Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date:	April 23, 2021
Citation:	*BCE Inc. v. Canada (Environment and Climate Change),* 2021 EPTC 2
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)*
Applicant:	BCE Inc.
Respondent:	Minister of the 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	**Counsel**
BCE Inc.	Stéphane Richer Julien Boudreault
Minister of the Environment and Climate Change Canada	Philippe Proulx

ORDER DELIVERED BY: **PAUL DALY**

[1] The Tribunal has before it a motion filed by the Applicant, BCE Inc. (“the Applicant”) under Rule 15.1 of the *Tribunal's Draft Rules of Procedure*, seeking the production of documents in the possession of the Respondent, the Minister of Environment and Climate Change Canada (“the Minister”).

[2] The documents in question are documents held by the Minister. They include documentation used by the Minister to train environmental enforcement officers and a list of certain violations of environmental laws and the penalties for those violations.

[3] The Applicant seeks these documents to support its theory of the case. This theory is, in essence, that the enforcement officer who issued the six notices of violation that are the subject of the current review process should have issued a mere warning instead of administrative monetary penalties. According to the Applicant, the documents in question demonstrate that an enforcement officer in such a situation should issue a warning and not impose administrative monetary penalties.

[4] The statutory and regulatory provisions delineating the Tribunal's role are clear, as is the Tribunal's jurisprudence. The Tribunal has no jurisdiction to rule on the exercise of discretion by enforcement officers. The documents are therefore not relevant to the process of reviewing the six notices of violation given to the Applicant. The Applicant's theory of the case thus fails, and the Tribunal must dismiss the request for production of documents.

Background

[5] In November 2018, an enforcement officer acting on behalf of the Minister issued six notices of violation to the Applicant in respect of alleged violations of the *Federal Halocarbon Regulations, 2003*, SOR/2003-289. Issued under the authority of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 (“EVAMPA”), the notices imposed administrative monetary penalties totalling $6,000.

[6] On December 30, 2018, the Applicant filed a request for review of the six notices of violation with the Tribunal under the provisions of EVAMPA.

[7] In accordance with the case management protocol for the proceeding, which they accepted, the parties agreed to a partial joint statement of facts and filed affidavits.

[8] In September 2019, the Applicant examined the enforcement officer regarding the contents of her affidavit. In the course of the examination, the Applicant made seven requests for undertakings to the officer. The Minister refused to respond to two of these undertakings, which essentially concerned the same documents as the current request.

[9] When the Minister refused to respond to the two undertakings, the Applicant turned to the Tribunal. The Tribunal denied the Applicant's request for responses to the undertakings: *BCE Inc. v Canada (Environment and Climate Change)*, 2019 EPTC 7. The

Tribunal was of the view that the requests for undertaking were “beyond the scope of the cross-examination of the affiant” (at para 18). The Tribunal was also of the view that it would be “very onerous for the Minister to produce a response to this request for undertaking by the nature of the request” (at para 25).

[10] Yet the Tribunal did not close the door completely to the possibility that the documents might prove relevant:

> 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 (at para 26).

[11] For this reason, the Applicant is now filing a Rule 15 request. Specifically, the Applicant seeks the following documents:

> (a) the documentation used to train officers on the *Environmental Violations Administrative Monetary Penalties Regulations* and their application; and
>
> (b) the list of violations of sections 3, 11, 24, 31 and 32 of the *Federal Hydrocarbon Regulations (2003)*, SOR/2003-289 and, for each violation, the nature of the enforcement measure (written warning, administrative monetary penalty or other) issued by the Minister, since June 2, 2017.

[12] The Tribunal delivered its decision on the enforcement officer's examination in December 2019. So why is the Tribunal only ruling now—in April 2021, almost 18 months later—on the request for production of documents?

[13] As it turns out, since December 2019, the Applicant has been attempting to obtain the documents covered by the current motion through an access to information request. That request is still being processed. While waiting for this request to come to fruition, the Applicant has repeatedly requested delays in the process of reviewing the notices of violation, requests which the Minister has granted on five occasions (which is hardly surprising in light of the health crisis that hit Canada and the world in 2020). The Minister objected to the sixth request for an extension. The parties agreed at this point that the Applicant should file the current motion.

