

Federal Court



Cour fédérale

**Date: 20260316**

**Docket: T-3619-24**

**Citation: 2026 FC 354**

**Ottawa, Ontario, March 16, 2026**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**POTASH CORPORATION OF  
SASKATCHEWAN INC.**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is the judicial review of a decision of the Environmental Protection Tribunal of Canada [Tribunal], dated November 15, 2024 (*Potash Corporation of Saskatchewan Inc v Canada (Environment and Climate Change)*, 2024 EPTC 6 (EPTC Case No. 0035-2023 to 0044-2023)). The Tribunal, at the request of the Applicant, the Potash Corporation of Saskatchewan Inc. [PCS], reviewed the notices of violations [NOV] issued with respect to the death of migratory birds on PCS's premises. The Tribunal upheld the NOV's and dismissed the review.

## Factual Background

[2] The factual background is generally not in dispute. As indicated and reproduced by the Tribunal in its decision, the parties jointly filed with the Tribunal a Partially Agreed Statement of Facts.

[3] The agreed facts include that on the morning of September 6, 2022, two environmental engineers employed by PCS discovered approximately 36 dead birds within a maintenance coverall structure at PCS's Nutrien Allan Potash mine. PCS retained Canada North Environmental Services Limited Partnership [CanNorth] to inspect the coverall structure, photograph and collect the birds. On the afternoon of September 6, 2022, CanNorth attended the site and discovered 88 freshly deceased Barn Swallows. The agreed facts state that PCS voluntarily reported the incident to the Canadian Wildlife Health Cooperative [CWHC] on September 7, 2022, and provided the 88 bird carcasses to CWHC. On September 12, 2022, two Environment and Climate Change Canada [ECCC] officers inspected the coverall structure, which was indicated as being used day to day for the housing of equipment and supplies. A CWHC wildlife biologist examined the birds, a necropsy for cause of death was conducted on ten of the 88 carcasses and a report was generated, a copy of which was attached to the Partially Agreed Statement of Facts.

[4] The agreed facts also indicate that on August 16, 2023, one of the officers [Officer] who conducted the PCS site inspection issued ten separate NOV's for contraventions of paragraph 5(1)(a) of the *Migratory Birds Regulations, 2022, SOR/2022-105 [MB Regulations]*, one for

each deceased bird examined by CWHC. PCS was issued ten administrative monetary penalties [AMP] in the aggregate amount of \$20,000 (base) plus \$30,000 on account of aggravating factors, pursuant to the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14 s 126 [*EVAMP Act*] and the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 [*EVAMP Regulations*]. Each of the ten AMPs was broken down as: \$2,000 base penalty amount and \$3,000 for environmental harm.

[5] On September 13, 2023, PCS submitted a request to the Tribunal for review, pursuant to section 15 of the *EVAMP Act*, of all of the NOVs [Request for Review].

[6] By its decision dated November 15, 2024, the Tribunal upheld the NOVs and dismissed the review.

### **Relevant Legislation, Regulations and Directives**

*Migratory Birds Convention Act*, 1994, SC 1994, c 22 [*MBC Act*]

#### **Penalty — other persons**

**13(3)** Every person, other than an individual or a corporation referred to in subsection (4), that commits an offence under subsection (1) is liable,

...

**(b)** on summary conviction,

**(i)** for a first offence, to a fine of not less than \$100,000 and not more than \$4,000,000, and ...

#### **Offences involving more than one bird or nest**

**13.19** If an offence under this Act involves more than one migratory bird or nest, the fine to be imposed in respect of that offence may, despite sections 13, 13.01, 13.03 and 13.04, be the

total of the fines that would have been imposed if each of the migratory birds or nests had been the subject of a separate information.

*Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14 s 126 [EVAMP Act]

### **Purpose of Act**

**3** The purpose of this Act is 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.

...

### **Regulations**

**5 (1)** The Governor in Council may make regulations

**(a)** designating as a violation that may be proceeded with in accordance with this Act

**(i)** the contravention of any specified provision of an Environmental Act or of any of its regulations,

**(ii)** the contravention of any order or direction, or of any order or direction of any specified class of orders or directions, made under any provision of an Environmental Act or of any of its regulations,

**(iii)** the failure to comply with any obligation, or with any obligation of any specified class of obligations, arising from an Environmental Act or any of its regulations, or

**(iv)** the failure to comply with any condition of a permit, licence or other authorization, or any condition of any specified class of conditions of permits, licences or other authorizations, issued under an Environmental Act or any of its regulations;

**(b)** respecting the determination of, or the method of determining, the amount payable as the penalty for each violation, penalties which may be different for individuals and other persons, and for ships and vessels;

.....

**Restriction — amount of penalty**

**5(4)** The amount that may be determined under any regulations made under paragraph (1)(b) as the penalty for a violation may not be more than \$5,000, in the case of an individual, and \$25,000, in the case of any other person or a ship or a vessel.

.....

**Commission**

**7** Every person, ship or vessel that contravenes or fails to comply with a provision, order, direction, obligation or condition designated by regulations made under paragraph 5(1)(a) commits a violation and is liable to an administrative monetary penalty of an amount to be determined in accordance with the regulations.

.....

**Proof of violation — persons**

**9 (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.

.....

**Certain defences not available**

**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) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person, ship or vessel.

**Common law principles**

**(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.

.....

**Violation or offence**

**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.

**Violations not offences**

**(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.

.....

**Right to request review**

**15** 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.

.....

**Decision**

**20 (1)** After giving the person, ship or vessel that requested the review and the Minister reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for the person, ship or vessel and the Minister to make oral representations, the review officer or panel conducting the review shall determine whether the person, ship or vessel committed a violation.

**Burden**

**(2)** The Minister has the burden of establishing, on a balance of probabilities, that the person, ship or vessel committed the violation.

**Correction of penalty**

**(3)** If the review officer or panel determines that the penalty for the violation was not determined in accordance with the regulations, the review officer or panel shall correct the amount of the penalty.

***Migratory Birds Regulations***, 2022, SOR/2022-105 [*MB Regulations*]

(made pursuant to subsection 5(1) of the *EVAMP Act* as well as the *Migratory Birds Convention Act, 1994* and the *Canada National Parks Act*)

**Prohibitions**

**5 (1)** A person must not engage in any of the following activities unless they have a permit that authorizes them to do so or they are authorized by these Regulations to do so:

(a) capture, kill, take, injure or harass a migratory bird or attempt to do so;

***Environmental Violations Administrative Monetary Penalties Regulations***, SOR/2017-109 [*EVAMP Regulations*]

(made pursuant to section 5 of the *EVAMP Act*)

**Definitions**

**2** The following definitions apply in this Act.

....

**Environmental Act** means the Antarctic Environmental Protection Act, the Canada National Marine Conservation Areas Act, the Canada National Parks Act, the Canada Water Act, the Canada Wildlife Act, the Impact Assessment Act, the Canadian Environmental Protection Act, 1999, the Greenhouse Gas Pollution Pricing Act, the International River Improvements Act, the Migratory Birds Convention Act, 1994, the Rouge National Urban Park Act, the Saguenay-St. Lawrence Marine Park Act or the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act. (loi environnementale)

**Provisions of Environmental Acts and regulations**

**2 (1)** The contravention of a provision of an Environmental Act or of any of its regulations that is set out in column 1 of Schedule 1 is designated as a violation that may be proceeded with in accordance with the Act.

.....

## Types of violations

**3** The contravention of a provision set out in column 1 of Schedule 1, of an order or direction made under a provision set out in column 1 of Schedule 2, or of a condition referred to in a provision set out in column 1 of Schedule 3 is classified as a Type A, B or C violation in accordance with column 2 of the respective schedule.

