Environmental Protection Tribunal of Canada

Tribunal de la protection de l'environnement du Canada

Issue Date:	June 19, 2020
Citation:	*Rice v. Canada (Environment and Climate Change),* 2020 EPTC 4
EPTC Case No.:	0020-2019
Case Name:	*Rice v. Canada (Environment and Climate Change)*
Applicant:	Kevin Rice
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. 8 of the *Wildlife Area Regulations,* CRC, c 1609 made under the *Canada Wildlife Act,* RSC 1985, c W-9.

Heard: May 29, 2020 by telephone conference call

Appearances:

Parties	**Counsel/Representative**
Kevin Rice	Self-Represented
Minister of Environment and Climate Change Canada	Elizabeth Koudys

DECISION DELIVERED BY: **LESLIE BELLOC-PINDER**

Background and Procedure

[1] This Decision disposes of a request by Kevin Rice ("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 October 10, 2019.

[2] The AMP was issued by ECCC Enforcement Officer Joshua Ladouceur 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. 8 of the *Wildlife Area Regulations,* CRC, c 1609 made under the *Canada Wildlife Act,* RSC 1985, c W-9.

[3] The Applicant submitted his request for a review to the Tribunal on October 17, 2019 under s. 15 of EVAMPA. ECCC filed an Administrative Monetary Penalties Brief in response to the request for review, and a pre-hearing conference occurred on March 23, 2020 by telephone conference call. Subsequently, Counsel for ECCC filed and served a motion to strike the request for review on jurisdictional grounds on April 22, 2020. The Applicant provided his written response to the motion on May 22, 2020, and a second telephone conference call was scheduled to provide an opportunity for oral submissions on the motion.

[4] On May 29, 2020, the telephone conference call began with a procedural discussion, and the parties agreed to convert the motion hearing to a full hearing on the merits. To that end, the parties agreed there is no dispute on the key facts giving rise to the AMP. The Applicant's letters dated October 17, 2019 and May 22, 2020 constitute his testimony about events on the day of the alleged violation and his written submissions on the unfairness of the Notice of Violation. Counsel for ECCC agreed to adopt Officer Ladouceur's Administrative Monetary Penalties Brief as the Minister's evidence supporting the Notice of Violation. The materials in support of the motion to strike with accompanying authorities constituted the Respondent's written legal submissions.

[5] No other evidence was provided by either party, and the hearing concluded with oral argument, which supplemented the written material.

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

Issues

[7] The issues to be resolved in this case are:

1. Has ECCC established the elements of a violation of s. 8 of the *Wildlife Area Regulations* and, if so, should the amount of the AMP be changed?

2. Does the Tribunal have jurisdiction to review the exercise of an enforcement officer's discretion to issue an AMP?

3. Is the defence of entrapment available to the Applicant, and if so, has the defence been established on the evidence?

Relevant Legislation

[8] 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.
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> 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
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> (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.
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> (2) The Minister has the burden of establishing, on a balance of probabilities, that the person, ship or vessel committed the violation.
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> (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.

[9] The relevant provision of the *Canada Wildlife Act* is:

> 12. The Governor in Council may make regulations
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> > (a) respecting the prohibition against entry, generally or for any specified period or purpose, by persons on lands under the administration of the Minister, or on public lands referred to in an order made under subsection 4(3), or on any part of those lands;

[10] The relevant provision of the *Wildlife Area Regulations* is:

> 8. Where the Minister has published a notice in a local newspaper or posted a notice at the entrance of any wildlife area or on the boundary of any part thereof prohibiting entry to any wildlife area or park thereof, no person shall enter the area or part thereof set out in the notice.

