



Environmental Appeal Board

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DECISION NO. 2016-EMA-120(a)

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

BETWEEN: MTY Tiki Ming Enterprises Inc. **APPELLANT**

AND: Director, *Environmental Management Act* **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
Michael Tourigny, Panel Chair

DATE: Conducted by way of written submissions
concluding on August 2, 2016

APPEARING: For the Appellant: Janylaine Lacasse, Counsel
For the Respondent: Elisabeth Graff, Counsel

APPEAL

[1] On May 13, 2016, MTY Tiki Ming Enterprises Inc. ("MTY") appealed an April 6, 2016 decision (the "Decision") issued by Cameron Lewis, Executive Director, Environmental Protection Division of the Ministry of Environment (the "Ministry"), acting as a Director under the *Environmental Management Act* (the "Director"). In that Decision, the Director made a determination to impose an administrative penalty of \$20,000 against MTY for its contravention, commencing on May 19, 2014, of Part 1, section 2 of the *Recycling Regulation*, B.C. Reg. 449/2004 (the "*Regulation*"). Section 2 of the *Regulation* obliged MTY, as a producer of packaging and printed paper products, to have an approved product stewardship plan, or to have appointed an agency to carry out MTY's duties under the *Regulation* with respect to product stewardship plans.

[2] The powers of the Board on an appeal under section 100(1) are set out in section 103 of the *Environmental Management Act* (the "*Act*"). It states:

103 On an appeal under this Division, the appeal board may

- (a) send the matter back to the person who made the decision, with directions,
- (b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[3] In its Notice of Appeal, MTY requests that the administrative penalty of \$20,000 be cancelled.

[4] The Director seeks confirmation of the Decision and the dismissal of the appeal.

BACKGROUND

Overview of the statutory scheme

[5] The *Regulation* was brought into effect on October 7, 2004 under section 138 of the *Act*, which authorizes the Lieutenant Governor in Council (i.e., Cabinet) to make regulations regarding recyclable materials.

[6] On May 19, 2011, the *Regulation* was amended to include “packaging and printed paper” as a product category governed by the *Regulation*. This amendment resulted in producers of packaging and printed paper products being subject to the *Regulation*, including section 2.

[7] Section 2 of the *Regulation* requires a producer to have an approved product stewardship plan, or to have appointed an agency with an approved product stewardship plan under Part 2 of the *Regulation* with respect to a product, in order to sell, offer for sale, distribute or use in a commercial enterprise the product in BC.

[8] On May 19, 2011, the *Regulation* was also amended by adding Schedule 5, which included a transitional provision in section 3 covering those who were producers of packaging and printed paper products on its effective date (i.e., May 19, 2011) and who continued to be so on May 19, 2014 (36 months after May 19, 2011). Section 3 of Schedule 5 required them to have an approved product stewardship plan in effect by May 19, 2014, in order to sell, offer for sale, distribute or use in a commercial enterprise the product in BC.

[9] Under section 115(1) of the *Act*, a director may issue an administrative penalty to a person that has contravened a prescribed provision of the *Act* or its regulations. Section 115(1) of the *Act* states as follows:

115 (1) Subject to the regulations, if a director is satisfied on a balance of probabilities that a person has

- (a) contravened a prescribed provision of this Act or the regulations,
- (b) failed to comply with an order under this Act, or
- (c) failed to comply with a requirement of a permit or approval issued or given under this Act,

the director may serve the person with a determination requiring the person to pay an administrative penalty in the amount specified in the determination.

[10] The *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014 (the "*Penalties Regulation*"), sets out the prescribed provisions of the *Regulation* for the purposes of section 115(1)(a) of the *Act*, and governs the determination of administrative penalties under section 115(1) of the *Act*. The *Penalties Regulation* came into force on June 23, 2014.

[11] For the purposes of section 115(1)(a) of the *Act*, the prescribed provision in the *Penalties Regulation* states:

Prescribed provisions of Recycling Regulation

36 (1) A person who contravenes

(a) section 2 (1), (2) or (3), 4, 6, 8 (1), 11 (2) or 14 (1) (a) or (2) of the Recycling Regulation, or

(b) section 5 (1) or (2), 6 (1), 7 or 8 of Schedule 1 of the Recycling Regulation

is liable to an administrative penalty not exceeding \$40 000.

(2) A person who contravenes section 2 (4) or (5), 9 (4), 10, 11 (3) or (4), 12 or 14 (1) (b), (3) or (4) of the Recycling Regulation is liable to an administrative penalty not exceeding \$10 000.

Factual Background

[12] MTY describes itself in its Notice of Appeal as a franchisor of various restaurant banners across Canada, and as of February 29, 2016, MTY had 104 opened franchises in BC out of a total of 2,474 franchises across Canada. MTY is a wholly owned subsidiary of MTY Food Group Inc. (which is a publically held Company) operating under the business name and style MTY Group.

[13] According to information provided by MTY in its Notice of Appeal, it has been carrying on its franchisor business in BC since at least 2012 to the present.

[14] It is not in dispute between the parties, and the Panel finds as a fact, that MTY did not have an approved product stewardship plan as required by section 2 of the *Regulation* until on or about March 21, 2016, when MTY appointed Multi-Material BC ("MMBC") as its agent to carry out its duties under Part 2 of the *Regulation*. The appointment by MTY of MMBC as its agent was confirmed by an email dated March 23, 2016 from Andrew Lee of MTY to the Director.

