Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date: August 21, 2019

Citation: *1952157 Ontario Inc. v. Canada (Environment and Climate Change),* 2019 EPTC 5

EPTC Case No.: 0034-2018

Case Name: *1952157 Ontario Inc. v. Canada (Environment and Climate Change)*

Applicant: 1952157 Ontario Inc.

Respondent: Minister of Environment and Climate Change Canada

Subject of Proceeding: Review commenced under s. 15 of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA") of an Administrative Monetary Penalty issued under s. 7 of EVAMPA for a violation of s. 6(2) of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act,* SC 1992, c 52

Heard: In writing

Appearances:

Parties	**Counsel/Representative***
1952157 Ontario Inc.	Rode Chow*
Minister of Environment and Climate Change Canada	David Shiroky

DECISION DELIVERED BY: **JERRY. V DEMARCO**

Background

[1] This Decision disposes of a request by the Applicant, 1952157 Ontario Inc., to the Environmental Protection Tribunal of Canada ("Tribunal") for a review of an Administrative Monetary Penalty ("AMP") issued by Environment and Climate Change Canada ("ECCC") on September 10, 2018.

[2] The AMP was issued by ECCC Enforcement Officer, Timothy Pitman, to the Applicant under s. 7 of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA") in respect of an alleged violation of s. 6(2) of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c 52 ("WAPPRIITA"). ECCC alleges that the Applicant exported sliced American Ginseng (*Panax quinquefolius*) without, or contrary to, a permit.

[3] The Applicant submitted its request for a review to the Tribunal on September 27, 2018 under s. 15 of EVAMPA.

[4] The hearing was conducted in writing according to a partial agreed statement of facts, affidavits, exhibits and written submissions. The Applicant was represented by Rode Chow, a director of the Applicant company. ECCC was represented by Counsel, David Shiroky.

[5] For the reasons set out below, the AMP is upheld and the review is dismissed.

Issues

[6] The issues are: 1) whether ECCC has established the elements of a violation of s. 6(2) of WAPPRIITA, and 2) if so, whether the AMP amount was determined in accordance with the regulations.

Relevant Legislation and Regulations

[7] The most relevant provisions of EVAMPA are:

> 7. Every person, ship or vessel that contravenes or fails to comply with a provision, order, direction, obligation or condition designated by regulations made under paragraph 5(1)(a) commits a violation and is liable to an administrative monetary penalty of an amount to be determined in accordance with the regulations.
>
> 20(1). After giving the person, ship or vessel that requested the review and the Minister reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for the person, ship or vessel and the Minister to make oral representations, the review officer or panel conducting

the review shall determine whether the person, ship or vessel committed a violation.

(2) The Minister has the burden of establishing, on a balance of probabilities, that the person, ship or vessel committed the violation.

(3) If the review officer or panel determines that the penalty for the violation was not determined in accordance with the regulations, the review officer or panel shall correct the amount of the penalty.

[8] The most relevant provisions of the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 ("AMP Regulations") are:

4. The amount of the penalty for each violation is to be determined by the formula

W + X + Y + Z

where

W is the baseline penalty amount determined under section 5;

X is the history of non-compliance amount, if any, as determined under section 6;

Y is the environmental harm amount, if any, as determined under section 7; and

Z is the economic gain amount, if any, as determined under section 8.

5. The baseline penalty amount for a violation is the amount set out in column 3 of Schedule 4 that corresponds to the category of the violator and the type of violation committed as set out in columns 1 and 2, respectively, of that Schedule.

8 (1) Subject to subsection (2), if the violation has resulted in economic gain to the violator, including an avoided financial cost, the economic gain amount is the amount set out in column 6 of Schedule 4 that corresponds to the category of the violator and the type of violation committed as set out in columns 1 and 2, respectively, of that Schedule.

(2) If the only economic gain is the avoidance of the cost of obtaining a permit, licence or other authorization, the economic gain amount is the amount set out in column 7 of Schedule 4 that corresponds to the category of the violator and the type of violation committed as set out in columns 1 and 2, respectively, of that Schedule.

