ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Hearing - September 22, 1999
Date of Decision - October 18, 1999

IN THE MATTER OF Sections 84, 86, 87, 90, and 223 of the *Environmental Protection and Enhancement Act*, (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF an appeal filed May 20, 1999 by Sovereign Castings Ltd. with respect to Administrative Penalties 99/14-BOW-AP-99/17 issued on April 22, 1999 by the Manager of Enforcement and Monitoring, Environmental Service, Bow Region, Alberta Environment.

Cite as: Sovereign Castings Ltd. v. Manager of Enforcement and Monitoring,

Environmental Service, Bow Region, Alberta Environment.

HEARING BEFORE Dr. William A. Tilleman, Chair
Dr. John P. Ogilvie
Dr. Ted W. Best

APPEARANCES

Appellant: Mr. Michael Stuart, Sovereign Castings Ltd.

Department: Ms. Charlene Graham, counsel, Alberta Justice, representing Mr. Jay Litke, Manager, Enforcement and Monitoring, Alberta Environment, Mr. Kevin Pilger, Mr. Nick Spruit, Mr. Howard Samoil

EXECUTIVE SUMMARY

This is an appeal by Sovereign Castings Ltd. (Sovereign) of a $12,000 administrative penalty assessed in respect of five counts of its licence to operate. These counts include violations of performance and environmental limits and failures to report those violations.

In Alberta, breach of a condition of a licence/approval is punishable under the *Environmental Protection and Enhancement Act* (Act), S.A., 1992, ch.E-13.3. Section 223 of the Act authorizes the Director to assess an administrative penalty in accordance with the approved regulations.

Following a review of the Director's decision and the evidence presented at the appeal hearing, the Board varies the decision and reduces the penalty from $12,000 to $9,000.

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I. BACKGROUND

A. Statutory Background

[1] This appeal involves administrative penalties issued pursuant to the *Environmental Protection and Enhancement Act*[1] (the Act). Section 223 authorizes the relevant Director of Alberta Environment (Department) to assess an administrative penalty "where the Director is of the opinion that a person has contravened a provision of this Act that is specified for the purposes of this section in the regulations..."[2]

[2] Administrative penalties are issued in accordance with, and to uphold, Alberta Environment's philosophy to provide firm but fair enforcement of the environmental legislation in a timely and consistent manner.[3]

The *Administrative Penalty Regulation*[4] (APR) lists over 200 contraventions for which administrative penalties may be assessed. This broad list includes:

- operating an activity without a required approval;
- failing to report a release of a substance that may cause an adverse effect;
- releasing a substance into the environment in an amount exceeding that required under a regulation or an approval;
- operating an activity in violation of process requirements specified in a regulation or an approval (e.g., exceeding allowable stack temperature);
- failing to report the contravention of an approval condition or limit; and/or

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1 S.A. 1992, c.E-13.3.

2 S.A. 1992, c.E-13.3.

3 Exhibit 3: Environmental Protection and Enhancement Act Administrative Penalties (Alberta Environment)

4 A.R. 143/95.

- submitting a required report late (e.g., annual emissions report, stack survey report, monthly emissions report, groundwater report)[5].

Section 84(1)(k) of the Act gives the Board authority to hear appeals of administrative penalties issued pursuant to section 223, if the appeals are brought by persons against whom the penalties are assessed. Under section 90(1) of the Act, the Board may "confirm, reverse, or vary" a penalty assessment, and the Board's decision is final.

B. Factual Background

[3] Sovereign Castings Ltd. (Sovereign) is a steel foundry in Calgary that was formerly owned by Mr. Len Knight and Mr. Glyndwr Harris. Apparently, Mr. Harris was the principal "foundryman". Mr. Harris was diagnosed with terminal cancer in 1997. Perhaps, as a result of this condition, he sold his 60% interest in Sovereign to WFG Holdings on December 1, 1997, owned in part by Mr. Michael Stuart, its current president. Mr. Harris was an advisor to Sovereign until his unfortunate death in April, 1998.

[4] Sovereign appears to have achieved generally poor compliance with its environmental requirements during the 1997/1998 period.

