Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date:	July 15, 2022
Citation:	*Bell Canada v. Canada (Environment and Climate Change),* 2022 EPTC 6
EPTC Case No.:	0028-2020
Case Name:	*Bell Canada v. Canada (Environment and Climate Change)*
Applicant:	Bell Canada
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 that Act for a violation of paragraph 3(a) of the *Federal Halocarbon Regulations*, 2003, SOR/2003-289, made under the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33.

Appearances:

Parties	**Counsel**
Bell Canada	Stéphane Richer Julien Boudreault
Minister of the Environment and Climate Change Canada	Benjamin Chartrand

DECISION DELIVERED BY: **PAUL DALY**

Summary

[1] Bell Canada (the "applicant") is the owner of a building located at 930 d'Aiguillon Street, in Quebec City. This building is equipped with an air conditioning system, one of thousands of such systems that the applicant owns across Canada. Towards the end of May 2019, there was a significant leak of halocarbons from this system. An officer of the Minister of the Environment and Climate Change Canada (the "Minister") issued a notice of violation to the applicant alleging a violation of paragraph 3(a) of the *Federal Halocarbon Regulations, 2003*, SOR/2003-289 (the "*Regulations*"). Through this notice of violation, issued pursuant to the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 (the "*EVAMPA*"), an Administrative Monetary Penalty of $5,000.00 was imposed on the applicant, calculated in accordance with the analytical grids found in the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 (the "*EVAMPR*").

[2] The applicant is seeking a review of the notice of violation, raising both procedural and substantive arguments. In procedural terms, the applicant complains that the Minister did not specify in the notice of violation the actual day of the leak and further argues that this review process should be limited to an assessment of the violation as specified in the notice. In terms of substance, the applicant is of the view that continued control of the system is a necessary element in establishing a violation of section 3 and, since the management of the system had been contracted to a third party, the applicant cannot be held responsible for the leak. The applicant is also seeking a review of previous decisions rendered by review officers in relation to the limits of the jurisdiction of review officers hearing requests for review under the *EVAMPA*, especially over the Minister's discretion to issue notices of violation. It is the applicant's position that we can and should entertain a request for review where the Minister's guidelines indicate that a warning (not a notice of violation) would be the appropriate sanction.

[3] For his part, the Minister argues that the applicant had continued control of the system at the time of the leak, which would be sufficient to establish the applicant's liability for a breach of paragraph 3(a) of the *Regulations*. With respect to the procedural argument, the Minister is of the view that we should not read the notice of violation formalistically and that the notice of violation provided ample information to the applicant to enable it to make full answer and defence. Finally, the Minister is of the view that there is no need to revisit our previous decisions in relation to the limits of review officers' jurisdiction.

[4] Despite the applicant's well-formulated arguments, we are of the view that there are no grounds for granting its request for review. First, the arguments of a procedural nature do not justify granting the request for review. On the substance of the request for

review, the Minister has met his burden of proving, on a balance of probabilities, that the applicant has contravened section 3 of the *Regulations*. Finally, while the applicant raises new arguments about our jurisdiction, we see no basis for reversing the line of authority that posits that we cannot review the exercise of discretion by the Minister and his officers in deciding whether to issue a notice of violation. Under the *EVAMPA*, the role of a review officer is to ascertain whether a violation has occurred and whether the amount of the penalty so applied was correct.

[5] Following our interlocutory order issued in *Bell Canada v. Canada (Environment and Climate Change*, 2021 EPTC 3, the applicant filed certain documents under seal. At the request of the Tribunal and in order to comply with the confidentiality order, the parties were asked to identify passages of this decision that should be redacted.

Background

Factual Background

[6] The parties agreed on a partial agreed statement of facts.

[7] The applicant owns equipment across Canada, including nearly 11,000 air conditioning and refrigeration units and nearly 1,000 fire protection systems at several hundred sites, including the 03-004 air conditioning system (serial number 1410Q18246) (the "system") at the building located at 930 d'Aiguillon Street in Quebec City (the "building").

[8] Under a contractual agreement with Bell Canada, BGIS O&M Solutions ("BGIS") is responsible for maintaining and, if necessary, repairing the system in order to keep it in good working order and to comply with the regulations in force.

[9] On June 7, 2019, Bell Canada provided the Minister with a written notice which reported a leak of 206.4 kg of HFC 134A from the system on May 28, 2019.

[10] This notice triggered an inspection of the building by the Minister to ensure compliance with the *Regulations*.

[11] On June 11, 2020, the Minister issued the notice of violation that is the subject of this proceeding, alleging that Bell Canada had violated section 3 of the *Regulations* and imposing an administrative monetary penalty of $5,000 under the *EVAMPA*.

[12] On July 8, 2020, the applicant submitted a request to the Chief Review Officer of the Environmental Protection Tribunal of Canada for a review of the facts of the alleged violation and of the administrative monetary penalty imposed on it.

[13] Although the parties have agreed on this agreed statement of facts, there is disagreement about the day of the leak. It appears to have occurred on May 29, 2019, rather than on May 28, 2019. That said, the fact that there was a significant leak of halocarbons, over 200 kg, from the system as a result of a rupture in the piping was not in dispute.

Case Law Background

[14] A brief description of the legislative and regulatory background relevant to the current request for review is in order.

[15] Through the *EVAMPA* and the *EVAMPR*, Parliament created a mechanism to address violations of Canada's environmental laws. Parliament's objective was "to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the Environmental Acts" ("*d'établir, comme solution de rechange au régime pénal et comme complément aux autres mesures d'application des lois environnementales en vigueur, un régime juste et efficace de pénalités*") (*EVAMPA*, s 3).

[16] In the case of a violation of these environmental laws (a complete list of which is set out in Schedules 1, 2 and 3 of the *EVAMPR*), a person designated by the Minister (*EVAMPA*, s 6) may issue a notice of violation (*EVAMPR*, s 2) to the person that is believed to have committed the violation (*EVAMPA*, ss 7, 10), if that designated person has reasonable grounds to believe that a violation has been committed (*EVAMPA*, s 10). The notice of violation includes a penalty — an Administrative Monetary Penalty — which is calculated in accordance with the terms established by the *EVAMPR*: a base amount as well as additional amounts for aggravating factors, if any.

[17] A person, ship or vessel which is served with a notice of violation may seek a review of the notice of violation by submitting a request to the Chief Review Officer within 30 days of being served with the notice of violation (*EVAMPA*, section 15). The Chief Review Officer, as well as all review officers performing duties under the *EVAMPA*, is appointed under the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, ss 243–255 (the "*CEPA*").

[18] Until a request for review is submitted, the Minister may cancel or correct a notice of violation (*EVAMPA*, s 16; *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 9, at paras. 80–87). However, once the Chief Review Officer has received a request for review, the correction or cancellation of a notice of violation by the Minister is no longer possible.