Discussion

Agreed Facts

[9] The parties agree to the main relevant facts as set out in the partial agreed statement of facts. To summarize, the Applicant is a registered and active corporation in

the Province of Ontario. American Ginseng is listed as Item 7.0.5.0(2) of Part II of Schedule I of the *Wild Animal and Plant Trade Regulations*, SOR/96-263, made under WAPPRIITA, as an Appendix II species under the Convention on International Trade in Endangered Species ("CITES"). Exporting American Ginseng from Canada requires a Canadian CITES permit issued by the Canadian Wildlife Service ("CWS"), which is part of ECCC.

[10] The Applicant purchased American Ginseng products from Sum Sum Hong Ginseng & Natural Foods ("Sum Sum Hong"), including sliced Ginseng root. The Applicant then resold the Ginseng products to a company in Macau, China. On February 9, 2018, the Applicant shipped the Ginseng products, including sliced American Ginseng root, to ACE Automatic System (H.K.) Co. ("Consignee"), via Korean Air Cargo departing Toronto and arriving in Hong Kong ("Shipment"). At the time of the Shipment, CITES Permit #18CA00119/CWHQ ("CITES Permit 00119") was presented to Canada Border Service Agency officers. The CITES Permit was issued to Sum Sum Hong and permitted the exportation of up to sixty kilograms of whole American Ginseng roots for commercial purposes. The Shipment left Toronto on February 11, 2018.

[11] On February 13, 2018, the Shipment arrived in Hong Kong. On arrival, the Consignee was alerted that it was being seized or detained as there were no CITES permits from Canada on the Shipment. Shortly after the Consignee was informed of the Shipment's seizure or detention, the Applicant contacted Brian Huang of Sum Sum Hong who then filled out eleven CITES Export Permit stickers bearing an export date of January 9, 2018 ("Stickers"). The Applicant sent the Stickers to the CITES Management Authority of Hong Kong Special Administrative Region. The Stickers were issued to Sum Sum Hong.

[12] The Applicant did not apply for or possess a CITES export permit for the Shipment at the time it exported the Shipment. Sum Sum Hong did not apply for CITES export permits as a broker for the Applicant.

Additional Evidence from the Applicant

[13] In addition to the above agreed facts, the Applicant provides the following additional evidence via the affidavit of Rode Chow. Mr. Chow states that the Applicant started to look for a Ginseng supplier after receiving an inquiry from a customer in Macau. The Applicant had not dealt with Ginseng material before. At that time, it was off-season for Ginseng harvest and no inventory was available from farms. Sum Sum Hong was the only option available for securing sufficient stock for the customer in Macau. Sum Sum Hong had agreed that it would provide the proper documents and permits for the export. According to Sum Sum Hong, the export of Ginseng root required a CITES permit, which was provided and the 60 kg of Ginseng root was shipped through Hong Kong to Macau. In the same Shipment, 200 bottles of sliced Ginseng were being delivered to the same customer in Macau. This was to be used as incentives, bonuses or gift items. Sum Sum Hong informed the Applicant that sliced

Ginseng, a health supplement, did not require a CITES permit. The Applicant relied on Sum Sum Hong and acted as their agent. Mr. Chow states that the Applicant was not privy to Sum Sum Hong's commercial transactions and trusted the Applicant as a supplier.

[14] Once the sliced Ginseng was detained in February 2018, the Applicant requested Sum Sum Hong to provide the CITES permit for the sliced Ginseng and Sum Sum Hong provided 11 sticker permits. The Applicant was in contact with the authorities in Hong Kong regarding the detained Shipment regarding a possible return of the Shipment or having a CITES permit issued after the Shipment left Canada. Mr. Chow urged Officer Pitman to request a return of the Shipment but Mr. Chow was later informed that the sliced Ginseng was disposed of. Mr. Chow states that Government notice to Ginseng exporters spells out CITES permit requirements but is not clear as to which entities should possess the permit. Mr. Chow states that the Applicant and Sum Sum Hong can both qualify as the exporter of the Shipment in the context of this commercial arrangement. The ultimate customer in Macau was the same regardless of who possessed the permit. Mr. Chow states that a CITES permit was provided to export the Ginseng root to the customer and that it was not known to the Applicant that a permit was also needed for the sliced Ginseng because of neglect or a misunderstanding on the part of Sum Sum Hong.

