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Why the Dramatic Rise in Marine Administrative Monetary Penalties in 2009 is Just the Beginning

The number of mariners being penalized under the new Administrative Monetary Penalty System (“AMP System”) increased significantly in 2009. Since coming into force in April of 2008, Transport Canada has become increasingly more comfortable using the AMP System to encourage compliance with shipping laws. In the ten months the system was in force in 2008, Transport Canada issued penalties in 20 cases across the four regions (Pacific, Ontario, Quebec and Atlantic). In 2009, this number rose to 109 cases. Mariners can expect the rapid rise of penalties to continue as the law is now being expanded to dramatically increase the number of violations you can be penalized for.

The AMP System in Brief:

If you are not already familiar with the AMP system, you should be. The AMP System, which has been in effect in the aeronautics and rail industries for several years, was implemented in the marine industry in 2008 as a way of streamlining prosecutions of shipping violations by avoiding lengthy delays in the court system. Minor offenders may be issued verbal warnings, or be asked to sign *Assurances of Compliance* (written promise to correct a problem), but repeat offenders and more serious violations are issued *Notices of Violation* by transport inspectors, which, unless disputed at the Transportation Appeal Tribunal within 30 days, deem the mariner to be guilty of the violation and subject to penalties ranging from \$250 to \$25,000.

One marine event (ex. a collision, a pollution occurrence, or just a routine inspection) may give rise to multiple penalties if several violations are discovered. For example, a vessel inspected for causing a small oil slick may be simultaneously penalized for having inadequate certificated crew, incomplete engine logs, and uninspected machinery. Offenders are registered in a Marine Enforcement Management System (“MEMS”) for 5 years, which Transport Canada can use to track the compliance histories of individual mariners, vessel owners, or vessels. The CSA 2001 contemplates this registry will be available to the public, which should concern some. Readers can refer to www.marinelaw.ca for more a detailed description of the AMP System.

Transport Canada Tests the Might of the AMP System in 2009

Of the 109 cases brought by Transport Canada in 2009 under the AMP System, 47 were in the Atlantic region, 26 were in Quebec, 12 were in Ontario, and 24 were in the Pacific region. The most common violation (25 cases across Canada) was failing to ensure the vessel was inspected for the purposes of having appropriate marine safety certificates. The next most common violation (20 cases) was failing to operate a vessel with sufficient or competent crew. Discharging a pollutant, and failing to ensure the vessel and its machinery meet safety requirements were the next most common violations (16 and 13 cases respectively). Less common violations included: failing to ensure safety training is provided (5 cases), carrying an

excess number of passengers (2 cases), cheating on an exam (1 case), providing false information to an inspector (3 cases), failing to make log entries (3 cases), and failing to mark a vessel with an official number (2 cases). These lesser cases provide a good perspective on just how broad the number violations which can be pursued under the AMP system are.

The largest penalty assessed and paid in 2009 for a single violation was \$25,000. The largest penalty assessed for multiple violations was approximately \$45,000, which is currently under appeal. According to Transport Canada, approximately 10-15% of the cases brought have been appealed to the Transportation Appeal Tribunal. An appeal may be brought to challenge the amount of fine assessed for the violation, or to challenge whether the violation occurred at all.

Why the Number of Penalties will Expand Significantly

Currently, the AMP System only applies to violations contained within the *Canada Shipping Act 2001* ("CSA 2001") itself. The AMP System does not currently capture violations under the large and expanding list of shipping regulations administered by Transport Canada. This, however, is about to change. Although the date is uncertain, but likely within the next year, seven of the largest and most important shipping regulations will be captured by the AMP System. These are the: *Collision Regulations, Marine Personnel Regulations, Vessel Certificates Regulations, Cargo, Fumigation and Tackle Regulations, Load Line Regulations, Special-Purpose Vessel Regulations, and Vessel Registration and Tonnage Regulations.*

Of particular interest is the addition of the *Collision Regulations* ("ColRegs"). Here are some interesting examples of violations under the *ColRegs*, which I have paraphrased for space, and the resulting minimum and maximum fines mariners can expect (the writer can be contacted for a complete list):

- Failing to comply with the directions contained in Notices to Shipping (*ColRegs s.7*): \$6,000 – \$25,000;
- Failing to maintain a proper look-out by all available appropriate means (*ColRegs R.5*): \$6,000 – \$25,000;
- Failing to maintain a safe speed (*ColRegs R.6, including Canadian modification*): \$6,000 – \$25,000;
- Sailing or fishing vessel impeding passage of another vessel within a narrow channel (*ColRegs R9(b)(c)*): \$600 - \$12,000;
- Using the inshore traffic zone when the appropriate traffic separation scheme lane can safely be used (and when not returning to or leaving port): (*ColRegs R.10(d)(i)*): \$250 - \$5,000; and
- Fishing vessel impeding traffic in a traffic lane (*ColRegs R.10(i)*): \$250 - \$5,000.

This is a small sample. In all, there are 115 different violations of the *Collision Regulations* that will attract fines ranging from \$250 to \$25,000.

Why You Shouldn't Ignore a Notice of Violation

The more violations a mariner has recorded on the new Marine Enforcement Monitoring System, the more severe the penalty will be for subsequent violations. As well, the *CSA 2001* contemplates the MEMS will be searchable by the public, such as potential employers or customers. Therefore, it is important when a Notice of Violation is issued to consider carefully whether it should be disputed, and to do so quickly. If the Notice of Violation is not disputed within 30 days, the violation is deemed to have been committed.

Importantly, if the mariner disputes the Notice of Violation, and a review is held by the Transportation Appeal Tribunal, the prosecutor need only prove "on the balance of probabilities" (essentially that it is 51% or more likely) that the violation occurred in order for the mariner to be found liable. In this way, while AMPs are like hefty motor vehicle traffic tickets, disputing an AMP is much more difficult than disputing a typical traffic ticket because in traffic court the prosecutor needs to prove "beyond a reasonable doubt" (essentially that it is 95% likely) the violation occurred. In others words, while in motor vehicle offences you can escape penalty by raising a "reasonable doubt" the offence occurred, in the AMP System you must persuade the Tribunal it is more likely than not the violation was not committed.

As well as mariners personally, it is also important for the employer and vessel owner to be aware of the consequences of a Notice of Violation. Section 238(2) of the *CSA 2001* makes employers and vessels owners vicariously liable for the violations of their employees. Employers and vessels owners should communicate to their employees that Notices of Violation should be brought to the employer/vessel owners attention immediately in case an appeal (within the 30 days) is appropriate. In all, it is advisable to obtain prompt legal advice if you, or your employee, receive a Notice of Violation.

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