[19] Before the Chief Review Officer (or, as in this case, the review officer designated by the Chief Review Officer: *EVAMPA*, s 17), the Minister has the burden of proving, on a balance of probabilities, that the applicant committed the violation (which is why the person named in the notice of violation describes himself or herself as the applicant, rather than the defendant or respondent, for the purposes of the request for review). The focus of the review process is on the liability of the person named in the notice of violation, "not whether some other entity could also have been issued a [penalty] because that other entity also committed a violation": *1952157 Ontario Inc. v. Canada (Environment and Climate Change)*, 2019 EPTC 5, at para. 39. It is thus incumbent on the review officer conducting the review to determine whether it is more likely than not that a violation has been committed (*EVAMPA*, ss 20(1) and (2)) and to verify that the amount of the applicable Administrative Monetary Penalty is correct (*EVAMPA*, s 20(3)). This limited role explains why a request for review must specify whether the purpose of the request is a review "of the penalty or the facts of the alleged violation, or both" (*EVAMPA*, s 15).

[20] In several earlier decisions, review officers hearing requests for review under the *EVAMPA* have reiterated that the sole role of a review officer in a request for review is to determine whether a violation has occurred and, if so, to ensure that the amount of the penalty is correct. In order to carry out this role, the review officer has certain powers to compel a person to appear or to produce documents (*EVAMPA*, s 19; *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 9).

[21] Lastly, the *EVAMPA* and the *EVAMPR* establish an absolute liability regime. Parliament achieved this objective by specifying in section 11 of the *EVAMPA* that "[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") ("*ne peut invoquer en défense le fait qu'il a pris les mesures nécessaires pour empêcher la violation ou qu'il croyait raisonnablement et en toute honnêteté à l'existence de faits qui, avérés, l'exonéreraient*"). Thus, the due diligence defence is excluded from the outset. Common law rules and principles nevertheless continue to apply, but only "to the extent that [their application] is not inconsistent with the Act" ("*dans la mesure de leur compatibilité avec la Loi*").

[22] As Dickson J. (as he then was) noted in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299, at page 1310, the result is the possibility of "conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished

as such". The comments of the Federal Court of Appeal in *Doyon v. Canada (Attorney General)*, 2009 FCA 152 describe this general context very well:

> [27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an *actus reus* which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.

[23] Significant consequences may follow, but the will of Parliament in this regard appears to be clear, at least according to our previous decisions: see, for example *F. Legault v. Canada (Environment and Climate Change)*; *R. Legault v. Canada (Environment and Climate Change)*, 2021 EPTC 1.

Issues

[24] First, (a) must a notice of violation under the *EVAMPA* identify the exact date of an alleged violation of paragraph 3(a) of the *Regulations*, and (b) if the Minister particularizes the alleged violation in the notice of violation, must the Minister so prove it as alleged?

[25] Second, has the Minister demonstrated, on a balance of probabilities, that the applicant committed a violation of paragraph 3(a) of the *Regulations*?

[26] Third, does the Tribunal have jurisdiction to review the exercise of the Minister's discretion to issue a notice of violation in a situation where the Minister's Guidelines indicate that an Administrative Monetary Penalty would not be the appropriate penalty?

[27] Fourth, was the amount of the penalty correct?

Analysis and Findings

First issue: (a) Must a notice of violation issued under the EVAMPA identify the exact date of an alleged violation of section 3 of the Regulations, and (b) if the Minister particularizes the alleged violation in the notice of violation, must the Minister so prove it as alleged?

[28] We have described this as the first issue but, of course, there are two sub-issues, which must be addressed together, because the issues raised are intrinsically linked.

[29] The applicant identifies two problems with the notice of violation. First, the date of the violation is not accurate. Second, the notice of violation particularized the alleged violation as one of releasing halocarbons rather than allowing or causing a release, and the Minister is now limited to showing that the applicant released halocarbons in order for the Tribunal to uphold the applicant's liability.

[30] Let us start with the *EVAMPA*, whose subsection 10(2) provides some guidance with respect to notices of violation:

The notice of violation must	Tout procès-verbal mentionne les éléments suivants :
(a) name the person, ship or vessel that is believed to have committed the violation;	a) le nom de l'auteur présumé de la violation;
(b) set out the relevant facts surrounding the violation;	b) les faits pertinents concernant la violation;
(c) set out the penalty for the violation;	c) le montant de la pénalité relatif à la violation;
(d) inform the person, ship or vessel of their right to request a review with respect to the alleged violation or penalty, and of the period within which that right must be exercised;	d) la faculté qu'a l'auteur présumé de la violation d'en demander une révision, ainsi que le délai pour ce faire;
(e) inform the person, ship or vessel of the manner of paying the penalty set out in the notice; and	e) les modalités de paiement de la pénalité;
	f) le fait que l'auteur présumé de la violation, s'il ne fait pas de demande de

(f) inform the person, ship or vessel that, if they do not pay the penalty or exercise their rights referred to in paragraph (d), they will be considered to have committed the violation and that they are liable for the penalty set out in the notice.	révision ou s'il ne paie pas la pénalité, est réputé avoir commis la violation et est tenu au paiement de cette pénalité.

[31] The dispute in this case revolves around the requirement that the notice of violation include the "relevant facts surrounding the violation".

[32] Section 3 of the *Regulations* reads as follows:

No person shall release, or allow or cause the release of, a halocarbon that is contained in (a) a refrigeration system or an air-conditioning system, or any associated container or device, unless the release results from a purge system that emits less than 0.1 kg of halocarbons per kilogram of air purged to the environment; (b) a fire-extinguishing system or any associated container or device, except to fight a fire that is not set for training purposes, or unless the release occurs during the recovery of halocarbons under section 7; or (c) a container or equipment used in the reuse, recycling, reclamation or storage of a halocarbon.	Il est interdit de rejeter un halocarbure — ou d'en permettre ou d'en causer le rejet — contenu, selon le cas : a) dans un système de réfrigération ou de climatisation, ou dans tout contenant ou dispositif complémentaire, sauf si le rejet se fait à partir d'un système à vidange qui émet moins de 0,1 kg d'halocarbure par kilogramme d'air vidangé dans l'environnement; b) dans un système d'extinction d'incendie ou dans tout contenant ou dispositif complémentaire, sauf pour lutter contre un incendie qui n'est pas allumé à des fins de formation ou si le rejet a lieu durant la récupération des halocarbures aux termes de l'article 7; c) dans un contenant ou du matériel servant à la réutilisation, au recyclage, à la régénération ou à l'entreposage d'un halocarbure.

[33] Part “C” of the notice of violation thus contains (1) the date of the violation (May 28), (2) the time of the violation (00:00), (3) the location of the violation (Room 601, 930 d’Aiguillon, Quebec City, Quebec, system 03-004 (Serial No. 1410Q18246), (4) the statute under which the notice of violation was issued (the *CEPA*, the framework statute of the *Regulations*), (5) an abbreviated description of the violation (“Releasing or having allowed or caused the release of a halocarbon contained in a system, container, or device in question”), (6) the type of violation (Type C, which has implications for calculating the appropriate penalty), and (7) a section entitled “Other Relevant Facts”. The “Other Relevant Facts” section contains a detailed explanation of the investigation conducted by the Minister’s officer.