[15] The 2015 Annual Report of MMBC states that MMBC is a non-profit organization that is fully financed by industry to manage residential packaging and printed paper recycling programs in communities across BC. According to the 2015 Annual Report, MMBC provides recycling services either directly to communities or by working in partnership with local governments, First Nations, private companies, and other non-profit organizations to ensure that households across BC are receiving best-in-class recycling services.

[16] According to the Director's evidence, MMBC is the only stewardship agency in BC with a currently approved stewardship plan for packaging and printed paper products, and its plan was launched on May 19, 2014. Therefore, since May 19,

2014, producers of packaging and printed paper who wish to appoint an agency to carry out their duties under the *Regulation* must enter into an agency agreement with MMBC as contemplated by section 2(2) of the *Regulation*.

Events preceding the Director's Decision

[17] In the period leading up to the May 19, 2014 effective date mandated by Schedule 5 of the *Regulation*, the Waste Prevention Section of the Environmental Standards Branch of the Ministry focused their efforts on making producers of packaging and printed paper products aware of, and compliant with, their new obligations.

[18] As part of this transitional information campaign, the Ministry sent a letter dated December 23, 2013 to MTY, advising it of the obligations of producers of packaging and printed paper products under section 2 of the *Regulation*, and providing MTY with information concerning MMBC as a potential agent as contemplated under section 2(2) of the *Regulation*. The Ministry requested that MTY advise whether it was a producer of packaging and printed paper products, and if so, how it intended to meet its obligations under section 2 of the *Regulation*.

[19] On March 10, 2014, Peter Keating of MTY advised the Ministry by email that MTY was taking the necessary steps to be in compliance with the *Regulation*, and that MTY would be working with MMBC to get required data reports submitted as soon as possible.

[20] As noted above, on May 19, 2014, the provisions of the *Regulation* that require producers of packaging and printed paper products to have an approved product stewardship plan, or to have appointed an agency to act on their behalf in that regard, came into force.

[21] Having heard no further from MTY, and having confirmed with MMBC that it had also heard no further from MTY, the Ministry sent a warning letter dated June 17, 2014 to MTY. The warning letter confirmed the Ministry's position that, since MTY had neither submitted a product stewardship plan nor appointed an agency with an approved stewardship plan to act on its behalf, MTY was in non-compliance with the *Regulation* and may be subject to escalating enforcement action by the Ministry. The letter gave MTY a "deadline" of September 19, 2014 to advise the Ministry as to how it had met its obligations under the *Regulation*.

[22] Between July 2014 and September 2015, there was sporadic communication between MTY and the Ministry concerning the status of MTY's efforts to meet its obligations under the *Regulation*. During this period, there were also multiple communications between MTY and MMBC regarding MTY's obligations under the *Regulation*, the process for becoming a member of MMBC's program, and the execution of a membership agreement.

[23] After further communications between MTY and the Ministry in September 2015 concerning MTY's status as a "producer" under the *Regulation*, Andrew Lee of MTY sent an email dated October 5, 2015 to the Ministry, stating that "I will be discussing with MTY head office in Montreal regarding to our obligations. I will keep you posted."

[24] Having not heard any further from MTY after October 5, 2015, the Ministry decided to proceed with enforcement action. This led to Louise LeBoutillier, a Senior Policy Analyst with the Ministry's Waste Prevention Section, preparing an administrative penalty assessment package including a Penalty Assessment Form, which was provided to the Director on February 3, 2016. The penalty assessment package was prepared by Ms. LeBoutillier in accordance with the Ministry's Administrative Penalties Handbook. The base penalty, penalty adjustments, and the total preliminary penalty set out in the Penalty Assessment Form were assessed by the Director as statutory decision-maker.

[25] On February 25, 2016, the Director issued, by registered mail, a Notice of Prior Determination of Administrative Penalty (the "Notice") to MTY, advising MTY that he was considering the imposition of an administrative penalty pursuant to section 115 of the *Act*. The Notice stated that his preliminary penalty assessment was \$40,000 under the *Penalties Regulation* for MTY's non-compliance with section 2 of the *Regulation*. Enclosed with the Notice were a number of documents setting out prior communications between the Ministry and MTY, a copy of the *Penalties Regulation*, an Administrative Penalty Fact Sheet, and a copy of the Penalty Assessment Form referred to above. Finally, the Notice offered MTY an opportunity to be heard and to provide, within 30 days of receiving the Notice, any additional relevant information before the Director made a final decision.

[26] On March 23, 2016, Mr. Lee of MTY sent an email to the Director acknowledging receipt of the Notice, and advising that MTY had signed a membership agreement with MMBC and had appointed MMBC to act on its behalf regarding a product stewardship plan. Mr. Lee also asserted that it would be unreasonable for the Ministry to assess a penalty against MTY.

The Director's Decision

[27] In his Decision dated April 6, 2016, the Director concluded that MTY had contravened section 2 of the *Regulation* as of May 19, 2014, and the Director levied an administrative penalty of \$20,000 against MTY. Under the heading "Reasons for Decision", the Decision states, in part, as follows:

MTY Group, Inc. produces an estimated tonnage of packaging and printed paper annually that is well in excess of the small business exemption of 1,000 kg. Without an approved Product Stewardship Plan itself, or an appointed agency with an approved Stewardship Plan, MTY Group, Inc. was out of compliance with the Recycling Regulation.

Despite numerous correspondences with both the Ministry and MMBC, MTY Group, Inc. took no action to comply with the regulation until being served with the Notice Prior to Determination of Administrative Penalty.

