Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date: November 16, 2023

Citation: *BGIS Global Integrated Solutions Canada LP v. Canada (Environment and Climate Change),* 2023 EPTC 11

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 of Administrative Monetary Penalties issued under section 7 of that Act 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: July 21, 2023 (by videoconference)

Appearances:

Parties	**Counsel**
BGIS Global Integrated Solutions Canada LP	Mark Youden
Minister of Environment and Climate Change Canada	Sahar Mir

DECISION DELIVERED BY: **PAMELA LARGE MORAN**

Introduction

[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* ("*EVAMPA*"), for contravention of Section 3(a) of the *Federal Halocarbon Regulations, 2003, SOR/2003 289* (the "*FHR*").

[2] The Applicant denies that it released, caused, or allowed a release of a halocarbon in violation of Section 3(a) of the *FHR* and is seeking a review of the two NOVs.

Background

[3] According to the parties' *Agreed Statement of Facts*, the two Chiller systems where the halocarbons were released are located in two different buildings in Winnipeg, Manitoba: (i) the Canadian Grain Commission Building, 303 Main St. ("CGC building") and (ii) the Canada Revenue Agency Building, 66 Stapon Rd ("CRA building") (collectively, the "Facilities").

[4] The Facilities are owned by the Crown and administered through Public Services and Procurement Canada ("PSPC"). BGIS, a real property management services company, contracted with PSPC to provide property management services to the Facilities. These services included facility operation, maintenance management, repairs, and replacement of building systems and components.

[5] Southampton-Trane Air Conditioning (Calgary) Inc., or its affiliate, ("Trane") manufactures air conditioning equipment and provides maintenance services for such equipment. BGIS contracted Trane to provide maintenance and servicing for certain equipment located in the Facilities.

[6] On November 5, 2018, a halocarbon leak was detected from the Chiller located at the CGC building ("CGC Chiller"). The leak from the CGC Chiller (the "CGC Leak") released 108 kg of halocarbon before it was capped and isolated the same day. It was ultimately repaired on February 1, 2019.

[7] BGIS verbally reported the CGC Leak to the Minister of Environment and Climate Change (the "Minister") on the same day of the leak. A written report was provided on February 12, 2019.

[8] On April 24, 2019, a halocarbon leak was detected from the Chiller located at the CRA building ("CRA Chiller"). The leak from the CRA Chiller (the "CRA Leak") released 136 kg of halocarbon.

[9] The CRA Leak was verbally reported to the Minister on May 2, 2019. A written report was provided on May 13, 2019.

Issues

[10] The parties have put forth the agreed upon issues in this matter as follows:

i. Did BGIS release, or allow or cause the release of, a halocarbon from (i) the CGC Chiller; and (ii) CRA Chiller (as defined in the parties' *Agreed Statement of Facts*), in violation of section 3(a) of the *Federal Halocarbon Regulations, 2003, SOR/2003-289?*

ii. Were the CGC Leak and the CRA Leak (as defined in the parties' *Agreed Statement of Facts*) impossible to prevent, and therefore justified or excused pursuant to subsection 11(2) of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("*EVAMPA*")?

iii. Is the Absolute Liability regime created by section 11(1)(a) of *EVAMPA* unconstitutional, or otherwise offensive to the principles of natural justice?

[11] The Applicant submits that:

i. It did not contravene section 3(a) of the *FHR* because it did not have continuing control over the CGC Chiller and the CRA Chiller and thus did not "release or allow or cause to be released" a halocarbon contrary to the *FHR*.

ii. The leaks were impossible to prevent and therefore justified or excused pursuant to subsection 11(2) of *EVAMPA*.

iii. The Absolute Liability regime created by section 11(1)(a) of *EVAMPA* is unconstitutional or otherwise offensive to the principles of natural justice.

[12] The Respondent, Environment and Climate Change Canada ("ECCC" or "the Respondent") maintains that:

i. The Applicant did contravene the *FHR* in that it had continuing control over the CGC Chiller and the CRA Chiller, such that it released, or allowed or caused the release of, a halocarbon.

ii. There is no defence of due diligence under *EVAMPA* regime. Further, the Applicant has not established that the leaks were impossible to prevent. BGIS had the ability to prevent the leaks and failed to do so.

iii. *EVAMPA* violations under section 7 are not considered criminal offences, and thus, subsection 11(d) of the *Charter of Rights and Freedoms* ("*the Charter*") does not apply. Further, *EVAMPA* is not contrary to the principles of Natural Justice.