## Penalties

### Formula

**4** The amount of the penalty for each 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.

## SCHEDULE 1

### PART 4

#### DIVISION 2

#### [Migratory Birds Regulations, 2022](#)

	Column 1	Column 2
Item	Provision	Violation Type
1	5(1)(a)	B

**SCHEDULE 4**  
**Section 5, subsection 6(1) and sections 7 and 8)**

**Penalty Amounts**

Item	Column 1 Violator	Column 2 Violation Type	Column 3 Baseline Penalty Amount (\$)	Column 4 History of Non-compliance Amount (\$)	Column 5 Environmental Harm Amount (\$)	Column 6 Economic Gain Amount (\$)	Column 7 Economic Gain Amount — Authorizations Only (\$)
1	Individual	(a) A	200	600	300	200	50
		(b) B	400	1,200	600	400	100
		(c) C	1,000	3,000	0	1,000	250
2	Other person or ship or vessel	(a) A	1,000	3,000	1,500	1,000	250
		(b) B	2,000	6,000	3,000	2,000	500
		(c) C	5,000	15,000	0	5,000	1,250

***Administrative Monetary Penalties, Legal Process Operational Directives 4-7-11 [Policy Directive]***

**Types of Violations under the AMPs Regulations:**

The baseline penalty amount varies depending on the type of violation; each designated violation is classified by either Type A, B, C, D, E, or Other according to the regulatory significance of the violation. Types of violations are set out in accordance with column 2 of the respective schedule of the AMPs Regulations.

.....

**Type B:** violations that represent more serious compliance issues and that create a risk of harm to the environment or constitute an obstruction of authority. (NOTE: This does not refer to obstruction under the Criminal Code, rather, it refers to the violations found in ECCC legislation).

.....

**6.** If one instance of non-compliance results in multiple violations, officers can only issue one (1) NOV. In these situations, officers must evaluate the facts of the situation and determine for which violation they will issue a NOV.

**A – There is one violation, but it continues over the course of more than one day.**

In this situation, based on s.12 of EVAMPA, the EO (Enforcement Officer) will use their discretion and may issue one NOV for each day of the continuing offence.

**B – There is one repeated offence on the same day. For example, a company illegally imports 25 engines.**

The EO will use their discretion and may issue one NOV for each item that is illegally imported illegally. This would result in 25 NOVs in the above example.

.....

**52.** Under section 12 of EVAMPA, a separate NOV may be issued for each day on which a violation is committed or continued.

**53.** A separate NOV may be issued for each individual thing (i.e.: one (1) NOV per violation).

### **Decision Under Review**

[7] In its decision the Tribunal first provided an overview; a description of the background facts and the review process it employed; and, set out the relevant legislation.

[8] The Tribunal then addressed three issues: (1) Had the Minister of Environment and Climate Change Canada [Minister] established the elements of a violation under paragraph 5(1)(a) of the *MB Regulations*, on balance of probabilities; (2) Was the Officer's decision to issue ten NOVs, rather than one, an abuse of process such that the Tribunal would have jurisdiction to set them aside and allow the Request for Review; and, (3) If one, or all, violations were proven to have occurred, had the penalty been correctly calculated?

[9] On the first issue, the Tribunal was unpersuaded by PCS's argument that the Minister had not proven an agent or employee of PCS closed the coverall structure doors for the last time on September 2, 2022 and that, because ECCC did not identify the identity of the person who closed the door, the Tribunal could not find that PCS committed the violation(s). The Tribunal found

that the evidence established it was more probable than not that an employee or agent of PCS closed the coverall structure doors. The Tribunal stated that corporations act through their employees and representatives and the evidence was sufficient to prove a violation by PCS by the action of an employee, agent or mandatory. The Tribunal found that PCS is ultimately responsible for events which occur on its site.

[10] The Tribunal also made several findings of fact, including that it was more probable than not that closing the overhead coverall structure doors prevented the birds' escape and trapped them in the coverall structure, where they had no access to water. The birds' dehydration in combination with the hot weather while they were trapped caused the birds' deaths. The Tribunal concluded that the Minister had established the elements of the violation which applied identically to each of the ten NOV's issued.

[11] On the second issue, the Tribunal noted that AMPs often arise in circumstances where there is no intention to violate the law, and a NOV does not presume or reflect morally or otherwise blameworthy behaviours. Parliament mindfully and clearly created this absolute liability regime in pursuit of the important purpose of protecting and conserving migratory birds. The decision goes on to note that the statutory and regulatory regime within which officers operate gives them discretion in deciding whether to issue a NOV. Further, that the Tribunal has established a clear line of authority holding that it cannot review the exercise of that discretion. Rather, the Tribunal's jurisdiction begins after the discretion of an officer to issue a NOV is exercised (*BCE Inc v Canada (Environment and Climate Change)*, 2021 EPTC 2 [*BCE Inc*]). However, an officer's discretion is not unfettered or unreviewable. The doctrine of abuse of

process protects proceedings that are unfair to the point that they are contrary to the interests of justice or constitute oppressive treatment (*Rice v Canada (Environment and Climate Change)*, 2020 EPTC 4 [*Rice*]). With respect to PCS's abuse of process argument, the Tribunal found that the relevant questions before it were: did the Officer exercise his authority to issue multiple violations improperly, unfairly, or inappropriately and/or is there evidence of bad faith?

[12] The Tribunal found that the evidence before it did not support PCS's argument that the issuance of ten NOV's represented a blatant attempt to maneuver around the maximum permissible penalty (\$25,000), and to impose punishment on PCS that far exceeded the amount which is allowed under the *EVAMP Act* for a single contravention and act. Rather, the evidence reasonably led to a conclusion that the Officer considered enforcement options and settled on issuing ten NOV's. Further, that if the Officer had wanted to maximize a financial penalty, he might have turned to issuing 88 NOV's or charging PCS with an offence under the *MBC Act* which carries a minimum penalty of \$100,000 upon summary conviction and \$500,000 for conviction on indictment. The Tribunal concluded that the evidence established the Officer's diligence and careful consideration of his enforcement options. This behaviour, on its face, did not exhibit indications of bad faith, arbitrary or unfair decision making.

[13] The Tribunal also concluded that the Officer relied on a defensible interpretation of the statutory regime. PCS and the Minister had presented different interpretations of the word "thing" in Rule 53 of the *Administrative Monetary Penalties, Legal Process Operational Directives 4-7-11* [*Policy Directive*]. The question was whether the word "thing" referred to the *actus reus* of closing the coverall structure door and committing the violation, or to each of the

birds' deaths which constitute environmental harm and breaches of the *MB Regulations*. The Tribunal concluded that the word "thing" in Rule 53 does not refer to an action that causes environmental harm. Further, Rule 6a clearly states that if there is one repeated violation committed on the same day or group of days, an officer can exercise discretion to issue one NOV for each harm.

[14] The Tribunal found that the evidence established that the Officer acted appropriately, within the scope of his authority, and in accordance with the overarching purpose of the *MBC Act*. The evidence did not indicate that the Officer acted in bad faith, was arbitrary, discriminatory, or ill-informed about his statutory responsibilities. Nor did the evidence demonstrate prosecutorial misconduct which could affect the fairness of the proceedings, contravene fundamental notions of justice, or undermine the integrity of the AMP system. The Tribunal concluded that there was no abuse of process.

[15] On the third issue, the Tribunal noted that its jurisprudence establishes that the death of even one migratory bird is an environmental harm within the meaning of section 7 of the *EVAMP Regulations* (*Sirois v Canada (Environment and Climate Change)*, 2020 EPTC 6 at para 54). Section 7 applied because a causal link was established between the violation (closing the coverall structure door and thereby trapping the birds) and the resulting environmental harm (death of the birds). The NOVs indicate that each violation included a \$2,000 base penalty and an additional \$3,000 penalty for environmental harm. The \$5,000 per violation did not exceed the maximum allowable penalty of \$25,000 as set out in subsection 5(4) of the *EVAMP Act*. The Tribunal stated there is no legal or evidentiary basis upon which it would aggregate the AMPs set

out in multiple NOV's to consider that an aggregated penalty becomes a single AMP of \$50,000. Therefore, the Tribunal concluded that each AMP was calculated correctly and in accordance with the *EVAMP Regulations*.

### **Issues and Standard of Review**

[16] In my view, the issues arising in the matter can be framed as follows:

1. Did the Tribunal reasonably conclude that the elements of the ten violations of paragraph 5(1)(a) of the *MB Regulations* were established; and
2. Did the Tribunal err in finding that the issuance of the ten NOV's was not an abuse of process.

[17] The parties submit, and I agree, that the standard of review for both issues is that of reasonableness.