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5 See e.g. Exhibit 3: Environmental Protection and Enhancement Act Administrative Penalties (Alberta Environment).

[5] The Department's assessment of an administrative penalty was instigated by the complaints of Sovereign's neighbour, Lumber Liquidators, which also launched its own civil court action[6] for what appeared to be very evident property damage. Lumber and stock doors left on the lot were discoloured, and rusted in some cases. The affidavit evidence of the owner of Lumber Liquidators and another neighbouring company indicates that Sovereign may have regularly violated the 15 minute stack house conditions.[7] Sovereign's neighbours also complained that Sovereign was emitting a brownish yellow smoke which had noxious odours and which gave the neighbours' personnel headaches and nausea.

[6] Sovereign's main contention in this appeal is that many of the environmental breaches took place during the "ownership transition period". In a December, 1997 meeting with the Department, WFG President Mr. Stuart specifically requested that "any recommendations, work required or costs attributable to Mr. Harris' tenure [at Sovereign] should be forwarded by letter..." to Mr. Stuart, because the "share purchase agreement" between WFG and Mr. Harris required Mr. Harris to indemnify WFG for "any and all environmental costs and liabilities." In other words, the purchase share agreement required that the vendor indemnify the purchaser for all environmental costs or liabilities incurred by the vendor.

[7] In late February, 1999, the Department sent Sovereign a "preliminary notice" of its

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6 *Lumber Liquidators Ltd. vs. Sovereign Castings Ltd. and Knight and Harris Properties Ltd.*, Alberta Court of Queen's Bench Action #9701-15554.

7 Licence to Operate section 2.3(d) states:

> 2.3(d) All particulate carrying emissions generated by the cupola furnace will be treated by the "Joy Pulseflo Model No. 45010-216" baghouse type dust collector for removal of the particulate matter, except under the following special circumstances:
>
> (i) the cupola start-up procedure prior to the light-off, not exceeding 15 minutes,
> (ii) the cupola burn-down period, not exceeding 15 minutes, and
> (iii) for any six minute period to a maximum of 30 minutes per day;

decision to assess an administrative penalty against the company. Roughly two months prior to receiving that notice, Mr. Stuart made an offer to Mr. Harris' estate to settle WFG/Sovereign's indemnity claim against the estate for environmental damage. In the end, the estate was settled for approximately $400,000.

[8] Sovereign now disputes the penalty on the ground that the 14 month delay between the original infractions and the assessment is neither "reasonable nor in accordance with the fundamentals of natural justice."[8] The Appellant also disputes Count #1 for several reasons

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[8] "Grounds for Appeal" attached to Sovereign Castings' Notice of Appeal, #1, states:

> As outlined in Mr. Samoil's Administrative Penalty Assessment Form, control of Sovereign Castings Ltd. changed on December 1, 1997 when the former owner (Mr. Glyn Harris) sold his 60% interest in the company to WFG Holdings Ltd. At the time of the sale, Mr. Harris was terminally ill with cancer and he subsequently died in April, 1998. As many of the alleged incidents occurred prior to or during the ownership transition period, Sovereign Castings Ltd. vehemently objects to the entire penalty assessment due to the length of time it took to (sic) Alberta Environmental Protection ("AEP") to render this decision. Specifically I would offer the following history:
>
> In December, 1997 when AEP Investigator (Mr. Kevin Pilger) and I spoke during one of his visits to the Sovereign site, I informed him that it was WFG Holdings Ltd.'s intention to fully comply with all environmental legislation.
>
> Further, Mr. Pilger was specifically informed that any recommendations, work required or costs attributable to Mr. Harris' tenure should be forwarded by letter to me as the share purchase agreement between WFG Holdings Ltd. and Mr. Harris contained language that would require Mr. Harris to indemnify the new owner for any and all environmental costs or liabilities. I believe that my exact words to Mr. Pilger were to "go to town on your recommendations because it is not on my nickel". In any event, Mr. Harris died in April, 1998 and by December, 1998 (one year after my earlier conversation with Mr. Pilger) AEP had made no comments with respect to this matter; accordingly, I made a good faith offer to settle all environmental indemnification matters with Mr. Harris' estate at that time.
>
> Needless to say, I was extremely agitated when I received the proposed notice of administrative penalty some 14 months after my discussions with Mr. Pilger and 2 months after my settlement proposal to Mr. Harris' estate. *While I am cognizant of legislation permitting penalties to be assessed up to 2 years after the alleged incidents, I would respectfully offer the opinion that the delay in assessing the*

discussed below.

