



Issue Date: January 10, 2023

Citation: *Doerksen and Bear Naked Wonders v. Canada (Environment and Climate Change)*, 2023 EPTC 2

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 challenging the Constitutional validity of the word “derivative” in section 6(2) of *The Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52

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] Bear Naked Wonders (“BNW”) is a registered corporation, with its office located in Steinbach, Manitoba. Nancy Lynn Doerksen is a Director for the company. The Applicants sell products containing bear fat through an online store.

[2] The Applicants were issued 4 Notices of Violation (“NOVs”) by Environment and Climate Change Canada (“ECCC”) pursuant to s. 7 and 8(1) of the [Environmental Violations Administrative Monetary Penalties Act](#) (“EVAMPA”) on February 10, 2022, for exporting black bear parts (cosmetics containing bear fat) to the United Kingdom and Germany without a required permit.

[3] The Applicants filed a request for review of the NOVs with the Environmental Protection Tribunal of Canada (“Tribunal”). In addition, the Applicants filed this motion challenging the Constitutional validity of the word “derivative” in section 6(2) of the [Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act](#) (“WAPPRIITA”). This decision relates to the Constitutional challenge of s. 6(2) of WAPPRIITA.

Context

[4] Wildlife management in Canada is an exercise in cooperative federalism. Parliament regulates the interprovincial and international trade of protected wildlife through the WAPPRIITA pursuant to its trade and commerce power in s. 91(2) of the [Constitution Act, 1867](#) (“*Constitution*”). The Manitoba legislature manages wildlife matters within the Province through [The Wildlife Act, R.S.M. 1987, c. W130](#) as part of its property and civil rights power in s. 92(13) of the *Constitution*.

[5] WAPPRIITA implements Canada’s international commitments under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), March 3, 1973, Canada Treaty Series 1975, No. 32. Section 6(2) of WAPPRIITA prohibits the export of products outside of Canada, including those containing bear fat, without a CITES permit.

[6] The Applicants were issued notices of violation pursuant to s. 7 and 8(1) of the EVAMPA for violating s. 6(2) of WAPPRIITA.

Applicant's Submissions

[7] The Applicants argue there is a constitutional obligation on Parliament to apply s. 15(1) of the [Manitoba Miscellaneous Licences and Permits Regulations, M.R. 53/2007](#) (“*Manitoba Regulations*”), the clause that exempts “finished artifacts” from the export permit requirement, to s.6(2) of the *WAPPRIITA* for international export permits. They argue that by failing to do so, Parliament has encroached on provincial powers and s. 6(2) of the *WAPPRIITA* is of no force and effect.

[8] Citing *R. v. Robertson*, (1886), 3 Man R. 613 (MBQB), the Applicants argue that the regulation of wildlife falls under the Provincial legislative powers of sections 92(13) “Property and civil rights”, and 92(16) “Matters of a merely local or private nature” of the *Constitution Act, 1867*. The Applicants argue that, under this authority, Manitoba enacted *The Wildlife Act*, and corresponding *Miscellaneous Licences and Permits Regulations*.

[9] The Applicants acknowledge that under section 91(2) of the *Constitution Act, 1867*, the Parliament of Canada has authority over the “Regulation of Trade and Commerce”, and that under this authority, Parliament enacted *WAPPRIITA*.

[10] Section 6(2) of *WAPPRIITA* reads:

(2) Subject to the regulations, no person shall, except under and in accordance with a permit issued pursuant to subsection 10(1), import into Canada or export from Canada any animal or plant, or any part or derivative of an animal or plant.

[11] The Applicants submit that in interpreting the term “derivative” in this section, the Tribunal should take into consideration the doctrine of interjurisdictional immunity, and that the appropriate definition must take into consideration Manitoba’s legislative authority over wildlife, including the exception for “finished artifacts” under *The Wildlife Act*, and the *Manitoba Regulations*.

[12] The Applicants submit that, if the definition of “derivative” in section 6(2) of *WAPPRIITA* includes a “finished artifact” exemption, the Tribunal should determine section 6(2) of *WAPPRIITA* to be of no force or effect in the case at hand per section 52(1) of the *Constitution Act, 1982*.

ECCC's Submissions

[13] ECCC submits that section 6(2) of *WAPPRIITA* is Constitutional. The preamble of s.15(1) of the *Manitoba Regulations* expressly states the “finished artifact” exception is subject to contrary provisions in an Act of Parliament of Canada or regulations under any such Act (in this case *WAPPRIITA*).