[14] Any debate regarding the relevance of the documents covered by the Applicant's request should now be finally resolved in the current review process.

Issues

[15] Should the Minister be required to produce documents relating to (a) the training of environmental enforcement officers and (b) the violations of the *Federal Halocarbon Regulations (2003),* SOR/2003-289, identified by the Minister since June 2, 2017?

Discussion

Applicant's argument

[16] The Applicant maintains that the Tribunal must take a broad and generous approach at this early stage of the review process.

[17] It notes in this regard that Rule 15.1 provides that the Tribunal may require the production of documents "that it considers necessary to enable it to acquire full knowledge of the subject matter of the review proceeding". Drawing on the Federal Court's jurisprudence, citing the Supreme Court of Canada's case law regarding the need to assess the concept of relevance broadly at the "exploratory stage of the proceeding" (*Imperial Oil v Jacques*, 2014 SCC 66, [2014] 3 SCR 287, at para 30), and relying on the observations of learned authors Léo Ducharme and Charles-Maxime Panaccio (*L'Administration de la preuve*, Wilson & Lafleur, Montreal, 2010), the Applicant argues that the Tribunal must interpret Rule 15.1 broadly and generously in order to obtain the "full and satisfactory understanding" necessary to be able to decide the request for review of the notices of violation.

[18] The Applicant explains that its theory of the case is that the appropriate sanction in this case was a warning and not an administrative monetary penalty. The Applicant argues that the documents at issue in the current request demonstrate that the enforcement officer erred in the exercise of her discretion because she misapplied *ECCC's Policy Framework of the Administrative Monetary Penalty System to Implement the EVAMPA* ("*Policy Framework*") and, furthermore, that the enforcement officer's decision to issue notices of violation to the Applicant undermined the consistency of enforcement (the latter being not only an aspect of the *Policy Framework* but also a requirement of administrative law: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 129-130). While the Tribunal's previous jurisprudence is that the Tribunal does not have jurisdiction to review the exercise of discretion by an enforcement officer, the Applicant submits that this jurisprudence is not binding on the Tribunal and may have to be disregarded at the hearing stage in light of all the evidence submitted.

Minister's argument

[19] The Minister argues, in essence, that the statutory and regulatory provisions delineating the Tribunal's role preclude it from considering an enforcement officer's exercise of discretion and that the officer's failure to comply with the *Policy Framework* or inconsistency in enforcement (if, of course, the Applicant is able to demonstrate such non-

compliance or inconsistency) is thus beyond the Tribunal's jurisdiction. The Minister further argues that since the *Policy Framework* is only “soft law”, any non-compliance with the *Policy Framework* would not be illegal in any event.

Analysis and findings

[20] The Tribunal cannot accept the Applicant's argument. First, Rule 15.1 of the *Tribunal's Draft Rules of Procedure* refers to the necessity test and not the relevance test, which makes the case law and doctrine cited by the Applicant inapplicable in this case. Moreover, the statutory and regulatory provisions delineating the Tribunal's jurisdiction outright exclude any question concerning the exercise of discretion by enforcement officers.

Rule 15.1: Necessity rather than relevance

[21] Let us start with Rule 15.1 of the *Tribunal's Draft Rules of Procedure* (which applies, despite its title, to any review process before the Tribunal, including the current process):

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.	Le réviseur peut, tout au long de l'instance en révision, exiger qu'une partie ou toute autre personne fournisse des renseignements, des documents ou d'autres pièces qu'il juge nécessaires pour pouvoir acquérir pleine connaissance de l'objet de la procédure de révision.

[22] This provision recalls section 19(1) of EVAMPA:

The review officer or panel conducting the review may summon any person to appear as a witness and may order the witness to (a) give evidence orally or in writing; and (b) produce any documents and things that the review officer or panel considers necessary for the purpose of the review.	Le réviseur ou le comité peut citer toute personne à comparaître devant lui et ordonner à celle-ci de déposer oralement ou par écrit, ou de produire toute pièce qu’il juge nécessaire à la révision.

[23] To begin with, the Tribunal notes that, in light of the wording of Rule 15.1, there is no reason to be guided by the Federal Court's jurisprudence, as the Applicant wishes.

