

**ADMINISTRATIVE MONETARY PENALTIES:
PRACTICE CONSIDERATIONS AND A REVIEW OF EXPERIENCE TO DATE**

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Canada Shipping Act, 2001 - Administrative Monetary Penalties

Introduction

On July 2, 2007, the *Canada Shipping Act, 2001* replaced the *Canada Shipping Act* as the principal legislation governing commercial marine transportation, the protection of the environment as well as certain terms of recreational boating. The Act and its Regulations apply to Canadian vessels operating in all waters and to all vessels operating in Canadian waters.

While Transport Canada will still be able to lay criminal charges against anyone who does not comply with the *Canada Shipping Act, 2001*, other marine legislation, or their accompanying regulations, the new regime ensures that this occurs only in the most serious circumstances. Instead, the *Canada Shipping Act, 2001* gives the respective department the right to issue Administrative Monetary Penalties (“AMPs”) for contravening the legislation.

Relatively new to the marine sector, AMPs set up a system applicable to all vessel types, including certain pleasure craft, which can be penalized for environmental violations. The AMP process is considered to be more expedient and more economical than the enforcement of regulatory offences in the criminal courts, although this economy has been the source of considerable debate.

Anyone issued an AMP may request its review by the Transportation Appeal Tribunal of Canada (“TATC”), a quasi-judicial body established in 2003 and previously known as the Civil Aviation Tribunal (“CAT”), to provide for an independent review process of administrative actions taken pursuant to various federal transportation acts. In theory, the TATC, and remains independent from specific government departments.

The previous regime under the CAT was, at the time, unique as a quasi-judicial tribunal established as an independent administrative body of experts to adjudicate aviation matters. The tribunal expanded to include rail and marine matters, and heard its first case

under the *Canada Shipping Act, 2001* in 2009.

Legislation Governed by the AMP System

With its new multi-modal mandate, administrative and monetary penalties apply to the following transportation related statutes:

- a. *Aeronautics Act*, R.S.C. 1985, c. A-2;
- b. *Canadian Aviation Regulations*, S.L.R./96-433;
- c. *Canada Marine Act*, 1988, c. 10;
- d. *Canada Shipping Act, 2001*, R.S.C. 1985, C. S-9;
- e. *Canada Transportation Act*, S.C. 1996 c. 10;
- f. *International Bridges and Tunnels Act*, 2007, c. 1;
- g. *Marine Transportation and Security Act*, S.C. 1994, c. 20;
- h. *Marine Transportation and Security Regulations*, S.O.R./2004-144;
- i. *Railway Safety Act*, R.S.C. 1985, c. 32; and
- j. *Transportation Appeal Tribunal of Canada*, S.C. 2001, c. 29.

The complete list of *Canada Shipping Act, 2001* provisions governed by this system, and the penalty scale applicable to violations, are both detailed in the attached Schedule to the Regulations, copy attached.

Enforcement Tools

The AMP system includes two enforcement tools the Minister of Transport can choose from to promote compliance:

- a. Assurance of Compliance (“AOC”) - A tool intended primarily for vessel owners. When an alleged offender agrees to the terms of the agreement, the penalty is suspended and the offender makes the appropriate remediation within the specified time frame. If the commitment is respected, no further measures are taken. If an offender should default on the AOC, the default is confirmed and the penalty reinstated and doubled.

- b. Notice of Violation - A fine that results from the issuance of a ticket given by the designated authority for breaches of an act or its regulations. This will typically arise with failures to meet equipment, environmental, safety, or documentary requirements discovered during spot checks or scheduled inspections. The amount of the fine varies with the nature of the offence, and the owners’ (or mariners’) history of compliance. Fines for individual mariners are set at a maximum of \$5,000.00, and range up to \$25,000.00 for corporations per occurrence.

As noted, the failure to comply with an AOC can result in the doubling of a fine. As such, the maximum penalty imposed can increase to \$50,000.00.

Disputing an AMP

Persons and vessels affected by an AMP may request a review of a violation, the amount of a penalty, or a default on an Assurance of Compliance by the TATC.

An AMP can be disputed within 30 days of receiving a Notice of Violation by filing a Notice of Dispute with the TATC’s Ottawa office. The process itself is quite user-friendly and detailed instructions can be found at the website: www.tatc.gc.ca. Written requests for an extension of time are permitted, but not guaranteed.

Applications should include a copy of the Notice of Violation and be submitted in writing

to the TATC to allow for a request for legal representation and appearance.

