuss operating standards required by Encorp and allows Return-It Depots to provide feedback on these standards, for consideration of adjustments to those standards;
- Small Volume Depots are ineligible to become Sample Depots because they receive a presence grant from Encorp;
- the consultant is to select five of the Sample Depots for completion of a questionnaire which is provided to all Sample Depots for comment in advance, the results of which are later to be verified against financial documents, to be used in the consultant’s analysis;
- reasonable profit margins are to be assessed assuming depots of average efficiency, which considers the volume of Encorp Containers processed per year, which do not require subsidization for other business activities, and which meet operational standards and procedures; and
- a dispute resolution process allows either Encorp or a Return-It Depot to file a notice of dispute, which requires both parties to negotiate and, failing negotiation, mediation and, failing mediation, to arbitrate.

[23] On November 24, 2022, Encorp submitted a proposed amendment of Section 9 to the Ministry (the “November 2022 Amendment Proposal”). This iteration was similar to the June 2022 Amendment Proposal, with additional detail provided about several steps in the Handling Fee Review process. This iteration also contained several key differences:

- the concept of an “efficient depot,” which is the benchmark by which a “reasonable profit margin” is to be realized in a Handling Fee Review, and which is defined as a depot “meeting operating procedures in a manner representative of the average depot operator;”²

² Page 2 of the November 2022 Amendment Proposal.

- the consultations at the start of the Handling Fee Review process are described in greater detail, with Encorp to provide information on the process and the consultant to present the data, assumptions, and results of the previous Handling Fee Review to Return-It Depots; and
- presence grants will be reviewed at least once every five years.

[24] On March 31, 2023, Bob McDonald, the Director of the EPR Section, wrote to the Third Party in response to the November 2022 Amendment Proposal and requested additional information. He advised he was considering making some amendments to the plan and provided Encorp a chance to comment.

[25] Mr. McDonald's main concerns related to whether:

- the use of an average depot in Handling Fee Reviews was sufficient to ensure that all Return-It Depots, especially Small Volume Depots, were reimbursed for their collection and management of Encorp Containers; and
- the Express Program's costs were adequately assessed and compensated for.

[26] The amendments Mr. McDonald was contemplating were to require Encorp to provide additional information to the EPR Section on a one-time basis, define "other material change to depot operations" as a trigger for Handling Fee Reviews, clarify elements of the November 2022 Amendment Proposal around stakeholder engagement during Handling Fee Reviews, disaggregate the average depot used in revenue assessment and forecasting in Handling Fee Reviews, review the sufficiency of the presence grant every five years, and review costs associated with the Express Program alongside Handling Fee Reviews.

[27] On May 12, 2023, Encorp responded to Mr. McDonald's letter and disagreed with the need for further consultations or fiscal studies. Encorp argued against disaggregating data, saying it may undermine the reliability of the data, lead to continuing disaggregation, disincentivize the processing of larger volumes of Encorp Containers, and over-emphasize the importance of Handling Fees to the viability of a Return-It Depot.

[28] With respect to express sorting, Encorp argued that variable baselines of service in different Return-It Depots mean the Express Program does not uniformly increase costs. It is a voluntary program that no Return-It Depots have discontinued, so must be profitable. Furthermore, Encorp paying costs associated with collecting and managing containers on behalf of other Representatives is not supported by *EMA* or the *Regulation*.

[29] Encorp was also concerned about defining "material change to depot operations," for fear of losing some of the flexibility it was aimed to provide, although it provided some additional discussion about circumstances in which the term was intended to be applied.

[30] On June 26, 2023, Mr. Melfi prepared an Information Note for the Respondent. Mr. Melfi discussed several areas of concern that had arisen since the 2021 Amendment Proposal.

[31] Mr. Melfi noted that Encorp had agreed to include Small Volume Depots in subsequent Handling Fee Reviews and to adjust the presence grant and index it to match inflation. Mr. Melfi commended Encorp for these steps but recommended amending Section 9 to require Encorp to undertake a presence grant review in 2023 and at least once every five years thereafter, to ensure the presence grant adequately compensates Small Volume Depots for their collection and handling of Encorp Containers.