[14] ECCC argues that, if the *Manitoba Regulations* did not recognize the primacy of Federal legislation in this regard, they would be *ultra vires*.

[15] ECCC submits that the Applicants’ reference to the doctrine of interjurisdictional immunity is misguided, and that the doctrine does not apply. ECCC submits that the doctrine is reserved to situations where the legislation at issue impairs, rather than just affects, the core of the legislative power of the other level of government. Such is not the case here.

[16] Further, it submits that the Tribunal need not determine whether the Applicants’ products contain bear parts versus bear derivatives under 6(1) of *WAPPRIITA*, as both result in liability.

Issue

[17] Is s. 6(2) of *WAPPRIITA* a valid exercise of federal power?

Relevant Legislation

Federal Legislation

Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, SC 1992, c 52

6(2) Subject to the regulations, no person shall, except under and in accordance with a permit issued pursuant to subsection 10(1), import into Canada or export from Canada any animal or plant, or any part or derivative of an animal or plant.

10 (1) The Minister may, on application and on such terms and conditions as the Minister thinks fit, issue a permit authorizing the importation, exportation or interprovincial transportation of an animal or plant, or any part or derivative of an animal or plant.

Manitoba Provincial Legislation

Miscellaneous Licences and Permits Regulation (53/2007) under *The Wildlife Act* (C.C.S.M. c. W130)

Commercial licences

2 The minister may issue the following types of licences that authorizes the holder to engage in the activities set out beside the name of the respective licence:

animal parts dealer's licence – a licence that authorizes the holder to buy, sell and trade animal parts, other than the castors of beavers and the pelts, skins or hides of fur bearing animals.

No licence or permit required for artifacts

15(1) Subject to a contrary provision in an Act of the Legislature or an Act of the Parliament of Canada or regulations under any such Act, a person may possess, buy, sell, trade, import or export, or offer to buy, sell or trade, export or import any of the following without obtaining a licence or permit:

- a) An animal part that has been made into a finished artifact;
- b) a processed pelt, skin or hide of a big game animal, fur bearing animal, game bird, amphibian or reptile.

Analysis

[18] The legislative powers of Parliament are set out in s. 91 of the *Constitution*, and those of the provincial legislatures are set out in s. 92.

[19] Both parties recognize that the Parliament of Canada has jurisdiction to regulate the import into and export out of Canada of protected animals, under the trade and commerce head of power in s. 91(2) of the *Constitution*. However, the Applicants argue that, if “derivatives” referred to in 6(2) of *WAPPRIITA* purports to encompass “finished artifacts” as described in the provincial wildlife regulations, s. 6(2) should be found to be of no force or effect.

[20] In determining whether a legislative provision is Constitutional, one must first determine which head of power it falls under, by determining its pith and substance.

[21] The pith and substance of *WAPPRIITA* can be best identified through its purpose, described in s.4: to protect certain species of animal and plants, particularly by implementing the *Convention on International Trade in Endangered Species of Wild*

Fauna and Flora, and regulating international and interprovincial trade in animals and plants.

[22] Section 91(2) of the *Constitution* is Parliament's trade and commerce head of power. As noted by counsel for ECCC, one branch of this power is the "specific federal power to regulate interprovincial and international trade and commerce" (*Reference re Securities Act*, 2011 SCC 66, para 46).

[23] It is clear that *WAPPRIITA* is properly classified as falling within the international and interprovincial trade portion of the federal trade and commerce power.

[24] The Manitoba *Wildlife Act* manages and regulates wildlife matters within the boundaries of the province as a matter of property and civil rights under s. 92(13) of the *Constitution*. It is clear that the province cannot regulate export from Canada.

[25] ECCC argues, and the Tribunal accepts, that there is no encroachment on provincial powers in this case. Section 15(1) of the *Manitoba Regulations* specifically states in the preamble that the finished artifact exception is "subject to a contrary provision in an Act of the Parliament of Canada or regulations under any such Act subject to a contrary provision in an Act of Parliament". ECCC argues, and the Tribunal accepts, that the section itself makes it clear that *WAPPRIITA* supersedes this provincial exception. Indeed, the provincial legislation would be encroaching on federal legislative competence if the preamble said otherwise.

[26] It is unnecessary to interpret the term "derivative" in order to decide the constitutionality of 6(2) of *WAPPRIITA*.

Decision

[27] The Tribunal finds that s. 6(2) of *WAPPRIITA* is Constitutional. The Applicants' motion is dismissed.

[28] The request for review of the NOV's will proceed on its merits.

"Heather Gibbs"

HEATHER GIBBS
CHIEF REVIEW OFFICER