Relevant Legislation and Regulations

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

3 No person shall release, or allow or cause the release of, a halocarbon that is contained in	**3** Il est interdit de rejeter un halocarbure — ou d'en permettre ou d'en causer le rejet — contenu, selon le cas :
(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;	**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) 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	**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) a container or equipment used in the reuse, recycling, reclamation or storage of a halocarbon.	**c)** dans un contenant ou du matériel servant à la réutilisation, au recyclage, à la régénération ou à l'entreposage d'un halocarbure.

Issue # 1: Did BGIS release, or allow or cause the release of, a halocarbon from (i) the CGC Chiller; and (ii) CRA Chiller (as defined in the parties' *Agreed Statement of Facts*), in violation of section 3(a) of the *Federal Halocarbon Regulations, 2003, SOR/2003-289*?

Applicant's Submissions

[14] BGIS maintains that ECCC has the burden to establish that BGIS either released, or allowed or caused the release of a halocarbon at either of the facilities. The issue is whether BGIS "allowed the release" to occur.

[15] BGIS submits that in an Absolute Liability offence such as section 3(a), for BGIS to have allowed the release, BGIS i) had to have care and control over the system from which the release occurred and ii) ought to have foreseen it.

[16] BGIS relies upon contractual provisions between BGIS and PSPC and BGIS and Trane and contends that, practically, the relationship between the parties was such that PSPC exercised absolute authority and control over all works carried out on the Chillers, and Trane carried out all relevant works and provided all information about the maintenance, servicing, and operation of the chillers.

[17] Accordingly, BGIS maintains that every action regarding the Chillers was subject to PSPC approval, and ultimate decision-making regarding maintenance and servicing rested with PSPC.

[18] Further, a comprehensive and non-exhaustive suite of preventative and predictive maintenance services were subcontracted by BGIS to Trane, of which PSPC was aware and approved.

[19] Thus, BGIS maintains that the full extent of the care and control necessary to provide the basis for a violation of s.3(a) rested with PSPC and Trane and not BGIS.

[20] It is further BGIS's position that it did not allow the Releases from the Chillers because the Releases were inherently unforeseeable and, alternatively, the requirement to foresee the releases was the responsibility of Trane under Trane's maintenance and servicing obligations and not BGIS's responsibility.

Respondent's Submissions

[21] ECCC, on the other hand, submits that section 3(a) has a broad scope extending to any person who had continuing control of a system at the time of a halocarbon leak.

[22] ECCC further takes the position that the interpretation of the word "allow" centers on the Applicant's passive lack of interference, in other words, its failure to prevent an occurrence which it ought to have foreseen.

[23] ECCC further submits that the obligation to prevent a violation rests on all persons who can control or prevent the factors giving rise to the violation. ECCC points to various contractual provisions between BGIS, PSPC and Trane, which, ECCC maintains, evidence that BGIS was in a position to ensure that the chillers were maintained at peak performance and to take proactive steps in ensuring the Chillers' optimal conditions.

[24] ECCC thus asserts that BGIS had continuing control of the Chillers by maintaining authority over proposing changes to PSPC regarding maintenance procedures, such as additional inspections and repairs. BGIS, by not exercising its control over the Chillers to inspect, maintain and repair them for optimal performance in line with the *FHR*, allowed or permitted the two halocarbon leaks in violation of section 3(a) of the *FHR*.

Analysis and Findings for Issue # 1

[25] Subsection 3(a) 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. The prohibition against "releasing a halocarbon — or allowing or causing the release of a halocarbon" has a broad scope that harmonizes 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.

[26] Both the Applicant and the Respondent have put forth jurisprudence that provides some guidance on the interpretation of the provision in issue.

[27] Both reference to the Supreme Court's decision in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, which dealt with the interpretation of the words: "cause" and "permit". The "causing" aspect was noted to centre on the defendant's active undertaking of something which it is in a position to control while 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.

[28] The Applicant and the Respondent further reference *9340-4234 Québec inc. c. Ville de Mercier*, 2021 QCCS 5421, a decision of the Quebec Superior Court, dealing with a provision relating to the absolute liability offence of polluting, which uses similar wording to the *FHR* provision is issue, namely "allowing" pollution to occur. Germane to the issue at hand, the Court states the following:

> [TRANSLATION]
>
> [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.

