

NEWS

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*APPEAL DECISION IN ADMINISTRATIVE MONETARY PENALTY CASE PROVIDES
SENTENCING GUIDANCE IN MARITIME POLLUTION SETTING**The Florence M v. Canada (Minister of Transport) 2009 TATCE 34
December 18, 2009*

Administrative Monetary Penalties (AMP's) entered the lexicon with the relatively recent (April 3rd, 2008) Administrative Monetary Penalties Regulations (AMPR) made under the Canada Shipping Act, 2001 (CSA). AMP's refer to the violation procedure by which certain contraventions of the CSA may be designated by regulation as violations, thereby enabling the option (exercisable by the Minister of Transport) of treatment via the AMPR's. The legislator's idea was to provide for an optional administrative handling of contraventions which could thereby be dealt with more expediently than if otherwise processed via the Court-based (the provincial courts systems) offence prosecution route.

Out of the myriad possible contraventions under the CSA, the general pollution prohibition is one of the contraventions which is designated as a violation under the AMPR's.

The adjudication of AMP violations is in the hands of the Transportation Appeal Tribunal of Canada (TATC), which is a federal government entity.

The TATC's decision in *The FLORENCE M* gives a first indication of the Tribunal's approach to violations in the maritime pollution setting.

FLORENCE M was issued with a notice of violation in relation to a spill of 600-700 litres (later agreed to have been in the vicinity of 1720 litres) of diesel oil in the St. Lawrence River near Kingston, Ontario. Had the contravention been dealt with as an offence, the maximum imposable fine under the CSA would have been CAD1Million. As a violation under the AMPR's, the penalty range was CAD1250 to CAD25,000. The notice of violation had assessed the penalty at the maximum CAD25,000.

The ship's authorized representative sought review of the amount of the penalty.

It was not disputed on the evidence that the spill had occurred as the result of human error during an onboard transfer operation. It was found that:

- the incident was reported;
- there was short-term water/shoreline damage;
- substantial cleanup costs were paid by the violator;
- remedial action by the violator was initially somewhat slow and under-resourced;
- there was no economic benefit to the violator and no history of non-compliance.

The Minister argued that had the violation instead been prosecuted as an offence, the provincial court would have imposed a fine of CAD40,000 to CAD60,000. The maximum AMP of CAD25,000 was therefore justified. The ship argued for something closer to CAD10,000.

The Tribunal decided to reduce the penalty to CAD10,000. The penalty range for the violation had been prescribed by regulation. The sentencing factors (applicable to an offence) set out in the CSA could be considered, in assessing the penalty, but within the context of the prescribed penalty range. Moreover, the Regulatory Impact Analysis Statement (RIAS) for the AMPR's, while not part of the Regulations, served as indication that the prescribed range of penalties signalled that the violation was regarded as one of high gravity. A penalty of CAD6,000 (first high-level violation by a corporation per the RIAS) was not appropriate, but equally neither was the maximum of CAD25,000. A mid-range penalty was more appropriate having regard to the relevant factors.

In short, once a contravention is taken via the AMP route, it is the AMP penalty range which is relevant, and not the assertion that a higher fine would have been attracted had the matter been prosecuted as an offence.

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