[18] On judicial review the Court “asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

**Establishment of the elements of the ten violations of paragraph 5(1)(a) of the *MB Regulations***

*PCS's Position*

[19] PCS argues the Tribunal's decision is unreasonable because the Tribunal failed to consider that the Minister had not established the *actus reus* for ten individual violations. PCS submits that the Tribunal's conclusion that the Minister had established the elements of ten individual violations of paragraph 5(1)(a) of the *MB Regulations* is unreasonable in two respects. First, the Tribunal did not identify the *actus reus* as it did not state whether the prohibition under paragraph 5(1)(a) was one of killing, trapping or taking. A reasonable analysis must consider the causal link between the action and the statutory prohibition. It is not sufficient for the Tribunal to find migratory birds died at PCS's site and conclude that PCS therefore committed a violation.

[20] Second, the Tribunal did not conduct an analysis of whether any *actus reus* was established ten times to establish each NOV. The Tribunal found that the *actus reus* was met by closing the door to the coverall structure. However, this action occurred once, not ten times. There was no analysis of how the *actus reus* of ten violations could be established through one action. This is also contrary to the principle that an accused cannot be convicted of multiple offences that arise from the same factual and legal nexus (*R v Kienapple*, 1974 CanLII 14 (SCC) [*Kienapple*]; *R v Prince*, 1986 CanLII 40 (SCC) [*Prince*]).

*AG's Position*

[21] The Respondent, the Attorney General of Canada [AG], submits that, when assessing whether the ECCC discharged its burden of establishing that PCS committed the prohibited act, the Tribunal considered whether the evidence established that PCS caused the actions that led to the birds' deaths and whether the actions were done without a permit. This included the finding that it is more likely than not that an employee or agent of PCS closed the overhead doors of the coverall structure and that PCS is ultimately responsible for events that occur on its work site. Further, that the closure of the doors trapped the birds inside the structure for four days with no access to water during hot weather which led to their death. As there was no evidence PCS had a permit to kill the birds, it was reasonable to conclude that the *actus reus* of the violations were established. The AG submits that the Tribunal reasonably concluded that the elements of the prohibition were established.

[22] The AG also submits that the Tribunal clearly identified the causal link between the *actus reus* (the closing of the overhead doors) to the prohibition at paragraph 5(1)(a) of the *MB Regulations* (the killing of migratory birds).

[23] Further, that the same *actus reus* can sustain ten NOV's. The AG submits that the Tribunal reasonably concluded that the elements of the violation were established and applied identically to each of the ten NOV's. This conclusion was supported by the Tribunal's finding that closing the overhead door of the coverall structure caused all ten of the birds that were subject to necropsies to become trapped in the structure, leading to their deaths.

[24] The AG submits that the protection from double punishment in *Kienapple*, as argued by PCS, applies in the criminal context, not administrative proceedings. Being subject to an administrative monetary penalty is not the same as being charged with an offence (*Guindon v Canada*, 2015 SCC 41 at paras 45-46 [*Guindon*]). Even if *Kienapple* could apply in this context, the rule against multiple convictions does not apply when the convictions related to different victims (*Prince* at para 47). Here, each of the NOVs were for the killing of a different migratory bird.

### *Analysis*

[25] Section 7 of the *EVAMP Act* addresses the commission of violations. Specifically, it states that a person that contravenes a provision designated by regulations made under paragraph 5(1)(a) commits a violation and is liable to an administrative monetary penalty of an amount to be determined in accordance with the regulations. Paragraph 5(1)(a) of the *EVAMP Act* authorizes the Governor in Council to make regulations designating violations that can proceed in accordance with *EVAMP Act*. This includes the contravention of any specified provision of an Environmental Act or of any of its regulations (s 5(1)(a)(i)). “Environmental Act” is defined as meaning the named environmental legislation, which includes the *MBC Act*.

[26] The *MB Regulations* are made pursuant to subsection 5(1) of the *EVAMP Act*. Subsection 5(1) of the *MB Regulations* prohibits a person from engaging in the listed activities unless they have a permit to do so or are authorized by the regulations to do so:

### **Prohibitions**

**5 (1)** A person must not engage in any of the following activities unless they have a permit that authorizes them to do so or they are authorized by these Regulations to do so:

- (a) capture, kill, take, injure or harass a migratory bird or attempt to do so;
- (b) destroy, take or disturb an egg; and
- (c) damage, destroy, remove or disturb a nest, nest shelter, eider duck shelter or duck box

[27] The NOVs refer to the *MBC Act* and paragraph 5(1)(a) of the *MB Regulations*. The “Short form description of violation” is stated to be the “unlawful capturing, killing, taking, injuring or harassing a migratory bird.” Each NOV also states, under “Other relevant facts”:

On September 08th, 2022, the Potash Corporation of Saskatchewan Inc. contacted the Canada Wildlife Service Permits office to report the death of eighty-eight (88) Barn Swallows found inside a coverall structure located on the site of Hwy 397 N near the town of Allan, SK.

Through the subsequent inspection and investigation by federal Wildlife Officers, it was learned that the doors on the structure had been closed for numerous days, leaving the migratory birds trapped inside the structure in extreme heat with no access to food/water or means of escape.

Furthermore, a necropsy was conducted on 10 of 88 specimens to determine cause of death. 10 specimens were tested for High Path Avian Influenza (HPAI) in which all 10, the result was negative.

Emaciation and dehydration was deemed the cause of death of those specimens conclusively.

[28] The *EVAMP Act* permits a person who has been served with a NOV to make a request for a review of the penalty or the facts of the alleged violation, or both (s 15). The review procedure is also set out. The reviewing officer or panel conducting the review shall determine whether the person committed a violation (s 20(1)). The Minister has the burden of establishing, on a balance

of probabilities, that the person committed the violation (s 20(2)). The reviewing panel or officer can also correct a penalty for violations if they determine that the penalty was not determined in accordance with the regulations (s 20(3)).

[29] PCS submits that in this case the Tribunal erred by not identifying the *actus reus* as it did not state whether the charge was one of killing, trapping or taking. PCS submits that a reasonable analysis must consider the causal link between the action and the statutory prohibition and that it is not sufficient for the Tribunal to find migratory birds died and conclude that PCS therefore committed a violation.

[30] I do not agree with PCS that the Tribunal erred in this regard.

[31] The Tribunal explicitly found that the *actus reus* of the violation was the action which caused the death of the birds (at paragraph 26 of its decision).

[32] As to that action, the Tribunal found that the evidence, considered in its entirety, established that it was more probable than not that an employee or agent of PCS closed the coverall doors. The Tribunal referred to the affidavit of PCS's superintendent who deposed that PCS had reviewed surveillance footage for the site and observed that someone had closed the overhead door of the coverall structure. PCS could not determine who the individual was – that is whether they were employed by PCS or by one of the numerous contractors on site on any given day – but did not pursue this because PCS's focus was on addressing the matter, not determining who did it. The Tribunal found that the identity of the door closer or that person's

employment or contractual relationship with PCS was tangential given that PCS is ultimately responsible for events which occur on its site.

[33] As to causation, the Tribunal found as a fact that it was more probable than not that the closing of the overhead doors of the coverall structure prevented the birds' escape and trapped them in the structure where they had no access to water. The birds' dehydration, combined with the hot weather in the region over the weekend that the birds were trapped, caused their deaths. This finding is consistent with the evidence of PCS's supervisor that the north door of the structure was closed at 2:31p.m. on Friday, September 2, 2022 and did not open again until 8:01a.m. on Tuesday, September 6, 2022 and the report of CWHC which found that the birds appeared to have died from "starvation and dehydration," its "final diagnosis" being "emaciation and dehydration."

[34] For these reasons, the Tribunal found that ECCC had established the elements of the violation, which applied identically to each of the ten NOV's issued.

[35] I agree with the AG that the Tribunal clearly identified the causal link between the *actus reus* (the closing of the overhead coverall structure doors) to the prohibition at paragraph 5(1)(a) of the *MB Regulations* (the killing of migratory birds).

[36] The Tribunal also found that there was no evidence or argument that PCS "had a permit to kill migratory birds" during the weekend in question.

[37] Accordingly, the Tribunal’s finding that PCS’s action of closing the coverall door caused the death of the birds, and that PCS did not have a permit to kill migratory birds, addresses all of the elements of the violations.

[38] While paragraph 5(1)(a) of the *MB Regulations* lists more than one prohibited actions, being the capturing, killing, taking, injuring or harassing “of a migratory bird”, I agree with the AG that it is apparent on the facts and from the Tribunal’s decision that the prohibited act at issue in this matter was the killing of migratory birds. Moreover, in the decision overview the Tribunal states:

[4] Section 5(1)(a) of the MBR prohibits killing a migratory bird, and even an unintentional violation is a breach of the *Migratory Birds Convention Act, 1994* (“MBCA”). The evidence establishes, on a balance of probabilities, that the demise of all 88 birds was an “incidental take” which the Canadian wildlife services has defined as the “inadvertent harming, killing, disturbance, or destruction of migratory birds, nests, and eggs.”....

