Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

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| **Issue Date:** | September 17, 2021 |
| **Citation:** | *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change),* 2021 EPTC 9 |
| **EPTC Case No:** | 0029-2020 |
| **Case Name:** | *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)* |
| **Applicant:** | BGIS O&M Solutions 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 of an Administrative Monetary Penalty issued under section 7 of the EVAMPA for a violation of paragraph 31(1) of the *Federal Halocarbon Regulations (2003)*, SOR/2003-289, enacted under the *Canadian Environmental Protection Act, 1999,* SC 1999, c 33.

**Appearances:**

| **Parties** | **Counsel** |
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| BGIS O&M Solutions Inc. | Mark Youden |
| Minister of the Environment and Climate Change Canada | Marilou Bordeleau |

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

[1] Was there a leak on May 22, 2019, or was there not? Under federal regulations, it is an offence not to keep records of leaks of large quantities of halocarbons. The Minister of the Environment and Climate Change Canada (the "Minister") issued a Notice of Violation against Brookfield Global Integrated Solutions Inc ("BGIS") for failing to record a leak at a Bell information centre in Quebec City. Bell reported a leak to the Minister, but without specifying the date of the leak. BGIS claims that there was no leak on that particular day. So, was there a leak on May 22, 2019, or was there not? This is the question underlying these proceedings.

[2] A final resolution of the question is, however, still some way off. The Tribunal has before it two motions, each of which raises a novel issue for determination.

[3] First, the Minister seeks to compel the production of documents from the applicant BGIS and third parties who were also involved in maintaining equipment in the Bell information centre. This is the first time the Minister has asked the Tribunal to use its power to compel production. Under the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA"), which delimits the Tribunal's jurisdiction, the power can only be used where it is necessary for the purposes of the proceeding. Here, only one of the eight documents sought satisfies the necessity criterion.

[4] There is more on the first issue. BGIS argues that it is inappropriate for the Minister to ask the Tribunal to use its power to compel production, given the extensive investigative powers granted to the Minister by the *Canadian Environmental Protection Act*, *1999*, SC 1999, c 33, Part 10 ("CEPA"). As the Minister has ample powers to require the production of documents *prior* to issuing a Notice of Violation – and, indeed, has to have "reasonable grounds" for issuing a Notice of Violation in the first place – BGIS argues that limitations must be placed on the Minister's ability to benefit from the Tribunal's power to compel production. The Tribunal agrees that some limitations are appropriate in this regard, specifically, that the Minister must demonstrate that he made reasonable efforts to obtain the information in the course of an investigation. In this case, the Minister has demonstrated reasonable investigative efforts in respect of the one document which satisfies the necessity criterion. Accordingly, it is appropriate for the Tribunal to use its power to compel production. As such, the Minister's motion is granted in part.

[5] Second, BGIS brings a motion to dismiss the Notice of Violation, arguing that there is no factual basis in the record for the Notice of Violation. Again, this is a novel question for the Tribunal and, once more, answering it requires a careful analysis of the statutory scheme. This scheme does not speak to motions for summary dismissal but, rather, provides machinery designed to resolve disputes expeditiously. The Tribunal concludes that it does not have jurisdiction to entertain a motion to dismiss a Notice of Violation brought by an applicant at this stage of these proceedings. A motion to dismiss a Notice of Violation can only be brought by an applicant, at the earliest, after the Minister has closed his case (and even there it is quite possible that the Tribunal would require the moving party to make an election, that is, to waive its right to introduce evidence in the

event the motion is unsuccessful). As the Minister has not yet closed his case, the motion is (at best) premature. Accordingly, BGIS's motion is denied.

**Context**

[6] On June 7, 2019, Bell sent a written notice to the Minister reporting a leak of 206.4kg of HFC-134A from System 03-004, located at a Bell information centre at 930, rue d'Aiguillon in Quebec City ("System 03-004"). The notice was dated May 28, 2019.

[7] This written notice triggered an inspection by the Minister in respect of compliance with the *Federal Halocarbon Regulations (2003)*, DORS/2003-289 ("FHR").

[8] On June 11, 2020, ECCC issued Notice of Violation 8200-0802 to BGIS pursuant to s.10 of the EVAMPA, alleging a failure to record a leak which occurred on May 22, 2019.

