Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Wen v. Canada (Canada Border Services Agency)*, 2014 CART 39

Date: 20141219
Docket: CART/CRAC-1805

BETWEEN:

HongXin Wen, Applicant

- and -

Canada Border Services Agency, Respondent

BEFORE: **Chairperson Donald Buckingham**

WITH: **HongXin Wen, self-represented; and**
Byron Fitzgerald, representative for the respondent

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of a violation of section 40 of the *Health of Animals Regulations* alleged by the respondent.

DECISION ON ADMISSIBILITY

The Canada Agricultural Review Tribunal ORDERS that the application for a review of Notice of Violation #4974-14-0987 dated October 12, 2014, requested by the applicant, Ms. HongXin Wen, pursuant to subsection 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, in relation to the Canada Border Services Agency alleging that Ms. HongXin Wen violated section 40 of the *Health of Animals Regulations*, IS INADMISSIBLE and, pursuant to this order, IS HEREBY DISMISSED.

By written submissions only,
made between October 17 and December 12, 2014.

Canada

Reasons for Decision on Inadmissibility

[1] In Notice of Violation #4974-14-0987 dated October 12, 2014, the Canada Border Services Agency (Agency) alleges that on that date at Airport 4974 (Lester B. Pearson International Airport in Toronto), Ontario, the applicant, Ms. HongXin Wen (Wen) [*verbatim*] "committed a violation, namely: import an animal by-product, to wit: Pork Sausages Cured., without meeting the prescribed requirements Contrary to section 40 of the *Health of Animals Regulations"*. The Agency served the Notice of Violation with Penalty personally on Wen on October 12, 2014. In the Notice of Violation, Wen is advised that the alleged violation is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act) and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations). Furthermore, the alleged violation is classified as a "serious violation" under section 4 of the AMP Regulations, for which the mandated penalty is $800.00.

[2] By letter dated October 17, 2014, sent by fax and received by the Canada Agricultural Review Tribunal (Tribunal) on October 20, 2014, Wen requested a review by the Tribunal (Request for Review). The letter consisted of a one-page typed document bearing her name, a copy of the Notice of Violation in question and an e-ticket for her flight on the day of the alleged violaton. In her one-page letter Wen explained as follows [*verbatim*]:

> *...I would like to request a review to Canada Agricultural Review Tribunal for a Notice of Violation issued by Canada Border Services Agency.*
>
> *CBSA134 Notice Number: 4974-14-0987 Date: 2014-10-12*
>
> *I was given this Violation Notice on October 12th 2014.*
>
> *The CBSA officer found some leftover sausages in my bag, which I bought at the Shanghai airport to sustain myself for 2 days.*
>
> *The reason I am mentioning this is that I was not able to catch my original flight to Canada on October 10th 2014 due to a delay on the connecting flight. Once I arrived at the Shanghai airport, the airline company moved my Toronto flight to October 12th 2014 without providing me proper accommodation for the two days. Because I have very little money for my trip, I have to stay in the airport waiting room over two days for my flight without proper food and accommodation. And for the amount of money I have, I can only afford to buy some bread and sausages to eat.*
>
> *As you can imagine, I have no proper food and shelter for over 48 hours at the Shanghai airport. Then, I have to catch another 15 hour flight to Canada. Overall, I have not had proper rest and food for over 63 hours. As a result, I was extremely exhausted once I arrived at Toronto airport. Both my body and my mind were not functioning properly. Meanwhile, my English is not very good, which only made the situation even worse.*

> *As a result, when the officer stopped me for secondary screening, I did not understand the officer's question correctly. The officer asked "Are there any plant or animal products in my baggage?" I was mistakenly thought the officer means "Dead Animal", so I said "What? Meat product? No!"*
>
> *If the officer had clarified about meat product, I would definitely say otherwise.*
>
> *I would really appreciate if the CBSA could consider my circumstance and to take down the fine.....*

[3] On October 23, 2014, Ms. Lise Sabourin (Sabourin), Administration, Finance and Registry Services Coordinator of the Tribunal, communicated to Wen and to the Agency, via letter, requesting that Wen provide fuller reasons for her Request for Review. This letter explained to Wen that [*verbatim*]:

> *...The applicant's request for a review with the Tribunal, as made, does not content reasons that would be permissible given section 18 of the* Agriculture and Agri-Food Administrative Monetary Penalties Act*. The applicant must submit further reasons concerning the events of October 12, 2014,* ***on or before November 07, 2014****, or the request risks being held to be inadmissible. Please consult Practice Note 11 and the* Guide for Self-Represented Litigants *(copies attached) for further information. ...*

