



**Issue Date:** April 4, 2019

**Citation:** *Bhaiyat v. Canada (Environment and Climate Change)*, 2019 EPTC 1

**EPRC Case No.:** 0033-2018

**Case Name:** *Bhaiyat v. Canada (Environment and Climate Change)*

**Applicant:** Ibrahim Mohamed Bhaiyat

**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:** March 8, 2019 by telephone conference call

**Appearances:**

**Parties**

**Counsel/Representative\***

Ibrahim Mohamed Bhaiyat

Junaid Bhaiyat\*

Minister of Environment and  
Climate Change

Elizabeth Koudys

**ORDER DELIVERED BY JERRY V. DEMARCO**

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## **Background**

[1] This Order disposes of a request by the parties to the Chief Review Officer to answer a preliminary question of law that has arisen in a review proceeding concerning an Administrative Monetary Penalty (“AMP”). The AMP was issued by Environment and Climate Change Canada (“ECCC”) to Ibrahim Mohamed Bhaiyat (“Applicant”) on October 16, 2018. The Applicant has filed a request to review the AMP with the Chief Review Officer.

[2] The AMP was issued by ECCC Enforcement Officer Mark McIntyre 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”). The AMP relates to an alleged shipment of thousands of feathers of Green Peafowl (*Pavo muticus*) and Indian/Blue Peafowl (*Pavo cristatus*) without a permit issued under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). Green Peafowl is listed under Appendix II of CITES and Indian/Blue Peafowl is listed under Appendix III of CITES. WAPPRIITA implements CITES in Canada.

[3] During a Pre-hearing Conference (PHC) held by telephone conference call, the parties submitted that the Chief Review Officer should answer a jurisdictional question that was raised by the Applicant as a preliminary matter in this proceeding. In the procedural direction that followed the PHC, the Chief Review Officer set out the steps for the exchange and filing of submissions on the preliminary question and set March 8, 2019 as the date for the parties to provide oral submissions. ECCC, represented by Counsel, Elizabeth Koudys, provided written and oral submissions and the Applicant, represented by his son, Junaid Bhaiyat, provided only oral submissions.

[4] The procedural direction noted that the “question will be answered in the abstract such that the posing of the question by the parties is not to be taken as an admission by the applicant that a violation has been established”. Accordingly, it is not necessary here to set out the circumstances of the alleged violation in detail. The Chief Review Officer will proceed directly to addressing the legal question at hand.

## **Issue**

[5] As set out in the procedural direction that was issued after the PHC, the issue is:

Under EVAMPA, if a violation that is the subject of administrative monetary penalty were established by Environment and Climate Change Canada, does the review officer have the authority to forgive the penalty and/or decrease the amount of the penalty?

## Relevant Legislation and Regulations

[6] 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.

11(1). A person, ship or vessel named in a notice of violation does not have a defence by reason that the person or, in the case of a ship or vessel, its owner, operator, master or chief engineer

(a) exercised due diligence to prevent the violation; or

(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person, ship or vessel.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an Environmental Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

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.

22. If the review officer or panel determines that a person, ship or vessel has committed a violation, the person, ship or vessel is liable for the amount of the penalty as set out in the decision.

[7] 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.

6(1). If the violator has a history of non-compliance, the history of non-compliance amount is the amount set out in column 4 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) A violator has a history of non-compliance if, in the five years preceding

(a) the commission of a violation relating to any Division of Part 7 of the Canadian Environmental Protection Act, 1999 or any regulation made under that Division, they were subject to an enforcement action in relation to that Division or any of those regulations;

(b) the commission of a violation relating to Part 9 of the Canadian Environmental Protection Act, 1999 or any regulation made under that Part, they were subject to an enforcement action in relation to that Part or any of those regulations; or

(c) the commission of a violation relating to any Environmental Act, other than the Canadian Environmental Protection Act, 1999, or a regulation made under one of those Acts, they were subject to an enforcement action in relation to that Act or any of that Act's regulations.