[39] The Tribunal also found that PCS did not have a “permit to kill migratory bids,” the NOV’s refer to the death of the birds and, the agreed statement of facts refers to the “deceased Barn Swallows.”

[40] There is simply nothing in the record to support that the violations in this matter concerned anything other than the killing of the barn swallows in the manner described by the Tribunal. Although the circumstances of the killing may also fall within the definition of “incidental take”, the result is the same – the killing of the birds. It cannot be seriously argued that the paragraph 5(1)(a) prohibition at issue was not identified by the Tribunal as the killing of the barn swallows.

[41] In my view, the Tribunal considered and reasonably concluded that all elements of the violations were established.

[42] PCS also argues that the Tribunal did not conduct an analysis of whether any *actus reus* was established ten times. PCS submits that the Tribunal found that the *actus reus* was met by closing the door to the coverall structure. However, that this action occurred once, not ten times. PCS submits that there was no analysis of how the *actus reus* of ten violations could be established through one action.

[43] In my view there is also no merit to this submission.

[44] The question of whether issuing ten NOVs was an abuse of process will be discussed below. With respect to the *actus reus*, in my view, it was reasonable for the Tribunal to conclude that the *actus reus* was met for each of the ten NOVs issued. As indicted above, the Tribunal found that ECCC had established the elements of the violation, which the Tribunal found applied identically to each of the ten NOVs issued. As the Tribunal reasonably concluded that the *actus reus* was met by closing the door to the coverall structure, it was also reasonable for it to find that the same *actus reus* applied to each of the ten migratory birds for which NOVs were issued and that were killed by this act, as confirmed by the necropsies. Further analysis was not required.

[45] Finally, PCS argues that the criminal law principle that an accused cannot be convicted of multiple offences that arise from the same factual and legal nexus should apply to this case.

[46] However, PCS provides no jurisprudence demonstrating that this principle has been applied in non-criminal administrative proceedings and/or to administrative monetary penalties.

[47] Moreover, the relevant legislation and case law is clear that being subject to an administrative monetary penalty is not the same as being charged with an offence. Section 3 of the *EVAMP Act* sets out the purpose of that *Act* as “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” (italic added). The *EVAMP Act* also explicitly states that a violation is *not* an offence:

#### **Violation or offence**

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.

#### **Violations not offences**

(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.

(subsection 126(1) of the *Criminal Code*, RSC 1985, c C-46 states that every person who, without lawful excuse, contravenes an Act of Parliament by intentionally doing anything that it forbids or by intentionally omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of (a) an indictable offence and liable to imprisonment for a term of not more than two years; or (b) an offence punishable on summary conviction).

[48] Jurisprudence of the Environmental Protection Tribunal of Canada, referred to by the Tribunal in this matter in the context of its jurisdiction, has found that the *EVAMP Act* “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” (*Bell v Canada (Environment and Climate Change)*, 2022 EPTC 6 at para 42 citing *BCE Inc* at paras 25-29). This Court has also held that the statutory regime created by the *EVAMP Act* is not criminal (and therefore that the *Charter* had no application: *BGIS Global Integrated Solutions Canada LP v Canada (Attorney General)*, 2025 FC 1213 at para 6; see also *Doyon v Canada (Attorney General)*, 2009 FCA 152 [Doyon] at para 10 regarding a violation under the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, SC 1995, c 40 and related regulations).

[49] Administrative proceedings are very different from criminal proceedings having different purposes, objectives and protections (see, for example *Guindon* at paras 45-46, 67-69, 75-79). PCS has not demonstrated that the *Kienapple* principle has application to the administrative procedure identified in the *EVAMP Act* – which explicitly states that a violation is not an offence. Or, in general, to administrative proceedings. And, as the AG points out, even if the *Kienapple* principle could apply in this context, the Supreme Court of Canada has held that the rule against multiple convictions does not apply when the convictions relate to different victims and that “it was never within the contemplation of the majority in *Kienapple* that the rule enunciated therein would preclude two convictions for offences respectively containing as elements the injury or death of two different persons” (*Prince* at para 47). Thus, even if the *Kienapple* rationale were to apply in this case (and I do not find that it does), there would be 88

“victims” as 88 migratory birds were killed. Each of the ten NOV<sub>s</sub> issued was for a different bird, or “victim,” that had been subject to necropsy.

[50] When appearing before me, PCS also argued that the ten NOV<sub>s</sub> were identical and failed to individually identify the particular bird with respect to which each NOV that was issued. In my view, nothing turns on this. The agreed facts acknowledge that the Officer issued ten NOV<sub>s</sub> for alleged contravention of paragraph 5(1)(a) of the *MB Regulations*, “one for each deceased bird examined by CWCH.” The Tribunal found that the Officer had “issued one NOV for each of the ten necropsied birds.” The Tribunal decision also quoted from the Officer’s response to “what factors were considered in issuing [ten] NOV<sub>s</sub>?” To which the Officer, stated, among other things “I considered that ten, out of the approximate 88 birds that were found, were necropsied with conclusive findings regarding cause of death.” It is clear from the record and the Tribunal’s decision that each NOV pertains to one of the ten necropsied birds killed in the same place at the same time and by the same act. The fact that each of the ten necropsied birds was not further identified by a distinct identification number is not significant.

[51] PCS also argued before me that if in this case issuing ten NOV<sub>s</sub> is not arbitrary then there is no reason that another number, up to 88 NOV<sub>s</sub>, would not be arbitrary. I disagree. In this case there were conclusive findings on the cause of death for the ten migratory birds that were necropsied. Therefore, ten NOV<sub>s</sub> were issued for those birds. Issuing ten NOV<sub>s</sub> was explained and was not arbitrary.

[52] To the extent that PCS now asserts that because the ten migratory bird “victims” were not identified individually and separately in each of the ten NOV’s and that, therefore, it has not been established that there were in fact different victims killed by the same action, the best that can be said is that this demonstrates the incompatibility of applying this criminal law principle to the subject administrative regime.

[53] To conclude on this issue, I find that the Tribunal reasonably determined that the elements of the violations of paragraph 5(1)(a) of the *MB Regulations* were established.

### **Abuse of process**

#### *PCS’s Position*

[54] PCS submits that the Tribunal’s decision is unreasonable because it failed to properly consider whether issuing ten NOV’s for the same act was an abuse of process. More specifically, that the Tribunal: (i) failed to consider the availability of the common law defence of abuse of process, which is permissible under the *EVAMP Act*; (ii) failed to properly articulate the test for an abuse of process by narrowing the test to whether the Officer had exercised his discretion improperly or in bad faith; (iii) unreasonably fettered its discretion by relying solely on its interpretation of the Policy Directive in deciding that multiple NOV’s could be issued in the circumstances; and (iv) relied on an absurd interpretation of the *EVAMP Act*.

#### *AG’s Position*

[55] The AG argues that the Tribunal reasonably concluded that the Officer's issuance of ten NOVs for each of the ten necropsied migratory birds was not an abuse of process. It submits that given the clear and unequivocal wording of paragraph 5(1)(a) of the *MB Regulations*, the purpose of the *MBC Act* and the background information found in the Canada Gazette, it was reasonable for the Tribunal to primarily rely on the ordinary meaning of the words of paragraph 5(1)(a) to find that the prohibition against killing migratory birds applies to individual birds; the Tribunal's conclusions about the limits of its jurisdiction were reasonable; and, the Tribunal's articulation and application of the test for abuse of process was supported by the facts and law.

### *Analysis*

#### *i. Consideration of the availability of the abuse of process defence and articulation of the test*

[56] As set out in subsection 11(1) of the *EVAMP Act*, a person named in a NOV does not have a defence by reason that the person: exercised due diligence to prevent the violation; or reasonably and honestly believed in the existence of facts that, if true, would exonerate the person. However, subsection 11(2) states that 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 the Act. This provision has previously been interpreted by the Tribunal to preserve the abuse of process defence (*Rice* at para 39; *Doerksen and Bear Naked Wonders v Canada (Environment and Climate Change)*, 2023 EPTC 1 [*Doerksen*] at para 15; see also *Doyon* at para 11).