[9] Before the appeal hearing, both parties filed the following *Agreed Statement of Facts*, the joint effort for which the Board is grateful:

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administrative penalties in this case (particularly given my earlier discussions with Mr. Pilger) is neither reasonable nor in accordance with the fundamentals of natural justice. Accordingly, I would request the reversal of all administrative penalties. (Emphasis added)

1. (a) In October of 1997, the Joy Pulseflo Baghouse operated with only one half the required number [of] (sic) bags from October 3, 1997 to October 18, 1997.[9]

   (b) Sovereign Castings Ltd. did not report to Alberta Environmental (sic) this incident immediately after its occurrence.

2. (a) In December, 1997, Sovereign Castings Ltd. inspected the American Baghouse at the request of the Investigators for Alberta Environment (following a Notice of Inspection dated December 22, 1997). The inspection found forty-five (45) bags in the Baghouse had holes.

   (b) The last inspection by Sovereign Castings Ltd. of American Baghouse occurred in August of 1997 during the annual shutdown. No inspection of Baghouse occurred for the months of September, October and November, 1997, and therefore there is no record of inspections occurring for these months.

   (c) Alberta Environment can find no reference in the approval file of an agreement between Alberta Environment and Sovereign Castings that Sovereign Castings did not have to do monthly monitoring of the American Baghouse.[10]

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9 February 18, 1998 letter from Len Knight, Vice President of Sovereign Castings Ltd. to Kevin Pilger, Alberta Environment.

10 Letter dated December 29, 1997 from G. Harris (Sovereign Castings Ltd.) to Kevin Pilger (Alberta Environment); and
Investigation Diary (Environmental Management System);
PCD Conservation Record 980129 - Brian Chaisson - Sovereign Castings Ltd.;
PCD Conversation Record 980130 - Ed Craig;
PCD Conversation Record 980120 - Bob Isted, Madis Engineering;
PCD Conversation Record 980119 - Rob Kemp, Alberta Environment; and
PCD Conversation Record 980113 - Len Knight.

3. On February 4, 1998, Alberta Environment investigators attended upon the premises of Sovereign Castings Ltd. Both investigators observed embers/smoke being emitted from the closed cupola cap. In addition, they observed emissions from the cupola charge door. The investigators were present at Sovereign Castings Ltd. for a number of hours. Emissions were noted at a variety of times during their attendance. Emissions coming from these two sources would not be treated by any pollution abatement equipment.[11]

4. Sovereign Castings Ltd. and Madis Engineering (retained by Sovereign Castings Ltd.) have admitted that they have had difficulties with the cupola cap and the cupola charge door prior to the February 4, 1998 observations by the Alberta Environment Investigators.[12]

C. The Penalty Assessment

1. Preliminary Assessment

[10] The assessment of an administrative penalty involves a two-stage analysis: In the first stage, the Director sets an initial base penalty amount for each violation based on the magnitude of the violation and the potential for environmental impacts. This determination is based on the following matrix, provided by section 3(1) of the *Administrative Penalty Regulation*:

Variation From Regulatory Requirement

		Major	Moderate	Minor
Potential For Adverse	Major	$5,000	$3,500	$2,500
	Moderate	$3,500	$2,500	$1,500

11 Investigator's notes - K. Pilger/N. Spruit dated February 4, 1998.

12 February 18, 1998 letter from Len Knight (Vice President of Sovereign Castings Ltd.) to Kevin Pilger; Meeting notes between Kevin Pilger and Madis Engineering dated February 10, 1998 and February 26, 1998.

