



Issue Date: October 8, 2021

Citation: *Boudreau v. Canada (Environment and Climate Change)*,
2021 EPTC 10

EPTC Case Nos.: 0002-2021, 0003-2021, 0004-2021, 0005-2021, 0006-2021
and 0007-2021

Case Names: *J-F. Boudreau v. Canada (Environment and Climate Change)*
(0002-2021, 0003-2021, 0004-2021)
P. Boudreau v. Canada (Environment and Climate Change)
(0005-2021, 0006-2021, 0007-2021)

Applicants: Jean-François Boudreau and Patrick Boudreau

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, of Administrative Monetary Penalties issued under section 7 of that Act for violation of paragraphs 15(1)(e) and 15(1)(d) of the *Migratory Birds Regulations*, CRC, c 1035; and violation of paragraph 5(a) of the *Migratory Birds Convention Act*, 1994, SC 1994, c 22.

Heard: September 9, 2021 (by teleconference)

Appearances:

Parties

Jean-François Boudreau
Patrick Boudreau

Minister of Environment and Climate
Change Canada

Counsel/Representative

Self-Represented

Maude Normand

DECISION DELIVERED BY:

HEATHER GIBBS

Introduction

[1] Brothers Jean-François Boudreau and Patrick Boudreau (the Applicants) decided to go duck hunting on October 11, 2019 near Île de la Fausse Passe in the St. Lawrence River. They had valid hunting permits with a quota of 12 ducks. After successfully obtaining their quota, the Applicants were met by Fisheries Officers Félix Hamel and Louis-Philippe Supper, who informed them they had been hunting contrary to regulations. The Applicants were later issued Notices of Violation by Marjolaine Lagacé, Wildlife Officer with the Ministry of the Environment and Climate Change Canada (the ECCC) relating to the Migratory Birds Regulations, CRC c.1035 (MBR), under the *Migratory Birds Convention Act, 1994* (MBCA).

[2] Three identical notices of violation (“NOV”) were issued to each of Jean-François and Patrick Boudreau:

- For hunting migratory birds from a power boat, prohibited under paragraph 15(1)(e) of the MBR;
- for hunting a migratory bird with a shotgun capable of holding more than three shells, prohibited under paragraph 15(d) of the MBR; and
- for the illegal possession of migratory birds, prohibited under paragraph 5(a) of the MBCA.

[3] The Applicants are challenging all of the notices of violation. They claim that the boat was only in movement when they retrieved injured ducks, as permitted under regulation; that their shotguns were appropriately fitted with plugs to prevent more than three shells; and that the ducks they possessed were obtained legally. The Applicants are therefore invoking the Tribunal’s jurisdiction under the *Environmental Violations Administrative Penalties Act*, SC 2009, c 14, s 126 (“EVAMPA”).

[4] The Tribunal’s role is to determine on the balance of probabilities whether a violation occurred as alleged in the notice of violation (section 20 of EVAMPA) and, if so, whether the applicable penalty amount was calculated in accordance with the *Environmental Violations Administrative Penalties Regulations*, SOR/2017-109 (“the EVAMP Regulations”). In this case, the Applicants are not challenging the calculation of the penalties.

[5] The Tribunal is of the opinion that the Minister has made out its case with respect to hunting from a motorboat and illegal possession of migratory birds. The Minister has not made out its case on a balance of probabilities with respect to the maximum number of shells in the shotgun, and the two notices of violation in that regard (NOV #9200-1335 for Patrick Boudreau, and NOV #9200-1332 for Jean-Francois Boudreau) are revoked. The request for review is therefore granted in part.

Background

[6] On October 11, 2019, at approximately 2:00 p.m., officers Félix Hamel and Louis-Philippe Supper of Fisheries and Oceans were patrolling the waters on the east side of the Île de la Fausse Passe, in the Archipelago of Mingan, in the St. Lawrence River in the Province of Quebec, in the course of their work.

[7] During their patrol, the two officers observed a motorboat in motion with three figures on board, two of them apparently hunters. Officer Hamel set up a camera on a tripod on the zodiac patrol boat to observe the hunters, and Officer Supper observed them with binoculars.