[32] Mr. Melfi stated there was not enough information to conclude the sorting fee provided in respect of Encorp Containers received through the Express Program was sufficient. Furthermore, Return-It Depots were left with costs associated with collecting and managing containers that fall within the Plans of other producers or their Representatives, for a collection process instigated by Encorp. Mr. Melfi noted Encorp was working with other Representatives on this issue and recommended the Beverage Plan be amended to require Encorp to demonstrate, within four months, the sufficiency of the fee it provides for the Express Program. Furthermore, Mr. Melfi recommended that Encorp be required to address, within nine months, the fact that Return-It Depots were receiving containers under other Representatives' Plans in the Express Program initiated and supported by Encorp.

[33] Mr. Melfi also recommended a more explicit statement of the Handling Fee Review process in the Beverage Plan.

[34] Mr. Melfi considered the use of an average depot in the Handling Fee Review to be appropriate, given the inclusion of different tiers of depot volume and different geographical locations in the selection process for Sample Depots, that Small Volume Depots remained open for business and therefore must be financially viable, and that the Handling Fees are set to provide a profit margin, not just reimbursement of the costs associated with receiving and managing Encorp Containers.

[35] Mr. Melfi was also satisfied that Encorp had completed the required consultations on not seeking to amend the Beverage Plan, other than Section 9, as part of its five-year review.

[36] On July 18, 2023, the Respondent issued a letter approving the November 2022 Amendment Proposal (the "Decision"). In the Decision, the Respondent also made the additional amendments recommended by Mr. Melfi. The Respondent also required Encorp to provide the Ministry with the outcome of the Consultant's review of "Encorp's Section 9 Producer Paying the Cost of Obligated Materials and Dispute Resolution Process." The Respondent further clarified "other material change" means, for the purposes of triggering a Handling Fee Review, a reasonable expectation that all depots be reasonably expected to experience a change in profitability of at least 10%.

The Appeal

[37] The Appellants appealed the Decision on July 18, 2023. The grounds of appeal being advanced by the Appellants are:

- Encorp did not consult as required by section 5(1)(b) of the *Regulation*³;
- the Section 9 amendment does not satisfy the requirement in section 5(1)(c)(i) of the *Regulation* that Encorp pay the program costs because its methodology for determining Handling Fees was flawed⁴; and
- the Section 9 amendment does not establish adequate dispute resolution procedures as required in section 5(1)(c)(vi) of the *Regulation*.⁵

[38] With respect to the second ground of appeal, the Appellants argue specifically that Section 9, as amended in the Decision:

- does not sufficiently set out the parameters or the weight given to them in the financial model or in the analyses performed in the Financial Studies;
- does not adequately describe selection criteria with respect to the cost study sample size;
- sets Handling Fees based on financial data from the “average depot” which is not adequately defined or representative of the Appellants, and projects revenues for an “average efficient depot” with a “reasonable return,” without defining either term; and
- does not include sufficient protections for recycling depots participating in the cost study.

Document Production Requests and Application

[39] On September 7, 2023, and again on August 8, 2025, the Appellants sought voluntary production of documents from Encorp. Encorp refused to voluntarily produce the requested documents.

³ Section 5(1)(b) requires a producer to undertake “satisfactory consultation with interested parties and the public” before submitting a Plan for approval and must provide “opportunity for input from interested parties and the public” in the implementation and operation of the program outlined in the Plan.

⁴ Section 5(1)(c)(i) requires a Plan to adequately provide for the producer paying the costs of collecting and managing products covered by the Plan.

⁵ Section 5(1)(c)(vi) requires a Plan to provide for a dispute resolution procedure to settle disputes arising between a producer and a person providing services related to the collection and management of containers covered by that Plan.

[40] Also on September 7, 2023, the Appellants sought documents forming the record of decision from the Respondent. The Respondent provided documents but, on Encorp's request, refused to provide four documents. On March 24, 2026, the Respondent provided a supplemental list of six documents which were communications between the Respondent and Encorp, all of which the Respondent refused to voluntarily produce at the request of Encorp

[41] On February 27, 2026, the Appellants asked the Board to order Encorp to produce documents and, after discovering redactions to certain documents that had been produced, amended that application on April 1, 2026. The parties provided submissions in response. The Appellants seek the following documents (the "Withheld Documents") with respect to the Financial Studies:

- the instructions provided to the authors;
- any and all documents relied upon by the authors in forming their opinion;
- any written statement of facts upon which the Financial Studies are based;
- any records of independent observations made by the authors in relation to the Financial Studies;
- any data compiled by the authors of the Financial Studies in relation to the Financial Studies;
- the results of any tests or inspections conducted by and relied upon by the authors in forming their opinions; and
- the authors' working files, including any draft versions of the Financial Studies.