[11] Schedule I, Part IV, s. 6 of the *Wildlife Area Regulations* lists Wellers Bay National Wildlife Area as a parcel of land contemplated by s. 12 of the *Canada Wildlife Act.*

Agreed Facts and Submissions

[12] As noted above, the parties agree to the main relevant facts as set out in the Applicant's request for review and ECCC's Administrative Monetary Penalties Brief. To summarize, four officers were conducting enforcement activities in Wellers Bay, located in Prince Edward County, Ontario, on August 3, 2019. The officers observed the Applicant navigating his fishing boat toward the east shoreline of Wellers Bay and, approximately six minutes later, they observed him enter the protected wildlife area and walk toward and on the west shoreline.

[13] The enforcement officers notified the Applicant that it was an offence to enter the National Wildlife Area ("NWA"), and the Applicant stated he was unaware of the NWA. The officers notified the Applicant that he had committed a violation and that he would be issued an AMP.

[14] The first Notice of Violation served on the Applicant on October 11, 2019 contained an error. The corrected Notice of Violation dated October 17, 2019, was subsequently served on the Applicant by email.

[15] The AMP is for $400, which is the baseline penalty amount for an individual for this type of violation as set out in Schedule 4 of the *Environmental Violations Administrative Monetary Penalties Regulations*, SOR/2017-109 ("AMP Regulations"). No amounts were added for history of non-compliance, environmental harm or economic gain.

Applicant's Submissions

[16] The Applicant does not dispute that he violated s. 8 of the *Wildlife Area Regulations* by walking on the "federal side" of the beach in Wellers Bay, which he described as an island in Lake Ontario. He did not notice the Prohibited Entry signs posted along the shoreline until after he was advised of his violation, and he presumed the plain clothed enforcement officers were fishermen.

[17] The Applicant walked over to the officers and asked, "how is the fishing guys?" to which one of the officers replied, with a chuckle, "pretty good". The Applicant submits that this brief conversation provided the officers with an opportunity to warn him about his proximity to a prohibited area. The Applicant believes that the ECCC officers should have "explained the situation" and exercised their discretion to issue a warning. A warning was not given, however. Instead, the Applicant submits that the officers watched him re-enter the prohibited beach area and then photographed his presence to support the Notice of Violation ultimately issued.

[18] The Applicant describes the officers' failure to provide him with a warning that he was about to enter (or re-enter) a prohibited area as "borderline entrapment". He submitted the officers' behavior provides him with a defence to the AMP on this basis or because he was unaware he had entered a prohibited area.

Respondent's Submissions

[19] The Respondent submits that the Applicant's admitted physical presence on the beach of an NWA constitutes a complete admission that he committed the violation. Further, the Applicant does not contest the amount of the AMP, which is the minimum possible penalty. As a result, the Respondent submits the Minister's burden of proof has been fully discharged and the AMP should be upheld.

[20] The Respondent submits the Tribunal has no jurisdiction to reduce or forgive the AMP, nor can it entertain defences of due diligence or mistake of fact as set out in s. 11(1) of EVAMPA. The Respondent equated the Applicant's submission regarding "borderline entrapment" with an imperfectly worded "mistake of fact" defence which is, similarly, unavailable in an "absolute liability regime".

Analysis and Findings

[21] Under s. 20 of EVAMPA, the Tribunal must 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. The evidence in this case is clear that the Applicant entered the Wellers Bay NWA in contravention of the *Wildlife Area Regulations*. The Applicant stated, upon being advised of his violation, that he did not realize the shoreline was part of a protected area or NWA, and if he had seen the signs prohibiting entry, he would not have entered. There is no reason to doubt the sincerity of the Applicant's statement in this regard; however s. 11 of EVAMPA specifically states that defences related to "mistake of fact" and "due diligence" cannot be relied upon.

[22] While conceding his presence on the protected land, the Applicant believes the enforcement officers should have spoken to him earlier and stopped him from walking along the prohibited shoreline. He submits it would have been more appropriate for the officers to issue a "verbal warning", using the least coercive means necessary to "mitigate a wrong". Thus, the Applicant asks the Tribunal to determine whether the enforcement officers' exercise of discretion was properly or reasonably carried out. The Tribunal does not, however, have the jurisdiction to review the enforcement officers' discretion to issue the AMP. Sections 15 and 20 of EVAMPA empower the Tribunal to determine only whether a violation was committed and whether the AMP was calculated properly (see: *Bhaiyat v Canada (Environment and Climate Change Canada)*, 2019 EPTC 1 and *Hoang v Canada (Environment and Climate Change)*, 2019 EPTC 2).