(3) For the purpose of subsection (2), enforcement action means the imposition of a ticket, penalty, conviction or injunction or the use of environmental protection alternative measures.

7. If the violation has resulted in harm to the environment, the environmental harm amount is the amount set out in column 5 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**

### *ECCC's Submissions*

[8] In overview, ECCC submits that the Review Officers do not have the jurisdiction to reduce or forgive an AMP for reasons of equity or fairness. ECCC submits that the only jurisdiction for Review Officers in respect of the amount of a penalty involves the authority to correct a penalty amount so that it accords with the AMP Regulations.

[9] ECCC submits that Review Officers, as administrative decision makers, must stay within the confines of their statutory authority (see: *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140; and *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at paras. 28-29). ECCC argues that a power to modify AMPs on equitable grounds would need to be set out in legislation or be necessarily implied in order for Review Officers to consider providing such a remedy. ECCC relies on the Alberta Court of Queen's Bench decision in *Alberta v. McGeedy*, 2014 ABQB 104 at para. 23 (upheld at 2015 ABCA 54), which states: "No statutory decision maker can ignore substantive statutory provisions because it believes its provision produces unfair results and adopt another norm which it is satisfied produces a more satisfactory result".

[10] ECCC notes that Review Officers are appointed under s. 243 and 244 of the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 ("CEPA") and are tasked with reviewing orders under numerous environmental protection statutes as well as reviewing AMPs under EVAMPA. The question in this proceeding relates specifically to the powers provided under EVAMPA and its regulations once an applicant exercises the right to request a review under s. 15 of EVAMPA.

[11] ECCC submits that, under s. 20 of EVAMPA, Review Officers determine: 1) whether a violation was committed (see s. 20(1) and (2) of EVAMPA), and 2) whether the amount of an AMP was determined correctly in accordance with the AMP Regulations (see s. 20(3) of EVAMPA). ECCC argues that Review Officers cannot waive or reduce an AMP on equitable grounds because such a power is not set out in the enabling legislation for Review Officers. In this regard, ECCC also relies on s. 22 of EVAMPA, which states that, if a Review Officer determines that a person committed a violation, then that person "is liable for the amount of the penalty as set out in the decision".

[12] With regard to the power of Review Officers to reduce the amount of an AMP, ECCC states that the only such power under EVAMPA is when if the amount of the original AMP was not calculated correctly as per the AMP Regulations. ECCC points out that s. 4 of the AMP Regulations sets out a specific formula to be used in calculating AMP amounts and that the formula starts with a base amount value and then adds other amounts for: a history of non-compliance, the seriousness of the environmental harm, and for economic gain. ECCC notes that the base amounts applicable to various types of violations are set out in the AMP Regulations. For the alleged violation here, the base amount is \$400 for an individual person (as opposed to a corporation). The AMP Regulations set out the amounts to be added for the additional factors set out above.

[13] Consequently, ECCC submits that, where a violation has been established on the facts, Review Officers do have the ability to adjust the amount of an AMP, but that such power is limited to ensuring that the amount correctly accords with the formula set out in the AMP Regulations. ECCC states that the amount of the penalty in the “decision” referred to in s. 22 of EVAMPA can only be either the original AMP amount or an amount adjusted by a Review Officer to accord with the AMP Regulations formula.

[14] ECCC submits that s. 7 of EVAMPA supports ECCC’s interpretation of the specific provisions of EVAMPA that relate to the work of Review Officers. Section 7 is a general provision that applies to all AMPs regardless of whether a review by a Review Officer has been requested. It states that AMP amounts are to “be determined in accordance with the regulations”. Implicit in this argument is that all AMP decision-makers, whether they are ECCC enforcement officers or independent Review Officers considering a request to review an AMP, must determine AMP amounts according to the AMP Regulations. That is, there is no jurisdiction to depart from the formula in the AMP Regulations at any stage of the AMP process.

[15] ECCC submits that s. 11 of EVAMPA also supports its interpretation even though the section is focused on the exclusion of certain defences to alleged violations. ECCC argues that s. 11 confirms that EVAMPA is an absolute liability regime and that fairness or equity considerations do not enter into the analysis.