[34] It cannot be said that the notice of violation does not include the “relevant facts surrounding the violation” because it is a document that that gives a detailed description of what happened, from the perspective of the Minister’s officer.

[35] The applicant does not question the compliance of the notice of violation with the requirements of the *EVAMPA*. Rather, it focuses on the date and on a sentence in the “Other Relevant Facts” section [TRANSLATION] “On May 28, 2019, the owner of the system failed to comply with the prohibition on the release of halocarbons . . .”. According to the applicant, the onus is on the Minister, in a request for review, to show (1) that the violation occurred in the manner described in the notice and (2) that the violation occurred on the date in question.

[36] The applicant relies on *Sirois v. Canada (Environment and Climate Change)*, 2020 EPTC 6, at para. 37, in which we explained that the role of the review officer is circumscribed by the *EVAMPA* and that “[e]ssentially, it is to verify that the violation as alleged in the notice of violation was indeed committed by the Applicant, and that the penalty, if any, was calculated correctly”. It also provides a reference to the Supreme Court of Canada’s decision in *R. v. Saunders*, [1990] 1 SCR 1020, where the following sentence appears: “It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved”.

[37] We do not agree with the applicant.

[38] First, the use of the word “alleged” in *Sirois* must be understood in its context. Moreover, the notice of violation is not an indictment, since we are in an administrative context, not a criminal one.

[39] With respect to the earlier decision in *Sirois* (which I also authored), the applicant places undue emphasis on the word “alleged”. The use of the word “alleged” must be understood in the context of the role of a review officer hearing a request for review under the *EVAMPA*. The notice of violation imposes an Administrative Monetary Penalty but

allows the affected person to make a request for review. In this request for review process, the review officer makes a *de novo* determination as to whether a violation occurred and whether the amount of the penalty imposed was correct. It is inherent in the process that the review officer must consider the entire record, starting with the notice of violation, but not limited to the content of the notice of violation.

[40] In *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 9, we explained that a review officer acts *de novo* and is not limited to the evidence held by the Minister at the time of the 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.

[41] A review officer is therefore not strictly limited to what is stated in the notice of violation. In other words, what is "alleged" in the notice of violation will not necessarily include all the evidence that the review officer will consider. To be sure, the violation complained of must be "alleged" — that is to say "identified": *Fontaine v. Canada*

(Environment and Climate Change), 2020 EPTC 5, at para. 37; *Desrosiers v. Canada (Environment and Climate Change)*, 2021 EPTC 5, at para. 10 — in the sense that the relevant facts of the violation must be specified in order to frame the debate and provide notice to the person who is the subject of the notice of violation.

[42] With respect to the argument that we should treat the notice of violation as an indictment, we have noted on a number of occasions that the *EVAMPA* establishes a system that is intended to be more flexible than the penal system, so we must be careful in borrowing legal concepts from other contexts: *BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 2 at paras. 25–29. Thus, we noted in *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 9 that notices of violation should not be treated as originating processes, and we disagreed with the proposition that notices of violation must be "detailed enough in their formulation to survive a motion for summary dismissal" (at para. 28).

[43] Just as notices of violation should not be equated with originating processes, they should not be equated with indictments. The Tribunal cannot blindly transpose the Supreme Court's teachings in *Saunders* to an administrative context. The Supreme Court commented on the importance of providing particulars in the indictment in a criminal context, where the liberty of the accused was at issue. The applicant's liberty is not at issue in this case, because we are in a purely administrative process where Canadian courts have traditionally recognized the virtues of flexibility, especially in procedural matters: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at paras. 29, 77 (the Supreme Court's "flexible" was translated as "*souple*" in the French version). Lastly, the applicant did not cite any authority applying the *Saunders* principle to an administrative context.

[44] The Minister rightly argues that the purpose of a notice of violation in an administrative context is to provide advance notice to the person being served, so that the latter can make full answer and defence: Patrice Garant, *Droit administratif*, 7th edition, Yvon Blais, Cowansville, 2017; see, by analogy *Omer Gingras ET Fils Inc. c Québec (Commission de protection du territoire agricole)*, 2019 CanLII 93284 (QC TAQ), at paras. 26–27. In *Saunders*, the Supreme Court referred to its decision in *The Queen v. Côté*, [1978] 1 SCR 8, where De Grandpré J. stated at page 13 that "the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the *Code,* it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure". Especially in an administrative context, where procedural flexibility is particularly important, it is important to avoid "extreme technicality".

[45] The notice of violation also provides a framework for the debate before the Tribunal. The Tribunal is not a royal commission with a general mandate to identify violations of Canada's environmental laws. Indeed, that task falls to the Minister, who has broad powers in this regard: *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 9, at paras. 46–55. Each request for review asks a specific question: did the person who received the notice of violation that is the subject of the request for review commit the violation alleged (identified) in it. It must be limited to ascertaining whether a violation occurred and whether the penalty imposed was calculated in accordance with the *EVAMPR*.

[46] We can now turn to the notice of violation at issue in this case.

First sub-issue: (a) Must a notice of violation issued under the EVAMPA identify the exact date of an alleged violation of section 3 of the Regulations?

[47] With respect to the date of the violation, we note at the outset that in the agreed statement of facts filed with the Tribunal in January 2021, the parties agreed that the report of release sent by the applicant to the Minister was dated May 28. In an affidavit filed by the applicant in March 2021, Martin Girard identified May 29 as the day of the leak.[1] Mr. Girard also testified that the report was "later" corrected. It is not clear, however, when this correction took place or whether the Minister's officer who was investigating the leak was notified of that correction.

[48] The applicant has not suffered any prejudice as a result of the identification of the date in the notice of violation. The evidence shows that from the outset of the investigation, all of the parties agreed that a significant system leak had occurred on May 28 or May 29. It is clear that the applicant was able to mount a full answer and defence in response to the notice of violation, despite the dispute as to the date of the leak.

[49] Notice in this regard that if the Minister had indicated in the notice of violation that the breach occurred on or about May 28, the applicant could not raise any objection. To insist that the Minister should have specified in the notice of violation that the violation occurred "on or about May 28" or "on or about May 29" would be an example of the extreme technicality that the Supreme Court of Canada has cautioned against, even in a criminal context.

[1] Martin Girard's affidavit, at para. 38.

[50] Moreover, the notice of violation also included a time of violation. Does the Minister have to show the very minute that a leak occurred? To ask the question is to answer it. The time and date are included to give notice to the person who is the subject of the notice of violation, a result which was amply achieved in this case. Certainly, in other contexts, the accuracy of the time and date of a violation may be more important (see: *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 9). However, in this case, the notice of violation provided all the necessary information to allow the applicant to mount a full defence.

Second sub-issue: (b) if the Minister particularizes the alleged violation in the notice of violation, must the Minister prove it as alleged?