[42] The Appellants also seek unredacted copies of the following redacted documents from the Respondent, as numbered in the Respondent's list of supplemental documents dated March 22, 2026: numbered 12, 16, 18, 22, 22.1, 25, 27, 27.1, 27.2, 28, 28.1, and 29 (the "Redacted Documents").

ISSUE

[43] The issue to be addressed in this preliminary decision is whether the Board should order Encorp to produce the Withheld Documents, the Respondent to produce the Redacted Documents, or both.

LEGAL BASIS

[44] Section 93.1 of the *EMA* imports certain sections of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA"), for the purposes of appeals before the Board. Among the sections imported is section 34(1)(b), which allows the Board to order production of

documents which are relevant to and admissible in an appeal before the Board, and which are in the care or control of the person who is to be ordered to produce the documents.

POSITIONS OF THE PARTIES

The Appellants' Submissions

[45] The Appellants note the Board has previously stated, in *Seaspan ULC and Domtar Inc. v. Director, Environmental Management Act*, 2013 BCEAB 11 (CanLII) ("*Seaspan*"), at para. 56:

... pre-hearing access to relevant documents is required to ensure that the parties can properly prepare, and effectively argue, their respective cases to the Board. The parties must be able to ascertain the facts (both favourable and unfavourable) in order to properly understand and assess their cases, evaluate the possibility of a settlement, and, if necessary, prepare their cases for a hearing.

[46] Referencing *Richmond Steel Recycling Ltd. v. Director, Environmental Management Act*, 2023 BCEAB 2 (CanLII) ("*Richmond Steel*"), at para. 55, the Appellants say the test for relevance is what is "reasonable to suppose" is "capable of proving or disproving a material fact in issue or shedding light on a disputed matter, based on the grounds of appeal." The Appellants say this should include information not initially before the decision maker, as hearings before the Board are generally new hearings, barring an application to the contrary.⁶ The Appellants argue this is the default mode of appeal.⁷

[47] The Appellants say the Financial Studies are plainly relevant to the Decision and therefore *prima facie* relevant to a central issue in the appeal: whether the amended Section 9 pays the costs of its recycling program as required by section 5(1)(c)(i) of the *Regulation*. That these documents were relevant to the Decision is established by the fact that Encorp's submission of the amended Section 9 were contingent on completion of the Financial Studies and both pertained to and referenced information from those studies. The Financial Studies also pertained to the Handling Fee review and associated procedure.

[48] Additionally, the Appellants say the Financial Studies were discussed repeatedly in communications between the Ministry and Third Party about the Section 9 amendment. The Respondent explained that it was concerned that Section 9 did not comply with the requirements of section 5(1)(c)(i) of the *Regulation*.

⁶ Page 25 of the Board's *Practice and Procedure Manual*.

⁷ *Imperial Oil Limited v. Regional Waste Manager*, 2004 BCEAB 5 (CanLII) and *Mount Polley Mining Corporation v. Director, Environmental Management Act*, 2021 BCEAB 20 (CanLII).

[49] The Appellants argue the Withheld Documents they seek will allow them to assess the reliability of the Financial Studies and other materials prepared about the Financial Studies, including the provided summaries. A review of the Withheld Documents may reveal concerns about the Financial Studies that were unknown to the Respondent.

[50] With respect to the Redacted Documents, the Appellants argue the Respondent conceded they may be relevant.

[51] The Appellants also references *Seaspan*, at para. 58–62, that “possession or control” is satisfied where someone “is reasonably likely to be able to supply the information.” The Appellants say Encorp has possession and control over the Withheld Documents.

[52] Referencing *Richmond Steel*, at para. 55, the Appellants argue that documents are admissible before the Board unless they are subject to a recognized form of privilege and therefore cannot be admitted as evidence by the Board under section 40 of the ATA. The Appellants argue that there is no suggestion the Withheld Documents are privileged and therefore inadmissible.