Additional Evidence from ECCC

[15] ECCC provides the following additional facts via the affidavit of Officer Pitman. CWS may issue CITES permits for Ginseng export for personal or commercial purposes. Multiple-use permits may be issued for shipments over 4.5 kg through "sticker" permits accompanying the multiple-use permit. A shipment must display an affixed sticker upon export. Officer Pitman attached a copy of the publically available notice to Ginseng exporters.

[16] On or about February 9, 2018, the Applicant presented a shipment containing sliced and whole Ginseng to the Canada Border Services Agency ("CBSA") prior to export to Hong Kong in transit to Macau. The Applicant presented to CBSA CITES Permit 00119 and stickers related to another permit ("CITES Permit 00072"). On March 5, 2018, an officer in Hong Kong contacted ECCC regarding the Shipment. There were no CITES sticker permits affixed to the Shipment. The Officer indicated that the Consignee claimed that it was planning to produce CITES Permit 00119 and stickers related to that permit to allow the Shipment to transit to Macau. The Officer requested ECCC to inform her whether the Consignee could use CITES Permit 00119 for customs clearance of the Shipment.

[17] On April 6, 2018, Mr. Chow informed ECCC that the Shipment contained 200 bottles of sliced Ginseng root and that it was "shipped and handled with deficiencies" and that no stickers were affixed to the Shipment. Mr. Chow provided scanned copies of CITES permit stickers related to CITES Permit 00119, which were different from those

presented to CBSA earlier. Mr. Pitman conducted a search of the CITES electronic permitting system and confirmed that: 1) the Applicant had not applied for CITES permits, 2) the stickers related to CITES Permit 00072 did not allow the Applicant to export sliced Ginseng, and 3) CITES Permit 00119 and related stickers provided on April 6, 2018 did not allow the Applicant to export sliced Ginseng. CITES Permit 00119 was issued to Sum Sum Hong and allowed for export of up to 60kg of whole dried Ginseng roots and did not allow for the export of sliced Ginseng. CITES Permit 00072 was issued to Sum Sum Hong and allowed Sum Sum Hong to export whole dried Ginseng roots for personal use and did not allow for the export of sliced Ginseng.

[18] On August 24, 2018, Mr. Pitman contacted the Applicant to confirm the details of his investigation and Mr. Chow responded and confirmed that Mr. Pitman's understanding of the underlying facts was correct. Mr. Pitman issued the AMP to the Applicant on September 20, 2018. In assessing the amount of the AMP, Mr. Pitman considered that the "Applicant had already sold the sliced American ginseng and was exporting the Shipment to a customer" and that the Applicant was a registered corporation. He states that, as the "Applicant exported the ginseng as part of a commercial transaction, I assessed the Applicant the baseline penalty of $2,000, plus $2,000 for the aggravating [factor] of Economic Gain, totalling $4,000".

Analysis and Findings

ECCC's Submissions

[19] In overview, ECCC states that the Applicant violated s. 6(2) of WAPPRIITA by exporting the sliced Ginseng without a permit. Alternatively, the export was contrary to a permit. ECCC also submits that the AMP amount was calculated properly.

