Environmental Appeal Board

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DECISION NO. EAB-EMA-20-A022(a)

In the matter of an appeal under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53.

BETWEEN:	Richard Yntema	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written submissions concluding on November 5, 2021	
APPEARING:	For the Appellant: Self-represented	
	For the Respondent: Emma Thomas, Counsel Grace Campbell, Counsel	

FINAL DECISION

APPEAL

[1] This appeal concerns a determination (the "Determination") issued to Richard Yntema (the "Appellant"). The Determination levies a $6,300 administrative penalty against the Appellant for contravening section 109(6) of the *Environmental Management Act* (the "*Act*") by failing to produce records to an inspector. The Determination was issued on November 13, 2020, by Liz Archibald, acting as a Director under the *Act* (the "Director") in the Ministry of Environment and Climate Change Strategy (the "Ministry").

[2] The Environmental Appeal Board has the authority to hear this appeal under section 100 of the *Act*. Under section 103 of the *Act*, the Board has the power to:

a) send the matter back to the Director, with directions,

b) confirm, reverse or vary the Determination, or

c) make any decision that the Director could have made, and that the Board considers appropriate in the circumstances.

[3] The Appellant asks the Board to reverse the penalty.

BACKGROUND

<u>The Facility and the regulatory scheme for slaughter facilities</u>

[4] The Appellant is the sole proprietor of a slaughter facility called Valley Wide Meats (the "Facility") in Enderby, British Columbia. The Facility processes beef, pork, lamb, and game meat from the North Okanagan area. The Facility is attached to a farm, and processes meat for consumption by local clients and for sale to the public.

[5] *The Code of Practice for the Slaughter and Poultry Processing Industries, B.C. Reg. 246/2007* (the "*Code*") regulates the discharge of waste by the slaughter and the poultry processing industries. Section 2(1) of the *Code* requires slaughter facilities to register for an exemption under section 4 of the *Waste Discharge Regulation*, unless a slaughter facility is exempted under section 2(2) of the *Code*. Under section 2(2) of the *Code*, registration is not required if the products from the slaughter facility are for the personal use and not for sale, or the person carries out an agricultural operation and produces less than 5 tonnes of "live weight killed red meat" per year.

[6] Sections 6(2) and (3) of the *Act* prohibit certain persons and businesses from introducing waste into the environment without authorization. Section 4 of the *Waste Discharge Regulation* provides an exemption from sections 6(2) and (3) of the *Act* if the person or business is registered under, and complies with, a code of practice that applies to their industry or activity, which in this case is the *Code*.

[7] Section 1 of the *Code* defines two categories of slaughter facilities (and poultry processing facilities). A "category A facility" discharges less than 5 cubic metres of wastewater per day and produces less than 60 tonnes live weight killed red meat per year. A "category B facility" discharges 5 or more cubic metres of wastewater per day or produces 60 tonnes or more live weight killed red meat per year.

[8] Sections 5(c) of the *Code* requires category A facilities to keep records of:

(i) the amount of wastewater discharged, in cubic metres per day, from the facility for any period during which there is a discharge; and

(ii) production volumes of red meat (or poultry), in tonnes of live weight killed per year.

[9] Section 6(a) of the *Code* requires category B facilities to comply with section 5.

[10] Section 3 of the *Code* states that records which must be kept under the *Code* must: (a) be retained for at least 10 years; and (b) be made available for inspection by an officer within two days of a request by the officer.

[11] On May 5, 2010, Mike Reiner, a Compliance Officer with the Ministry, conducted an inspection of the Facility. Officer Reiner noted concerns with the Facility's storage and disposal of slaughter waste and stated that the Appellant should ensure the Facility is registered under the *Code*.

[12] On June 10, 2010, the Appellant applied to register the Facility under the *Code*. The Appellant's application for registration states that the Facility discharges liquid from red meat, produces a maximum of 200 gallons (approximately 0.909 cubic meters) of wastewater per day, and the method of discharge is "subsurface

(tile/drain field)". It also states that the Facility produces 350 tonnes live weight killed per year.[1]

[13] On July 28, 2010, the Ministry issued registration #104928 (the "Registration") to the Appellant, confirming the Facility to be a "category B" slaughter facility, as defined in the *Code*. The letter confirming registration of the Facility noted that the Facility could discharge waste in accordance with the *Act* and the *Code*. Among other things, the Registration stated that the Facility must meet the requirements of sections 5 and 6 of the *Code*, including keeping records of the amount of wastewater discharged in cubic meters per day and the production of volumes of red meat or poultry in tonnes of live weight killed per year.

Inspections and Warnings from 2013 to 2019

[14] On May 1, 2013, Officer Reiner and an officer with the Canadian Food Inspection Agency ("CFIA") inspected the Facility. According to the Inspection Report completed on that date, the Appellant did not allow them to access freezers to verify if any waste was stored in them, or to a boar pasture or mortality pit to determine if slaughter waste had been discharged. Officer Reiner reportedly advised the Appellant that he needed to "… record and maintain reliable records with respect to wastes and volumes leaving the site." The Appellant was given a violation ticket under section 120(5) of the *Act* for obstructing an officer, but the ticket was later stayed following court proceedings.

[15] On November 12, 2015, Stephanie Little, an Environmental Protection Officer with the Ministry, inspected the Facility. She was accompanied by a veterinarian from the CFIA. According to Officer Little's Inspection Report completed on the day of the visit, the Facility was non-compliant with various waste disposal requirements under the *Code*. The inspection report states that the Appellant failed to:

- keep all slaughter waste in covered containers during storage;
- prevent the escape of slaughter waste from his property (birds and hogs could access and remove pieces of waste);
- follow proper composting processes, including the separation of finished compost with material being composted;
- have berms or works constructed to prevent the escape of compost or leachate from a composting pad being used to treat slaughter waste, resulting in the escape of waste; and,
- follow the composting requirements in the *Code*.

[16] Officer Little's Inspection Report also says that the Appellant failed to keep records related to his composting. He did not have documentation related to soil testing, a nutrient management plan, production levels of compost, and temperatures and retention times measured during the composting process.

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[1] While the Director stated that the Appellant reported a discharge of 200 cubic meters of wastewater per day, he wrote "200 Gal." on the application form, which asks for wastewater in cubic meters per day.