[29] Accordingly, the broad scope of provisions such as section 3 of the *Regulations* is circumscribed somewhat by the concept of "continued control". In other words, it only applies to certain persons who would be able to prevent the harm in question. Thus, according to the foregoing case law, the "wilful" act for the purposes of section 3 of the *Regulations* is to have "continued control" or "authority" over the system from which a halocarbon leak originated.

[30] The determination of “continued control” is thus a factual determination which, in the present case, is assisted by an analysis of the contractual terms between BGIS and PSPC, and BGIS and Trane.

[31] Relating to this issue, I agree with ECCC’s position supported by a decision of this Tribunal, *Bell Canada v Canada (Environment and Climate Change)*, 2022 EPTC 6, which held that in some situations there may be more than one person who is in a position to control or prevent the violation. Accordingly, multiple parties can have “continuing control” of the same system at the same time.

[32] Although it is the Applicant’s position that the full extent of the care and control necessary to provide the basis for a violation of section 3(a) rested with PSPC and Trane, based on the evidence, and in particular, the contractual provisions, I find that not to have been the case.

Contractual Provisions

[33] The Applicant maintains that by virtue of the “Work Authorization” in the BGIS-PSPC Contract, every action in respect of the Chillers was subject to PSPC’s approval and direction, including high-level decision-making authority regarding maintenance and servicing of the Chillers.

[34] Similarly, the Applicant submits with respect to its Contract with Trane, that maintenance and servicing was carried out wholly by Trane. In other words, the Applicant sub-contracted its maintenance and servicing of the Chillers to Trane, which also included Trane advising BGIS of any work needed to prevent releases or other malfunctions of the Chillers.

[35] The Applicant contends that these contractual provisions explicitly encompassed preventative and predictive maintenance services, including regular inspections and written reports to BGIS; preventative maintenance in accordance with manufacturers’ recommendations; the provision of audits on the internal integrity of the Chillers; leak test the Chillers; etc.

[36] The Respondent states that the PSPC-BGIS Contract requires, inter alia, that BGIS will “manage risk effectively, which includes ensuring due diligence and compliance with applicable legislation and policy”, and “improve the environmental sustainability of government accommodations…”

[37] According to the Respondent, there are four sections of the *Statement of Work* in the BGIS-PSPC Contract that highlight BGIS’s continuing control over the Chillers:

i. BGIS is required to ensure that the overall management and operations of the Facilities and equipment therein is consistent with the applicable legislation and support custodians in complying with legislation.

ii. BGIS is contractually obligated to handle the day-to-day responsibilities of operating the Facilities and the Chillers, 24 hours per day, 365 days per year. This includes operating the building and system in accordance with the most current release of the appropriate industry standards and government policies and guidelines.

iii. BGIS is to provide maintenance services for the continual improvement of activities and ongoing performance measurement, taking into consideration, age, construction detail, condition, heritage designation and exposure conditions. In maintaining the Facilities, BGIS is to undertake maintenance based on evidence of need, which includes ensuring that equipment systems perform at peak efficiency, that BGIS demonstrate due diligence, and that BGIS provide effective analysis, decision-making and planning for future repair programs.

iv. BGIS is to provide environmental management services for the Facilities. This includes providing support, identifying requirements, and undertaking work to ensure compliance with the CEPA and other environmental legislation. Further, BGIS is contracted to specifically identify opportunities and make recommendations to reduce greenhouse gas emissions to meet requested targets and to manage halocarbons generally.

[38] The Respondent's contention is that BGIS was in the position to ensure that the Chillers were maintained at peak performance and to take proactive steps in ensuring the Chillers' optimal conditions, which could include additional inspections or other maintenance procedures to meet the requirements of the *FHR*.

[39] Further, BGIS was on the ground overseeing the day-to-day operations and would have been intimately aware of the condition of the Chillers, what aspects of the equipment commonly fail or require regular monitoring. BGIS also has the authority to set out maintenance and repair procedures and processes to best ensure that the Chillers remain in top form and in line with the *FHR*.

[40] All of these obligations, the Respondent contends, indicate BGIS' vital authority and control over the maintenance and repairs of the Chillers.

[41] Additionally, in response to the Applicant's position that PSPC's approval for costs of repairs and priority of repairs establishes that BGIS does not have continuing control, ECCC submits that BGIS retains control as the one capable of proposing changes to PSPC regarding maintenance procedures, such as additional inspections and repairs.

[42] Accordingly, upon my careful review of the various contractual provisions, I am persuaded by ECCC's submissions and characterization of BGIS's obligations under the Contracts in issue and conclude that the Contracts evidence BGIS's continuing control of the Chillers.