[20] ECCC states that the February 2018 export of the Ginseng products under CITES Permit 00119 or the stickers related to CITES Permit 00072 did not comply with WAPPRIITA. CITES Permit 00119 belongs to Sum Sum Hong and was for the export of whole Ginseng roots for commercial purposes and CITES Permit 00072 also belongs to Sum Sum Hong and permits the export of whole Ginseng roots for personal use. ECCC states that neither permit allowed for the export of sliced Ginseng by anyone (including the Applicant or Sum Sum Hong). ECCC notes that Ginseng is a "plant" under WAPPRIITA's definitions as it is a species of flora listed under CITES. As such, a permit is required to export Ginseng from Canada. Therefore, a person violates s. 6(2) of WAPPRIITA by exporting Ginseng without a CITES permit or in a way that is not in accordance with a permit. ECCC also notes that s. 9(1) of EVAMPA provides that it is sufficient proof of a violation if the violation was committed by an employee, agent or mandatary of the person issued an AMP. ECCC states that the evidence shows that the export of the sliced Ginseng portions of the Shipment occurred either without a permit (i.e., the Applicant never had a permit), or contrary to a permit held by another (i.e., Sum Sum Hong's permit does not relate to sliced Ginseng). ECCC points out that

neither of the permits had the “sliced roots” checkbox checked and that it is clear that the permits were for whole Ginseng exports only.

[21] While the Applicant deposes to it acting as agent for Sum Sum Hong and there being a transaction between a company and Sum Sum Hong, ECCC states that “the Applicant has agreed that it resold the sliced ginseng to the Client and was responsible for its exportation”. ECCC also states that receiving bad advice from Sum Sum Hong regarding permit requirements is not a defence to the AMP given the wording of s. 11(1) of EVAMPA. ECCC also submits that it is clear that the exporter here was the Applicant and that taking steps to obtain permits after the Shipment was detained would not suffice anyway because CITES Permit 00119 states that the relevant stickers are to be provided to CBSA at the time of export. ECCC concludes that all of the elements of the violation are present in either of the two scenarios that could apply here (i.e., export without a permit held by the Applicant or export contrary to Sum Sum Hong’s permit).

[22] ECCC states that the AMP amount of $4,000 was properly calculated under s. 4 of the AMP Regulations. The Applicant is a corporation so the baseline amount is $2,000 for this type of violation and there is no authority to decrease an AMP below the baseline amount if a violation is established (see: *Hoang v. Canada (Environment and Climate Change)*, 2019 EPTC 2 at para 23). ECCC states that the $2,000 “economic gain” amount was properly added to the baseline amount because the violation was part of a commercial transaction. ECCC states that the Applicant sold the sliced Ginseng to a customer and exported it to deliver the Ginseng to the customer. Regarding the fact that Hong Kong authorities destroyed the seized portion of the Shipment, ECCC submits that the Applicant cannot “rely on the consequences of its own violation to reduce the penalty amount”. ECCC submits that the Applicant realized an economic gain when it sold the Ginseng to a customer prior to or at the time of the violation (i.e., at the time of export) and that any subsequent loss of revenue resulting from the violation (i.e., the seizure of a portion of the Shipment and its destruction) should not be factored in. ECCC also notes that the Applicant has not provided evidence of any losses and admits that much of the Shipment (the material other than the sliced Ginseng) was delivered to its customer.

Applicant’s Submissions

[23] The Applicant states that the ECCC enforcement officer did not correctly identify which entity should be subject to the AMP for the violation that occurred. It states that Sum Sum Hong was the exporter. The Applicant also states that the AMP amount should not have included an “economic gain” amount because the sliced Ginseng never made it to the ultimate customer in Macau.

[24] The Applicant states that it searched for Ginseng supplies for a Macau customer in the fall of 2017 and at that time, it had never exported Ginseng before. It states that it relied on Sum Sum Hong, as it had stock available or could locate stock to satisfy the Macau customer’s needs. It states that it worked together with Sum Sum Hong and that

Sum Sum Hong was responsible for providing the proper paperwork while the Applicant was a “middleman” or agent.

