



Issue Date: January 19, 2023

Citation: *Ingram and Carroll v. Canada (Environment and Climate Change)*, 2023 EPTC 4

EPTC Case No: 0005-2022 and 0006-2022

Case Name: *Ingram v. Canada (Environment and Climate Change)*
(0005-2022)

Carroll v. Canada (Environment and Climate Change)
(0006-2022)

Applicant: Dwayne Ingram and Deon Carroll

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under s. 15 of the *Environmental Violations Administrative Monetary Penalties Act*, S.C. 2009, c. 14, s. 126 ("EVAMPA") of Administrative Monetary Penalties issued under s. 7 of EVAMPA for violation of paragraph 15(1)(e) of the *Migratory Birds Regulations*, C.R.C., c. 1035, made under the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22.

Heard: December 5, 2022 (by videoconference)

Appearances:

Parties

Dwayne Ingram
Deon Carroll

Minister of Environment and
Climate Change Canada

Counsel/Representative

Self-Represented

Sarah Drodge

DECISION DELIVERED BY:

PAMELA LARGE MORAN

Introduction

[1] On January 21, 2022, Dwayne Ingram and Deon Carroll (“the Applicants”) were duck hunting in the waters near the town of Margaree, in Newfoundland and Labrador. They both had Migratory Game Bird Hunting Permits with a daily bag limit for Elder Ducks. The Applicants were hunting from a wooden dory with an outboard motor at the rear of the boat. They had material draped over the boat from which they took cover and were using duck decoys.

[2] At the time, Wildlife Enforcement Officers with the Department of the Environment and Climate Change Canada (“ECCC”) were conducting surveillance of a common Elder Duck hunting location. Upon the Applicants returning to the wharf in Margaree, they were met by ECCC Wildlife Officers, Dylan Decker, Sherry Pittman and Dennis Parr, who advised the Applicants that they had been hunting contrary to the regulations. The Applicants were later issued Notices of Violation by Wildlife Officer, Dylan Decker, relating to the [Migratory Birds Regulations](#) (“MBR”), under the [Migratory Birds Convention Act, 1994](#) (“MBCA”).

[3] Two identical notices of violation (“NOVs”) were issued to each of Dwayne Ingram and Deon Carroll: - For hunting migratory birds from a power boat, prohibited under paragraph 15(1)(e) of the MBR. Through the NOVs the Applicants are being assessed administrative monetary penalties of \$1,000 each, in both cases a baseline penalty amount of \$400 and an additional \$600 for environmental harm, calculated as per the criteria set out in the [Environmental Violations Administrative Monetary Penalties Regulations](#) (the “EVAMP Regulations”).

[4] The Applicants are seeking a review by the Tribunal of their NOVs under the [Environmental Violations Administrative Penalties Act](#) (“EVAMPA”). They have put forth two factual arguments. Specifically,

- I. The boat was not under propulsion but was moving due to wind, waves and current, as well as the sail effect from the material draped over the boat;
- II. Alternatively, the boat was only in movement when they attempted to retrieve an injured male Elder Duck, as permitted under regulation.

[5] Under the jurisdiction of EVAMPA, the Tribunal’s role is to determine on the balance of probabilities whether a violation occurred as alleged in the NOVs (section 20 of EVAMPA) and, if so, whether the applicable penalty amount was calculated in accordance with the EVAMP Regulations.

[6] The Tribunal concludes that the Minister has made out its case on a balance of probabilities with respect to the Applicants hunting a migratory bird from a moving power boat. Given that EVAMPA establishes an absolute liability regime, and the Tribunal has no jurisdiction to review the discretion of the Minister’s officers to issue administrative monetary

penalties, intervention is not warranted in this case. The Applicants violated subsection 15(1)(e) of the MBR, and the applicable penalties were calculated correctly.

Background

[7] On January 21, 2022, at approximately 8:00 a.m., Wildlife Officers Dylan Decker, Dennis Parr and Sherry Pittman were working in the area of Margaree, Newfoundland and Labrador, with Officer Decker specifically surveilling a common Elder Duck Hunting spot. It was a clear but cool, dry day.

[8] During that time, Officer Decker, through binoculars, observed a boat moving towards duck decoys at a pace much faster than drift speed, and observed an occupant of the boat shoot a duck and retrieve it. After observing the boat for a further 45 minutes, at approximately 9:00 am, Officer Decker observed the boat reset into position to the west and as a male Elder Duck flew in from the east to land in the decoys at the far east, Officer Decker saw the boat turn suddenly to face the decoys and move in the direction of the decoys at a fast rate of speed.

[9] At that time, Officer Decker observed wake coming from the stern of the boat and when the boat reached the decoys, he observed initially the person midship, followed by the person in the stern, stand up in the boat and shoot the male Elder Duck. The officer heard a shot, observed the shot hit the water around the male Elder Duck and observed the person in the stern of the boat retrieve the male Elder Duck and take it onboard the boat. Six still photographs were taken by Officer Decker during his initial observations of the boat.

