



Issue Date: April 13, 2022
Citation: *Ma v. Canada (Environment and Climate Change)*, 2022 EPTC 1
EPTC Case No.: 0074-2021
Case Name: *Ma v. Canada (Environment and Climate Change)*
Applicant: Huibo Ma
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

Huibo Ma

Minister of Environment and
Climate Change Canada

Counsel/Representative

Self-represented

Cody Francon

DECISION DELIVERED BY:

HEATHER GIBBS

Background

[1] Huibo Ma (“Applicant”) is requesting a review of an Administrative Monetary Penalty (“AMP”) issued on October 7, 2021 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 (“Act”). The AMP levied was for \$800.

[2] The Applicant operates a small business in Saskatchewan in which he sells American ginseng. In 2021 he delivered some American ginseng via UPS and Air Canada to an address in China. The Applicant acknowledges that he does not have an export license. Exporting American ginseng without a license is prohibited by the Act.

[3] A pre-hearing conference took place on February 16, 2022. At that time Cody Francon, counsel for the Minister of Environment and Climate Change Canada (“ECCC” or the “Minister”), indicated that the penalty appeared to have been incorrectly calculated. Mr. Francon undertook to file written submissions with the Environmental Protection Tribunal of Canada (“Tribunal”) explaining why in his submission the correct amount of the AMP should have been \$500.

[4] Following receipt of the Minister’s submissions, the Applicant confirmed in writing to the Tribunal that he agrees with the amended penalty calculation.

[5] For the reasons set out below, the Tribunal finds that the application for review must be allowed in part. The incorrect amount was imposed for the element of economic gain. The amount of the AMP should therefore be corrected from \$800 to \$500. The notice of violation is upheld, but the amount of the AMP is corrected from \$800 to \$500.

Issues

[6] The issues are:

- (a) Whether the ECCC has established the elements of a violation of subsection 6(2) of the Act;
- (b) If so, whether the amount of the AMP should be changed.

Facts

[7] The parties agree to the main relevant facts as set out in the Notice of Violation. Chiefly, that the Applicant sent American ginseng from Canada to his customer in China without previously obtaining a permit under the Act.

[8] On October 17, 2021, Officer David Syzek issued Notice of Violation no. 9400-8377 to the Applicant. The amount in the AMP was \$800, broken down as follows:

\$400 (baseline amount for the violation)
\$400 (economic gain).

Discussion

[9] In his written submissions, counsel for the Minister submits the following:

In the monetary penalty under review, the economic gain penalty amount used was \$400. \$400 is the amount intended to apply to Type B violations wherein there was economic gain as per s. 8(1) of the EVAMPR. However, the additional economic gain incurred by Huibo Ma in this case was limited to his failure to obtain a permit prior to arranging international shipping for his customers. As such, the Minister submits that the correct economic gain penalty should be calculated pursuant to s. 8(2) of the EVAMPR. Therefore, the appropriate economic gain amount with respect to this violation should be \$100.

[10] The Applicant agrees with the Minister's submissions and accepts that the correct amount of the AMP should be \$500.

Analysis and Findings

[11] Subsection 6(2) of the Act states "Subject to the regulations, no person shall, except under and in accordance with a permit issued pursuant to subsection 10(1), import into Canada or export from Canada any animal or plant, or any part or derivative of an animal or plant."

[12] A violation of the Act is subject to an AMP under the regime established by the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA"). Given that the Applicant admits he exported American ginseng without a permit, issuing an AMP was warranted.

