



Issue Date: November 21, 2024

Citation: *Tsybulskaya v. Canada (Environment and Climate Change)*,
2024 EPTC 8

EPTC Case No: 0052-2023

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

Applicant: Elena Tsybulskaya

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under s. 15 of the *Environmental Violations Administrative Monetary Penalties Act*, S.C. 2009, c. 14, s. 126 of an Administrative Monetary Penalty issued under s. 7 of that Act for a violation of section 5(b) of the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22.

Heard: In Writing

Appearances:

Parties

Elena Tsybulskaya

Minister of Environment and
Climate Change Canada

Representative/Counsel

Self-Represented

Ryan Deshpande (Counsel)

DECISION DELIVERED BY:

PAUL MULDOON

Overview

[1] Environment and Climate Change Canada (“ECCC” or “Minister”) issued a Notice of Violation (NOV) to Elena Tsybulskaya (“Applicant”) on October 13, 2023 concerning violation of the section 5(b) of the [Migratory Birds Convention Act, 1994](#), S.C. 1994, c. 22 (“MBCA”).

[2] ECCC provided an evidentiary record in support of the NOV that includes extensive evidence from Wildlife Officer Mark McIntyre and includes interview material, website searches and information, photographs, along with other information.

[3] The Applicant did not agree to participate in a Pre-Hearing Conference proposed by the Tribunal and only provided a brief submission outlined below. She stated that she has permanently left Canada and now resides in Russia. The Applicant did not provide any other evidence in support of her Request for Review.

[4] The Tribunal considers the Request for Review has been abandoned owing the Applicant’s lack of interest in participating in the Tribunal’s process. However, the Tribunal considered it prudent to review the evidentiary record and issue a decision in this matter. For the reasons below, the Tribunal finds that ECCC has established the elements of the violation and correctly calculated the amount of the Administrative Monetary Penalty (AMP). The Tribunal finds that the brief submissions provided by the Applicant have no merit and that there are no defences applicable to this NOV.

Background

[5] On October 13, 2023, ECCC Wildlife Officer McIntyre issued Notice of Violation (NOV) #9300-6954 for a violation of Section 5(b) of the MBCA to the Applicant and the amount of the penalty is \$2000.00.

[6] The Applicant submitted her Request for Review on November 7, 2023.

Issues in this Review

[7] The issue in this Request for Review is whether ECCC has established that the alleged violation has occurred and whether there are any defences applicable with respect to the allegations in the NOV.

[8] The Applicant does not contest whether the amount of the penalty was properly calculated.

Relevant Legislation and Regulations

[9] The most relevant provisions of the [Environmental Violations Administrative Monetary Penalties Act](#) (“EVAMPA”) are outlined below with the regulations pertaining to the calculation of the penalty reproduced in Appendix A:

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.

[10] The applicable provisions of the MBCA are as follows:

Subsection 2(1)

migratory bird means a migratory bird referred to in the Convention, and includes the sperm, eggs, embryos, tissue cultures and parts of the bird

Section 4

The purpose of this Act is to implement the Convention by protecting and conserving migratory birds — as populations and individual birds — and their nests.

Section 5

Except as authorized by the regulations, no person shall, without lawful excuse,

(a) be in possession of a migratory bird or nest; or

(b) buy, sell, exchange or give a migratory bird or nest or make it the subject of a commercial transaction.

Discussion and Analysis

ECCC's Evidence

[11] Mark McIntyre is a Wildlife Enforcement Officer with ECCC and a designated “game officer” pursuant to subsection 6(1) of the MBCA. For the purposes of this Act and the regulations, game officers have all the powers of a peace officer.

[12] On April 21, 2023, Officer McIntyre opened the [grizzlycan.store] website and observed it offered to sell the parts of a Red crossbill (*Loxia curvirostra*) for \$152.00 and observed the website automatically displayed a popup chat box with the name “Elena” “Customer Support”. He believed “Elena” referred to Elena Tsybulskaya residing in Woodbridge, Ontario.

[13] Officer McIntyre states that a Red crossbill is a migratory bird protected under the MBCA and that the sale, exchange or giving of a migratory bird or making it the subject of a commercial transaction is a violation of section 5(b) of the MBCA. He states that subsection 1(2) of the [Migratory Birds Regulations, 2022](#) (“MBR”) defines “sell” to include, offering for sale and exposing for sale.

[14] On April 24, 2023, Officer McIntyre states that he examined the source code for website [grizzlycan.store] and observed that the Applicant’s address was associated with the website profile. He states that he opened the [shamanamulets.com] website and observed it had offered to sell a “Crossbill skin, complete set with wings, tail, paws and skull”, for \$152.00. The Crossbill parts were described as “Out of stock”.

[15] Officer McIntyre states that on October 13, 2023, he issued NOV 9300-6954 to the Applicant and issued a \$2,000.00 Administrative Monetary Penalty (AMP) for violating section 5(b) of the MBCA, by offering to sell, exchange or give a Red crossbill (*Loxia curvirostra*), a migratory bird or make it the subject of a commercial transaction. On October 18, 2023, Officer McIntyre observed that he had entered the incorrect year (i.e.,

1970) in the NOV's date of violation field and changed the date of violation year to the correct year (i.e., 2023). He then sent the amended NOV to the Applicant.