Effect	Minor	$2,500	$1,500	$1,000

In the second stage, the Director can adjust the base penalty amount upwards or downwards based on the applicability of one or more aggravating or mitigating factors, respectively, which are listed in section 3(2) of the *Regulation*.[13]

The Director's **preliminary** administrative penalty calculation was based on seven counts of violating the conditions of Sovereign's Licence to Operate. The counts and stage one assessments are described as follows[14]:

Count 1: Violation of an environmental limit - February 4, 1998-release of particulate emissions from the cupola charge door without treatment, contrary to s.2.3(d) of the approval.
Variation from Regulatory Requirement-Major-emissions released to the environment.
Potential for Adverse Effect-Moderate-emissions causing harm to property.

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[13] Section 3(2) of the *Administrative Penalty Regulation*, A.R. 143/95 states:

> 3(2) In a particular case the Director may increase or decrease the amount of the administrative penalty from the base penalty after considering the following factors:
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> (a) importance of compliance with the regulatory scheme;
> (b) the degree of wilfulness or negligence in the contravention;
> (c) whether or not there was any mitigation of the consequences of the contravention;
> (d) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
> (e) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention;
> (f) any other facts that, in the opinion of the Director are, relevant.

[14] Documents Subject of the Appeal, Tab A, Administrative Penalty Assessment Form.

Assessed level from chart $3500

Count 2: Contravention of a performance limit - October 3, 1997- operating the plant while the Joy Pulseflo baghouse was not in effective operation, contrary to s.2.9 of the approval.
Variation from Regulatory Scheme: Moderate
Potential for Adverse Effect: Moderate
Assessed level from chart $2500

Count 3: Contravention of a performance limit - December 22, 1997- operating the plant while the American baghouse was not in effective operation, contrary to s.2.9 of the approval.
Variation from Regulatory Scheme: Moderate
Potential for Adverse Effect: Moderate
Assessed level from chart $2500

Count 4: Contravention of a performance limit - failing to inspect the American baghouse on a monthly basis, from August, 1997 to December, 1997, as required by s.2.8 of the approval (1 count for the whole period).
Variation from Regulatory Scheme: Moderate
Potential for Adverse Effect: Minor
Assessed level from chart $1500

Count 5: Failing to report a contravention of an approval - failing to report forthwith to the Director, the October 3, 1997 incident where the bags in the Joy Pulseflo baghouse were damaged, contravening s.3.4 of the approval.
Variation from a Regulatory Scheme: Moderate
Potential for Adverse Effect: Minor
Assessed level from chart $1500

Count 6: Failing to report a contravention of an approval - failing to report in the October, 1997 monthly summary report, the October 3, 1997 incident where the bags in the Joy Pulseflo baghouse were damaged, contravening s.3.2 of the approval.
Variation form Regulatory Scheme: Moderate
Potential for adverse effect: Minor
Assessed level from chart $1500

Count 7: Contravention of a performance limit - On December 22 and 23, 1997, observed collecting dust from the Joy Pulseflo Baghouse in an open container, contrary to s.2.5 of the approval.
Variation from Regulatory Scheme: Moderate
Potential for Adverse Effect: Moderate-particulate matter entrained in the ambient air, health hazard.
Assessed level from chart $2500

[11] The total stage one penalty was $15,500. Upon considering the enumerated stage two factors in section 3(2) of the Regulation, the Director decided to increase the base penalty by $500[15]. Thus, the total assessment was $16,000. This assessment was dated February 24, 1999 and faxed to Sovereign on February 25, 1999 and described as a "preliminary" assessment only.[16]

2. Final Assessment Decision

[12] Subsequently, Alberta Environment and Sovereign met to discuss the preliminary penalty. As a result of this meeting, the Director decided to drop counts 6 and 7 respectively, due to duplication of a prior count and to the Appellant's claim that the relevant requirements of its licence were ambiguous.