[51] With respect to the particularization alleged by the applicant, it is appropriate to reproduce the sentence in question: [TRANSLATION] "On May 28, 2019, the owner of the system failed to comply with the prohibition on the release of halocarbons . . .". But the notice of violation should be read as a whole. The abbreviated description of the violation reads as follows: "Releasing or having allowed or caused the release of a halocarbon contained in a system, container, or device in question". Clearly, the Minister does not limit himself to a "release" in the notice of violation read as a whole, because he uses all of the wording of section 3 of the *Regulations*.

[52] In *Saunders*, the Crown chose to particularize the offence in the indictment for conspiracy to import by indicating that the drug in question was heroin. As McLachlin J. (as she then was) explained, the purpose of doing so was "to identify the transaction which is the basis of the alleged conspiracy" (at page 1023). Even if *Saunders* were to be applied in the context of the current request for review, it is clear that the "transaction which is the basis" of the alleged violation, namely, a leak in the system piping leading to a significant release of halocarbons, was identified in the notice of violation.

[53] In summary, the notice of violation put the applicant on notice of the alleged violation, a contravention of section 3 of the *Regulations* on or about May 28, 2019, and provided ample information to enable the applicant to make full answer and defence.

Second issue: Has the Minister demonstrated, on a balance of probabilities, that the applicant committed a violation of paragraph 3(a) of the Regulations?

[54] It is appropriate to reproduce the text of section 3 of the Regulations:

No person shall release, or allow or cause the release of, a halocarbon that is contained in (a) a refrigeration system or an air-conditioning system, or any associated container or device, unless the release results from a purge system that emits less than 0.1 kg of halocarbons per kilogram of air purged to the environment; (b) a fire-extinguishing system or any associated container or device, except to fight a fire that is not set for training purposes, or unless the release occurs during the recovery of halocarbons under section 7; or (c) a container or equipment used in the reuse, recycling, reclamation or storage of a halocarbon.	Il est interdit de rejeter un halocarbure — ou d'en permettre ou d'en causer le rejet — contenu, selon le cas : a) dans un système de réfrigération ou de climatisation, ou dans tout contenant ou dispositif complémentaire, sauf si le rejet se fait à partir d'un système à vidange qui émet moins de 0,1 kg d'halocarbure par kilogramme d'air vidangé dans l'environnement; b) dans un système d'extinction d'incendie ou dans tout contenant ou dispositif complémentaire, sauf pour lutter contre un incendie qui n'est pas allumé à des fins de formation ou si le rejet a lieu durant la récupération des halocarbures aux termes de l'article 7; c) dans un contenant ou du matériel servant à la réutilisation, au recyclage, à la régénération ou à l'entreposage d'un halocarbure.

[55] It is axiomatic that such a provision must be interpreted in light of its wording, context and objectives in order to identify the elements of a violation of the provision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at para. 120. As will be explained, the prohibition against "releasing a halocarbon — or allowing or causing the release of a halocarbon" is a single generic offence, with a very broad scope that goes hand in hand with Parliament's clear objective of protecting the environment. The *actus reus* of a violation is having continued control of a system

described in paragraph (a) or (b) or a container or equipment described in paragraph (c) at the time of a halocarbon release.

Text

[56] In this case, there is case law that deals with the wording of similar provisions, which can guide us in our interpretation exercise.

[57] Both the Minister and the applicant refer to the Supreme Court's decision in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299. That case dealt with subsection 32(1) of the *Ontario Water Resources Commission Act*, and in particular with "the interpretation of two troublesome words frequently found in public welfare statutes: 'cause' and 'permit'" (at p. 1327). Since Dickson J. was of the view that a new trial was necessary (because at trial the issue of due diligence, an applicable defence in the case, was not pleaded), his comments on the interpretation of subsection 32(1) (at page 1329) are *obiter*, but nonetheless carry the considerable weight of their author as well as that of the Supreme Court:

> It may be helpful, however, to consider in a general way the principles to be applied in determining whether a person or municipality has committed the *actus reus* of discharging, causing, or permitting pollution within the terms of s. 32(1), in particular in connection with pollution from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to excercise [*sic*] continued control of this activity and prevent the pollution from occurring, but fail to do so. The "discharging" aspect of the offence centres on direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen. The close interweaving of the meanings of these terms emphasizes again that s. 32(1) deals with only one generic offence.

[58] More recently, in *9340-4234 Québec inc. c. Ville de Mercier*, 2021 QCCS 5421, Charbonneau J. of the Quebec Superior Court had occasion to consider a municipal provision imposing a prohibition on [TRANSLATION] "throwing, depositing or allowing to be thrown or deposited" a variety of noxious materials [TRANSLATION] "onto or into public highways, waterways, lakes, public places, ditches or municipal sewers". It is worth quoting at length from her scholarly analysis of this provision, which is very illuminating given the similarities between it and section 3 of the *Regulations*, and tells us much about the context and objectives of such a provision:

[TRANSLATION]

[16] Has the respondent shown . . . that the appellant *permitted* mud to be deposited on the public road?

[17] In order to answer this issue, it is necessary to determine what the elements of the offence are. Section 3.12.1(b) of the By-Law prohibits depositing or allowing the deposit of various materials, such as mud and dirt.

[18] The use of the word “permit” is significant and goes some way to addressing the issue of whether a property owner can incur penal liability for the offence in question.

[19] First, the use of the word “permit” means that the failure to act is penalized, as explained by Côté-Harper, Rainville and Turgeon in the *Traité de droit pénal canadien*:

> [TRANSLATION]
>
> Omission is clearly inculpatory when expressions such as “omit”, “abandon” or “expose”, “voluntarily cause” or “permit” something are used. In the latter case, omission is penalized in the sense that someone has caused or permitted something by not preventing it.
>
> [References omitted.]

[20] As defined by the Supreme Court in *Sault Sainte-Marie*, “the ‘permitting’ aspect of the offence centres on the defendant’s passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen”.

[21] Second, the words used in the By-Law’s provision also help us determine which persons are covered by the duty to prevent an event from occurring. According to Swaigen and McRory in *Regulatory Offences In Canada*, the use of the verb “to permit” means that the provision is intended to penalize a broad spectrum of persons:

> The class of persons who have a duty to avoid or prevent violations will also be determined by the wording of the offence. If the statute makes it an offence to “permit”, “cause”, “concur in”, “participate in” or “acquiesce in” a prohibited act, or imposed a duty to “ensure” that precautions are taken to prevent harm, it may create a duty to prevent the offence in a much broader category of persons than those who actually do the prohibited act.

[22] Moreover, the offence in s. 3.12.1(b) is very broadly worded and does not specifically target a particular class of persons. Accordingly, we are of the view that the appellant, as the owner, may incur penal liability under this provision.

[23] However, this penal liability will only arise under certain conditions. Indeed, the fact of being a landlord will only be penalized if they had a duty to act, since one cannot be found guilty of an omission in the absence of a duty to act. To do so, they must have control or authority over the activity in question:

> One cannot "permit" something to happen unless one has knowledge that it is happening, but the *actus reus* consists in not taking steps that are appropriate to the circumstances to prevent it. This could be characterized as a failure to act, though it is difficult to regard this type of conduct as an omission in the classic sense of the word. Permitting something to happen or allowing it to occur, means that the person in question has authority over the situation, and the act in question consists of exercising such authority — albeit in a negative manner.
>
> [References omitted.]