Encorp’s Submissions

[53] Encorp argues the Withheld Documents are irrelevant, as a more detailed description of the Handling Fee Review methodology had already been approved. The Financial Studies were conducted by third parties applying that approved methodology. Encorp says the Decision does not rely on the Financial Studies nor did it discuss them: the different versions of Section 9 discuss the methodology, which the Financial Studies followed but did not dictate or assess.

[54] Encorp adds that some of the Withheld Documents—including confidential information of other depot operators—were intentionally never provided to Encorp and so are not within Encorp’s possession or control. Specifically, Encorp did not have, in its possession, care, or control, the following of the Withheld Documents, as they were kept confidential by the authors of the Financial Studies and are not, and never were, accessible by Encorp:

- any data compiled by the authors of the Financial Studies in relation to the Financial Studies;
- the results of any tests or inspections conducted by and relied upon by the authors in forming their opinions; and
- the authors’ working files, including any draft versions of the Financial Studies.

[55] Encorp says the Appellants failed to articulate a coherent basis to establish the relevance of the Withheld Documents and the Redacted Documents. This, Encorp says, signals the request is nothing more than a “fishing expedition.” Referencing para. 47 of *Richmond Steel*, Encorp says such a request is to be avoided and documents disclosed may need to be redacted to conform with “privacy legislation.”

[56] Encorp says the Board's role is to determine whether the amended form of Section 9 accepted in the Decision adequately provides for Encorp paying for the collection and management of products covered in the Beverage Plan. The implementation of a previously approved methodology is not at issue, nor should the Board investigate all underlying information which went into the Financial Studies and gauge whether they are correct or provide for "fair" compensation for the Appellants.

[57] Turning to the grounds of appeal articulated by the Appellants, Encorp argues those grounds—the alleged inadequacy of consultation leading up to the Decision, the allegedly flawed methodology in calculating Handling Fees, and the alleged inadequacy of a dispute resolution procedure in the Beverage Plan—are unconnected to the Financial Studies.

[58] Encorp says the Board should be cautious in ordering documents to be produced, saying these orders are "not made as a matter of course," referencing *Richmond Steel*, at para. 54. In this case, Encorp argues the scope of information sought is incredibly broad and would be onerous to obtain, as it includes internal workings, assumptions, data, and drafts. The Appellants have not indicated how these documents would inform whether the methodology approved in the Decision satisfied the criteria from the *Regulation*, namely whether the methodology adequately provides for Encorp paying costs, on behalf of producers, of collecting recyclable packaging and managing recycling depots. The fact that there were discussions about the Financial Studies while the amendment to Section 9 was being drafted do not mean the two are related.

[59] Encorp also argues that, if the Board orders the production of the Withheld Documents, the Appellants will be required to provide documents about their depot operations' costs and revenues, so they can be analyzed against the information in the Financial Studies. Encorp says this kind of analysis is beyond the jurisdiction of the Board and is a substantial and onerous undertaking.

[60] With respect to the Redacted Documents, Encorp says it asked the Respondent to redact information pursuant to sections 21(1)(a) and 21(1)(c)(i) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (the "FOIPPA"). Those sections protect an entity from disclosure of information that would be harmful to its business interests, including trade secrets. Encorp says the Appellants have not established why any of this redacted information is relevant. Encorp adds that some documents are marked as private and/or confidential. Encorp says the Board cannot and should not rely on the Respondent's comment that documents "may be relevant" to establish that they should be produced. Encorp says the Appellants have not established the relevance of the Redacted Documents, which do not relate to whether the regulatory criteria applicable to Section 9 were satisfied and so do not relate to the issues under appeal.

The Respondent's Submissions

[61] The Respondent took no position with respect to the Appellants' application.

The Appellants' Reply

[62] The Appellants reply there is evidence that the Financial Studies and underlying information was used in determining whether Section 9 satisfied the requirement in section 5(1)(c)(i) of the *Regulation*, as the Appellants described in their application and as demonstrated in Mr. Melfi's memo dated June 26, 2023, and in the Decision. The Appellants note EPR Section staff had identified issues with implementation during the 2021 Handling Fee Review and recommended redoing one of the Financial Studies. Additionally, the two consultations in 2021 and 2022 were undertaken for the amendment of the Beverage Plan and those consultations addressed the 2021 Handling Fee Review, as did the November 2022 Proposed Amendment. These documents all relate to a single, ongoing process of amending the Beverage Plan, ultimately done in the Decision.

