



Issue Date: April 4, 2019

Citation: *Hoang v. Canada (Environment and Climate Change)*, 2019 EPTC 2

EPRC Case No.: 0026-2018

Case Name: *Hoang v. Canada (Environment and Climate Change)*

Applicant: Tunghai Henry Hoang

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under s. 15 of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 ("EVAMPA") of an Administrative Monetary Penalty issued under s. 7 of EVAMPA for a violation of s. 6(b) of the *Migratory Birds Regulations*, CRC, c 1035 made under the *Migratory Birds Convention Act, 1994*, SC 1994, c 22

Heard: March 8, 2019 by telephone conference call

Appearances:

Parties

Counsel/Representative*

Tunghai Henry Hoang

Self-represented

Minister of Environment and
Climate Change Canada

David Shiroky

DECISION DELIVERED BY JERRY V. DEMARCO

Background

[1] This Decision disposes of a request by Tunghai Henry Hoang (“Applicant”) to the Chief Review Officer for a review of an Administrative Monetary Penalty (“AMP”) issued by Environment and Climate Change Canada (“ECCC”) on June 19, 2018.

[2] The AMP was issued by ECCC Enforcement Officer Kristopher Dirks to the Applicant under s. 7 of the *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 (“EVAMPA”) in respect of an alleged violation of s. 6(b) of the *Migratory Birds Regulations*, CRC, c 1035, made under the *Migratory Birds Convention Act, 1994*, SC 1994, c 22 (“MBCA”).

[3] The Applicant submitted his request for a review to the Chief Review Officer on June 21, 2018 under s. 15 of EVAMPA.

[4] The hearing was conducted by telephone conference call on March 8, 2019. ECCC was represented by Counsel, David Shiroky. The Applicant represented himself. Their submissions focused mainly on the amount of the AMP penalty rather than the facts of the alleged violation, which were admitted by the Applicant.

[5] For the reasons set out below, the AMP is upheld and the review is dismissed.

Issues

[6] The issues are: 1) whether ECCC has established the elements of a violation of s. 6(b) of the *Migratory Birds Regulations*, and 2) if so, whether the amount of the AMP should be changed.

Relevant Legislation and Regulations

[7] The most relevant provisions of EVAMPA are:

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.

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.

(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.

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.

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

(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.

22. If the review officer or panel determines that a person, ship or vessel has committed a violation, the person, ship or vessel is liable for the amount of the penalty as set out in the decision.

[8] The most relevant provisions of the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 (“AMP Regulations”) are:

4. The amount of the penalty for each violation is to be determined by the formula

$$\mathbf{W + X + Y + Z}$$

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.

5. The baseline penalty amount for a violation is the amount set out in column 3 of Schedule 4 that corresponds to the category of the violator and the type of violation committed as set out in columns 1 and 2, respectively, of that Schedule.

[9] The relevant provision of the *Migratory Birds Regulations* is:

6. Subject to subsection 5(9), no person shall

(a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird, or

(b) have in his possession a live migratory bird, or a carcass, skin, nest or egg of a migratory bird except under authority of a permit therefor.

Discussion

Facts

[10] The parties agree to the main relevant facts as set out in the Affidavit of Officer Dirks, which was made an exhibit in this proceeding. To summarize, the Applicant phoned Officer Dirks on June 19, 2018 and advised him that he had removed baby birds from a nest and wanted to know what to do with them. The Applicant told Officer Dirks that he discovered the birds while making stucco repairs at a building in Calgary, Alberta. The Applicant believed the birds to be woodpeckers. They were later identified as Northern Flickers (*Colaptes auratus*), a member of the woodpecker and allies family (Picidae).

[11] Officer Dirks informed the Applicant that he had violated the *Migratory Birds Regulations* by disturbing the nest and possessing the birds. He instructed the Applicant to take the birds to a wildlife rehabilitation centre to be looked after. The Applicant dropped off nine young Northern Flickers at the centre. Staff at the centre told Officer Dirks that eight of the birds were near the fledgling stage and had a good chance of survival and that one was a young nestling and had a 50% chance of survival.

