



Issue Date: June 9, 2022
Citation: *BGIS Global Integrated Solutions Canada LP v. Canada (Environment and Climate Change)*, 2022 EPTC 5
EPTC Case Nos.: 0009-2019 and 0010-2019
Case Name: *BGIS Global Integrated Solutions Canada LP v. Canada (Environment and Climate Change)*
Applicant: BGIS Global Integrated Solutions Canada LP
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*, S.C. 2009, c. 14, s. 126 (“EVAMPA”) of Administrative Monetary Penalties issued under section 7 of EVAMPA for violations of section 3(a) of the *Federal Halocarbon Regulations, 2003*, SOR/2003-289, enacted under the *Canadian Environmental Protection Act (1999)*, S.C. 1999, c. 33.

Heard: April 14, 2022 (by teleconference)

Appearances:

Parties

BGIS Global Integrated Solutions
Canada LP

Minister of the Environment and
Climate Change Canada

Counsel

Mark Youden

Samantha Pillon

DECISION DELIVERED BY:

PAMELA LARGE MORAN

Background

[1] Two Notices of Violation, numbered 8400-0276 and 8400-0302, (the “NOVs”) were issued to the Applicant, BGIS Global Integrated Solutions Canada LP (the “Applicant” or “BGIS”), on July 11, 2019, pursuant to Sections 7 and 10(1) of the *Environmental Violations Administrative Monetary Penalties Act* (the “EVAMPA”), for contravention of Section 3(a) of the *Federal Halocarbon Regulations, 2003* (the “FHR”).

[2] The Applicant argues two grounds for the request for review. First, that it did not contravene section 3(a) of the FHR because it did not “release or allow or cause to be released” a halocarbon contrary to the FHR. Second, the Applicant raises policy grounds for its request for review and argues that enforcement of the Administrative Monetary Penalties (the “AMPs”) runs contrary to public policy and the Review Officer should cancel the AMPs.

[3] Environment and Climate Change Canada (“ECCC” or “the Respondent”) maintains that the Applicant did contravene the FHR, it is a strict liability offence, and that the NOVs should be upheld.

Motion

[4] The Environmental Protection Tribunal of Canada (the “EPTC” or the “Tribunal”) has before it a motion by the Applicant on the issue of jurisdiction. This decision is not deciding the substantive question of whether the NOVs should be upheld.

[5] The preliminary jurisdictional questions raised in the motion are:

1. Whether the Tribunal has jurisdiction to consider the constitutional validity and applicability of legislation?
2. In conducting a “review of the penalty” pursuant to s. 15 of the EVAMPA, (a) can a Review Officer consider policy concerns, such as the potential chilling effect of enforcement on industry; and (b) if so, can a Review Officer cancel the NOVs because of these policy concerns?

Parties’ Positions

[6] In seeking to have the Tribunal determine that it has jurisdiction over the constitutional validity and applicability of legislation, the Applicant’s argument is threefold. Namely, that i) The Tribunal has implied jurisdiction to consider questions of law, including constitutional questions; ii) The Tribunal’s Draft Rules expressly provide for the manner in which constitutional questions can be raised; and iii) The Tribunal and ECCC have acknowledged the Tribunal’s jurisdiction over constitutional questions.

[7] BGIS further contends that in conducting a review of the penalty, a Review Officer pursuant to s. 15 of the EVAMPA can consider policy issues and thus cancel the NOVs based on policy concerns.

[8] In response, the ECCC maintains that Review Officers have limited authority delegated by Parliament and their authority is limited to that conferred upon Review Officers by statute. Specifically, the Respondent takes the position that Review Officers under the EVAMPA have no explicit or implicit authority to determine questions of law and therefore do not have jurisdiction to consider constitutional or *Charter* issues.

[9] The Respondent further contends, in the alternative, that if Review Officers do, in fact, have jurisdiction to consider questions of law, then their jurisdiction is limited to simply disregarding offending provisions of legislation and cannot make declarations of invalidity.

Applicant's Submissions

[10] With respect to jurisdictional question number one, the Applicant submits that the statutory mandate of Review Officers under the EVAMPA supports that they have implied jurisdiction to consider questions of law. Specifically, BGIS submits that s. 3 of the EVAMPA supports implied jurisdiction, and that Review Officers could not carry out their mandate without this authority.