[25] The Applicant describes its role in the commercial transaction as one where it was not privy to the confidential commercial arrangements (e.g., how and where Sum Sum Hong secured the Ginseng, the export permits and relevant documentation for the export). The Applicant states that it never took possession of the Ginseng; rather it was a “go-between” that coordinated the transaction. Because there was no previous relationship between the Macau customer and Sum Sum Hong, the Applicant committed to the customer that it would manage shipping arrangements and guarantee that the products would arrive in good quality and condition to bring the business to a successful closure. The Applicant relied on Sum Sum Hong to provide all necessary permits to comply with the applicable legal obligations.

[26] The Applicant states that the arrangement did not require the Applicant itself to obtain the CITES permit as it was simply assisting with the Shipment and with the closing of the transaction. The Applicant also states that the Macau customer directly paid for the freight and logistics company costs and that the Macau customer paid Sum Sum Hong directly for the Shipment. The Applicant was entitled to a percentage once the Shipment was received.

[27] The Applicant submits that Canadian and Hong Kong authorities did not initially contact the Applicant at the time the Shipment was detained, as it was clear that the exporter (which the Applicant believes to be Sum Sum Hong and not the Applicant) was responsible. The Applicant only became involved to try to help find a possible solution. Because of this, the Applicant believes that ECCC enforcement staff mistakenly concluded that the Applicant was the exporter instead of Sum Sum Hong.

[28] The Applicant characterizes its role as a go-between and that any documents that suggest that it bought and resold the Ginseng is inaccurate. The Applicant states that its role was only to represent the Macau customer’s interests in the transaction and that ECCC has misunderstood the commercial arrangements of the transaction and export that took place.

[29] The Applicant counters ECCC’s submission regarding the fact that review officers do not review the exercise of enforcement discretion by stating that the Tribunal should examine whether ECCC correctly identified which person was the violator that should be subject to an AMP. The Tribunal should examine which persons were involved in the violations and not simply accept ECCC’s choice of which one to name in the AMP. In making this argument, the Applicant draws an analogy to a house sale where an agent is involved but the actual parties to the sale are the buyer and seller. It states that it was an agent rather than the seller of exporter. The Applicant adds that the onus is on ECCC to demonstrate that the Applicant itself committed a violation. The Applicant states that ECCC has failed to prove that the Applicant itself committed a violation because the Applicant was only a “middleman”.

[30] The Applicant also argues that, because the sliced Ginseng was not actually delivered to its customer in Macau, the Applicant did not receive any commission. Therefore, there was no economic gain to it. The Applicant also states that it does not have sufficient cash resources to pay the AMP amount.

[31] The Applicant seeks to have the AMP set aside.

ECCC's Reply Submissions

[32] In reply, ECCC argues that the Applicant's submissions contradict the actual evidence and that it is the evidence that governs. ECCC points to the relevant portions of the agreed statement of facts and Mr. Chow's affidavit in support of its position that the Applicant violated WAPPRIITA. ECCC argues that the Applicant has failed to show that it was a mere "middleman", "go-between" or "agent" of Sum Sum Hong or that the Applicant was not required to obtain the proper permits. ECCC also submits that the fact that another entity may also have committed a violation does not exonerate the Applicant.

[33] With respect to the economic gain question, ECCC submits that the Tribunal:

> …should not permit the Applicant to rely on the consequences of its own violation to reduce the penalty amount. It is correct for an officer to consider Economic Gain where the discovery and investigation of a violation results in some financial losses in what would have otherwise been a profitable transaction, had the violator not been caught.

[34] Alternatively, ECCC submits that much of the overall Shipment made it to the customer in Macau and it was only the sliced Ginseng that was apparently destroyed. Therefore, even if the there was a loss in regards to the sliced Ginseng, the Shipment itself still resulted in revenue for the Applicant and that such "revenue is indicia of economic gain". ECCC also notes that the enforcement officer could not have considered the destruction of the sliced Ginseng prior to the issuance of the AMP if the officer was unaware of the destruction at that time.

Findings Regarding the Alleged Violation

[35] While the Tribunal was provided with detailed evidence and submissions from both parties, only a subset of that evidence and submissions is necessary to answer the question of whether the Applicant corporation committed the alleged violation. Of course, given that corporations act through their employees and representatives, it is sufficient for ECCC to prove a violation by the corporate person named in an AMP via the actions of an employee, agent or mandatary (see: s. 9(1) of EVAMPA). References to the Applicant below include those individuals acting on the Applicant corporation's behalf.