[12] Officer Dirks considered a number of options before deciding to issue an AMP to the Applicant. Among the other options he considered were: 1) a written warning to the Applicant or his employer, 2) a ticket to the Applicant or his employer under applicable provincial legislation, and 3) formal charges under federal legislation. Officer Dirks elected to proceed with the AMP after considering that the Applicant self-reported the violation, was cooperative and took the birds to the wildlife centre.

[13] The AMP is for \$400, which is the baseline penalty amount for an individual for this type of violation (i.e., type B), as set out in Schedule 4 of the AMP Regulations. No amounts were added for history of non-compliance, environmental harm or economic gain.

The Applicant's Submissions

[14] The Applicant admits the facts as summarized above and does not dispute that he violated s. 6(b) of the *Migratory Birds Regulations*. He states that he did as directed by Officer Dirks and brought the birds to the closest wildlife centre and that the birds were not harmed. As a construction worker, he was not aware that the birds were a protected species and he believes that he acted humanely in the circumstances. He believes that ECCC should not have been issued an AMP and that a verbal warning would have been sufficient in these circumstances. He asks for some compassion as he believes that issuing an AMP was harsh, given that he was doing the right thing. He would like the AMP set aside or the amount of the AMP reduced given the positive actions he took. He added that this has been a learning process for him and that his experience with this matter will assist him in the future. In response to ECCC's

submissions, the Applicant stated that he was not aware that \$400 was a minimum amount under the rules.

ECCC's Submissions

[15] In overview, ECCC submits that the Applicant violated s. 6(b) of the Regulations because he took possession of live migratory birds without a permit. ECCC notes that Northern Flickers are members of the woodpecker and allies family (Picidae) and, as such, are protected under the Schedule to the MBCA. ECCC also submits that due diligence and mistake of fact defences (such as the Applicant did not know that birds were a protected species) cannot be raised as per s. 11 of EVAMPA. ECCC notes that the Applicant does not dispute that a violation of the Migratory Birds Regulations occurred and thus focused its submissions on the appropriateness of the AMP amount.

[16] ECCC submits that a violation of s. 6(b) of the Migratory Birds Regulations is classified as Type B under the AMP Regulations (see: Sch. 1, Part 4, Div. 2, Item 16 of the AMP Regulations). Therefore, the applicable baseline amount for an individual violator is \$400 under Schedule 4 of the AMP Regulations. ECCC submits that no aggravating factors were present and thus none of the additional amounts that can be added under the AMP regulations were added to the \$400 AMP here. ECCC also submits that Officer Dirks did not choose the harshest option (i.e., formal charges) and considered the Applicant's positive conduct and the lack of aggravating factors in electing to issue an AMP instead of a prosecution. ECCC notes that \$400 is the lowest amount possible for an AMP for a Type B violation.

[17] ECCC submits that s. 20(3) of EVAMPA does not permit a Review Officer to reduce an AMP below the applicable baseline amount of \$400 set out in the AMP Regulations. ECCC also submits that it was not open to Officer Dirks to issue an AMP for an amount lower than the applicable baseline amount (see s. 7 of EVAMPA). As such, the amount cannot be lowered in this case. Similarly, ECCC submits that a Review Officer cannot substitute a warning for an AMP that has been issued, if the violation has been proven.

[18] ECCC submits that the only authority for Review Officers to change the amount of AMP for a proven violation is when the amount was not determined correctly in accordance with the AMP Regulations, as per s. 20(3) of EVAMPA. In other words, the only remedy available in respect of proven violations is a correction of the penalty so that the amount accords with the formula set out in the AMP Regulations. Lowering an AMP to reflect the positive conduct of the Applicant would not be in keeping with EVAMPA or be in accordance with the AMP Regulations.

