Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

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| **Issue Date:** | September 28, 2020 |
| **Citation:** | *Sirois v. Canada (Environment and Climate Change*, 2020 EPTC 6 |
| **EPTC Case No.:** | 0008-2019 |
| **Case Name:** | *Sirois v. Canada (Environment and Climate Change)* |
| **Applicants:** | Pierre-Luc Sirois |
| **Respondent:** | Minister of Environment and Climate Change Canada |

**Subject of proceeding:** Review commenced under section 15 of the *Environmental Violations Administrative Penalties Act*, SC 2009, c 14, s 126 of an Administrative Monetary Penalty issued under section 7 of that Act for a violation of subsection 5(4) of the *Migratory Birds Regulations*, CRC, c 1035, made under the *Migratory Birds Convention Act, 1994*, SC 1994, c 22.

**Heard:** In writing

**Appearances:**

| **Parties** | **Counsel** |
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| Pierre-Luc Sirois | Marie-Philipe Lévesque |
| Minister of Environment and Climate Change Canada | Philippe Proulx |

**DECISION DELIVERED BY:** **PAUL DALY**

## Introduction

[1] On September 18, 2018, Pierre-Luc Sirois (the "Applicant") killed a great blue heron at the Forestville Controlled Harvest Zone in Quebec.

[2] Since the great blue heron is a migratory bird protected by the *Migratory Birds Convention Act, 1994*, SC 1994, c 22, (the "1994 Act") and the *Migratory Birds Regulations*, CRC, c 1035 (the "Regulations") and since it was killed outside open season, a notice of violation was issued against the applicant by the Minister of Environment and Climate Change Canada (the "Minister").

[3] An Administrative Monetary Penalty ("AMP") of $1,000 was imposed on the Applicant. That amount comprises a $400 penalty for violating the Regulations and a $600 penalty for environmental harm caused by the violation, imposed under the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 (the "EVAMP Regulations"), made under the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA").

[4] Claiming that the great blue heron's death was an accident, the Applicant is seeking a review of the notice of violation and of the AMP it contains.

[5] The Tribunal's finding is that the Minister has shown that the violation underlying the notice of violation has been committed. The notice of violation is therefore upheld.

## Background

[6] On September 18, 2018, the Applicant, who was a wildlife protection assistant at the Forestville Controlled Harvest Zone at the time, killed a great blue heron when hunting great blue herons was not authorized under subsection 5(4) of the Regulations, since open season ended on September 1.

[7] In a conversation with Stéphane Lavoie, Wildlife Officer with the Quebec Department of Forests, Wildlife and Parks, Forestville Office, the Applicant spontaneously admitted that he had killed a great blue heron. He then explained to Officer Lavoie that it was an accident.

[8] On March 22, 2019, Officer Lavoie and Yann Bolduc, Enforcement Officer for the Minister, met with the Applicant at the Forestville Wildlife Protection Office. After being informed of his rights and warned that his statement might potentially be used as evidence, the Applicant stated that he had killed a great blue heron in the fall of 2018 thinking that it was a Canada goose. He stated that he shot too fast without taking the time to confirm that the bird was actually a Canada goose. The Applicant showed the spot where he had killed the bird on a map and stated that he had disposed of the carcass at the edge of a field his father owned.

[9] Between March 22, 2019, and April 11, 2019, the Applicant contacted Officer Bolduc. The officer informed him that he intended to give him an AMP because he violated subsection 5(4) of the Regulations by hunting a migratory bird. Officer Bolduc read the back of the notice of violation, containing all the information on the various options available to the violator, to the Applicant.

[10] On April 11, 2019, Officer Bolduc prepared the notice of violation number N9200-1376. The notice of violation was served on the Applicant on April 11, 2019.

## Issues

[11] The issues are: (1) whether the Applicant committed a violation under subsection 5(4) of the Regulations and (2) whether the penalty amount is correct.

## Discussion

*Minister's Argument*

[12] According to the Minister, the Tribunal must answer two questions. First, does the evidence show, on a balance of probabilities, that the Applicant violated subsection 5(4) of the Regulations? Second, was the penalty amount calculated in accordance with the EVAMP Regulations? The Minister submits that the answer to both questions is affirmative.

[13] The Minister alleges that the Tribunal's mandate is clear. When a request for review is before it, the Tribunal cannot determine whether the Minister's officers' exercises of discretion were properly or reasonably carried out. In addition, the Tribunal has neither jurisdiction to set aside an AMP (once the elements of the violation have been demonstrated) nor jurisdiction to change its amount: *Hoang v Canada (Environment and Climate Change Canada)*, 2019 EPTC 2.