[43] Further, although the PSPC-BGIS Contract does allow BGIS to subcontract aspects of the Contract, such as BGIS's subcontracting to Trane, the PSPC-BGIS Contract states:

> *Even if Canada consents to a subcontract, the Contractor is responsible for performing the Contract and Canada is not responsible to any subcontractor. The Contractor is responsible for any matters or things done or provided by any subcontractor under the Contract …*

[44] Further, Trane's roles and responsibilities of reporting and record keeping under the BGIS-Trane Contract requires under "Inspection Plan", Trane providing a written report to BGIS about the condition of the equipment and any recommendations for necessary repairs.

[45] Under "Predictive Maintenance Plan" in the BGIS-Trane Contract as well, BGIS must be advised on any dynamic or static parameters that may cause equipment problems and upon annual inspection and leak testing, an email is to be sent to BGIS, as well as leak tests and reports provided in on-site logbooks.

[46] Accordingly, in considering the Contracts as a whole, including the Statement of Work in the PSPC-BGIS Contract as previously set out, I find on a balance of probabilities that BGIS had continuing control over the Chillers.

[47] Regarding the issue of foreseeability, the Applicant contends that the Chillers are prone to unforeseen leaks and thus the halocarbon releases were inherently unforeseeable.

[48] In my view, the Applicant has not put forth sufficient convincing evidence that the halocarbon releases were unforeseeable and that BGIS took reasonable precautions to prevent the releases.

[49] I further do not accept the Applicant's contention that the ability to foresee rested with Trane and not BGIS because of Trane's maintenance and servicing requirements in the BGIS-Trane Contract**.** This is not supported by the contractual evidence of Trane's roles and responsibilities of reporting and record keeping for BGIS with respect to the condition of the equipment, the need for repairs, leak testing, etc.

[50] I therefore conclude that BGIS "allowed to be released" halocarbons contrary to the *FHR*.

ISSUE # 2: Were the CGC Leak and the CRA Leak (as defined in the parties' *Agreed Statement of Facts*) impossible to prevent, and therefore justified or excused pursuant to subsection 11(2) of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("*EVAMPA*")?

Applicant's Submissions

[51] The Applicant submits that while section 11(1) precludes the use of due diligence as a defence, section 11(2) of *EVAMPA* preserves the use of other common law defences. I agree with this.

Relevant Legislation and Regulations

[52] Section 11 excludes certain defences, thereby establishing a regime of Absolute Liability. It is appropriate to reproduce the text of section 11(1) and section 11(2) of *EVAMPA*:

11 (1) A person, ship or vessel named in a notice of violation does not have a defence by reason that the person or, in the case of a ship or vessel, its owner, operator, master or chief engineer **(a)** exercised due diligence to prevent the violation; or **(b)** (b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person, ship or vessel. **(2)** Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an Environmental Act applies in respect of a violation to the extent that it is not inconsistent with this Act.	**11 (1)** L'auteur présumé de la violation — dans le cas d'un navire ou d'un bâtiment, son propriétaire, son exploitant, son capitaine ou son mécanicien en chef — 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. **(2)** Les règles et principes de la common law qui font d'une circonstance une justification ou une excuse dans le cadre d'une poursuite pour infraction à une loi environnementale s'appliquent à l'égard d'une violation dans la mesure de leur compatibilité avec la présente loi.

[52] The Applicant maintains that the common law defence of impossibility of compliance is made out because Chiller systems by their nature are prone to unforeseen leaks, and the extent and frequency of inspections, repairs, and replacements necessary

for BGIS to undertake to prevent occurrences like the Releases renders compliance with section 3(a) not a “reasonable legal alternative”.

[53] Further, the Applicant submits that the reasonable legal alternative in the present circumstances can be inferred from maintenance protocols produced by the manufacturers of the Chillers and from the *FHR*, which prescribes maintenance requirements. BGIS subcontracted Trane to follow the manufacturers’ protocols and exceeded the maintenance requirements prescribed by the *FHR*.

[54] Accordingly, BGIS maintains that in order to make out the defence of impossibility, BGIS was not required to have taken every last precaution imaginable to prevent releases of halocarbon.

Respondent’s Submissions

[55] The Respondent relying upon this Tribunal’s decision in *Bell*, previously referenced, maintains that to establish a defence of impossibility, the impossibility must be “absolute”, and the high threshold is not met when the inspection, repair or replacement of equipment would have made it possible to prevent.

