

APPEAL NUMBER: NOAA 23-02

IN THE MATTER OF AN APPEAL UNDER PART IV OF ONTARIO REGULATION 187/09
MADE UNDER THE *SAFETY AND CONSUMER STATUTES ADMINISTRATION ACT, 1996*

BETWEEN:

NUTRAGUMMY INC.

Appellant

- and -

GENERAL MANAGER AND DIRECTOR, ELECTRICAL SAFETY AUTHORITY

Respondent

Decision of the Review Panel

Review Panel: Ralph Van Haeren

Hearing Dates: In writing

Appeal Number: NOAA 23-02

For the Appellant

Self-represented

For the Respondent

Tracey Gauley

Independent Legal Counsel

Justin Safayeni

I. BACKGROUND

1. This appeal hearing was conducted by the Review Panel (“**Panel**”) in writing, pursuant to rule 19.3 of the Electrical Safety Authority’s (“**ESA**”) *Rules of Procedure for Reviews and Appeals* (“**Rules**”).
2. The basic facts and chronology in this case are set out in the ESA’s materials. The Appellant does not contest them.
3. The Appellant operates a large manufacturing facility at 570 Coronation Drive in Toronto, Ontario (the “**Property**”).
4. On November 15, 2022, an ESA inspector attended the Property to conduct an inspection. The inspection noted a large amount of new wiring throughout the Appellant’s production area in the Property, without any certification.
5. On December 13, 2022, based on the results of the investigation, the Appellant was issued an Investigation Inspection Defect Notice (“**Defect Notice**”). The Defect Notice identified that:
 - a. the electrical work in the production area was not carried out by a licensed contractor (contrary to 2021 Ontario Electrical Safety Code (“**OESC**”) Rule 02-004);
 - b. equipment within that area was not approved (contrary to OESC Rule 02-022);
 - c. there was not enough workspace left in front of the service equipment (contrary to OESC Rule 02-308); and
 - d. issues relating to cord safety and maintenance (contrary to OESC Rules 02-034, 02-300 and 12-402).
6. The Defect Notice provided the Appellant with 30 days to correct these problems.
7. By January 13, 2023, the Appellant had failed to correct the defects in the Defect Notice, and the ESA issued a remedial order requiring the Appellant to remedy the defects within a further 14 days, i.e. by January 17, 2023 (“**Remedial Order**”). The Remedial Order was issued pursuant to s. 113(11) of the *Electricity Act, 1998* (“**Act**”).
8. The deadline in the Remedial Order was subsequently extended to February 23, 2023, then to March 31, 2023 and then to April 14, 2023.
9. On April 14, 2023, the ESA re-issued the Remedial Order and the Appellant was re-served with the Remedial Order on April 18, 2023.
10. On May 8, 2023, the ESA delivered a Notice of Disconnect to the Appellant, which set out that the disconnect was scheduled for May 23, 2023. The ESA then held the disconnect in abeyance until June 27, 2023 to provide the Appellant yet another opportunity to correct the defects and comply with the Remedial Order.

11. On June 13, 2023, a General Manager and Director with the ESA (“**Director**”) issued a Notice of Intent to Issue and Administrative Penalty Order, providing the Appellant with notice of the Director’s intention to impose a \$5,000 penalty and giving the Appellant an opportunity to provide responding information.
12. On June 21, 2023, the Appellant provided responding information, outlining the efforts it said it had undertaken since the inspection to bring its facility into compliance.
13. On July 5, 2023, the Director issued an Administrative Penalty Order (“**APO**”) to the appellant, pursuant to subsection 113.18.1(1) of the *Electricity Act, 1998* (“**Act**”). The APO describes the Appellant’s contravention (“**Contravention**”) as follows:

On or about January 30, 2023, you contravened an Order [the Remedial Order] issued under the *Act* with respect to 570 Coronation Drive, Toronto, Ontario.