[63] The Appellants argue that the use documents will be put to in appeals does not inform whether document production will be ordered: the test is, as described in *Seaspan*, para. 56, whether the documents will assist a party in putting their case forward and the Board in adjudicating the matter. The Appellants make the same reply about the concerns Encorp expressed about the need for the Appellants to produce additional documents for the other parties. The Appellants add their application falls within the Board's adjudicative function and is not investigative.

[64] Furthermore, the Appellants say EPR Section Staff assessed the validity and reliability of the Handling Fee Review process when considering whether to approve the various amendments to Section 9 put forward by Encorp. The Withheld Documents may provide insight into the instructions and methodology of the review process, which was a concern for EPR Section staff and which arises again on appeal.

[65] With respect to the Redacted Documents, the Appellants say, after reviewing Encorp's submissions, they abandon their request for Redacted Documents numbered 12, 14.6, 16, 18, 22, 22.1, and 25. As for the rest (Redacted Documents numbered 27, 27.1, 27.2, 28, 28.1, and 29), these documents are not held out as confidential and relate to the requested amendments to Section 9. The Appellants argue that the opinion of the Respondent, agreeing these documents may be relevant, may be of use to the Board in this preliminary decision.

THE PANEL'S FINDINGS

[66] As stated above, section 34(1)(b) of the *ATA* allows the Board to order the production of documents which are relevant to and admissible in an appeal before the

Board, and which are in the care or control of the person who is to be ordered to produce the documents.

[67] I note that the Appellants have abandoned their request for some documents because Encorp has advised they were redacted under the *FOIPPA*. Specifically, the only Redacted Documents for which the Appellants seek unredacted copies are now those numbered 12, 14.6, 16, 18, 22, 22.1, and 25—those not redacted under the *FOIPPA*. As such, the question of redactions under the *FOIPPA* need not be discussed in any further detail, as the Appellants have persisted only in their request for production of documents not redacted under the considerations of that statute.

Relevance

[68] The test for relevance is, as described in *Richmond Steel*, whether it is reasonable to suppose, based on the evidence and submissions provided by the parties and on the grounds of appeal, that the requested documents are capable of proving or disproving a material fact in issue or shedding light on a disputed matter.

[69] It is not a sufficient reason to order the production of documents simply because those documents were before the original decision maker (the Respondent in this case). The Board cannot assume relevance for that reason alone: relevance must be assessed based on the grounds of appeal. As noted by the Appellants, this appeal is by default a new hearing, meaning evidence not before the decision maker can be admitted by the parties, subject to requirements on relevance and admissibility. As such, whether the documents were before the decision maker does not advance the analysis of this application. By the same token, the fact that documents were the subject of discussion between parties leading up to the Decision being issued does not establish that the documents are relevant to the appeal.

[70] I also do not consider it appropriate to guess the use to which any documents produced will be put. A document's relevance is not determined by supposing there are uses or arguments that could result which are beyond the purview of the panel considering the appeal. It will be for the panel to decide what evidence is ultimately relevant and admitted, and the weight to be given such evidence. All that is required for the Board to order production of documents is to reasonably suppose that the documents will assist a party in proving or disproving a material fact or shedding light on a disputed issue. An argument that there is an inappropriate use for such documents is not persuasive unless there are no appropriate uses for the documents; that is to say, unless they are irrelevant. The proper question is whether it is reasonable to suppose the requested documents are capable of proving or disproving a material fact in issue or shedding light on a disputed matter.

[71] The Appellant says the Financial Studies inform whether the amended Section 9 ensures Encorp pays for the costs of Return-It Depots collecting and managing Encorp

Containers as required by section 5(1)(c)(i) of the *Regulation*. This has been put into issue in this appeal by the Appellants.

[72] I agree. I find the KPMG Study is relevant. The November 2022 Amendment Proposal was ultimately accepted by the Respondent. That was not a stand-alone proposal, however, but rather the result of prolonged engagement between Encorp and its stakeholders, and between Encorp and EPR Section staff.