[17] Following that inspection, Ms. Little prepared a warning letter dated April 25, 2016 (the "First Warning Letter"). The First Warning Letter outlined several alleged violations of the *Code*, identified administrative penalties that could potentially be levied against the Appellant, and advised the Appellant that the violations would form part of his compliance history. Ms. Little directed the Appellant to make certain modifications within 30 days of receiving the First Warning Letter.

[18] The Ministry sent the First Warning Letter to the Facility by registered mail, but the letter was returned on May 20, 2016, as it was unclaimed.

[19] On April 28, 2016, Ministry Conservation Officers attempted to hand deliver the First Warning Letter to the Appellant. The Appellant asked the officers to sign a visitor log, but the Conservation Officers refused. The Conservation Officers left the First Warning Letter on a desk in the office/reception area of the Facility.

[20] On May 24, 2016, Ms. Little sent an email to the Appellant asking if he needed assistance with the details and directions in the First Warning Letter. In reply, Carleen Yntema sent an email on May 25, 2016, stating that she did not receive a hand delivered letter, as the officers who attended on April 28, 2016 had refused to sign the visitor's log.

[21] On August 24, 2016, Officer Little and Officer Jonathan Lahti inspected the Facility. The inspection report states that waste storage had improved since the last inspection, there was no visible discharge of blood or slaughter waste, and there appeared to be no composting of slaughter waste.

[22] The inspection report states that Officer Little telephoned the Appellant on September 27, 2016 to follow up on the inspection. Officer Little asked the Appellant if he was measuring the wastewater being discharged, and he said there was no meter or way of monitoring it. Officer Little also asked if he would provide production volumes for 2015, to which he stated that the Facility does not track that information. The inspection report concluded that the Appellant was out of compliance with sections 5(c) and 6(a) of the *Code*. The inspection report was sent to the Appellant by email on September 28, 2016, and the email stated, in part, "Please note the items that are out of compliance and take the necessary steps to rectify them."

[23] On February 13, 2018, Officer Little attended the Facility. During the inspection, the Appellant refused to produce the records that must be kept under section 5(c) of the *Code*. He said there was no flow meter installed to determine the wastewater discharge per day. He also said he preferred not to provide the Ministry with information about the live weights killed per year because he was afraid his neighbours could access the numbers through a request under the *Freedom of Information and Protection of Privacy Act*.

[24] On March 20, 2018, Meaghan Murphy, an Environmental Protection Officer with the Ministry, sent the Appellant a warning letter (the "Second Warning Letter") as a follow-up from the February 13, 2018 inspection. The Second Warning Letter stated that the Appellant was out of compliance with sections 5(c) and 6(a) of the *Code*, and failure to take steps to restore compliance may result in escalating enforcement action. The Second Warning Letter requested that the Appellant advise the Ministry in writing within 30 days what corrective measures he had taken to

prevent similar non-compliances in the future. The Second Warning Letter was sent to the Appellant via email and registered mail.

[25] On December 17, 2018, after receiving no response to the Second Warning Letter, Travis Kurinka, an Environmental Protection Officer with the Ministry, sent an email to the Appellant and requested the following information under the *Code* by no later than January 11, 2019:

1. Section 5(c)(i) – Please confirm by submitting photos or a copy of the installation invoice that a flow meter has been installed at your facility to record the amount of effluent discharged per day.
2. Section 5(c)(i) – Submit copies of your effluent discharge records between February 7, 2018 to December 14, 2018
3. Section 5(c)(ii) – Submit copies of your 2017 and 2018 records of production volumes of red meat or poultry, in tonnes of live weight killed per year.[2]

[26] Officer Kurinka's email also stated that failure to provide the requested information in a timely manner is an offence under section 109(6) of the *Act* and is subject to administrative penalties.

[27] Section 109(6) of the *Act* states that a director, officer, employee, or agent of a person who is the subject of a compliance inspection must, on request of an inspecting officer:

(a) produce, without charge or unreasonable delay, for examination by the inspecting officer

…

(ii) any other record that touches on any matter relating to the production, treatment, storage, handling, transport or discharge of waste on or from the land or premises, and

(b) provide the inspecting officer with information relevant to the purposes of the inspection.

[28] The Appellant did not respond to Officer Kurinka's December 17, 2018 email.

[29] On January 21, 2019, Officer Kurinka prepared a letter, which was hand delivered to the Appellant on February 5, 2019. This letter requested the same information requested in Officer Kurinka's email of December 17, 2018 pursuant to section 109(6) of the *Act*. The letter imposed a deadline of 30 days from the date of receipt (March 5, 2019) and advised the Appellant to contact Officer Kurinka if he needed any clarification. The letter warned the Appellant of escalating enforcement action for non-compliance, including administrative penalties of up to $40,000 for contravening section 109(6) of the *Act*, up to $10,000 for contravening section 5(c) of the *Code*, and up to $75,000 for contravening section 6 of the *Code*.

[30] The Appellant did not respond to Officer Kurinka's letter.

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[2] These three points are reproduced as written in Mr. Kurinka's email of December 17, 2018.

2019 Penalty Notice

[31] On July 4, 2019, Officer Kurinka sent a notice (the "Penalty Notice") to the Appellant, stating that he had breached section 109(6) of the *Act* by failing to produce records, and the matter was being referred for an administrative penalty. The Penalty Notice was sent to the Appellant by email and registered mail.

Overview of the Administrative Penalty Scheme

[32] Under section 115 of the *Act*, a director may issue an administrative penalty to a person who fails to comply with a prescribed provision of the *Act* or its regulations. The *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*Penalties Regulation*"), governs the determination of administrative penalties under section 115(1) of the *Act*.

[33] Part 2 of the *Penalties Regulation* specifies which sections of the *Act* and its regulations are prescribed for the purposes of section 115(1) of the *Act*, and the maximum penalties for contraventions. Section 12(2) of the *Penalties Regulation* states that the maximum penalty for contravening section 109(6) of the *Act* is $40,000. Section 21(3) of the *Penalties Regulation* states that the maximum penalty for contravening section 5(c) of the *Code* is $10,000.

