

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 31, 2020

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 an appeal filed by M. Pidherney's Trucking Ltd. and 1598768 Alberta Ltd. with respect to the decision of the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to issue Administrative Penalty No. 15/03-AP-RDNSR to M. Pidherney's Trucking Ltd. and 1598768 Alberta Ltd.

Cite as: *M. Pidherney's Trucking Ltd. et. al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (31 March 2020), Appeal Nos. 15-001-002-D (A.E.A.B.), 2020 ABEAB 12.

BEFORE:

Mr. Alex MacWilliam, Board Chair.

PARTIES:

Appellants: M. Pidherney's Trucking Ltd. and 1598768 Alberta Ltd., represented by Mr. Ron Kruhlak, Q. C., McLennan Ross LLP.

Director: Mr. Michael Aiton, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Administrative Penalty to M. Pidherney's Trucking Ltd. and 1598768 Alberta Ltd. (the Appellants) for contravening the *Environmental Protection and Enhancement Act*. AEP alleged that the Appellants operated a pit exceeding 5 hectares between July 5, 2012, and March 13, 2013, without authorization and failed to report any contravention of the Code of Practice for Pits, for a site at SW-5-40-9-W5M in Clearwater County. The amount of the Administrative Penalty assessed by AEP was \$224,542.00. In setting the amount of the Administrative Penalty, the Director calculated a base assessment of \$70,000.00 plus an additional \$154,542.00 for factors that varied the assessment, including economic benefit.

The Appellants filed a Notice of Appeal with the Environmental Appeals Board (the Board). A mediation meeting was held on September 2, 2015, and a further mediation meeting was held on December 6, 2016. As no resolution was reached the Board set a written hearing process to address two issues as requested by the parties. A third issue was added to the written hearing process. The parties subsequently undertook their own discussions. The parties have reached a resolution whereby the parties recommended to the Board that the Administrative Penalty be varied by reducing the assessed amount to \$77,679.00.

The Board accepted the mediated agreement and varied the Administrative Penalty accordingly.

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I. BACKGROUND

[1] On April 8, 2015, the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the “Director”), in accordance with section 237 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”),¹ issued Notice of Administrative Penalty No. 15/03-AP-RDNSR-15-03 (the “Administrative Penalty”) to M. Pidherney’s Trucking Ltd. and 1598768 Alberta Ltd. in the amount of \$224,542.00.

[2] The Administrative Penalty consisted of one count. This count related to the operation of a pit exceeding 5 hectares between July 5, 2012, and March 13, 2013, without authorization and a failure to report any contraventions of the Code of Practice for Pits, for a site at SW-5-40-9-W5M in Clearwater County. In setting the amount of the Administrative Penalty, the Director calculated a base assessment of \$70,000.00 plus an additional \$154,542.00 for factors that varied the assessment, including economic benefit.²

¹ Section 237 of EPEA provides:

“(1) 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.

(2) 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; ...

(3) A person who pays an administrative penalty in respect of a contravention may not be charged under this Act with an offence in respect of that contravention.

(4) Subject to the right to appeal a notice of administrative penalty to the Environmental Appeals Board, where a person fails to pay an administrative penalty in accordance with the notice of administrative penalty and the regulations, the Minister may file a copy of the notice of administrative penalty with the clerk of the Court of Queen’s Bench and, on being filed, the notice has the same force and effect and may be enforced as if it were a judgment of the Court.”

² Section 3(1) and 3(2) of the *Administrative Penalty Regulation*, A.R. 23/2003, lists factors a Director may consider when assessing the amount of an Administrative Penalty:

“3(1) Subject to subsections (2) and (3), the amount of an administrative penalty for each contravention that occurs or continues is the amount set out in the Base Penalty Table but that amount may be increased or decreased by the Director in accordance with subsection (2).

[3] On May 12, 2015, the Environmental Appeals Board (the “Board”) acknowledged receipt of a Notice of Appeal from M. Pidherney’s Trucking Ltd. and 1598768 Alberta Ltd. (the “Appellants”) and notified the Director of the appeal. The Board requested the Appellants and the Director (collectively the “Parties”) provide available dates for a mediation meeting and the Director provide the records he reviewed and that were available to him when making his decision (the “Director’s Record”).

[4] The Director’s Record was received by the Board on July 17, 2015, and provided to the Appellants on July 21, 2015. A Supplemental Director’s Record was received by the Board September 2, 2015, and provided to the Appellants on September 2, 2015.

[5] On June 2, 2015 the Board scheduled a mediation meeting on September 2, 2015 involving the Parties and a member of the Board acting as a mediator. Discussions continued and the Parties provided regular status reports to the Board. On November 9, 2016 conference calls were held between the Parties and mediator and on December 6, 2016 a second mediation meeting was held.

BASE PENALTY TABLE
Type of Contravention

	Major	Moderate	Minor	
Potential for Adverse Effect	Major	\$5000	\$3500	\$2500
	Moderate	3500	2500	1500
	Minor to	2500	1500	1000
	None			

- (2) 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.”