14. The APO states that the Contravention reflects a breach of s. 113(11) of the *Act*, which states:

The Authority may issue such orders relating to work to be done, or the removal of things used, in the installation, removal, alteration, repair, protection, connection or disconnection of any of the works, matters and things mentioned in subsection (1) as the Authority considers necessary or advisable for the safety of persons or the protection of property and, in any such order or after having made it, the Authority may order any person to cease and desist from doing anything intended or likely to interfere with the terms of the order.

15. The APO seeks an administrative penalty in the amount of \$5,000.
16. On July 13, 2023, the Appellant filed a Notice of Appeal. The sole reason supporting the appeal provided in the Notice of Appeal is: “The container TGBU411024 carrying our crucial machine parts for ESA certification encountered significant delay in arrival due to prolonged port strike in British Columbia and other related issues. We were not able to finish ESA-required modification without these parts” (the “**Port Strike Explanation**”).
17. The only supporting material the Appellant provided with the Notice of Appeal was an “appeal letter” to the Director. In that correspondence, the Appellant elaborated on the Port Strike Explanation, stating that it had to order some machine parts from China to comply with the Remedial Order; that it had placed orders for those replacement parts; that the container with those parts was supposed to arrive on June 22nd but due to a “prolonged port strike in British Columbia and other related issues” the container was delayed until July 4th; and that this delay caused the Appellant’s failure to “meet the ESA inspection deadline of June 30, 2023”. The Appellant argued that because “this delay was entirely beyond our

control... [w]e believe that we should not be held liable for any penalties due to force majeure circumstances”.¹

18. The Appellant’s material raises no other arguments apart from the Port Strike Explanation as to why the APO ought to be reconsidered.
19. On October 20, 2023, the ESA issued a Notice of Review Panel Hearing in this matter, which provided for a written process whereby the Appellant could submit further material in support of the appeal; the ESA could then file responding material; and the Appellant would have an opportunity to file material in reply. The sole material submitted by the Appellant was the Notice of Appeal and appeal letter described above.
20. In its responding material, the ESA characterized the Appellant’s Port Strike Explanation as amounting to a type of “due diligence” defence, and argued that such defence was not applicable.
21. On January 4, 2024, following receipt and review of all of the parties’ materials, this Panel received the following advice, in written form, from its independent legal counsel:

The due diligence defence does not apply in the context of establishing liability for administrative penalty orders (APOs), i.e. when establishing whether a contravention occurred. APOs are a type of compliance or enforcement proceeding, where liability is assessed on a balance of probabilities standard of proof. In that context, the classifications of “absolute liability” and “strict liability” are irrelevant, as these classifications only apply to criminal and quasi-criminal offences (where a criminal or quasi-criminal standard of proof applies): see *Summitt Energy Management Inc v OEB*, [2013 ONSC 318](#) at paras 70 and 72. Elements of a due diligence defence, or arguments that are similar to a due diligence defence, may still be relevant when assessing penalty for APOs, insofar as those elements or arguments relate to the statutory criteria set out in s. 6 of O. Reg 12/23 (including, for example, whether the contravention was deliberate).

22. This advice was disclosed to both parties, which were provided with an opportunity to comment on it in writing. Neither party did.

¹ Appended to the appeal letter were two documents: a document with no discernable title appearing to show a “Cosco Malaysia 094N” vessel from China would arrive in British Columbia on June 22, 2023; and a “Canadian Pacific Railway Equipment Inspection Record” from July 4, 2023.

II. LEGISLATIVE SCHEME

23. With respect to liability, the key provision is s. 113(11) of the *Act*, which provides the basis for the Remedial Order, and which states:

The Authority may issue such orders relating to work to be done, or the removal of things used, in the installation, removal, alteration, repair, protection, connection or disconnection of any of the works, matters and things mentioned in subsection (1) as the Authority considers necessary or advisable for the safety of persons or the protection of property and, in any such order or after having made it, the Authority may order any person to cease and desist from doing anything intended or likely to interfere with the terms of the order.

24. With respect to administrative penalty imposed by the Respondent, the key provision is s. 113.18.1 of the *Act*, which states:

113.18.1 (1) A Director may, by order, impose an administrative penalty against a person in accordance with this section and the regulations made by the Minister if the Director is satisfied that the person has contravened or is contravening,

- (a) a prescribed provision of this Part or the regulations;
- (b) a restriction, limitation or condition imposed by a Director in respect of a prescribed authorization; or
- (c) a prescribed order of the Authority.