[34] Section 7(1) of the *Penalties Regulation* lists factors that a director must consider, if applicable, in establishing the amount of an administrative penalty. In summary, those factors are:

a) the nature of the contravention;

b) the real or potential adverse effect of the contravention;

c) any previous contraventions, administrative penalties imposed on, or orders issued to the person who is the subject of the determination;

d) whether the contravention was repeated or continuous;

e) whether the contravention was deliberate;

f) any economic benefit derived by the person from the contravention;

g) whether the person exercised due diligence to prevent the contravention;

h) the person's efforts to correct the contravention;

i) the person's efforts to prevent recurrence of the contravention; and

j) any other factors that, in the opinion of the director, are relevant.

[35] Under section 7(2) of the *Penalties Regulation*, if a contravention continues for more than one day, separate administrative penalties may be imposed for each day the contravention continues.

[36] To assist decision-makers in determining an appropriate penalty using these factors, the Ministry has developed the *Administrative Penalties Handbook – Environmental Management Act and Integrated Pest Management Act*, dated June 2020 (the "Handbook"). The Handbook recommends first assessing a "base penalty" for the contravention. The base penalty is intended to reflect the seriousness of the contravention based on factors a) and b) above (i.e., the nature

of the contravention, and any real or potential adverse effects). Additional amounts are then added to, or deducted from, the base penalty after considering the "penalty adjustment factors" in subsections c) to j).

The Notice Prior to Penalty

[37] On June 25, 2020, the Director issued a Notice Prior to Determination of Administrative Penalty (the "Notice Prior to Penalty") to the Appellant, recommending a penalty of $6,300 for contravening section 109(6) of the *Act*. The Notice Prior to Penalty included information from the Ministry's records regarding the Appellant and the Facility, and details of how the Director calculated the proposed penalty. The Notice Prior to Penalty offered the Appellant an opportunity to provide written submissions before the Director made a final decision.

[38] On October 13, 2020, the Appellant provided submissions to the Director. The Appellant submitted that the Facility has never been a class B facility, as he obtained a class A "Licence" for the Facility in August 2008. Attached to his submission was a page summarizing a licensing system for slaughter facilities. The Appellant stated that the Facility has been "challenged by storing and handling [our] slaughter waste, bones and hides", but has been trying to work with the government to rectify this. He said there has never been a problem with the Facility's wastewater discharge system and it works like a septic system.

[39] As for the requested records, the Appellant said the Ministry of Agriculture has records of the number of animals processed, and Interior Health has inspection records for the Facility. The Appellant said he did not understand "the discharge issues." He stated that the Facility does not discharge anything into a water course or the air, and "minor infractions" with storage bins and liquid around the salted hide pile have been addressed. He also stated that the Facility has no way of recording wastewater discharge flow rates or volumes. He submitted that the proposed penalty was excessive and unfair, and he could not afford to pay it. He said the Facility was down to one employee due to COVID-19 and is the only slaughter facility left in the area. He said he was willing to work with the Ministry to resolve the issue and the misunderstanding.

The Determination

[40] On November 13, 2020, the Director issued the Determination. The Determination states that a penalty of $6,300 was levied for contravening section 109(6) of the *Act* from March 8, 2019 to June 25, 2020. The Determination also states that, at the time of making the Determination, the Appellant remained out of compliance for failing to produce records of production and discharge flow rates.

[41] The reasons provided in the Determination state:

> Mr. Yntema is expected to comply with all applicable requirements of the Code and the *Environmental Management Act* at all times. Mr. Yntema has been aware, since receiving the July 31, 2010, registration letter, of the requirement to retain effluent discharge records and production records for inspection by an Inspecting Officer. Multiple inspections have previously identified the non-compliances in this administrative penalty. Mr. Yntema has

been uncooperative with Inspecting Officers by refusing to answer questions and provide records required for compliance verification and has attempted to obstruct Inspecting Officers at the Facility. He has evaded contact with the Inspecting Officers by refusing to respond to inspection records sent by email and failing to claim inspection records sent by registered mail. Mr. Yntema has also attempted to refuse an inspection record and Warning hand delivered by the COS. This willful disregard to address the contravention and return to compliance undermines the basic integrity of the overarching regulatory regime and has interfered with the Ministry's capacity to regulate and ensure that the environment and human health are protected. The penalty remains the same as described in the Penalty Assessment Form and no changes were made for the final determination.

Appeal of the Determination

[42] On December 7, 2020, the Appellant appealed the Determination and requested that the penalty be reversed. I have summarized the grounds for appeal provided in his Notice of Appeal as follows:

- I don't understand why the Registration was issued and why the limits of 350 tons live weight killed per year and maximum waste discharge rate was determined. The Facility does not discharge anything, and the slaughter records are kept with the CFIA, and now the B.C. Agricultural Ministry.
- The Registration states that the Facility is a Category B facility. It never was a Category B facility. It has always been a Class A facility.
- The reason for not cooperating with the inspection officer, Ms. Little, was she came without making an appointment, causing me to have to stop working, as well as all my employees. She also demonstrated by the pictures in her report that she was not at all familiar with what is happening here. There were multiple discrepancies, showing her reports are inaccurate. My behavior reflects my frustration at her lack of knowledge, her comprehension, and her own interpretation of what practices happen on my farm and my abattoir, which are two separate entities.
- In the determining of the administrative penalty, the date of contravention states March 8, 2019 to June 25, 2020. I do not understand this time period as the Facility has been operating since August 4, 2008 with minimal change.
- Four of my affiliates who also own Class A slaughter facilities do not have permits under the *Code*. They do not know what I am talking about, as they do not discharge waste either.
- the $6,300 penalty is excessive and would force me to close my operation due to the fact this is a small family run business.
- I need an understanding of how I can install and maintain wastewater discharge flow and production volumes. This present system cannot facilitate this.

[43] The Board directed that the appeal be conducted by way of written submissions. The appeal was conducted as a new hearing of the matter.

Consequently, the Board considered the matter afresh, with both evidence that was considered by the Director and new evidence that was not.

[44] The Director provided written submissions and an affidavit with documentary evidence. The Appellant provided written submissions.

[45] After reviewing the submissions, I considered further submissions to be warranted. I invited follow-up submissions in two phases. In the first phase, both parties provided written submissions and the Director included an affidavit in support of those submissions. In the second phase, the Director provided submissions and an affidavit in support, while the Appellant did not provide further submissions.