[73] Encorp, as documented in its own consultation report, noted the following when addressing the Return-It Depots: "What is different is the amount of detail that has been laid out in this new document. Nothing has changed in the way that Encorp is setting the methodology." While there were some changes between the June 2022 Amendment Proposal and the November 2022 Amendment Proposal, I find that those changes can be classified as further clarifications. For example, the concept of a depot of average efficiency was defined with more precision and the consultation process was clarified and codified into that iteration of Section 9. There were also more substantive changes, including a commitment to periodic reviews of the presence grant, but the overall structure and methodology of a Consultant identifying Sample Depots, obtaining information from them, and performing an analysis that informed the Handling Fee remained in place.

[74] I recognize that there are differences between the June 2022 Amendment Proposal and the amendment approved in the Decision. For example, Small Volume Depots are to be included as possible Sample Depots. These changes are modest, however, and do not serve to make the Withheld Documents irrelevant. I find it reasonable to suppose, based on the information provided, the Withheld Documents are capable of either proving or disproving the appropriateness of the version of Section 9 enacted by the Decision, particularly with respect to the process followed in the 2021 Fee Handling Review and the analysis which followed, including of the process by which Return-It Depots participate in Handling Fee reviews. Furthermore and alternatively, I find it reasonable to suppose these documents will shed light on the methodology described in the Decision, based on the experience of a substantively similar process: the 2021 Fee Handling Review.

[75] The overall consistency in the Handling Fee Review process, in particular with the functions to be served by a Consultant, show that the November 2022 Amendment Proposal, which was substantively adopted in the Decision, were based on the 2021 Handling Fee Review, which included a substantively similar process performed by KPMG, the Consultant for the purposes of that Handling Fee Review.

[76] This process does not need to be identical for the Withheld Documents pertaining to the KPMG Study to be relevant. It is sufficient that the processes are substantively similar and constrained by the terms of engagement agreed to between Encorp and KPMG. The Appellants have argued there was insufficient consultation and an inappropriate and incorrect basis for factual determinations in the 2021 Handling Fee Review. It is reasonable to suppose the Withheld Documents will help to prove or disprove

those allegations, as the Withheld Documents include instructions provided to KPMG, documents relied on, facts relied upon (both those prescribed in documents and those observed and obtained through testing), and drafts that would show refinement of analysis,

[77] I also find Propel's study is relevant to this appeal. I recognize the process surrounding the Propel Study is not set out in any relevant version of Section 9, either proposed or enacted. Encorp commissioned and relied upon the Propel Study in forecasting costs as part of the 2021 Handling Fee Review. In particular, Encorp studied labour cost and occupancy cost changes that may arise with the new sorting system being proposed. This seems to be neither required nor forbidden by any version of Section 9 that has been made available to me, either proposed or enacted, though I note Encorp was not prohibited from commissioning such a study.

[78] The issues under appeal include the sufficiency of consultation and whether the process for Handling Fee Reviews is appropriate. Encorp relied on the Propel Study in the 2021 Handling Fee Review, which as I have said is substantively similar to the Handling Fee Review process described in the amended form of Section 9 enacted in the Decision.

[79] I find it is reasonable to suppose the Propel Study methodology and outcome will serve to prove or disprove that the process in the 2021 Handling Fee Review did not allow for adequate consultation, did not result in Encorp paying all required costs of Return-It Depots collecting and managing Encorp Containers, or both. While there is a question as to the weight given such arguments, the overall continuity in process—and in particular the lack of constraints around Encorp's ability to commission independent studies that will be considered in the Handling Fee Review process—makes such arguments relevant to the issues under appeal.

[80] Having decided the Financial Studies are relevant, I turn to consider the Withheld Documents. I find those are also relevant. It is reasonable to assume that each of the Withheld Documents describe instructions given, assumptions made, information relied upon, or analytical frameworks that inform, the creation of the Financial Studies. The relevance of these documents does not relate to whether the outcome of the Financial Studies was correct, but rather whether the process followed allowed for sufficient engagement with the Return-It Depots and followed a methodology that sufficiently ensures the Handling Fee Review could result in Encorp paying the costs associated with Return-It Depots' collection and management of Encorp containers.

[81] I disagree that production of the Withheld Documents amounts to a "fishing expedition." Rather, the process followed in the 2021 Handling Fee Review was essentially the same as the process described in the June 2022 Amendment Proposal and was substantially similar to the November 2022 Amendment Proposal as well. It is reasonable to suppose the Withheld Documents, in describing the 2021 Handling Fee Review process—a substantively similar template for the Handling Fee Review process described in the Decision—will shed light on, serve to prove, or serve to disprove the Appellants'

arguments that the Handling Fee Review process authorized in the Decision does not adequately define parameters, Return-It Depot selection criteria, or the “average depot” concept used in financial studies, or whether there are sufficient protections provided for Return-It Depots that participate in these studies. This is sufficient for the purposes of a document production order.