...

(3) An administrative penalty may be imposed under this section for one or more of the following purposes:

- 1. To ensure compliance with this Part or the regulations.
- 2. To prevent a person from deriving, directly or indirectly, any economic benefit as a result of a contravention described in subsection (1).

...

(4) The amount of an administrative penalty shall reflect the purpose of the penalty and shall be determined in accordance with the regulations made by the Minister, but the amount of the penalty shall not exceed \$10,000. [Emphasis added].

25. Given the discussion around the possible application of a due diligence defence, it is also relevant to note s. 113.18.1(7) of the *Act*, which states:

Absolute liability

(7) An order made under subsection (1) imposing an administrative penalty against a person applies even if,

- (a) the person took all reasonable steps to prevent the contravention on which the order is based; or
- (b) at the time of the contravention, the person had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent.

26. Further detail on the administrative penalty regime is set out in O. Reg 12/23 under the *Act* (the “**Regulation**”), which provides as follows:

6. For the purposes of subsection 113.18.1 (4) of the Act, a Director shall determine the amount of an administrative penalty for a contravention prescribed in section 1 of this Regulation in accordance with the following rules:

- 1. The Director shall determine whether, in the Director’s opinion, the contravention had a major, moderate or minor adverse effect, or the potential to have such an adverse effect, on electrical safety.
- 2. The range for the administrative penalty is set out in Column 2 of the Table to this section opposite the determination set out in Column 1 as described in paragraph 1.
- 3. The amount of the administrative penalty for the contravention is an amount selected by the Director from within the range described in paragraph 2 after considering the following criteria:
 - i. Whether the person who committed the contravention has previously been subject to enforcement actions under Part VIII of the Act or its regulations for contraventions of a similar nature.
 - ii. The extent of the harm, or of the degree of risk of harm, to others as a result of the contravention.
 - iii. Whether the contravention was deliberate.
 - iv. Whether the contravention was repeated or continuous.
 - v. The length of time during which the contravention continued.

- vi. Whether the person who committed the contravention derived any economic benefit from the contravention.

TABLE
RANGE OF ADMINISTRATIVE PENALTIES

Column 1 Severity of adverse effect or potential adverse effect	Column 2 Range
Major	From \$5,001 to \$10,000
Moderate	From \$1,001 to \$5,000
Minor	From \$100 to \$1,000

III. ISSUES TO BE DECIDED

27. The issues to be decided on this appeal are: (i) whether the ESA has proven that the Appellant committed the Contravention on a balance of probabilities; and (ii) if so, whether the \$5,000 in the APO should be confirmed or varied.
28. As was recently explained in *Soheil Sobat v Director Licensing, Electrical Safety Authority*², in the context of another appeal from an APO, this appeal hearing before the Review Panel is, in effect, a *de novo* process. That means that this Panel must assess for itself the correct interpretation and application of the relevant statutory provisions, rather than deferring to the Director's views or analysis, both with respect to liability and with respect to penalty.

IV. LIABILITY

A. The Appellant's Position

29. The Appellant does not challenge the Remedial Order, the Defect Notice, or the findings in the Inspection Notice (i.e. the breaches of the OESC). Nor does the Appellant dispute that it failed to comply with the Remedial Order.
30. The Appellant's sole argument is that no penalty should be imposed due to the Port Strike Explanation.

B. The Respondent's Position

31. The Respondent relies on the findings in the Inspection Report, the issuance of the Remedial Order and the Appellant's failure to meet the Remedial Order.

²NOAA-23-05 at paras 12-14.

32. The Respondent argues that the Appellant's Port Strike Explanation, which it characterizes as a kind of "due diligence" defence, has no application when it comes to liability for an APO, relying (among other things) on s. 113.18.1(17) of the *Act*.