ISSUES

[46] The main issue raised by the Appellant is whether the penalty should be reversed. I note that the Appellant's submissions also express confusion over why he was issued the Registration and why the Facility is required to comply with the *Code*, given his view that the Facility discharges no waste. I have addressed that as a separate issue before addressing the penalty. Accordingly, I have addressed the following issues in deciding the appeal:

1. Is the Facility required to comply with the *Code*, and if so, did the Appellant contravene the *Code* and/or the *Act*?
2. If the Appellant contravened the *Code* and/or the *Act*, what is the appropriate penalty?

DISCUSSION AND ANALYSIS

1. Is the Facility required to comply with the *Code*, and if so, did the Appellant contravene the *Code* and/or the *Act*?

<u>Summary of the Appellant's submissions</u>

[47] The Appellant submits that the Facility is a licensed class A abattoir which received its licence on August 4, 2008. He says the Facility does not discharge waste, and he does not understand why the Registration was issued.

[48] The Appellant states that in 2006, the government helped him upgrade the Facility to a class "A" facility, and the Ministry was included in that process. He says the Facility was "grandfathered" into certain requirements because it was an existing facility.

[49] The Appellant says he recently talked to 18 other abattoir owners around the Province, and none of them record or submit records of their waste volumes or discharge of effluent. He says their wastewater systems consist of simple septic systems, open lagoons, holding tanks, drainage fields, or dry wells. He says none of them could tell him what volumes of solid waste they generated on a daily basis. Some were using the local land fill, others were burying the waste on site, while others were having the waste picked up. The amount of this waste was not documented or recorded.

[50] The Appellant submits that new government employees do not understand the Facility's day-to-day operations. He maintains that he is being singled out from other abattoir operators and is being treated in a harsh and unfair manner.

[51] Furthermore, he submits that if the Facility is required to comply with the requirement to record flow volumes, he would have to completely redesign the drainage system, which is under concrete flooring in the middle of the Facility. He says it would be too expensive for him to do that. Further, he says that the penalty does not make sense as, even if he pays it, he will still be non-compliant with the requirements of the *Code*. The Appellant says he would be willing to work with the Ministry to arrive at a "mutually agreeable solution" to this issue.

Summary of the Director's submissions

[52] The Director submits that on May 5, 2010, the Ministry issued an inspection report to the Appellant advising him to ensure that the Facility's wastewater system was registered under the *Code*. On June 10, 2010, the Appellant applied to register the Facility under the *Code* for authorization to discharge waste. His application for registration stated that the Facility discharges waste in liquid form (red meat) and the method of discharge is subsurface. The application also stated that the Facility produces a maximum of 200 gallons (approximately 0.909 cubic meters) of wastewater per day, and 350 tonnes live weight killed per year. The Director says this means the Facility is a category B slaughter facility under the *Code*.

[53] On July 28, 2010, the Ministry issued the Registration allowing the Facility to discharge waste in accordance with the legislation. The Registration states that the Facility is a category B slaughter facility, and must meet the requirements of sections 5 and 6 of the *Code*, namely, keeping records of the amount of wastewater discharged in cubic meters per day and the production volumes of red meat or poultry in tonnes of live weight killed per year. The Director provided documents showing that the Appellant paid the $100 application fee on June 10, 2010, and he has paid the annual registration fee every year since then.

[54] In addition, the Director submits that through the inspections conducted in 2016, 2018, and 2019, the Appellant was notified of his obligations under the *Code* and was specifically asked for records relating to wastewater discharge.

[55] The Director notes that the Appellant's submissions to her, before the Determination was issued, expressed confusion over the Facility being referred to as a "class B" facility, and the issue of effluent discharge being raised by the Ministry. In his submissions to the Board, the Appellant again expresses confusion as to his Registration, and he says the Facility does not discharge anything. Yet, the Registration, and numerous letters and inspection reports sent to him by the Ministry, outlined his duties the *Code*.

[56] The Director submits that, to date, the Appellant has failed to produce any records of wastewater discharge and he continues to deny that he has any obligation under the *Code* to maintain records. In that regard, the Director says there is clear evidence that the Appellant has failed to produce records in accordance with section 3 of the *Code* and section 109(6) of the *Act*. Further, given

that he has admitted to not having the required records, he has breached sections 5 and 6 of the *Code*.

[57] In summary, the Director submits that the Appellant is required to comply with all applicable requirements of the *Code*. He was aware since July 28, 2010 of his requirement to retain effluent discharge records, and he has been informed on several occasions about this obligation, yet he continues to fail to produce such records.

The Panel's findings

[58] The Appellant's submission that the Facility is a "licensed class A" abattoir appears to relate to a licence issued under the *Food Safety Act*, S.B.C. 2002, c. 28. Provincially licensed slaughter establishments are regulated under the *Food Safety Act.* The Ministry of Agriculture, Food and Fisheries issues abattoir licences under that Act. Under that licensing scheme, class A slaughter establishments are permitted to slaughter, cut, and wrap meat products, and sell those products in B.C.

[59] In contrast, the *Act* and the *Code* regulate the discharge of waste from the slaughtering process. The Registration relates to the requirements in the *Act* and its regulations, including the *Code*, which apply when waste from the slaughter process is discharged to the environment. The legal requirement to hold this Registration is separate from, and serves a different purpose then, holding a licence under the *Food Safety Act*.

[60] The Registration allows the Facility to discharge liquid waste from the slaughter process to a subsurface disposal system in compliance with the *Code* and the *Act*. Although the Appellant claims that the Facility discharges no waste, I find that the discharge of liquids from the slaughter process to a subsurface disposal system is a discharge of waste to the environment. The *Act* defines "environment" to include land, water, and air. The *Code* defines "processing waste" as wastewater, solid waste and semi-solid waste. Further, the *Code* defines "wastewater" as processing water which may contain blood, fat, oil, grease, industrial cleaners, and other liquid wastes produced by the slaughter industry. The evidence, including the Appellant's application for the Registration and his submissions to the Director and the Board, indicates that wastewater is produced from the slaughter process in the Facility, and is discharged to the land via a subsurface disposal system.

[61] Given the evidence that the Facility sells its products to the public, produces much more than 5 tonnes of live weight killed red meat per year, and discharges wastewater from the slaughter process, I also find that the Facility does not qualify for the exception from registration provided in section 2(2) of the Code. I find that the Facility does need to be registered as required under section 2(1) of the Code and section 4 of the *Waste Discharge Regulation*. Without the Registration, the Facility's discharge of wastewater to the disposal system would violate sections 6(2) and (3) of the *Act* and section 2(1) of the *Code*.