[24] Thus, the obligation to prevent a violation rests on all persons who can control or prevent the factors underlying the activities that gave rise to the violation.

. . .

[29] The Court finds that, through the use of the words [TRANSLATION] "permit the deposit of mud and soil on public highways", the By-Law is intended to penalize any person who is in a position to exercise continued control over an activity that results in a spill of mud or soil, who is in a position to prevent it, but who fails to do so.

[30] Thus, the appellant as owner of the land could incur criminal liability. However, in order to do so, the respondent had to show that the appellant was in a position to exercise control over the activity that caused the spill, that is, the transportation of soil in the course of restoration work on the sand pit. This is one of the elements constituting the *actus reus*.

[59] In both *Sault Ste Marie* and *Ville de Mercier*, the courts noted that the language of a provision similar to section 3 of the *Regulations* was very broad. By its very wording, section 3 of the *Regulations* generally applies where there is a significant leak of halocarbons (subject to the exceptions set out in paragraphs (a) and (b)). It is "one generic offence" covering affirmative acts as well as omissions: *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299, at page 1329. The drafter was "therefore aiming as broadly as possible": *Sirois v. Canada (Environment and Climate Change)*, 2020 EPTC 6, at para. 46.

[60] That said, the scope of a provision such as section 3 of the *Regulations* is not unlimited. It cannot apply to everyone, only to certain persons who would be in a position to prevent the harm in question. This is why courts have developed the concept of "continued control". As for the text of the provision, the applicant argues that

[TRANSLATION] “the Minister has the burden of proving that the person committed a wilful act or omission to release, allow or cause the release of a halocarbon”.[2] It is the applicant’s view that the two exceptions in section 3 — in paragraphs (a) and (b) — would support its interpretation because they provide for wilful acts that cause leaks. However, according to the case law already mentioned, the “wilful” act for the purposes of section 3 of the *Regulations* is to have continued control of the system from which a halocarbon leak originated. In other words, the wilful act is to have a system that can, if it malfunctions, release significant amounts of halocarbons.

[61] Moreover, the fact that a few exceptions may refer to a voluntary release (although the one in paragraph 3(a) does not necessarily appear to be voluntary) does not change the clear language of section 3, which is very broad. Moreover, the exceptions provided are equally consistent with the notion of “one generic offence” requiring “continued control” of a system, because they raise (a) a situation where the leak would be *de minimis* and (b) an emergency situation. In both of these cases, it is entirely rational not to hold the person with continued control of the system liable for a leak.

[62] The case law cited by the applicant in support of its interpretation of the wording of section 3 of the *Regulations* is not germane. In *1213963 Ontario Limited (Sin City Bar and Eatery) v. Ontario (Alcohol and Gaming Commission)*, 2009 ONCA 323, at paras. 3–4, the provision in question was directed specifically at the liquor licensee and imposed a duty not to “allow” intoxicated persons into his or her establishment. Section 3 is much more broadly worded. With respect to *R. v. Edmonton (City)*, 2006 ABPC 56, while the comments about continued control at paras. 558–559 are accurate, in that case the municipality was found not to be liable because it had leased the property in question to a third party (see paras. 70–77) and was not exercising any control at the time of the release in question; in fact, the third party had disregarded the warnings of the municipality: at para. 567. The applicant also refers, albeit by analogy, to Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile, Volume 1 - Principes généraux*, 8th edition, 2014. The learned authors explain at para. 1-964 that in the context of property liability (which in this case would be BGIS’s and not the applicant’s, according to the latter’s arguments) the Quebec courts have [TRANSLATION] “applied the presumption of fault resulting from the general regime to the lessee, the bailee, the borrower, the usufructuary, etc.” With respect, this case is far from a type of relationship similar to that recognized in the Quebec case law.

[63] The Minister contends that the fact that the applicant submitted a release report to the Minister in accordance with the requirements of section 32 of the *Regulations* amounts to a self-declaration of guilt which establishes, in and of itself, a violation of

[2] Applicant’s written submissions, at paras. 19, 30, and 74.

section 3.[3] Without accepting the applicant's counter-arguments regarding self-incrimination (which in our view borrow too readily from the criminal context), we cannot accept the Minister's position. The "owner" is required by the terms of section 32 of the *Regulations* to submit a report in the event of a release of 100 kg or more of halocarbon. But the requirement to submit a report under section 32 does not mean that the owner is necessarily responsible for the leak. For example, a landlord may rent a property to a tenant. In such a case, the landlord would still be required to submit a report under section 32 of the *Regulations*, but would not necessarily have the continued control of the property that would trigger liability under section 3 of the *Regulations*. *R. v. Edmonton (City)*, 2006 ABPC 56 would appear to be a good example.

[64] Let us summarize our analysis of the wording of section 3 of the *Regulations* and the relevant case law and doctrine. Given that the *EVAMPA* places the burden of proof on the Minister, the Minister must show, on a balance of probabilities, that the applicant released, or allowed or caused the release of a halocarbon. This raises the question of whether the applicant had "continued control" of the system at the time the leak occurred and halocarbons were released.

Purpose

[65] The broad (but not unlimited) scope of section 3 of the *Regulations* goes hand in hand with the objective of protecting the environment — in the words of the Supreme Court of Canada, "a public purpose of superordinate importance" (*R. v. Hydro-Québec*, [1997] 3 SCR 213, at para. 85) — and appears to be quite common in environmental legislation: Paule Halley, "Infractions environnementales : éléments moral et matériel (JENV-15.3)", in *JCQ-Droit de l'environnement*, 2021. The objectives pursued, both by section 3 of the *Regulations* and by the similar provisions identified in the case law we have mentioned, are clearly to protect the environment.

[66] The applicant argues that the purpose of the *EVAMPA*, as well as that of the *CEPA*, in fact supports its position. As the applicant notes, section 3 of the *EVAMPA* states that the purpose is to establish a "fair and effective penalty regime" while one of the purposes of the *CEPA* is to apply it in a "fair, predictable and consistent" manner. Concerned about the risk of promoting efficiency at the expense of what would be "fair", the applicant also recalls the comments of the Federal Court of Appeal in *Doyon v. Canada (Attorney General)*, 2009 FCA 152:

[3] Minister's written submissions, at para. 38.

> [49] As this provision triggers a substantial monetary penalty, we must guard against a liberal interpretation that extends the scope of the essential elements, which are already quite broad, given the fact that the person who has committed the violation has absolute liability, that the prosecutor has a considerably reduced burden of proof and that the person who has committed a violation risks higher penalties in the event of a subsequent violation.