[16] ECCC supports its argument by considering the purpose of EVAMPA, which states:

3. The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the Environmental Acts.

[17] ECCC argues that allowing Review Officers to grant equitable relief for violations that have occurred would run counter to EVAMPA’s purpose. In support of this argument, ECCC also relies on Hansard (see: House of Commons Debates, 40-2, No 31 (March 23, 2009) at 1740 (Mr. Mark Warawa,

Parliamentary Secretary to the Minister of the Environment)). According to Hansard, Bill C-16, *Environmental Enforcement Act*, 40th Parl., 2nd session, which included EVAMPA, was passed in part to reflect “society’s serious disapproval of environmental offences” and to “institute a more principled approach to assessing penalties for violations”. ECCC argues that “Parliament intended to grant a stricter regime that would encourage [and] enforce compliance with environmental legislative schemes”.

[18] EVAMPA was passed as part of a much larger bill affecting numerous environmental statutes. Much of the Hansard appears to relate to Bill C-16 as a whole or to its provisions that increased fines in numerous federal statutes concerning the environment. For example, the Hansard states:

The need for the amendments proposed in the environmental enforcement act are clear. At the Global Judges Symposium held in Johannesburg, South Africa in 2002, where Canada's Supreme Court was represented, the Johannesburg Principles on the Role of Law and Sustainable Development were adopted.

The principles include the following statement:

We are strongly of the view that there is an urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who play a critical role...in the process of implementation, development and enforcement of environmental law...especially through the judicial process....

Current fines are too low to be effective deterrents. Furthermore, they do not adequately express society’s strong disapproval of environmental offences.

[20] However, there are brief passages from Hansard that do specifically speak to the AMP regime put into place under EVAMPA via Bill C-16. The Hansard material that is more relevant to the question at hand under EVAMPA will be referred to later in these reasons.

[21] ECCC submits that EVAMPA “was also intended to promote predictability on the amounts charged for violations” and that “allowing equitable relief based on highly individualized and subjective criteria such as fairness would run counter to this objective”. Allowing equitable relief from penalties, ECCC argues, would introduce unpredictability and undermine deterrence. ECCC submits that Parliament constructed the authority of Review Officers narrowly under EVAMPA to meet the objectives of deterrence and predictability. This, ECCC submits, is reflected in the wording of EVAMPA, which states that penalties are to be determined in accordance with the AMP Regulations.

[22] In response to a question from the Chief Review Officer on the role of Review Officers in reviewing penalties, ECCC relied on Schedule 4 of the AMP Regulations to demonstrate the mechanical nature of an AMP calculation. For a violation such as the one alleged in this case, Schedule 4 states that the baseline

amount for an individual is \$400. ECCC states that the AMP could not fall below \$400 if ECCC were to prove that a violation occurred here. Other amounts could be added to the baseline amount (e.g., \$600 for environmental harm) but there is nothing in the AMP Regulations that permits a reduction below the baseline amount. While no environmental harm was alleged in this case (and thus the total AMP was the baseline amount), ECCC agreed that Review Officers do have the ability to determine if there was environmental harm in reviews of AMPs that have an environmental harm amount added to the baseline. ECCC argues that, if there is such harm, the \$600 component of an AMP that was issued would be upheld and that there is no jurisdiction for Review Officers to select a different amount. That is, the exact amounts that can be added are set in the Schedule and there is no discretion to vary them if they were properly included in the original AMP amount by the enforcement officer and accord with the Schedule.

[23] ECCC acknowledges that tribunals can also exercise powers that they have by “necessary implication” (see: *Canada (Attorney General) v. Vorobyov*, 2014 FCA 102 at para. 44). However, ECCC submits that such powers would be confined to those that are required for a tribunal to properly carry out its statutory mandate. ECCC argues that the mandate is for Review Officers to ensure that penalty amounts accord with the AMP Regulations and that there are no necessarily implied powers to alter penalty amounts for equitable reasons.