[16] Officer McIntyre states that the AMP amount was determined by selecting the Violation Type C Baseline Penalty amount of \$1,000.00 and adding \$1,000.00 for the Aggravating Factor for Economic Gain. The total AMP was assessed as \$2,000.00.

Applicant's submissions

[17] The Applicant did not agree to participate in the Pre-Conference Hearings. The Applicant also did not provide any evidence in support of her Request for Review.

[18] The Applicant, in her Request for Review, provides the only substantive submissions. The Applicant states that, "... yes, indeed, I was offered to become a distributor of products from the website "grizzlycan.store", but all the products from this site have never been imported to Canada. In addition, I didn't earn anything for this work because I wasn't able to sell anything."

[19] The Applicant also states that Officer McIntyre's allegation that he visited the website September 5, 2023 is incorrect and not possible because, as of June 14, 2023 the website "grizzlycan.store" stopped working as confirmed by the Fornex document that she provided. As it says in the confirmation, the Applicant states that the website "grizzlycan.store" was officially closed on June 14, 2023 and Officer Mark McIntyre could not in any way have been able to gain access to this site.

[20] Third, the Applicant states that Officer McIntyre incorrectly states that the date of violation is April 21, 1970. She states that Officer Mark McIntyre came to her apartment on May 11, 2023, and fraudulently took her personal items from her family's collection and request that they be returned. She states that Officer Mark McIntyre knew information about her family, such as the name of her eldest daughter and her name and her address which is not in the public domain. The Applicant states that Officer McIntyre did not present any of his documents confirming his identity and she thought that she had become a victim of a scammer, the stress of which caused her health problems.

[21] The Applicant, in an email dated August 22, 2024, states that the case against her is fabricated and that ECCC inappropriately has taken her personal family items and that the NOV was provided without proof.

Analysis and Findings

Whether ECCC has established the elements of a violation of the MBCA

[22] 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. Section 11 of EVAMPA provides that defences related to “mistake of fact” and “due diligence” cannot be relied upon. The Applicant does not dispute the amount of the AMP.

[23] ECCC provided extensive evidence relating to the basis for issuing the NOV. Officer McIntyre observed that he opened the [grizzlycan.store] website in April 2023 and observed it offered to sell the parts of a Red crossbill (*Loxia curvirostra*) for \$152.00. The uncontested evidence is that a Red crossbill is a migratory bird protected under the MBCA. The evidence provided by ECCC also established the person offering to sell the Red crossbill was the Applicant. The Tribunal notes that section 5(b) of the MBCA states that the sale, exchange or giving of a migratory bird or making it the subject of a commercial transaction. The Tribunal finds that offering to sell a Red crossbill on a public on-line website falls within the domain of section 5(b) of the MBCA. The Tribunal finds that there is sufficient evidence that the Applicant violated section 5(b) of MBCA and that ECCC has established the elements of the violation.

[24] The Applicant admitted in her submissions that she did host the website. The Tribunal accepts ECCC’s evidence that the website, hosted by the Applicant, offered the product for sale.

[25] The Tribunal does not accept the Applicant’s submission that the website was not active as of June 14, 2023. The Tribunal accepts Officer McIntyre’s evidence that he examined the source code for website [shamanamulets.com] and observed the Applicant’s address was associated with the website profile. At that time, the Officer’s evidence is that the website offered to sell a “Crossbill skin, complete set with wings, tail, paws and skull”, for \$152.00. The Tribunal notes that it is uncontested that the Applicant offered to sale the Red crossbill through the noted website in April 2023.

[26] Contrary to the Applicant’s submissions, there is no evidence or merit to the allegation that the NOV was fabricated by ECCC or anyone else.

[27] The Applicant makes several allegations concerning the nature and conduct of the investigation. The Tribunal notes that the allegations are without any factual foundation as the Applicant did not agree to participate in the Tribunal’s processes where such allegations can be challenged and tested. The Tribunal finds that such allegations have no merit. The Tribunal also notes that the jurisprudence is consistent that it does not have

the authority to review the exercise of discretion of enforcement officers and the Tribunal relies on the reasoning in the jurisprudence.¹

[28] The Applicant did not challenge the amount or calculation of the AMP. In the Tribunal's review of the evidence, the Tribunal finds that the calculation of the AMP is correct.

Conclusion

[29] ECCC has discharged its burden under s. 20(2) of EVAMPA by demonstrating, on a balance of probabilities, that a violation of section 5(b) of the MBCA occurred. As well, the AMP was calculated correctly in accordance with the [Environmental Violations Administrative Monetary Penalties Regulations](#) (SOR/2017-109).

Decision

[30] The Notice of violation is upheld and the review is dismissed.

Review Dismissed

"Paul Muldoon"

PAUL MULDOON
REVIEW OFFICER

¹ For example, see: *Bell Canada v. Canada (Environment and Climate Change)*, [2022 EPTC 6](#), at paras. 49-59.

APPENDIX A – Relevant Legislation and Regulations

Environmental Violations Administrative Monetary Penalties Regulations, **SOR/2017-109**

4 (1) 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.