[8] The two officers continued their observation for some minutes, taking still photographs and video recordings. At approximately 2:15 p.m. the officers observed one hunter stand up in the motorboat, with his shotgun to his shoulder, and heard a gunshot while the boat was in movement. Officer Hamel then observed a duck come out of the water close to the hunters' boat. The hunter then shot again at the duck while the motor was still running.

[9] Officers Supper and Hamel then intercepted the motorboat. The Officers introduced themselves to the individuals in their capacity as fishery officers. Officer Supper's sworn evidence is that the individuals in the motorboat were Jean-Francois Boudreau and Patrick Boudreau, who identified themselves with their valid hunting licenses.

[10] Based on the notes of officers Supper and Hamel, on December 10, 2020, Officer Lagacé issued three notices of violation to each Applicant, as follows:

(i) Notices of violation number 9200-1331 and 9200-1334 for the baseline amount of \$400 because, according to the observations of officers Hamel and Supper, the Applicants hunted ducks from a moving power boat and were therefore in violation of paragraph 15(1)(e) of the MBR;

(ii) Notices of violation number 9200-1332 and 9200-1335 for the baseline amount of \$400 and the additional amount of \$600 for aggravating factor of environmental harm because, according to the observations of officers Hamel and Supper, the Applicants hunted migratory birds using a shotgun that could hold more than 3 cartridges and were therefore in violation of paragraph 15(1)(d) of the MBR; and

(iii) Notices of violation number 9200-1333 and 9200-1336 for the baseline amount of \$400 because, according to the observations of officers Hamel and Supper, the Applicants were found in possession of a migratory bird and were therefore in violation of paragraph 5(a) of the MBCA.

[11] The Applicants gave their version of the facts orally at the hearing, in addition to their written statements filed as evidence.

[12] The Applicants do not dispute they fired a shotgun from a moving boat. However they argue that this was done in accordance with paragraph 16(2) of the MBR, which permits the use of power boat to retrieve a migratory bird, and 16(1.1)(b), which requires a hunter who retrieves the bird while it is still alive, to “immediately kill and include it in his daily bag limit”. The Applicants dispute the allegation that their shotguns permitted more than three cartridges.

Relevant Legislation

Relevant portions of the MBCA, MBR and EVAMPA are listed below at Appendix A.

Analysis and Findings

General analytical framework

[13] In a request for review under EVAMPA, the burden is on the Minister to establish on the balance of probabilities that a violation was committed as alleged in the notice of violation that is the subject of the request for review (subsection 20(2) of EVAMPA). It is the Tribunal’s responsibility to ensure that the amount of the applicable penalty, if any, has been properly calculated (subsection 20(3) of EVAMPA).

[14] EVAMPA provides for a regime of absolute liability by excluding defences based on due diligence or good faith: section 11 of EVAMPA; *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.

[15] A violation of the MBCA is subject to the procedure set out in EVAMPA, section 5, which provides that certain violations of Canadian environmental laws specified by regulation warrant the imposition of administrative monetary penalties calculated in accordance with the formulas set out in the *Environmental Violations Administrative Penalties Regulations*, SOR/2017-109 (“the EVAMP Regulations”). Notably, Schedule 1, Part 4, Division 1 of the EVAMP Regulations identifies a violation of the MBCA as “a violation that may be proceeded with in accordance with this Act” (paragraph 5(1)(a) of EVAMPA).

[16] Section 5 of the MBCA lays out the fundamental prohibition on possessing a migratory bird, unless one of the regulations applies as an exception:

<p>Except as authorized by the regulations, no person shall, without lawful excuse,</p> <p>(a) be in possession of a migratory bird or nest; or</p> <p>(b) buy, sell, exchange or give a migratory bird or nest or make it the subject of a commercial transaction.</p>	<p>Sauf conformément aux règlements, nul ne peut, sans excuse valable :</p> <p>a) avoir en sa possession un oiseau migrateur ou son nid;</p> <p>b) acheter, vendre, échanger ou donner un oiseau migrateur ou son nid, ou en faire le commerce</p>
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[17] The Applicants do not deny that they were in possession of migratory birds. The question is whether the Applicants were in possession of these birds “as authorized by the regulations.”