[56] Thus, given BGIS’s authority under the PSPC Contract, control over the frequency and quality of inspections, and the repair of certain equipment, it was obligated to provide effective analysis and decision-making to ensure ongoing maintenance.

[57] The Respondent further contends that BGIS has the onus to put forth evidence to support its defence of impossibility but has failed to do so and thus BGIS has not established that the Releases were not possible to prevent nor justified/excused under section 11(2) of *EVAMPA*.

Analysis and Findings for Issue # 2

[58] I am more persuaded by the Respondent’s submission on this issue. There were ample contractual provisions whereby BGIS had inspection, repair, and maintenance obligations.

[59] Further, I find that the common law excuse of impossibility requires that the impossibility be absolute. In this case, BGIS has not put forth sufficient evidence to establish either that the impossibility was absolute, or that they undertook sufficient steps under their obligations to inspect, repair and maintain the equipment.

[60] I therefore conclude that the Applicant has not established on a balance of probabilities that the leaks were impossible to prevent and is not excused from liability pursuant to subsection 11(2) of *EVAMPA*.

Issue # 3: Is the Absolute Liability regime created by section 11(1)(a) of *EVAMPA* unconstitutional, or otherwise offensive to the principles of Natural Justice?

Applicant's Submissions

[61] The Applicant contends that the premise upon which Absolute Liability is based is that it involves occurrences that are easy to avoid. However, in contrast, releases from the Chillers are not easy to control and that violations of section 3(a) are not practically preventable. Therefore, the provision of a penalty where there is no moral blameworthiness may offend the principles of Natural Justice.

[62] Further, according to the Applicant, the Absolute Liability regime created by section 11(1)(a) of *EVAMPA* violates section 11(d) of the *Charter* because it presumes guilt and denies an accused the benefit of reasonable doubt and is not justified under section 1 of the *Charter*.

[63] The Applicant maintains that section 11 *Charter* protections are available to those charged with criminal offences. Penalties pursuant to *EVAMPA* are both criminal by their very nature and true penal consequences such that they trigger the procedural safeguards provided by section 11(d) of the *Charter*.

Respondent's Submissions

[64] In response, the Respondent relies upon section 13(2) of *EVAMPA*, which specifies that a violation is not an offence and that the *Criminal Code* does not apply in respect of a violation. Thus, section 11 of the *Charter* does not have any application in the circumstances.

[65] The Respondent further submits, relying upon the *Sault Ste. Marie* case, that Absolute Liability entails conviction on proof merely that the Defendant committed the prohibited act and there is no relevant mental element.

Analysis and Findings for Issue # 3

[66] I have carefully considered the parties' submissions and agree with the Respondent. Section 13(2) of *EVAMPA*, makes it very clear that violations are not offences and that the *Criminal Code* does not apply.

[67] Section 11(d) of the *Charter* provides:

> **11.** Any person charged with an offence has the right:

> **d)** to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Section 13(2) of *EVAMPA* provides:

> **13 (1)** Proceeding with any act or omission as a violation under this Act precludes proceeding with it as an offence under an Environmental Act, and proceeding with it as an offence under an Environmental Act precludes proceeding with it as a violation under this Act.
>
> **(2)** For greater certainty, a violation is not an offence and, accordingly, section 126 of the *Criminal Code* does not apply in respect of a violation**.**

[68] An "offence" is a term that has a specific meaning in Canadian statutes. When enforcing the Act, Enforcement Officers make choices about what type of penalty they will issue. *EVAMPA* clearly states that the administrative monetary penalty regime applies to "violations" of the Act rather than offences. It is clear that protection under 11(d) of the *Charter* only applies to offences. Accordingly, I find that section 11(d) of the *Charter* is not applicable in this case.

[69] Further, I agree with the Respondent that the Absolute Liability regime of *EVAMPA* requires no relevant mental element. I thus find that the statute is not offensive to the principles of Natural Justice.

Was the amount of the penalty correct?

[70] Even though the applicant did not dispute the amount of the penalties 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.

[71] It is appropriate to begin with section 4(1) of the *Environmental Violations Administrative Monetary Penalties Regulations,* SOR/2017-109:

(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.

[72] A violation of section 3 of the *FHR* 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.

[73] The amount of the penalty imposed in this case, $5,000, for each violation was therefore correct.

Decision

[74] The requests for review are dismissed. Notices of Violation 8400-0276 and 8400-0302 are therefore upheld.

Review Dismissed

"Pamela Large Moran"
PAMELA LARGE MORAN
REVIEW OFFICER