[14] The Minister notes that the Applicant had admitted killing a great blue heron. According to the Minister, this fact is conclusive because it is not necessary to show intent or negligence on the part of the Applicant. In this respect, the Minister refers to section 13.01 of the *1994 Act*:

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| (1) Every person commits an offence who<br><br>(a) contravenes any provision of this Act or the regulations, other than a provision the contravention of which is an offence under subsection 13(1);<br><br>(b) negligently contravenes paragraph 5.2(b); or<br><br>(c) contravenes an order or direction made under this Act, other than an order the contravention of which is an offence under subsection 13(1). | (1) Commet une infraction quiconque contrevient :<br><br>a) à toute disposition de la présente loi ou des règlements, à l'exception d'une disposition dont la contravention constitue une infraction aux termes du paragraphe 13(1);<br><br>b) par négligence à l'alinéa 5.2b);<br><br>c) à tout ordre donné en vertu de la présente loi, à l'exception d'un ordre dont la contravention constitue une infraction aux termes du paragraphe 13(1). |

[15] According to the Minister, it follows that a mere violation of subsection 5(4) of the Regulations constitutes an offence. Using the implied exclusion rule of interpretation, the Minister notes that Parliament specifically identified provisions that require that an element of intent be shown, but identified nothing with respect to subsection 5(4) of the Regulations.

[16] The Minister also refers to section 11(1) of EVAMPA:

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| 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<br><br>(a) exercised due diligence to prevent the violation; or<br><br>(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person, ship or vessel. | L'auteur présumé de la violation — dans le cas d'un navire ou d'un bâtiment, son propriétaire, son exploitant, son capitaine ou son mécanicien en chef — ne peut invoquer en défense le fait qu'il a pris les mesures nécessaires pour empêcher la violation ou qu'il croyait raisonnablement et en toute honnêteté à l'existence de faits qui, avérés, l'exonéreraient. |

[17] According to the Minister, it follows that EVAMPA establishes a regime for absolute, not strict, liability and that the violator of a statutory or regulatory provision covered by EVAMPA may be held liable for it once it is simply proven that the prohibited act was committed. The Minister claims that his interpretation of EVAMPA is supported

by the purpose of that statute, namely, to establish, as an alternative to the penal system, a fair and efficient administrative monetary penalty system.

[18] As a result, for the Minister, any claim by the applicant that he acted accidentally, in good faith and without guilty intent cannot justify setting aside an AMP. The Applicant also cannot claim that the penalty was too harsh given the circumstances because the exercise of the officer's discretionary power in choosing the appropriate penalty cannot be subject to a request for review under section 15 of the Act.

[19] With respect to calculating the AMP imposed in this case, the Minister submits that it is correct and in line with the relevant regulatory provisions. According to the Minister, in the case of violations punishable under the Act, the penalty amount must be calculated and an amount, if any, for an aggravating factor must be added in accordance with the EVAMP Regulations. The officer has no discretion to establish the penalty amount or to decide whether to add an additional amount because of an aggravating factor. The officer must rather refer to columns 1 and 2 of Schedule 1 of the EVAMP Regulations: Column 1 provides the list of provisions, the violation of which can result in an AMP, while Column 2 provides a violation type for each provision based on its degree of seriousness. Then, the officer consults Column 3 of Schedule 4 of the EVAMP Regulations to see the baseline penalty amount. The aggravating factor amounts are in columns 4 to 7 of the same schedule, and when relevant amounts are identified, the officer just has to add them up based on the formula in subsection 4(1) of the EVAMP Regulations. The resulting amount is the penalty amount.

[20] The Minister explains that, in this case, the officer correctly identified that a violation of subsection 5(4) of the Regulations is a type B violation, which was committed by an individual, thus attracting a baseline penalty of $400. Moreover, the officer referred to Chapter 4 of the *Policy framework to implement the Environmental Violations Administrative Monetary Penalties Act* to determine whether an additional amount should be added to the baseline amount given that there was an aggravating factor. Based on that document, killing a wildlife species causes environmental harm, which is an aggravating factor within the meaning of the Regulations. Given that the Applicant admitted killing a great blue heron and disposing of its carcass at the edge of a field owned by his father, the officer had to add $600 to the baseline amount to take the aggravating factor of environmental harm into account.