[13] Under s. 20 of EVAMPA, after receiving a request for review and relevant information and representations, the Tribunal must verify whether the alleged violation was committed by the Applicant and whether the amount of the penalty was calculated correctly. To calculate the amount of an AMP, one must refer to the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 ("EVAMP Regulations"). The burden of proof lies with the Minister, who must discharge it on a balance of probabilities. Section 20 is reproduced in full below:

<p>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.</p> <p>(2) The Minister has the burden of establishing, on a balance of probabilities, that the person, ship or vessel committed the violation.</p> <p>(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.</p>	<p>20 (1) Après avoir donné au demandeur et au ministre un préavis écrit ou oral suffisant de la tenue d’une audience et leur avoir accordé la possibilité de présenter oralement leurs observations, le réviseur ou le comité décide de la responsabilité du demandeur.</p> <p>(2) Il appartient au ministre d’établir, selon la prépondérance des probabilités, que le demandeur a perpétré la violation.</p> <p>(3) Le réviseur ou le comité modifie le montant de la pénalité s’il estime qu’il n’a pas été établi conformément aux règlements.</p>
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[14] The amount of an AMP is calculated in accordance with the EVAMP Regulations. In this case, the relevant provision is s. 4(1) of the EVAMP Regulations:

<p>4(1) The amount of the penalty for each Type A, B or C violation is to be determined by the formula</p> <p>W + X + Y + Z</p> <p>where</p> <p>W is the baseline penalty amount determined under section 5;</p> <p>X is the history of non-compliance amount, if any, as determined under section 6;</p>	<p>4(1) Le montant de la pénalité applicable à une violation de type A, B, ou C est calculé selon la formule suivante :</p> <p>W + X + Y + Z</p> <p>où :</p> <p>W représente le montant de la pénalité de base prévu à l’article 5;</p> <p>X le cas échéant, le montant pour antécédents prévu à l’article 6;</p>
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<p>Y is the environmental harm amount, if any, as determined under section 7; and</p> <p>Z is the economic gain amount, if any, as determined under section 8.</p>	<p>Y le cas échéant, le montant pour dommages environnementaux prévu à l'article 7;</p> <p>Z le cas échéant, le montant pour avantage économique prévu à l'article 8.</p>
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[15] With respect to economic gain, the relevant provision is s. 8 of the AMP Regulations:

<p>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.</p> <p>(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.</p>	<p>8 (1) Sous réserve du paragraphe (2), si l'auteur de la violation tire un avantage économique, y compris l'évitement d'une dépense, de la violation commise, le montant pour avantage économique est celui prévu à la colonne 6 de l'annexe 4, selon l'auteur et le type de violation commise figurant, respectivement, aux colonnes 1 et 2 de cette même annexe.</p> <p>(2) Si l'avantage économique représente seulement l'évitement des droits d'obtention d'un permis, d'une licence ou de toute autre autorisation, le montant pour avantage économique est celui prévu à la colonne 7 de l'annexe 4, selon l'auteur et le type de violation commise figurant, respectivement, aux colonnes 1 et 2 de cette même annexe.</p>
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[16] The Applicant admits that he violated s. 6(2) of the Act by exporting American ginseng without a licence.

[17] A violation of s. 6(2) of the Act corresponds to a Type B violation according to Schedule 1, Part 3, Division 1 of the EVAMP Regulations. The baseline amount for a person who commits a Type B violation is \$400. The AMP issued to the Applicant included the \$400 baseline amount, as well as \$400 for the economic gain component. There were no allegations of a history of non-compliance or environmental harm.

[18] The \$400 economic gain component in the AMP issued to the Applicant was calculated under subsection 8(1) of EVAMPR. The Minister, on whom the burden rests to establish the elements of the AMP, has not established that the Applicant benefited from his violation of the Act. To the contrary, both the Applicant and the Minister agree that the

only economic gain to the Applicant in this case was the avoidance of the cost of obtaining a permit.

[19] The Tribunal finds that 8(2) is the correct provision to calculate the penalty in this case since the only economic gain was the avoidance of the cost of obtaining a permit. Column 7 of Schedule 4 for a Type B violation lists the economic gain component as being \$100.

Conclusion

[20] The Applicant having admitted to a violation of the Act, the role of the Tribunal was to verify the amount of the AMP. The Tribunal is of the view that the baseline amount was calculated correctly. However, the Tribunal is of the view that the economic gain component was incorrectly calculated.

Decision

[21] The review is granted in part. The notice of violation is upheld, but the AMP amount is corrected from \$800 to \$500.

Review Granted in Part

AMP Amount Corrected

“Heather Gibbs”

HEATHER GIBBS
CHIEF REVIEW OFFICER