ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Hearing – July 19, 2016
Date of Decision – August 18, 2016

IN THE MATTER OF sections 91, 92, 94, 95, and 98 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed by Alberta Reclaim and Recycling Company Inc., Johnny Ha, and Shawn Diep with respect to Administrative Penalty No. 15/01-AP-RDNSR-15/01 issued to Alberta Reclaim and Recycling Company Inc., Johnny Ha, and Shawn Diep, under the *Environmental Protection and Enhancement Act*, by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

Cite as: *Alberta Reclaim and Recycling Company Inc. et al*. v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (18 August 2016), Appeal Nos. 14-025-027-D (A.E.A.B.).

BEFORE: Mr. Alex MacWilliam, Board Chair, Mr. Eric O. McAvity, Q.C., Board Member, and Ms. A.J. Fox, Board Member.

SUBMISSIONS BY:

Appellants: Alberta Reclaim and Recycling Company Inc., Mr. Johnny Ha, and Mr. Shawn Diep, represented by Mr. Hasaan Jomha, Jomha Karout Law.

Director: Mr. Michael Aiton, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Mr. Howard Samoil and Ms. Erika Gerlock, Alberta Justice and Solicitor General.

BOARD STAFF: Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Ms. Denise Black, Board Secretary; and Ms. Marian Fluker, Associate Counsel.

WITNESSES:

Appellants: Mr. Shawn Diep.

Director: Mr. Michael Aiton, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks; Mr. Todd Smith, Environmental Protection Officer, Red Deer-North Saskatchewan Region, Alberta Environment and Parks; and Mr. Daniel White, Beverage Container Management Board.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Administrative Penalty for $844,778.00 to Alberta Reclaim and Recycling Company Inc., Mr. Johnny Ha, and Mr. Shawn Diep (the Appellants) for contraventions of the *Beverage Container Recycling Regulation* under the *Environmental Protection and Enhancement Act*. AEP determined the Appellants transported beverage containers into the Province of Alberta to operating a non-permitted bottle depot in Edmonton, obtained refunds for these beverage containers, and failed to comply with the terms and conditions of the Permit for the operation of the Andrew Bottle Depot. The Administrative Penalty included a penalty assessment of $75,000.00 and an economic benefit assessment of $769,778.00 for a total of $844,778.00.

The Appellants appealed both the penalty assessment and economic benefit assessment.

At the hearing, the Appellants conceded they committed the offences and were liable for the Administrative Penalty. The Board had to determine whether the penalty and economic benefit assessments were reasonable in the circumstances.

Based on the submissions and evidence provided, the Board varied the Administrative Penalty. The Board upheld the classification of each of the offences as being major offences with major impacts on the environment. To recognize the different time periods in which Mr. Diep and Mr. Ha were sole directors of Alberta Reclaim and Recycling Inc., the Board varied the Administrative Penalty issued by AEP, and instead issued two Administrative Penalties, dividing the penalties accordingly. The first Administrative Penalty was issued to Alberta Reclaim and Recycling Inc. and Mr. Shawn Diep with a penalty assessment of $32,500.00 and an economic benefit assessment of $467,178.00. The second Administrative Penalty was issued to Alberta Reclaim and Recycling and Mr. Johnny Ha with a penalty assessment of $42,500.00 and an economic benefit assessment of $329,750.00.

The total Administrative Penalty assessed against Alberta Reclaim and Recycling Company Inc., Mr. Johnny Ha, and Mr. Shawn Diep was $871,928.00. The increased total Administrative Penalty was the result of calculation errors that the Board corrected.

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I. BACKGROUND

[1] On February 28, 2015, the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director"), issued Administrative Penalty No. 15/01-AP-RDNSR-15/01 ("Administrative Penalty") to Alberta Reclaim and Recycling Company Inc. (the "Company"), Mr. Johnny Ha, and Mr. Shawn Diep (collectively, the "Appellants"). The Administrative Penalty was issued for contraventions of section 11(1), 11(2), 14(1), and 14(2) of the *Beverage Container Recycling Regulation*, A.R 101/97 (the "Regulation").[1] The Director has the authority to issue an administrative penalty under section 237(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA").[2]

[2] The Director issued the Administrative Penalty in the total amount of $844,778.00 based on 15 counts: in Counts 1-13, the Director determined the Appellants accepted beverage containers from the Yukon and returned them for a refund in the Alberta recycling program (13 counts at $5,000.00 per count for a total of $65,000.00); in Count 14, the Director found the Appellants operated a bottle depot without a permit at a warehouse in Edmonton ($5,000.00); and in Count 15, the Director found the Appellants did not comply with the terms and conditions of Permit No. 12-BCD-091 (the "Permit") for the Andrew Bottle Depot ($5,000.00). The Director also assessed a one-time economic benefit of $769,778.00.

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[1] Sections 11(1) and (2) of the *Beverage Container Recycling Regulation* state:

> "(1) No depot operator or retailer shall accept a container or provide a cash refund for a container that can reasonably be identified by the depot operator or retailer as having been transported into Alberta.
>
> (2) No person shall return to a depot or retailer for a refund a container that the person knows or ought reasonably to know has been transported into Alberta."

Sections 14(1) and (2) *Beverage Container Recycling Regulation* provide:

> "(1) No person shall operate a depot unless that person holds a permit for that purpose issued by the [Beverage Container Management] Board in accordance with the by-laws and the permit is not under suspension.
>
> (2) A permit holder shall comply with the terms and conditions to which the permit is subject."

[2] Section 237(1) of EPEA provides:

> "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, the Director may, subject to the regulations, by notice in writing given to that person require that person to pay to the Government an administrative penalty in the amount set out in the notice for each contravention."

[3] On March 19, 2015, the Environmental Appeals Board (the "Board") received Notices of Appeal from the Appellants. The Appellants also requested a stay of the Administrative Penalty.

[4] On March 23, 2015, the Board acknowledged receipt of the appeals and notified the Director of the appeals. The Board also requested the Director provide the Board with a copy of the record (the "Record") relating to the Administrative Penalty.

[5] On March 25, 2015, the Director notified the Board that he consented to the stay by not enforcing the Administrative Penalty while the appeal was being dealt with by the Board.

[6] On August 13, 2015, the Board held a mediation meeting. A follow-up mediation meeting was held on December 11, 2015. No resolution was reached, and the Board proceeded to schedule a hearing.

[7] On December 15, 2015, the Board asked the Parties to provide available dates for a hearing. The Board proposed the issues for the hearing as follows:

1. Was the Administrative Penalty properly issued?
2. Are the conditions in the Administrative Penalty reasonable?

[8] On January 11, 2016, the Board notified the Parties that, based on the available dates provided, the hearing would be held on March 15, 2016.[3]

[9] On February 10, 2016, the Appellants requested the hearing be rescheduled due to their counsel having to attend to a personal matter. The Director agreed to the rescheduling of the hearing.

[10] On February 18, 2016, the Board notified the Parties that the only available common date for the hearing was April 22, 2016. The Board asked the Parties to confirm their

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[3] The Board published a Notice of the Hearing in the Heartland Extra and the Farm 'n' Friends, and provided the Notice to the Village of Andrew and Lamont County to post on their public bulletin boards. A news release was forwarded to the Public Affairs Bureau for distribution to media throughout the Province, and the news release was posted on the Board's website. The Notice of Hearing provided an opportunity for persons who wanted to make a representation before the Board to apply to intervene. The Board did not receive any applications from individuals to intervene.

On February 24, 2015, the Board notified the Parties that it was publishing the Notice of Hearing in the Yukon News. The alleged source of the beverage containers that were the subject matter of the Administrative Penalty was the Yukon. The Board did not receive any applications to intervene.

availability. On February 19 and 23, 2016, the Appellants and Director confirmed, respectively, their availability for the hearing on April 22, 2016.

[11] The Director and Appellants provided their written submissions for the hearing on April 5, 2016.

[12] On April 13, 2016, the Director requested the hearing be adjourned due to a family matter. The Board granted the request.