[36] The question is whether ECCC has shown that the role the Applicant played was sufficient to ground a finding that the Applicant itself violated s. 6(2) of WAPRIITA. The Applicant argues that it only played a small role in the commercial transaction/export that took place without a proper permit or in violation of a permit. The Applicant variously characterizes its role as akin to an “agent”, “middleman” or “go-between” in its submissions. However, as noted by ECCC in its reply submissions, it is important to examine the evidence itself in this case, regardless of how that evidence has been characterized in submissions.

[37] The following paragraphs of the agreed statement of facts are especially important:

> The exportation of American ginseng from Canada requires a Canadian CITES permit issued by Canadian Wildlife Service.
>
> The Applicant purchased ginseng products from Sum Sum Hong Ginseng & Natural Foods (“Sum Sum Hong”), including sliced American ginseng root.
>
> The Applicant then resold the ginseng products purchased from Sum Sum Hong to a company in Macau, China.
>
> On February 9, 2018, the Applicant shipped the ginseng products, including sliced American ginseng root, to a consignee, ACE Automatic System (H.K.) Co. (the “Consignee”), via Korean Air Cargo departing Toronto, Ontario and arriving in Hong Kong (the “Shipment”).
>
> The Applicant did not apply for or possess a CITES export permit for the Shipment at the time it exported the Shipment. (emphasis added)

[38] The affidavit evidence of Mr. Chow also demonstrates that the Applicant occupied a role that was more significant than that of a “go-between”. For example, Mr. Chow refers to a “customer” in Macau and finding a source for Ginseng stock in Canada. While the Applicant decided to rely on Sum Sum Hong to ensure that “proper documents and permits necessary for the export” were provided, it cannot absolve itself of legal responsibility by making such a decision. Once the Applicant engaged with the Macau customer and went about having Ginseng shipped to its customer, it was incumbent upon the Applicant to ensure that WAPPRIITA was followed.

[39] It is clear, based on the agreed statement of facts and the additional affidavit evidence, that the Applicant was an exporter that shipped or caused to be shipped the sliced Ginseng without a proper permit or in contravention of a permit. While the Applicant points to Sum Sum Hong as the exporter, the question before the Tribunal is whether the Applicant’s actions constitute a violation and not whether some other entity could also have been issued an AMP because that other entity also committed a violation. It is not a defence to an AMP that some other entity could have or should have also received an AMP.

[40] It is not the Tribunal's role to re-examine the enforcement officer's exercise of discretion in deciding to target only the Applicant. Having said that, the Tribunal agrees with the Applicant that the Tribunal should examine whether ECCC correctly identified whether the Applicant was a violator. In other words, where more than one entity may be involved in an alleged violation, the Tribunal must still examine whether the Applicant named in an AMP committed a violation. It cannot simply take ECCC's word for that under the umbrella of deferring to an officer's exercise of discretion. The onus is on ECCC to demonstrate that the Applicant committed a violation. However, ECCC does not need to show that the Applicant was the only violator or that the Applicant was more involved in the violation than other possible violators.

[41] Of course, if Sum Sum Hong had also been issued an AMP and sought a review then the Tribunal would have had to determine whether Sum Sum Hong's role was such that it also committed a violation. However, as there is no AMP issued to Sum Sum Hong before the Tribunal in this proceeding, the Tribunal declines to make any findings on Sum Sum Hong's liability.

[42] The Tribunal focuses its analysis here on whether the Applicant committed a violation. In that regard, the evidence is clear that the Applicant did commit a violation. The Applicant shipped or caused to be shipped sliced Ginseng without a proper permit or in contravention of a permit.