C. Decision

33. The Panel accepts the ESA's position that the Port Strike Explanation does not impact whether the Appellant is liable in respect of the Contravention.
34. Based on the Panel's review of the materials submitted, the Panel is satisfied the Appellant committed the Contravention. There is no dispute that the Appellant failed to comply with the Remedial Order.

V. PENALTY

A. The Appellant's Position

35. The Appellant repeats the arguments outlined above with respect to the Port Strike Explanation.

B. The Respondent's Position

36. The Respondent submits that \$5,000 figure for the APO is justified, relying on the Director's rationale for the APO by reference to the criteria in the Regulation (which rationale was affirmed by the Director in the form of affidavit evidence on the appeal).
37. More specifically, the Respondent argues as follows:
- a. *Previous enforcement action.* The Appellant was provided with multiple opportunities to come into compliance, including the original December 13, 2022 Defect Notice, January 13, 2023 Remedial Order and the May 8, 2023 Notice of Disconnect.
 - b. *Extent of harm and degree of risk of harm to others.* There was the potential for major harm as a result of the Contravention. By refusing or neglecting to bring the Property into compliance in accordance with the Remedial Order, there remains the potential that major harm to persons, property or electrical equipment will occur. In addition, the failure stands to erode the integrity of the ESA and the electrical safety infrastructure in the province.
 - c. *Deliberate.* Intention can be demonstrated.
 - d. *Repeated or continuous, and length of time.* The Contravention was continued or repeated for between 1-6 months.
 - e. *Economic benefit.* There was major financial gain or benefit.
38. The Respondent did not elaborate on the questions of intention or economic benefit beyond the points made above.

C. Decision

39. Upon reviewing the Appellant's position pertaining to the Port Strike Explanation, the Appellant has indicated that container TGBU411024 carrying crucial machine parts "*encountered a significant delay in arrival due to a prolonged port strike in British Columbia*". According to the Appellant, the container was supposed to arrive on June 22, 2023, but instead it arrived on July 4, 2023, twelve days after the originally scheduled arrival date. In the Panel's view, a delay of twelve days does not constitute a significant delay.
40. In regards to the Respondent's position outlining the criteria in the Regulation for proposing a \$5,000 amount for the APO, the Panel concludes as follows:
 - a. *Previous enforcement action.* The Panel agrees with the Respondent's position that the Appellant was provided with ample time and opportunities to come into compliance by correcting the defects.
 - b. *Extent of harm and degree of risk of harm to others.* The Panel has difficulty accepting the Respondent's position that there was a "potential for major harm", given the Respondent's pattern of conduct in this case. The Respondent postponed or put on hold the originally issued Remedial Order of January 13, 2023 approximately five times, extending to May 1, 2023. In addition, the issuance of the Notice of Disconnection issued on May 8, 2023 was postponed three times, extending to August 28, 2023. If the Respondent's position is that there was the potential for major harm as a result of the Contravention, then the Respondent could have taken more immediate action in order to remove the "harm to persons, property or electrical equipment".
 - c. *Deliberate.* The Panel does not have adequate evidence to prove if a deliberate intent existed.
 - d. *Repeated or continuous, and length of time.* The Panel agrees with the Respondent's position that the Contravention was continued for more than 7 months.
 - e. *Economic benefit.* The Panel agrees with the Respondent's position that there was financial gain or benefit for the Appellant in continuing its operations while not being in compliance with the Contravention.
41. The Panel does not have specific information on the details of the Contravention or a specific explanation underlying the Respondent's position that there was a potential for major harm. Either such harm did not exist (which would be consistent with the Respondent's conduct in granting multiple extensions), or such harm did exist (which gives rise to concern about whether the multiple postponements of both the Remedial Order and the Notice of Disconnection were appropriate). In either case, however, the Panel is not prepared to rely on this criteria to support a higher penalty amount against the Appellant.
42. Having taken all of these considerations into account, the Panel concludes that an appropriate amount for the APO in this case is a penalty of \$4,000.

VI. ORDER

43. The Panel confirms the APO in this matter in respect of the Contravention, but varies the administrative penalty amount to \$4,000.

Dated this 19th day of January, 2024.



Ralph Van Haeren