[23] To conclude on the first issue, the elements of a violation of s. 8 of the *Wildlife Area Regulations* have been established and the AMP amount was calculated correctly. On the second issue, the Tribunal concludes that it does not have jurisdiction to review the exercise of an enforcement officer's discretion to issue an AMP instead of a warning.

[24] The Applicant's final argument relates to the availability of a defence which, if proven, might rebut a finding that all elements of the violation have been proven despite his admission. Section 11(1) of EVAMPA removes the potential for due diligence or mistake of fact as defences to a violation issued in a case such as this one. Section 11(2), however, contemplates that other defences might be available to provide "a justification or excuse in relation to a charge for an offence under an Environmental Act". It is this section which provides the Applicant with an opportunity to argue he was treated unfairly, unreasonably, or as the victim of entrapment by the enforcement officers.

[25] Counsel for the Respondent filed a legal brief that included reference to the Federal Court of Appeal's decision in *Doyon v. Attorney General of Canada*, 2009 FCA 152. In *Doyon*, the Court was dealing with an appeal from a Canadian Agricultural Review Tribunal ("CART") decision regarding an absolute liability regulatory offence,

which is the same situation in this case. Further, the same statutory language regarding possible common law defences as applies in this case governed CART in *Doyon,* and the Court considered CART's equivalent to s. 11(2) of EVAMPA, as follows:

> [11] Violations of the Act are absolute liability offences for which, as stipulated in section 18, a defence of due diligence or honest and reasonable mistake of fact is not available…However, the same section allows as a defence 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 agri-food Act, to the extent that it is not inconsistent with the Act. These defences include intoxication, automatism, necessity, mental disorder, self defence, *res judicata*, abuse of process and entrapment.

[26] More recently, the same conclusion was reached by the Federal Court of Appeal in *Canada (Attorney General) v Klevtsov*, 2018 FCA 196, which cited *Doyon* at para. 5. Again, the court was examining a CART decision regarding an absolute liability offence.

> [5] …. A violation is established upon proof of the prohibited act, or the *actus reus*. Mistakes of fact and due diligence are not defences. Common law defences including necessity, mental disorder and abuse of process however, are available…
>
> [6] As a result, mental disorder, including automatism, is a potential defence.
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> [7] Whether the constituent elements of a defence have been identified by a judge is a question of law, reviewable on a correctness standard…In this case, the Tribunal did not address the evidentiary and legal elements necessary to establish the defence of automatism.

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

[28] Counsel for the Respondent submitted two cases in response to the Applicant's entrapment argument. In *R. v. Amato*, [1982] 2 SCR 418, which involved a criminal prosecution, the majority of the Supreme Court of Canada endorsed the trial judge's view, stated as follows:

> [20] In order to determine the sufficiency of evidence to raise a defence of entrapment there must be evidence to show that the police had instigated the crime and that, had they not done so, the accused would not have been involved in the transaction. The instigation must, of course, go beyond mere solicitation or decoy work.

[29] With the passage of time and subsequent inclusion of the *Canadian Charter of Rights and Freedoms* in the Canadian *Constitution*, the dissent of Justice Estey in *R. v. Amato* is its most enduring feature. In his dissent, Estey J found a stay of proceedings in the presence of entrapment was a matter of judicial implementation of proper legal policy rooted in common law. Foreshadowed by Estey J, s. 7 of the *Charter* merged the common law doctrine of abuse process into the criminal context such that an abuse of process could thereafter clearly constitute a violation of the principle of fundamental justice. From this context, the second decision cited by Counsel for the Respondent emerges.