Having not heard from MTY Group, Inc. through the offer of an opportunity to be heard, I do not have additional information to bring to bear on the assessment of my preliminary penalty amount.

However, since MTY Group, Inc. has now come into compliance by signing a Membership Agreement with MMBC, I have reduced the penalty amount by 50 percent of the amount described in the Penalty Assessment Form. I believe

this reduction is fair and reasonable, and a gesture of good faith that MTY Group, Inc. will remain in compliance with the regulation.

[28] The Decision was sent to MTY via registered mail. MTY received the Decision on April 20, 2016.

MTY's appeal of the Decision

[29] On May 13, 2016, MTY appealed the Decision. In its Notice of Appeal, MTY made a number of submissions, including that MTY has acted in good faith since 2012, and has paid a total of \$16,869.01 to file annual reports with MMBC for 2013, 2014, and 2015. MTY submits that the penalty is "grossly excessive and disproportionate in regards to the amounts that MTY must pay annually for its franchises in BC." MTY also submits that this is its first contravention, the alleged breach caused no environmental damage, and MTY did not profit from its behavior.

[30] On May 17, 2016, the Board directed that the appeal be conducted by way of written submissions, and a schedule for the exchange of written submissions was established. The appeal was conducted as a new hearing of the matter, based on the written submissions and evidence filed by the parties.

ISSUES

[31] In deciding this appeal, the Panel has considered the following issues and sub-issues:

1. Whether MTY was in contravention of section 2 of the *Regulation* from May 19, 2014 until March 21, 2016.
 - a. Was MTY a "producer" as defined in section 1(1) of the *Regulation* within the packaging and printed paper product category from and after May 19, 2014?
 - b. Was MTY a "small producer" as defined in sections 1(1) and (2) of the *Regulation* within the packaging and printed paper product category from and after May 19, 2014?
2. If MTY contravened section 2 of the *Regulation*, should the administrative penalty imposed by the Director be varied or cancelled?
 - a. Did the Director comply with the requirements of the *Penalties Regulation* in making his determination of administrative penalty?
 - b. Is the administrative penalty in the amount of \$20,000 fair and reasonable in the circumstances?

RELEVANT LEGISLATION

[32] The relevant sections of the *Act*, the *Regulation*, and the *Penalties Regulation* are reproduced where they are referred to in the body of this decision.

DISCUSSION AND ANALYSIS**1. Whether MTY was in contravention of section 2 of the *Regulation* from May 19, 2014 until March 21, 2016.**

[33] Sections 2(1) and (1.1) of the *Regulation* state:

2 (1) Except as otherwise specifically provided in this regulation, a producer must

(a) have an approved plan under Part 2 [*Product Stewardship Plans*] and comply with the approved plan, or

(b) comply with Part 3 [*Product Stewardship Program Requirements If No Product Stewardship Plan*]

with respect to a product in order to sell, offer for sale, distribute or use in a commercial enterprise the product in British Columbia.

(1.1) If a franchisor and a franchisee operating under a franchise agreement are producers in relation to the same product, the duty set out in subsection (1)

(a) must be carried out by the franchisor.

[34] Section 2(2) of the *Regulation* allows for a producer to appoint an agency to carry out its duties under Part 2 [product stewardship plans] on behalf of the producer.

[35] Section 9(2)(b) of the *Regulation* states that Part 3 of the *Regulation* does not apply to the packaging and printed paper product category. Consequently, producers of packaging and printed paper products do not have the option of complying with Part 3 of the *Regulation*, and must comply with Part 2 of the *Regulation* either themselves or through an authorized agency.

[36] Section 2(1) of the *Regulation* was considered by the Board in *StewardChoice Enterprises Inc. v. Director, Environmental Management Act*, Decision No. 2016-EMA-066(a), May 2, 2016 [*“StewardChoice”*]. At paragraph 56 in *StewardChoice*, the Board stated as follows with respect to section 2(1):

Under section 2(1) of the *Regulation*, a producer “must” have an approved plan under Part 2 of the *Regulation*. A failure to do so is an offence under section 16(a) of the *Regulation*. Thus, it is mandatory for a producer to have an approved product stewardship plan. However, the Panel finds that section 2(1) contains no reference to a timeline for doing so. It simply requires a producer of products covered by the *Regulation* to have an approved plan if they operate in BC.

[37] The Panel agrees with this interpretation of section 2(1) of the *Regulation*. The Panel notes that, as a matter of statutory interpretation, mandatory provisions, such as the obligations under section 2(1) of the *Regulation*, typically speak from the date of pronouncement.

[38] In *StewardChoice*, the Board also comprehensively analyzed Schedule 5 of the *Regulation*, and in particular section 3 thereof, finding at paragraph 59:

... that the language in section 3 of Schedule 5 indicates an intention to provide a transitional period by which all then-current producers of packaging and printed paper products had to submit a stewardship plan and then comply with an approved plan.

[39] Then at paragraph 60, the Board further stated:

It is clear from the language in section 3 of Schedule 5 that the 18-month period for submitting a product stewardship plan applies to any person who was a producer as of May 19, 2011, if the person continued to be a producer at the end of the 18-month period. Similarly, any person who was a producer as of May 19, 2011 had 36 months to comply with an approved plan, if the person continued to be a producer at the end of the 36-month period [May 19, 2014]. As a result, section 3 of Schedule 5 provided for a period of transition to the new regulatory requirements, so that producers who were operating on May 19, 2011 were not immediately in breach of the *Regulation*.

[40] The Panel agrees with and adopts this interpretation of section 3 of Schedule 5 of the *Regulation*.