[11] As well, s. 11, 15, and 17 of the EVAMPA provide Review Officers with the power to pronounce upon legal defences and thus engage in interpretation on questions of law and questions of evidence, and thus supports that they have jurisdiction.

[12] Further, BGIS maintains that the Tribunal, through its Draft Rules and jurisprudence, establishes that Review Officers have authority to decide constitutional questions that are properly before them.

[13] BGIS further relies upon the wording of the Tribunal's Draft Rules, specifically number 8 in allowing for "combined proceedings", and particularly referencing "questions of fact, law or policy," as a further basis of the Tribunal's implied jurisdiction. Additionally, Draft Rule 29, titled, "Constitutional Questions", according to BGIS, explicitly contemplates the consideration of constitutional questions by Review Officers.

[14] Additionally, BGIS submits that the right of judicial review from the Tribunal's decisions, based on either a failure to observe a principle of natural justice or an error of law, as well as the Tribunal's adjudicative nature, further support that it has the power to decide legal questions.

[15] BGIS also raises the fact that the Tribunal is an early venue for the determination of constitutional issues and thus in ensuring access to justice and promotion of the administration of justice supports that Parliament intended for the Tribunal to have the power to decide constitutional questions.

[16] With respect to jurisdictional question number two, whether Review Officers in conducting a review of the penalty can consider policy concerns, BGIS contends that Review Officers have a broad scope of authority pursuant to s. 15, 20 and, most specifically, s. 11 (2) of the EVAMPA.

[17] Additionally, BGIS proposes that Review Officers as statutory decision-makers, are subject to the duty of procedural fairness, and that the Policy Framework of the Tribunal in providing for the clarification on the implementation and administration of AMPs and enforcement of the EVAMPA is meant to be fair, predictable, and consistent to ensure the effectiveness of the measure in securing compliance. BGIS submits that this can give rise to legitimate expectations in those subject to the EVAMPA regime.

[18] BGIS has further raised a policy concern of a chilling effect on the industry if AMPs are enforced against entities performing all actions in their power to comply with the Regulations. BGIS thus maintains that Review Officers can consider such a policy concern as a matter of administrative law (procedural fairness) and as a matter of constitutional law (whether a constitutional right has been breached and if justified).

[19] BGIS, accordingly, takes the position that not only do Review Officers have the power to consider constitutional questions but also policy concerns, and further that Review Officers have remedial power to revoke, cancel or quash a notice of violation as a result of a policy concern.

Respondent's Submissions

[20] The Respondent submits that administrative decision-makers, including Review Officers in a federal Tribunal such as the EPTC, may only exercise their authority to consider issues or grant remedies as conferred upon them by statute.

[21] ECCC relies upon s. 15, 20 and 22 of the EVAMPA to support the proposition that a narrow construction of Review Officers' jurisdiction is set out therein, and explicitly limits Review Officers' inquiry to a two fact-based determination, specifically: whether the alleged violator committed the violation; and/or, whether the penalty is calculated in accordance with the EVAMPA and the Regulations.

[22] ECCC further submits that where there is no explicit granting of authority to determine questions of law, implied jurisdiction to decide questions of law may be determined with considerations of the statute as a whole.

[23] In reading the statute as a whole and in the context of the regulatory and review scheme established by the legislator, ECCC maintains that the intention is clear to limit the authority of Review Officers exclusively to that of deciding questions of fact. The Respondent reiterates that s. 15 of the EVAMPA limits Review Officers' authority to make two exclusively fact-based findings.

[24] ECCC further maintains that in determining whether the Minister has proven on a balance of probabilities that the alleged violator committed the violation and whether the penalty amount is in accordance with the legislation, it is not necessary for the Review Officer to engage in statutory interpretation of its legislation, or to make any determinations of law in order to make the factual findings that are necessary to carry out its statutory mandate.

[25] Further, ECCC's position with respect to s. 11(1) and (2) of the EVAMPA, is that upon establishing the exclusion of certain defences in the subsections, rules and principles of common law that are not inconsistent with the Act may be applied. However, in considering whether such rules or principles of common law provide justification to excuse a violation, it is not necessary for Review Officers to determine questions of law but only consideration of the factual circumstances are necessary.