[13] On May 12, 2016, the Board notified the Parties the hearing was re-scheduled to July 19, 2016, at the Board's office in Edmonton.

[14] On May 20, 2016, the Board noted the Appellants had identified three main issues to be considered in these appeals in their written submission:

1. The "fine" portions of the Administrative Penalty should be reduced from $5000.00 per count to "closer to $1500.00" per count.
2. The "economic benefit" component of the Administrative Penalty should be reduced. In particular, whether basing the economic benefit component of the Administrative Penalty on "the gross revenue believed to have been earned based on the evidence gathered fits within the proper statutory construction." Further, "it would be greatly unfair and out of line with the pith and substance of the legislation to have the [Appellants] pay to the state funds that [they] never truly realized or enjoyed."
3. Mr. Shawn Diep be dismissed as a defendant in the action entirely as it cannot be shown control was taken by him.[4]

[15] Given the adjournment of the hearing and the refinement of the issues to be considered, the Board invited the Parties to provide supplemental submissions. Neither party provided supplemental submissions.

[16] The hearing was held on July 19, 2016, in Edmonton, Alberta, before three members of the Board.

II. PRELIMINARY MATTERS

[17] At the start of the hearing, the Board asked the Appellants if they adopted the written submissions submitted by their legal counsel on April 5, 2016. Specifically, the Board

asked Mr. Ha if he understood these submissions would hold him and the Company liable for payment of the Administrative Penalty, and if the Company could not pay, he alone would be responsible. Mr. Ha acknowledged he understood the consequences of the written submission filed by his counsel.

[18] Immediately before the start of the presentation of the Appellants' evidence at the hearing, the Board was informed that Mr. Ha would not be a witness. The Board asked Mr. Ha if he understood that he was giving up his right to explain his position to the Board. Mr. Ha stated he understood and was not willing to participate as a witness. Mr. Diep was the only witness to testify on behalf of the Appellants.

III. SUBMISSIONS

A. Appellants

[19] The Appellants explained they operated a bottle depot from October 2012 to February 2013. They stated Alberta Environment and Sustainable Development[5] started an investigation regarding activities being conducted in a building at 14318 - 140 Street N.W., Edmonton (the "Warehouse"), because it appeared the building was being operated as a bottle depot without a permit. The Appellants acknowledged they were tenants of the building at that time. The Appellants said the investigation showed that bales of beverage containers were being delivered to the Warehouse, broken apart, and stored in garbage bags that were transported once a week.

[20] The Appellants said the main issue is whether the gross revenue received from these activities was the proper basis for determining the economic benefit of the Administrative Penalty under EPEA.

[21] The Appellants conceded the Administrative Penalty was imposed under the proper legislation. They argued the Administrative Penalty was maximized even though in four of the six criteria listed in section 3(2) of the *Administrative Penalty Regulation*, A.R. 23/2003, it

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4 See: Appellant's submission, dated April 5, 2016.

5 AESRD is now called Alberta Environment and Parks. However, some of the events occurred regarding these appeals while the Department was called AESRD.

was assessed as either neutral or positively in the Appellants' favour.[6] The Appellants suggested the penalty component should be closer to $1,500.00 per contravention, rather than the $5,000.00 imposed, if these criteria were considered for the Appellants.

[22] The Appellants acknowledged the Director was entitled to impose a one-time administrative penalty based solely on the economic benefit derived from an illegal enterprise such as this one. The Appellants stated the Director's economic benefit calculation was based on "educated guessing" and was inaccurate. The Appellants said the Director should have accounted for the costs of doing business. The Appellants argued the economic benefit should have been based only on net profit.

[23] The Appellants noted the following costs associated with the business:

1. rent for the Warehouse;
2. transportation charges of $372,477.00 paid to Saini Metals; and
3. wages paid to employees.

[24] The Appellants submitted the economic benefit component should reflect the actual benefit they received (i.e. revenue less expenses). The Appellants argued section 237(b) of EPEA does not intend to have the Appellants pay a punitive penalty.[7]

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6 Section 3(2) of the *Administrative Penalty Regulation* provides:

"In a particular case, the Director may increase or decrease the amount of the administrative penalty from the amount set out in the Base Penalty Table on considering the following factors:

(a) the importance to the regulatory scheme of compliance with the provision;
(b) the degree of wilfulness or negligence in the contravention;
(c) whether or not there was any mitigation relating to the contravention;
(d) whether or not steps have been taken to prevent reoccurrence of the contravention;
(e) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
(f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention;
(g) any other factors that, in the opinion of the Director, are relevant."

7 Section 237(2) of EPEA states:

"A notice of administrative penalty may require the person to whom it is directed to pay either or both of the following:

[25] The Appellants conceded they must repay the economic benefit realized through a business that was operating unlawfully but argued that it would be unfair for the Appellants to pay funds they never realized or enjoyed.

[26] The Appellants stated the 2012 financial statement of the Company identified Mr. Johnny Ha as the sole owner and director. The Appellants requested the Board specify the relative culpability of each of the Appellants. The Appellants submitted Mr. Shawn Diep should not be held responsible since it could not be shown he had control of the Company at the time the offences were committed. The Appellants stated Mr. Ha was an owner of the Company from inception and controlled the Company at all relevant times. However, during closing arguments and based on the evidence presented by the Director, counsel for the Appellants indicated that Mr. Diep conceded he was a director of the Company at the time of the initial offences and admitted responsibility for Counts 1 to 6.

[27] The Appellants requested the monetary amount of the Administrative Penalty be reduced. Specifically, the Appellant requested the economic benefit portion to take into account the monetary gain was not as substantial as the Director's estimate.

B. Director

[28] The Director explained the following regarding the Appellants and their operations:

1. the Director was notified the Warehouse contained empty beverage containers and appeared to be operating as an unauthorized bottle depot;
2. the Company was the tenant of the Warehouse;
3. the Company was registered as a corporation on January 13, 2012;
4. between January 13, 2012 and May 22, 2012, the sole director of the Company was Mr. Shawn Diep;
5. on May 23, 2012, Mr. Johnny Ha became the sole director of the Company;

(a) a daily amount for each day or part of a day on which the contravention occurs and continues;

(b) a one-time amount to address economic benefit where the Director is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention."

6. on June 15, 2012, the Company applied to purchase the Andrew Bottle Depot, and on October 15, 2012, the Company was given the Permit by the Beverage Container Management Board ("BCMB") to operate the bottle depot in Andrew, Alberta;

7. on February 25, 2012, the owner of the Warehouse told the Environmental Protection Officer that bales of containers were delivered to the Warehouse, broken apart and sorted into garbage bags, and the bags were hauled away once a week;

8. between January 2, 2011 and January 8, 2013, approximately 738,609 pounds of crushed and baled beverage containers were delivered to the Warehouse from Raven Recycling Society in Whitehorse, Yukon, with Mr. Diep listed as a contact for the consignee, Saini Metals;

9. a total of 376,684 pounds of crushed and baled beverage containers were delivered to the Warehouse from the Yukon between January 5, 2012 and October 5, 2012, while the Company was responsible for the Warehouse;

10. employees of the Company at the Warehouse described to the Environmental Protection Officer how they sorted and counted the beverage containers from the bales and put them into large bags with "ABCRC" printed on the side, and the bags were then loaded into a truck;

11. a search of the Warehouse on February 26, 2013, found approximately 109 bales of empty beverage containers with empty beverage containers loosely scattered throughout the Warehouse, and the Warehouse had benches and equipment used for sorting beverage containers;

12. a representative of the BCMB told the Environmental Protection Officer that an audit on the Andrew Bottle Depot on March 3, 2013, showed the Andrew Bottle Depot had 20 mega bags of crushed aluminum cans on the premises, but it did not have a can crusher;

13. items seized from the Warehouse on March 10 and 26, 2013, included a partial roll of Alberta Beverage Container Recycling Corporation ("ABCRC") beverage container labels for aluminum cans, on which "Andrew" was written in the box titled "Bottle Depot Name," a roll of unused ABCRC beverage container labels for aluminum cans, and assorted ABCRC beverage container tags with "Andrew Bottle Depot" printed on the label;