[24] The key word in Rule 15.1 is “necessary”, a word not found in the relevant provisions of the *Federal Courts Rules*. The provisions for examination and discovery in the Federal Courts are found in rules 222 to 233 of the *Federal Courts Rules*. Nowhere does the word “necessary” appear. Instead, the key word in the relevant provisions of the *Federal Courts Rules* is “relevant”: s 222(2); *Khadr v Canada*, 2010 FC 564, at para 9. While the *Federal Courts Rules* use the word “relevant”, Rule 15.1 uses the word “necessary”. In matters of document production (and in civil procedure generally), the term “necessary” is more restrictive than the term “relevant”.

[25] Nor is it appropriate to rely on the Supreme Court of Canada's case law on civil procedure.

[26] In this regard, let us look at section 3 of EVAMPA:

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.	La présente loi a pour objet d’établir, comme solution de rechange au régime pénal et comme complément aux autres mesures d’application des lois environnementales en vigueur, un régime juste et efficace de pénalités

[27] Through EVAMPA, Parliament intended to create an “alternative to the existing penal system”, signaling its desire for a flexible and lighter process for the enforcement of environmental laws. As the Tribunal will explain in more detail below, EVAMPA contemplates a streamlined process, with a review body of limited jurisdiction, devoid of the complexities of the criminal process.

[28] To blindly apply the teachings of civil procedure, which regulates *judicial* rather than *administrative* processes, in this case would risk undermining the legislative intent of EVAMPA. While civil procedure is not the same as criminal procedure, it is a judicial process that is difficult to reconcile with Parliament's desire for an alternative, streamlined process.

[29] The Applicant must therefore demonstrate that the production of documents is “necessary” to gain full knowledge of the subject matter of the review process, or in other words, the streamlined process created by EVAMPA. The bar is higher than that set by the *Federal Courts Rules* and the Supreme Court’s jurisprudence.

Relevant statutory and regulatory provisions

[30] It is now necessary to describe the streamlined process created by EVAMPA.

[31] Section 15 of EVAMPA specifies how the Tribunal's jurisdiction is invoked:

A person, ship or vessel that is served with a notice of violation may, within 30 days after the day on which the notice is served, or within any longer period that the Chief Review Officer allows, make a request to the Chief Review Officer for a review of the penalty or the facts of the alleged violation, or both.	L'auteur présumé de la violation peut, dans les trente jours suivant la signification d'un procès-verbal ou dans le délai supérieur que le réviseur-chef peut accorder, saisir le réviseur-chef d'une demande de révision du montant de la pénalité ou des faits quant à la violation présumée, ou des deux.

[32] The Tribunal's role is essentially to verify whether there was a violation as alleged in the Notice of Violation the applicant is seeking to have reviewed (the "facts of the alleged violation") and, if so, whether the administrative monetary penalty was properly calculated (the "[amount] of the penalty").

[33] To being with, the Tribunal verifies whether a violation of environmental laws has occurred.

[34] Any violation of an environmental law designated under EVAMPA may warrant the imposition of an administrative monetary penalty, as provided in section 7 of EVAMPA:

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.

[35] Section 20 of EVAMPA sets out the role of the Tribunal in a review request:

(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,	(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. (2) Il appartient au ministre d'établir, selon la prépondérance des probabilités, que le demandeur a perpétré la violation.

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.	(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.

[36] In light of sections 7 and 20 of EVAMPA, it is incumbent upon the Tribunal to establish the facts to determine, on a balance of probabilities, whether a violation has occurred.

[37] Yet, in establishing the facts, the Tribunal's role is circumscribed, because section 11 of EVAMPA clearly excludes certain defences:

(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.	(1) 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. (2) Les règles et principes de la common law qui font d'une circonstance une justification ou une excuse dans le cadre d'une poursuite pour infraction à une loi environnementale s'appliquent à l'égard d'une violation dans la mesure de leur compatibilité avec la présente loi.

[38] As revealed by several Tribunal decisions, it follows that an applicant's good intentions are simply not relevant to a request for review: *Sirois v Canada (Environment and Climate Change)*, 2020 EPTC 6, at para 41; *F. Legault v Canada (Environment and Climate Change); R. Legault v Canada (Environment and Climate Change)*, 2021 EPTC 1, at para 52. Section 11 significantly circumscribes the role of the Tribunal, excluding

from the outset a broad category of factual issues, thereby streamlining the EVAMPA review process.