[26] Additionally, ECCC submits that the role and mandate of Review Officers under the EVAMPA is not adjudicative in nature and that the AMP scheme under the EVAMPA, with Review Officers' limited jurisdiction, assists the purpose of the Act in achieving fast and inexpensive determinations, thus making the system of review under the EVAMPA more accessible.

[27] Accordingly, it is ECCC's clear position that Review Officers conducting reviews pursuant to the EVAMPA, have not been granted the authority by the provisions of that Act to make determinations with respect to questions of law, neither explicitly nor implicitly.

[28] ECCC concedes, however, that the jurisprudence supports that where an administrative tribunal does, in fact, have the jurisdiction to consider a question of law, whether explicit or implicit, it has the power to interpret the *Charter* and apply it to the relevant provisions of the statute being challenged.

[29] Further, ECCC submits, in the alternative, that if Review Officers have statutory authority to decide questions of law, the authority to consider constitutional validity and applicability of legislation is limited. Therefore, Review Officers cannot make a declaration

of invalidity of the statute but may disregard the provision that is inconsistent with the *Charter* for the purpose of the matter before it.

[30] Finally, ECCC maintains that the explicit language of the EVAMPA, prevents Review Officers from forgiving or otherwise cancelling an NOV issued by ECCC and further do not have discretion to consider other factors, such as the effect on industry when determining a review.

Analysis and Conclusions

Jurisdiction on Questions of Law

[31] EPTC Review Officers have no express jurisdiction to consider questions of law. However, they have an implied jurisdiction to consider questions of law. Indeed, this implied jurisdiction is essential to permitting Review Officers to fulfil the role granted to them by Parliament. As Review Officers have implied jurisdiction to consider questions of law they also have, by extension, jurisdiction to consider constitutional questions.

[32] There is a myriad of instances of this in Tribunal jurisprudence, where Review Officers have engaged in not only statutory interpretation of the legislation and regulations under the Tribunal's purview but also other relevant legislation and regulations. Review Officers have also accordingly made determinations of law in order to make the factual findings necessary to carry out the Tribunal's statutory mandate.

[33] While not an exhaustive review of the Tribunal's jurisprudence, I will provide just some of the Tribunal decisions clearly demonstrating numerous instances where Review Officers employ legal analysis.

[34] To begin, although s. 7, 11(1), 15,17, and 20 of EVAMPA impose absolute liability, the Minister still must prove all elements of the violation, on a balance of probabilities, under the impugned legislation. Section 20 (2) of EVAMPA sets out that the legal burden of proof is on the Minister. Thus, this requires EPTC Review Officers to engage in legal and factual analysis of the offending provisions of the legislation in determining if the Minister has met the required evidentiary burden.

[35] In *Legault v. Canada (Environment and Climate Change Canada)*, 2021 EPTC 1, the Applicant was given an NOV for breaching the *Migratory Birds Regulations* ("MBR"). In the case, the Review Officer conducted a detailed legal analysis of the elements of the violation set out in the MBR, as well as interpreting the EVAMP Regulations to ascertain the necessary causal link between the violation and the resulting environmental harm.

[36] In *BGIS O&M Solutions Inc. v. Canada (Environment and Climate Change)*, 2021 EPTC 9, the Applicant sought to have the Tribunal entertain a motion for summary

dismissal of an NOV prior to the Minister closing its case. The Review Officer in disposing of the issue was required to examine questions of law and statutory interpretation of the EVAMPA.

[37] Further, in *Bhaiyat v. Canada (Environment and Climate Change)*, 2019 EPTC 1, the Chief Review Officer was asked to interpret the wording of the EVAMPA and the EVAMP Regulations in determining whether Review Officers have the power to forgive or decrease the amount of a penalty.