14. based on information provided by the BCMC, there was an approximate 1070 percent increase in beverage container returns at the Andrew Bottle Depot from 2010 to 2011 and 2012 as the annual returns increased from 564,770 containers in 2010 to over 6,440,010 containers in 2011 and 6,608,595 containers in 2012;

15. the increase in returns at the Andrew Bottle Depot roughly corresponded to the number of beverage containers (7,887,537) that were estimated to have been brought from the Yukon to the Warehouse;

16. an estimated 2.08 million containers, with an estimated deposit value of $255,295.00, were seized at the Warehouse;

17. from January 2012 to January 2013, an estimated 8,331,993 beverage containers worth an estimated $972,061.00 in deposit returns were transported into Alberta by the Company and were introduced into the deposit refund system through the Andrew Bottle Depot as if they were Alberta beverage containers;

18. the beverage containers processed through the Warehouse went to the Andrew Bottle Depot to collect the refund for the beverage containers while the Company owned and operated the Andrew Bottle Depot;

19. the Company received $53,012.00[8] in handling fees for beverage containers that were from outside of Alberta after the Company received the Permit from the BCMB; and

20. an estimated $1,025,073.00 was paid to the Company for deposit refunds and handling fees out of the beverage container refund system.

[29] The Director explained the purpose of the ABCRC is to be the agent for the beverage manufacturers to operate a common collection system for registered beverage containers, to be responsible for recycling beverage containers, to ensure the BCMB regulations and by-laws are followed, and to promote the economic and efficient collection of beverage containers. The ABCRC is part of the collection system. It processes used beverage containers and provides payment of the deposit and handling fees to the bottle depots.

[30] The Director stated the Appellants received a significant economic benefit by importing containers from the Yukon into Alberta and circumventing the legislated deposit system. The Director explained that, based on the Bills of Lading from the Raven Recycling Society (Yukon), the BCMB was able to make a reasonable estimate of the type and numbers of beverage containers that were delivered to the Warehouse.

[31] The Director stated that February 22, 2013, was the date on which evidence of the Company's contraventions of the Regulation came to his attention. He said the contraventions related to bringing beverage containers from outside of Alberta and returning them into the beverage container handling system, which provides for refunds to be obtained at the bottle depot and handling fees to be paid to the bottle depot.

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[8] At the hearing, the Director adjusted this value due to a computation error. The Director confirmed the actual amount received for handling fees was $78,211.00.

[32] The Director stated he issued the preliminary administrative penalty assessment to the Company and the two corporate directors, Mr. Diep and Mr. Ha, at the time of the contraventions. The Director explained that he provided the Appellants an opportunity to comment on the preliminary administrative penalty assessment, but no comments were received.

[33] The Director said he made his final decision on February 20, 2015, and determined that, under section 237(2)(a) of EPEA,[9] a total administrative penalty of $75,000.00 for 15 contraventions should be assessed. The Director also determined the Appellants had received unlawful proceeds derived from the contraventions associated with bringing beverage containers into Alberta and depositing them into the beverage container refund system. The Director assessed a one-time amount of $769,778.00 to address the economic benefit the Director believed the Appellants derived as a result of the contraventions.

[34] The Director noted section 237 of EPEA provides that an administrative penalty may be issued for contraventions of the Act and the regulations that have been identified as being ones for which an administrative penalty may be issued.

[35] The Director noted that contraventions of the *Beverage Container Recycling Regulation*, are identified in the *Administrative Penalty Regulation*, as ones for which an administrative penalty under section 237 of EPEA may be issued.[10]

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[9] Section 237(2)(a) of EPEA states:

> "A notice of administrative penalty may require the person to whom it is directed to pay either or both of the following:
>
> (a) a daily amount for each day or part of a day on which the contravention occurs and continues."

[10] Section 2(1) of the *Administrative Penalty Regulation* states:

> "The provisions set out in the Schedule are the provisions in respect of which a notice of administrative penalty may be given under section 237 of the Act."

The Schedule (Provisions in Respect of Which an Administrative Penalty is Payable) of the *Administrative Penalty Regulation* provides:

> "2 *Beverage Container Recycling Regulation* (A.R. 101/97)
>
> - sections 6, 7, 8, 9, 10(1), (2), 11(1), (2), (4), 12, 13, 14, 15, 16, 17(1)."

Section 11 of the *Beverage Container Recycling Regulation* states:

> "(1) No depot operator or retailer shall accept a container or provide a cash refund for a container that can reasonably be identified by the depot operator or retailer as having been transported into Alberta.

[36] The Director stated that, if a corporation commits an offence under section 232 of EPEA, any officer, director, or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence is guilty of the offence and is liable to the punishment provided for the offence.[11]

[37] The Director noted that in section 253 of EPEA, an act or thing done by a director, officer, official, employee, or agent of a corporation in the course of that person's employment or in the exercise of that person's powers or of that person's duties is deemed to be an act or thing done by the corporation.[12]

[38] The Director confirmed he has the authority to issue administrative penalties under EPEA. He explained the usual process was followed in this case, including investigating the complaint, gathering evidence of the contraventions through site inspections, witness interviews, collecting photographs and other physical evidence, and consulting with subject-matter experts before deciding to issue the Administrative Penalty.

[39] The Director stated Mr. Diep was the sole shareholder and director of the Company from January 2012 to May 22, 2012, and Johnny Ha became the sole shareholder from

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(2) No person shall return to a depot or retailer for a refund a container that the person knows or ought reasonably to know has been transported into Alberta.

(3) Subsections (1) and (2) do not apply to a container that has been transported into Alberta by a manufacturer for the purposes of selling a beverage in the container in Alberta.

(4) A retailer shall not accept or pay a cash refund for an empty non-refillable container."

Section 14 of the *Beverage Container Recycling Regulation* provides:

"(1) No person shall operate a depot unless that person holds a permit for that purpose issued by the [Beverage Container Management] Board in accordance with the by-laws and the permit is not under suspension.

(2) A permit holder shall comply with the terms and conditions to which the permit is subject."

[11] Section 232 of EPEA provides:

"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted for or convicted of the offence."

[12] Section 253 of EPEA states:

"For the purposes of this Act, an act or thing done or omitted to be done by a director, officer, official, employee or agent of a corporation in the course of that person's employment or in the exercise of that person's powers or the performance of that person's duties is deemed also to be an act or thing done or omitted to be done by the corporation."

May 22, 2012, to February 2013. The Director was of the opinion these two Appellants were the sole directing minds of the Company during the respective periods in which they served as sole shareholder and director.

[40] The Director said he provided the Appellants an opportunity to meet with him to discuss the matter before the Administrative Penalty being issued.

[41] The Director argued the actions of Mr. Diep and Mr. Ha during their respective times as sole shareholder and director of the Company were indistinguishable from the actions of the Company. The Director stated there was no evidence that anyone else was responsible for making any decisions by or on behalf of the Company or for directing the unauthorized activities. The Director said there was no evidence that indicated they made any attempt to prevent the unauthorized activities from occurring. The Director found Mr. Diep and Mr. Ha, as directors of the Company, were also vicariously liable for the acts of the Company in their personal capacity during the periods they were the director of the Company.[13]

[42] The Director believed the economic benefit received and the administrative penalties for the contraventions up to May 22, 2012, were the joint responsibility of Mr. Diep and the Company, and from May 23, 2012, Mr. Ha and the Company were jointly responsible for the economic benefit received and the administrative penalties for the contraventions.

[43] The Director submitted the Administrative Penalty was properly issued.