[39] The limited scope of the Tribunal's jurisdiction is consistent with Parliament's objective, as set out in section 3 of EVAMPA, to provide an alternative to the penal system. It is understandable that the implementation of a streamlined process dealing only with the existence of facts that do or do not justify the imposition of an administrative monetary penalty balances (i) the public interest in rigorous enforcement of environmental laws and (ii) the individual interest in an impartial and independent process for reviewing the decisions of environmental enforcement officers. To follow the penal process in this regard, however, would risk significant delay and cost.

[40] With respect to the calculation of penalties, the relevant provisions are found in the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 (the “EVAMP Regulations”). Section 4 creates a “formula” in this regard:

(1) The amount of the penalty for each Type A, B or C 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.	(1) Le montant de la pénalité applicable à une violation de type A, B, ou C est calculé selon la formule suivante : **W + X + Y + Z** où : **W** représente le montant de la pénalité de base prévu à l'article 5; **X** le cas échéant, le montant pour antécédents prévu à l'article 6; **Y** le cas échéant, le montant pour dommages environnementaux prévu à l'article 7; **Z** le cas échéant, le montant pour avantage économique prévu à l'article 8.
(2) The amount of the penalty for each Type D or E violation is to be determined by the formula **W + X + Y** 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; and **Y** is the economic gain amount, if any, as determined under section 8.1.	(2) Le montant de la pénalité applicable à une violation de type D ou E est calculé selon la formule suivante : **W + X + Y** où : **W** représente le montant de la pénalité de base prévu à l'article 5; **X** le cas échéant, le montant pour antécédents prévu à l'article 6; **Y** le cas échéant, le montant pour avantage économique prévu à l'article 8.1.

[41] Schedule 1 to the EVAMP Regulations contains a comprehensive list of all statutory and regulatory provisions whose violation warrants the imposition of an

administrative monetary penalty under EVAMPA. Each provision is labelled A, B, C, D or E.

[42] The amounts W, X, Y and Z are specified in schedules 4 and 5. For example, for an individual, the baseline penalty amount (W) for a Type C violation is $1,000 (Schedule 4, Item 1, Column 3), while for another person, vessel or craft, the history of non-compliance amount for a Type B violation is $6,000 (Schedule 5, Item 2, Column 4).

[43] Simply put, in terms of penalty calculation, everything is provided for in the EVAMP Regulations. Since the calculation of the administrative monetary penalty is mechanical, the Tribunal's jurisdiction is, quite simply, to verify whether the amount of the applicable penalties has been calculated in accordance with the formula in section 4 of the EVAMP Regulations. It is only the calculation of the penalties that the Tribunal can review. The Tribunal has no discretion regarding the formula used to calculate penalties.

[44] It follows that the discretion of enforcement officers to impose an administrative monetary penalty or not is beyond the jurisdiction of the Tribunal, a statutory entity that does not have inherent powers. The prior decision to issue the administrative monetary penalty does not involve verifying whether a violation has occurred or whether the penalty accordingly imposed has been properly calculated. The Tribunal is not a competent forum for reviewing this exercise of discretion by enforcement officers.

[45] The fact that the exercise of discretion by enforcement officers is outside the jurisdiction of the Tribunal is consistent with the objective set out in section 3 of EVAMPA of providing an alternative to the criminal justice system. Excluding any question about the formula used to calculate penalties simplifies the Tribunal’s review process.

[46] Rule 15.1 of the *Tribunal's Draft Rules of Procedure* refers to “the purpose of the review process”. In light of the relevant statutory and regulatory provisions, the purpose of the review process is to verify whether a violation occurred as alleged in the notice of violation that is the subject of the request for review and, if so, whether the applicable administrative monetary penalty was properly calculated. As the exercise of discretion to issue a notice of violation or not is not subject to the review process, the documentation of an enforcement officer's exercise of discretion cannot be “necessary to gain full knowledge of the subject matter of the review process” as required by Rule 15.1 of the *Tribunal's Draft Rules of Procedure*.