[41] The Panel finds, based on its interpretation of section 2 of the *Regulation* and section 3 of Schedule 5 of the *Regulation*, that all producers of packaging and printed paper products operating in BC as of May 19, 2014 were subject to section 2 of the *Regulation*, requiring them to have an approved product stewardship plan, or to have appointed an agency with an approved product stewardship plan under Part 2 of the *Regulation* by May 19, 2014. The Panel finds this to be so whether or not the transitional provisions of section 3 of Schedule 5 apply to any particular producer of packaging and printed paper products.

[42] The Panel has already found as a fact that MTY did not have an approved product stewardship plan as required by section 2 of the *Regulation* until March 21, 2016, on which date MTY appointed MMBC as its agent to carry out its duties under Part 2 of the *Regulation*.

[43] Given the fact that MTY did not have an approved product stewardship plan as required by section 2 of the *Regulation* until March 21, 2016, the Panel could, on that basis alone, conclude that MTY was in contravention of section 2 of the *Regulation* from May 19, 2014 until March 21, 2016. However, before reaching that conclusion, the Panel has considered whether MTY was a "producer" or a "small producer" of packaging and printed paper products, and was operating as such in BC as of May 19, 2014 and thereafter. The terms "producer" and "small producer" are defined in section 1 of the *Regulation*, and are discussed below. Those definitions are important because section 3(2) of the *Regulation* provides "small producers" with an exemption from the requirements in Part 2 of the *Regulation*. In its Notice of Appeal, MTY does not suggest that it is not a "producer" as defined in section 1(1) of the *Regulation*. Indeed, as noted above, on March 21, 2016, MTY appointed MMBC as its agent on a going forward basis to carry out its duties as a "producer" under Part 2 of the *Regulation*. Moreover, in its Notice of Appeal, MTY did not suggest that it is a "small producer" as defined in section 1 of the *Regulation* within the packaging and printed paper product category. Nevertheless, for added certainty, the Panel has considered these sub-issues.

a. Was MTY a “producer” as defined in section 1(1) of the *Regulation* within the packaging and printed paper product category from and after May 19, 2014?

[44] The relevant portion of the definition of “producer” in section 1(1) of the *Regulation* states:

“**producer**” means

- (b) In respect of the producer of a product within a product category other than the beverage container product category or the tire product category,
 - (i) a person who manufactures the product and sells, offers for sale, distributes or uses in a commercial enterprise the product in British Columbia under the manufacturer’s own brand,
 - (ii) if subparagraph (i) does not apply, a person who is not the manufacturer of the product but is the owner or licensee of a trademark under which a product is sold, distributed or used in a commercial enterprise in British Columbia, whether or not the trademark is registered, or
 - (iii) if subparagraphs (i) and (ii) do not apply, a person who imports the product into British Columbia for sale, distribution or use in a commercial enterprise;

[45] Enclosed with its Notice of Appeal, MTY submitted annual reports it filed with MMBC in April 2016 for the years 2013 through 2015, detailing the categories and volumes of packaging and printed paper products produced through its listed restaurant franchisees operating in BC during 2012 through 2014.

[46] As set out in section 2(1.1) of the *Regulation*, quoted above, MTY as a franchisor is responsible for carrying out the duty set out in subsection 2(1)(a) (i.e. to have an approved product stewardship plan and comply with it) for all of its franchisees.

[47] As a franchisor of various restaurant banners across Canada and within BC, the Panel agrees with the Director’s submission that MTY would be both “the owner or licensee of a trademark under which a product is sold, distributed or used in a commercial enterprise in British Columbia” (subsection (b)(ii) of the definition of “producer”), and “a person who imports the product into British Columbia for sale, distribution or use in a commercial enterprise” (subsection (b)(iii) of the definition).

[48] In letter from MTY to MMBC dated November 14, 2012, MTY expressed its intent to appoint MMBC as its agent to carry out its duties under Part 2 of the *Regulation*. In the first paragraph of that letter, MTY stated:

MTY Tiki Ming Enterprises Inc. is a producer as defined in Part 1 Section 1 of the British Columbia Environmental Management Act Recycling Regulation and is appointing Multi-Material British Columbia to act on its behalf in carrying out its duties under part 2 of the Recycling Regulation.

[49] In result, based on the foregoing evidence and analysis, the Panel finds as a fact that from 2012 through to at least March 21, 2016, MTY was a “producer”, as

defined in section 1(1) of the *Regulation*, of products within the packaging and printed paper category.

b. Was MTY a “small producer” as defined in section 1(1) and (2) of the *Regulation* within the packaging and printed paper product category from and after May 19, 2014?

[50] Sections 3(1) and (2) of the *Regulation* state:

Part 2 — Product Stewardship Plans

Application

3 (1) This Part applies to a producer

(a) that sells, offers for sale, distributes or uses in a commercial enterprise a product within one of the following product categories:

(i) beverage container product category;

(ii) packaging and printed paper product category,

(b) that wishes to be covered by this Part in respect of a product category, other than a product category listed in paragraph (a), of a product that the producer sells, offers for sale, distributes or uses in a commercial enterprise, or

(c) that is required under section 3.1 to comply with this Part in respect of a product category.

(2) Despite subsection (1) (a) (ii), this Part does not apply to a small producer in respect of the sale, offer for sale, distribution or use in a commercial enterprise of a product within the packaging and printed paper product category.