[44] The Director explained the final amount of the Administrative Penalty was $844,778.00, which consisted of: (1) $75,000.00 being the penalty portion for the 15 offences assessed under the authority of section 237(2)(a) of EPEA; and (2) $769,778.00 being a one-time amount assessed under section 237(2)(b) of EPEA to address economic benefit where the person derived an economic benefit directly or indirectly as a result of the contravention.[14]

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[13] See: Section 253 of EPEA:

"For the purposes of this Act, an act or thing done or omitted to be done by a director, officer, official, employee or agent of a corporation in the course of that person's employment or in the exercise of that person's powers or the performance of that person's duties is deemed also to be an act or thing done or omitted to be done by the corporation."

[14] Sections 237(2)(a) and (b) provides:

[45] The Director explained the penalty portion related to the contraventions for transporting bottles into Alberta under section 11(2) of the *Beverage Container Recycling Regulation*, and he considered the penalty portion reasonable. He stated the Bills of Lading from Raven Recycling in the Yukon showed delivery of beverage containers to the Warehouse. The Director said the evidence showed the Warehouse was operating as an unlawful bottle depot with bales of crushed containers being broken down for delivery into the beverage container recycling system. The Director said the Andrew Bottle Depot and potentially other depots were the intended locations for funneling the out-of-province containers into the recycling system to be returned for a refund. The Director said the audit conducted by the BCMB showed most of the containers were refunded through the Andrew Bottle Depot based on the dramatic increase in containers processed there during the relevant time.

[46] The Director considered the penalty portion was also reasonable as it related to section 14(1) of the *Beverage Container Recycling Regulation* because experts from BCMB confirmed the Warehouse was being operated as a bottle depot without a permit.

[47] The Director explained he assessed a one-time economic benefit of $769,778.00. He stated his approach to the calculation of the economic benefit was reasonable and consistent with the provisions of EPEA, including section 230.

[48] The Director explained the method used to calculate the economic benefit was to account for all beverage containers confirmed to be received from out of the province which entered the beverage container recycling system for refunds. The Director said there was a large increase in the number of containers processed through the Andrew Bottle Depot during the time period of the contraventions and, after adjusting for the containers seized, the amount of containers processed by the Andrew Bottle Depot was approximately the same as the containers imported to the Warehouse. The Director stated the evidence collected at the Warehouse showed

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"A notice of administrative penalty may require the person to whom it is directed to pay either or both of the following:

(a) a daily amount for each day or part of a day on which the contravention occurs and continues;

(b) a one-time amount to address economic benefit where the Director is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention."

the containers were destined for the Andrew Bottle Depot for return into the Alberta beverage container recycling system. The Director noted a small percentage of the out-of-province containers were unable to be recycled and would not have received refunds, but the amount was a relatively small percentage based on the large increase of containers recycled through the Andrew Bottle Depot and based on an audit conducted by the BCMB. The Director believed it was unnecessary to adjust for the containers that could not be recycled because of the small percentage involved, the difficulty in quantifying the number, and given he did not assess the time value of the refunds.[15]

[49] The Director said the approach taken in assessing economic benefit was consistent with the approaches taken by the Alberta Utilities Commission ("AUC") and Alberta Securities Commission.

[50] The Director stated the AUC has a statutory provision for imposing administrative penalties similar to the provisions in section 237 of EPEA. The Director noted the AUC considered the proper measure of economic benefit was "a reasonable estimate" of all the revenues unlawfully received from the contravention.[16]

[51] The Director stated the Alberta Securities Commission also assesses economic benefit in the context of an administrative penalty regime similar to section 237 of EPEA. The Director said the assessment of economic benefit reflects an equitable policy of disgorging (another term for eliminating economic benefit) all money unlawfully obtained.

[52] The Director considered accounting for all revenues or proceeds received was the proper and reasonable measure of economic benefit since the unlawful acts from which the economic benefit derived would never have been permitted within the regulatory scheme of the *Beverage Container Recycling Regulation* or the by-laws of the BCMB.

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[15] "Assess the time value" refers to adjusting the actual value of the monetary benefit based on current dollars.

[16] See: Alberta Utilities Commission Decision 3110-D03-2015 and the Alberta Utilities Commission Rule 13: Rules on Criteria Relating to the Imposition of Administrative Penalties.

[53] The Director said that assessing all revenues or proceeds received also ensures that no economic benefit accrues to the Appellants from the unlawful use of the public's beverage container recycling system overseen by the BCMB.

[54] The Director asserted that effective deterrence required assessment of the total economic benefit realized from the unlawful behaviour to ensure the overall penalty amount, including the penalty portion under section 237(2)(a) of EPEA, reflected more than just a return of the economic gain received by the Appellants.

[55] The Director considered that the penalty assessed reflected a reasonable "estimate," and that was all that was reasonably required in the economic assessment.[17]

[56] The Director requested the Administrative Penalty be confirmed.

IV. ANALYSIS

[57] Under section 98 of EPEA, the Board is the final decision maker with respect to appeals of administrative penalties.[18]

[58] Although the Board initially set two general issues for the hearing, the written submissions received in preparation for the hearing focused on the three issues raised by the

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[17] See: Section 230 of EPEA states:

"Where a person is convicted of an offence under this Act and the court is satisfied that as a result of the commission of the offence monetary benefits accrued to the offender, the court may order the offender to pay, in addition to a fine under section 228, a fine in an amount equal to the court's estimation of the amount of those monetary benefits."

[18] Section 98 or EPEA provides:

"(1) In the case of a notice of appeal submitted under section 91(1)(n) or (o) of this Act or a notice of appeal submitted under section 115(1)(j), (l) or (q) of the *Water Act*, the Board shall, within 30 days after the completion of the hearing of the appeal, make a written decision on the matter.

(2) In its decision, the Board may

(a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and

(b) make any further order the Board considers necessary for the purposes of carrying out the decision.

(3) On making its decision, the Board shall immediately

(a) give notice of the decision to all persons who submitted notices of appeal or made representations to the Board and to all other persons who the Board considers should receive notice of the decision, and

Appellants and identified by the Board in its May 20, 2016 and May 27, 2016 letters. These issues fell within the parameters of the original issues identified by the Board. Therefore, the Board considered the following issues in making its decision on these appeals, as described by the Appellants:

1. The "fine" portions of the Administrative Penalty should be reduced from $5000.00 per count to "closer to $1500.00" per count.
2. The "economic benefit" component of the Administrative Penalty should be reduced. In particular, whether basing the economic benefit component of the Administrative Penalty on "the gross revenue believed to have been earned based on the evidence gathered fits within the proper statutory construction." Further, "it would be greatly unfair and out of line with the pith and substance of the legislation to have the [Appellants] pay to the state funds that [they] never truly realized or enjoyed."
3. Mr. Shawn Diep be dismissed as a defendant in the action entirely as it cannot be shown control was taken by him.

[59] The Board will address the issue of whether Mr. Diep should be dismissed as a defendant first, followed by discussions on the penalty assessment and economic benefit assessment.

A. Dismissal of Mr. Diep as a Person Responsible

[60] In the written submissions and through most of the evidence presented at the hearing, it was argued the Administrative Penalty should be dismissed as against Mr. Diep since he was not a director of the Company during the times specified in the Penalty. However, during closing arguments and based on the evidence presented by the Director, Mr. Diep, through his legal counsel, conceded he was a director of the Company at the time of the initial counts and admitted responsibility for Counts 1 to 6. Counsel for the Appellants explained the dates of the specific counts had not been thoroughly reviewed before the hearing, and they had misunderstood the dates.

[61] Mr. Diep was the sole director of the Company at the time Counts 1 to 6 occurred, between January 2012 and May 22, 2012. Based on the information in the Director's record, it

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(b) make the written decision available in accordance with the regulations."

appears Mr. Diep was operating the Company, albeit under a different corporate name, before 2012. Since the Administrative Penalty does not pre-date January 2012, the Board will not consider if Mr. Diep contravened the *Beverage Container Recycling Regulation* and EPEA before that time.

[62] Although there is some evidence before the Board that Mr. Diep may have continued his involvement in the Company after it was sold to Mr. Ha, the evidence was not sufficient to hold Mr. Diep responsible throughout the entire time period included in the Administrative Penalty.