[57] PCS argues that the Tribunal failed to meaningfully engage with the issue of whether it had jurisdiction to consider the defence of abuse of process and unreasonably narrowed its jurisdiction. It submits the proper analysis would have been to review the *EVAMP Act* and determine that the defence of abuse of process was not precluded on a request for review and, therefore, the Tribunal had jurisdiction to consider the issue.

[58] I disagree with PCS.

[59] In the “Relevant Legislation” portion of its decision the Tribunal included section 11 of the *EVAMP Act*. As noted above, subsection 11(2) states that 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.

[60] The Tribunal also explicitly identified as an issue before it whether the Officer’s decision to issue ten NOV’s, rather than one, was an abuse of process such that the Tribunal would have jurisdiction to set aside the NOV’s and allow the Request for Review.

[61] The Tribunal then discussed the discretion afforded to officers under the *EVAMP Act* statutory regime and the rationale for this. The Tribunal noted that there is a clear line of its own authority holding that it cannot review the exercise of discretion by ECCC and its officers when deciding whether to issue a NOV, and:

[40] As discussed, at length, in the Tribunal's *BCE Inc.* (2021) and *Bell Canada* (2022) decisions, the Tribunal's jurisdiction begins after the discretion of an officer to issue an NOV is exercised.

[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").

[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.

(footnotes omitted)

[62] This is also consistent with the role of the reviewing panel as prescribed by the *EVAMP Act*. Subsection 20(1) states that following a review hearing "the review officer or panel conducting the review *shall determine whether the person, ship or vessel committed a violation*" (italic added). Subsection 20(3) states "[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*" (italic added).

[63] Thus, the legislatively defined role of the Tribunal on review is to make findings of fact in determining if there was a violation and, if a penalty was not determined in accordance with the regulations, to correct the penalty amount.

[64] Further, the Tribunal also explicitly recognized that even though the *EVAMP Act* is an absolute liability regime which excludes the defences of due diligence and honest mistake of

fact, subsection 11(2) permits any available common law defences so long as they are not inconsistent with the Act. Accordingly, and because the discretion afforded to officers to issue a NOV is not unfettered or unreviewable, that the abuse of process doctrine has application and the assessment of whether there has been an abuse of process falls within the Tribunal's jurisdiction, citing *Rice*:

[43] While the Tribunal generally does not have jurisdiction to interfere with an officer's discretionary decision to issue a notice of violation, in the *Rice* case the Tribunal held that the discretion of officers was not unfettered or unreviewable.

[39] ... Their work must be done in good faith, for a proper purpose and undertaken without discrimination. Section 11(2) of EVAMPA preserves common law justifications and excuses such as abuse of process. As was noted by the Court in *Clothier*, at para. 46: "...if it is done in bad faith, then courts retain jurisdiction to stay proceedings under the general abuse process doctrine of which entrapment is one aspect." The Court further noted:

....

(footnotes omitted)

[65] The Tribunal also cited the Supreme Court of Canada's decision in *Toronto (City) v CUPE, Local 70*, 2003 SCC 63 [*Toronto (City)*] at para 35, stating that it holds that the doctrine of abuse of process protects proceedings that are unfair to the point that they are contrary to the interests of justice or constitute an oppressive treatment.

[66] The Tribunal found that the questions before it were: "did the officer exercise his authority to issue multiple violations improperly, unfairly, or inappropriately?" and "is there evidence of bad faith?" citing to *Rice* (see paras 39-40).

[67] The Tribunal also stated in its overview that it does not have jurisdiction to interfere with the Officer's discretionary decisions to issue ten NOVs "[h]owever, it is available to the Applicant to argue, as has been done, that issuance of multiple NOVs constitutes an abuse of process which gives rise to a defence."

[68] Given the above, I do not agree with PCS that the Tribunal failed to meaningfully engage with the issue of whether it had jurisdiction to consider the defence of abuse of process and unreasonably narrowed its jurisdiction. It clearly did engage with the issue and found that, while it generally does not have jurisdiction to interfere with an officer's discretionary decision with respect to the issuance of NOVs, subsection 11(2) permits the defence of abuse of process and, therefore, the Tribunal had jurisdiction to consider abuse of process with respect to a discretionary decision of an officer. I see no error in the Tribunal's determination of its jurisdiction in this regard. That interpretation is consistent with its limited reviewing role within the legislative regime and the Tribunal's jurisprudence on abuse of process. The Tribunal then proceeded with its consideration of the facts in relation to that allegation.

[69] PCS also asserts that it was not solely asking the Tribunal to determine whether the *decision* to issue ten NOVs was made improperly or in bad faith. Rather, PCS was asking the Tribunal to consider the broader issue that, in the circumstances as a whole, issuing ten NOVs for one action was an abuse of process. PCS asserts that, as a result of the Tribunal narrowing the question, it ignored the overarching issue of whether the proceedings as a whole contravened fundamental principles of justice or brought the administration of justice into disrepute. PCS

asserts that, because the Tribunal misconstrued the test, it unreasonably failed to consider whether the issuance of ten NOV's for one act was an abuse of process.

[70] First, I note that PCS's written submission to the Tribunal is found in the Certified Tribunal Record [CTR]. There, PCS made an initial one sentence assertion that the Officer's "decision to issue ten (10) NOV's is a clear abuse of process as it materially affected the fairness of these proceedings and undermined the integrity of the AMP regime." PCS's following arguments were that *the issuance of multiple NOV's was not done for a proper purpose, nor in accordance with the express provisions or underlying principles of the EVAMP Act and Regulations and set out its rationale in that regard. PCS asserted that the Officer's actions represented either a mistake in interpreting his own legislative authority, or an intentional attempt to circumvent the rules and restrictions that govern the implementation of the AMP regime. Having described why it was of the view that the statutory regime did not support the issuance of multiple NOV's, PCS concluded by submitting that "as the decision to issue multiple NOV's constitutes a clear abuse of process, the NOV's ought to be dismissed for abuse of process"* (italic added).

[71] I also note that, in its written submissions to this Court, PCS states that it sought review by the Tribunal on the basis that PCS did not commit the *actus reus* in paragraph 5(1)(a) of the *MB Regulations* and "[i]n the alternative, PCS sought a review on the basis that it was an abuse of process for ECCC to issue ten NOV's in respect of one alleged act, transaction, or omission" (italic added).

[72] This makes it apparent that before the Tribunal PCS took issue with the decision to issue ten NOV's – which decision was made by the Officer. As will be discussed below, in its decision the Tribunal dealt with PCS's arguments concerning the issuance of multiple NOV's by the Officer. I am not persuaded that the Tribunal erred in failing to consider “the broader issue that, in the circumstances as a whole, issuing ten NOV's for one action was an abuse of process.” The Tribunal considered all of the circumstances raised by PCS. PCS's assertion now that there was a broader unaddressed issue is not supported by any example of an argument made in that regard and not addressed by the Tribunal.

[73] PCS also asserts that by improperly constraining its jurisdiction, the Tribunal prevented PCS from raising all defences available to it. Although PCS does not agree with its determination, the Tribunal did address the abuse of process submission. PCS does not identify what other defences were available to it that it claims to have been denied.

[74] PCS next argues that the Tribunal erred by failing to properly articulate the test for an abuse of process and, as a result, failed to consider whether the issuance of ten NOV's for the same act or omission was an abuse of process. PCS submits that this error flowed from the Tribunal's unreasonable interpretation of its jurisdiction.

[75] I have found above that the Tribunal did not err in its interpretation of its jurisdiction, and that it did consider PCS's argument as to abuse of process – as that argument was submitted by PCS and within the Tribunal's review of the Officer's decision to issue ten NOV's. Thus, this submission cannot succeed.

[76] In any event, with respect to the articulation of the test, while the Tribunal did not explicitly state the test as set out by PCS in its written submissions, the Tribunal did articulate the general principles of the abuse of process doctrine in its decision. In that regard, it cited *Toronto (City)* for the principle that the abuse of process doctrine protects proceedings that are unfair to the point that they are contrary to the interest of justice or constitute oppressive treatment (at para 44). The Tribunal also cited to *Rice* which states that “work must be done in good faith, for a proper purpose and undertaken without discrimination” (at para 39). In that regard I note that the test for abuse of process was recently set out by the Supreme Court of Canada in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*] at para 139:

...The test for abuse of process — in all of its applications — is whether the impugned conduct affects adjudicative fairness or would otherwise bring the administration of justice into disrepute (*Blencoe*, at para. 115; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33, at para. 106; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 68; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 49-50; *O’Connor*, at paras. 60-64; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31; *Regan*, at para. 49; *Behn*, at para. 39; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, at paras. 36-40; *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007; *R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616). In sum, an abuse of process may arise from two often interrelated categories: adjudicative unfairness and harm to the integrity of the justice system.