[4] On November 14, 2014, Sabourin communicated again to Wen and to the Agency, via letter, requesting that Wen provide fuller reasons for her Request for Review that would substantiate why her actions did not constitute a violaton of section 40 of the HA Regulations. This letter again explained to Wen that [*verbatim*]:

> *... The applicant's request for a review with the Tribunal, as made, does not content reasons that would be permissible given section 18 of the* Agriculture and Agri-Food Administrative Monetary Penalties Act*. The applicant must submit further reasons concerning the events of October 12, 2014,* ***on or before November 25, 2014****, or the request risks being held to be inadmissible. Please consult Practice Note 11 and the* Guide for Self-Represented Litigants *(copies attached) for further information.*
>
> *Please send this material to the Tribunal within the prescribed timeframe cited above, by* ***Registered Mail****, so that your file can be processed. ...*

[5] No response was received from Wen by the November 25, 2014 deadline. So, a third follow-up letter from Sabourin was sent to Wen via email on December 2, 2014. The letter provided that [*verbatim*]:

> *...This is a final opportunity for the applicant to provide further details of the October 12, 2014 incidents, which would support the invalidity of the Notice of*

> *Violation, her request for review will be found to be inadmissible and may result in an order from the Tribunal dismissing it. Therefore, the applicant must provide further details to the Tribunal,* ***on or before 5:00 p.m., on Friday, December 12, 2014.***

[6] No response was received from Wen by the December 12, 2014 deadline, or thereafter, prior to the issuance of this decision.

[7] The Tribunal is quasi-judicial body, which is independent from the government agencies and departments that oversee and enforce Canada's agriculture and agri-food administrative monetary penalty system. The Tribunal's role is to determine the validity of any agriculture and agri-food administrative monetary penalty or warning issued under the authority of the AMP Act and the AMP Regulations. The Tribunal's procedure in making such a determination is set out, in part, in the *Rules of the Review Tribunal* (*Agriculture and Agri-Food*) (Tribunal Rules).

[8] Rule 34 of the Tribunal Rules states:

> …
>
> *An applicant who requests a review by the Tribunal must indicate the reasons for the request, the language of preference and, if the notice of violation sets out a penalty, whether or not a hearing is requested.*
>
> …

[9] Where the applicant does not meet the requirements of the AMP Act, the AMP Regulations and the Tribunal Rules, the Tribunal may rule that the applicant's request for review is inadmissible.

[10] The Tribunal has addressed admissibility issues in *Wilson v. Canada (Canadian Food Inspection Agency)*, 2013 CART 25 (*Wilson*), *Soares v. Canada (Canada Border Services Agency)*, 2013 CART 39, *Salim v. Canada (Canada Border Services Agency)*, 2014 CART 18, *Asare v. Canada (Canada Border Services Agency)*, 2014 CART 37 and *Ajibowu v. Canada (Canada Border Services Agency)*, 2014 CART 38. As discussed in paragraph 10 of the *Wilson* decision:

> *[10] A request for review is a right which Parliament has extended to applicants which allows them, for a very limited expenditure of time and money, to have their Notice of Violation reviewed by an independent body. However, when played out to its full conclusion, including the filing of pleadings, the holding of a hearing and the rendering of a decision, considerable time and money from all parties will be expended. For this reason, legislators have placed some basic requirements on applicants that they must meet for their rights to be preserved. Where the applicant does not meet the requirements of the Act, the Regulations and the Rules, the Tribunal may rule that the applicant's request for review is inadmissible.*

[11] In the present case, the Tribunal has attempted, on at least three occasions, to encourage Wen to present reasons in support of her Request for Review that would meet a threshold of providing some permitted basis upon which the validity of the Notice of Violation might be challenged. However, in her correspondence with the Tribunal, Wen has presented only the following information:

(a) That she did bring sausages into Canada from another country;

(b) That the importation was unintentional as she was exhausted after a very long flight and travel interruptions, her mind and body were consequently not functioning properly, and she does not speak English well;

(c) That after she had cleared [primary inspection], she did not comprehend the meaning of the questions that the Agency officer at secondary screening was asking her but at secondary inspection the officier inspected her bags and found the sausage;

(d) That if the Agency officer would have clarified the questions asked of her about meat products, she would have answered other that as she did; and

(e) That the Tribunal consider her circumstances and reduce the fine in this case.