[62] Thus, while the Facility may have a class A license under the *Food Safety Act*, the Facility also needs to be registered under the *Code*. Indeed, the evidence shows that the Appellant applied for, and received, the Registration so that the Facility

would comply with sections 6(2) and (3) of the *Act* and section 2(1) of the *Code*. However, the *Code* imposes additional requirements, beyond the need to be registered. Some of those additional requirements include the record-keeping requirements in section 5(c) of the *Code*.

[63] Based on the definitions of category A and B facilities in section 1 of the *Code*, and given the information in Appellant's application for the Registration regarding the Facility's volume of wastewater discharged per day and the live weight killed per year, I find that the Facility is a category B facility under the *Code*. However, for the purposes of this appeal, it makes no difference whether the Facility is a category A or a category B facility under the *Code*, because the record-keeping requirements in section 5(c) of the *Code* apply to not only category A facilities, but also category B facilities, as stated in section 6(a) of the *Code*.

[64] Although the Facility was built before the *Code* came into effect, it is still required to comply with the *Code*, and the Appellant is still obligated to have a means of recording and keeping the information required under section 5(c) of the *Code*. I find that that the Appellant was notified in writing of those requirements when the Registration was issued to him on July 28, 2010. The Registration states, in part:

> As a Category B facility, under the Code…, Valley Wide Meats … must also meet the requirements in Sections 5 and 6…, which include keeping records of the following information:
>
> (i) the amount of wastewater discharged, in cubic meters per day, from the … facility for any period during which there is discharge;
>
> (ii) production volumes of red meat or poultry, in tonnes of live weight killed per year.
>
> This registration is being issued without the requirement of the subsurface disposal system being designed by a qualified professional and installed according to the design (Section 7(3) of the Code) being met. This exception was made because the system was already in place at the time of application and appeared to be functioning properly when observed by Ministry of Environment staff during a May 6, 2010 site visit.
>
> …
>
> This acknowledgement of your registration should not be construed as a representation that the works are adequately designed or will satisfy the regulatory requirements. It is the responsibility of the discharger to ensure that the facility is adequately designed, constructed and operated to ensure compliance.

[65] I appreciate that, because the Facility was built before the *Code* came into effect, the Facility's disposal system may not have a meter to measure the amount of wastewater discharged in cubic meters per day. I also appreciate that the Appellant says he would have to redesign the drainage system under concrete flooring in the Facility, at his own cost, if he is to comply with section 5(c) of the *Code*. However, I find that the Registration also alerted the Appellant to this potential situation, as it advised him that he needed to comply with the

requirements under the *Code* to maintain records about the amount of wastewater discharged from the Facility per day. Specifically, the Registration states that it was issued despite the subsurface disposal system not being designed by a qualified professional, it did not mean that the works were adequately designed or would satisfy the *Code*, and the Appellant is responsible for ensuring that the Facility is designed, constructed and operated in compliance with the *Code*.

[66] In addition, I find that the Appellant was reminded numerous times of his obligation to comply with section 5(c) of the *Code*, during site inspections after the Registration was issued, and in letters and inspection reports issued to him before the Penalty Notice and, ultimately, the Determination was issued.

[67] Based on the evidence, I find that the Appellant knew, or should have known, about his obligation to comply with the record-keeping requirements in section 5(c) of the *Code* for several years before the matter was referred for an administrative penalty. He has had considerable time to find a way to comply with section 5(c) of the *Code* since the Registration was issued in July 2010.

[68] Also based on the evidence, including the Appellant's own submissions, I find that the Appellant has not installed a flow meter or other means of measuring the volume of wastewater discharged from the Facility, and he keeps no records of the amount of wastewater discharged, in cubic meters per day, from the Facility, contrary to section 5(c)(i) of the *Code*.

[69] Failing to produce records for inspection is a contravention of section 109(6) of the *Act*. I also note that section 3(b) of the *Code* states that records required to be kept under the *Code* must be made available for inspection by an officer within two days of a request by the officer. Given that the Appellant did not keep records as required by section 5(c)(i) of the *Code*, he had no records to show when Ministry officers sought to inspect those records. As such, he also failed to comply with not only section 109(6) of the *Act*, but also section 3(b) of the *Code*.

[70] Regarding the records to be kept under section 5(c)(ii) of the *Code*, there is evidence that the Appellant had some records of the production volumes of meat in tonnes of live weight killed per year. Photograph 11 in the report from the February 2018 site inspection shows a handwritten document listing amounts of live weight processed for lamb. The documents show that during the February 2018 inspection, Ms. Little told the Appellant that failure to provide the live weights killed per year in tonnes would be a non-compliance under section 5(c)(ii) of the *Code*, but the Appellant stated that he preferred not to give this information to the Ministry because he was afraid his neighbours could access it through a "Freedom of Information" request.

[71] Based on the evidence, I find that the Appellant kept at least some of the records required under section 5(c)(ii) of the *Code*, and he may have kept all of those records, but he declined to produce the records to Ministry inspectors. As a result, he contravened section 3(b) of the *Code* and section 109(6) of the *Act*.

2. What is the appropriate penalty in the circumstances?

i) Should the penalty be for contravening section 3(b) of the *Code*, or alternatively, section 109(6) of the *Act*?

[72] I have already concluded that the Appellant contravened both the *Code* and the *Act*. Each has its own penalty provisions, so the first point to consider is which provisions should apply. In reviewing the material available to me, I decided I needed additional arguments from the parties in order to fairly consider this question. I raised it with the parties and each provided submissions. The Director also provided an affidavit in support of his submissions.

Summary of the Appellant's submissions

[73] The Appellant's submissions do not directly address this question; rather, they assert that a penalty will not lead to any greater compliance and would unfairly single him out from many similar operations in his area. The Appellant also argues that enforcement of such penalties would force businesses such as his out of operation.

Summary of the Director's submissions

[74] The Director says that Officer Kurinka requested records from the Appellant using the authority granted under section 109(6) of the *Act*, rather than under section 3 of the *Code*. Although the Director did not know the reason why, she suggested that it may be because the former requires production within two days, while the latter gives more latitude by requiring production "without unreasonable delay". The Director says that it was procedurally fair to issue the penalty based on non-compliance with section 109(6) of the *Act*, given that Officer Kurinka referenced that authority in demanding the records.