[77] In its analysis in this case, the Tribunal did reflect the two categories of prosecutorial conduct set out in *R v Babos*, 2014 SCC 16 [*Babos*] and *R v Brunelle*, 2024 SCC 3 at para 27 [*Brunelle*] (both cited by PCS) and *Abrametz*. Specifically, the Tribunal found, having reviewed the facts, that the evidence did not “demonstrate unfairness, or that the officer’s decision to issue ten NOVs was oppressive or contrary to the interests of justice.”

[78] In *Babos* the Supreme Court held:

[31] Nonetheless, this Court has recognized that there are rare occasions —the “clearest of cases” — when a stay of proceedings for an abuse of process will be warranted (*R. v. O’Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused’s trial (the “main” category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the “residual” category) (*O’Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

[79] The Supreme Court also noted that while it is generally true that the residual category will be invoked as a result of state misconduct, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct giving, as examples, cases where there was repeated prosecuting of an accused for the same offence after successive juries had been unable to reach a verdict, and using the criminal courts to collect a civil debt (*Babos* at para 37).

[80] In my view, *Babos* and *Brunelle* – both criminal matters – do not assist PCS. First, PCS is not seeking to stay the Tribunal’s decision. Second, it has not identified any state conduct, other than the decision of the Officer, that could result in an abuse of process. That is, PCS points to no evidence of potential prosecutorial conduct other than the decision of the Officer to issue ten NOVs. PCS does not identify any other “state conduct” that risks undermining the integrity of the judicial process.

[81] In that regard, *Doerksen*, also cited by PCS, concerned a preliminary motion seeking to stay the proceedings on the basis of abuse of process by ECCC enforcement. There the Tribunal

found that it had jurisdiction to address allegations of abuse of process, which were allegations of prosecutorial conduct that contravened fundamental notions of justice and undermined the integrity of the justice system – all of which pertained to the conduct of the ECCC officers involved. Specifically, unreasonable pre-charge delay, vexatious conduct, including improper motive and oppressive conduct. The Tribunal held that a party must show prejudice in order to merit the “last resort” remedy of a stay of proceedings due to abuse of process but that the applicants in that case had not demonstrated prejudice relating to the issuance of NOVs (at para 28).

[82] When appearing before me, PCS argued that there need not always be state misconduct to bring the administration of justice into disrepute. To the extent that PCS is now arguing that the Tribunal unreasonably failed to consider whether, in the absence of prosecutorial misconduct, the issuance of ten NOVs for one act was an abuse of process and, therefore, that the proceeding as whole addressing the multiple NOVs contravened the principles of fundamental justice, again, this was not the argument pursued in PCS’s written submissions to the Tribunal. And, in any event, the issuance of multiple NOVs in these circumstances is not comparable to the examples described in *Babos* – repeated prosecution after successive juries were unable to reach a verdict and using the criminal court to collect civil debts. Here, the Tribunal was assessing the facts and interpreting and applying the legislation. What is at issue is the reasonableness of the Tribunal’s interpretation and application of the legislative regime to the facts. I am not persuaded that this is a circumstance where the integrity of the justice system is implicated in the absence of misconduct.

[83] In that regard, I note that the Tribunal listed the relevant legislation, engaged in an analysis regarding the appropriate limits of an officer's discretion, considered the purpose of the *MBC Act* and *EVAMP Act*, articulated the nature of the absolute liability regime expressly created by Parliament, and explained the limited jurisdiction of the Tribunal to review NOV's and, having done so, ultimately concluded that the issuance of ten NOV's was supported by the law and the facts. That is, the Tribunal described and applied the entirety of the legislative regime. The fact that PCS disagrees with the outcome does not make the Tribunal's analysis and determination unreasonable nor does it establish that there was an abuse of process.

[84] In the matter before it in this case the Tribunal concluded:

[61] Considered in its totality, the evidence establishes that the officer acted appropriately, within the scope of his authority, and in accordance with the overarching purpose of the *MBCA*. The evidence does not indicate the officer acted in bad faith, was arbitrary, discriminatory, or ill-informed about his statutory responsibilities.

[62] Further, the evidence does not demonstrate prosecutorial misconduct which could affect the fairness of the proceedings, contravene fundamental notions of justice, or undermine the integrity of the AMP system. Consequently, the Tribunal concludes that no abuse of process occurred in this case.

[63] The Tribunal finds, as a fact, that the officer's decision to issue ten NOV's arose from his interpretation of the law and policies governing his actions and the facts giving rise to the violations (i.e. multiple bird deaths, verified by scientific examination, arising from human activity on the Applicant's mine site).

[85] In summary, the Tribunal's decision considered the principles relevant to abuse of process. The fact that it did not cite the test, as articulated by PCS, does not render the decision unreasonable. Further, the abuse of process argument raised by PCS before the Tribunal was

grounded in the fact that ten NOV's were issued by the Officer instead of just one. That is, the Officer's decision and prosecutorial discretion. The argument that PCS now makes, that the Tribunal ignored the overarching question of whether the proceeding as a whole contravened fundamental principles of justice or brought the administration of justice into disrepute was not argued before the Tribunal. The Tribunal cannot be faulted for failing to address an argument that was not before it. Nor has PCS identified any state conduct, other than the Officer's decision, that would support the allegation of abuse of process. And, finally, I am not persuaded that the issuance of multiple NOV's, in these circumstances, can be characterised as an abuse of process falling outside prosecutorial conduct or that the Tribunal's failure to consider the issue in that context and in these circumstances undermines the integrity of the administration of justice.

[86] It was reasonable for the Tribunal to find that PCS did not establish that abuse of process occurred in this case.

*ii. Fettering of discretion*

*PCS's Position*

[87] PCS argues the Tribunal unreasonably fettered its discretion by relying solely on its interpretation of the Policy Directive in deciding that multiple NOV's could be issued in the circumstances and failing to consider whether its interpretation of the Policy Directive was consistent with the *EVAMP Act*. According to PCS, the issue is not that the Tribunal considered the Policy Directive, rather that the Tribunal *only* interpreted the Policy Directive and did not explain how its interpretation was consistent with the legislation.

*AG's Position*

[88] The AG argues that the Tribunal reasonably concluded that reading the words of the provisions in the Policy Directive in its entire context, grammatical and ordinary sense, and harmoniously with the statutory objectives of both the *MBC Act* and *EVAMP Act* affirmed that “thing” meant “migratory bird.” The Tribunal reasonably concluded that “thing” was not referring to an “action that causes environmental harm” such that multiple violations may only occur when there is more than one action. The Tribunal’s conclusion that the Policy Directive permitted the Officer to issue multiple NOV’s for one incident resulting in the deaths of multiple migratory birds was informed by its general analysis of the purpose and scheme of the *MBC Act*, *MB Regulations*, and *EVAMP Act*. The Tribunal reasonably concluded that the permission granted in the Policy Directive did not conflict with the governing legislation.

*Analysis*

[89] In the “Relevant Legislation” section of its decision, the Tribunal set out sections of the *EVAMP Act*, *MB Regulations* and *EVAMP Regulations*. The Tribunal then states:

[16] The MBCA explicitly permits multiple fines to be imposed if an offence under the MBCA involves more than one migratory bird or nest:

**Offences involving more than one bird or nest**

13.19 If an offence under this Act involves more than one migratory bird or nest, the fine to be imposed in respect of that offence may, despite sections 13, 13.01, 13.03 and 13.04, be the total of the fines that would have been imposed if each of the migratory birds or nests had been the subject of a separate information.

[17] It is important to note that the NOV's issued in this case were issued as violations under EVAMPA and not offences under the MBCA. Section 13(2) of EVAMPA states that "a violation is not an offence". Neither EVAMPA nor its regulations include a similar explicit direction permitting multiple NOV's.