[38] Also, in *1952157 Ontario Inc. v. Canada (Environment and Climate Change)*, 2019 EPTC 5, the Chief Review Officer was called upon to interpret a provision in the EVAMP Regulations relating to an aggravating factor of economic gain by the violator. In that situation, the Chief Review Officer was required to interpret the wording of s. 8(1) of the Regulations and determine whether the timing of the economic gain should be at the time of the violation or at a later point. When a penalty has been imposed because of the presence of an aggravating factor, Review Officers must determine whether the aggravating factor was present, having regard to the legal definition of the aggravating factor in the EVAMP Regulations. Accordingly, Review Officers in their analysis are often required to answer legal questions as to causation, i.e. whether the offence caused environmental harm, whether the violator has a history of non-compliance, or whether there was a benefit to the violator as a result of the violation: *1952157 Ontario Inc. v. Canada (Environment and Climate Change)*, 2019 EPTC 5 (economic gain); *Kruger v. Canada (Environment and Climate Change)*, 2020 EPTC 1 (economic gain); *Sirois v. Canada (Environment and Climate Change)*, 2020 EPTC 6 (environmental harm); *Nyobe v. Canada (Environment and Climate Change)*, 2020 EPTC 7 (environmental harm and economic gain); *Moreau v. Canada (Environment and Climate Change)*, 2020 EPTC 8 (history of non-compliance).

[39] In *ArcelorMittal Canada inc. v. Canada (Environment and Climate Change)*, 2019 EPTC 4, the EPTC Review Officer conducted a detailed legal analysis of the law relating to partnerships, which required interpretation of provincial legislation, in order to determine whether the individual partners could be liable under the EVAMPA.

[40] Additionally, I agree with the Applicant's submission that s. 11 of the EVAMPA, while excluding legal defences of due diligence and mistake of fact, does allow for other common law defences. This thus requires Review Officers to consider and analyze various common law defences. This clearly requires Review Officers to engage in legal analysis.

[41] This is aptly demonstrated in the recent Tribunal decision, *Cameron Wildlife Solutions v. Canada (Environment and Climate Change)*, 2022 EPTC 2, wherein the Review Officer was required to consider the Applicant's common law defence of

necessity, which provides that noncompliance with the law may be excused by an emergency or justified by the pursuit of a greater good. In the case, the Review Officer had to apply the facts and evidence of the case to Supreme Court of Canada jurisprudence setting out three elements required for the defence of necessity to succeed.

[42] As well, in the case of *Rice v. Canada (Environment and Climate Change)*, 2020 EPTC 4, the justification or excuse proposed by the Applicant was the common law defence of entrapment. This issue was well analysed by the Review Officer in the case, who applied the guidance of the Federal Court of Appeal in *Canada (Attorney General) v. Klevtsov*, 2018 FCA 196 as follows:

... this Tribunal must determine whether the constituent elements of an entrapment defence exist on the evidence before it can find the charges not proven. In other words, the Tribunal must first consider what the evidentiary and legal elements might be to establish the entrapment defence to the charge set out in the Notice of Violation. Then it must examine the evidence itself and determine if it is sufficient to satisfy the required elements.

[43] Accordingly, I conclude that EPTC Review Officers frequently deal with varied legal questions, legal interpretation, and legal analysis in fulfilling their roles. As set out, they interpret the EVAMPA and its Regulations, as well as other relevant legislation and regulations. In order to fulfil the role given to them by Parliament, Review Officers must always analyze the constituent elements of a violation in the particular impugned environmental legislation and consider the legal and evidentiary burden imposed on the Minister. They further interpret Common Law defences. All of the foregoing is relevant to whether the Tribunal has implied jurisdiction to determine questions of law and, by extension, constitutional questions.

[44] I, therefore, find that EPTC Review Officers not only have implied jurisdiction to determine questions of law, but such jurisdiction is clearly necessary to effectively carry out the mandate of the Tribunal. It is noteworthy that such necessity was determined to be a significant factor on the issue of an administrative body's power to determine questions of law as set out in Supreme Court of Canada leading authority, *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54.

[45] Accordingly, given my determination that EPTC Review Officers have implied jurisdiction to analyze and determine questions of law, there is no need to consider the additional arguments raised by the Applicant relating to the EPTC Draft Rules and the Policy Framework issue.

Constitutional validity and applicability of legislation

[46] When a Tribunal's mandate engages questions of law, the Tribunal also has the power to decide constitutional/*Charter* issues. This was clearly explained by the Supreme Court of Canada in *Martin (supra)*:

...An administrative body will normally either have or not have the power to decide questions of law. As stated above, administrative bodies that do have that power may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard... Absent a clear expression or implication of contrary intent, such administrative bodies will also have jurisdiction to subject the statutory provisions over which they have jurisdiction to Charter scrutiny... [emphasis added]

[47] Further, counsel for the Minister quite rightly pointed out that further jurisprudence has confirmed that where an administrative tribunal has the jurisdiction to decide questions of law, it will be presumed to be able to apply the *Charter*. *Mario Cote Inc. v. Canada (AG)*, 2017 FCA 36 para.15.