Findings Regarding Economic Gain

[43] The Tribunal relies on the following factual findings in conducting its analysis of the economic gain issue. Based on the evidence, the Tribunal finds that the Applicant carried out a commercial transaction involving the export of products (including but not limited to the sliced Ginseng at issue here) to a customer in Macau. The Tribunal concludes that the business relationship that was formed between the Applicant and the customer was intended to create revenue for the Applicant. It has been shown that, as of the time of the violation, the Applicant was entitled to a commission or profit from the transaction. The Tribunal also concludes that the customer ultimately received at least a portion of the Shipment but that some portion of the Applicant's expected revenue did not accrue because the sliced Ginseng portion of the Shipment was destroyed. In addition, the Applicant avoided the costs associated with familiarizing itself with WAPPRIITA and the relevant regulations before entering this new line of business and elected to rely solely on Sum Sum Hong.

[44] The parties provided the Tribunal with brief submissions regarding the interpretation of the economic gain provision of the AMP Regulations. This decision is the first time s. 8(1) of the AMP Regulations has been at issue before the Tribunal. The Tribunal was not provided with documents (e.g., statements or policies) interpreting s. 8(1) or any authorities related to provisions that are similar to s. 8(1), if there are any. It is clear, however, that the wording of s. 8(1) necessarily requires an exercise of judgment as to what constitutes economic gain on the facts of a given case. The

Tribunal has, therefore, reached the following conclusions regarding this specific case based on the limited material provided and the factual conclusions set out above.

[45] For the reasons that follow, the Tribunal finds that, if ECCC demonstrates that the violation by the Applicant relates to a commercial transaction that has resulted in an economic gain to the Applicant at the time of the violation (i.e., around February 9-11, 2018), this is sufficient to meet s. 8(1) of the AMP Regulations in this case. It is noteworthy that the "violation has resulted" wording of s. 8(1) is in the present perfect tense rather than past tense (i.e., "violation resulted"). If the past tense had been employed, there would be a stronger argument against assessing economic gain at the time of the violation. Assessing economic gain at the time of the violation also fits with the French text of s. 8(1): "si l'auteur de la violation tire un avantage économique, y compris l'évitement d'une dépense, de la violation commise".

[46] If economic gain were not to be assessed at the time of the violation (i.e., when the Shipment, or portions thereof, was exported without or contrary to a permit), it would be difficult to determine where one should draw the line. Would one factor in the time and resources spent by the Applicant addressing issues arising from compliance and enforcement actions in determining economic gain (e.g., resources dealing with the detention and eventual destruction of the sliced Ginseng)? Would one factor in that any commission the Applicant ultimately received because of the Shipment was less than what it would have been had the sliced Ginseng also been delivered to the customer? Would one factor in the time and resources spent by the Applicant in seeking a review of an AMP in determining economic gain?

[47] The AMP Regulations do not appear to ask the Tribunal to inquire into whether there was only a "net" or "permanent" economic gain for one portion of the Shipment or to consider economic gain only after compliance and enforcement actions and review proceedings are factored into the equation. The provision simply asks whether the "violation has resulted in economic gain to the violator, including an avoided financial cost". Clearly, when a sale to a customer takes place without the proper permits, this is a type of economic gain because, at the time of the violation, the sale either has resulted in revenue to the seller or has given rise to an account receivable to the Applicant. Whether such an economic gain lasts after a violation is uncovered and compliance and enforcement actions and review proceedings take place does not alter the fact that an economic gain has resulted from the violation at the time of the violation.

[48] When violators are caught and drawn into delays or losses of portions of shipments and subsequent administrative proceedings like this one, there may not be a "net" or "permanent" economic gain for the portion of a shipment that was lost; however, the AMP Regulations do not appear to require such a narrow perspective on the matter of economic gain. Looking at economic gain from the point of view of what was resulting from the violation at the time of the violation, it is clear that a gain was present. As well, if the violation had gone unnoticed, the Applicant's gain would have been permanent. Given that the AMP Regulations seek to increase AMP amounts beyond the baseline

amount when any of the three aggravating factors (i.e., history of non-compliance, environmental harm, or economic gain) is present, it follows that s. 8 should be read in a way that supports the AMP Regulation's intent to impose higher AMP amounts in commercial transaction situations. Otherwise, it is difficult to see when s. 8 could apply to export violations like this one since it is those that are caught that end up losing detained shipments. It is those that are not caught that have a "net" or "permanent" economic gain because their violations went unnoticed and no AMPs were imposed.