[underlining added]

[51] By reason of section 3(2) of the *Regulation*, a “small producer” of products in the packaging and printed paper category is exempt from Part 2 of the *Regulation*, and the related section 2 requirement to have an approved product stewardship plan.

[52] Sections 1(1) and (2) of the *Regulation* define “small producer” in respect of a producer within the packaging and printed paper product category as follows:

Definitions

1 (1) In this regulation:

...

“**small producer**”, in respect of the producer of a product within the packaging and printed paper product category, means one of the following:

(a) the producer is a charitable organization registered under the *Income Tax Act* (Canada);

(b) the producer meets one or both of the following criteria:

- (i) subject to subsection (2), the producer had a gross revenue in the most recent calendar year of less than \$1 000 000 in British Columbia;
- (ii) subject to subsection (2), the producer manufactured in the most recent calendar year less than one tonne of products within the packaging and printed paper product category that have been or will be sold, offered for sale, distributed or used in a commercial enterprise in British Columbia;
- (c) subject to subsection (2), the producer does not have more than one point of retail sale in British Columbia;

...

- (2) For the purposes of the definition of "small producer", if the producer is operating under a franchise agreement, the producer, the franchisor and the other parties with whom the franchisor has a franchise agreement in relation to the same product are deemed to be a single producer.

[53] When considering whether MTY fits within the definition of "small producer" the Panel finds that section 1(2) above deems MTY, as franchisor, and its franchisees in BC (numbering 104 as of February 29, 2016), to be a single producer.

[54] Regarding subsection (a) of the definition of "small producer", MTY operates a "for profit" franchise business and is not a charitable organization. Therefore, MTY does not fall within subsection (a) of the definition.

[55] Regarding subsections (b)(i) and (c) of the definition of "small producer", MTY states in its Notice of Appeal that its 104 opened franchises in BC represented 4.20% of its total of 2,474 franchises throughout Canada. MTY provided no evidence as to the amount of gross revenue earned by it and its 104 opened franchises operating in BC over the relevant calendar years. In particular, MTY has presented no evidence to suggest that such revenue would be less than \$1,000,000.

[56] The Director's evidence includes minimal extracts from the consolidated financial statements of MTY Food Group Inc. for its fiscal years 2013 through 2015, indicating that its total annual operating revenues (which would include that of its wholly owned subsidiary MTY) totaled \$101.4 million, \$115.2 million, and \$145.2 million respectively for those years. This data does not directly address the amount of gross revenue earned by MTY and its franchisees in BC, but does assist the Panel in finding, in the absence of any suggestion to the contrary from MTY, that it is more likely than not that the annual gross revenue earned by MTY and its 104 opened franchises operating in BC over the relevant period was not less than \$1,000,000 for purposes of the definition of "small producer". Consequently, MTY does not fall within subsections (b)(i) and (c) of the definition of "small producer".

[57] Regarding subsections (b)(ii) of the definition of "small producer", the annual reports for 2013 through 2015 filed by MTY with MMBC, which were attached to MTY's Notice of Appeal, list the total weight of packaging and printed paper products being produced by MTY's franchisees operating in BC during 2012 through

2014. The total weight produced in each year exceeded the one tonne threshold referenced in the definition of "small producer". Therefore, MTY does not fall within subsection (b)(ii) of the definition.

[58] Based on the foregoing evidence and analysis, the Panel finds as a fact that from 2012 through to at least March 21, 2016, MTY was not a "small producer", as defined in sections 1(1) and (2) of the *Regulation*, of products within the packaging and printed paper category.

Summary of the Panel's conclusions on Issue 1

[59] Based on the above findings, the Panel finds that between May 19, 2014 and March 21, 2016, MTY was a producer within the packaging and printed paper product category, and was in contravention of its obligations under section 2 of the *Regulation* by reason of its failure to have an approved product stewardship plan or to have appointed an agency with an approved product stewardship plan under Part 2 of the *Regulation*.

[60] Accordingly, the Director's finding that MTY contravened Part 1, section 2 of the *Regulation* is hereby confirmed.

2. Should the administrative penalty imposed by the Director be varied or cancelled?

a. Did the Director comply with the requirements of the *Penalties Regulation* in making his determination of administrative penalty?

Notice of Prior Determination of Administrative Penalty

[61] Section 2(1) of the *Penalties Regulation* requires a director who intends to impose an administrative penalty on a person to give written notice to the person. The required contents of a notice are set out in section 2(2), as follows:

2 (2) The notice under subsection (1) must

(a) include

- (i) the name of the person who is the subject of the notice,
- (ii) a description of the circumstances that gave rise to the alleged contravention or failure,
- (iii) the person's right to make representations under section 3, and
- (iv) a preliminary assessment of the amount of the administrative penalty, and

(b) identify

- (i) the prescribed provision of the Act or the regulations the person is alleged to have contravened,
- (ii) the order the person is alleged to have failed to comply with, or
- (iii) the requirement of a permit or approval the person is alleged to have failed to comply with.

[62] In the present case, the Director's Notice dated February 25, 2016 was the "notice" for the purposes of section 2 of the *Penalties Regulation*.

[63] The Panel finds that the Director's Notice fully complied with the requirements of section 2 of the *Penalties Regulation*. The Notice was in writing, it set out the name of the person subject of the notice, the circumstances that gave rise to the alleged contravention were described, a preliminary assessment of the amount of administrative penalty was set out and the prescribed provision of the *Regulation* that MTY was alleged to have contravened was set out. The Notice further complied with section 2 of the *Penalties Regulation* by providing MTY with notice of its rights under section 3 for an opportunity to make representations in respect of the alleged contravention.

