



Issue Date: January 10, 2023

Citation: *Doerksen and Bear Naked Wonders v. Canada (Environment and Climate Change)*, 2023 EPTC 1

EPTC Case No.: 0001-2022; 0002-2022; 0003-2022 and 0004-2022

Case Name: *Doerksen and Bear Naked Wonders v. Canada (Environment and Climate Change)*

Applicant: Nancy Lynn Doerksen and Bear Naked Wonders

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Motion for a stay of proceedings on the grounds of abuse of process.

Heard: In writing

Appearances:

Parties

Nancy Lynn Doerksen
Bear Naked Wonders

Minister of Environment and
Climate Change Canada

Counsel

Myles Davis

Brenna Dixon

DECISION DELIVERED BY:

HEATHER GIBBS

Overview

[1] Bare Naked Wonders (“BNW”) is a registered corporation that produces and sells products containing black bear parts. Nancy Doerksen is a Director for the company.

[2] BNW and Ms. Doerksen (together the “Applicants”) were subject to an enforcement action from Environment and Climate Change Canada (“ECCC”) under the [Environmental Violations Administrative Monetary Penalties Act, SC 2009, c 14, s 126](#) (“EVAMPA”) for a violation of s. 6(2) of the [Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, S.C. 1992, c. 52](#) (“WAPPRIITA”).

[3] On February 10, 2022, Wildlife Enforcement Officer Matthew Jon Burke issued Notices of Violation (“NOVs”) #9400-8361, 9400-8362, 9400-8363, and 9400-8364 to Nancy Doerksen and BNW for export of bear parts without a permit. The Applicants requested a review of the NOVs to the Environmental Protection Tribunal of Canada (“Tribunal”).

[4] The Applicants bring a preliminary motion that the Tribunal stay the proceedings pursuant to section 24(1) of the [Canadian Charter of Rights and Freedoms](#) (“Charter”) on the basis of abuse of process by ECCC enforcement.

[5] The Applicants submit that there was unreasonable “pre-charge delay”, vexatious conduct and oppressive conduct on the part of ECCC enforcement, such that proceeding with the NOVs would harm the integrity of the justice system. ECCC’s position is that there was no abuse of process.

[6] The Tribunal finds that the Applicants have not established the constituent elements of the abuse of process defence, and in any event no prejudice has been shown by the Applicants. For the reasons detailed below, the motion is dismissed.

Relevant Legislation

[7] The most relevant provisions in this motion are the following sections of *EVAMPA*:

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.

Issue

[8] The issue is whether the proceedings before the Tribunal should be stayed due to an abuse of process.

Applicant's Submissions

[9] The Applicants argue for a “judicial stay of proceedings” under s. 24(1) of the *Charter*, due to an abuse of process by ECCC’s enforcement branch.

[10] The Applicants capably lay out the law on abuse of process, noting there are two categories of abuse of process:

(a) Prosecutorial conduct affecting the fairness of the trial (prejudice to an accused’s fair trial interests); and

(b) Prosecutorial conduct that “contravenes fundamental notions of justice” and undermines the integrity of the justice system.

[11] The Applicants submit that the second category applies in the case. In summary, the Applicants argue the following elements amount to prosecutorial conduct that undermines the integrity of the justice system:

- “unreasonable pre-charge delay”. ECCC enforcement officers obtained evidence from Ms. Doerksen’s cell phone on October 28, 2020 but did not issue the NOV’s until February 2022.
- Vexatious conduct, including improper motive. The Applicants argue that ECCC has “insufficient grounds” to issue the NOV’s, that ECCC enforcement officers were “hunting for evidence” at the time they searched Ms. Doerksen’s cell phone, and that Officer Burke sought to have BNW’s CITES permits put on hold.
- Oppressive conduct. This allegation rests on the manner in which the evidence was obtained; i.e. through a search of Ms. Doerksen’s home and extracting data from her cell phone.

[12] In their summary of the applicable law, the Applicants note that the remedy of a stay of proceedings where there has been an abuse of process “is a power which can only be exercised in the ‘clearest of cases’.” (*R. v. Jewitt*, 1985 CarswellBC743 (SCC) at para 26).

ECCC’s Submissions

[13] ECCC submits that the test for determining an abuse of process comes from the case *R. v. Babos*, 2014 SCC 16 (“*Babos*”) and includes the following three elements:

- a) There must be prejudice to the integrity of the justice system which will be perpetuated by the conduct of a trial or its outcome;
- b) There must be no alternative remedy capable of redressing the prejudice;
- c) Where uncertainty remains after the first two stages, the court balances the need to denounce misconduct and preserve the integrity of the justice system against society’s interest in adjudicating the case on its merits. This third element requiring a balancing of factors should only apply if the first two steps do not determine the issues conclusively.