[49] In addition, it must be recalled that AMPs can be imposed at the time of a violation, which can be prior to many of the events that may ultimately reduce or eliminate the "net" or "permanent" economic gain. It is, therefore, preferable to interpret the economic gain section in a manner that makes sense at both the first instance (i.e., when ECCC enforcement officers are completing a notice of violation for an AMP) and the second instance (i.e., when the Tribunal is carrying out a review of the AMP to determine if ECCC calculated the AMP amount in accordance with the AMP Regulations). This is especially true since s. 20(3) of EVAMPA speaks to determining whether the penalty "was not determined in accordance with the regulations". If one were to factor in compliance (e.g., Shipment detention or destruction) and enforcement actions (e.g., AMPs) and review proceeding costs before the Tribunal in calculating economic gain, then it would often be difficult or impossible for enforcement officers to determine whether an economic gain amount should be levied at the time a notice of violation for an AMP was being issued. It is unlikely that the AMP Regulations intended that the economic gain factor be a "moving target" that would be difficult for enforcement officers to assess at the time a notice is issued. As well, considering that the maximum economic gain amount ($5,000) that can be levied in the most serious AMP cases under EVAMPA (i.e., Type C violations by a person other than an individual) is relatively small compared to what the actual economic gains could be in large commercial transactions, it is unlikely that the AMP Regulations were intended to ask the Tribunal to carry out a factually complex new hearing into post-violation losses associated with compliance and enforcement actions and/or the review process. Section 20(3) of EVAMPA simply asks the Tribunal to determine whether ECCC properly determined the AMP amount in accordance with the AMP Regulations.

[50] In this case, the Applicant ultimately did not receive the part of the expected commission or profit for the portion of the Shipment involving the sliced Ginseng because that part of the Shipment was never delivered. However, the violation (exporting without, or contrary to, a permit) has resulted in an economic gain (sale of Ginseng to a customer with, at the time of the violation, a payment or account receivable that included a commission) as per the wording of s. 8(1) of the AMP Regulations. Moreover, as pointed out by ECCC, much of the Shipment involved here did ultimately make its way from the Applicant to its customer in Macau so there would have been some economic gain from the Shipment as a whole.

[51] Given the above conclusions, it is not necessary to determine if the avoided financial costs associated with the Applicant failing to familiarize itself with WAPPRIITA and the relevant regulations before entering this new line of business would also satisfy s. 8(1) of the AMP Regulations.

[52] As regards the Applicant's submission that it does not have sufficient cash available to pay the AMP, there is no such relief provided for in the AMP Regulations. The Tribunal, in carrying out its statutory mandate, must remain within the role provided to it under EVAMPA. Reducing or eliminating AMP amounts because of an inability to pay is not one of the Tribunal's roles under the legislative and regulatory provisions. The Tribunal does not have the jurisdiction to provide relief of that nature.

[53] The Tribunal concludes on the evidence that the violation has resulted in an economic gain for the purposes of s. 8(1) of the AMP Regulations and that ECCC properly assessed the penalty in accordance with the AMP Regulations.

Overall Conclusion Regarding the AMP Amount

[54] The baseline amount of $2,000 was properly determined according to the schedule set out in the AMP Regulations given that this was a corporate violator and the violation was Type B. Similarly, the "economic gain" amount of $2,000 was properly determined given the violation has resulted in a gain (revenue or account receivable) at the time of the violation.

Decision

[55] The AMP is upheld and the review is dismissed.

Review Dismissed

Jerry V. DeMarco

JERRY V. DEMARCO
CHIEF REVIEW OFFICER