In terms of AMP appeals, there are two levels of hearings:

- a. A review, conducted by one TATC member, regarding:
 - i. The Minister of Transport's decision to suspend, cancel or refuse or issue or amend, or renew a Canada Maritime document; or
 - ii. The Minister's decision to issue a Notice of Violation, or issue a Notice of Default, where the Minister believes on reasonable ground that there has been a breach of a designated provision or an assurance of compliance;
- b. The second level, heard by the designated chairperson and two other TATC members, as an appeal of the determination rendered at the first level of review. The member who conducted the first hearing is not involved in the second. Appeals are based on the arguments, evidence and exhibits contained in the Record of the Review Hearing, and only evidence not previously available at that hearing may be presented at the Appeal.

Decisions of the TATC are subject to judicial review by the Federal Court, Trial Division, in a similar manner as other administrative tribunals are subject to review. While I was unable to find the judicial review of any marine matters under the new system, civil aviation decisions have determined that the appropriate standard of review is one of correctness¹ as it pertains to jurisdictional and statutory interpretation, and reasonableness in their interpretation of the facts and applicability of the law.

¹*Milton James Woods, Applicant and Minister of Transport, Respondent, CAT File No. P-1908-02, MOT File No. EMIS32262*

For a more detailed discussion of correctness and reasonableness in the context of administrative tribunals, see the Supreme Court of Canada's recent decision of *Dunsmire v. New Brunswick*, 2008 SCC 9 and its subsequent clarification in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12. While second nature to administrative lawyers, reasonableness is a deferential standard that allows tribunals a marginal appreciation within a range of acceptable and rational solutions. In reviewing the correctness of a decision, a reviewing court may take into consideration the experience of an administrative tribunal, but will not show deference to a panel's reasoning process, instead undertaking its own analysis of the question. While beyond the scope of this paper, these are factors to take into consideration when advising a party on whether to embark on a judicial review from a hearing determination.

The Hearing

Procedurally, an AMP hearing is not all that different than the former criminal prosecution. Akin to a prosecutor, the Minister's representative first presents its case, as they bear the burden of proof, albeit on a balance of probabilities. The applicant/defendant has the right to cross-examine the Minister's sworn witnesses, and once the Minister's case is completed, the applicant has the right to present its case by calling witnesses under oath and entering documents through them. The Minister's representative also has the right of cross-examination, and each of the parties then has an opportunity to summarize its case and present legal arguments to the Member. The review hearing is recorded, and a transcript can be generated for use at any subsequent appeal hearing.

The TATC member shall provide a determination in writing following the review hearing, which can be appealed in writing within **30 days** after the decision is served on the parties. This service can also occur by registered mail. No extension to the appeal time frame is provided for the Act and the request for an appeal must be **received** at the Registry with the 30 -day period. The written request for an appeal shall include a concise statement of the grounds on which the appeal is based.

An appeal hearing is preceded by briefs of fact and law, which are supplemented with oral testimony. Written reasons, once rendered, are to be served on the parties.

Concerns about Administrative Monetary Penalties and its Enforcement Procedure

In addition to the abbreviated time frames, the more common concern I've heard voiced about the implementation of the AMP system relates to the change to the burden of proof. With most regulatory offences (and in the previous regime), the Crown has to prove beyond a reasonable doubt that the offence occurred, and the accused could still attempt to demonstrate they had exercised reasonable care and due diligence to avoid the outcome.

Under the previous regime, the defence of due diligence was open to shipowners/seafarers, but has all been removed by the *Canada Shipping Act, 2001*. This is now akin to an absolute liability offence, whereby if the inspector satisfies the adjudicator that the offence occurred, the shipowner may not escape liability by simply showing due diligence. This is particularly acute for ship owners, vicariously liable for the acts of their employees, who may no longer be able to show they took all reasonable care to ensure their employees were not careless. These changes in the burden of proof dramatically increase the potential for contravening parties to be convicted of an offence under the AMP system without the benefit of extenuating circumstances being fully considered. The previous hybrid burden of proof under the old regime was more desirable for mariners because it put the burden on the Crown and provided a more accessible defence to the Applicant.

While given cautious credence, another concern I hear from (mostly) ship owners is the subjectivity and relative ease of issuing an AMP. AMPs are issued on the spot and are subject to the exercise of considerable discretion by the inspector. Compared with the legally onerous, and costly, process for disputing the AMP, the economical alternative is often to simply pay. If not disputed, then the party is deemed to have committed the

offence, with the potential for higher fines for future infractions. Particularly with smaller penalties, the likelihood that the AMP would be disputed is low and often factored in as an operational expense.

