Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date:	October 27, 2021
Citation:	*Neault v. Canada (Environment and Climate Change Canada),* 2021 EPTC 11
EPTC Case No.:	0031-2020
Case Name:	*Neault v. Canada (Environment and Climate Change)*
Applicant:	Patrick Neault
Respondent:	Minister of the Environment and Climate Change Canada

Subject of proceeding: Review commenced under section 15 of the *Environmental Violations Administrative Penalties Act*, SC 2009, c 14, s 126, of an Administrative Monetary Penalty issued under section 7 of that Act for a violation of paragraph 3(1)(a) of the *Wildlife Area Regulations*, CRC, c 1609, made under the *Canada Wildlife Act*, RSC, 1985, c W-9.

Heard: October 5, 2021 (by teleconference)

Appearances:

Parties	**Counsel or representative**
Patrick Neault	Self-Represented
Minister of the Environment and Climate Change Canada	Maude Normand

DECISION DELIVERED BY: **PAUL DALY**

Introduction

[1] On September 12, 2020, wildlife officers working for the Minister of Environment and Climate Change Canada ("the Minister") were conducting a patrol in the Îles de Contrecoeur National Wildlife Area ("the "Area") when they noticed Patrick Neault ("the Applicant") seated with his fishing gear in the Area.

[2] Mr. Neault received an Administrative Monetary Penalty issued under the authority of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA") for fishing in a wildlife area. The Notice of Violation assessing the penalty noted a violation of paragraph 3(1)(a) of the *Wildlife Area Regulations*, CRC, c 1609 ("WAR"). The notice provides for the payment of a $400 fine.

[3] The Applicant is challenging the Administrative Monetary Penalty, claiming that he had not started fishing and that he was not aware that he was in a wildlife area. For the reasons that follow, the request for review is dismissed: the Applicant was in the process of "fishing" in the Area within the meaning of the WAR and, despite his good faith, the Tribunal cannot find any flaw in the notice that would allow it to grant his request for review.

Analysis and Findings

Violation

[4] The regulatory provision that is primarily in question in this case is paragraph 3(1)(a) of the WAR:

Subject to subsection (2), no person shall, in any wildlife area, (a) hunt or fish . . .	Sous réserve du paragraphe (2), il est interdit à quiconque se trouve dans une réserve d'espèces sauvages (a) de chasser ou de pêcher […]

[5] The term "fishing" is not defined in the WAR. This regulatory silence is important because the Applicant claims that he was not fishing when the wildlife officers arrived in the Area. The Applicant agrees that he was in the Area, that he had his fishing gear and that he had baited his line, but insists that he had not cast his line in the water.

[6] In such a situation, can one say that the Applicant was "fishing" in the Area within the meaning of the WAR? This must be answered in the affirmative.

[7] As the Minister notes, even if the authors of the WAR remain silent as to the definition of "fishing", Parliament, for its part, was certainly not silent on the matter, namely in the *Fisheries Act*, RSC 1985, c F-14, which provides the following definition:

fishing means fishing for, catching or attempting to catch fish by any method	**pêche** s'entend de l'action de capturer ou de tenter de capturer du poisson par tout moyen et, en outre, notamment des espèces, populations, assemblages et stocks de poissons pêchés ou non, du lieu ou de la période où il est permis de pêcher ou de la méthode ou des types d'engins, d'équipements ou de bateaux de pêche utilisés

[8] To be sure, the definition does not expressly apply to the WAR. Nevertheless, it is appropriate to interpret legislative instruments in such a way as to further coherence in the law. In particular, when Parliament uses a term, it normally follows that it must be interpreted consistently. In this case, the WAR, which represents delegated legislation, must be interpreted in light of a definition found in legislation adopted by Parliament, the democratic assembly of elected representatives.

[9] The Minister points out, moreover, that there is Supreme Court of Canada jurisprudence on this very issue, namely in *Frederick Gerring Jr (The) v. The Queen*, 1897 CanLII 84 (SCC), 27 SCR 271, at pages 280–81:

> The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what "fishing", according to the ordinary acceptation of the word means and that, I think, is the meaning which we must give to the word in the statutes and treaty.

[10] That case involved the interpretation of a treaty between Canada and the United States, a very different context from the present one. Yet, as the Minister quite correctly points out, this stated understanding of the term "fishing" has been and continues to be used by tribunals across Canada: see, for example, *R. v. McKinnell Fishing Ltd.*, 2016 BCCA 472. Thus, it is appropriate to interpret the word "fishing" in the WAR in light of this Supreme Court decision, again to ensure that the jurisprudence is coherent. Here, the Supreme Court, Canada's ultimate authority on statutory interpretation, has provided an interpretation of the word "fishing". By using it to interpret the WAR, the Tribunal can

contribute to a harmonious and pan-Canadian interpretation of the term “fishing”. Thus, the act of “fishing” will have the same meaning whether one is fishing in the salt waters of the Atlantic or Pacific or in the Great Lakes, and whether one is fishing for lobster, salmon or sturgeon.

[11] In short, the same term should have the same meaning in all contexts, taking into account the jurisprudence interpreting the term, unless there is a statutory provision giving a different meaning to the term in question.

[12] Let us return to the Applicant. Of course, he was not fishing in the literal sense of the term. But he took all the necessary steps to fish. In the words of the *Fisheries Act*, he was “attempting to catch fish”. And if there were any doubt about this, it would be eliminated by the Supreme Court’s decision in *Gerring*, because the Applicant’s preparations are beyond doubt “preliminary preparations . . . for the taking of the fish”.

[13] The Applicant was therefore fishing in a wildlife area, an act prohibited under paragraph 3(1)(a) of the WAR.