The Panel's findings

[75] Given that the requirement to produce records for inspection in section 3(b) of the *Code* is similar to the requirement in section 109(6) of the *Act*, the Ministry chose to pursue compliance and enforcement action in relation to only one of those provisions. I agree with pursuing enforcement action for contravening only one of those provisions, as it would be duplicative to apply separate penalties for each contravention.

[76] The Director says that she imposed the penalty pursuant to section 109(6) of the *Act* because that was the authority referenced by Officer Kurinka, although she does not know why he referenced that authority, rather than section 3(b) of the *Code*.

[77] I appreciate that a contravention of section 109(6) of the *Act* may not be a contravention of section 3(b) of the *Code*, and vice versa. That said, in this case, the Appellant did not provide records because he did not have any. His actions constituted a violation of both provisions. The Appellant never questioned whether he was compliant with his record-keeping and record production obligations. Accordingly, in the circumstances of this case, I consider the Director should have given some thought to which provision ought to be enforced. Given that there was

no dispute about whether an infraction had occurred, it would not have been procedurally unfair of the Director to consider a potential violation with a lesser maximum penalty.[3] Furthermore, there was an opportunity to be heard, which could have addressed any procedural fairness concerns (as did the supplemental submissions in this appeal).

[78] It is also important to consider what types of contraventions and consequences the Appellant was being notified and warned about. Based on the inspection reports and other compliance-related documents issued by the Ministry, it is apparent that the Appellant was warned on several occasions about the need to keep records as required by section 5(c) of the *Code*. He was also warned that failing to produce those records was a contravention of the *Code*. The inspection reports and warning letters, up to and including the Second Warning Letter dated March 20, 2018, do not mention that failing to produce those records might also be a contravention of section 109(6) of the *Act*.[4]

[79] The possibility that the Appellant was contravening section 109(6) of the *Act* was only raised after Officer Kurinka took charge of the matter. The possibility of contravening section 109(6) of the *Act* for failing to produce the requested records was first stated in Officer Kurinka's December 17, 2018 letter, and was re-stated Officer Kurinka's January 21, 2019 letter. The January 21, 2019 letter also set out the maximum penalties for contravening sections 3, 5, 6 of the *Code*, and section 109(6) of the *Act*. Thus, up to that point, it appears that the Appellant was warned about possible administrative penalties for contravening one, some, or all of those provisions.

[80] The July 4, 2019 Penalty Notice, also issued by Officer Kurinka, states that the Appellant was out of compliance with section 109(6) of the *Act*. For reasons that are not apparent in the evidence or the Director's submissions, the Penalty Notice also states that it was "not determined" whether the Appellant had complied with sections 5(c)(i) and (ii) of the *Code*. I find that the "not determined" statement is inaccurate. Based on my review of the Ministry inspection reports and letters leading up to the Penalty Notice, the focus was clearly on the Appellant's failure to comply with sections 5(c)(i) and (ii) of the *Code*. In fact, his failure to provide the records he was required to keep under sections 5(c)(i) and (ii) of the *Code* was what led to contravening section 109(6) of the *Act* and section 3(b) of the *Code*. Also, for reasons that are not apparent in the evidence or the Director's submissions, the Penalty Notice does not discuss section 3 of the *Code* as a consideration in terms of pursuing an administrative penalty.

[81] In summary, I find that the Director should have considered which provision(s) to enforce by imposing an administrative penalty. It is insufficient to reference the infraction provided by an officer in the Notice of Penalty or a warning, without assessing if there are other, potentially more appropriate infractions to

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[3] A contravention of section 3 of the *Code* has a maximum penalty of $10,000 whereas a contravention of section 109(6) of the *Act* has a maximum penalty of $40,000.

[4] The Second Warning Letter does state, however, "Failure to comply with the requirements set out in your registration under Code of Practice for Slaughter and Poultry Processing is an offense under the *Environmental Management Act* (EMA)." The Second Warning Letter does not refer to any specific sections of the *Act*.

address through a penalty. Furthermore, the Director's documents and submissions do not explain why the Penalty Notice inaccurately states that it was "not determined" whether the Appellant had complied with sections 5(c)(i) and (ii) of the *Code*.

[82] Given the statements in the Penalty Notice, it is not surprising that the subsequent Notice Prior to Penalty issued by the Director only discusses the Appellant's failure to comply with section 109(6) of the *Act*, and the potential penalty associated with that. Similarly, the Director's Determination only addresses the Appellant's failure to comply with section 109(6) of the *Act*, and the penalty levied for that contravention.

[83] Based on the facts in this case, I find that it would be more appropriate to levy an administrative penalty against the Appellant for contravening section 3(b) of the *Code*, than for contravening section 109(6) of the *Act*. The requirements in section 3(b) of the *Code* are directly connected to the record-keeping requirements in section 5(c) of the *Code*, and specifically apply to the operations and waste discharged by slaughter facilities, such as the Facility. In contrast, the requirement in section 109(6) of the *Act* is a general requirement to produce records for inspection. Further, the $10,000 maximum penalty for contravening section 3 of the *Code* is more appropriate than the $40,000 maximum penalty for contravening section 109(6) of the *Act*, given that this is the first time the Appellant has been formally penalized for contravening the record-keeping and record production requirements that apply to him and the Facility. Furthermore, as discussed below, there is no evidence that the contravention caused any harm to the environment.

[84] In summary, I find that the Appellant contravened both section 3(b) of the *Code* and section 109(6) of the *Act* by failing to produce records that he is required to keep under section 5(c) of the *Code*. I further find that it is appropriate to levy a penalty against the Appellant for contravening section 3(b) of the *Code*, but not for contravening section 109(6) of the *Act*.

ii. What is the appropriate penalty based on the factors in section 7 of the *Penalties Regulation*?

Summary of the Appellant's submissions

[85] The Appellant submits that the Facility causes no harm or impact to the surrounding environment. Paying the $6,300 penalty makes no sense, because the Facility still will not be in compliance. The Appellant says he is willing to work with the Ministry to come up with a mutually agreeable solution.