[9] The Notice of Violation imposes an administrative monetary penalty of $5,000 on BGIS.

[10] On August 3, 2020, BGIS made a request to the Chief Review Officer under s. 15 of the EVAMPA for review of the Notice of Violation.

[11] On November 9, 2020, the Minister informed the Tribunal that the Minister consents to modify the penalty amount to $1,000 in accordance with the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 ("EVAMPR") since a mistake occurred in the calculation of the monetary penalty.

[12] The parties produced a partial agreed statement of facts but have disagreed sharply from the outset of the review process about whether there was any violation at all.

[13] BGIS has consistently taken the position that there was no leak on May 22, 2019 and that the Minister has failed to provide evidence in support of the Notice of Violation. The Minister is equally firm in his position that there was a leak on May 22, 2019.

[14] In support of his position, the Minister has brought a motion compelling BGIS and third parties involved in the maintenance of equipment at the Bell information centre to produce documents. In response, BGIS has brought a motion to summarily dismiss the Notice of Violation. Hence this decision disposing of two motions.

[15] As noted above, the Tribunal is granting the Minister's motion in part. The consequence of granting the Minister's motion is that BGIS's motion for summary dismissal cannot succeed. The premise of BGIS's motion is that the Minister has not provided an adequate basis for the Notice of Violation – but the disclosed document might

provide just that. In a sense, therefore, it is too early to address BGIS's motion for summary dismissal.

[16] However, the Tribunal's view is that it can and should dispose of the motion for summary dismissal at this point. Nothing would preclude BGIS from bringing a renewed motion for summary dismissal at a later date if the disclosed document turns out not to adequately support the Minister's case; the parties have thoroughly addressed the issue in excellent submissions; and the motion for summary dismissal issue is one of general importance to the Tribunal's operations. Furthermore, the Tribunal's view is that there is no jurisdiction to entertain a motion for dismissal of a Notice of Violation brought by an applicant before the Minister has closed his case, a conclusion which would not be altered by the content of the disclosed documents. Accordingly, it is appropriate for the Tribunal to dispose of BGIS's motion for summary dismissal at this point.

[17] The Tribunal will address the motion for summary dismissal first and then the motion to compel the production of documents.

## Analysis and Conclusions

*Motion for Summary Dismissal*

[18] The issue here is whether the Tribunal can entertain a motion for summary dismissal of a Notice of Violation brought by an applicant before the Minister has closed his case. This is a relatively narrow issue. There are other circumstances which might arise – a Request for Review made outside the time limit; a Request for Review by a party without standing to make the request – where the Minister might wish to bring a motion to summarily dismiss a Request for Review. None of these other circumstances are present here. Accordingly, the analysis and conclusions which follow relate only to a motion for summary dismissal of a Notice of Violation *brought by an applicant before the Minister has closed his case*.

[19] The Minister correctly observes that the EVAMPA makes no provision for motions for summary dismissal of a Notice of Violation brought by an applicant. BGIS counters that the Tribunal has the authority within the statutory framework to fashion a procedure which would permit an applicant to strike a Notice of Violation which is manifestly unfounded.

[20] Recognizing the authority to entertain motions for summary dismissal of a Notice of Violation brought by applicants before the Minister has closed his case would be inappropriate, in the Tribunal's view, having regard (as the Tribunal must) to statutory text, context and purpose. BGIS rightly observes that the Supreme Court of Canada has stated that administrative tribunals are "masters in their own house": *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, at para. 46. But the Supreme Court stated in almost the same breath that this autonomy is contingent on respect for the rules of natural justice. Similarly, it is contingent on respect for the statutory

limits on the Tribunal's jurisdiction: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 108-110.

[21] First, recognizing a jurisdiction to entertain motions for summary dismissal of a Notice of Violation sits uncomfortably with the overall scheme of the EVAMPA and the text of s. 20.

[22] The EVAMPA gives the recipient of a Notice of Violation the right to request a review of the Notice of Violation: s. 15. Exercising this right triggers a review, to be conducted by a single-member panel or three-member panel of the Tribunal: s. 17.