Opportunity to make representations

[64] Section 3 of the *Penalties Regulation* governs the rights and obligations concerning the opportunity to make representations. The relevant portions of section 3 state as follows:

Opportunity to make representations

- 3** (1) Before making a determination in respect of an alleged contravention or failure by a person, a director must provide the person with an opportunity to make representations in respect of the alleged contravention or failure.
- (2) A person wishing to make representations under subsection (1) must make a request, in writing, to the director within 30 days after the date the person receives the notice under section 2.
- (3) Subject to subsection (4), if a person makes a request in accordance with subsection (2), the director
- (a) must conduct a written, electronic or oral hearing, or any combination of them, as the director, in his or her sole discretion, considers appropriate, and
- (b) may
- (i) determine the circumstances and place in which, and the process by which, the hearing may be conducted, and
- (ii) specify the form and content of materials to be provided for the hearing, and the date the materials must be provided.
- (4) If a person does not provide materials to the director in accordance with subsection (3) (b) (ii), the director is not required to conduct a hearing.

[65] Section 3(1) of the *Penalties Regulation* obliges a director, before making a determination, to provide the person with an opportunity to make representations. This was done by the Director in the Notice. Section 3(2) of the *Penalties Regulation* obliges a person wishing to make representations under section 3(1) to make a request, in writing, to the director within 30 days after the date the person receives the notice under section 2. The Director advised MTY of this 30-day period in the Notice, and he also advised MTY that if no request was received within the 30 days, he would proceed to make a decision and notify MTY accordingly.

[66] The March 23, 2016 email from Mr. Lee of MTY to the Director confirmed MTY's receipt of the Notice, and advised that MTY had signed a membership agreement with MMBC and had appointed MMBC to act on its behalf for a stewardship plan. The email stated further that MTY should be deemed to be in compliance with the *Regulation*, and that "It would be unreasonable to assess any penalty by the Ministry."

[67] According to the Director's evidence, on March 23, 2016, the Ministry confirmed with MMBC that MTY had signed a membership agreement with MMBC on March 21, 2016. Also on March 23, 2016, the Director responded by email to Mr. Lee of MTY, advising that, when making his determination, he would consider the fact that MTY had now appointed MMBC as its agent to meet its obligations under the *Regulation*. The Director also reminded MTY of the 30-day period in which MTY had a right to request an opportunity to make representations as set out in the Notice. The Director also advised that the 30-day period would expire on April 4, 2016.

[68] Although MTY made no formal request for an opportunity to make representations under section 3(2) of the *Penalties Regulation*, MTY requested a teleconference with the Director, which took place on April 18, 2016. During the teleconference, MTY representatives advised that MTY had signed a membership agreement with MMBC, and MTY asserted that, in light of MTY's limited operations in BC relative to its overall business, the proposed \$40,000 penalty was excessive. The Director advised MTY that he had reduced the administrative penalty from \$40,000 to \$20,000 in acknowledgement of the fact that MTY had come into compliance, and he reminded MTY of its appeal rights.

[69] Based on the evidence, the Panel finds that the Director complied with section 3 of the *Penalties Regulation*. In the Notice, the Director offered MTY an opportunity to make representations within 30 days of receiving the Notice, as required by sections 3(1) and (2) of the *Penalties Regulation*. Although MTY made no request for an opportunity to make representations pursuant to section 3(3) of the *Penalties Regulation*, the Director considered and responded to the March 23, 2016 email from Mr. Lee of MTY. In addition, MTY requested, and the Director held, a teleconference with MTY on April 18, 2016, which was within the 30-day period. During the teleconference, MTY presented information to the Director, and the Director provided information to MTY, including a reminder of the 30-day period to request an opportunity to make representations as set out in the Notice.

Director's assessment of the administrative penalty

[70] Section 7(1) of the *Penalties Regulation* lists the matters that a director must consider, if applicable, in establishing the amount of an administrative penalty in a particular case. Section 7 of the *Penalties Regulation* states as follows:

Assessment of administrative penalty

7 (1) In establishing the amount of an administrative penalty in a particular case, a director must consider the following matters, if applicable:

- (a) the nature of the contravention or failure;
- (b) the real or potential adverse effect of the contravention or failure;

- (c) any previous contraventions or failures by, administrative penalties imposed on, or orders issued to the following:
 - (i) the person who is the subject of the determination;
 - (ii) if the person is an individual, a corporation for which the individual is or was a director, officer or agent;
 - (iii) if the person is a corporation, an individual who is or was a director, officer or agent of the corporation;
 - (d) whether the contravention or failure was repeated or continuous;
 - (e) whether the contravention or failure was deliberate;
 - (f) any economic benefit derived by the person from the contravention or failure;
 - (g) whether the person exercised due diligence to prevent the contravention or failure;
 - (h) the person's efforts to correct the contravention or failure;
 - (i) the person's efforts to prevent recurrence of the contravention or failure;
 - (j) any other factors that, in the opinion of the director, are relevant.
- (2) If a contravention or failure continues for more than one day, separate administrative penalties, each not exceeding the applicable maximum administrative penalty, may be imposed for each day the contravention or failure continues.

[71] In the reasons section of his Decision, the Director confirmed that his evaluation included a consideration of the matters listed in section 7(1) of the *Penalties Regulation*, as applicable. The Director referred to the Penalty Assessment Form previously provided to MTY with the Notice, and stated that he had decided to reduce the preliminary penalty amount of \$40,000 by 50% to \$20,000, based on MTY having come into compliance by signing a membership agreement with MMBC. The Director stated that he believed this reduction was fair and reasonable, and a gesture of good faith that MTY will remain in compliance with the *Regulation*.