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15 Pursuant to section 3(2)
(a) +$500 The contraventions are important because reporting contraventions are the only source of information.
(b) + $1,000 The decision not to inspect was made because it was deemed too difficult to spend 3 days a month inspecting the baghouse.
(c) - $500 The company was slow in responding and introducing corrective measures. (Did improve after February of 1998). The big problem appeared to be loss of experienced personnel - a consultant has since been retained.
(d) - $500 The company has no recent enforcement actions. (Old actions were in 1980 and 1981).
(e) neutral - No economic benefit quantified.
(f) neutral - The company reacted slowly but positively.
BASE ASSESSMENT $15,500.00, FACTORS TO VARY ASSESSMENT +$500.
TOTAL PRELIMINARY ASSESSMENT $16,000.00.

16 Documents Subject of the Appeal, Tab A, letter dated February 24, 1999 from Mr. J. Litke, Manager, Enforcement and Monitoring, Bow Region, Alberta Environment to Mr. Michael Stuart, President, Sovereign Castings Ltd.

[13] These deletions caused the preliminary penalty to be reduced by $4,000. Therefore, the Director's final total penalty assessment was for $12,000.

[14] At the Board's appeal hearing, the Director conceded that the total penalty should be further reduced by $1,000, due to the mitigating factor in section 3(2)(b) of the APR. This would leave the final penalty amount at $11,000.

II. DISCUSSION

A. Burden of Proof and Standard of Review

[15] The Board has long made it clear that an appellant generally bears the burden of proving the merits of its appeal.[17] This burden must be viewed in light of the Board's administrative review and within the context of the Act's environmental protection purposes and policies. One of those policies, expressed in section 2(i) of the Act, is that polluters are "responsible . . . to pay for the costs of their actions. . . ."

[16] The appellant's overall burden of proof must also be viewed in the context of the type of evidentiary review conducted by the Board. According to Alberta Court of Appeal in *Chem-Security (Alberta) Ltd v. The Lesser Slave Lake Indian Regional Council and the Environmental Appeal Board (Alberta),* a hearing before the Board is a *de novo* hearing.[18] The Board confirmed the *de novo* principle recently in the M.D. of Cardston appeal.[19]

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17 See, *e.g., Bodo Oilfield Maintenance Ltd. v. Director,* (April 16, 1999) No. 98-247-D (EAB) at 9.

18 (1996) Appeal No.16947, Alta.C.A.;(1997) 56 Alta.L.R. (3d) 153; (1997) 23 C.E.L.R. (N.S.) 165.

19 *Municipal District of Cardston No. 6 v. Director, Enforcement and Monitoring Division, Alberta Environmental Protection,* (August 17, 1999) No. 99-011-D (EAB).

B. Legitimate Expectations of the Appellant

[17] Sovereign challenges the overall penalty assessment on the ground that Sovereign "had a legitimate expectation to receive AEP notification about proposed penalties in a more timely manner so that we could reach a settlement with Mr. Harris (or his estate) on all environmental indemnification matters having full knowledge of all costs and/or potential costs to be borne by the new controlling shareholder of Sovereign Castings Ltd".[20]

[18] In other words, Sovereign argues that the Director should have informed Sovereign of the penalty so that the company could make the proper financial deal with Mr. Harris' estate. In the Board's view, neither the facts of this case or the law support this contention.

[19] In the leading judicial decision on the subject -- *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*[21] -- the Supreme Court of Canada stated that the "legitimate expectations" doctrine is "simply an extension of the rules of natural justice and procedural fairness." The Court made it clear, however, that the doctrine is limited to procedural claims involving an expectation of an opportunity to make presentations to a government decision-maker before the decision is made. According to the Court, the doctrine:

> affords a party affected by the decision of a public official an opportunity to make representations in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.[22]

The Board is doubtful that the "legitimate expectations" doctrine is even relevant here, because

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20 Written Submission of Sovereign Castings dated September 15, 1999 at 2.

21 [1990] 3 S.C.R. 1170 at 1204.

22 *Ibid.* at 1204.

Sovereign is not arguing that it should have been given an additional opportunity to present *its* side of the story to the Director. Rather, Sovereign argues that the Director should have kept Sovereign better apprized of *the Director's intent* to assess a penalty. In other words, Sovereign doesn't claim an expectation of a missed opportunity to express its own views to the Director, but of a missed opportunity to hear the Director's views prior to Sovereign's settlement negotiations in a contract context with Mr. Harris' estate.