[18] However, guidance exists in Policy Directive 4-7-11 for AMPs, which was referred to by the Respondent, which states:

Rule 6 – If one instance of non-compliance results in multiple violations, officers can only issue one (1) NOV. In these situations, officers must evaluate the facts of the situation and determine for which violation they will issue an NOV.

Rule 6a – In the circumstance where there is one repeated offence on the same day (e.g. a company illegally imports 25 engines) the EO [Environmental Officer] would use their discretion and may issue one NOV for each item that is illegally imported, and which would result in 25 NOV's.

Rule 53 – A separate NOV may be issued for each individual thing (i.e. one (1) NOV per violation).

[19] According to s. 5(4) of EVAMPA, the maximum penalty in an NOV may not be more than \$25,000. In contrast, a summary conviction offence under the MBCA carries a minimum penalty of \$100,000 for corporations and other persons pursuant to s. 13(3)(b).

(I note here in passing the relevant provisions of the Policy Directive found in the version of that document contained in the CTR are set out above in the Relevant Legislation, Regulations and Directives section of these reasons. In the quote above, the Tribunal quotes Rule 6 somewhat differently, notable referring to Rule 6a which is Rule 6B in the CTR version. However, the parties do not raise this as a concern nor is it significant to the Tribunal's analysis.)

[90] When considering the abuse of process issue the Tribunal addressed the legal considerations and absolute liability, acknowledging that in its written submissions PCS had correctly summarised the overall purpose of the *MBC Act*, the objectives of the *EVAMP Act* and its regulations, and the existence of the Policy Directive. The Tribunal also discussed the broad considerations regarding officers' discretion which included noting that the overall purpose of the *MBC Act* is to protect and preserve migratory bird populations. The Tribunal also noted the absolute liability regime pursuant to which Parliament requires strict enforcement of the law with relief from liability being available only in exceptional circumstances and Parliament's decision to create an absolute liability regime and equip ECCC officers with broad discretion to issue violations is illustrated by the objectives of the amended *MB Regulations* in 2022, published in the Canada Gazette on May 20, 2022.

[91] In its analysis, the Tribunal described the Officer's evidence with respect to how he exercised his discretion in deciding to issue ten NOV's, quoting directly from the Officer's answer to an interrogatory question asking him to explain what factors were considered in issuing ten NOV's:

I considered that there were multiple violations of the prohibition in the *Migratory Birds Regulations* against killing a migratory bird and that the *Migratory Birds Regulations* refers to "bird" in the singular. I considered that section 13.19 of the MBCA which provides that where an offence under the Act involves more than one migratory bird or nest, the fine to be imposed in respect of that offence may be the total of fines that would have been imposed if each of the migratory birds or nests had been the subject of a separate information. I considered that there was no prohibition to proceeding with multiple NOV's in the governing legislation in relation to the violations.

I considered that ten, out of the approximate 88 birds that were found, were necropsied with conclusive findings regarding cause of death. I was guided by the overall policy that enforcement

officers will administer ECCC legislation with an emphasis on prevention of damage to the environment, conservation and protection of natural resources. Further, the purpose of AMPs is to provide a financial disincentive to non-compliance and ensure the goal of deterrence.

[92] The Tribunal also noted that the Officer had obtained organizational oversight and approval from the Operations Manager before deciding to issue the NOVs and that the Officer deposed that he reviewed the “legislation and internal policies” including section 13.19 of the *MBC Act* and the Policy Directive.

[93] The Tribunal concluded that the evidence led reasonably to a conclusion that the Officer considered enforcement options and settled on issuing ten NOVs. Additionally, that the Officer “relied upon a defensible interpretation of the statutory regime he is required [to] enforce.”

[94] In that regard, the Tribunal acknowledged PCS’s argument, based on Rule 6 of the Policy Directive, which appeared to indicate that only one NOV may be issued in respect of one instance of non-compliance, even if it results in multiple violations or environmental harms. PCS argued that the Policy Directive, and the regime as a whole, made it clear that there is a “one action, one violation rule.”

[95] The Tribunal did not agree, noting that Rule 53 in the same Policy Directive provides that a separate NOV may be issued for “each individual thing.” The Tribunal stated that the statutory interpretation question arising from the apparent inconsistency in the Directive was whether the word “thing” in Rule 53 refers to the *actus reus* of closing the door and committing the violation, or to each of the birds’ deaths which constitute environmental harm and breaches paragraph

5(1)(a) of the *MB Regulations*. It noted that PCS argued that closing a single overhead door is an “individual thing” and the focus should be on that action and not the multiple birds. On the other hand, the AG submitted that the “definition asserted by PCS is an illogical definition of the word ‘thing’ and is not in line with other related rules in the Policy Directive. Thus, the Respondent argued that [the] most logical application of Rule 53 is that the word ‘thing’ applies to each single dead bird and that multiple dead birds are all ‘individual things’.”

[96] The Tribunal concluded that “[r]eading the words of the Directive in their entire context, grammatical and ordinary sense, and harmoniously with the statutory objectives of both the MBCA and EVAMPA, the Tribunal finds that the word ‘thing’ in Rule 53 does not refer to an action that causes environmental harm.”

[97] It is true, as PCS submits, that the Tribunal interpreted the meaning of the word “thing” in the Policy Directive. I would note, however, that this was in direct response to the argument raised by PCS. In the matter before me, PCS acknowledges that the Tribunal could have referred to the Policy Directive to inform its interpretation of the *MBC Act* and the *EVAMP Act* but asserts that the Tribunal erred by only interpreting the Policy Directive and failing to explain how its interpretation was consistent with the legislation.

[98] However, it is apparent from the decision that the Tribunal also looked at the relevant legislation and provisions which provide context for when multiple violations can be issued. The Tribunal noted that the *MBC Act* explicitly permits multiple fines to be imposed if an offence under the *MBC Act* involves more than one migratory bird or nest. However, that the NOVs

issued in this case were issued as violations under the *EVAMP Act* and not offences under the *MBC Act*. The Tribunal also noted that neither the *EVAMP Act* nor its regulations include a similar explicit direction permitting multiple NOV's. The Tribunal therefore turned to the Policy Directive to assist with determining whether multiple NOV's could be issued in this case, stating “guidance exists in Policy Directive 4-7-11 for AMPs.”

[99] This is also apparent from the Tribunal’s conclusion on this point quoted at paragraph 96 above. Further, the Tribunal, in its discussion of the Officer’s discretion, noted that the overall purpose of the *MBC Act* is to protect and preserve migratory bird populations and their habitats. Indeed, the purpose of the *MBC Act* as stated in section 4 of that *Act* is “to implement the Convention by protecting and conserving migratory birds — as populations and individual birds — and their nests.” The stated purpose of the *EVAMP Act* “is 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” (s 3) which includes the *MBC Act* (s 2).

[100] Given the above, and reading the decision as a whole, I am of the view that the Tribunal was alert to the purpose of the *MBC Act* and the *EVAMP Act* and that this underpinned its analysis of whether more than one NOV could be issued in the circumstances before it. The Tribunal did not rely solely on its interpretation of the Policy Directive and thereby fetter its discretion.

[101] I therefore also agree with the AG that the cases cited by PCS (*Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61; *Elson v Canada (Attorney General)*, 2019 FCA 27; *Az-Zahraa Housing Society v Canada (National Revenue)*, 2023 FC 842) are not applicable as they deal with fettering of discretion in circumstances where policies were treated as mandatory, which the Tribunal did not do. Although the Tribunal considered the Policy Directive, it used it as an interpretive tool to determine whether multiple NOVs could be issued in the circumstances.

[102] Before leaving this point, I note that when appearing before me PSC argued that, with respect to the Tribunal's interpretation of Rule 6b of the Policy Directive, which uses as an example that when a company illegally imports 25 engines on the same day that an officer can use their discretion and may issue one NOV for each item (resulting in 25 NOVs), that this was not analogous to the situation before the Officer. PCS submitted that this was because the importing of 25 engines would have required 25 actions whereas the closing of the coverall door was only one action. However, the reasonableness of the Tribunal's interpretation of the Policy Directive was not challenged by PCS on judicial review other than by PCS's argument that the Tribunal fettered its discretion in relying only on the Policy Directive. And, in any event, PCS's submission may not hold true if all 25 engines were imported on the same day by the same means of transport, such as a ship or train.