*Applicant's Argument*

[21] The Applicant submits to the Tribunal that he simply did not commit a violation under the Regulations because he was not [translation] "hunting" a migratory bird on September 18, 2018. The Applicant cites subsection 2(1) of the Regulations:

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| ***hunt*** means chase, pursue, worry, follow after or on the trail of, lie in wait for, or attempt in any manner to capture, kill, injure or harass a migratory bird, whether or not the migratory bird is captured, killed or injured. | ***chasser*** signifie pourchasser, poursuivre, harceler, traquer, suivre un oiseau migrateur ou être à son affût, ou tenter de capturer, d'abattre, de blesser ou de harceler un oiseau migrateur, que l'oiseau soit ou non capturé, abattu ou blessé |

[22] According to the Applicant, he was hunting Canada geese. Therefore, he did not chase, pursue, worry, follow after or on the trail of, lie in wait for, or attempt in any manner to capture, kill, injure or harass a migratory bird. On the contrary, he was hunting Canada geese. The Applicant notes that, in subsection 2(1) of the Regulations, Parliament used a set of words that describe a group of actions and behaviours, but insists that he did not take any of the prohibited actions or adopt any of the prohibited behaviours.

[23] More specifically, the Applicant states that, instead of using the usual meaning of the word "hunt," Parliament rather decided to develop a comprehensive definition made up of two parts: "chase, pursue, worry, follow after or on the trail of, lie in wait for" **or** "attempt in any manner to capture, kill, injure or harass a migratory bird". However, in this case, according to the Applicant, the facts show that the Applicant's actions fall under neither the first part of the definition nor under the second part:

> The Applicant did not "chase, pursue, worry, follow after or on the trail of, lie in wait for" a migratory bird. He submits that his activities targeted Canada geese.
>
> The Applicant also did not "attempt in any manner to capture, kill, injure or harass a migratory bird." According to him, he was rather attempting to capture, kill, injure or harass Canada geese.

[24] The Applicant also refers to *R v Chapin*, [1979] 2 SCR 121, calling the Tribunal's attention to Justice Dickson's comment at page 132 that the Regulations need not be interpreted so that an "innocent person should be convicted" and to the same judge's comment at page 134 that "[w]e should not assume that punishment is to be imposed without fault."

[25] The Applicant also cites a Court of Québec decision, *Québec (Procureur général) c. Senneville*, 150-61-003987-026 and 150-61-003986-028, dated June 11, 2004. Relying on the analysis of Justice Dickson in *Chapin*, Judge Paradis acquitted the accused of two offences he was charged with under provincial regulations, finding that the accused acted in error or by accident (para 43) and that he acted with due diligence (paras 47 and 48).

[26] The Applicant does not dispute the calculations of the AMP amount.

*Minister's Reply*

[27] The Minister responds that EVAMPA and the Regulations create an absolute, not strict, liability regime. The case law cited by the Applicant is therefore not relevant for interpreting the statutory and regulatory provisions alleged to have been violated.

[28] According to the Minister, the Applicant's argument has the perverse effect of contravening subsection 11(1) of the Act, which expressly provides that exercising due diligence and reasonably believing in the existence of facts that, if true, would exonerate the Applicant cannot be used as a defence.

[29] According to the Minister, the facts clearly show that the Applicant contravened the Regulations.

## Analysis and Findings

*Legislative framework*

[30] The Regulations were enacted under the 1994 Act, which implements Canada's international obligations as a signatory to the *Migratory Birds Convention*.

[31] Section 12 of the 1994 Act authorizes the Governor in Council to "make any regulations that the Governor in Council considers necessary to carry out the purposes and provisions of this Act and the Convention" ("Le gouverneur en conseil peut prendre les règlements qu'il juge nécessaires à la réalisation de l'objet de la présente loi et de la convention"). The Applicant does not question the validity of the Regulations.

[32] The 1994 Act provides a definition of migratory bird:

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| *migratory* bird means a migratory bird referred to in the Convention, and includes the sperm, eggs, embryos, tissue cultures and parts of the bird | Tout ou partie d'un oiseau migrateur visé à la convention, y compris son sperme et ses œufs, embryons et cultures tissulaires |

[33] Great blue herons are migratory birds under Article 1 of the Convention (reproduced in the Schedule to the 1994 Act).