[6] As a result of the December 6, 2016 mediation meeting, the Parties came to an agreement on the issues for a written hearing. On December 12, 2016, the Board's decided it would bifurcate the hearing of the appeals and set a process for a written hearing, requested the Director provide an updated record, and advised that a Notice of Hearing was placed in the Rocky Mountain House Mountaineer on December 20, 2016 advising that applications to intervene in the hearing were to be filed by January 6, 2017. The two issues to be decided by the Board were:

1. Is the Director obliged to consider the sentencing principles of parity and proportionality when determining what may be an appropriate administrative penalty for a corporation who has been found to have operated a sand and gravel facility without a registration with respect to section 237(2) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 on both subsections (a) and (b)?
2. If the principles of parity and proportionality do apply, what direction would the Board provide as to how a Director ought to consider these principles in the administrative penalty assessment process?

The Board stated once it made a decision on the two issues, it would provide direction on how the remaining issues in these appeals would be dealt with.

[7] A Supplemental Director's Record was received by the Board on January 6, 2017, and provided to the Appellants on the same date.

[8] The Appellants submitted a motion on January 9, 2017, to exclude the January 6, 2017 Supplemental Director's Record. The motion argued that the records were either previously available to the Director or not relevant to the appeals currently before the Board. The Appellants later withdrew the motion on January 20, 2017.

[9] On January 11, 2017, the Board advised the Parties that it did not receive any applications to intervene in the written hearing.

[10] Submissions for the written hearing were received on January 20, 2017 from the Appellants, on February 3, 2017 from the Director, and on February 16, 2017 the Appellants filed a rebuttal submission.

[11] On May 4, 2017, the Board wrote to the Parties and advised that after reviewing the hearing submissions, it required further information prior to making a decision on the two issues before it, and further details. A process was set where it would ask questions of the Parties, receive written submissions, set a date for an oral hearing, and allow for additional response and final arguments of the Parties. Following conclusion of the process, the Board would issue a decision pursuant to section 98 of EPEA.

[12] On June 23, 2017, the Board decided it required submissions on a third issue:

How does the administrative law principle of “like decisions in a like manner” apply to these appeals? This principle is also referred to as judicial comity, and suggests that discretion should be generally exercised in a similar manner. In addressing this issue, parties should also address the question of whether the Director, as a statutory decision-maker, is bound by the precedent of previous decisions or the principles of *stare decisis*?

[13] Following receipt of the submissions, the Board stated an oral hearing would be convened to allow the Director to be cross-examined, the Board to ask questions, and the Parties to summarize their arguments on the three issue. The Board set a schedule for submissions and the Director’s affidavit and requested any concerns with the procedures to be provided by June 29, 2017.

[14] Objections were received from the Parties and on August 28, 2019, the Board requested the Parties provide their schedules for a conference call with the Chair to discuss a path forward. A conference call was scheduled for September 30, 2019.

[15] On September 27, 2019, the Board cancelled the conference call at the request of the Parties to engage in settlement discussions. The Board requested the Parties provide regular status reports on their progress.

[16] On March 6, 2020, the Director wrote to the Board and providing the agreement reached between the Parties’ and requesting the Board issue its decision ordering the Administrative Penalty be modified according to the agreement.

II. DISCUSSION

[17] The mediated agreement resulted in the Parties recommending to the Board the Administrative Penalty be varied by reducing the Administrative Penalty from \$224,542.00 to \$77,679.00. The Board considers the mediated agreement to be reasonable and will vary the Administrative Penalty according to the agreement reached between the Parties.

III. DECISION

[18] Based on the mediated agreement, the Board varies the Administrative Penalty as follows:

1. The base penalty amount is varied from \$70,000.00 to \$28,500.00; and
2. The economic benefit amount is varied from \$154,542.00 to \$49,179.00.

[19] Pursuant to section 98 of EPEA, a copy of this decision is to be provided to:

1. Mr. Ron Kruhlak, McLennan Ross LLP, on behalf of M. Pidherney's Trucking Ltd. and 1598768 Alberta Ltd.; and
2. Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General, on behalf of the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

IV. ORDER OF THE BOARD

[20] In accordance with section 98 (1) and (2) of EPEA, the Board has the authority to confirm, reverse, or vary the decision of the Director.³ Therefore, with respect to the decision of

³ Section 98 of 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

the Director to issue the Administrative Penalty to M. Pidherney's Trucking Ltd. and 1598768 Alberta Ltd., the Board orders the decision of the Director to issue the Administrative Penalty is varied as follows:

1. The assessment for the base penalty amount is varied from \$70,000.00 to \$28,500.00;
2. The total assessment for the economic benefit is varied from \$154,542.00 to \$49,179.00;
3. M. Pidherney's Trucking Ltd. and 1598768 Alberta Ltd. shall pay the total amount of \$77,679.00 to the Government of Alberta within 30 days of the date of this Order; and
4. No interest is payable on the Administrative Penalty amount until after 30 days of the date of this Order.

Dated on March 31, 2020, at Edmonton, Alberta.

"original signed by"

Alex MacWilliam
Board Chair