[67] Although made in a different statutory context, these comments are relevant to the present case, given the nature of the absolute liability regime established by Parliament in Canada's environmental legislation. In this case, the "scope" of the elements of section 3 extends to any person in continued control of a system or vessel at the time of a halocarbon leak and, in the context of a request for review, the *EVAMPA* instructs that the Minister must show that a violation occurred on a balance of probabilities. By holding the applicant accountable, we are not extending the scope of the provision: we are giving effect to the will of the drafter. A statutory reference to the "fairness" of a regime does not give the interpreter authority to rewrite the words used to create the regime in question. The same is true with respect to the consistency and predictability of the regime (one of the 17 objectives currently found in the *CEPA*). An interpreter who perceives an injustice is not permitted to add protections to which the litigant is not entitled: *Canada (Border Services) v. Tao*, 2014 FCA 52, at para. 28.

Context

[68] In order to limit the scope of section 3, the applicant develops a contextual analysis based on general principles of interpretation: the principle of voluntariness and the principle against self-incrimination. The applicant argues that section 3 [TRANSLATION] "should not be interpreted as applying to spontaneous and unforeseeable, and therefore involuntary, releases that could not be prevented by the person concerned".[4] As we have already explained, the "voluntariness" in this case is having "continued control" of a system from which a significant amount of halocarbons were released: this is the *actus reus* of section 3 of the *Regulations*. Having "continued control" of a system explains why one is responsible for spontaneous and unpredictable releases. As for self-incrimination, we have addressed the point above.

[69] In any event, this context nevertheless affects the disposition of the current request for review because we are well aware of the teachings of the Federal Court of Appeal in *Doyon*:

[4] Applicant's written submissions, at para. 43.

> [28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

[70] In applying paragraph 3(a), therefore, we must guard against mere conjecture, speculation, hunches, impressions and hearsay, and instead ensure that the Minister has relied on evidence "based on [sound] facts". In other words, we have a duty of circumspection when applying the notion of continued control.

Has the Minister shown, on a balance of probabilities, that a violation of paragraph 3(a) of the Regulations has occurred?

[71] It is clear in this case that a leak from an air conditioning system has occurred and that the exceptions in paragraphs 3(a) and (b) are not relevant. Thus, the only issue is, as will be explained, whether it is more likely than not that the applicant had continued control of the system at the time of the leak.

[72] The answer to this question is yes. The evidence shows that the applicant had "continued control" of the system.

[73] First, the applicant was the owner of the system. At the very least, ownership suggests that the owner has continued control of the property, because normally an owner will have continued control of their property. Of course, the Minister has the burden of showing that it is more likely than not that the owner had such control (*9340-4234 Québec inc. c. Ville de Mercier*, 2021 QCCS 5421, at para. 31). But in determining whether he has met his burden, it is legitimate to take into account the fact that an owner will normally have the capacity to control their property on a continuous basis. In this case, the agreed statement of facts indicates that the applicant was the owner of the system (and of the building in which the system was located), which supports the conclusion that the applicant had continued control at the time of the leak.

[74] Second, the applicant entered into a contractual relationship with BGIS precisely to ensure that the system operated in compliance with the *Regulations* and other applicable regulations. In other words, it was in exercising its continued control over the system that the applicant created this contractual agreement. The applicant is the owner of the system and, as the legal entity in continued control of the system, had put in place a contractual agreement to ensure compliance with its regulatory obligations.

[75] The applicant argues that it had transferred the monitoring and management of the system to a third party, BGIS, and no longer had continued control of the system. It is true

that the applicant is correct that [TRANSLATION] "BGIS must provide all the services normally required of a prudent manager".[5] However, the due diligence defense is expressly excluded by the plain language of the *EVAMPA*. At any rate, as Dickson J. instructs us in *Sault Ste Marie*, one who has continued control which justifies the imposition of regulatory liability "cannot avoid liability by contracting out the work": *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299, at page 1331.

[redacted]Third, the terms of the agreement between the applicant and BGIS demonstrate that the applicant had continued control over the building and the system. The property management contract generally provides for a collaborative relationship between BGIS and the applicant.[6] [redacted]

[77] The applicant replies that these provisions merely provide it with a [TRANSLATION] "right of review" to ensure that BGIS complies with the terms of the contract.[7] However, the terms of the contract preserve more than a right of review. Read as a whole, the property management contract provides, as we have already noted, for a collaborative relationship. This is a far cry from a situation where the applicant no longer has continued control of the system.

[78] In light of these three pieces of evidence, taken together, the Minister has discharged his burden of showing, on a balance of probabilities, that the applicant had continued control of the system and, since a halocarbon leak occurred, breached the

[5] Applicant's written submissions, at para. 81.
[6] Minister's written submissions, at para. 57.
[7] Applicant's written submissions, at para. 81.

prohibition against “releas[ing], allow[ing] or caus[ing] the release of a halocarbon”. Again, the exceptions in paragraphs (a) and (b) are not applicable in this case: paragraph (b) is simply not relevant, and the leak in question was much larger than the “less than 0.1 kg of halocarbon” referred to in paragraph (a).

[79] A final comment is in order on the proposition that the leak in question could have been caused by “spontaneous and unforeseeable breakdown” and therefore it would have been impossible for the applicant to prevent the leak (a defence preserved in subsection 11(2) of the *EVAMPA*). The Minister has provided us with a persuasive analysis in this regard. Indeed, impossibility is very difficult to demonstrate in a regulatory context, because impossibility “must be absolute”: Paule Halley, “Moyen d’exonération de la responsabilité pénale (JENV-15.4)”, in *JCQ-Droit de l’environnement, 2021*. As Professor Halley explains, [TRANSLATION] “the malfunctioning of industrial equipment is not a fortuitous event when the inspection, repair or replacement of the equipment would have made it possible to prevent the event”: Paule Halley, *Le droit pénal de l’environnement : l’interdiction de polluer*, Cowansville, Éditions Yvon Blais, 2001, at page 216. No doubt aware of the difficulty of overcoming the impossibility threshold, the applicant does not raise it as a defence, but rather focuses on the interpretation and application of section 3 of the *Regulations*.

[80] In short, section 3 of the *Regulations* is very broad in scope, extending, according to its text, context and purpose, read in light of the jurisprudence of courts that have dealt with similar provisions and scholarly commentary, to any person having “continued control” of a system or building. In this case, the Minister has demonstrated, on a balance of probabilities, that the applicant had continued control of the system at the time of the leak at issue in this request for review.

Was BGIS an "agent or mandatary" of the applicant?

[81] In the alternative, the Minister argues that BGIS was an "agent or mandatary" of the applicant. It is necessary to address this issue: if our analysis and application of paragraph 3(a) of the *Regulations* is wrong, would the applicant still be liable for the leak because BGIS was its "agent or mandatary"?

[82] We must begin with section 9 of the *EVAMPA*:

(1) In any proceedings under this Act against a person in relation to a violation, it is sufficient proof of the violation to establish that it was committed by an employee or agent or mandatary of the person, whether or not the agent or mandatary has been proceeded against in accordance with this Act.	(1) Dans les procédures en violation engagées au titre de la présente loi, il suffit, pour prouver la violation, d'établir qu'elle a été commise par un employé ou un mandataire de l'auteur de la violation, que l'employé ou le mandataire ait été ou non identifié ou poursuivi.

