Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Tam v. Canada (Canada Border Services Agency),* 2014 CART 40

Date: 20141224
Docket: CART/CRAC-1801
Cross-reference: CART/CRAC-1686

BETWEEN:

Ting Ting Tam, Applicant

- and -

Canada Border Services Agency, Respondent

BEFORE: **Chairperson Donald Buckingham**

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 the facts of a violation of section 40 of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

In accordance with the directions of the Federal Court of Appeal, set out in its decision dated September 30, 2014 (as corrected on October 7, 2014), and indexed as *Attorney General of Canada v. Ting Ting Tam* (2014 FCA 220; docket A-69-14), the Canada Agricultural Review Tribunal, by Order, determines that the applicant, Ting Ting Tam committed the violation set out in Notice of Violation #YOW-12-071, dated November 7, 2012, and is liable to pay the respondent, the Canada Border Services Agency, a monetary penalty of $800 within thirty (30) days after the day on which this decision is served.

For reconsideration from the Federal Court of Appeal,
According to its decision dated September 30, 2014.

REASONS

[1] The respondent, the Canada Border Services Agency (Agency) through the Attorney General of Canada, filed an application for judicial review on January 22, 2014, to the Federal Court of Appeal of the decision of the Canada Agricultural Review Tribunal (Tribunal) dated December 24, 2013, in the matter of *Tam v. Canada Border Services Agency* (2013 CART 41; CART/CRAC-1686).

[2] On September 30, 2014, the Federal Court of Appeal rendered its decision in *Attorney General of Canada v. Ting Ting Tam* (2014 FCA 220; docket A-69-14). On October 7, 2014, the Federal Court of Appeal issued a corrected version of the decision, referred to herein as *Tam (FCA).*

[3] In *Tam (FCA)*, the Federal Court of Appeal held as follows:

> *The judicial review application is allowed, the decision of the Canada Agricultural Review Tribunal dated December 24, 2013 is set aside and the matter returned to the Tribunal for reconsideration, in light of the reasons for judgment, of whether the respondent committed the violation and whether the penalty is established.*

Commission of the Alleged Violation by Tam

[4] With respect to whether Tam committed the violation, the Tribunal is guided by the Federal Court of Appeal's reasons for judgement particularly at paragraphs 1-5 and 11 of *Tam (FCA)*:

> *[1] On November 7, 2012, the respondent [Tam], coming from China, entered Canada at the MacDonald-Cartier International Airport in Ottawa.*
>
> *[2] She was asked by an officer of the Canada Border Services Agency (CBSA) whether she was bringing into Canada any food items, plants/vegetation, candies or anything edible.*
>
> *[3] Her answer to the question was no.*
>
> *[4] Because of her demeanour and her answers to his questions, the officer referred her to another officer for a secondary examination.*
>
> *[5] The inspection conducted by this second officer revealed that the respondent was importing into Canada assorted pork products which she had purchased in China.*
>
> *...*
>
> *[11] First, it is clear that the respondent did bring into Canada pork products which she failed to declare upon entry.*

[5] The Tribunal concludes that the findings of fact made by the Federal Court of Appeal in paragraphs 1-5 and 11 of its decision are sufficient to establish all the elements of a violation under section 40 of the *Health of Animals Regulations* (HA Regulations) in the present case, namely:

- Tam's identity as the alleged violator is not contested;
- Tam imported a meat product without declaring it at primary inspection;
- An Agency officer found imported meat products in Tam's luggage at secondary inspection.

Justifications Available to Tam

[6] Alleged violators of section 40 of the HA Regulations may defend themselves by adducing evidence proving they met the prescribed requirements permitted under Part IV of the HA Regulations. However, the responsibility and burden for persuading the Agency, or eventually the Tribunal, that a person has met the prescribed requirements of Part IV falls on the alleged violator and he or she must take all of the necessary and reasonable steps to make such a justification known. Normally, this justification will take one of two forms, either by:

- the traveller declaring any animal by-products to the Agency, either in writing on that person's Declaration Card or to an Agency official as soon as possible once that person had deplaned and entered Canada on his way through an airport, such that an Agency inspector could inspect the product and determine if it should be allowed entry into Canada pursuant to paragraph 41(1)(*a*) or subsection 41.1(1) of the HA Regulations; or
- the traveller producing a certificate (paragraph 41(1)(*b*); paragraph 41(1)(*c*); section 43; section 46), document (subsection 52(1)), or permit (subsection 52(2)) such that the meat product would be permitted to be imported into Canada under Part IV of the HA Regulations.

[7] The Federal Court of Appeal in *Canada (Attorney General) v. Savoie-Forgeot*, 2014 FCA 26 *(Forgeot)* states clearly that a declaration, either by reporting an importation of meat 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 the individual fails to declare and present such products before secondary inspection, unless some other circumstances prevail, he or she will have contravened section 40 of the HA Regulations. In this case, the finding by the Federal Court of Appeal was that Tam made no such declaration to the officer at primary inspection. Evidence in the case presented by the Agency reveals that Tam made no such declaration on her Declaration Card either.

[8] Moreover, in reviewing the evidence in this case, the Tribunal finds no indication that Tam produced a certificate, document or permit in accordance with the applicable

provisions of Part IV of the HA Regulations for any animal by-product that might have justified her importation of meat products on November 7, 2012.

[9] Therefore, upon reviewing the evidence in this case, and given the findings of the Federal Court of Appeal, the Tribunal finds that Tam has not raised any defence or justification for her importation in accordance with Part IV of the HA Regulations.

[10] The Tribunal finds that all of the necessary elements of the violation allegedly committed by Tam, as set out in Notice of Violation #YOW-12-071, dated November 7, 2012, have been established on the balance of probabilities.

Penalty and Removal of All Record of the Penalty After Five Years

[11] Based on the evidence of this case, the penalty for a violation of section 40 of the HA Regulations as established by the AMP Act and AMP Regulations is correctly assessed at $800.00. The classification of an alleged offence under section 40 of the HA Regulations is set out in the AMP Regulations as a "serious violation" for which the mandated penalty is $800.00. As such, the Tribunal finds that the penalty of $800.00 is the correct penalty required by the law in this case.

[12] The Tribunal finds that Tam committed the violation and orders her to pay the Agency a monetary penalty in the amount of $800.00 within thirty (30) days after the day on which this decision is served.

[13] A review of Tam's case indicates that she has requested that the Tribunal consider her circumstances and reduce the fine or not penalize her. 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.

[14] Agency inspectors are charged with protecting Canadians, the food chain and agricultural production in Canada from the risks posed by biological threats to plants, animals and humans. There is no doubt that these duties must be exercised responsibly. The Tribunal is aware that the Agency has its own procedure for reviewing traveller complaints against inspectors should travellers believe they have been improperly treated by Agency officials.

[15] The Tribunal wishes to inform Ms. Tam that this violation is not a criminal offence. After five years, she will be entitled to apply to the Minister to have the violation removed from her record, in accordance with subsection 23(1) 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 24th day of December, 2014.

_____

Dr. Don Buckingham, Chairperson