Tribunal’s jurisprudence

[47] The Tribunal's jurisprudence confirms this reading of the relevant statutory and regulatory provisions.

[48] In *Hoang v Canada (Environment and Climate Change)*, 2019 EPTC 2, the applicant did not dispute that a violation had occurred, but argued that the imposition of an administrative monetary penalty was unfair and that the appropriate penalty in that

case was a warning. After citing the relevant statutory and regulatory provisions, the Chief Review Officer found that the review of an enforcement officer's discretion to issue a notice of violation is not within the Tribunal's jurisdiction:

> Review Officers are not given the authority under EVAMPA to determine whether enforcement officers' exercises of discretion were properly or reasonably carried out. Officers review "the facts of the alleged violation" and the determination of the correct penalty under s. 15 and s. 20 of EVAMPA. Review Officers do not review the exercise of enforcement officers' discretion to issue AMPs in the first place. . . . Accordingly, while the Chief Review Officer understands the Applicant's concerns in this case, EVAMPA does not provide recourse when the ground for a review goes to the exercise of an enforcement officer's discretion as opposed to the facts of the alleged violation. . . . It is not for the Review Officer to consider setting aside the AMP once the elements of the violation have been demonstrated (at paras 21-22).

[49] The decision in *F. Legault v Canada (Environment and Climate Change); R. Legault v Canada (Environment and Climate Change),* 2021 EPTC 1, is to the same effect. In that case, the Applicants argued that they had been entrapped by enforcement officers. Nevertheless, the Tribunal could not intervene in respect of the officers' enforcement discretion:

> . . . the officers' decision to issue a notice of violation is immune from oversight by this Tribunal. As the Tribunal has now observed on a number of occasions, its role is simply to verify whether the violation alleged in the notice was committed and if so, whether the amount of the penalty imposed is correct. Nothing more, and certainly not to review the discretionary power of the Minister's officerse (at para 54).

[50] See also *Fontaine v Canada (Environment and Climate Change),* 2020 EPTC 5, at para 28 ("it is now well established in the Tribunal's jurisprudence that the Tribunal's role is (1) to determine whether the violation alleged by the Notice of Violation has occurred and (2) to determine whether the amount of the administrative monetary penalty, if any, has been calculated in accordance with the [EVAMP Regulations]"); *Sirois v Canada (Environment and Climate Change),* 2020 EPTC 6, at para 38; ("The Tribunal's role is circumscribed by the [EVAMPA]. It is essentially to verify that the violation as alleged in the Notice of Violation was in fact committed by the Applicant and that the penalty, if any, was properly calculated"); *Nyobe v Canada (Environment and Climate Change),* 2020 EPTC 7, at para 21 ("The role of the Tribunal is to verify that the violation as alleged in the Notice of Violation was actually committed by the Applicant and that the penalty, if any, was properly calculated").

[51] Technically, as the Applicant argues, the Tribunal is not bound by its own decisions. Still, it is necessary to foster the development of a harmonized decision-making

culture within the Tribunal and thus follow the Tribunal's previous jurisprudence unless there are good reasons to depart from it (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 131). As the case law is supported by the statutory and regulatory provisions regarding the Tribunal's jurisdiction, there is no reason to depart from it in this case, which is as true at this preliminary stage as it would be at the main hearing stage.

Summary

[52] The statutory and regulatory provisions governing the Tribunal's jurisdiction are clear, and the Tribunal's jurisprudence is equally clear: the Tribunal has no authority to review the exercise of discretion by enforcement officers.

[53] It follows that the theory of cause advanced by the Applicant, on which the current request is based, is doomed to failure. The Tribunal is not the forum to rule on either inconsistency in the enforcement of halocarbon regulations by the enforcement officer or misinterpretation of the Minister's *Policy Framework* by the enforcement officer. If the theory falls, so does the current motion.

[54] The Tribunal concludes that the documents sought by the Applicant are not necessary for the Tribunal to acquire full knowledge of the subject matter of the request for review as required by Rule 15.1 of the *Tribunal's Draft Rules of Procedure*.

Decision

[55] The Tribunal therefore dismisses the Applicant’s motion.

Motion Dismissed

Procedural Direction Given

“Paul Daly”

PAUL DALY
REVIEW OFFICER