[23] Section 20 details what is to be determined at the hearing:

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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. | (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) The Minister has the burden of establishing, on a balance of probabilities, that the person, ship or vessel committed the violation. | (2) Il appartient au ministre d'établir, selon la prépondérance des probabilités, que le demandeur a perpétré la 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. |

[24] Section 20(1) contemplates that a hearing will be conducted. Taken together, ss. 20(1) and 20(3) indicate that the goal of the hearing is to determine (1) whether the offence alleged in the Notice of Violation actually occurred; and (2) whether the penalty thereby imposed was properly calculated. Notably, s. 20(2) places the burden of proof on the Minister. That is, in a hearing before the Tribunal, the Minister proceeds first.

[25] As such, on the face of the statute, there is no scope for the applicant to bring a motion for summary dismissal of a Notice of Violation. There is a Notice of Violation imposing a liability on the Applicant, but it is up to the Minister to prove the underlying

allegations on the balance of probabilities. If the Minister fails to do so, the Notice of Violation falls away: see *e.g. Andrade v Canada (Environment and Climate Change)*, 2021 EPTC 4. Crucially, s. 20(1) of the EVAMPA provides that the Tribunal "shall" make a determination "[a]fter" hearing the parties: a successful motion for summary dismissal of a Notice of Violation would preclude the holding of a hearing, which would be inconsistent with s. 20(1).

[26] Second, a jurisdiction to entertain motions for summary dismissal of a Notice of Violation brought by an applicant is difficult to square with the purpose of the EVAMPA. Parliament explained the purpose of the statutory scheme in s. 3 of the EVAMPA: to provide an alternative to the existing penal system for the punishment of environmental offences. Criminal procedure and civil procedure as developed by the courts should therefore not blindly be transplanted into the EVAMPA regime: see generally *BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 4. Many of these grafts simply will not take, and Parliament has warned us not to attempt to make them.

[27] If the Tribunal were to entertain motions for summary dismissal of Notices of Violation brought by applicants, it would introduce an additional procedural step into every Request for Review. This alone would frustrate the achievement of the efficiency goals Parliament sought to further by enacting the EVAMPA.

[28] Another systemic consequence of entertaining motions for summary dismissal of a Notice of Violation at the behest of an applicant would also undermine Parliament's manifest intention. Notices of Violation would have to become more like originating process, detailed enough in their formulation to survive a motion for summary dismissal. This would place a significant administrative burden on the Minister.

[29] BGIS argues that a motion for summary dismissal of a Notice of Violation brought by an applicant is a "proportionate, expeditious and a less expensive means of achieving a just result in the circumstances" (Applicant's Reply, at para. 17). Even if this were generally true – which is doubtful, once systemic consequences are taken into account – considerations of expediency cannot override the statutory scheme.

[30] In any event, there is no need to allow expediency to trump statutory text, context and purpose, as the Tribunal certainly has tools at its disposal which allow it to fashion procedures which resemble a motion for summary dismissal of a Notice of Violation brought by an applicant. On several occasions, the parties before the Tribunal have cooperated to develop a factual basis for resolving a determinative legal issue. For example, in *Hoang v. Canada (Environment and Climate Change)*, 2019 EPTC 2, the Tribunal addressed its authority to review the exercise of the discretion to impose a Notice of Violation as a preliminary question; resolving the issue in the negative effectively disposed of the Request for Review. Again, in *Deep River (Town) v. Canada (Environment and Climate Change)*, 2020 EPTC 3, the Tribunal addressed an issue relating to the time period within which a Notice of Violation must be issued and, the issue having been resolved against the applicant, the Request for Review was subsequently

withdrawn. The Tribunal suggested a similar course of action to the parties in the instant case, but the parties were not able to agree on a question to put to the Tribunal. In general, however, creative use of this 'preliminary question' procedure is to be preferred to entertaining motions for summary dismissal of a Notice of Violation. It is perfectly consistent with s. 20 of the EVAMPA, as the result of an unfavourable answer to a preliminary question is, for the Applicant, the withdrawal of a Request for Review (if the Applicant so chooses) and, for the Minister, proceeding to a hearing.

