



Issue Date: February 27, 2020
Citation: *Kruger v. Canada (Environment and Climate Change)*, 2020 EPTC 1
EPTC Case No.: 0004-2019
Case Name: *Kruger v. Canada (Environment and Climate Change)*
Applicants: Donna Mae Kruger
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. 12.1(2) of the *Migratory Birds Regulations*, CRC, c 1035 made under the *Migratory Birds Convention Act*, 1994, SC 1994 c 22.

Heard: In writing

Appearances:

Parties

Donna Mae Kruger

Minister of Environment and
Climate Change Canada

Counsel/Representative

Self-Represented

Don Klaassen

DECISION DELIVERED BY:

LESLIE BELLOC-PINDER

Background

[1] This Decision disposes of a request by Donna Kruger (“Applicant”) to the Environmental Protection Tribunal of Canada (“Tribunal”) for a review of an Administrative Monetary Penalty (“AMP”) issued by Environment and Climate Change Canada (“ECCC”) on March 14, 2019.

[2] The AMP was issued by ECCC Enforcement Officer Amy Biensch 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. 12.1(2) 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 her request for a review to the Tribunal on March 25, 2019 under s. 15 of EVAMPA.

[4] The hearing was conducted largely by written submissions, but one pre-hearing conference call occurred on November 29, 2019. The Applicant did not participate in the call, but was advised of its outcome on December 12, 2019.

[5] Following review of the parties’ written submissions, and for the reasons set out below, the AMP is upheld but also corrected.

Issues

[6] The issues are: 1) whether ECCC has established the elements of a violation of s. 12.1(2) 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.

8(1). Subject to subsection (2), if the violation has resulted in economic gain to the violator, including an avoided financial cost, the economic gain amount is the amount set out in column 6 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] Pursuant to Part 4, Division 2 of the AMP Regulations, a violation of section 12.1(2) of the *Migratory Birds Regulations* is a Type B violation. Pursuant to Column 3 of Schedule 4 of the AMP Regulations, the baseline amount for a Type B violation is \$400 for an individual and \$2,000 for “other person or ship or vessel”. The economic gain amount for a Type B violation in Schedule 4 is \$400 for an individual and \$2,000 for “other person or ship or vessel”.

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

12.1(2). No person shall purchase, sell, barter, or offer to purchase, sell or barter the feathers of migratory birds for millinery or ornamental use.

[11] Migratory game birds, including geese, are included as protected migratory birds pursuant to the MBCA.

Discussion

Facts

[12] There is no dispute about the primary facts underlying the AMP under review. On March 14, 2019, Wildlife Officer Biensch and Regional Intelligence Officer Vodden attended The Broom Closet Witchcraft Supplies Shop in Regina, Saskatchewan. They spoke with Donna Kruger, who is the sole proprietor of the shop. Officer Biensch noticed there were four feather fans on display and offered for sale for \$35 each. Each fan was made from three feathers, and Ms. Kruger advised Officer Biensch that the feathers were from a Canada Goose. Ms. Kruger had purchased the fans from an individual, whom she described as a wandering artist. She paid the artist \$10 each for the fans and bought only four. She did not sell any, and they remained, on display, in the store when Officer Biensch appeared. Upon being advised that offering Canada Goose feathers for sale contravened the MBCA and *Migratory Birds Regulations*, Ms. Kruger said she was unaware of the law.

[13] Officer Biensch issued an AMP in the total amount of \$4,000, comprised of a \$2,000 baseline penalty for a Type B violation committed by an “other person or ship or vessel”, and \$2,000 for the aggravating factor of economic gain.

Analysis and Findings

[14] Under s. 20 of EVAMPA, Review Officers are to determine whether a violation was committed. 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 also 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. While the Applicant submitted she was unaware that offering the feather fans for sale contravened the law, her primary concern was the substantial penalty which, she asserted, would result in extreme financial hardship and the likely closure of her business. Based on the evidence, the Review Officer finds that ECCC has shown that the Applicant violated s. 12.1(2) of the *Migratory Birds Regulations*. The question that remains is whether the AMP amount determined correctly in accordance with the AMP Regulations.

[15] During the pre-hearing conference call on November 25, 2019, the Minister’s counsel was asked to clarify the Minister’s position regarding the following two questions related to the AMP amount of \$4,000:

- 1) Whether the Notice of Violation is against Ms. Kruger as an individual or an “other person” (which contemplates a separate legal entity); and
- 2) Whether the aggravating factor of economic gain should have been assessed in the AMP.

In reply to these questions, the Minister, through counsel, provided its position as follows:

- 1) A sole proprietor should be considered as an “individual” for the purposes of calculating the penalty; and
- 2) The economic gain aggravating factor requires there to be actual economic gain, and there is no evidence that any of the fans were sold.

[16] In the AMP under review, the baseline amount used was \$2,000. This is the amount intended to apply to a Type B violation for “other person or ship or vessel”, which would include legal entities distinct from individuals. While Ms. Kruger operates a retail business, she does so as a sole proprietor. The Broom Closet Witchcraft Supply Shop is not an incorporated company. Therefore, the Minister’s submission that a sole proprietor should be considered an individual for the purposes of calculating the penalty

is entirely appropriate. A \$400 baseline penalty should have been issued to Ms. Kruger as an individual instead of the \$2,000 baseline penalty, which would apply to other legal entities, such as corporations.

[17] Further, regarding the aggravating factor of economic gain, it is significant that s. 8 of the AMP Regulations includes the phrase, "... if the violation has resulted in economic gain to the violator ..." (emphasis added). ECCC's 2017 "Policy Framework of the Administrative Monetary Penalty Regime at Environment and Climate Change Canada to Implement the *Environmental Violations Administrative Monetary Penalties Act*" (Chapter 4, p. 12) also states that "economic gain will only include realized gains" and not potential gains. There is no evidence any of the Canada Goose feather fans were sold by Ms. Kruger or that there was actual economic gain realized by her. As a result, the penalty should have been calculated without any amount for the aggravating factor that applies when a violation "has resulted" in economic gain.

[18] The Minister's concession on the above points has facilitated prompt resolution of this review. While s. 16 of EVAMPA provides that the Minister's designate could cancel or correct a notice of violation prior to a request for review being filed, once a request for review is received by the Tribunal, a decision must be rendered by a review officer in order to correct the amount of the penalty pursuant to s. 20(3) of EVAMPA.

[19] The Review Officer finds that the AMP was incorrectly calculated because the Applicant is an individual who committed a Type B violation. Schedule 4 of the AMP Regulations states that \$400 is the baseline amount that applies in these circumstances. Further, the evidence does not support any additional penalty for economic gain as an aggravating factor.

Conclusion

[20] ECCC has discharged its burden under s. 20(2) of EVAMPA by demonstrating, on a balance of probabilities, that a violation of s. 12.1(2) of the *Migratory Birds Regulations* by the Applicant occurred. However, the AMP was calculated incorrectly in accordance with the AMP Regulations. The AMP is, therefore, reduced to the correct amount of \$400.

Decision

[21] The AMP is upheld but the amount of the penalty is corrected from \$4,000 to \$400.

Review Granted in Part

AMP Amount Corrected

“Leslie Belloc-Pinder”

LESLIE BELLOC-PINDER
REVIEW OFFICER