[24] ECCC also submits that Review Officers have the jurisdiction to apply the *Canadian Charter of Rights and Freedoms* (see: *R v Conway*, 2010 SCC 22 at para. 81) but that EVAMPA does not infringe any *Charter* right, such that Review Officers could reduce or forgive a penalty amount. ECCC also points out that the Applicant has not pled any *Charter* violation.

[25] In conclusion, ECCC submits that the Chief Review Officer should find that Review Officers do not have the jurisdiction to grant equitable relief in regards to AMP penalty amounts. ECCC states that the only power for Review Officers in regards to an AMP amount is the authority to correct the amount so that it properly accords with the AMP Regulations.

### *The Applicant's Submissions*

[26] The Applicant argues that Review Officers have the ability to reduce or forgive penalties as such is inherent in their supervisory role. The Applicant submits that it is self-evident that Review Officers have such powers. He argues that the mere fact that the parties are having this legal debate before the Chief Review Officer implies that there must be jurisdiction.

[27] The Applicant submits that, where a body oversees a dispute like the one before a Review Officer in this case, such a body plays a role that is akin to a judge in the courts. He argues that, just as a judge could dismiss a parking ticket or reduce the amount of a fine, Review Officers can do the same in respect of an AMP. He states that, upon receiving the AMP in this case, he was informed by ECCC that he could have the AMP reviewed by the Chief Review Officer. The fact that a Review Officer can review the AMP implies that Review Officers have

the full authority to deal with the matter, including the power to forgive or reduce the amount on equitable grounds. Here, the Applicant argues that a ticket for a lower amount could have been issued if ECCC had acted more quickly. He also argues that the seizure of the shipment itself constituted adequate enforcement activity and that no AMP was necessary considering the financial effects of the seizure. He also argues that Review Officers should also have the ability to deal with a matter such as this to the full extent, including the power to review ECCC's seizure of the shipment.

[28] The Applicant submits that Review Officers ought to have the ability to express sympathy for first time violators and the ability to consider the full circumstances of a case, including whether, for example, a seizure of a shipment suffices in terms of a financial penalty, whether a proper permit was later obtained, or whether an AMP was issued for a petty issue.

[29] The Applicant submits that the regime governing AMPs is not a rigid one as submitted by ECCC but one that more similar to the court system where judges have full authority to decide on how a matter should be disposed of. The Applicant also submits that it would be a more productive use of everyone's time if one were to conclude that Review Officers do have wider jurisdiction in cases such as this.

#### *ECCC's Reply Submissions*

[30] In reply, ECCC states that the fact that the parties are having this debate does not imply a particular outcome. ECCC states that the statutory wording is what governs. As regards the Applicant's analogy to a judge, ECCC submits that Federal Court judges, for example, still have to limit their remedies to what is legally available to them.

#### **Analysis and Findings**

[31] The question posed raises an issue of statutory interpretation. Generally speaking, the issue relates to the scope of jurisdiction afforded Review Officers when dealing with a request to review the amount of an AMP. As AMPs have only recently begun to be issued by ECCC under the AMP Regulations passed in 2017, there have been few cases filed to date and none where the parties posed the specific question at issue here. The Chief Review Officer, therefore, will fully examine the question as a matter of first instance under EVAMPA.

[32] The Chief Review Officer begins the analysis of the legal question raised in this proceeding with the specific wording of the most relevant provisions of EVAMPA. EVAMPA states:

Every person... that contravenes or fails to comply with a provision...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 (EVAMPA, s. 7).

A person... served with a notice of violation may... make a request to the Chief Review Officer for a review of the penalty or the facts of the alleged violation, or both (EVAMPA, s. 15).

... the review officer... shall determine whether the person... committed a violation (EVAMPA, s. 20(1)).

If the review officer... 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 (EVAMPA, s. 20(3)).

If the review officer... determines that a person... has committed a violation, the person, ship or vessel is liable for the amount of the penalty as set out in the decision (EVAMPA, s. 22).