[31] Furthermore, another obvious possibility arises from the EVAMPA scheme. Once the Minister has closed his case, the Applicant can simply decline to tender any evidence and argue that the Minister has failed to make out his case on the balance of probabilities. This is commonly known as a motion for a non-suit. A separate question arises as to whether the Applicant would have to 'make an election' in such circumstances, that is, to waive the right to lead evidence in the event that the motion for a non-suit is dismissed. The Tribunal does not offer any response to the election question at this point. It is sufficient to say that in circumstances where the Applicant takes the view that the Minister's case is fundamentally flawed, the Applicant can express that view once the Minister has closed his case. Again, this is consistent with s. 20 of the EVAMPA.

[32] It is true, as BGIS observes, that "reasonable grounds" must exist to support the exercise of discretion to issue a Notice of Violation: EVAMPA, s. 10(1). But the Tribunal does not have the jurisdiction to review exercises of discretion by environmental enforcement officers: *BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 2, at paras. 30-51. If the Tribunal cannot review the decision to issue a Notice of Violation, it cannot make a determination on the presence or absence of reasonable grounds to issue a Notice of Violation either. As explained below (especially at para. 53), the "reasonable grounds" requirement is a relevant factor in interpreting the scope of the Tribunal's power to compel the production of documents. But it is not a basis on which the Tribunal can review the exercise of the discretion to issue a Notice of Violation, still less to strike out a Notice of Violation at a preliminary stage at the instance of an applicant.

[33] As noted at the outset of this section, at para. 18 above, different considerations may arise where the Minister seeks to summarily dismiss a Request for Review. Notice, though, that in both of the hypotheticals – a late request or a request made by a party with no standing – there would be a statutory basis in the EVAMPA for refusing to deal with the requests for review: s. 15 imposes a 30-day time limit (which can be extended by the Chief Review Officer) and permits only those "served" with a Notice of Violation to make a Request for Review. Whereas entertaining a motion for summary dismissal of a Notice of Violation brought by an applicant would be inconsistent with the statutory scheme, treating a flawed request as, effectively, null and void would have a sound basis in the text of the EVAMPA. There might therefore be – though it is unnecessary to express a concluded view on the point in this decision – a difference between a motion for summary dismissal of a Notice of Violation brought by an applicant and a motion for

summary dismissal of a Request for Review brought by the Minister: the Tribunal can entertain the latter, but not the former.

[34] Accordingly, BGIS's motion for summary dismissal is dismissed.

*The Motion to Compel Production of Documents*

[35] Before grappling with the details of the Minister's motion to compel the production of documents, it is helpful to describe the evidential basis on which the Tribunal determines whether a Request for Review should be granted or dismissed.

[36] In this regard, both parties have referred to *Kost v. Canada (Environment and Climate Change); Distribution Carworx Inc. v. Canada (Environment and Climate Change)*, 2019 EPTC 3. This decision of the Tribunal is to be treated with some caution, as it was issued under the authority granted to the Tribunal by the CEPA, not the authority granted to the Tribunal under the EVAMPA. In particular, the assessment of whether "reasonable grounds" supported the order subject to review is of central importance when the Tribunal is conducting a review under the CEPA, indeed, one of the Tribunal's "main tasks": *Kost*, at para. 21. By contrast, as noted above at para. 32 and reiterated again below at para. 47, under the EVAMPA the Tribunal cannot review exercises of enforcement discretion, including any question as to whether "reasonable grounds" existed to issue a Notice of Violation.

[37] Nonetheless, *Kost* is helpful in determining the scope of the record for a review under the EVAMPA. The Tribunal commented as follows at para. 15:

> Different types of administrative "reviews" arise under various statutes. Some reviews are restricted to the record before the original decision-maker and do not involve a typical hearing with oral representations while other reviews are more expansive and include a hearing of evidence. If the Legislature had intended that the Tribunal limit its considerations to only information available to the officer at the time the Compliance Order was issued, there would be little need for the power to summon in s. 260, for example. Moreover, s. 257 would not have included the wording "conduct a review of the order, including a hearing". References to parties having the right to appear in person or through a representative (s. 259) and to oral representations (s. 263) would also likely have been excluded if a narrow review of the record by the Tribunal had been intended by the Legislature. As well, s. 257 or 263 would likely have been drafted to state explicitly that the evidence that the Tribunal is entitled to consider in a review is limited only to the record before the enforcement officer.