[18] The Minister maintains that possession was not lawful because it was the result of a violation of paragraphs 15(1)(d) and (e) of the MBR.

(i) Hunting from a moving vessel

[19] Paragraph 15(1)(e) of the MBR prohibits the hunting of migratory birds “from any aircraft, sailboat, power boat, or motorized vehicle, or any vehicle to which a draught animal is attached.”

[20] Paragraph 2(3) of the Regulation describes what is meant by a power boat :

(3) A reference in these Regulations to the use of a power boat does not include the use of a power boat when the motor is not in operation and forward progress has ceased.

[21] Reading the two sections together, therefore, one concludes that it is a violation of the regulations to hunt from a power boat when the motor is in operation and it is progressing forward.

[22] The Minister entered as evidence the sworn statement of Officer Supper, as well as videos and still photos that clearly depict the Applicants shooting at ducks from a moving power boat.

[23] The Applicants note that Regulation 16(1.1) permits using a motor boat to retrieve a duck. It also requires a hunter to immediately kill an injured duck. They state they are responsible hunters and were following the regulations to not leave an injured duck in the water, but collect it as required. This, they state, is what was occurring on the video in evidence.

[24] However, Officer Supper's evidence demonstrates that it is likely that at least one migratory bird was killed by the gunshots seen on the video. He related at paras. 5-7 of his sworn statement that he first observed the hunters in the boat collect what appeared to be a hunted duck from the water. He then observed the boat to move in various directions at various speeds for several minutes, and no gunshots were heard. Officer Supper then observed at approximately 2:15 pm that the power boat was travelling in a westerly and then north-west direction. After almost two minutes at high speed, the man at the front of the boat stood up and shouldered his shotgun as the boat was advancing with the motor engaged. A duck came up out of the water close to the boat, which then slowed down. The man at the front of the boat shot at the duck in the water as the boat was still advancing.

Findings on Allegation 1

[25] The Tribunal is satisfied that the Minister has established the identities of Patrick and Jean-Francois Boudreau as the hunters in the video. Officers Hamel and Supper did not lose sight of the motor boat they were observing from the time the video was taken until they intercepted the boat and the Applicants identified themselves.

[26] In the video, it is clear that one person fired a shotgun from a moving boat and the other was handling the motor. The question to be determined is whether the Applicants were shooting at a duck that had been injured earlier, or whether the video depicts the Applicants hunting an uninjured duck from the moving vessel.

[27] The Tribunal finds that it is more likely than not that the Applicants were hunting for ducks from a moving boat, in violation of the regulation. It is true that at one point early in the videos the Applicants are seen collecting a duck from the water. Following that, however, for the next several minutes the Applicants are seen to be changing direction, speeding up and slowing down, and shooting more than once. This observed behaviour is consistent with hunting another duck.

[28] The Minister has made out the first alleged violation on a balance of probabilities and the Tribunal upholds notices of violation 9200-1331 and 9200-1334.

(ii) Shotgun permitting more than three shells

[29] Notices of violation 9200-1332 and 9200-1335 allege a violation of s.15(1)(d) of the Regulation:

15 (1) Subject to subsections (4) and (5) and section 23.1, no person shall hunt a migratory bird ...

(d) with a shotgun of any description capable of holding more than three shells unless the capacity of the gun has been reduced to three shells in the magazine

and chamber combined, by means of the cutting off or the altering or plugging of the magazine with a one-piece metal, plastic or wood filler that cannot be removed unless the gun is disassembled;

[30] Officer Supper wrote in his sworn statement that he and Officer Hamel inspected the Applicants' shotguns when they intercepted the boat, and that neither was equipped with a plug to reduce the magazine capacity to a maximum of three shells.

[31] The Applicants, on the other hand, testified that the shotguns were equipped with a plug at the time they were shooting ducks, and that they removed the plugs once they finished shooting while still in the boat.