[20] Even if the "legitimate expectation" doctrine is relevant in this context, Sovereign has not satisfied its burden of proving that it had a legitimate expectation of a right to notice of the Director's plans to assess a penalty and of the precise or rough penalty amount, prior to Sovereign's initiation of settlement negotiations with Mr. Harris' estate. At the December, 1997 meeting with the Department, WFG/Sovereign President Mr. Stuart requested that the Department communicate its environmental concerns directly to him. But there is no evidence that the Department volunteered or agreed, at the December, 1997 meeting, to communicate its concerns to Mr. Stuart by any particular time. Nor is there any evidence that the Department might have misled Mr. Stuart into thinking that no penalty assessment would be forthcoming at a later time. In fact, there is no evidence that Mr. Stuart even *requested* that the Department communicate its concerns to Mr. Stuart by any particular date or general period. Nor is there evidence that Mr. Stuart even informed the Department of his general intent to settle Sovereign's indemnity claim with Mr. Harris' estate in the near future and that administrative penalties were a part of the settlement.

[21] Under these circumstances, the Board does not see how Mr. Stuart could have had any, let alone a "legitimate," expectation that the Department would express its enforcement concerns, especially those relating to a penalty assessment, prior to Mr. Stuart's own schedule for negotiating with Mr. Harris' estate. The Board finds it particularly troublesome that Mr. Stuart did not bother himself to initiate contact with the Department prior to making his settlement offer, to see what the Department's next step was likely to be, if any, if Mr. Stuart really believed that this information was necessary for his settlement negotiations with Mr. Harris' estate. Sovereign did send a letter to Alberta Environment on February 18, 1998 outlining the prior operational concerns

and steps that Sovereign had taken to address these concerns. But that letter did not seek to confirm that Alberta Environment would follow a certain procedural course *vis a vis* its investigations and/or penalties and/or next steps. The letter simply concluded "should you have any comments or concerns, please do not hesitate to contact our office".[23] Penalty assessment procedure was not the issue.

[22] There was no further contact between the parties until approximately 1 year later when the Director sent his notice of assessment to the Appellant. The reason for the delay, according to the oral evidence of the Director, was reorganization of Alberta Environment. The Board accepts the evidence of the Director on this point; there was no bad faith or *mala fides* in the delay; the Director had at least 2 years to assess an administrative penalty against Sovereign and he did so within that legislated time frame.[24]

[23] The Board also fails to see how Sovereign was actually harmed by any supposed lack of notice of the Director's intent to assess a penalty prior to Sovereign's settlement negotiations with Mr. Harris' estate. At the hearing, Mr. Stuart indicated that Sovereign settled its indemnity claim for $400,000, only half of which has already been spent. Thus, Sovereign appears to still have a $200,000 pot, *from its settlement funds alone*, to use for paying the Department's $12,000 administrative penalty. From this standpoint, Mr. Stuart appears to have generously and successfully estimated his potential environmental liability *vis a vis* the Department, for purposes of negotiating a

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[23] Letter of February 18, 1998 from L. Knight, Vice President of Sovereign Castings to K. Pilger, Alberta Environment, faxed on February 19, 1998.

[24] Section 2(3) of the *Administrative Penalties Regulation* states:

> 2(3) A notice of administrative penalty may not be issued more than 2 years after the later of
>
> (a) the date on which the contravention to which the notice relates occurred, or
>
> (b) the date on which evidence of the contravention first came to the notice of the Director.

settlement on Sovereign's indemnity claim, even if he did not bother to try to determine the precise or even rough amount of that liability prior to making his settlement offer.

[24] The Board recognizes that at least part of the remaining $200,000 may still be needed to cover environmental liabilities or other matters stemming from Mr. Harris' tenure at Sovereign, in addition to paying for the Director's penalty. Thus, the remaining $200,000 may not provide Sovereign with a considerable or any windfall. However, Sovereign made no effort to show that any such other environmental liabilities are so big that the remaining $200,000 will be insufficient to cover the Department's administrative penalty. Absent of any such evidence, the $200,000 remainder is *prima facie* evidence that Sovereign will be able to pay off the administrative penalty with settlement funds from its indemnity claim.