Practically speaking, time constraints have been a logistical impediment to properly preparing to dispute an AMP. While I've personally found the Registrar decent in providing leeway in the setting of hearing dates, it still makes for a short time line within which to properly prepare your case.

Assuming an initial meeting with the relevant supervisors and crew members involved in the incident, and subsequent preparatory time for the hearing itself, the cost to ship owners, both out of pocket and by way of lost productivity, can be extensive. Faced with the spectre of having to disprove the charge, the option to contest these fines becomes less attractive.

As for disputing the facts on which an Assurance of Compliance is based, this must be done within 48 hours of signing the Assurance. This is important because once an Assurance is signed, the party has essentially admitted to the facts which go into the Record.

AMPs - The First Two Years

A particularly useful tool for exploring trends and reviewing up to date case law is the Minister of Transportation's website on which the TATC decisions are posted.

While it is suspected that the bulk of the tribunal decisions will now be comprised of marine matters, the majority of decisions currently available on the website are aviation matters.

l) Costs

The decisions I have reviewed are silent on costs, although the tribunal does, in theory, have the power to award these. The *Transportation Appeal Tribunal of Canada Act, 2001*, c. 29 states as follows:

19. (1) The Tribunal may award any costs, and may require the reimbursement of any expenses incurred in connection with a hearing, that it considers reasonable if

(a) it is seized of the matter for reasons that are frivolous or vexatious;

(b) a party that files a request for a review or an appeal and does not appear at the hearing does not establish that there was sufficient reason to justify their absence; or

(c) a party that is granted an adjournment of the hearing requested the adjournment without adequate notice to the Tribunal.

In the aviation context, costs were visited on a judicial review by the Federal Court following a number of appearances before the TATC appeal panel, and one previous appearance before the Federal Court².

Following the second appearance before the Federal Court, the Applicant's (Woods) counsel referred to a pre-hearing offer to settle matters with admission to a number of offences in question, an offer made at a time when his counsel noted the cost consequences of having gone through various incarnations of the proceeding. Woods asserted that the cost of going through to the Federal Court and back was overly onerous, particularly given his prior willingness to admit all but one of the impugned offences.

In the end, the Federal Court of Appeal upheld the 90-day suspension with no

² *Woods, supra.*

consideration for costs:

The Appellant admitted the elements of the alleged offence at the review hearing. At this appeal hearing, counsel for the appellant did not assert that the penalty is excessive under the facts. Hence, in the circumstances, we are not moved to give relief from the 90 day suspension from deterrence view point nor were we asked to do so.

From the aspect of fairness, we are not moved to alter the penalty to provide some relief in the way of costs. We are not empowered to award costs per ss.37(7) of the *Aeronautics Act* and, in any event, since costs usually follow the event of success, even if the tribunal had power to award to costs, it would not be appropriate to award costs to the losing party despite the protracted proceedings.

Failing to pay, or simply ignoring, an AMP could result in collection proceedings being commenced against an offender:

Recovery

(2) Costs awarded to the Minister of Transport, and expenses of that Minister or the Tribunal that are subject to reimbursement, under subsection (1) are a debt due to Her Majesty in right of Canada.

Certificate

(3) Costs or expenses under subsection (1) that have not been paid may be certified by the Tribunal.

Registration of certificate

(4) On production to the Federal Court, a certificate shall be registered. When it is registered, a certificate has the same force and effect as if it were a judgment obtained in the Federal Court for a debt of the amount specified in it and all reasonable costs and charges attendant on its registration, recoverable in that Court or in any other court of competent jurisdiction.

Conceivably, therefore, the parties have the ability to seek cost awards at the conclusion of the hearing, although it is unclear whether full legal costs, on a solicitor/client basis, or simply what are considered “reasonable” costs are taken into consideration.

Continuing Violations

The infractions which may attract a separate AMP for each day of a “continuing violation” are outlined at column 3 of the attached Schedule. Whether each day of an alleged “continuing violation” could constitute a separate AMP was explored in ***Atlantic Towing Limited***, Applicant and ***Minister of Transportation***, Respondent T.A.T.C. File No. MA-009-37, NOT File A20090105-200-00018. The applicant had received an AMP in violation of paragraph 106(2)(a) of the *Canada Shipping Act, 2001* for the failure to ensure the vessel was inspected for the purpose of obtaining the required inspection document. The original account was dated November 30, 2008, and subsequent accounts were dated over seven of the eight following days. The penalty for each violation was \$6,000.00 per day, leading to an overall penalty of \$48,000.00.