[38] These considerations apply with equal force to reviews under the EVAMPA, because the statutory scheme, similarly, makes express provision for the conduct of a review (s. 20), including the right to appear (s. 18) and the ability of the Tribunal to compel

the production of evidence (s. 19). Plainly, therefore, the Tribunal in conducting a review under the EVAMPA is not limited to the documentary record which existed immediately prior to the issuance of the Notice of Violation but may rest its conclusions on a broader evidentiary basis.

[39] Both the applicant and the Minister may contribute to this evidentiary basis by, for example, placing testimony (written or oral) or documents within their possession before the Tribunal.

[40] The Tribunal's *Draft Rules of Procedure* create additional means of expanding the record before the Tribunal. One such provision, under which the Minister has brought his motion, is Rule 15.1 (emphasis added):

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| 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*. |

[41] This provision builds on s. 19 of the EVAMPA (emphasis added):

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| The review officer or panel conducting the review may summon any person to appear as a witness and may order the witness to<br><br>(a) give evidence orally or in writing; and<br><br>(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*. |

[42] In order for the Tribunal to grant a motion brought under Rule 15.1, the Tribunal must be satisfied that the material sought to be produced is "necessary". Necessity is to be judged by reference to the "purpose" of the review (EVAMPA, s. 19) which, as specified by Rule 15.1 is "to obtain a full and satisfactory understanding of the subject matter of the review".

[43] In *BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 2, the Tribunal considered Rule 15.1 in some detail and concluded as follows, at para. 22:

> 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.

[44] As such, a party to the Request for Review may ask the Tribunal to use its powers under Rule 15.1, as has happened here. It is important to note that the documents of which the Minister seeks to compel production *pre-dated* the issuing of the Notice of Violation. The analysis and conclusions which follow do not speak to a situation where the documents sought post-date the issuing of a Notice of Violation.

[45] It is common ground that the Minister has to satisfy the necessity criterion contained in Rule 15.1 and s. 19 of the EVAMPA. BGIS argues that the use of the power to compel production *at the request of the Minister* is subject to additional limitations. No such limitations appear in Rule 15.1 or s. 19 of the EVAMPA, as the Minister points out. From where, then, would BGIS derive them?

[46] First, BGIS observes that the Minister has significant powers under Part 10 of the CEPA to compel the production of documents during the investigation of suspected violations of Canadian environmental laws: see e.g. s. 218 (power to conduct inspections), s. 219 (power to compel the production of documents and samples) and s. 223 (power to seize and detain anything related to a contravention of Canada's environmental laws).

[47] Second, BGIS notes that Notices of Violation are only to be issued where the environmental enforcement officer has "reasonable grounds" to believe that a violation occurred: s. 10(1) of the EVAMPA. Determining whether such reasonable grounds existed is, of course, beyond the Tribunal's jurisdiction: *BCE Inc.* at paras. 30-51. But the "reasonable grounds" requirement suggests, BGIS says, that the Minister should make all due efforts to use his investigative powers under CEPA prior to issuing a Notice of Violation. "Reasonable grounds" is a serious threshold requirement and it follows, for BGIS, that a Notice of Violation must have a solid contemporaneous basis.

[48] In summary, BGIS argues that it is inappropriate for the Minister to use Rule 15.1 and s. 19 of the EVAMPA to fish for evidence which should have been caught in the trawl the Minister ought to have conducted before issuing the Notice of Violation:

> The fact that a review is underway does not provide the Respondent with the opportunity to reopen its inspection by requesting that the Tribunal supplant the enforcement officer's role and conduct its own lengthy and far-reaching fact finding; this would defeat the purposes of the administrative process…(Applicant's Response and Cross-Application to Dismiss, at para. 51)

[49] The Tribunal agrees with BGIS that the circumstances in which the Tribunal may grant a motion brought by the Minister under Rule 15.1 and s. 19 of the EVAMPA in respect of information which pre-dated the issuing of a Notice of Violation must be limited,

not only by reference to the necessity criterion but by the imposition of additional limitations.

[50] It is helpful to put the argument in the language of statutory text, context and purpose. The text of Rule 15.1 and s. 19 of the EVAMPA do not limit the circumstances in which the Minister may ask the Tribunal to compel the production of documents: necessity is the only criterion.