[82] I do not find it relevant that the Respondent has advised documents may be relevant to these appeals. The Respondent has not taken a position with respect to this application and a comment that documents may be relevant is similarly inconclusive.

[83] I consider it reasonable to suppose the documents above may be relevant. They are, according to the descriptions provided, correspondence regarding Section 9 and the requirement from section 5(1)(c)(i) of the *Regulation*, both of which are squarely in issue in the appeal.

[84] While Encorp says the Appellants have not established the relevance of these documents, I find the Appellants have done so to the degree they can: they have identified documents that, on the face of the description provided, may be capable of proving or disproving a material fact in issue or shedding light on a disputed matter, based on the grounds of appeal. Encorp is the party with specific knowledge about these documents and has not provided any persuasive rationale why these documents are not relevant. The mere assertion that the documents do not pertain to regulatory criteria does not provide a satisfactory response.

[85] This is one of the limited examples where a shifted burden of proof is appropriate, as Encorp has special knowledge about the content of the documents that the Appellants, who do not have access to the documents, lack. As a result, I am satisfied that these documents meet the threshold for relevance as set out in *Richmond Steel*.

Admissibility

[86] The Appellants argue the Withheld Documents and the Redacted Documents are not subject to a recognized form of privilege and are therefore admissible before the Board. I agree.

[87] While Encorp expressed concern some of these documents are marked private or confidential, this does not make the documents inadmissible. The Board may receive private or confidential information. Such concerns may be addressed, for example, by having parties request that the Board hold information received to the exclusion of the public or even to the exclusion of parties or interveners.⁸

⁸ See sections 41(2) and 42 of the *ATA*.

Care and Control

[88] Encorp has argued that several classes of the Withheld Documents sought by the Appellants were, by design, never in their care and control. After reviewing the documents submitted by the parties, I am satisfied this is so. KPMG was noted to have signed confidentiality agreements and the process for the KPMG Study was set up to specifically insulate Encorp from financial information pertaining to individual Return-It Depots and data KPMG was considering in their work as part of the 2021 Handling Fee Review.

[89] As a result, I consider the following documents, with respect to the Financial Studies, to not be within the care and control of Encorp:

- any data compiled by the authors of the Financial Studies in relation to the Financial Studies;
- the results of any tests or inspections conducted by and relied upon by the authors in forming their opinions; and
- the authors' working files, including any draft versions of the Financial Studies.

[90] The Board accordingly cannot order the production of these documents by Encorp.

[91] Encorp has not argued that the remainder of the documents not in its care and control. Encorp has argued the Board should only order document production cautiously because such orders are not made as a matter of course. I have done so in this case. The production of documents was not presumptive, but was rather the result of an application by the Appellants who established to the appropriate standard, that the remaining documents should be produced.

[92] I am not persuaded the Board should not exercise its discretion to order the production of documents simply because the process to produce them may be onerous. This is not a sufficient reason to deprive the Appellants of documents to which they are otherwise entitled, and the production of these documents maintains a procedurally fair process before the Board.

CONCLUSION

[93] For the reasons provided above, I order Encorp to produce to the Appellants the following of the Withheld Documents, with respect to the Financial Studies:

- the instructions provided to the authors;
- any and all documents relied upon by the authors in forming their opinion;
- any written statement of facts upon which the Financial Studies are based; and

- any records of independent observations made by the authors in relation to the Financial Studies, other than results of any tests or inspections conducted by and relied upon by the authors in forming their opinions.

[94] I also order the Respondent to produce to the Appellants the following of the Redacted Documents, as numbered by the Respondent: documents 27, 27.1, 27.2, 28, 28.1, and 29.

[95] In making these orders, I have considered all the evidence and arguments provided by all parties, whether or not they were specifically referenced in this preliminary decision. Given the extensive evidence in this case, I had to address the evidence in broad strokes to maintain a degree of proportionality and ensure the appropriate expenditure of the Board's limited resources for the just resolution of the diverse matters before the Board.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board