Analysis and Findings

[19] Under s. 20 of EVAMPA, Review Officers are to determine whether a violation was committed and whether the AMP was calculated properly. The burden is on ECCC to demonstrate on a balance of probabilities that the elements of the violation are

present. Defences related to “mistake of fact” and “due diligence” cannot be relied upon as per s. 11 of EVAMPA. With respect to the amount of the AMP, Review Officers are to determine whether the amount was calculated correctly in accordance with the formula and elements set out in sections 4 to 8 of the AMP Regulations.

[20] During the hearing of this matter, the Applicant did not dispute that a violation took place. Northern Flickers are “migratory birds” protected by the MBCA and the *Migratory Birds Regulations*. The Applicant took possession of nine Northern Flickers. The Applicant did not have a permit for possessing them. As well, to the extent that the Applicant’s submissions could be interpreted as an attempt to mount a due diligence or mistake of fact defence (i.e., that he believed he was doing the right thing in the circumstances), such a defence does not apply as per s. 11 of EVAMPA.

[21] While the Applicant believes that issuing an AMP (as opposed to a warning, for example) was harsh, the Chief Review Officer finds that the role of Review Officers is not to step into the shoes of enforcement officers and re-exercise enforcement discretion. Officer Dirks chose the AMP option among several options. One of those options (i.e., a warning) was less “harsh” and at least one of those options (i.e., formal charges) was more “harsh”. While the Chief Review Officer acknowledges the steps the Applicant took to self-report the incident and to protect the birds after he removed them from their nest, this does not change the fact that he unlawfully removed them from their nest and took possession of them in the first place. Review Officers are not given the authority under EVAMPA to determine whether enforcement officers’ exercises of discretion were properly or reasonably carried out. Review Officers review “the facts of the alleged violation” and the determination of the correct penalty under s. 15 and s. 20 of EVAMPA. Review Officers do not review the exercise of enforcement officers’ discretion to issue AMPs in the first place.

[22] Accordingly, while the Chief Review Officer understands the Applicant’s concerns in this case, EVAMPA does not provide recourse when the ground for a review goes to the exercise of an enforcement officer’s discretion as opposed to the facts of the alleged violation. To conclude, ECCC has discharged its burden under s. 20(2) of EVAMPA by demonstrating, on a balance of probabilities, that a violation of s. 6(b) of the *Migratory Birds Regulations* occurred. It is not for the Review Officer to consider setting aside the AMP once the elements of the violation have been demonstrated, as they were here.

[23] The next question to be addressed is whether the amount of the AMP should be decreased. Review Officers are required to assess the correctness of an AMP amount in accordance with the AMP Regulations (see: s. 7 and s. 20(3) of EVAMPA). The AMP Regulations provide the formula for determining an AMP amount (s. 4 of the AMP Regulations) and for determining the baseline penalty amount that is one part of the four-part formula (s. 5 of the AMP Regulations). Neither EVAMPA nor the AMP Regulations provide authority for Review Officers to decrease an AMP amount below the baseline amount. In this case, the AMP amount of \$400 consists only of the baseline amount and no additional amounts for aggravating factors were added for

history of non-compliance, environmental harm or economic gain. The Chief Review Officer finds that the AMP was correctly calculated as the Applicant is an individual violator and s. 6(b) of the *Migratory Birds Regulations* is a Type B violation. Schedule 4 of the AMP Regulations states that \$400 is the baseline amount in these circumstances. EVAMPA and the AMP Regulations do not permit Review Officers to change the amount of an AMP unless the AMP was not calculated correctly in accordance with the AMP Regulations. In this case, the AMP was properly calculated.

Conclusion

[24] ECCC has discharged its burden under s. 20(2) of EVAMPA by demonstrating, on a balance of probabilities that a violation of s. 6(b) of the *Migratory Birds Regulations* occurred. As well, the AMP was calculated correctly in accordance with the AMP Regulations.

Decision

[25] The AMP is upheld and the review is dismissed.

Review Dismissed

“Jerry V. DeMarco”

JERRY V. DEMARCO
CHIEF REVIEW OFFICER