[14] ECCC denies the allegations made by the Applicants and argues that no abuse of process has been established. It argues that any pre-charge delay should be considered investigative delay and reasonable in the circumstances; that evidence from Ms. Doerksen’s cell phone was obtained through a lawful warrant; and that the Applicants’

submissions relating to previous legal proceedings, prior to the issuance of the NOVs in question, are irrelevant.

Analysis and Findings

[15] The Tribunal has previously found that abuse of process is a common law defence that may be considered by the Tribunal under s. 11(2) of *EVAMPA* (see for example [Rice v. Canada \(Environment and Climate Change\), 2020 EPTC 4](#) (“*Rice*”).

[16] However, the evidentiary requirement for such a defence is a stringent one, given that this remedy is a last resort, in the “clearest of cases in which a stay of proceedings is necessary to preserve and protect the integrity of the justice system.” (*Babos*, paras 3, 31, 39 40, 44, 69, 75; and *Jewitt, supra*). The Applicants have not met this stringent test.

[17] On the allegation of “pre-charge delay”, the evidence before the Tribunal shows that Officer Burke extracted information from an iPhone 8 and 11 in accordance with a search warrant issued on December 3, 2020. The extracted data was analyzed, with the resulting information delivered to Officer Burke on December 22, 2021. Officer Burke’s affidavit states that he was informed that the delay in completing the forensic examination of the iPhone 8 and iPhone 11 was due to staffing issues at ECCC’s computer forensic unit, related to the COVID-19 pandemic.

[18] *EVAMPA* s.14 includes the limitation period of two years for issuing a Notice of Violation. There is a presumption that NOVs issued within the statutory time limit will not be considered excessive delay. The two-year limit builds in a reasonable period for investigation and issuing notices of violation under the Act. The NOVs in this case were issued within that statutory time period. ECCC has also provided a reasonable explanation for the investigative delay between the time the phones were seized and the issuance of the NOVs. It cannot therefore be said there was any unreasonable pre-charge delay.

[19] With respect to “vexatious conduct”, the Applicants argue there is insufficient evidence of a violation to issue the NOVs in question. This is a substantive argument that should be made at the hearing in this request for review, rather than as part of a preliminary argument.

[20] The Applicants assert that in 2018, Officer Burke sought to have BNW’s CITES permits (i.e., permit issued under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*) “put on hold indefinitely”. The Applicants acknowledge that the hold was removed in March 2018. There is no evidence the Applicants were unable to obtain CITES permits in 2020. The Tribunal finds the assertion relating to events in 2018 to be irrelevant to the NOVs which were issued in 2020.

[21] The Applicants also allege that Officer Burke's actions in extracting information from Ms. Doerksen's cell phone was vexatious. The Applicants point out that Officer Burke extracted information from the phone after a decision had been made in a separate environmental enforcement proceeding to return Ms. Doerksen's property.

[22] However, ECCC notes that the Applicants "failed to consider that the third warrant for the extracting of cellular phone data issued on December 3, 2020 validly authorized a search of data between April 2, 2017 and August 12, 2020, above and beyond that which was captured in the 2019 prosecution." Officer Burke's evidence shows that the warrants pertained to gathering evidence in relation to several ongoing investigations.

[23] As noted above, the evidence before the Tribunal shows that Officer Burke extracted information from an iPhone 8 and 11 in accordance with a search warrant issued on December 3, 2020. Extracting and analyzing cell phone data obtained pursuant to a lawful warrant is not vexatious conduct.

[24] In the Tribunal's view, the Applicants have not established that there was any vexatious conduct in obtaining or analyzing the evidence used to issue the NOV's in this proceeding.

[25] Similarly, the Applicants have not established that the search of Ms. Doerksen's home constituted oppressive conduct. The Applicants submit that the Tribunal should apply the definition of "oppressive conduct" of the Saskatchewan Court of the Queen's Bench in *Wark v. Kozicki*, 1997 CarswellSask 38, as "burdensome, harsh and reprehensible".

[26] The search was conducted by enforcement officers pursuant to a lawful search warrant. While Ms. Doerksen describes her personal reaction and shock resulting from the search of her home, there is no evidence of conduct other than what would be expected of enforcement officers undertaking their regular duties.

[27] The Tribunal agrees with ECCC, that the Applicants' allegation that ECCC should not have been able to use the evidence gathered in that operation, is speculative and unsubstantiated by evidence.

[28] In any event, it is clear that a party must show prejudice in order to merit the "last resort" remedy of a stay of proceedings due to abuse of process. The Applicants have demonstrated no prejudice relating to the issuance of the NOV's. Enforcement of environmental statutes, and the ability to request a review before the Tribunal, are part of the normal justice system and due process. These elements cannot be considered prejudice to the Applicant.

Decision

[29] The Applicants have not established the requisite elements of abuse of process in this proceeding. The application is dismissed.

“Heather Gibbs”

HEATHER GIBBS
CHIEF REVIEW OFFICER