[83] In *Arcelor Mittal Canada Inc. v. Canada (Environment and Climate Change Canada); ArcelorMittal Dofasco MP Inc. v. Canada (Environment and Climate Change Canada)*, 2019 EPTC 4, at paras. 54–57, the Chief Review Officer confirmed the liability of a "partnership" for the acts of its partners and employees.

[84] Of course, this is not a case of a "partnership". But in the Minister's view, if the applicant assigned monitoring and control of the system to BGIS, it follows that BGIS was its "agent or mandatary", which would be sufficient to dismiss the request for review.

[85] We cannot accept the Minister's argument. First, there is the question of the applicable law: is it the civil law that applies, given that the event in question took place in Quebec, or the common law, [redacted] In this case, it is not necessary to answer this question definitively, because in both civil law and common law, BGIS is neither the "agent" nor the "mandatary" of the applicant.

[redacted]

[86] With respect to the civil law, as the Quebec Court of Appeal explained in *Canaque International construction inc. c. James Richardson International (Quebec) Ltd.*, 2000 CanLII 3786 (QC CA), per Gendreau J.:

> [TRANSLATION]
>
> [19] Legally, a mandate is a contract by which one person gives another the power to represent him or her in the performance of a juridical act; this means that the mandatary has the right and the power to create, amend or extinguish obligations for the mandator towards third parties. Conversely, there will be no mandate if the contractor's obligation is to produce a particular good or service. In this case, it will be a question of a contract for services or work or a contract of enterprise.

[87] The same is true at common law with respect to "agents". While the term is often used broadly and liberally to indicate a collaborative relationship between two persons, the technical meaning of the term is more limited. "Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties": Maurice Coombs, *Halsbury's Laws of Canada - Commercial Law I (Agency)* (reprinted 2020) at para. HAY-5. In the words of the British Columbia Supreme Court, "[t]he mere fact that a person does something for another does not mean that such a person becomes an agent for that other. Agency requires that the agent represent the principal": *Roeder v. Halicki*, [1983] B.C.J. No. 651, at para. 60; see also *Gichuru v. Purewal*, 2019 BCSC 731, at para. 46.

[88] [redacted] But simply because it has such authority in some respects to discharge its contractual obligations does not mean that the holder of that authority becomes entirely the "agent" or mandatary of the applicant. Although the wording of the contract is not determinative, it is a contract between the applicant and a "Service Provider", i.e. BGIS. In fact, Appendix B to the contract provides for several "services" to be provided to the applicant by BGIS. With respect to the system from which the halocarbons escaped, we cannot say that BGIS "represented" the applicant, whether we apply civil law or common law concepts.

Third issue: Does the Tribunal have jurisdiction to review the exercise of the Minister's discretion to issue a notice of violation in a situation where the Minister's Guidelines indicate that an administrative monetary penalty would not be the appropriate penalty?

[89] Review officers who hear requests for review under the *EVAMPA* have repeatedly ruled on the limits of their jurisdiction. The applicant submits, however, that there are other arguments that have not yet been made to a review officer that support a broader role for the review officer. Having considered the elegant arguments put forth by the applicant, we are of the view, as the Minister contends, that there is no reason to reverse the current line of authority, because the statutory and regulatory framework does not allow review officers to control the exercise of discretion to issue a notice of violation.

[90] It is appropriate to reproduce passages from *BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 2 for the most complete analysis of the issue:

> [32] The Tribunal's role is essentially to verify whether there was a violation as alleged in the Notice of Violation the applicant is seeking to have reviewed (the "facts of the alleged violation") and, if so, whether the administrative monetary penalty was properly calculated (the "[amount] of the penalty").
>
> [33] To begin with, the Tribunal verifies whether a violation of environmental laws has occurred.
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> . . .
>
> [36] In light of sections 7 and 20 of EVAMPA, it is incumbent upon the Tribunal to establish the facts to determine, on a balance of probabilities, whether a violation has occurred.
>
> . . .
>
> [39] The limited scope of the Tribunal's jurisdiction is consistent with Parliament's objective, as set out in section 3 of EVAMPA, to provide an alternative to the penal system. It is understandable that the implementation of a streamlined process dealing only with the existence of facts that do or do not justify the imposition of an administrative monetary penalty balances (i) the public interest in rigorous enforcement of environmental laws and (ii) the individual interest in an impartial and independent process for reviewing the decisions of environmental enforcement officers. To follow the penal process in this regard, however, would risk significant delay and cost.
>
> . . .

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

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

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

. . .

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

[48] In *Hoang v. Canada (Environment and Climate Change)*, 2019 EPTC 2, the applicant did not dispute that a violation had occurred, but argued that the imposition of an administrative monetary penalty was unfair and that the appropriate penalty in that case was a warning. After citing the relevant statutory and regulatory provisions, the Chief Review Officer found that the review of an enforcement officer's discretion to issue a notice of violation is not within the Tribunal's jurisdiction:

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

> aside the AMP once the elements of the violation have been demonstrated (at paras 21-22).

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

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

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

[51] Technically, as the Applicant argues, the Tribunal is not bound by its own decisions. Still, it is necessary to foster the development of a harmonized decision-making culture within the Tribunal and thus follow the Tribunal's previous jurisprudence unless there are good reasons to depart from it (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 131). As the case law is supported by the statutory and regulatory provisions regarding the Tribunal's jurisdiction, there is no reason to depart from it in this case, which is as true at this preliminary stage as it would be at the main hearing stage.

[91] The applicant makes four arguments which, in its view, demonstrate that this analysis is flawed.

[92] First, the applicant raises an issue regarding the bilingual interpretation of the relevant statutory provisions:

> [TRANSLATION]
>
> [T]he Tribunal's previous decisions ignore the English version of the provision, which provides for "a review of the penalty", thus clarifying the French text and confirming that the Tribunal's role is not limited to recalculating the "amount of the penalty" (*montant de la pénalité*). On the contrary, it has the power to determine that no penalty amount should be imposed in the circumstances.[9]

[93] Section 15 reads as follows:

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

[94] Even if there were a difference between the two versions, the difference would not support the applicant's argument. Let us follow the analytical framework for bilingual statutory interpretation set out by the Supreme Court in *R. v. Daoust*, 2004 SCC 6, [2004] 1 SCR 217, at paras. 26–31. The English version, which provides for a "review of the penalty" is perhaps broader in scope than the French version, which refers more narrowly to a [TRANSLATION] "review of the amount of the penalty" (*révision du montant de la pénalité*). But the common meaning of the two versions (which is what the Tribunal must look for first) would be the French version, because the "review of the penalty" in English may be limited to a "review of the amount of the penalty" in accordance with the French version. Thereafter, still following the approach of the Supreme Court in *Daoust*, one must "determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent" (at para. 30). In this regard,

[9] Bell Canada's written submissions, at para. 114.

the Tribunal refers to the extensive analysis found in *BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 2, as reproduced above.