[48] Accordingly, when a *Charter* right is involved, EPTC Review Officers can review a provision of law for compliance with the *Charter*. However, in the case before me, the Applicant has not put forth any particular *Charter* right infringement to be considered.

Policy Issue

[49] BGIS appears to be seeking that in my determining that EPTC Review Officers have the power to consider a *Charter* issue applicable to the legislation, I, should likewise, accept the proposition that a policy issue is akin to a constitutional issue and may be considered. I do not accept this to be the case. A policy issue is an entirely different matter altogether. Review Officers' implied jurisdiction does not extend to allowing a party to raise a policy issue or concern, such as the potential chilling effect of enforcement on industry. BGIS has provided no authority for the proposition that there is a constitutional right to invoke public policy as a defence in regulatory proceedings.

[50] Para. 70 of the Applicant's Submissions Brief, BGIS proposes a 3-part test as follows:

EPTC must then have the jurisdiction to 'revoke' or 'cancel' a notice of violation or AMP where an applicant is able to make out a common law defence pursuant to subsection 11(2) of EVAMPA, including on:

- i) *grounds that an AMP was decided in breach of affording legitimate expectations.*
- ii) *was otherwise decided in denial of the duty of fairness.*
- iii) *where an AMP or its enabling legislation was unconstitutional.*

[51] Accordingly, BGIS is attempting to broaden common law defences referred to in s. 11 of the EVAMPA to include breach of legitimate expectations and denial of the duty of fairness. However, after establishing the exclusion of certain defenses in s. 11(1), subsection 11(2) of the EVAMPA states:

(2) Every rule and principle that renders any circumstance a justification or excuse in relation to a charge for an offence under an Environmental Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

[52] A policy issue does not meet the definition in the EVAMPA s. 11(2) of “render[ing] any circumstance a justification or excuse” and as such is not a common law defence in a regulatory proceeding. Accordingly, there is no constitutional, statutory or common law basis for allowing BGIS to raise public policy as a defence in the context of a Request for Review.

[53] In response to the third part of BGIS’s test, BGIS has not put forth any constitutional issue or *Charter* violation to be considered.

[54] Further, I agree with the Minister that s. 15 and s. 22 of the EVAMPA limit what a Review Officer can do upon review. The Tribunal’s decisions are consistent in establishing that a Review Officer can strictly do 2 things: i) examine whether the ECCC has met the burden of establishing that a violation occurred, and ii) determine whether the AMP amount is correct according to the EVAMP Regulations.

[55] It is well established that after conducting the review, if the Review Officer determines that the violation was committed, s. 22 of the EVAMPA states, “the person, ship or vessel is liable for the amount of the penalty as set out in the decision.” This mandatory language limits the decision-making power of the Review Officer and removes discretion of the Review Officer to consider other factors in upholding a penalty. If the Review Officer finds that the violation was committed, then liability for the penalty follows. Review Officers do not have broad authority, and as the Tribunal has consistently held, have no jurisdiction to review the discretion of the enforcement officer.

[56] Accordingly, with respect to the preliminary jurisdictional motion questions set out at the beginning of this decision (para. 5), I answer question 1) in the affirmative, and find that the EPTC does have jurisdiction to consider the constitutional validity and

applicability of legislation. In regard to question 2) I answer that in the negative and find that pursuant to s. 15 of the EVAMPA, a Review Officer cannot consider policy concerns, such as the potential chilling effect of enforcement on industry nor cancel the NOV's because of these policy concerns.

Decision

[57] BGIS's motion is granted in part. I find that EPTC Review Officers do have jurisdiction to consider the constitutional validity and applicability of legislation. The remainder of BGIS's motion is dismissed. The next step is a hearing on the merits unless there are any preliminary issues to resolve. Pursuant to s. 20 of the EVAMPA, the Minister has the burden to establish on a balance of probabilities that BGIS violated s. 3(a) of the *Federal Halocarbon Regulations, 2003* as set out in the NOV's and that penalties are applicable.

"Pamela Large Moran"

PAMELA LARGE MORAN
REVIEW OFFICER