[72] While not binding on a director acting as a statutory decision maker ("SDM"), the Ministry has published an Administrative Penalties Handbook (the "Handbook") (a copy of which was included in the Director's evidence) that contains "Guidance for Statutory Decision Makers" in Chapter 4. A stated objective of the guidelines in Chapter 4 is to assist in ensuring that the principles of administrative fairness are upheld when SDM's, such as the Director, make decisions that impact a person's rights or interests.

[73] Chapter 4 of the Handbook also provides guidance to SDM's in their assessment of the quantum of the penalty under section 7 of the *Penalties Regulation*. While due consideration of all applicable factors is called for, the suggested approach is to first consider two factors that make up the "gravity" component of the penalty, which are the "nature of the contravention or failure" (section 7(1)(a)) and the "real or potential adverse effect of the contravention or

failure" (section 7(1)(b)) to come up with a "base penalty amount" with the ultimate quantum being adjusted up or down from the base amount through consideration of the other applicable matters listed in section 7(1) of the *Penalties Regulation*.

[74] The Handbook includes tables setting out suggested "base penalty amounts" for the two "gravity" components depending on the maximum penalty applicable to a particular contravention together with the relative nature and adverse effect of the particular contravention. In reference to these tables, the Handbook states:

The tables are not meant to be prescriptive; that is, they are not binding on the SDM. Rather, the purpose of the tables is to encourage consistency and transparency in assessing penalty amounts.

[75] The Panel agrees with the proposition that an important principle of administrative fairness is that administrative penalties should be assessed on a consistent and transparent basis. This is important not only to the person against whom the penalty is being assessed, but also to the public at large and particularly to those who are potentially subject to the regulatory framework in question.

[76] While the Director did not expressly reference the Handbook or its guidelines in his Decision, it is apparent that he considered the guidelines in his preliminary penalty assessment set out in the Administrative Penalty Assessment Form, referred to in the Decision.

The Panel's consideration of subsections 7(1)(a) and (b) of the *Penalties Regulation*

[77] Regarding the nature of the contravention, and the real or potential adverse effect of the contravention, the Panel agrees with the proposition generally advanced in the Handbook that a failure by a producer to provide a stewardship plan when required under the *Regulation*, could be seen as a "major" non-compliance given that such a plan is a foundation of the regulatory regime and is the government's only way to ensure that the regulatory objectives are being met. Persistent non-compliance with section 2 of the *Regulation* by producers within the packaging and paper products category, from and after the May 19, 2014 effective date, would undermine the basic integrity of the regulatory regime and significantly interfere with the Ministry's capacity to protect and conserve the natural environment.

[78] As early as November 14, 2012, MTY was aware of its upcoming obligations as a producer of packaging and printed paper products under section 2 of the *Regulation*, and MTY even described itself as such in its letter to MMBC of that date. Specifically, in its November 14, 2012 letter to MMBC (referred to above under Issue 1(a)), it is evident that MTY was aware of its obligations under section 2 of the *Regulation* as a producer of packaging and printed paper products for over a year before MTY received the December 23, 2013 information letter from the Ministry. Indeed, in its Notice of Appeal, MTY states that: "it has been in constant communication with" MMBC since 2012, and that it had "asked many questions to MMBC since 2012 in order to understand its duties".

[79] After receiving the Ministry's December 23, 2013 advisory letter, MTY advised the Ministry on March 10, 2014 that it was taking the necessary steps to be

in compliance through the agency of MMBC. Those steps were not taken by MTY, and on June 17, 2014, the Ministry sent a warning letter to MTY confirming its non-compliance and advising of possible enforcement action. After some further communications ending on October 5, 2015, and MTY having failed to come into compliance into 2016, the Director issued his February 25, 2016 Notice to MTY. It was ultimately not until March 21, 2016, after being served with the Notice, that MTY came into compliance through its agency appointment of MMBC.

[80] In its Notice of Appeal, MTY submits, as an apparent explanation for its delay in compliance, that it took many months for MTY to prepare and submit the annual reports [required by MMBC to calculate agency fees payable by MTY] for the first time in BC, because the suppliers MTY uses in BC are mostly different than the suppliers used in Quebec and Ontario, where the majority of MTY's franchises are located. In its Notice of Appeal, MTY submits that the combined fees that MTY had to pay to MMBC for the last three years totaled \$16,869.01.

[81] The Panel finds on the facts that MTY's non-compliance was persistent from May 19, 2014 until March 21, 2016, undermining the basic integrity of the regulatory regime. It also undermined the Ministry's capacity to protect and conserve the natural environment. In that regard, the Panel notes that at paragraph 55 of *StewardChoice*, the Board discussed the *Regulation's* requirements regarding product stewardship plans in light of the *Act's* purposes, stating as follows:

... The Panel finds that the requirements in the *Regulation* for product stewardship plans that address the collection and management of recyclable products are consistent with the *Act's* purposes of preventing pollution, as well as controlling, ameliorating and, where possible, eliminating the environmental impacts of waste. ...

[82] The Panel finds that MTY's non-compliance should, accordingly, be considered a "major" contravention of section 2 of the *Regulation*. The Panel does not accept the "paperwork problems" or "constant communications with MMBC" referred to by MTY in its Notice of Appeal as a justification or a reasonable mitigating factor when considering the nature of the contravention in the circumstances.