[51] But Rule 15.1 and s. 19 have to be read in their whole context, which includes the "reasonable grounds" requirement in s. 10 of the EVAMPA and the investigative powers set out in Part 10 of the CEPA. When read in their whole context, it becomes clear that the necessity criterion – on its own – is insufficient.

[52] Both s. 10 of the EVAMPA and Part 10 of the CEPA are relevant to determining the scope of Rule 15.1 and s. 19 of the EVAMPA.

[53] Section 10 of the EVAMPA is relevant because it makes clear that the Minister must have "reasonable grounds" to issue a Notice of Violation. In order to make out reasonable grounds, a decision-maker must have "an objective basis for the belief which is based on compelling and credible information": *Mugesera v. Canada (M.C.I.)*, 2005 SCC 40 at para. 114. This suggests that the Minister must make an effort to seek out such information prior to issuing a Notice of Violation – otherwise the "reasonable grounds" requirement would be meaningless. It also suggests that it would be inappropriate for the Minister to issue a Notice of Violation in the hope that "compelling and credible information" would emerge during the process of a Request for Review, or in the hope that the Tribunal would consider such information "necessary" for the purposes of the review and compel disclosure under Rule 15.1 and s. 19 of the EVAMPA.

[54] Part 10 of the CEPA is relevant because it provides the Minister with a suite of investigative powers which can be used to generate the "compelling and credible information" required to justify the issuing of a Notice of Violation. This information could then (and, in the ordinary course, would) be placed before the Tribunal on the Request for Review. Part 10 of the CEPA and Rule 15.1 and s. 19 of the EVAMPA overlap, in that both can potentially be used to build an evidentiary basis for the Tribunal to dispose of a Request for Review. The Tribunal's power to compel the production of evidence should therefore be read harmoniously with these investigative powers, especially given the requirement to have "reasonable grounds" for issuing a Notice of Violation. If the Minister has a specific power to achieve his objectives of enforcing Canada's environmental laws, that power should qualify any power the Tribunal has which the Minister may seek to use to achieve the same ends, given that the Minister is obliged in any event to develop "reasonable grounds" before a Request for Review is made.

[55] Accordingly, the Tribunal should interpret Rule 15.1 and s. 19 of the EVAMPA in harmony with the Minister's investigative powers under the CEPA and the reasonable grounds requirement in s. 10 of the EVAMPA. The necessity requirement, as applied to

the Minister, should be sufficiently rigorous to ensure that the Minister seeks to obtain necessary information using his investigative powers in Part 10 of the CEPA, such that the evidentiary basis for a Notice of Violation is solid, rather than to resort to the Tribunal's coercive power to compel production. The Minister is free to bring a motion under Rule 15.1, but when the Minister does so in respect of information which pre-dated the issuing of a Notice of Violation, the Tribunal should apply an appropriately demanding standard. The Minister must therefore be subject to additional limitations.

[56] What would such additional limitations look like? That Rule 15.1 and s. 19 of the EVAMPA should be read as requiring more than necessity when the Minister seeks to compel production does not indicate exactly what should be required. Part 10 of the CEPA and s. 10 of the EVAMPA are the relevant parts of the broader statutory context. As such, the additional limitations should be consistent with them. The appropriate additional limitation is that the Minister must demonstrate that he made reasonable efforts to obtain the information in the course of an investigation before asking the Tribunal to exercise its power under Rule 15.1 and s. 19.

[57] If the Minister has not done so, and seeks to invoke the Tribunal's coercive powers to obtain information which pre-dated the issuing of a Notice of Violation, the Tribunal will be justified in denying the Minister's motion.

[58] Given the requirement of necessity, which emerges clearly from the text of Rule 15.1 and s. 19 of the EVAMPA, and the requirement of reasonable investigative efforts, which emerges when Rule 15.1 and s. 19 of the EVAMPA are read in their whole context, the Tribunal will compel the production of only one of the documents or classes of document sought by the Minister.

(1) Necessity

[59] The difficulty for the Minister in respect of most of the documents sought is that they would not provide direct evidence of whether or not there was a leak on May 22, 2019, which is the subject matter of this review. At best, they would provide additional indirect evidence from which an inference might be drawn that there was a leak on that date. They cannot, therefore, be said to be necessary to obtain a full and satisfactory understanding of the subject matter of the review as required by Rule 15.1 and s. 19 of the EVAMPA.