[63] Therefore, the Board accepts Mr. Diep's admission of liability of Counts 1 to 6 of the Administrative Penalty and that he was responsible for the Company's actions during that time, including operating a bottle depot without a permit at the Warehouse.

B. Fine Portion of the Administrative Penalty

[64] As noted in the Compliance Assurance Framework issued by AEP, administrative penalties are issued to penalize the offender and to deter future non-compliance of the offender and others. The penalty is issued to reinforce the appropriate change in behaviour.[19]

[65] As stated in the Alberta Court of Appeal decision, *R.* v. *Terroco Industries Limited*:[20]

> "The penalty imposed should also have a deterrent effect on others in the industry who may risk offending…. The starting point for sentencing a corporate offender must be such that the fine imposed appears to be more than a licensing fee for illegal activity or the cost of doing business."[21]

[66] When determining the administrative penalty that will be assessed, the Director refers to the Base Penalty Table included in the *Administrative Penalty Regulation*.[22] In using

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19 See: Alberta Environment, *Alberta Environment – Compliance Assurance Framework* (2005).

20 See: *R.* v. *Terroco Industries Limited*, 2005 ABCA 141 ("*Terroco*").

21 *R.* v. *Terroco Industries Limited*, 2005 ABCA 141, at paragraph 60.

22 Section 3(1) of the *Administrative Penalty Regulation*, A.R. 23/2003 states:

"Subject to subsections (2) and (3), the amount of an administrative penalty shall be the base penalty calculated by the Director in accordance with the following Table:

	Type of Contravention

this table, the Director looks at the type of contravention being investigated and the potential for an adverse effect. These two parameters are assessed as to whether each is minor, moderate, or major. Based on this assessment, the Director has a starting point to calculate the penalty based on the table in section 3(1) of the *Administrative Penalty Regulation*.

[67] In this case, the Director issued the Administrative Penalty in respect to 15 counts. The first 13 counts related to the contravention of section 11(2) of the *Beverage Container Recycling Regulation* for accepting containers that were transported from the Yukon into Alberta and returning them for refunds from the Alberta beverage container recycling fund. The Director assessed the type of contravention as major and the potential for an adverse effect as major, thereby making the penalty $5,000.00 on each count.

[68] The Board found the Director's argument regarding the potential impacts on the closed-loop recycling program operating in Alberta persuasive. The Director explained the recycling program would be negatively impacted, possibly to the extent of bankrupting the recycling fund if the illegal return of beverage containers was allowed to continue unchecked. The closed loop system supports classifying the importation of beverage containers and putting them into the recycling system as a major contravention of the legislation with a major adverse effect.

[69] Count 14 related to the contravention of section 14(1) of the Regulation[23] for operating a bottle depot at the Warehouse without a permit. The Director assessed the type of contravention as major and the potential adverse effect as major, thereby resulting in a penalty of $5,000.00.

[70] The cornerstone of the regulatory scheme is to ensure activities are conducted properly by issuing approvals, licences, or permits with specific conditions with which the holder

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		Major	Moderate	Minor
Potential for Adverse Effect	Major	$5000	$3500	$2500
	Moderate	$3500	$2500	$1500
	Minor	$2500	$1500	$1000

"

[23] Section 14(1) of the Regulation states:

"No person shall operate a depot unless that person holds a permit for that purpose issued by the

must comply. Therefore, the Board considers operating a bottle depot without a permit as a major contravention with a major adverse effect given the potential impact to the regulatory scheme of non-compliance, which is the potential for the system to fail.

[71] Count 15 related to the contravention of section 14(2) of the Regulation[24] for not complying with the terms and conditions of the Permit for the Andrew Bottle Depot. The Director assessed the type of contravention as major and the potential adverse effect as major, thereby resulting in a penalty of $5,000.00.

[72] The underlying basis of the legislation is the requirement for permit holders to comply with the terms and conditions of their permits. In this case, the Appellants accepted containers from outside of Alberta on which no deposit had been collected (i.e. no contribution to the recycling fund), and then received the recycling and handling fees for these containers from the recycling fund. Accepting containers from outside Alberta was clearly a contravention of the terms and conditions of the Permit and a major contravention of the legislation with a major impact on the regulatory system. Since the Permit was issued to the Company in October 2012, when Mr. Ha was the director, the Board found that Count 15 only applied to the Company and Mr. Ha, and not to Mr. Diep.

[73] The *Administrative Penalty Regulation* allows the Director to consider factors that can reduce or increase the initial penalty assessed based on the table in section 3(1) of the *Administrative Penalty Regulation*. In determining the amounts for the Administrative Penalty, the factors the Director considered to vary the assessment were:

(a) the importance to the regulatory scheme of compliance with the provision;
(b) the degree of willfulness or negligence in the contravention;
(c) whether or not there was any mitigation relating to the contravention;
(d) whether or not steps have been taken to prevent recurrence of the contravention;
(e) whether or not the person who receives the notice of the administrative penalty has a history of non-compliance;

Board in accordance with the by-laws and the permit is not under suspension."

[24] Section 14(1) of the Regulation states:

"No person shall operate a depot unless that person holds a permit for that purpose issued by the Board in accordance with the by-laws and the permit is not under suspension."

(f) whether or not the person who receives the notice of the administrative penalty has derived any economic benefit from the contravention;

(g) any other factors that, in the opinion of the Director, are relevant.

[74] In this case, the Director assessed an additional penalty of $1,000.00 under factor (a) and $1,000.00 under factor (b) for each count. However, section 3(3) of the *Administrative Penalty Regulation* imposes a limit of $5,000.00 for each count.[25] Therefore, the assessed amount remained at $5,000.00 per count. In cannot be increased beyond this amount in the "fine" portion of the Penalty.

[75] In reviewing the type of contraventions assessed against the Appellants, the Board is of the view that there was a clear intention on the part of the Appellants to defraud the recycling system. They acquired the Andrew Bottle Depot to use as the site where the beverage containers would enter the recycling system. Contraventions that resulted from intentional behaviour are considered as more serious contraventions.[26] The activities took place over a year and possibly longer. The Appellants originally denied importing beverage containers so as to receive recycling refunds and instead, stated they were simply reloading the beverage containers to ship overseas. Their behaviour did not demonstrate they appreciated the seriousness of the contraventions to the beverage container recycling system.

[76] The underlying foundation of the regulatory system requires that approvals are obtained before commencing an activity and that the approval holders comply with these approvals. Counts 14 and 15 reflect the Appellants' disregard for the requirements of obtaining a permit to operate a bottle depot at the Warehouse and their failure to comply with the terms and conditions of the Permit for the Andrew Bottle Depot. Given the Appellants were aware a bottle depot was required to place beverage containers into the recycling system, it is clear the Appellants intentionally devised the scheme to defraud the beverage recycling system.

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25 Section 3(3) of the *Administrative Penalty Regulation* provides:

"The maximum administrative penalty that may be imposed for the purposes of section 237(2)(a) of the Act is $5000 for each contravention or for each day or part of a day on which the contravention occurs and continues, as the case may be."

26 See: Alberta Environment, *Alberta Environment – Compliance Assurance Framework* (2005).

[77] In his testimony at the hearing, the representative of the BCMB described the closed-loop system for beverage container recycling in Alberta. The manufacturer provides the product to the retailer who in turn sells it to the consumer. When the product is sold to the consumer, the retailer collects a recycling fee (deposit) which is forwarded to the collection system agent. The consumer returns the empty beverage containers to a bottle depot, and the consumer receives the deposit back. The bottle depot sends the bottles to the collection system agent, who reimburses the depot for the refunds paid out, based on the beverage containers returned. A handling fee is also paid to the bottle depot based on the number and type of beverage containers returned. The collection system agent sells the empty containers to end markets for recycling into other products. The monies acquired from these sales are put into the collection system. The system is designed to be self-supporting in that monies received from consumers must be adequate to cover reimbursement to the consumer.