The TATC review determined, with regard to the first AMP, that the Minister of Transport had proven on the balance of probabilities that Atlantic Towing had violated the legislation in question. As such, they confirmed the AMP of \$6,000.00.

Regarding counts two through eight, however, the TATC review determined the Minister failed to prove the allegations, leading to the dismissal of the additional \$42,000.00 of AMPs as imposed by the Minister.

The TATC review determined, at para. 69, that, in fact, a single violation had occurred:

I find that, when a violation has passive and active elements, it is primarily a passive violation (passive failure to ensure that an inspection be done to obtain an inspection certificate that could have covered the entire period which the alleged

violations relate). In this matter, the violation was completed on or about November 30, 2008 (the day after the expiration of the previously existing inspection certificate and the day of the first voyage in which the "ATLANTIC OAK" engaged without a valid inspection certificate); and the violation continued until it was terminated when an inspection (one sufficiently satisfactory to allow for the issuance of Certificate 3) was conducted on December 10, 2008.

With respect to the resultant penalty of \$6,000.00, the TATC held that this was in line with the recommended penalty for the violation in question.

As the range of penalties has been set out in the AMPRs, pursuant to paragraph 244(h) of the Act, I am bound by that range. ... The \$1,250.00 to \$25,000.00 of penalties set out in the AMPRs, in respect of violation of paragraph 106(2)(a) of the Act, signals that the violation in that paragraph is regarded as one of high gravity. The RIAS also gives some indication of penalty amounts, which are higher for corporations than for individuals, providing an appropriate deterrent effect and that a penalty of \$6,000.00 was envisaged for the first high gravity violation by a corporation. In the circumstances of this case, I am satisfied that the penalty imposed by the Minister in respect of CAT 1 is appropriate.

Foreign Vessels

As noted, *Canada Shipping Act, 2001* and its Regulations apply to Canadian Vessels operating in all waters and to all vessels operating in Canadian waters. Foreign vessels can be expelled or, in some cases, detained, although it is unclear whether Transport Canada has the power to issue an AMP to a foreign vessel. In the case of lapsed International Ship Security Certificates (ISSC) and Safety Management Certificates (SMC), Transport Canada may:

1. prevent the ship from entering Canadian waters [s.227 (a)]
2. require the ship to leave Canadian waters under terms specified by Transport

Canada [s. 227(b) and (c)]

3. possibly detain a vessel if,
 - a. it is suspected it is unsafe or has defective equipment [s.222(2)]
 - b. information has been laid or notice of violation issues [s. 222(3)]
 - i. if a detention order is issued then
 - (1) must be served on master [s. 222(5)]
 - (2) notice must be given to the foreign state where the vessel is registered [s. 222(7)]
 - (3) order must be rescinded by a Marine Safety Inspector matters set out and notice of them met

As it stands, it appears to be a viable interpretation of the legislation that foreign vessels can only be issued AMPs for certain infractions. I understand that current amendments are under consideration to address this.

Penalty Ranges

The attached Schedule sets out an applicable penalty range for each of the impugned provisions of the *Canada Shipping Act, 2001*. The impetus behind these ranges is meant to take into consideration the specific circumstances of each violation, including any mitigating or aggravating factors, as well as the previous record of the offender.

The ranges are classified as either low, medium or high, and within each category there

are minimum amounts for a first violation, mid-range amounts for a second violation and maximum amounts for a subsequent violation³:

Gravity	1 st Violation Individual/Vessel or Corporation	2 nd Violation Individual/Vessel or Corporation	Subsequent Violation Individual/Vessel or Corporation
Low	\$250 to \$1,000	\$500 to \$2,000	\$1,000 to \$5,000
Medium	\$600 to \$3,000	\$1,200 to \$6,000	\$2,400 to \$12,000
High	\$1,250 to \$6,000	\$2,500 to \$12,000	\$5,000 to \$25,000

As noted above, however, failure to adhere to the AOC can boost the maximum penalty to \$50,000.00. If the amount is not paid, then collection procedures can be taken by Her Majesty.

Summary

The new AMP system under the *Canada Shipping Act, 2001* is a developing yet important new area for mariners and vessel owners. The dearth of jurisprudence may demonstrate a hesitation on the part of aggrieved parties to challenge the new system or simply that matters have not made their way through the system. Seafarers and owners issued AMPs will undoubtedly continue to dispute the fines, and cases will develop which will be helpful to others dealing with alleged contraventions. With this experience will come a wider understanding of how the respective administrative bodies are interpreting this new burden of proof and other related issues.