[95] Second, the applicant submits that in previous decisions too much emphasis has been placed on section 20(3) of the *EVAMPA*, which provides that "[i]f 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". For the applicant, this provision does not limit the general scope of section 15. Then we would be reading the *EVAMPR* reductively:

> [TRANSLATION]
>
> Indeed, the discretion of the Minister with respect to the choice of enforcement measures — and indeed of the Tribunal under sections 15 and 20(3) of the *EVAMPA* — is derived from, among other things, section 2 of the Regulations, which states that a violation "may be proceeded with" ("est *punissable*"). Thus, the Tribunal may determine, "in accordance with the Regulations" ("*conformément aux règlements*"), that the appropriate enforcement action is a warning and not a penalty.[10]

[96] It is clear that the Minister has discretion as to whether or not to issue a notice of violation. The question is rather the jurisdiction of the Tribunal to review the exercise of that discretion. To answer this question requires a reading of the text, context and purpose of the *EVAMPA* and the *EVAMPR*. Once such a reading is done, the obvious conclusion is that the Tribunal does not have the jurisdiction that the applicant would have conferred on it, as explained in the passages from *BCE Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 2 reproduced above.

[97] Third, the applicant argues that without a power to review the Minister's exercise of discretion, the operation of the legislative scheme will be neither "fair", as required by section 3 of the *EVAMPA*, nor "predictable and consistent" as required by paragraph 2(1)(o) of the *CEPA*. With respect, the applicant misfires by invoking broad — and laudable — objectives in order to reopen or circumvent doors that Parliament has knowingly closed: *F. Legault v. Canada (Environment and Climate Change); R. Legault v. Canada (Environment and Climate Change)*, 2021 EPTC 1, at paras. 52, 54. Without a foundation in the *EVAMPA* or *EVAMPR*, a review officer, who as a statutory entity has no inherent jurisdiction, cannot exercise supervisory jurisdiction over the Minister's discretion.

[98] Fourth, the applicant raises the spectre of a segmentation of remedies:

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[10] Bell Canada's written submissions, at para. 116.

[TRANSLATION]

> Indeed, under the Tribunal's approach, the applicant will have to undertake, on the one hand, an administrative remedy to have the facts of the alleged violation reviewed and to obtain a recalculation of the amount of the penalty and, on the other hand, an application for judicial review in the Federal Court to have the choice of the enforcement measure reviewed.[11]

[99] To begin with, the applicant does not provide any details regarding the possibility of seeking judicial review of the choice of enforcement action. At present, such a remedy is purely theoretical: see *R. v. Anderson*, 2014 SCC 41, [2014] 2 SCR 167. If it is assumed that the Federal Court could review the choice of enforcement action (which is a matter for the Federal Court, of course), it is true that some disadvantages could follow. A person subject to a notice of violation would, in order to exhaust his or her remedies, have to file a request for review with the Chief Review Officer first, while filing a parallel application for judicial review in the Federal Court (which would remain pending, one imagines, while the Chief Review Officer or a designated review officer disposes of the request for review). However, a possible segmentation of remedies does not allow the Tribunal to grant itself a jurisdiction that was not granted by Parliament. Moreover, such a segmentation of remedies is not foreign to the Canadian legal system: see, for example, the Supreme Court's comments in *Canada (Minister of Citizenship and Immigration)) v. Vavilov*, 2019 SCC 65, at para. 52.

[100] In any event, even if we had jurisdiction to review the Minister's discretion, it is not clear that the Tribunal could intervene on the applicant's behalf. The applicant submits that in deciding what enforcement action to take, the Minister must rely on his own guidelines which, according to the applicant, lead to the conclusion that a warning would have been the appropriate action in this case, not a notice of violation. Admittedly, adherence to guidelines is an important aspect of reasonableness in Canadian administrative law: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at para. 131. However, the role of a review officer is not to rule on the reasonableness of the Minister's decisions, but rather to determine whether a violation has occurred and whether the penalty, if any, has been properly calculated. The applicant is looking for a way to give the force of law to guidelines, which we cannot provide under the limits on our jurisdiction imposed by Parliament.

[101] Lastly, the recent decision of the Federal Court of Appeal in *Canada (Attorney General) v. Chu*, 2022 FCA 105 makes the applicant's argument even less plausible. Of course, its arguments were made before the Federal Court of Appeal delivered its

[11] Bell Canada's written submissions, at para. 119.

decision, but we cannot ignore this recent decision. In *Chu*, the Canada Agricultural Review Tribunal set aside a notice of violation because the Minister did not give reasons for his decision to issue the notice of violation. Writing for the Federal Court of Appeal, Boivin J.A. explained that it was unreasonable for the Tribunal to do so:

> [7] The Act and Regulations clearly state that a violation of subsection 16(1) of the Animals Act is a "very serious violation" with a corresponding penalty of $1,300. The Tribunal agreed with the Minister's determination that the respondent imported pork sausages and did not present the sausages before or at the time of importation to an inspector, officer or customs officer, thereby violating subsection 16(1) of the Animals Act. Given that determination, the role of the Tribunal was limited to determining whether the penalty was established according to the Regulations. Instead, the Tribunal set aside the penalty, properly established by the Regulations, which was unreasonable.
>
> [8] Further, it was unreasonable for the Tribunal to review the Minister's discretion to issue the notice of violation and the applicable penalty. Parliament has clearly limited the Tribunal's powers to determining whether a violation has been proven and if so, and if applicable, whether the amount of the penalty has been imposed in accordance with the Regulations (the Act, ss. 14(1); *Canada (Attorney General) v. Vorobyov*, 2014 FCA 102, 459 NR 134 at para. 42). By reviewing the Minister's discretion, the Tribunal unreasonably interpreted its statutory powers and exercised authority contrary to the text of the Act.

[102] The Federal Court of Appeal even refused to refer the matter back to the Tribunal, on the basis that there was only one possible outcome.

[103] The Environmental Protection Tribunal of Canada is not the Canadian Agricultural Review Tribunal, but the limits on its jurisdiction appear to us to be similar: see in particular section 14 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* , SC 1995, c 40. In light of this recent and eminently clear decision, it seems to us that we cannot grant the applicant's request for a review of the Minister's exercise of discretion.

Fourth issue: Was the amount of the penalty correct?

[104] Even though the applicant did not dispute the amount of the penalty imposed, it is nonetheless incumbent upon us to verify that the calculation was correct, because this verification is one of the tasks assigned to review officers by Parliament: *Sirois v. Canada (Environment and Climate Change)*, 2020 EPTC 6, at para. 50.

[105] It is appropriate to begin with section 4(1) of the *EVAMPR*:

(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.

[106] A violation of section 3 of the *Regulations* is a Type C violation: Schedule 1, Part 5, Section 9, divisions 1 and 2. The base amount ("W") for a Type C violation committed by a corporation such as the applicant is $5,000: Schedule 4, Section 2, Column 2.

[107] The amount of the penalty imposed in this case, $5,000, was therefore correct.

Conclusion

[108] The request for review is dismissed. Notice of Violation N8200-0801 is therefore upheld.

Request for review dismissed

"Paul Daly"
PAUL DALY
REVIEW OFFICER