[25] Given the above discussion, the Board believes that Sovereign's "legitimate expectations" claim is misplaced and insufficient to thwart the penalty assessment.[25]

C. Appropriateness of Penalty Amount

[26] The Board has reviewed all of the evidence placed before it by both parties. After careful consideration, the Board concludes on the balance of the evidence to reduce the Director's final assessment decision from $12,000 to $9,000.

[27] The Board believes the penalty should be reduced by $3,000 for the following

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[25] At the Board's hearing, the Director's counsel referred to the doctrine of "officially induced error," as well as "legitimate expectations," in the context of Sovereign's claim that it was entitled to notice of the penalty assessment prior to its settlement negotiations with Mr. Harris' estate. The "officially induced error" doctrine provides a defence to a prosecution when the accused shows that he was induced by government officials to believing that his conduct was legal. See, *e.g.*, *R. v. Pontes*, [1995] 3 S.C.R. 44 at 88 (explaining the defence but noting that it "has yet to be formally recognized" by the Supreme Court of Canada); see also *R. v. Jorgensen*, [1995] 4 S.C.R. 55 at 77 (explanation of the defence by a dissenting Justice). As such, the defence has no applicability to Sovereign's claim that its lack of government notice prejudiced its settlement negotiations with Mr. Harris' estate.

reasons. First, at the oral hearing, the Director recognized that the total "factors to vary the assessment" should be "-500", not "+500". The application of this net credit (of $1,000) can be attributed to a reduction in the APR section 3(2) factor from +1000, to neutral. The Board agrees with the Director.

[28] Second, the Board believes APR sections 3(2)(c) and (f) warrant a further credit of $500 each totaling a further $1,000 reduction. The Board believes this reduction is appropriate because the company reacted positively, and in the circumstances quickly, following the December 1997 meeting with Alberta Environment. These actions are consistent with the objectives in sections 2(f), (i) and (j) of the Act.[26] For example, since the investigation began the Appellant immediately instituted the following nine changes at the plant:[27]

- Design and fabrication of an additional cap for the cupola stack;
- Installation of a monitoring and alarm system for cupola cap openings;
- Purchase and maintenance of a complete set of replacement bags for the Joy Baghouse in the event of a major burnout of existing bags similar to the October 3, 1997 incident;
- Reinstatement of monthly inspection and reporting for both the American and Joy Pulseflo baghouse;
- Construction of secondary containment vestibules for indoor storage of Core Room chemicals;
- Repainting of the exterior of all foundry buildings;
- Installation of a new sand mixing machine and vibrating table that has allowed reduction of the use of chemical binder from 1.4% to 0.95%;

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[26] Section 2(f) refers to the "shared responsibility" of all Albertans for environmental protection. Section 2(i) is the "polluter pays" principle referred earlier. And section 2(j) refers to the importance of "comprehensive and responsible action" in implementing the Act.

[27] Written submissions of Sovereign Castings Ltd., September 15, 1999, p. 1 and 2.

- Movement of the coke storage pit to an area less susceptible to winds to reduce the opportunity for blowing coke dust; and

- Asphalting of the inventory storage area to lessen the impact of blowing road material.

[29] Additionally, two months later, on February 18, 1998, Sovereign agreed to the following 15 changes; when analysed, these commitments further the goals of environmental protection:[28]

1. The cupola has been assigned to record the time when the cupola cap opens, which sensor caused it to open, the duration it remained open and what action was taken to remedy the cause.

2. Madis Engineering Ltd. has been retained to prepare an inspection and maintenance procedure report for both the Joy and American Air Filter baghouses. A copy of these procedures will be forwarded to you once they are complete.

3. The electrician will be trained and assigned to inspect both baghouses at least twice per day.

4. The incident reporting procedures will be updated and fully explained to the foundry lead hand.

5. The baghouse operating and maintenance reporting procedures will be reviewed with the foundry lead hand.

6. Sovereign's Licence to Operate will be reviewed, in detail, with foundry personnel.

7. The Pollution Control System Manual, the Cupola Operators Handbook and the Cupola workshop manual will be reviewed with the new cupola operator.