[78] The Appellants defrauded the regulatory scheme by willfully importing recyclable containers from the Yukon to collect recycling fees from Alberta's recycling system. This type of contravention is considered major. The effect is also major since actions like this have a significant impact on the viability of the recycling program. The closed-loop system cannot accommodate large numbers of illegal containers entering the system. The representative from the BCMB acknowledged some containers from other jurisdictions will enter the system (e.g. individual wine bottles from British Columbia), but the small number is offset by containers that are not returned or leave the jurisdiction. Large quantities of illegal containers could disrupt, or potentially bankrupt, the closed loop system. If Alberta's recycling program fails, there could be an environmental impact as the containers would be disposed of in landfills or become litter.

[79] Evidence presented indicated containers may have been received from other jurisdictions. The BCMB explained to the Board that containers coming from other jurisdictions are an issue for the recycling fund. Some other jurisdictions, such as the Yukon, have no recycling program while many other jurisdictions have different programs that, in many instances, pay a lower refund or do not accept specific types of containers for refunds. This results in people attempting to put containers into the system that should not be included. If large numbers are put into the system, as in this case, there would be insufficient refund deposits

paid into the system to cover refunds paid out of the system, resulting in significant impacts to the operation of the recycling system and potential system failure.

[80] The Director assessed Counts 1 to 13 as major contraventions with a major environmental adverse effect. These counts all relate to the Appellants contravening section 11(2) of the *Beverage Container Recycling Regulation* by accepting beverage containers that were transported from the Yukon into Alberta and returning the beverage containers for a refund. The 13 counts arise from 13 different Bills of Lading from Raven Recycling in the Yukon, which transferred recyclable containers to the Warehouse. In the Director's administrative assessment form, the dates of the contraventions were on or about January 4, 2012, February 1, 2012, March 8, 2012, April 18 and 26, 2012, May 22, 2012, June 20, 2012, July 18 and 25, 2012, August 16, 2012, October 4 and 11, 2012, and January 8, 2013.

[81] In this particular case, the dates of the contraventions are important since the Company had two sole directors at consecutive times, Mr. Diep from January 2012 to May 2012, and Mr. Ha from June 2012 to January 2013. Although the Company was responsible at all times, Mr. Diep and Mr. Ha were responsible for the contraventions at different times. To reflect the split responsibilities of Mr. Diep and Mr. Ha, the Board has chosen to divide Counts 1 to 13 based on the sole directorship of the Company at the time the contravention occurred, with the Company named as a person responsible throughout the entire period.

[82] The Administrative Penalty issued by the Director holds each of the Appellants jointly and severally responsible for the entire penalty. At the hearing, Mr. Diep testified that he was sole director of the Company from January 2012 until May 22, 2012, when he sold the business to Mr. Ha. During the period when Mr. Diep was a director, Mr. Ha was not involved in the Company in any manner. He did not work for the Company or hold any position as director or manager. Based on this information, the Board does not believe the Administrative Penalty accurately reflects the responsibility of Mr. Ha at the time Mr. Diep directed the Company by holding Mr. Ha accountable for the infractions that occurred during that period. Therefore, the Board will not assess Counts 1 to 6 against Mr. Ha given these counts occurred from January 2012 to May 2012. Counts 1 to 6 will be assessed against the Company and Mr. Diep only.

[83] With respect to Mr. Diep's role in the Company after it was sold, there is some evidence he continued his involvement. As part of the investigation, employees of the Company described Mr. Diep as their "boss" who directed their actions and paid their wages. Mr. Diep also explained he provided advice to Mr. Ha on how to operate the Company and provided a loan to Mr. Ha. The evidence of the employees was not presented in a manner that allowed cross-examination or questioning from the Board. It was presented merely as statements included in the investigation report within the Director's Record. Although Mr. Diep may have assisted Mr. Ha in the business, there was insufficient evidence presented to show that, on a balance of probabilities, Mr. Diep was responsible for the actions reflected in Counts 7 to 13 which occurred after the Company was sold to Mr. Ha. Count 15 was issued as a result of the Company failing to comply with the terms and conditions of the Permit issued for the Andrew Bottle Depot. The Permit was issued in October 2012 when Mr. Ha was the director of the Company. The Permit contained specific terms and conditions that had to be complied with as part of operating the Andrew Bottle Depot, including complying with EPEA and the *Beverage Container Recycling Regulation*. The Permit also required that only "registered containers" be accepted for refunds. "Registered containers" do not include beverage containers from out of the province. Therefore, the Board does not consider it appropriate that Mr. Diep be held liable for Counts 7 to 13.

[84] Count 14 applies to all the Appellants. All the Appellants admitted to operating a bottle depot at the Warehouse without the required permit. Although the Board considers Count 14 should be assessed at $5,000.00, the Board cannot assess the maximum amount against the Company twice for the same infraction. Therefore, the Board will divide the penalty assessed for Count 14 in half, and assess $2,500.00 against the Company and Mr. Diep and $2,500.00 against the Company and Mr. Ha.

[85] The Director made his assessment based on the criteria available, and the Appellants had the onus to bring credible evidence forward to persuade the Board that the assessment was too high. When asked at the hearing to provide a reason why the assessments should be lowered to $1500.00 as suggested by the Appellants, the Appellants could not provide

any evidence to explain why the assessment should be reduced and did not present any cogent arguments to support the position.

[86] When arguing the base penalty should be assessed at $1500.00 instead of $5000.00, the Appellants referred to the modifying factors as a reason to reduce the base penalty. They argued that, since only two of the factors apply to the counts, the base penalty should not be the maximum. It appears that counsel for the Appellants did not understand how the modifying factors are used when assessing an administrative penalty. The assessment of the base penalty is not determined by the number of mitigating factors that apply. The mitigating or aggravating factors provide the Director with the ability to adjust the base penalty up or down or keep it at the originally assessed level. The modifying factors considered by the Director play no part in determining or assessing the type of contravention or the severity of the environmental impact.

[87] Therefore, the Board considers all 15 counts as major contraventions with potential for major environmental impacts. Therefore, all counts will be assessed at $5,000.00 each. The Company and Mr. Diep are liable for Counts 1 to 6 and 14, and the Company and Mr. Ha are liable for Counts 7 to 15. The $5,000.00 assessment for Count 14 will be divided in half between the Company and Mr. Diep and the Company and Mr. Ha. The total for the "fine" portion of the Penalty assessed against the Company and Mr. Diep is $32,500.00 and $42,500.00 against the Company and Mr. Ha.

C. Economic Benefit

[88] The issue of economic benefit has not been dealt with by the Board in any previous appeal. To assess whether the Director's approach in calculating economic benefit was correct, the Board reviewed the submissions and evidence presented by both Parties as well as decisions made by the courts and other tribunals on assessing economic benefit for contraventions of the applicable legislation.

[89] Section 237 of EPEA reflects the legislative intent that merely imposing a penalty may not deter offenders from conducting illegal activities, and that additional options should be available to the Director to ensure offenders do not benefit from illegal activities.

[90] The Alberta Court of Appeal has looked at the sentencing options available under EPEA. Although the Court's analysis relates to environmental offences, the Board is of the view that some of the concepts are relevant in determining if the Administrative Penalty was properly assessed. In *Terroco* the Court stated:

> "Sentencing judges should use the entire arsenal of sentencing options under the relevant legislation to accomplish the sentencing goals including goals related to general deterrence.… There should be no possibility of financial gain as a result of a breach or a series of breaches."[27]

[91] The Director determined that conducting an illegal operation importing recyclable containers from out of the Province to obtain recycling payments warranted an assessment of the economic benefit. Although the Director has the jurisdiction to assess this benefit under EPEA, this is the first hearing the Board has held on an appeal of the economic benefit assessment.[28]

[92] In this case, the evidence showed the Appellants received over $700,000.00 from the beverage container recycling fund. If the Director was limited to only assessing the administrative penalties or "fines," which amounted to $75,000.00, the Appellants were still positioned to receive a benefit of over $625,000.00 after the "fines" were paid. Put another way, payment of the Administrative Penalty would simply have been another cost of carrying on this illegal business, just like the transportation charges and rental of the Warehouse. Given the potential for economic gain to far exceed the penalty provisions, the legislation allows the Director to assess economic benefit resulting from non-compliance with the legislation. The provisions exist to be used when the Director considers it appropriate. In the circumstances of these appeals, the Board considers the approach taken by the Director was reasonable.