[60] The first document sought is the "Liste datée du registre d'entretien d'un système contenant des halocarbures" for System 03-004. According to the Minister, this document "includes information about the amount of halocarbon that was charged or reclaimed, and whether a certified person conducted a leak test, detected a leak and repaired a leak" (Respondent's Written Representations, par. 35). But it is not clear how these documents would clearly establish the date of the leak, rather than providing indirect evidence from which an inference could be drawn.

[61] The second document (or set of documents sought) is a time sheet for Carrier employees Dany Simard and Dominic Plenzich. Some time sheets are already found in the record before the Tribunal. The difficulty is that these time sheets are singularly unlikely to confirm the date of a leak. At most, the time sheets will confirm that a leak occurred (though this too is far from clear).

[62] The third document is Carrier work orders for the month of May. As with the time sheet, the fundamental difficulty here is that the work orders will not specify the date on which a leak occurred. The Minister states that these documents would reveal "the amount of halocarbon that was charged, released or reclaimed, the result of the pressure test and the leak test and whether a leak was repaired" (Respondent's Written Representations, par. 45). However, the Tribunal's understanding is that the work orders would only speak to work done by Carrier employees in charging, releasing or reclaiming halocarbon in the course of a pressure test or leak test. They might allow the Tribunal to infer that a leak occurred. As to the date of any such leak, though, the work orders would be silent.

[63] The fourth document is Carrier service reports for System 03-004. According to the Minister, these documents will show when System 03-004 "was serviced and the nature of the work that was done on the system" (Respondent's Written Representations, par. 51). Again, the evidence in these documents as to a leak date can only be indirect. A system must be serviced if there was a leak and, plainly, the "nature of the work" would allow the Tribunal to infer that a leak occurred – but, crucially, it would not indicate the precise date of the leak, which is the very point in issue in this Request for Review.

[64] The fifth document is packing slips for a period from March 2019 to June 2019. These provide, the Minister says, "relevant information regarding the type of service that was undertaken on System 03-004 on a specific date" (Respondent's Written Representations, par. 56). Once again, these documents would only allow the Tribunal to draw inferences about whether there was a leak, not the date of the leak.

[65] The sixth document is a copy or photograph of any alarms on the system between March and June. As the Minister puts it, "a copy or photo of the record of alarms on System 03-004 or a copy or photo of any alarm relating to System 03-004 is highly relevant to the Review Officer's determination in this matter" (Respondent's Written Representations, par. 56). Indeed, this is an understatement. This document would be dispositive of the issue. It should demonstrate conclusively whether or not a leak occurred on May 22, 2019. It would almost certainly identify the date on which a leak occurred, occasioning the repairs which were undertaken on System 03-004. Given that it would be dispositive, the sixth document is by definition necessary to obtain a full and satisfactory understanding of the subject matter of the review.

[66] The seventh document is a copy of the "Rapport de service commercial" for the period from March to June 2019. The Minister does not specify why this document is relevant, other than to state that the Minister received an excerpt, not the full report. The

basis provided by the Minister is insufficient to conclude that the document is necessary for the purposes of the review.

[67] Lastly, the Minister requests a legible copy of a document already provided, namely Carrier Service Report 107189. This document is dated March 15, 2019. Accordingly, it does not relate to the date of the suspected leak and cannot shed any light on the underlying issue in this review.

[68] Of these documents, only the sixth satisfies the necessity criterion in Rule 15.1 and s. 19 of the EVAMPA.

(2) Reasonable investigative efforts

[69] With two exceptions, the Minister has failed to demonstrate reasonable investigative efforts. Agent Sabrina Duchesne deposed that she interviewed various employees of Bell, BGIS and Carrier from June 2019 to January 2020 in person, via telephone and over email. In the course of these interactions, she asked them to provide various documents:

> Au cours de ces communications, j'ai demandé aux gestionnaires et aux employés de BGIS et de Carrier de me fournir des documents spécifiques, y compris des bons de travail, des rapports de service, des feuilles de temps et des bordereaux de marchandise. À ce moment-là, certains documents m'ont été fournis, tandis que d'autres ne l'ont pas été (Affidavit of Sabrina Duchesne, par. 13).