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[28] Summary Report from Mr. Stuart, Sovereign Castings Ltd. to Mr. K. Pilger, Alberta Environment, February 18, 1998.

8. Temporary repairs have been made to the refactory lining on the cupola cap to ensure a tighter fit. These repairs will be monitored and maintained until permanent repairs can be made.

9. Madis Engineering Ltd. have (sic) been requested to arrange for the fabrication of a new cap, as a spare, so that one cap can be relined, baked and replaced as necessary.

10. A cover will be fabricated for the joint between the cupola outlet and the upper plenum on the heat exchanger to reduce emission from this point.

11. Staff have been instructed to reinstate the collection of dust from the Joy baghouse in bags sealed to the spout.

12. The discharge from the American baghouse will be collected in closed containers.

13. The foundry will reinstate regular sand testing to improve quality and reduce chemical binder emissions.

14. An order has been placed for a complete set of spare bags for the Joy baghouse so that repairs, when and if necessary, can be conducted in a timely fashion.

15. Consideration is being give (sic) to the installation of a mechanism to automatically record the information being recorded under item 1 above.

[30] The Board is persuaded that these changes by Sovereign's new owner(s) have had an immediate and positive environmental impact. The civil action complainant, Lumber Liquidators, even sent the Appellant a letter of thanks for these environmental improvements.[29] This is quick and

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[29] Letter from Lumber Liquidators Ltd. to Madis Engineering dated April 13, 1999 stated:

> This letter is to inform you regarding the improvements of Sovereign Castings previous air pollution situation. The smoke and soot problems have improved 90% over the same time last year. We do experience some smoke but the soot problem has basically disappeared.
>
> We continue to notice the very foul chemical solvent type smell, although it is not present on a regular basis. I would appreciate you looking into it so we can prevent

positive action by the new owner(s).

[31] Finally, the Board believes the classifications of count #1 should be changed to "moderate/moderate" from "moderate/major." This will lower the penalty by an additional $1,000. The Board agrees with the Director's assessment for potential negative environment effects. But, the Board does not believe the variation from regulatory requirement was major. Section 2.3(d) of the licence to operate permits periodic discharge of effluent from the cupola. While the discharges did exceed those permitted, the Board does not believe they could be rated as excessive on the facts of this case. Thus, the reduction in classification from major to moderate.

> it from becoming a problem in the future.
>
> It is a relief to have these dilemmas rectified after all the problems we've experienced over the past several years.
>
> *Thank you for all your efforts in helping to prevent the situation from continuing. (Emphasis added)*

[32] The Board does not believe the penalty should be reduced further. During the investigation of February 4, 1998, either Mr. Pilger, or Mr. Spruit, or both investigators, observed a failure of the cupola cap, and charge door, for:[30]

(a) more than 6 minutes per individual occurrence;
(b) over thirty minutes per day in total;
(c) not related to start-up; and
(d) not tied to shut-down.

[33] These investigative findings, which support a breach section 2.3(d) of the licence, were not successfully disputed by Mr. Stuart in his cross examination of the inspectors. In other words, the Board accepts the evidence of the inspectors on this point. The Board believes these facts also constitute a breach of section 2.9(b) of the licence.[31] In short, Sovereign neglected to perform a task or a duty required by either section 2.3 or 2.9 of its licence to operate.

[34] Counts 2-5 were not disputed by the Appellant at the hearing. The Board agrees with the Director's assessment on those counts.

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30 Documents Subject of the Appeal, Tab 3, K. Pilger, Investigator's notes dated February 4, 1998.

31 Section 2.9(b) of the licence states "the proper operational procedures are followed to ensure efficient performance of the abatement equipment".

III. CONCLUSION

[35] For the reasons listed above and pursuant to section 90(3) of the Act, the Board sets the penalty at $9,000. The penalty must be paid by November 19, 1999.

Dated on October 18, 1999, at Edmonton, Alberta.

"original signed by"

Dr. William A. Tilleman

"original signed by"

Dr. John P. Ogilvie

"original signed by"

Dr. Ted W. Best