[14] A Notice of Violation of the said provision may be issued under EVAMPA: see *Desrosiers v. Canada (Environment and Climate Change Canada)*, 2021 EPTC 5, at paragraphs 8-9. For the purposes of a request for review before the Tribunal, the Minister has the burden of proving, on the balance of probabilities, that a violation occurred: EVAMPA, subsection 20(2). Since the Applicant’s admissions amply support the Notice of Violation, the Minister has discharged his burden of proof in this case.

[15] The Applicant also argues that he was unaware that fishing was prohibited in the Area, particularly because there was no signage indicating that fishing and other activities were prohibited. While the Tribunal understands the Applicant’s frustration, it is not appropriate to grant his request for review on this basis. On the one hand, there is no obligation on the part of the Minister to post signs in a reserve identified by the WAR to indicate what is and is not permitted. The WAR provides that it is prohibited to fish in a wildlife area — including the Area — and as seen above, the Applicant was fishing there. On the other hand, EVAMPA precludes certain defences that applicants might otherwise raise, such as due diligence: EVAMPA, s 11. The fact that the Applicant did not know that he was committing an offence is not a consideration that the Tribunal can take into account in the context of a request for review under EVAMPA: see, for example, *Desrosiers v. Canada (Environment and Climate Change Canada),* 2021 EPTC 5, at paragraph 13. This is a regime of absolute liability, not merely strict liability, because consideration of the Applicant’s intentions has been excluded by Parliament.

[16] Also, the Applicant claims that the officers did not properly identify the offence on the spot. From the record, it appears that the Applicant violated (without, of course, any culpable intent) several provisions of the WAR and that the officers decided to impose only an Administrative Monetary Penalty. On a request for review, the Tribunal can only look at the Notice of Violation that is the subject of the request for review, to determine

whether an alleged violation actually occurred and whether the amount of the Administrative Monetary Penalty was correct: *Sirois v. Canada (Environment and Climate Change Canada),* 2020 EPTC 6, at paragraph 38. The fact that other violations may have occurred is simply not relevant.

Amount of penalty

[17] To properly calculate the amount of an Administrative Monetary Penalty issued under EVAMPA one must turn to subsection 4(1) of the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 ("the EVAMP Regulations"):

(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.

[18] In this case, we are simply interested in the variable "W". The Notice of Violation did not impose an amount for history of non-compliance, environmental damage or economic benefit. We need only identify the applicable base amount.

[19] In this regard, paragraph 5 of the EVAMP Regulations sets out where to find the relevant amounts:

The baseline penalty amount for a violation is the amount set out in column 3 of Schedule 4 or of Schedule 5 that corresponds to the category of the violator and the type of violation committed as set out in columns 1 and 2, respectively, of the applicable schedule.	Le montant de la pénalité de base applicable à une violation est celui prévu à la colonne 3 de l'annexe 4 ou de l'annexe 5, selon l'auteur et le type de violation commise figurant, respectivement, aux colonnes 1 et 2 de cette même annexe.

[20] Applying the formula in paragraph 5, we find that we are dealing with a Type B violation: Schedule 1, Part 2, Division 2 of the EVAMP Regulations.

[21] For an individual such as the Applicant who has committed a Type B violation, the applicable amount is $400: Schedule 4, Item 1, Column 3 of the EVAMP Regulations.

[22] It follows that the calculation of the Administrative Monetary Penalty is correct.

[23] At the time of their intervention, the officers told the Applicant that the amount of the Administrative Monetary Penalty would be $200. This was an error on their part. As we have seen, the statutory amount applicable in this case is $400. The fact that the officers did not properly communicate this information does not affect the calculation of the penalty amount. First, the Tribunal has no jurisdiction to change the amount of a penalty, because the calculation must be made in accordance with the terms of the EVAMP Regulations: *Hoang v. Canada (Environment and Climate Change Canada),* 2019 EPTC 2, at paragraph 23. Second, the Tribunal cannot review the exercise of discretion by the Minister's agents: *BCE Inc. v. Canada (Environment and Climate Change Canada),* 2021 EPTC 2, at paragraph 52. The decision whether or not to issue a Notice of Violation after finding that there was an error of communication, as in the present case, is beyond the jurisdiction of the Tribunal. Thus, two doors are closed to the Applicant by virtue of the limits Parliament chose to place on the powers granted to the Tribunal.

Conclusion

[24] The request for review must therefore be dismissed.

[25] A final comment is in order. Shortly before the hearing, the Applicant sent the Tribunal certain communications that he received in the course of his campaign to educate the public in the locality of the Area about the WAR prohibitions. This included a communication with his Member of Parliament. When the Tribunal sent the documents to the Minister for his comments, the Minister correctly argued that this communication was not relevant to the current request for review. In this regard, the Minister is entirely correct, having regard to the limits on the Tribunal's jurisdiction.

[26] In support of his position, the Minister also referred to the separation of powers. Here, however, insofar as the Tribunal is not the appropriate forum to review the discretion

of officers, it is quite understandable that an applicant would turn to a political public authority to remedy what he or she perceives to be an injustice: with the EVAMPA, Parliament has closed several doors to applicants, such as the door to a due diligence defence and the door to review of the discretion of the Minister's officers. Having done so, it is only Parliament that has the power to reopen the doors; it is ultimately to Parliament, moreover, that the Minister and his agents are accountable. Whether legislating or investigating, Parliament is a competent body to respond to the applicant's representations. For the purposes of the current request for review, these submissions are not relevant, but this does not mean that raising concerns about the operation of the EVAMPA regime violates the separation of powers.

Decision

[27] The request for review is dismissed. Notice of Violation N9200-2009 is therefore upheld.

Review dismissed

"*Paul Daly*"

PAUL DALY
REVIEW OFFICER