[30] In *R. v. Clothier*, 2011 ONCA 27, the Ontario Court of Appeal addressed the "broad question" of whether the defence of entrapment applies to a regulatory offence and the "narrow question" of whether certain compliance monitoring techniques can be undertaken without a reasonable suspicion that the person being monitored is engaged illegal activity contrary to the *Smoke-Free Ontario Act*, SO 1994, c-10.

[31] The following excerpts from *R. v. Clothier* are instructive in this case:

> (i) Entrapment
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> [13] The doctrine of entrapment in Canadian criminal law is an aspect of the broader abuse of process doctrine. Entrapment reflects judicial disapproval of unacceptable police or prosecutorial conduct in investigating crimes. The defence is extensively discussed by Lamer J. in *R. v. Mack*, 1988 CanLII 24 (SCC), [1988] 2 S.C.R. 903, and in his later judgment in *R. v. Barnes*, 1991 CanLII 84 (SCC), [1991] 1 S.C.R. 449.
>
> [14] In setting out the contours of the doctrine of entrapment, Lamer J. balanced two competing objectives. On the one hand, he recognized that the police must have considerable leeway in the techniques they use to investigate criminal activity. On the other hand, he also recognized that the power of the police to investigate crimes should not be untrammeled. The police should not be allowed to randomly test the virtue of citizens by offering them an opportunity to commit a crime without reasonable suspicion that they are already engaged in criminal activity; or worse, to go further and use tactics designed to induce citizens to commit a criminal offence. To allow these investigative techniques would offend our notions of decency and fair play.

> [15] Lamer J. struck the balance between these two objectives by concluding that an accused will be entitled to rely on the defence of entrapment in either of two situations:
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> - First, when government authorities provide a person with an opportunity to commit a crime, unless they have a reasonable suspicion that the person is already engaged in criminal activity, or unless they are acting in the course of a bona fide investigation.
>
> - Second, when government authorities, though they have a reasonable suspicion or are acting in the course of a bona fide investigation, go beyond providing an opportunity to commit a crime by inducing the commission of an offence.

[32] In this case, the Applicant does not suggest that any of the enforcement officers threatened him or induced him to enter the prohibited area. Despite the definition of entrapment provided in his written submissions, the Applicant acknowledged during the hearing, that no "trickery, persuasion or fraud" was utilized against him. Therefore, the Tribunal is only concerned with the first branch of entrapment described above which encompasses two kinds of cases. In either kind of case, the Ontario Court of Appeal held that police can lawfully act only on reasonable suspicion, "either of any individual's or an area's criminal activity. The requirement of reasonable suspicion in the criminal law context defines the debate on this appeal" (*Clothier* at para. 19). But neither this case, nor *R. v. Clothier* involve a criminal offence – they involve regulatory offences enacted to promote values such as health and safety or environmental protection. Therefore, the question is whether reasonable suspicion is required as it would be in the criminal context (where if such suspicion is not proven then entrapment can succeed) or whether a *bona fide* investigation is enough to support a conviction for the regulatory offence and repel an entrapment claim.

[33] Laskin J, writing for the court in *Clothier*, specifically notes his reasons are limited to the question of whether the entrapment defence is available for a charge stemming from a compliance check under the *Smoke-Free Ontario Act*. As a result, *Clothier* may arguably have limited applicability to the instant case. On the other hand, the analysis undertaken by the court in *Clothier* establishes a process and lens through which other regulatory statues can be viewed, including the one at issue here. There are sufficient similarities between all regulatory regimes designed to protect and advance public values. In *Clothier*, Laskin J quotes from Cory J in *R. v. Wholesale Travel Group Inc.* (1991) 3 SCR 154 at pp.218-219:

> [21] Regulatory legislation involves a shift in emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interest. …regulatory

> measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

[34] According to the Respondent's Administrative Monetary Penalties Brief at pp. 8-9:

> …National Wildlife Areas are established to protect migratory birds, species at risk, and other wildlife and their habitats. National Wildlife Areas are established under the authority of the *Canada Wildlife Act* and are, first and foremost, places for wildlife.
>
> The Wellers Bay National Wildlife Area is located along the shores of Prince Edward County near Trenton, in northeastern Lake Ontario. It was established in 1978 to protect the peninsula and islands of Weller Bay in Lake Ontario for the benefits of waterfowl. Covering a total area of 41 hectares (ha), the NWA is comprised of a long, narrow sandspit known as the Baldhead Peninsula with three adjoining small islands… The Great Lakes shoreline is one of the most modified habitats in Canada, and also one of the most important habitats for migratory waterfowl, shorebirds, and songbirds in North America…
>
> Access to the Wellers Bay NWA is prohibited to protect the fragile beach and dune ecosystems, sensitive wildlife habitats, and also to reduce the risk of exposure to injury from Unexploded Explosive Ordnance (UXO) on the site.

[35] Thus, the two reasons the public is prohibited from entering the NWA are to protect the fragile ecosystems and habitats and to reduce the risk of potential personal injury from unexpected contact with unexploded ordnances. The Tribunal is satisfied that statutory compliance is required to deter harmful conduct in the future in keeping with the purpose of protecting the NWA. Like the preventative health protection objective of the *Smoke-Free Ontario Act*, the regulatory provision giving rise to the AMP in this case is designed to prevent future environmental harm and protect vulnerable ecosystems, both of which are ultimately in the public interest.

[36] It is uncontroverted that enforcement officers were working in plain clothes and travelling in an unmarked boat in order to detect unlawful entry to the Wellers Bay NWA. The importance of establishing and protecting such a fragile area is not challenged in this proceeding and there is no evidence the enforcement officers conducted their surveillance and investigation in a discriminatory way or for an improper purpose. They were present near the NWA to monitor compliance with the prohibition on entry to any part of the NWA and their presence was required to observe unlawful entry. The evidence supports the conclusion that the officers were engaged in a *bona fide* investigation.

[37] Further, like the government officers in *Clothier*, the ECCC officers in this case were not engaged in virtue testing; they were engaged in compliance monitoring. Contravention of s. 8 of the *Wildlife Area Regulations* is an absolute liability offence. A person can be convicted, regardless of intent, for simply being present in an NWA.

[38] For these reasons, the Tribunal finds that ECCC officers need not have a reasonable suspicion of illegal activity before using the compliance monitoring technique they employed in this case. The evidence establishes that the officers were engaged in a *bona fide* investigation into compliance with a regulation.

[39] That said, the Tribunal agrees with the Applicant that the discretion vested in ECCC officers in carrying out random compliance checks should not be unfettered or unreviewable. 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:

> [47] The overriding rationale of the abuse of process doctrine – a rationale that also underlies the entrapment doctrine – is that government should not be allowed to investigate possible illegal activity in a way that offends our sense of decency and fair play. This rationale applies as much to the regulatory charge of selling tobacco to an underage person as it does to a charge under the *Criminal Code*.

[40] This reasoning also applies to the Notice of Violation at issue in this case. There is no evidence the officers carried out their compliance monitoring in an improper, unfair, or inappropriate way. It does not offend decency or fair play that officers dress in plain clothes, which permits unobtrusive observation and sometimes more effective investigation than that which might be accomplished in uniform.

[41] On the third issue, the Tribunal concludes that certain common law excuses or justifications can be raised in AMP proceedings as per s. 11(2) EVAMPA. However, the Tribunal finds the evidence does not establish entrapment in this case and all elements of the violation set out in the AMP have been proven.

Conclusion

[42] ECCC has discharged its burden under s. 20(2) of EVAMPA by demonstrating, on a balance of probabilities, that a violation of s. 8 of the *Wildlife Area Regulations* by the Applicant occurred. As well, the AMP was calculated correctly in accordance with the AMP Regulations. Finally, no excuse or justification to the violation relating to entrapment or abuse of process has been demonstrated on the evidence.

Decision

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

Review Dismissed

"Leslie Belloc-Pinder"

LESLIE BELLOC-PINDER
REVIEW OFFICER