[10] Officer Decker continued his observations, seeing the two individuals pulling the draped material from the side of the boat and retrieving the decoys. Officer Decker advised Officers Pittman and Parr by text of his observations and the two officers, who were nearby, travelled to the Margaree wharf to meet the Applicants. Upon meeting the Applicants as they docked at the wharf, the officers inspected 9 Elder Ducks and 2 Mergansers, with only one male Elder Duck matching the description provided by Officer Decker. That male Elder Duck was thus seized. Six still photographs of the Applicant's boat and the retrieved duck were taken by the officers at the wharf.

[11] The individuals in the power boat were the Applicants, Dwayne Ingram and Deon Carroll, who identified themselves with their valid hunting licenses.

[12] According to the notes of Officer Decker and his oral evidence during the hearing, Officer Decker issued one NOV to each Applicant on March 14, 2022, as follows: (i) Notices of violation number 9100-4265 to Deon Carroll and 9100-4266 to Dwayne Ingram for the penalty amount of \$400 based on, according to the observations of Officer Decker, the Applicants hunting a duck from a moving power boat in violation of paragraph 15(1)(e) of the MBR. The NOVs also included a penalty of a further \$600 for aggravating factors, which, in this case is an environmental/conservation concern.

[13] As evidenced in verbatim notes taken by officers at the wharf, initially in discussing the charges with Officer Parr, the Applicants denied that the boat motor was operational and advised that the wind, waves and current were moving them around. They also said that the tarp on the boat acted like a sail and also moved the boat around. They, accordingly, denied that they shot at ducks while the boat was powered by the motor.

[14] The Applicants gave their similar version of events orally at the hearing. They do not dispute they fired a shotgun from the boat. They, however, initially denied that the motor of the boat was operational but indicated that the wind, waves, and current were propelling the boat. They subsequently took the position that they did propel the boat towards the Elder Duck but argued that paragraph 16(2) of the MBR 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”.

Relevant Legislation

[15] Relevant portions of the MBR, EVAMPA and EVAMP Regulations are listed below at Appendix A.

Analysis and Findings

[16] 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 NOV's that are 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).

[17] 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.

[18] 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 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).

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 defines 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] In other words, a boat may be used as a platform from which to hunt, as long as the boat is not in operation or moving forward.

[22] The Minister entered as evidence the three Officers notes, contemporaneous text messages between the officers, as well as still photos taken through binoculars depicting the Applicants in the boat, as well as photos of the Applicants’ ducks harvested, including the lone male Elder Duck.

[23] Further, Officer Decker in oral evidence at the hearing maintained that he observed the Applicants in the boat through binoculars for a period and made note of the light to moderate wind and current causing the boat to drift sideways towards the decoys. He maintained, however, that when the male Elder Duck flew in from the west towards the decoys, the boat, which had been drifting sideways, quickly turned towards the decoys and began propelling forward, creating a wake behind the boat evidencing the propulsion of the boat. He opined that the boat was travelling at least double the speed of a normal drift.

[24] Further, Officer Decker advised that he continually watched through the binoculars and next observed, while the boat was moving, both Applicants put up their firearms. Officer Decker then heard a shot, observed it hit the water and subsequently saw the Applicants retrieving the male Elder Duck and bringing it on board the boat. When the Applicants arrived at the wharf, the two officers there, upon checking, confirmed that the Applicants were in possession of only one male Elder Duck, as evidenced by the photos.

[25] The Tribunal is satisfied that the Minister has established the identities of Dwayne Ingram and Deon Carroll as the hunters in Officers Decker’s photographs. Officer Decker was clear in his oral testimony that he could, at all times, see clearly through the binoculars and provided clear and cogent evidence to support that the boat was moving under propulsion at the time the male Elder Duck was shot. Further, there was continuity in the observations of Officer Decker, and subsequently, Officers Parr and Pittman, from the time Officer Decker observed the Applicants to when Officers Parr and Pittman met them at the wharf with the male Elder Duck in their possession.

[26] Throughout the oral hearing, Officer Decker’s testimony was wholly consistent, internally, as well as with documentary evidence, including his and the other two Wildlife Officers’ notes and texts during the events. The Tribunal does not accept that the Applicants were shooting at a duck that had been injured earlier. There is nothing to support this proposition.

Conclusion

[27] The Tribunal thus finds that the Minister has made out the two violations on a balance of probabilities and the Tribunal upholds Notices of Violation 9100-4265 and 9100-4266.

Penalty Amount

[28] During the oral hearing, the Applicants questioned the amount of the penalty imposed. Verification of the amount is part of the Tribunal’s role when it receives a request for review.