³SSOR/2008-97 April 3, 2001, *Canada Shipping Act, 2001* Administrative Monetary Penalties Regulations, at p. 6

SCHEDULE

(Section 2)

VIOLATIONS

	Column 1	Column 2	Column 3
Item	Provision of the Act	Range of Penalties (\$)	Separate Violation for Each Day
1.	Subsection 16(3)	600 to 2,400	
2.	Subsection 17(2)	600 to 12,000	
3.	Section 18	250 to 5,000	
4.	Subsection 20(2)	600 to 10,000	
5.	Paragraph 23(a)	1,250 to 25,000	
6.	Paragraph 23(b)	1,250 to 25,000	
7.	Paragraph 23(c)	1,250 to 25,000	
8.	Paragraph 23(d)	1,250 to 25,000	
9.	Paragraph 23(e)	1,250 to 25,000	
10.	Subsection 28(7)	1,250 to 25,000	
11.	Subsection 46(2)	1,250 to 10,000	X
12.	Subsection 57(1)	600 to 10,000	X
13.	Subsection 57(3)	600 to 10,000	
14.	Subsection 57(4)	600 to 12,000	
15.	Subsection 58(1)	250 to 5,000	
16.	Subsection 58(2)	1,250 to 10,000	
17.	Subsection 58(3)	250 to 5,000	
18.	Subsection 58(4)	250 to 5,000	
19.	Subsection 63(1)	250 to 5,000	
20.	Subsection 63(2)	250 to 5,000	
21.	Subsection 63(3)	600 to 10,000	
22.	Subsection 64(2)	250 to 1,000	
23.	Subsection 82(1)	250 to 1,000	

24.	Subsection 82(2)	1,250 to 25,000	X
25.	Subsection 82(3)	1,250 to 5,000	X
26.	Section 87	1,250 to 5,000	
27.	Subsection 90(1)	1,250 to 5,000	
28.	Subsection 90(2)	600 to 2,400	
29.	Paragraph 91(1)(a)	250 to 5,000	
30.	Paragraph 91(1)(b)	250 to 5,000	
31.	Section 92	250 to 5,000	
32.	Subsection 93(1)	250 to 5,000	
33.	Subsection 93(2)	250 to 5,000	
34.	Subsection 94(1)	600 to 12,000	
35.	Subsection 97(1)	250 to 1,000	
36.	Subsection 97(2)	250 to 1,000	
37.	Subsection 97(3)	250 to 1,000	
38.	Subsection 97(4)	250 to 1,000	
39.	Paragraph 98(a)	250 to 5,000	
40.	Paragraph 98(b)	250 to 5,000	
41.	Paragraph 98(c)	250 to 5,000	
42.	Paragraph 98(d)	250 to 5,000	
43.	Paragraph 98(e)	600 to 12,000	
44.	Paragraph 106(1)(a)	1,250 to 25,000	
45.	Paragraph 106(1)(b)	1,250 to 25,000	
46.	Paragraph 106(1)(c)	1,250 to 25,000	
47.	Paragraph 106(2)(a)	1,250 to 25,000	
48.	Paragraph 106(2)(b)	1,250 to 25,000	
49.	Section 107	1,250 to 25,000	
50.	Subsection 109(1)	1,250 to 25,000	
51.	Subsection 109(2)	1,250 to 25,000	
52.	Subsection 110(1)	1,250 to 25,000	
53.	Subsection 110(2)	1,250 to 25,000	

54.	Section 111	1,250 to 25,000	
55.	Section 112	600 to 12,000	
56.	Paragraph 113(a)	1,250 to 5,000	
57.	Paragraph 113(b)	1,250 to 5,000	
58.	Paragraph 113(c)	1,250 to 5,000	
59.	Paragraph 113(d)	1,250 to 5,000	
60.	Section 114	1,250 to 5,000	
61.	Subsection 115(1)	600 to 2,400	
62.	Subsection 115(2)	250 to 1,000	
63.	Paragraph 116(a)	600 to 2,400	
64.	Paragraph 116(b)	600 to 2,400	
65.	Section 117	1,250 to 25,000	
66.	Section 118	1,250 to 25,000	
67.	Section 119	1,250 to 25,000	
68.	Paragraph 148(b)	250 to 5,000	
69.	Section 187	1,250 to 25,000	X
70.	Section 188	6,000 to 25,000	
71.	Section 213	6,000 to 25,000	
72.	Section 215	1,250 to 25,000	
73.	Subsection 218(1)	1,250 to 25,000	
74.	Subsection 222(9)	1,250 to 25,000	
75.	Subsection 222(10)	1,250 to 25,000	
76.	Section 223	1,250 to 25,000	