[93] The Board also notes the Appellants conceded the Director had the authority to issue a penalty for economic benefit, and it was appropriate to do so in this case. The

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27 *R.* v. *Terroco Industries Limited*, 2005 ABCA 141, at paragraph 57.

28 See: Section 237(b) of EPEA:

> "A notice of administrative penalty may require the person to whom it is directed to pay either or both of the following: …
>
> (b) a one-time amount to address economic benefit where the Director is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention."

Appellants' only issue with the economic benefit portion of the Administrative Penalty was how it was calculated.

[94] As stated in the Supreme Court of Canada decision, *Guidon* v. *Canada*,[29] the "…analysis must ask whether the amount of the penalty, considered with the other relevant factors, is in keeping with the nature of the misconduct and the penalty necessary to serve regulatory purposes, such as promoting compliance and deterring non-compliance." The Supreme Court also recognized that sizeable penalties might be necessary, so the penalty is not simply considered a cost of doing business.[30] The Supreme Court of Canada stated: "The amount of the penalty should reflect the objective of deterring non-compliance with the administrative or regulatory scheme."[31]

[95] In his evidence at the hearing, the Director discussed four different approaches to determining how economic benefit should be assessed. The Director suggests that different approaches should be used depending on the "type" of contravention that occurred.[32]

[96] Under the first approach, the activity is described as "always unlawful," meaning there was no lawful way to carry out the activity. An activity that is "always unlawful" cannot be made lawful by way of an authorization (i.e. an approval, licence, or permit) under the regulatory scheme. According to the Director, in such a situation the economic benefit should be assessed as the total revenue generated by the activity without any deduction for costs.

[97] Under the second approach, the activity was unlawfully at the time the revenue was generated, but it could be made lawful by meeting certain requirements. This type of activity is one that was carried out without the appropriate regulatory authorizations but is one for which the proper authorizations could have been obtained. If the proper authorization had been obtained, the activity would have been lawful. According to the Director, in such a situation the economic benefit should be assessed as the total revenue generated by the activity less the reasonable costs associated with the activity.

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29 *Guidon* v. *Canada*, [2015] 3 SCR 3, 2015 SCC 41 at paragraph 79.

30 *Guidon* v. *Canada*, [2015] 3 SCR 3, 2015 SCC 41 at paragraph 80.

31 *Guidon* v. *Canada*, [2015] 3 SCR 3, 2015 SCC 41 at paragraph 77.

32 See: Exhibit 1, at pages 43 to 47.

[98] The Director did not review the third and fourth approaches in significant detail in his evidence because, in his view, the first approach was appropriate for dealing with this case. The third and fourth approaches both relate to contraventions resulting from the failure to expend funds to be in compliance with the regulatory scheme. The third approach was described as applying where actions were taken to avoiding incurring costs, where subsequent expenditures cannot correct the non-compliance. The fourth approach was described as applying where actions were taken to delay incurring costs, where subsequent expenditures in the present can correct the non-compliance. The Director did not state how the economic benefit should be assessed in these cases; but presumably, it would be the total revenue earned as a result of the avoidance or delay in incurring the costs of compliance, adjusted for the reasonable costs associated with carrying out the activity. However, in these cases, the time value of money would play a more significant role in determining the economic benefit.

[99] As is discussed below, in the Board's view, the Director's approach to determining the economic benefit by looking at the total revenue without deduction for cost was appropriate given the circumstances in this case. The activities the Appellants undertook were "always unlawful" and there was nothing that could have been done to make them legal. The Board also agrees, in general, with the various approaches suggested by the Director. The complete disgorgement of revenue may not be the proper approach in each case, and the Director's approach was an acceptable starting point for determining how economic benefit should be calculated. As further economic benefit cases come before the Board different approaches may be considered and accepted as appropriate.

[100] Further, in the circumstances of these appeals, there is a strong public interest element that demands that any economic benefit the Appellants received by contravening the legislation should be recovered given the closed-loop beverage container recycling system.

[101] In AUC Decision 3110-D03-2015,[33] the AUC found the Market Surveillance Administrator's approach of calculating economic benefit, without accounting for or "setting off" any related costs or losses was consistent with the wording, spirit, and intent of section

[33] See: Alberta Utilities Commission Decision 3110-D03-2015, Market Surveillance Administrator allegations against TransAlta Corporation et al., Phase 2 - Request for Consent Order.

63(2)(b) of the *Alberta Utilities Commission Act*, R.S.A. 2000, c. A-37.[34] This approach has also been used by the Ontario Securities Commission.[35]

[102] The Alberta Securities Commission noted that disgorgement is designed to remove all money unlawfully obtained so that the respondent does not retain any financial benefit from breaching the Act. The Alberta Securities Commission also noted the Ontario Securities Commission's decision in *Limelight Entertainment*:

> "[The commission staff bears] … the initial burden of proving the amount obtained by a respondent through its non-compliance with the Act, with the burden then shifting to the respondent to disprove the reasonableness of that amount. We also note that the relevant amount is that 'obtained,' not the amount retained, the profit, or any other amount calculated by considering expenses or other possible deductions."[36]

[103] The Appellants did not provide any credible evidence that would convince the Board that the economic benefit was incorrectly calculated. The Appellants argued that net benefits should be considered, not gross benefits. The Board was willing to consider this argument and encouraged the Appellants to provide credible documentation to prove the expenses incurred by the Appellants. However, the Appellants provided only invoices from Saini Metals, but it was unclear as to what portions of the invoices were relevant. Mr. Diep stated he acted as a "broker" for recyclables, and he said at the hearing that not all the material listed on the invoices entered the recycling program. The Board also notes some of the Saini Metals invoices pre-date the time period to which the Administrative Penalty relates. Without clear proof of the actual expenses incurred, the Board cannot consider the invoices as adequate evidence to support calculating net profit. Even if relevant documentation had been provided, the Board is reluctant to modify the approach taken by the Director in assessing economic benefit. As discussed by the Director, the monies received by the Appellants in conducting the

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[34] Section 63(2)(b) of the *Alberta Utilities Commission Act* provides:

"An administrative penalty imposed under subsection (1) may require the person to whom it is directed to pay either or both of the following: …

(b) a one-time amount to address economic benefit where the Commission is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention."

[35] See: Re: *Limelight Entertainment Inc.* (2008), 31 OSCB 12030 ("*Limelight Entertainment*").

[36] Re: *Arbour Energy Inc*., 2012 ABASC 416 at paragraph 37.

illegal activities came from a closed-loop system. The Director calculated what the Appellants would have received based on the best information available to him, including estimated weights of recyclables using data provided by the BCMB, the agency that oversees the recycling program in Alberta. The Bills of Lading provided by Raven Recycling indicated the weight of recyclable containers sent to the Warehouse. The weight was then converted to determine an estimated number of beverage containers based on data provided by the BCMB.

[104] In their submission, the Appellants asked the Board to consider deducting minimum wages of the employees who sorted the material from the economic benefit calculation. No reliable documentation was presented to indicate what was paid to the employees nor to what extent payments of wages were made relating to the illegal operations. In one of the statements included in the Director's record, one former employee stated he was paid $10.00 per hour by Mr. Diep. However, there are no records to substantiate any of the expenses claimed. The Appellants acknowledged the less-than-standard business record keeping of the Company.