[12] The AMP Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the AMP Act states:

> **18.** (1) *A person named in a notice of violation does not have a defence by reason that the person*
>
> *(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.*

[13] When an administrative monetary penalties provision has been enacted for a particular violation, as is the case for section 40 of the HA Regulations, there is little room for the applicant to mount a defence. Section 18 of the AMP Act excludes many of the common reasons that applicants raise to justify their actions when a Notice of Violation has been issued to them. Given Parliament's clear intention on the issue of prohibited versus permitted defences, the Tribunal finds that none of the reasons given by Wen in her submissions to this Tribunal, as set out in paragraph 11 above, are permitted defences under section 18 of the AMP Act. Even Wen's assertaion that she acted as she did because she was exhausted from her long and trying journey from China, and was not consequently physically or mentally alert, would not be valid defences given the ambit of section 18 of the AMP Act.

[14] Other explanations offered by Wen for her importation of products without declaring or presenting them to an Agency official—such as her uncertainty about the nature of the questions that the Agency official was asking her concerning the products she was importing—do not negate that she did not declare the meat products to a primary inspection Agency officer or that an Agency officer performing a secondary inspection did find meat in her luggage. The Tribunal accepts that, on the basis of the Federal Court of Appeals's decision in *Canada (Attorney General) v. Savoie-Forgeot*, 2014 FCA 26 *(Forgeot)*, Wen had already "imported" the meat products by this point. It was then too late to avoid liability for the unauthorized importation, even if she did not know, or failed to understand, that she was obliged to declare her imported meat to Agency officials.

[15] The law, as set out in *Forgeot,* is now quite clear that a declaration, either by reporting it on the Declaration Card, or orally to an Agency official as soon as possible, is a vital step in avoiding a charge under the AMP Act and the AMP Regulations. Where individuals declare and make available for inspection those products which might be subject to seizure because they could endanger human, animal or plant life in Canada, such individuals ought not to be found to have violated the HA Act and the HA Regulations provisions. As the Court states in *Forgeot,* at paragraph 18, "Even if upon inspection they are found to have in their possession animal by-products that do not fall within the exceptions enumerated in Part IV of the Regulations, they have not yet completed the process of importing these by-products into Canada." But conversely, where the individual fails to declare and present such products before secondary inspection, even if that person does not deliberately fail to declare the products, he or she will have, unfortunately, contravened the HA Act or HA Regulations.

[16] With respect to Wen's request, as set out in the last point listed in paragraph 11 above—that the Tribunal consider her circumstances and reduce the fine in this case—the Tribunal notes that it is not empowered under its enabling legislation to grant relief to parties based on compassionate and humanitarian considerations, or to change the administrative choice of penalties or warnings as selected in the discretion of the Agency official issuing a particular Notice of Violation. There is little, if any, room for the Tribunal to eliminate, reduce, substitute, or even to provide for a payment plan, other than what has been set out in the Notice of Violation in question.

[17] Therefore, in the Tribunal's view, the current circumstances provide the Tribunal with few alternatives other than to hold that the Request for Review by Wen is inadmissible, and the Tribunal so holds. Consequently, by operation of subsection 9(3) of the AMP Act, Wen is deemed to have committed the violation particularized in Notice of Violation #4974-14-0987 dated October 12, 2014. Subsection 9(3) of the AMP Act provides as follows:

> *(3) Where a person who is served with a notice of violation that sets out a penalty does not pay the penalty in the prescribed time and manner or, where applicable, the lesser amount that may be paid in lieu of the penalty, and does not exercise any right referred to in subsection (2) in the prescribed time and manner, the person is deemed to have committed the violation identified in the notice.*

[18] The Tribunal has considered these matters in light of the provisions of the AMP Act, the AMP Regulations, the Tribunal Rules, applicable jurisprudence and fairness, plus the information provided by parties. The Tribunal notes that the information from Wen in her Request for Review and submissions provides no credible basis to challenge the validity of the Notice of Violation in question.

[19] The Tribunal wishes to inform Wen that this violation is not a criminal offence. After five years, Wen will be entitled to apply to the Minister to have the violation removed from the records, in accordance with section 23 of the AMP Act:

> **23.** *(1) Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from*
>
> *(a) where the notice of violation contained a warning, the date the notice was served, or*
>
> *(b) in any other case, the payment of any debt referred to in subsection 15(1),*
>
> *unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.*

Dated at Ottawa, Ontario, this 19th day of December, 2014.

_____

Dr. Don Buckingham, Chairperson