



Issue Date: December 19, 2019
Citation: *BCE Inc. v. Canada (Environment and Climate Change)*,
2019 EPTC 7
EPTC Case Nos.: 0052-2018, 0053-2018, 0054-2018, 0055-2018, 0056-2018
and 0057-2018
Case Name: *BCE Inc. v. Canada (Environment and Climate Change)*
Applicants: BCE Inc.
Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under section 15 of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 (“EVAMPA”) of Administrative Monetary Penalties issued under section 7 of EVAMPA for violations of paragraphs 11(1), 24(1), 31(1), 32(b) of the *Federal Halocarbon Regulations (2003)*, SOR/2003-289, enacted under the *Canadian Environmental Protection Act (1999)*, SC 1999, c 33.

Appearances:

Parties

BCE Inc.

Minister of Environment and
Climate Change Canada

Counsel

Stéphane Richer
Emma Lambert

Adam Gilani

ORDER DELIVERED BY:

HEATHER GIBBS

Background

[1] This Order disposes of a request by the parties to the Review Officer to answer a preliminary question of law that has arisen in a review proceeding concerning six Administrative Monetary Penalties (“AMPs”). These AMPs were issued by Environment and Climate Change Canada (“ECCC” or “Respondent”) to BCE Inc. (“Applicant”). The Applicant filed a request to review the AMPs with the Chief Review Officer on December 30, 2018.

[2] The AMPs were issued by ECCC Enforcement Officer Kristen Thompson to the Applicant under s. 7 of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 (“EVAMPA”).

[3] In accordance with the procedural direction adopted by the Tribunal at a pre-hearing conference, counsel for BCE Inc. asked to examine ECCC’s deponent, Ms. Thompson, on the contents of her affidavit. That examination occurred on September 27, 2019.

[4] Following the examination, the Minister, represented by the Attorney General of Canada (“AGC”), responded to the undertakings requested during the examination. The AGC responded to six undertakings and refused to respond to two undertakings, for lack of relevance.

[5] At a supplementary pre-hearing conference before the Tribunal held on November 29, 2019, the Applicant filed a motion to obtain answers to the two questions that were refused. The date of the hearing on the merits has yet to be scheduled.

Issues

[6] In this motion, the Tribunal must determine whether it will require the Minister to respond to the two undertakings that were refused. The undertakings that were refused for lack of relevance are the following:

- a. Copy of material received during the training regarding that new regulation [Environmental Violations Monetary Penalty Regulations]
- b. How many times Environment Canada noted a contravention to all sections of the Federal Halocarbon Regulations and what kind of enforcement measure has been issued or undertaken for each and every case

Relevant Tribunal Rules of Procedure

[7] The most relevant of the Tribunal’s Draft Rules of Procedure are the following:

[13.2] All evidence filed with the Review Officer must be served on the other Party at the same time. The Review Officer may require a Party to serve evidence on an Intervenor.

[15.1] A Review Officer, at any time in the review, may require a Party or any other person to provide such information, documents, or other things as the Review Officer determines to be necessary in order to obtain a full and satisfactory understanding of the subject matter of the review.

[15.2] A Review Officer, at the request of either Party or an Intervenor or on his or her own initiative, may issue a summons in the form set by the Tribunal.

Discussion

BCE Inc.'s Submissions

[8] Counsel for BCE Inc. points out that the Tribunal must make a determination on the issue of relevance in light of the current status of the case. BCE Inc. is seeking to advance a theory with respect to the scope of the Tribunal's authority, in particular, the consistency of the enforcement measures taken by ECCC in cases similar to this one. Thus it would be premature, according to BCE Inc., for the Tribunal to make a determination as to the legal relevance of the documentation and information sought, and that this therefore calls for prudence and flexibility on the Tribunal's part in its assessment of the relevance of the information and documentation sought.

[9] BCE Inc. is relying on Rule 222(2) of the *Federal Courts Rules* (SOR/98-106) and the case law of the Federal Court to argue that a "document is relevant if it either directly or indirectly advances a party's case or damages that of its adversary or may fairly lead to a "train of inquiry" that may have either of these two consequences" (*Khadr v. Canada*, 2010 FC 564, para. 9; *Apotex Inc. v. Canada*, 2005 FCA 217, para. 15).

ECCC's Submissions

[10] ECCC is asking that the Tribunal dismiss BCE Inc.'s request, on the basis of the legal relevance and the scope of the Tribunal's authority, the principles that apply to the scope of the cross-examination of a deponent of an affidavit, and the fact that it would be too onerous to produce the information sought.

[11] ECCC argues that the requests for undertaking that were refused involve issues that are beyond the jurisdiction of the Tribunal as set out in section 15 of EVAMPA.