[105] The economic benefit is being assessed for the benefit received for the contraventions described in Counts 1 to 13. The contravention occurred when the Appellants put the imported containers into the recycling system. If the containers had been brought in, repackaged, and sent to India, China, or some other country accepting recyclable containers as the Appellants suggested was done here, then there would not have been an economic benefit realized from the Alberta beverage container recycling program. However, no evidence was presented that showed the Appellants exported the containers to other countries. In fact, the evidence showed the containers were put into the Alberta recycling program. The BCMB noted the Andrew Bottle Depot saw more than a 1000 percent increase in the number of containers it was returning for a refund. The Board has difficulty seeing how a small operation at Andrew, that was only open two days a week and was considered barely profitable by Mr. Diep, could experience the sudden and sizable growth reflected in the evidence. The BCMB also estimated the number of containers brought into the system by the Appellants roughly reflected the number of containers brought in from the Yukon.

[106] Court cases and other administrative decisions have recognized the need to assess an economic benefit to act as a deterrent for the offender as well as others in the industry who might attempt to conduct illegal operations. The purpose of disgorgement of an economic benefit is to remove any benefit the offender received as a result of the illegal activities.

[107] The Appellants did not import beverage containers once, but did so on numerous occasions, and there were indications it occurred more often than the Bills of Lading from Raven Recycling indicated. In *Terroco*, the Court noted:

> "Finally, sentencing judges should consider the size and profitability of the transaction that resulted in the breach and whether it was part of an ongoing series of breaches…."[37]

[108] Since the actual contravention was importing the containers and putting the containers into the recycling program, the Board considers it appropriate that the economic benefit is the amount the Appellants actually received from the beverage container recycling program as a result of their actions that contravened the legislation. In this case, the Board finds the Director's decision to assess the economic benefit using the first of the four approaches described above is both reasonable and appropriate.

[109] In calculating the economic benefit received by the Appellants, the Director used the Bills of Lading from Raven Recycling. In reviewing the Bills of Lading and the calculation of refunds received,[38] the Board found an error with the April 18, 2012 bill of lading. That bill of lading included 4200 other plastic containers whereas the Director used 3680 in his calculation of economic benefit. Since the Director intended to use the numbers from the Bills of Lading, and the Board considers it a reasonable approach to estimating the number of containers involved, the Board will adjust the economic benefit received based on 4200 other plastic containers received.

[110] As part of the investigation, beverage containers were seized at the Warehouse that would have resulted in approximately $255,295.00 had they been returned for a refund. The Director deducted this amount from the total economic benefit assessed to the Appellants

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37 *R.* v. *Terroco Industries Limited*, 2005 ABCA 141 at paragraph 59.

38 See: Tab 1 of Director's Record: Director's Preliminary Assessment of Administrative Penalty at Tab A.

because these containers were included in the Bills of Lading but were not returned for refunds. As the Director indicated, these containers would have been included on the Bills of Lading and, since the containers did not get into the recycling system, they cannot be included as part of the economic benefit and will be deducted from the total economic benefit calculation. Since containers were removed from the Warehouse regularly throughout this time period, it is unlikely any of the containers brought in while Mr. Diep was a director would still be on the premises, so the credit for the seized containers will be applied to the economic benefit calculated for the time period during which Mr. Ha was the sole director.

[111] Handling fees were originally assessed at $53,012.00 but were re-assessed at $78,211.00 as calculated in Exhibit 4. At the hearing, the Director noted he had made a calculation error in his original assessment. The Board accepts the handling fee calculations as presented in Exhibit 4 totaling $78,211.00. The handling fees were only assessed from October 2012 to January 2013. October 2012 to January 2013 was when the Company had the Permit to operate the Andrew Bottle Depot and would have been collecting the handling fees under the depot operations. Since all of these fees related to the time period when Mr. Ha was director of the Company, the Board will include the handling fees as part of the economic benefit accrued while Mr. Ha was a director. Given the Andrew Bottle Depot was operating under a permit issued to the previous owner before October 2012, it is unclear to whom the handling fees were paid. Therefore, the Board cannot include any further handling fees as part of the economic benefit.

[112] Based on the revised calculations, the economic benefit assessed against the Company and Mr. Diep in relation to Counts 1 to 6 is $467,178.00. This total is based on the estimated value of the refunds the Company received from the Alberta beverage container recycling program from January 2012 to May 2012 while Mr. Diep was a director. The number of containers was determined by the Bills of Lading from Raven Recycling.

[113] The economic benefit assessed against the Company and Mr. Ha is $329,750.00. This amount is based on the estimated refund value according to the Raven Recycling Bills of Lading ($506,834.00), less the refund value of the containers seized from the Warehouse ($255,295.00), plus the handling fees received from October 2012 to January 2013 ($78,211.00).

[114] The Board notes the AUC has a document available which provides guidance to the person assessing the penalty as to how the penalty should be calculated and the factors that need to considered, including determining economic benefit.[39] The Board suggests AEP should consider developing a guide to assist compliance managers in calculating administrative penalties, particularly as it relates to economic benefit. Given the circumstances of these appeals, the Director did a fair and reasonable assessment of the administrative penalty, but guidance for future cases may be beneficial to AEP staff and the public.

V. CONCLUSION

[115] Based on the submissions and evidence provided, the Board determines that it is appropriate to vary the Administrative Penalty.

[116] The Board determines the penalty for each of Counts 1 to 13 is assessed at $5,000.00 to Alberta Reclaim and Recycling Inc. and apportioned between Mr. Diep and Mr. Ha according to the time each was sole director of Alberta Reclaim and Recycling Inc. Count 14 will be assessed at $2500.00 to Alberta Reclaim and Recycling Inc. and Mr. Diep and $2500.00 to Alberta Reclaim and Recycling Inc. and Mr. Ha. Count 15 is assessed at $5,000.00 and will be assessed against Mr. Ha.

[117] The economic benefit assessment will be assessed to Alberta Reclaim and Recycling Inc. and apportioned between Mr. Diep and Mr. Ha according to the time each was sole director of the Company.

[118] The total administrative penalty assessed against Alberta Reclaim and Recycling Inc. and Mr. Diep is $499,678.00, and the total administrative penalty to be assessed against Alberta Reclaim and Recycling Inc. and Mr. Ha is $372,250.00.

VI. ORDER OF THE BOARD

[119] In accordance with section 98(2) of EPEA, the Board has the authority to confirm, reverse or vary the decision of the Director.[40] Therefore, with respect to the decision of the

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[39] See: AUC Rule 13, Criteria Relating to the Imposition of Administrative Penalties.

[40] Section 98(2) of the Act provides:

Director to issue Administrative Penalty No. 15/01-AP-RDNSR-15/01 to the Appellants, for contravention of sections 11 and 14 of the *Beverage Container Recycling Regulation*, the Board orders that the decision of the Director to issue the Administrative Penalty is varied as follows:

1. In place of the original Administrative Penalty, the Director is to issue an administrative penalty to Alberta Reclaim and Recycling Inc. and Mr. Shawn Diep in respect to Counts 1 to 6 and 14, and an administrative penalty to Alberta Reclaim and Recycling Inc. and Mr. Johnny Ha in respect to Counts 7 to 15;

2. That the decision of the Director regarding the amounts of $5,000.00 for each of Counts 1 to 13 and 15 be confirmed;

3. That the amount of Count 14, being $5,000.00, be assessed at $2,500.00 against Alberta Reclaim and Recycling Inc. and Mr. Diep and $2,500.00 against Alberta Reclaim and Recycling Inc. and Mr. Ha;

4. That the administrative penalty issued to Alberta Reclaim and Recycling Inc. and Mr. Shawn Diep shall include an administrative penalty for Counts 1 to 6 and 14 totaling $32,500.00 and an economic benefit assessment of $467,178.00, for a total of $499,678.00;

5. That the administrative penalty issued to Alberta Reclaim and Recycling Inc. and Mr. Johnny Ha shall include an administrative penalty for Counts 7 to 15 totaling $42,500.00 and an economic benefit assessment of $329,750.00, for a total of $372,250.00;

6. That the administrative penalties described above are payable in accordance with the legislation.

Dated on August 18, 2016, at Edmonton, Alberta.

- original signed -

Alex MacWilliam

"In its decision, the Board may (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make …."

Board Chair

- original signed -

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Eric O. McAvity, Q.C.
Board Member

- original signed -

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A.J. Fox
Board Member