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

<p>(1) The amount of the penalty for each Type A, B or C violation is to be determined by the formula</p> <p>W + X + Y + Z</p> <p>where</p> <p>W is the baseline penalty amount determined under section 5;</p> <p>X is the history of non-compliance amount, if any, as determined under section 6;</p> <p>Y is the environmental harm amount, if any, as determined under section 7; and</p> <p>Z is the economic gain amount, if any, as determined under section 8.</p>	<p>(1) Le montant de la pénalité applicable à une violation de type A, B, ou C est calculé selon la formule suivante :</p> <p>W + X + Y + Z</p> <p>où :</p> <p>W représente le montant de la pénalité de base prévu à l’article 5;</p> <p>X le cas échéant, le montant pour antécédents prévu à l’article 6;</p> <p>Y le cas échéant, le montant pour dommages environnementaux prévu à l’article 7;</p> <p>Z le cas échéant, le montant pour avantage économique prévu à l’article 8.</p>
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[30] According to the EVAMP Regulations, contravening subsection 15(1)(e) of the MBR is a Type B violation: Schedule 1, Part 4, Division 2. Item 1 and Column 3 of Schedule 4 establish that the baseline penalty amount for a Type B violation is \$400 when committed by an

individual. Given that the Applicants are individuals who contravened subsection 15(1)(e), the baseline amount of \$400 is correct.

[31] The amount for an aggravating factor is established in Schedule 4 of the EVAMP Regulations. According to Item 1, Column 5 of Schedule 4 of those Regulations, the amount for environmental harm is \$600 in respect of an individual.

[32] Section 7 of the EVAMP Regulations is reproduced below:

<p>If the violation has resulted in harm to the environment, the environmental harm amount is the amount set out in column 5 of Schedule 4 that corresponds to the category of the violator and the type of violation committed as set out in columns 1 and 2, respectively, of that Schedule.</p>	<p>Si des dommages environnementaux découlent de la violation commise, le montant pour dommages environnementaux est celui prévu à la colonne 5 de l'annexe 4, selon l'auteur et le type de violation commise figurant, respectivement, aux colonnes 1 et 2 de cette même annexe.</p>
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[33] In this case, it is clear that there was environmental harm in the form of the death of the male Elder Duck hunted by the Applicants. Tribunal jurisprudence establishes that the death of an animal is environmental harm within the meaning of section 7 of the EVAMP Regulations: *Sirois v. Canada (Environment and Climate Change)*, 2020 EPTC 6, at para 54.

[34] For section 7 to apply, it is necessary to establish not only environmental harm, but also a causal link between the violation and the resulting environmental harm: *Nyobe v. Canada (Environment and Climate Change)*, 2020 EPTC 7, at paras 32-33.

[35] There is the necessary causal link in these circumstances. If the Applicants had been acting in accordance with the regulatory framework, the Applicants would not have shot the male Elder Duck as they did. Therefore, the death of the duck resulted from the violation of subsection 15(1)(e), as required by section 7 of the EVAMP Regulations, and the additional amount for environmental harm applies.

[36] The amount of the administrative monetary penalties imposed on the Applicants was correct.

Decision

[37] The Tribunal therefore upholds notices of violation 9100-4265 and 9100-4266, relating to hunting of a migratory bird from any power boat, including the penalty amounts.

Review Dismissed

"Pamela Large Moran"
PAMELA LARGE MORAN
REVIEW OFFICER

APPENDIX A – Relevant Legislation and Regulations

Migratory Birds Regulations, C.R.C., c. 1035

2 (1) In these Regulations,

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*)

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*)

(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.

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

(e) from any aircraft, sailboat, power boat, or motorized vehicle, or any vehicle to which a draught animal is attached.

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.

(1.1) A person who kills, cripples or injures a migratory bird shall

(a) immediately make every reasonable effort to retrieve the bird; and

(b) if he retrieves the bird while it is still alive, immediately kill and include it in his daily bag limit.

(2) Notwithstanding paragraph 15(1)(e), a power boat may be used for the purpose of retrieving a migratory bird.

Environmental Violations Administrative Monetary Penalties Act, S.C. 2009, c. 14, s. 126

5 (1) The Governor in Council may make regulations

(a) designating as a violation that may be proceeded with in accordance with this Act

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.

11 (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.

20 (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, 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.

Environmental Violations Administrative Monetary Penalties Regulations, SOR/2017-109

4 (1) The amount of the penalty for each 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.

5 The baseline penalty amount for a violation is the amount set out in column 3 of Schedule 4 that corresponds to the category of the violator and the type of violation committed as set out in columns 1 and 2, respectively, of that Schedule.

7 If the violation has resulted in harm to the environment, the environmental harm amount is the amount set out in column 5 of Schedule 4 that corresponds to the category of the violator

and the type of violation committed as set out in columns 1 and 2, respectively, of that Schedule.