

# **Administrative Penalties in Alberta: Overview and Latest Trends**

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A Symposium on  
Environment in the Courtroom:  
Enforcement Issues in Canadian Wildlife Protection

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## 1 SCOPE OF THIS PAPER

The focus of this Symposium is the Enforcement Issues in Canadian Wildlife Protection. Unfortunately, while administrative penalties are used in Alberta's environmental regulatory scheme, they are not used directly to address wildlife protection. Administrative penalties can be used incidentally to protect wildlife under legislation such as the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("EPEA"), the *Water Act*, RSA 2000, c W-3, and the *Public Lands Act*, RSA 2000, c P-40 ("PLA").

This paper will provide an overview of the administrative penalty regime in Alberta and will examine a recent case before the Alberta Environmental Appeals Board (*Alberta Reclaim and Recycling Company Inc. et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, 2016 AEAB 16). This paper will conclude with a brief overview of some of the economic models use by the United States Environmental Protection Agency with respect to administrative penalties.

## 2 ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT

EPEA was the first piece of environmental legislation in Alberta to include administrative penalties. EPEA provides:

**237(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;
- (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.

**(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.

The original provisions for administrative penalties were brought into force on September 1, 1993. However, the ability to assess "a one-time amount to address economic benefit" was enacted in 2002.

The Administrative Penalty Regulation, A.R. 23/2003 (the "Regulation") details what is required to be included in the administrative penalty and provides for a two-year limitation period.

**Notice of administrative penalty**

**2(1)** 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.

**(2)** A notice of administrative penalty must be given in writing and must contain the following information:

- (a) the name of the person required to pay the administrative penalty;
- (b) particulars of the contravention;
- (c) the amount of the administrative penalty and the date by which it must be paid;
- (d) a statement of the right to appeal to the Environmental Appeal Board given under section 91(1)(n) of the Act.

**(3)** A notice of administrative penalty may not be issued more than 2 years after the later of

- (a) the date on which the contravention to which the notice relates occurred, or
- (b) the date on which evidence of the contravention first came to the notice of the Director.

The Regulation also details how the penalty is to be assessed, including the determination of the base penalty and the factors to be considered in adjusting the based penalty. The Regulation also prescribes a maximum of \$5000 per day.

**Penalty assessment**

**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).

**BASE PENALTY TABLE**  
**Type of Contravention**

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

**(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.

(3) 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.

The structure of the administrative penalty regime under the *Water Act* and the PLA, and other environmental legislation, is substantially similar.

However, the key detail that is missing from all of this legislation is how to deal with “a one-time amount to address economic benefit.” No guidance is provided in either that Acts or the regulations as to how to determine this amount.

### 3 APPEALING ADMINISTRATIVE PENALTIES

One of the key pieces in any administrative penalty scheme is provision for an appeal mechanism as follows:

**91(1)** A notice of appeal may be submitted to the Board by the following persons in the following circumstances: ...

- (n) where the Director requires a person to pay an administrative penalty under section 237, the person to whom the notice is directed may submit a notice of appeal; ....

With an appeal mechanism in place, the administrative penalty can be registered as an order of the Court and enforced without the need to prove the administrative penalty in Court.

### 4 ALBERTA RECLAIM AND RECYCLING

The first time an economic benefit case came before the *Environmental Appeals Board* was in *Alberta Reclaim and Recycling Company Inc. et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, 2016 AEAB 16 (“*Alberta Reclaim*”) as follows:

“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 anon-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.”

See: *Alberta Reclaim*, Executive Summary.

The key issue in this case was what should the economic benefit calculation be based upon – total revenue or total profit. The Director (the statutory decision maker for Alberta Environment and Parks) based the assessment on total revenue.

In the *Alberta Reclaim* case, the Board discussed the following four possible approaches to determine the basis for the economic benefit calculation:

“[95] ... [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.

[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.

[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.”

The Board agreed with the Director that the appropriate basis upon which to assess the economic benefit amount was the total revenue. As stated, this was a case where the actions of the Appellants would always be unlawful.

There are other cases before the Environmental Appeals Board and the Public Lands Appeal Board that will continue to expand the analysis of economic benefit in administrative penalties.

## **5 UNITED STATES OF AMERICA – ENVIRONMENTAL PROTECTION AGENCY**

The best resources to understand how administrative penalties work can be found at the United States of America's Environmental Protection Agency ("EPA") website ([www.epa.gov](http://www.epa.gov)). Among the resources to be considered is the "Resource Conservation and Recovery Act - Civil Penalty Policy" (EPA: June 2003). The policy document is published by the Resource Conservation and Recovery Act Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance.

In addition to this policy, the EPA has developed a number of penalty and financial models to assist in the determination of the appropriate economic benefit amount. These models have yet to be used in Alberta, but are likely the next step in the development of economic benefit analysis.

These models include:

- BEN - Calculates a violator's economic benefit of noncompliance from delaying or avoiding pollution control expenditures.
- ABEL - Evaluates a corporation's ability to afford compliance costs, cleanup costs or civil penalties.
- INDIPAY - Evaluates an individual's ability to afford compliance costs, cleanup costs or civil penalties.
- MUNIPAY - Evaluates a municipality's or regional utility's ability to afford compliance costs, cleanup costs or civil penalties.
- PROJECT (6.7.0) - Calculates the real cost to a defendant of a proposed supplemental environmental project.

See: <https://www.epa.gov/enforcement/penalty-and-financial-models> (Retrieved: Mar 2, 2018.)

## **6 CONCLUSION**

The use of administrative penalties has many benefits over quasi-criminal penalty schemes. For example, administrative penalties are usually quicker, have few defences, and require a lower level of proof. However, until the introduction of economic benefit, the limitation on the penalty amount could be viewed as "just the cost of doing business." With the ability to take away the economic benefit that is gained from a violation, administrative penalties have become a very effective tool in deterring non-compliance with a legislative scheme.

In Alberta, this area of law is still emerging, with the foundation for the determining the amount of the economic benefit just being established. The next development will likely be the use of the EPA penalty and financial models to adjust the economic benefit amount.