[32] The Applicants explained to the officers, and testified before the Tribunal, that the plugs were in their backpack in the boat. The photos in evidence depict one of the Applicants holding up a plug to show the officers. The Applicants testified that it takes only a matter of seconds to remove the plugs, and that they preferred to take the plugs out of the shotguns when not in use to avoid damage.

[33] The Tribunal accepts the testimony of the Applicants in this regard. The Applicants testified first-hand about their own actions at the time the shotguns were fired, while the allegations of Officer Supper rely on assumptions based on the state of the shotguns when they were intercepted later on. The Applicants' credibility is bolstered by the fact that they had the required plugs with them in the boat. The Applicants have shown themselves to be responsible hunters in that they had valid hunting permits and took only the number of ducks allowed under their quota. The Tribunal therefore prefers the evidence of the Applicants on this point, with respect whether the plugs were in the gun magazine at the time the ducks were killed.

[34] The Tribunal therefore finds that the Minister has not satisfied the burden of proof on a balance of probabilities that the Applicants violated s. 15(1)(d) of the MBR, and dismisses notices of violation 9200-1332 and 9200-1335.

(iii) Possession of illegal migratory birds

[35] The Applicants admit that they were in possession of migratory birds. It is not contested that the Applicants had a valid hunting permit and were within their quotas. However, as described above, para. 5(a) of the MBCA prohibits possession of a migratory bird unless the person has complied with the regulations. Therefore, if the Applicants are found to have contravened the regulations, their possession of migratory birds will be illegal. This analysis has been consistently applied by the Tribunal in the past (see for example *Cormier v. Canada (Environment and Climate Change)*, 2021 EPTC 6, dated June 29, 2021).

[36] Given the Tribunal's finding that the Applicants violated para. 15(1)(e) of the MBR by hunting from a moving vessel, it follows that at least one duck obtained was illegally in their possession.

[37] The Tribunal therefor upholds notices of violation 9200-1333 and 9200-1336, relating to illegal possession of a migratory bird.

Conclusion

[38] The Minister has shown on a balance of probabilities that the Applicants committed a violation of section 5 of the MBCA and para. 15(1)(e) of the MBR. There is no reason to modify the penalty relating to those violations. However, the Minister has not shown on the balance of probabilities that the Applicants committed a violation of para. 15(1)(d) of the MBR, and the notices of violation based on that ground should be revoked.

Decision

[39] The review is granted in part. Notices of violation 9200-1331, 9200-1333, 9200-1334 and 9200-1336 are upheld. Notices of violation 9200-1332 and 9200-1335 are revoked.

Review granted in part

Four Notices of Violation upheld

Two Notices of Violation revoked

"Heather Gibbs"

HEATHER GIBBS
CHIEF REVIEW OFFICER

Appendix A: Relevant Legislation

Migratory Birds Convention Act, 1994 (1994, c.22)