[emphasis added]

[33] The AMP Regulations provide:

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

**W + X + Y + Z...** (AMP Regulations, s. 4).

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 (AMP Regulations, s. 5).

If the violator has a history of non-compliance, the history of non-compliance amount is the amount set out in column 4 of Schedule 4... (AMP Regulations, s. 6(1)).

If the violation has resulted in harm to the environment, the environmental harm amount is the amount set out in column 5 of Schedule 4... (AMP Regulations, s. 7).

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... (AMP Regulations, s. 8(1)).

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... (AMP Regulations, s. 8(2)).

[emphasis added]

[34] The Schedule to which the above provisions of the AMP Regulations refer provides (AMP Regulations, Schedule 4):

## Penalty Amounts

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	
Item	Violator	Violation Type	Baseline Penalty Amount (\$)	History of Non-compliance Amount (\$)	Environmental Harm Amount (\$)	Economic Gain Amount (\$)	Economic Gain Amount — Authorizations Only (\$)
1	Individual	• (a) A	200	600	300	200	50
		• (b) B	400	1,200	600	400	100
		• (c) C	1,000	3,000	0	1,000	250
2	Other person or ship or vessel	• (a) A	1,000	3,000	1,500	1,000	250
		• (b) B	2,000	6,000	3,000	2,000	500
		• (c) C	5,000	15,000	0	5,000	1,250

[35] It should also be noted that Parliament has given the Chief Review Officer wide powers under other legislation. For example, with respect to reviews of compliance orders, CEPA states:

263. The review officer, after reviewing the order and after giving all persons who are subject to the order, and the Minister, reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for those persons and the Minister to make oral representations, may

(a) confirm or cancel the order;

(b) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order; or

(c) extend the duration of the order for a period of not more than 180 days less the number of days that have passed since the day on which the

order was received by the person who is subject to the order, not counting the days during which the order was suspended under subsection 258(3).

[36] Presumably, if Parliament had intended to give wide powers under EVAMPA, the legislation would have been drafted differently than it is. When one compares the wording of EVAMPA and the wording of CEPA, it is clear that the scope of authority assigned to the Chief Review Officer under EVAMPA is narrower.

[37] The Chief Review Officer has considered the purpose of the EVAMPA (see s. 3) in this analysis. While ECCC states that the purpose of EVAMPA supports its arguments, the Chief Review Officer notes that some aspects of s. 3 also support the Applicant's interpretation (e.g., the reference to a "fair" system could also be interpreted to mean a system that addresses individual circumstances in an equitable manner).

[38] The Chief Review Officer agrees that Bill C-16 as a whole was passed to reflect the important need to strengthen environmental laws so to better "express society's strong disapproval of environmental offences" and to broaden the suite of enforcement tools because "ineffectual enforcement of environment and wildlife conservation and protection laws make them ineffective". Most of the Hansard to which ECCC refers is relatively general and does not speak to the specific question raised here. However, the following passage does speak directly to the issue in the case at hand (House of Commons Debates, 40-2, No 31 (March 23, 2009) at 1745 (Mr. Mark Warawa)):

Persons issued an administrative monetary penalty may have them reviewed by an administrative tribunal to ensure fairness that may determine whether the person committed the violation and, if the tribunal determines the penalty for the violation is not determined in accordance with regulations, it may correct the amount of the penalty.

[emphasis added]

[39] However, this passage does little more than paraphrase the wording of s. 20(3) of EVAMPA.

[40] In this case, the Chief Review Officer finds that the question raised by the parties is answered clearly in the wording of EVAMPA and the AMP Regulations. While the purpose section of EVAMPA and the Hansard material submitted by ECCC provide useful context for the overall objectives behind EVAMPA and its implementing bill, the plain wording of EVAMPA is unambiguous.

[41] From a statutory interpretation point of view, the Chief Review Officer finds that the key passages are from s. 7 and s. 20(3) of EVAMPA, which state that the AMP amount is to be "determined in accordance with the regulations". The reference in section 20(3) to correcting the amount also leads to the conclusion that the calculation of the penalty is to be done as per the process set out in the AMP Regulations rather than according to broader discretionary factors.