[12] Furthermore, ECCC notes that under section 19 of EVAMPA, Review Officers have the power to obtain any evidence or testimony it determines to be necessary to conducting the review. The burden of proof is established by subsection 20(2) of

EVAMPA. It is for the Minister to establish, on a balance of probabilities, that the Applicant has committed the violation.

[13] With respect to the essential principles in the issue of the scope of the cross-examination of the deponent of an affidavit, ECCC relies on *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] FCJ No. 1847, at paragraphs 4–8, [affirmed by the Federal Court of Appeal] (“*Merck Frosst*”).

[14] ECCC points out that cross-examination of deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding. (*Merck Frosst*, by Hugessen J. at paragraph 7).

[15] ECCC further submits that an affiant is not required to inform themselves or obtain information from others, in contrast to a deponent in an examination for discovery (*Ottawa Athletic Club Inc. v. Athletic Club Group Inc.*, 2014 FC 672 at paragraph 136) (“*Ottawa Athletic Club*”). In addition, the obligation to disclose documents and other material in the possession, power or control of the party to be examined, is limited to those documents and other material in the possession, power or control of the individual affiant, and not the party (*Ottawa Athletic Club* at paragraph 138).

[16] ECCC asserts that this obligation is subject to the Tribunal’s authority to order that the party being examined be relieved of the obligation to produce certain documents if the Tribunal is of the opinion that the documents are irrelevant or that it would be unduly onerous to require the person or party to produce them by reason of their nature or number of documents (*Ottawa Athletic Club* at paragraph 139).

[17] Nonetheless, ECCC argues that the questions in a cross-examination of an affiant must be legally relevant and be able to contribute to the Review Officer’s determination of the issues.

Analysis and Findings

[18] The Tribunal does not require the Respondent to respond to the requests for undertaking that were refused. The Tribunal finds that the principles in *Merck Frosst* and *Ottawa Athletic Club* are applicable here, and that cross-examination is not an examination for discovery. Accordingly, the Tribunal finds that the two requests for undertaking that were refused are beyond the scope of the cross-examination of the affiant, Ms. Thompson.

[19] The following principles are set out at paragraph 4 of *Merck Frosst*:

[4] It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:

- a) the person examined is a witness not a party;
- b) answers given are evidence not admissions;
- c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
- d) production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document; and
- e) the rules of relevance are more limited.

[20] In this proceeding, Ms. Thompson is a witness, and the answers given are evidence, not admissions. According to the procedure provided for by the Tribunal, the parties exchange the evidence on which they are going to rely at the hearing in writing well before the Tribunal hearing, whether it is an oral hearing or in writing. The agreed-upon amended procedural direction in this review reflects this procedure as follows [translation] “Each party will be able to complete the joint partial agreed statement of facts, if applicable, with evidence in the form of an affidavit (including the required supporting documentation).”

[21] The Tribunal agrees that the documents requested that involve Ms. Thompson’s training are not in the possession, power or control of Ms. Thompson. According to *Ottawa Athletic Club* and *Merck Frosst*, therefore, she is under no obligation to search for documents that are not in her possession or control.

[22] Similarly, the Tribunal agrees that the information sought with regard to the record of any violation *Federal Halocarbon Regulations (2003)*, SOR/2003-289 is not in the possession, power or control of Ms. Thompson.

[23] It is clear that all of these questions must be legally relevant and assist the Review Officer in determining the issues under EVAMPA. ECCC argues that the information sought is not relevant because the right to review a monetary penalty under section 15 of EVAMPA only entitles those alleged of committing the violation to request a review of:

- a. the penalty,
- b. the facts of the alleged violation, or
- c. both.

[24] BCE Inc. argues that it is too early at this preliminary stage of the proceeding to determine the relevance of the information sought. Having regard to the Applicant’s theory of the case, the Tribunal will not make any determination as to the legal relevance of the questions in this motion.

[25] Nevertheless, the Tribunal agrees with ECCC's statement that, in any case, it would be very onerous for the Minister to produce a response to this request for undertaking by the nature of the request.

[26] This order in no way prevents the Applicant from advancing these arguments on the Tribunal's jurisdiction at the hearing. In addition, if the Review Officer finds at the hearing that he or she requires more information on the issue of jurisdiction, this order does not prevent the Review Officer from requiring the production of information, documents and other material he or she determines to be necessary in order to obtain a full and satisfactory understanding of the subject matter of the review, as set out in Rule 15.1.

Order

[27] The request for the Tribunal to require ECCC to respond to the requests for undertaking cited above is dismissed.

[28] The amended procedural direction of November 28, 2019, will govern the next steps to follow in the review proceeding.

Request dismissed

Procedural direction issued

"Heather Gibbs"

HEATHER GIBBS
REVIEW OFFICER