[103] To conclude on this point, I find that the Tribunal did not fetter its discretion by relying solely on its interpretation of the Policy Directive in deciding that multiple NOVs could be

issued by the Officer in the circumstances before him. Nor did it fail to consider whether its interpretation of the Policy Directive was consistent with the *EVAMP Act*.

*iii. Absurd interpretation*

*PCS's Position*

[104] Finally, PCS argues that the Tribunal erred in relying on an absurd interpretation of the *EVAMP Act* in reaching the conclusion that the issuance of ten NOV's for the same act was not an abuse of process. PCS submits that under the Tribunal's interpretation, the Officer would have had the discretion to issue anywhere from one to 88 NOV's in relation to the incident. This is an absurd result because the regime would have more severe consequences than the offence regime without any of the legal protections inherent in the offence regime. This is inconsistent with the purpose of the *EVAMP Act*.

[105] When appearing before me, PCS added that allowing this absurd interpretation to stand would result in there being no predictability in how the law will be applied because there would be no way to know how many NOV's would be issued. Here, a single act of closing the coverall door could have resulted in AMP's of \$440,000 if 88 NOV's were issued.

*AG's Position*

[106] The AG submits that PCS misinterprets the Tribunal’s statement in this regard. The Tribunal did not interpret the legislation as permitting 88 NOVs in the circumstances. Rather, in the course of evaluating PCS’s argument that issuing ten NOVs was an attempt to evade the maximum monetary penalty available for an AMP, the Tribunal commented that if that had been the Officer’s intent, he “might have turned to issuing eighty-eight NOVs.” The Tribunal does not suggest or conclude that in the circumstances of the matter before it, that it would have been proper for the Officer to do this. The Tribunal was faced with evaluating the issuance of ten NOVs, not 88, and the reasonableness of the Tribunal’s decision must be evaluated in that context.

[107] When appearing before me, the AG disagreed with PCS’s submission that allowing multiple NOVs to be issued leads to more severe consequences than if the Officer had proceeded under the offence regime. The AG pointed out that the prohibition in paragraph 5(1)(a) of the *MB Regulations* against the killing of “a migratory bird” is an offence under paragraph 13.01(1)(a) of the *MBC Act*. Under subsection 13.01(3) of the *MBC Act* the fine for a first offence is not more than \$250,000 on summary conviction and not more than \$500,000 on indictment. Under section 13.19 of the *MBC Act*, where an offence involves more than one migratory bird, multiple fines can be imposed. And, under paragraph 13.1(2)(a), causing damage to migratory birds is an aggravating factor that can increase the fine amount. Therefore, the fine imposed under the offence regime could have amounted to up to \$2.5 million, which far exceeds the theoretical aggregate \$440,000 fine under the administrative penalties regime as advanced by PSC.

*Analysis*

[108] First, I agree with the AG that PCS misconstrues the Tribunal's statement which was as follows:

[49] The Applicant argued that "the issuance of 10 NOVs represents a blatant attempt to maneuver around the maximum penalty [\$25,000], and to impose punishment on PCS that far exceeds the amount which is allowed under the EVAMPA for a single contravention and act." The evidence does not support such a speculative and disparaging statement.

[50] On the contrary, the evidence leads reasonably to a conclusion that the officer considered enforcement options and settled on issuing ten NOVs. If the officer wanted to maximize a financial penalty levied against PCS, he might have turned to issuing eighty-eight NOVs or charging the corporation with an offence under the MBCA.

[109] On the facts before the Tribunal, it was considering whether issuing ten NOVs for the ten necropsied birds was an abuse of process. The Tribunal addressed PCS's argument that issuing ten NOVs was an attempt to get around the maximum monetary penalty by illustrating other avenues the Officer might have taken if that was, in fact, his goal. The Tribunal made no comment as to whether those other avenues would have been reasonable or an abuse of process as that was not the circumstance before it. Accordingly, I do not agree with PCS that "[b]ringing the Tribunal's interpretation to its local conclusion," up to 88 NOVs could have been issued, and the interpretation was therefore absurd.

[110] Second, I have found above the Tribunal did not err in its conclusion that there was no abuse of process in this case and that the Tribunal's interpretation and analysis was not unreasonable. Accordingly, I do not agree with PCS that Tribunal erred in relying on an absurd interpretation of the *EVAMP Act* in reaching the conclusion that the issuance of ten NOVs for the same act was not an abuse of process.

[111] Third, with respect to PCS's submission that the Tribunal's interpretation, that it was open to the Officer to issue more than one NOV, is absurd because it would result in more severe consequences than the offence regime under the *MBC Act*, I do not agree. Section 13.19 of the *MBC Act* states that "[i]f an offence under this Act involves more than one migratory bird or nest, the fine to be imposed in respect of that offence may, despite sections 13, 13.01, 13.03 and 13.04, be the total of the fines that would have been imposed if each of the migratory birds or nests *had been the subject of a separate information*" (italic added). Paragraph 13.1(2)(a) lists one of the aggravating factors as "the offence caused damage or risk of damage to migratory birds or their nests." In this case, if the Officer had elected to proceed by way of the offence regime and the elements of the offence were established, a fine could have been imposed for at least each of the ten necropsied birds. In that event, the potential maximum fine for PCS, as a corporation and assuming a first offence, would be \$2.5 million on summary conviction (subparagraph 13.01(3)(b)(i)) and \$5 million for an indictable offence (subparagraph 13.01(3)(a)(i)). Although in this scenario there would be a higher burden of proof and more defences would have been available to PCS, I do not agree with PCS that the Tribunal's interpretation and decision results in the *EVAMP Act* penalty regime being so severe that it is contrary to the purpose of the *EVAMP Act* and absurd. The amount of the penalty reflects the objective of deterring non-compliance with the *EVAMP Act* regime (see *Guindon* at para 77; *3510395 Canada Inc v Canada (Attorney General)*, 2020 FCA 103 at paras 215-216).

[112] It is also to be recalled that the fine imposed in each case will depend on the facts before the officer and the application of those facts to the *EVAMP Act* penalty table.

[113] In this case, the Officer exercised his discretion to issue NOVs only with respect to the ten necropsied birds. The penalties imposed were in accordance with the penalty chart set out in the *EVAMP Act*. Each penalty was a \$2,000 base penalty plus \$3,000 for environmental harm, for a total of \$5,000. Even viewed cumulatively (this is not an aggregate fine), the fines amounted to \$50,000, which is well below the potential maximums under the *MBC Act* offence regime. While I acknowledge that, theoretically, had the Officer chosen to issue 88 NOVs and assigned fines of \$5,000 to each then this would result, cumulatively, in fines amounting to \$440,000 (still below the offence regime maximum fines). But that did not happen. Further, had the Officer been of the view the offences were so serious that a fine of that magnitude was warranted, then he could have exercised his discretion to proceed under the offence regime, rather than the administrative penalty regime.

[114] In this matter, the Officer elected to proceed under the administrative penalties regime. While it seems that PCS may be of the view that it would have fared differently under the offence regime, where it would have had access to the due diligence defence, that was not the issue before the Tribunal.

## **Conclusion**

[115] For the reasons above, I find that the Tribunal reasonably concluded that the elements of the prohibition against killing a migratory bird, contained in paragraph 5(1)(a) of the *MB Regulations*, were established for each of the ten NOVs. Further, that the issuance of ten NOVs, rather than one, was not an abuse of process.

[116] I also find that the Tribunal's analysis engaged with the evidence, flowed logically, was intelligible, and that its conclusions were drawn based on the evidence and reasonable interpretations of the relevant legislation and policy. The Tribunal's decision is justifiable, transparent, intelligible, and defensible and was reasonable.

[117] Accordingly, the judicial review of the Tribunal's decision is dismissed.

### **Costs**

[118] When appearing before me, the parties advised that they had mutually agreed that the successful party would be awarded a lump sum costs award of \$4,000.

[119] As the successful party, I will therefore award the Respondent a lump sum costs award of \$4,000.

**JUDGMENT IN T-3619-24**

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is dismissed.
2. The Respondent is awarded a lump sum costs award in the amount of \$4,000.

"Cecily Y. Strickland"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-3619-24

**STYLE OF CAUSE:** POTASH CORPORATION OF SASKATCHEWAN INC.  
v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** SASKATOON, SASKATCHEWAN

**DATE OF HEARING:** MARCH 2, 2026

**JUDGMENT AND REASONS:** STRICKLAND J.

**DATED:** MARCH 16, 2026

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