[42] Having concluded that EVAMPA clearly provides that penalties are to be determined in accordance with the AMP Regulations, the analysis must now turn to the question as to what specific scope of jurisdiction is provided for in those regulations.

[43] The Chief Review Officer finds that s. 4 is also very clearly worded in stating that the penalty amount “is to be determined” by the specific formula set out in the AMP Regulations. Again, there is no indication of an intent to consider broader discretionary factors in calculating an AMP amount. This is reinforced by the wording of s. 5, 6, 7 and 8 of the AMP Regulations, where the method of arriving at the correct amount of each components of the overall AMP calculation in s. 4 is set out. In every case, the operative section uses clear language that the amount of each component is to be found in the applicable part of Schedule 4 to the AMP Regulations. That schedule does not provide for reductions of the amounts stipulated and does not provide for ranges for each component of the calculation. Rather, it sets out specific amounts to be included in the calculation.

[44] As regards the question as to whether a Review Officer can completely forgive an AMP amount, s. 5 of the AMP Regulations, when read in conjunction with s. 4 and Schedule 4 make it clear that there is no jurisdiction for a Review Officer to impose a penalty lower than the “baseline penalty amount”. There are six such amounts set out in Schedule 4, depending on the violation type and the nature of the violator (individual or other). If a violation is proven by ECCC, then the AMP amount will not be lower than the applicable baseline amount. Therefore, there is no jurisdiction to “forgive” the amount of a penalty if a violation is established by ECCC. The applicable baseline amount is the legal floor.

[45] Returning to the rest of the question to be answered in this preliminary step in this proceeding, the Chief Review Officer must now determine whether there is authority to “decrease” the amount of the penalty if a violation is established by ECCC. For the same reasons set out above, the Chief Review Officer concludes that there is no broad jurisdiction for Review Officers to decrease an AMP amount for general reasons of fairness or equity. That sort of discretion is simply not provided for in EVAMPA and the AMP Regulations. Review Officers, as creatures of the statutory regime that established them, must respect their legislative authority and legal limits (see: *Dunsmuir* at paras. 28-29). Moreover, Review Officers can carry out the full extent of their statutory role without finding that an equitable power to reduce AMP amounts is “necessarily implied”. There is a difference between implied powers that are required to carry out a legislated role and powers that would be completely additional powers. An ability to reduce penalties on equitable grounds could have been included in EVAMPA by Parliament. Similarly, Parliament could have drafted the Review Officer provisions of EVAMPA in broader terms like CEPA. However, once Parliament makes choices as to the scope of jurisdiction, it is up to statutory decision makers to carry out the assigned role. It is not up to such statutory decision makers to read in completely new powers that are not necessary for them to fully carry out their assigned roles.

[46] It is clear from s. 15 of EVAMPA that an applicant can “make a request to the Chief Review Officer for a review of the penalty or the facts of the alleged violation, or both”. With regard to the “facts of the alleged violation”, the role of the Review Officer will be determine if ECCC has met its burden under s. 20(2) while keeping in mind that certain defences are not available (s. 11). This will often involve many of the same types of inquiries that arise in prosecutions, such as whether the elements of the violation have been proven, whether the person named in the AMP is the person who committed the violation, whether a limitation period has been complied with, etc. It may also involve a question as to whether the alleged violation relates to a provision specifically listed in the AMP Regulations.

[47] With regard to the “review of the penalty”, s. 20(3) sets out that the Review Officer “shall correct the amount of the penalty” if it “was not determined in accordance with the regulations”. This means that EVAMPA does not go so far as requiring Review Officers to accept the enforcement officer’s calculation of the penalty set out in the AMP notice of violation. The Chief Review Officer finds that Review Officers not only have the power to correct AMP penalties but have the obligation to do so if they find that a penalty was not determined correctly in accordance with the AMP Regulations.