[70] Agent Duchesne received some documents in October 2019 and again in January 2020: Affidavit of Sabrina Duchesne, pars. 18-19. She did not follow up with the employees to explain why (as the Minister now suggests) these documents were inadequate or what further documents would be adequate.

[71] The Minister did not furnish any description of what Agent Duchesne did between January 2020 and June 2020, when she issued the Notice of Violation. Of course, in March 2020, Canadian life was turned upside down by the COVID-19 pandemic. But Agent Duchesne's affidavit does not speak to this – nor, critically, to any additional steps she took to follow up with the employees in question, including invoking the Minister's powers under the CEPA. Everything was left hanging from January 2020 until the Minister brought this motion a year later. The Minister thus has failed to demonstrate reasonable investigative efforts, save in two respects.

[72] The first exception is the sixth document described above. In a meeting in October, 2019, Agent Duchesne asked specifically for – and was promised she would receive – a photograph of a list of pressure alarms on the system:

> [M. Simard] m'a indiqué qu'il allait me transmettre une photo de la liste des alarmes de pression enregistrées sur le système le lendemain par courriel. Or, je n'ai jamais

reçu de photo de la liste des alarmes enregistrées (Affidavit of Sabrina Duchesne, par. 21).

[73] Unlike with the other requests, in response to which the Minister received documents which the Minister says were inadequate, the Minister never received anything in response.

[74] Here, therefore, the Minister did make reasonable investigative efforts. Indeed, it was reasonable for the Minister to proceed on the basis that this photograph would be provided.

[75] The second exception is Carrier Service Report 107189, which the Minister obtained in the course of an investigation. However, as noted, a legible copy of this document is not necessary for the purposes of disposing of this Request for Review.

[76] As a result, the Tribunal grants the Minister's motion in part, as it relates to the sixth requested document.

## Decision

[77] The Minister's motion is granted in part. The parties should make the necessary arrangements for the production of the sixth requested document. If the parties are unable to agree, the Minister may provide a draft order to the Tribunal to be issued under Rule 15.1.

[78] BGIS's motion is dismissed.

[79] BGIS sought costs. In the absence of express statutory authority to make a costs order and the presence of the well-established principle that there is no inherent power to award costs, the Tribunal has no jurisdiction to make the order sought.

[80] One final comment is appropriate. It is not to be construed as a criticism of counsel in this matter, who find themselves navigating the Tribunal's jurisdiction at a relatively early stage, where the boundaries of the jurisdiction and the Tribunal's modes of operations remain fluid to some extent.

[81] However, the course of this Request for Review illustrates some of the disadvantages of making a Request for Review too quickly.

[82] Under s. 16 of the EVAMPA, the Minister may cancel or correct an error in a Notice of Violation, but only ***before*** a Request for Review is made.

[83] Here, there was an obvious error in the calculation of the amount of the penalty. Both parties agree that the error should be corrected.

[84] However, once the review process has been initiated, the Tribunal can only correct the error as part of its final disposition of the Request for Review: EVAMPA, s. 20(3).

[85] In some cases, where the error is obvious, invoking the Tribunal's jurisdiction will lead to needless cost and delay.

[86] Of course, the recipient of a Notice of Violation must act swiftly, as they have only 30 days within which to make a Request for Review: EVAMPA, s. 15. But a Request for Review can be summary in nature, such that even 30 days provides ample time both to request the correction of an error by the Minister and, should this request go unheeded, to submit a Request for Review. Moreover, the Chief Review Officer can extend the 30-day time limit under s. 15, where there are good grounds to do so (and it is reasonable to think that good faith negotiations between the Minister and a prospective applicant will furnish the required good grounds).

[87] Again, this is not a criticism of counsel in this matter, and is not intended to discourage recipients of Notices of Violation from invoking the Tribunal's jurisdiction. Rather, it is simply to point out that the most efficient and expeditious way to correct obvious errors in a Notice of Violation is for the recipient to communicate any concerns forthwith to the Minister.

*"Paul Daly"*

PAUL DALY
REVIEW OFFICER