[86] In the first round of supplemental submissions, the Appellant argues that he lacks the income necessary to pay the penalty. He adds that, even if he paid the penalty, he would still be unable "… to keep any records of [his] waste discharge amounts, due to the way [his] system works, and how it was built." He says that other facilities, similar to his own, operate in the same way and have not been subject to any penalties. He says the enforcement of such penalties would lead to the closure of many similar family-owned businesses that offer a valuable service in his area.

[87] The Appellant did not provide submissions when I asked for submissions on the appropriate amount of the penalty.

Summary of the Director's submissions

[88] The Director reviewed her considerations with respect to the applicable factors in section 7 of the *Penalties Regulation*. The Director submits that, given those factors and the information from the Appellant, a penalty of $6,300 is appropriate for contravening section 109(6) of the *Act*.

[89] Under sections 7(1)(a) and (b) of the *Penalties Regulation*, the Director says the nature of the contravention (failing to provide the requested records) was minor, the adverse effect (preventing the Ministry from conducting inspections) was medium, and these factors warranted a base penalty of $3,000.

[90] The Director then considered the following factors under the *Penalties Regulation*:

- section 7(1)(c) – the Appellant had no previously imposed prosecutions or administrative penalties. Therefore, the Director did not increase the penalty.
- section 7(1)(d) - the Director concluded that the contravention of section 109(6) of the *Act* was continuous since the March 8, 2019 deadline to submit the records for inspection. Consequently, the Director increased the base penalty by 10% (+$300).
- section 7(1)(e) – the Director concluded that the contravention was deliberate based on the Appellant's past involvement with the Ministry and having been aware since receiving the Registration in June 2010 of his obligations under the *Code*. Given the lengthy passage of time with repeated correspondence and warnings, the Director added a 100% increase to the base penalty (+$3,000).
- section 7(1)(f) - not applicable.
- section 7(1)(g) - there was no evidence that that the Appellant took all reasonable measures to avoid the contraventions. Therefore, the Director did not reduce the penalty.
- section 7(1)(h), there was no evidence that the Appellant made any efforts to correct the contravention or failure. Therefore, the Director did not reduce the penalty.
- section 7(1)(j) – there was no evidence that the Appellant made any efforts to prevent the reoccurrences of the contraventions. Therefore, the Director did not reduce the penalty.
- section 7(1)(k) – there were no additional factors to consider.

[91] The Director, in supplemental submissions, states that the amount of the penalty is the same, whether the *Code* or the *Act* forms the basis for the penalty. She says that the smaller maximum penalty yields a smaller base penalty, and applying the factors described above, the final penalty is for $3,150; however, a penalty under the *Code* would be applied for violations of both section 5(c)(i) and

5(c)(ii), resulting in an overall total of $6,300. This is the same as the penalty under appeal.

The Panel's findings

[92] For reasons provided above, I have already found that it is appropriate in this case to levy a penalty against the Appellant for contravening section 3(b) of the *Code*, but not for contravening section 109(6) of the *Act*.

[93] I do not agree with the Director that two penalties are appropriate, one for each subsection of section (c). As noted in the Handbook, on which the Director relied:

> Where there are multiple contraventions related to the same requirement (e.g. subsections of the same subsection), such as late reporting + missing content of a report, one penalty would be appropriate with justification for a higher amount.[5]

[94] The Director has not explained why she would have ignored this guidance. I consider the Handbook to foster consistency and quality decision-making, and offer guidance that balances the need for deterrence with the need for proportional penalties. I find the guidance in the Handbook persuasive, and I consider it appropriate to consider only one penalty in the circumstances of this case.

[95] Below, I have considered the parties' submissions and evidence in light of the maximum penalty for contravening section 3(b) of the *Code*, which is $10,000 under section 21(3) of the *Penalties Regulation*, and the relevant factors in section 7 of the *Penalties Regulation*.

Factors a) and b): nature of the contravention, and real or potential adverse effect of the contravention

[96] I agree with the Director that the nature of this contravention is "minor", and the adverse effect (preventing the Ministry from conducting inspections) was "medium". I find that the Appellant's failure to produce records of the Facility's wastewater discharge and production volume interfered with the Ministry's ability to ensure compliance with the *Code* and to regulate wastewater discharges for the purpose of protecting the environment. In this sense, the contravention was "medium" in nature. However, the nature of the contravention is minor because there is no evidence that the contravention had any actual or potential adverse effects on the environment. There is no evidence of unauthorized wastewater discharges or disposal system problems that resulted in, or could have resulted in, an adverse effect on the environment.

[97] Finally, I have considered the maximum penalty that could be imposed for the most serious noncompliance with section 3(b) of the *Code*, which is $10,000.

[98] Based on the potential maximum penalty, the minor nature and medium adverse effect of the contravention, as well as the guidance provided in the Ministry's Handbook, I find that a base penalty of $1,500 is warranted. Although

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[5] See section 3.3, "Should one or multiple penalties be recommended?"

the $1,500 base penalty is at the low end of the scale relative to the maximum penalty, it is still a significant amount given that the Facility is a small business which serves the local area and is operated by a sole proprietor. Overall, I find that this is an appropriate amount in the circumstances of this case.

Factor c): any previous contraventions, administrative penalties imposed on, or orders issued to the Appellant

[99] I find that the Appellant has no previous offences or administrative penalties. Therefore, I find no amount should be added to the base penalty for this factor.

Factor d): whether the contravention was repeated or continuous

[100] I find that there is clear evidence that this contravention was repeated or continuous for a period of at least two years since the February 13, 2018 inspection and the resulting Second Warning Letter. During that inspection, the Appellant refused to produce the records he was required to keep under section 5(c)(i) and (ii) of the *Code*. He admitted that there was no flow meter or other means to determine the volume of wastewater discharged from the Facility, and he refused to produce the Facility's production records to Ministry inspectors. The Director added 10% to the base penalty for this factor, and in the absence of any argument for a larger percentage, I find that this is appropriate in the circumstances. I add $150 to the base penalty under this factor.

Factor e): whether the contravention was deliberate

[101] I find that the contravention was deliberate. The evidence shows that Ministry staff provided repeated reminders and warnings to the Appellant, both in person and in writing, that it was a contravention of the *Code* not to keep and produce the records required under section 5(c) of the Code. I find that he knew or should have known that he was contravening the *Code* by failing to produce the required records. I find that the Appellant's failure to produce the records was the result of his deliberate actions (such as withholding information from the Ministry because he didn't want neighbours to find out) and inactions (such as not having a flow meter or other means to record the volume of wastewater discharged by the Facility). I find that an amount should be added to the base penalty for this factor. I agree with the Director that a 100% increase should be added to the base penalty for this factor. I find that adding $1,500 to the base penalty for this factor is appropriate in the circumstances.