[48] A reading of sections 4 to 8 of the AMP Regulations reveals that there are several reasons why a penalty may need to be decreased by a Review Officer (e.g., wrong classification of violator in column 1 of Schedule 4 of the AMP Regulations, wrong violation type in in column 2, wrong addition of an amount from columns 4 to 7, wrong classification of economic gain amount as between columns 6 and 7, etc.). All of these reasons fall within the rubric of a finding that a penalty “was not determined in accordance with the regulations”. The required correction may arise, for example, from a mistake in the calculation required by s. 4 of the AMP Regulations or from a factual finding made by a Review Officer (e.g., there was no history of non-compliance even though the AMP calculation by the enforcement officer had included an amount for such, there was no environmental harm even though the AMP had included an amount for such, etc.). Direction on whether amounts should be added by enforcement officers to the baseline amount set out in Schedule 4 will come from the wording of sections 6 to 8 of the AMP Regulations and the facts of a given case. Review Officers have the power to ensure that those sections were applied properly.

[49] Review Officers can only decrease a penalty amount if the original penalty calculated by an enforcement officer was not determined in accordance with regulations. Importantly, once a finding has been made that there was an error in the enforcement officer’s calculation of a penalty amount, this does not give Review Officers full discretion to impose any penalty they see fit. Rather, the task is for Review Officers to “correct the amount of the penalty” by applying sections 4 to 8 and Schedule 4 of the AMP Regulations. This reinforces the approach of EVAMPA and the AMP Regulations that, once the facts of a violation are known (including the elements of the violation itself, the type of violator, the type of violation and the presence or absence of any of: history of non-compliance,

environmental harm, and economic gain (two types)), the calculation of the AMP does not involve any discretion on the part of Review Officers. They are to make their findings and then calculate the correct AMP amount in accordance with the AMP Regulations.

[50] To conclude, the Chief Review Officer was asked to answer this question:

Under EVAMPA, if a violation that is the subject of administrative monetary penalty were established by Environment and Climate Change Canada, does the review officer have the authority to forgive the penalty and/or decrease the amount of the penalty?

[51] The answer is:

If a violation is established, a Review Officer does not have the authority to forgive the penalty, as the baseline penalty amount will always apply at a minimum as per sections 4 and 5 of the AMP Regulations. A Review Officer does have the authority to decrease the amount of the penalty, but only if the amount requires correction in order to accord with the AMP Regulations. There is no authority under EVAMPA or any implied authority to either forgive or decrease the amount of an AMP on the basis of equity or fairness.

[52] While the Applicant did make some brief submissions about some of the circumstances of this particular case, including the timing of the issuance of the AMP, the ongoing seizure of the shipment and the timing of securing the necessary permit, the Chief Review Officer reiterates that this order relates only to the preliminary legal question raised by the parties. No conclusions regarding the facts are being made here and it is, therefore, unnecessary to consider the Applicant's brief submissions on those facts at this stage in the proceeding. Similarly, in answering the specific legal question posed by the parties, the Chief Review Officer is not reviewing the discretionary decision by ECCC to issue the AMP in the first place.

[53] Finally, the Chief Review Officer is in agreement with ECCC that *Charter* issues can be addressed by Review Officers as per *Conway*. However, given that the Applicant has not raised any *Charter* grounds, it is not necessary to address ECCC's *Charter* arguments in this case. The above analysis is restricted to the statutory interpretation issues raised in this case and any potential *Charter* issues that could arise are left to a future case where such issues are pled by an applicant.

## **Order**

[54] Having answered the preliminary question raised by the parties, the Chief Review Officer directs the Applicant to notify the Chief Review Officer within two weeks of the issuance of this order whether he wishes to proceed further with this request for review or whether he wishes to withdraw the request to review. If the Applicant elects to continue with this request for review, the Chief Review Officer will contact the parties with further procedural directions. If the Applicant elects to withdraw this request for review, the Chief Review Officer will close its file.

*Procedural Directions Given*

*“Jerry V. DeMarco”*

JERRY V. DEMARCO

CHIEF REVIEW OFFICER