[34] Two penalties were imposed on the Applicant. The first stems from the Regulations, subsection 5(4) of which provides as follows:

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| Subject to section 23.1, no person shall in any area described in Schedule I hunt a species of migratory bird except during an open season specified in that Schedule for that area and that species. | Sous réserve de l'article 23.1, il est interdit, dans les régions visées à l'annexe I, de chasser toute espèce d'oiseau migrateur, sauf pendant la saison de chasse indiquée pour la région et l'espèce en cause. |

[35] Under section 13.01 of the 1994 Act, contravening the Regulations is an offence. By means of the Act, Parliament also created an AMP system as an alternative to the existing penal system and as a supplement to existing enforcement measures.

[36] Section 5 of EVAMPA thus provides that the Governor in Council may identify statutes and regulations, a violation of which is punishable by an AMP. The 1994 Act as well as the Regulations are part of the AMP system because they are identified in Schedule 1, Part 4 of the EVAMP Regulations.

[37] The second penalty was imposed under the EVAMP Regulations, section 7 of which provides that an additional amount will be added to the AMP "[i]f the violation has resulted in harm to the environment" ("des dommages environnementaux découlent de la violation commise").

[38] The Tribunal's role is circumscribed by the Act. Essentially, it is to verify that the violation as alleged in the notice of violation was indeed committed by the Applicant, and that the penalty, if any, was calculated correctly. Section 7 reads as follows:

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| 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. | La contravention à une disposition, un ordre, une directive, une obligation ou une condition désignés en vertu de l'alinéa 5(1)a) constitue une violation pour laquelle l'auteur — personne, navire ou bâtiment — s'expose à une pénalité dont le montant est déterminé conformément aux règlements. |

[39] The person served with a notice of violation may request a review of it within 30 days (section 15), in which case, the Chief Review Officer conducts the review or causes the review to be conducted by a review officer or by a panel of three review officers. Under section 20, after receiving the relevant information and representations, the Tribunal must determine whether the Applicant committed the alleged violation and whether the penalty amount was calculated correctly. The burden of proof is on the

Minister, who has to discharge it on a balance of probabilities. Section 20 should be reproduced in its entirety:

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| (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.<br><br>(2) The Minister has the burden of establishing, on a balance of probabilities, that the person, ship or vessel committed the violation.<br><br>(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. | (1) Après avoir donné au demandeur et au ministre un préavis écrit ou oral suffisant de la tenue d'une audience et leur avoir accordé la possibilité de présenter oralement leurs observations, le réviseur ou le comité décide de la responsabilité du demandeur.<br><br>(2) Il appartient au ministre d'établir, selon la prépondérance des probabilités, que le demandeur a perpétré la violation.<br><br>Correction du montant de la pénalité<br><br>(3) Le réviseur ou le comité modifie le montant de la pénalité s'il estime qu'il n'a pas été établi conformément aux règlements. |

*Violation*

[40] The Tribunal does not accept the Applicant's argument.

[41] Regarding the case law raised by the Applicant, the Tribunal is of the view that it is not relevant to this case. It is true that in *Chapin*, the Supreme Court interpreted the Regulations and came to the conclusion that this was a strict liability regime where due diligence was admissible as a defence. However, *Chapin* predates the Act. It is clear that, through the Act, Parliament created an absolute, not strict, liability regime. The key provision in that respect is subsection 11(1) of the Act, according to which neither exercising due diligence nor believing in the existence of facts that, if true, would exonerate the Applicant are admissible as a defence. Conversely, the Applicant's intent is completely irrelevant. *Senneville*, which is also based on a strict liability regime, cannot shed any light on this request for review either.

[42] In this case, what is important is the interpretation of the Regulations.

[43] The notice of violation alleges a violation of subsection 5(4) of the Regulations, which provides that it is prohibited to “hunt” migratory birds except during open season.

[44] Let us recall that “hunt” is defined in subsection 2(1) of the Regulations:

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| ***hunt*** means chase, pursue, worry, follow after or on the trail of, lie in wait for, or attempt in any manner to capture, kill, injure or harass a migratory bird, whether or not the migratory bird is captured, killed or injured. | ***chasser*** signifie pourchasser, poursuivre, harceler, traquer, suivre un oiseau migrateur ou être à son affût, ou tenter de capturer, d’abattre, de blesser ou de harceler un oiseau migrateur, que l’oiseau soit ou non capturé, abattu ou blessé. |

[45] In light of the text, context and purpose of the relevant provisions, the Tribunal is of the opinion that the Applicant committed the violation underlying the notice of violation.