Factor f): any economic benefit derived by the Appellant from the contravention

[102] The Director found that this factor was not applicable. I find that there is no evidence that the Appellant derived an economic benefit from the contravention, except perhaps avoiding (for now) the cost of installing a flow measuring device on the Facility's wastewater discharge system. However, given that neither party has argued for this or presented further evidence on this point, I will add no amount to the base penalty for this factor.

Factor g): whether the Appellant exercised due diligence to prevent the contravention

[103] I find that there is no evidence that the Appellant was duly diligent in preventing this contravention. As such, no reduction in the base penalty is warranted for this factor.

Factor h): the Appellant's efforts to correct the contravention

[104] There was no evidence that the Appellant has made any efforts to correct the contravention. Therefore, I will not reduce the penalty based on this factor.

Factor i): the Appellant's efforts to prevent recurrence of the contravention

[105] There is no evidence that the Appellant has made any efforts to prevent recurrence of the contravention. I find that no reduction is warranted for this factor.

Factor j): any other factors that, in the opinion of the Director (and now the Board), are relevant

[106] The Director says there were no additional factors to consider. I note that in some of the Board's past decisions on appeals of administrative penalties, the Appellant's cooperativeness with the Ministry and status as a small operator were found to be relevant factors that warranted a reduction in the penalty (for example, see: *Pacesetter Mills Ltd. v. Director, Environmental Management Act*, Decision No. EAB-EMA-20-A023(a), April 21, 2021). Although I am not bound by the Board's past decisions, I agree that those considerations may be relevant as mitigating factors in some cases.

[107] In this case, however, I find that the Appellant has not been cooperative with the Ministry. As such, this is not a mitigating factor. The Appellant failed to respond to most of the Ministry's letters and inspection reports, including those that were delivered in person by Conservation Officers. He only responded to the Ministry's correspondence after he was notified that the matter was being referred for an administrative penalty.

[108] The Appellant refers to the Facility as a small, family-operated business, and he says he would have to incur excessive costs and completely redesign the drainage system, which is under concrete flooring in the Facility, to comply with section 5(c)(i) of the *Code*. However, I find that these considerations do not warrant a reduction in this case. Under issue 1, above, I already took into account the Appellant's circumstances as the sole proprietor of a small business. Further, the Appellant has not provided sufficient evidence to establish that he has assessed the cost of installing a flow meter or other means of measuring the volume of wastewater discharge, let alone that the cost would be excessive.

[109] Further, the Appellant has argued that he is unable to pay a penalty because of his modest personal income, and the imposition of a penalty may result in the closure of his business. I agree that this is a valid consideration; however, the Appellant did not provide evidence to corroborate his assertion that he cannot afford to pay a penalty, or that it could result in his business' closure. As a result, I do not consider it appropriate to reduce the penalty because of any inability to pay or risk of business closure.

[110] I note, however, that the Handbook recognizes, "Penalties for individuals and small operators should be lower than for companies (many [administrative

monetary penalty] regimes prescribe different penalty levels to recognize this)."[6] I find this to be a reasonable and advisable practice. Given that the Appellant operates his business as a sole proprietor and not a corporation, I consider a 25% reduction in the penalty to be appropriate. Accordingly, I reduce the penalty by $375.

[111] I also note that section 7(2) of the *Penalties Regulation* provides that if a contravention continues for more than one day, separate administrative penalties may be imposed for each day the contravention continues. Given that the contravention in this case continued since at least the Second Warning Letter dated March 20, 2018 and was ongoing when the Determination was issued in 2020, the Director could have imposed more than one penalty but chose not to. This is another potential ground to increase the base penalty, but as neither party argued this ground, I consider it inappropriate to do so.

[112] Lastly, as I indicated previously, that the Appellant was noncompliant with both section 5(c)(i) and 5(c)(ii) of the *Code* warrants consideration of an increased penalty, instead of the imposition of two separate penalties. While neither party provided any specific guidance on this point and the Handbook does not assist, I consider it to be proportional to increase the penalty by less than 100%. The Handbook recognizes that the similarity of infractions in two subsections of the same section does not warrant two separate penalties, and I consider that increasing the penalty by 100% would yield no practical difference at the end of the penalty process.

[113] I consider 50% to be a reasonable increase in the circumstances of this case. This imposes a significant penalty in respect to record-keeping and record production contraventions with respect to the volumes of both the Appellant's meat processed and wastewater discharged. It also reflects that these are similar issues of noncompliance. As a result, I increase the penalty by $750 in applying this factor.

[114] Overall, with respect to factor j, I increase the penalty by $375.

Conclusion

[115] Based on the parties' submissions and evidence and the relevant factors in section 7 of the *Penalties Regulation*, I conclude that a penalty of $3,525 is appropriate for the Appellant's contravention of section 3(c) of the *Code.*

[116] I recognize that the Appellant says the penalty amounts to selective and unfair enforcement of the *Act* and *Code*. He says that other, similar operators have not been subject to the same scrutiny by the Ministry; however, he did not provide any further information that would allow me to assess whether there are, in fact, other, similar operators in his area, or whether the Ministry has taken any steps to enforce compliance with the *Act* or the *Code* or both. As a result, I do not find this argument to be persuasive and I have not adjusted the penalty, or the decision whether to impose one, as a result of that concern.

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[6] See under the subsection entitled, "*APR s. 7(j): Any additional factors that are relevant (+/-)*", in section 3.6.2., "Penalty Adjustment Factors".

DECISION

[117] In making this decision, I considered all of the relevant and admissible evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[118] For the reasons set out above, based on the Board's powers under sections 103(b) and (c) of the *Act*, I order that the Determination is varied by reversing the finding that the Appellant contravened section 109(6) of the *Act* and the penalty of $6,300 for that contravention. The Determination is further varied by adding my findings that the Appellant contravened section 3(d) of the *Code*, and my order that he must pay a penalty of $3,525 for that contravention.

[119] The appeal is allowed, in part.

"Darrell Le Houillier"

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Darrell Le Houillier
Chair

November 29, 2021