[83] The Panel agrees with MTY's submission in its Notice of Appeal that there is no evidence of actual environmental damages directly linked to its contravention. However, the Panel also agrees with the statement in the Penalty Assessment Form that, although the immediate environmental impact of this contravention was low, a lack of producer fees to fund the packaging and printed paper recycling program in BC may undermine the program entirely with negative effect.

The Panel's consideration of remaining applicable matters in section 7(1) of the *Penalties Regulation*

[84] Regarding sections 7(1)(c) and (d) of the *Penalties Regulation*, respectively, MTY has no previous contraventions, and the contravention was continuous between May 19, 2014 and March 21, 2016, or just short of two years.

[85] When considering whether the contravention by MTY was deliberate, as contemplated by section 7(1)(e) of the *Penalties Regulation*, or whether MTY exercised due diligence to prevent the contravention, as contemplated by section 7(1)(g) of the *Penalties Regulation*, the Panel is cognizant of section 6 of the *Penalties Regulation*. Section 6 states that the requirement that "A requirement that a person pay an administrative penalty applies even if the person exercised due diligence to prevent the contravention...", which amounts to 'absolute liability' for the contravention. In other words, the intentions or due diligence of the person are not relevant considerations in determining whether a contravention occurred for purposes of the imposition of an administrative penalty under the *Penalties Regulation*. However, the intentions or due diligence of the person are relevant in assessing the quantum of penalty under section 7 of the *Penalties Regulation*.

[86] The word "deliberate" as used in section 7(1)(e) of the *Penalties Regulation* requires a consideration of whether the person was intentionally in contravention, or at least willfully blind as to whether or not they were in contravention. It is clear on the evidence that the Ministry made MTY aware of its position that MTY was not in compliance by way of the June 17, 2014 warning letter and subsequent communications. Even before that, MTY signed a letter on November 14, 2012 stating that it was a "producer as defined" in the *Regulation*. While it is apparent from the evidence that MTY, at various times thereafter, did raise questions as to whether or not it was a "producer" given the volume of business it conducted in BC and its role as a franchisor, answers to those questions were provided to MTY by the Ministry and MMBC on a timely basis, such that the Panel finds that continuing non-compliance by MTY was deliberate for purposes of section 7(1)(e) of the *Penalties Regulation*.

[87] When determining whether MTY exercised due diligence to prevent the contravention, the Panel notes that the Director submits that "due diligence" is defined in *Black's Law Dictionary*, 10th ed., as "the diligence reasonable expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."

[88] On the evidence, the Panel finds as a fact that MTY failed to exercise due diligence to prevent the contravention. Despite a clear record of communication between MTY and the Ministry, and between MTY and MMBC, which shows that MTY was aware of its obligations under the *Regulation* and the steps it needed to take to be compliant with the *Regulation*, MTY failed to take the steps that would reasonably be expected to achieve compliance until March 2016, almost two years after the *Regulation's* requirements came into effect.

[89] Regarding section 7(1)(f) of the *Penalties Regulation*, although the Panel agrees with MTY that it did not "profit" as a consequence of its contravention, the Panel finds that MTY did derive some economic benefit from its delay in paying MMBC fees of \$16,869.01 until at least April 2016, when MTY filed its annual reports for 2013 through 2015 with MMBC, rather than the earlier dates that payment would have been made if MTY has signed its membership agreement with MMBC effective from May 19, 2014, as required by the *Regulation*.

[90] Finally, with respect to section 7(1)(h) of the *Penalties Regulation*, and MTY's efforts to correct the contravention, the Panel has considered that the Director

reduced the preliminary penalty amount of \$40,000 by 50% to \$20,000, based on MTY having come into compliance by signing a membership agreement with MMBC in March 2016. The Panel agrees with this downward adjustment in the penalty, both as an acknowledgment of MTY's belated efforts to correct the contravention and to reflect the fact that MTY had paid \$16,869.01 in fees to MMBC that it had previously avoided paying through non-compliance.

Other considerations in the assessment of the administrative penalty

[91] Section 36(1) of the *Penalties Regulation* (quoted above) states that a person who contravenes Part 1, section 2(1) of the *Regulation* is liable to an administrative penalty not exceeding \$40,000.

[92] An important objective of assessing the amount of penalty is to promote deterrence and future compliance by both MTY specifically and other producers subject to the *Regulation* generally. The Panel agrees with the statement in the Handbook that: "To be a true deterrent, the administrative penalty must go beyond simply restoring compliance or companies may be more likely to take their chances on getting caught and only comply when they are caught."

The Panel's conclusion on Issue 2

[93] In making his Decision, the Director considered the applicable matters set out in section 7(1) of the *Penalties Regulation*, and he complied with all other relevant provisions of the *Penalties Regulation* in regard to both the Notice and the Decision. The Panel has also considered the applicable matters set out in section 7(1) of the *Penalties Regulation*, as well as the other matters referred to above, and the Panel agrees with the Director's assessment of an administrative penalty in the amount of \$20,000 as set out in the Decision.

[94] The Panel finds that the administrative penalty of \$20,000 is fair and reasonable in the circumstances, and will serve as an adequate deterrent specifically to MTY, and generally to other producers subject to the *Regulation*.

DECISION

[95] In making this decision, the Panel has considered all of the relevant evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[96] For the reasons set out above, the Panel confirms the Director's Decision, and dismisses the appeal.

"Michael Tourigny"

Michael Tourigny
Panel Chair

September 1, 2016