[46] Let us begin with the wording of subsection 2(1) of the Regulations. The Applicant is correct in stating that that definition has two parts. However, the Tribunal cannot accept the implication that the Applicant drew from it. The first part of the definition describes the actions or behaviours that a hunter would engage in **before** spotting his quarry, while the second part concerns actions or behaviours the hunter engages in to bring down his quarry, regardless of whether he is successful. Parliament is therefore aiming as broadly as possible. Contrary to the Applicant’s allegations, the second part **extends and broadens** the definition: it does not restrict it.

[47] In addition, the Applicant’s actions and behaviours clearly fall within the definition. The Applicant shot a bird that turned out to a migratory bird. He therefore attempted to kill a migratory bird. Even if the Applicant did not know that his target was a great blue heron, if we look at the facts objectively, he still attempted to kill a migratory bird. Therefore, he “hunted” a migratory bird within the meaning of the Regulations.

[48] A contextual analysis supports this textual conclusion. The Applicant invites the Tribunal to introduce an additional element to subsection 2(1), that is, his knowledge of the species that he shot. This is essentially an attempt to develop a defence of error of fact. However, that defence is expressly excluded by subsection 11(1) of the Act. Reasonably believing that he was shooting a Canada goose is simply not a defence allowed by the Act. Introducing an element of intent into an absolute liability regime provided by the interaction of the EVAMP Regulations and EVAMPA would therefore go against Parliament’s explicit intention.

[49] This textual and contextual analysis of the relevant provisions is also consistent with the purpose of the Regulations. Subsection 5(4) aims to protect migratory birds. An interpretation of the definition of “hunt” that includes an attempt to kill a bird that turns

out to be a migratory bird certainly protects migratory birds. The narrow interpretation provided by the Applicant reduces the protection of migratory birds because a hunter could dispute a notice of violation arguing that he was not hunting a protected species. This is not about condemning the Applicant because his actions and behaviours were not in line with Parliament's intention in the broad sense, but about insuring that the Tribunal interprets the Regulations in accordance with the purpose of the relevant provisions. In that respect, the Tribunal prefers the Minister's interpretation.

*Penalty amount*

[50] Although the Applicant does not dispute the penalty amount imposed, the Tribunal still has the burden of verifying that the amount is correct.

[51] In this case, the relevant provision is subsection 4(1) of the EVAMP Regulations:

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| (1) The amount of the penalty for each Type A, B or C violation is to be determined by the formula<br><br>**W + X + Y + Z**<br><br>where<br><br>**W** is the baseline penalty amount determined under section 5;<br><br>**X** is the history of non-compliance amount, if any, as determined under section 6;<br><br>**Y** is the environmental harm amount, if any, as determined under section 7; and<br><br>**Z** is the economic gain amount, if any, as determined under section 8. | (1) Le montant de la pénalité applicable à une violation de type A, B, ou C est calculé selon la formule suivante :<br><br>**W + X + Y + Z**<br><br>où :<br><br>**W** représente le montant de la pénalité de base prévu à l'article 5;<br><br>**X** le cas échéant, le montant pour antécédents prévu à l'article 6;<br><br>**Y** le cas échéant, le montant pour dommages environnementaux prévu à l'article 7;<br><br>**Z** le cas échéant, le montant pour avantage économique prévu à l'article 8. |

[52] According to the EVAMP Regulations, contravening subsection 5(4) of the Regulations is a Type B violation: Schedule 1, Part 3, Section 1. Section 1 and Column 3 of Schedule 4 of the EVAMP Regulations establish that the baseline penalty amount for a Type B violation is $400 when committed by an individual. Given that the Applicant is an individual who contravened subsection 5(4), the baseline amount of $400 is correct.

[53] The AMP imposed on the Applicant also includes an amount of $600 to take into account an aggravating factor, namely, environmental harm.

[54] It is clear that the violation committed by the Applicant has led to environmental harm. He shot a migratory bird and killed it. In addition, he disposed of the carcass at the edge of a field.

[55] The amount for an aggravating factor is established in Schedule 4 of the EVAMP Regulations. According to section 1, Column 5 of Schedule 4 of the EVAMP Regulations, the amount for environmental harm is $600.

[56] The AMP amount imposed in this case, namely, $1,000 is therefore correct.

*Summary*

[57] The Applicant did kill a great blue heron, which is a migratory bird within the meaning of the Regulations. In spite of his eloquent argument, the Tribunal is of the view that the facts point to a violation of subsection 5(4) of the Regulations and that the AMP amount was calculated correctly.

**Decision**

[58] The request for review is dismissed. Notice of violation N9200-1376 is therefore upheld.

*Review Dismissed*

*"Paul Daly"*

PAUL DALY
REVIEW OFFICER