<p>Prohibition</p> <p>5 Except as authorized by the regulations, no person shall, without lawful excuse,</p> <p>(a) be in possession of a migratory bird or nest; or</p> <p>(b) buy, sell, exchange or give a migratory bird or nest or make it the subject of a commercial transaction.</p>	<p>Interdiction relative aux oiseaux migrateurs et à leurs nids</p> <p>5 Sauf conformément aux règlements, nul ne peut, sans excuse valable :</p> <p>a) avoir en sa possession un oiseau migrateur ou son nid;</p> <p>b) acheter, vendre, échanger ou donner un oiseau migrateur ou son nid, ou en faire le commerce.</p>
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<p>MIGRATORY BIRDS CONVENTION ACT, 1994</p> <p>Regulations Respecting the Protection of Migratory Birds</p> <p>Interpretation</p> <p>2 (1) In these Regulations,</p> <p>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)</p> <p>power boat means any boat, canoe or yacht equipped with an electric, gasoline, oil or steam motor as a means of propulsion; (bateau à moteur)</p> <p>(3) A reference in these Regulations to the use of a power boat does not include the use of a power boat when the motor</p>	<p>LOI DE 1994 SUR LA CONVENTION CONCERNANT LES OISEAUX MIGRATEURS</p> <p>Règlement concernant la protection des oiseaux migrateur</p> <p>Interprétation</p> <p>2 (1) Dans le présent règlement,</p> <p>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; (hunt)</p> <p>bateau à moteur désigne tout bateau, canot ou yacht muni d'un moteur électrique, à essence, à huile ou à vapeur; (power boat)</p> <p>(3) Dans le présent règlement, une mention de l'usage d'un bateau à moteur ne comprend pas l'usage d'un bateau à</p>
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is not in operation and forward progress has ceased.	moteur dont le moteur est à l'arrêt et qui a cessé d'avancer.
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<p>Hunting Methods and Equipment</p> <p>15 (1) Subject to subsections (4) and (5) and section 23.1, no person shall hunt a migratory bird</p> <p>(a) except with a long bow and arrow or with a shotgun not larger than number 10 gauge;</p> <p>(b) by the use or aid of live birds, including non-migratory birds;</p> <p>(c) by the use or aid of recorded bird calls, except as permitted in any part of Schedule I;</p> <p>(d) with a shotgun of any description capable of holding more than three shells unless the capacity of the gun has been reduced to three shells in the magazine and chamber combined, by means of the cutting off or the altering or plugging of the magazine with a one-piece metal, plastic or wood filler that cannot be removed unless the gun is disassembled; or</p> <p>(e) from any aircraft, sailboat, power boat, or motorized vehicle, or any vehicle to which a draught animal is attached.</p> <p>Retrieving Birds</p> <p>16 (1) No person shall hunt a migratory bird unless he has adequate means for retrieving any such bird that he may kill, cripple or injure.</p> <p>(1.1) A person who kills, cripples or injures a migratory bird shall</p>	<p>Méthodes et matériel de chasse</p> <p>15 (1) Sous réserve des paragraphes (4) et (5) et de l'article 23.1, il est interdit de chasser les oiseaux migrateurs :</p> <p>a) sauf à l'aide d'un grand arc de chasse ou d'un fusil de chasse de calibre 10 au maximum;</p> <p>b) au moyen ou à l'aide d'oiseaux vivants, y compris des oiseaux non migrateurs;</p> <p>c) au moyen ou à l'aide d'enregistrements d'appels d'oiseaux, sauf en conformité avec la partie applicable de l'annexe I;</p> <p>d) au moyen d'un fusil de chasse de tout genre pouvant contenir à l'origine plus de trois cartouches, dont le magasin n'a pas été tronçonné, modifié ni obturé à l'aide d'un bouchon de métal, de plastique ou de bois d'une seule pièce qui ne puisse s'enlever que si ledit fusil est démonté, de sorte que le magasin et la chambre dudit fusil ne puissent ensemble contenir plus de trois cartouches à la fois; ou</p> <p>e) au moyen d'un aéronef, d'un bateau à voiles ou à moteur, d'un véhicule automobile ou d'un véhicule tiré par une bête de trait.</p> <p>Récupération d'oiseaux</p> <p>16 (1) Il est interdit à quiconque de chasser un oiseau migrateur, à moins d'avoir les moyens adéquats pour récupérer l'oiseau tué, estropié ou blessé.</p> <p>(1.1) Quiconque tue, estropie ou blesse un oiseau migrateur, doit</p>
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<p>(a) immediately make every reasonable effort to retrieve the bird; and</p> <p>(b) if he retrieves the bird while it is still alive, immediately kill and include it in his daily bag limit.</p> <p>16(2) Notwithstanding paragraph 15(1)(e), a power boat may be used for the purpose of retrieving a migratory bird.</p>	<p>a) prendre immédiatement tout moyen raisonnable pour récupérer l’oiseau; et</p> <p>b) s’il réussit à récupérer l’oiseau vivant, le tuer sur-le-champ et le compter dans son maximum de prises de la journée.</p> <p>16(2) Sous réserve de l’alinéa 15(1)e), il est permis d’utiliser un bateau à moteur pour récupérer un oiseau migrateur.</p>
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Environmental Violations Administrative Monetary Penalties Act

<p>S.C. 2009, c. 14, s. 126</p> <p>Commission</p> <p>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.</p>	<p>L.C. 2009, Ch. 14, art. 126</p> <p>Violations</p> <p>7 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.</p>
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