Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Bougachouch v. Canada (Canada Border Services Agency)*, 2013 CART 20

Date: 20130624
Docket: CART/CRAC-1624

Between:

Youssef Bougachouch, Applicant

- and -

Canada Border Services Agency, Respondent

[Translation of the official French version]

Before: **Bruce La Rochelle, Tribunal Member**

With: **Youssef Bougachouch, self-represented; and**
Sylvie Renaud, representing 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

[1] Following a hearing and a review of all oral and written submissions of the parties, the Canadian Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not commit the alleged violation and is not liable for payment of the monetary penalty.

Hearing held in Montreal, Quebec,
March 8, 2013.

REASONS

Alleged Incident and Legislative Authority

[2] The respondent, the Canada Border Services Agency (Agency), alleges that, on March 27, 2012, at Pierre Elliott Trudeau International Airport, in the province of Quebec, the applicant, Youssef Bougachouch (Mr. Bougachouch) [translation] "committed a violation, namely: imported an animal by-product, to wit, meat, without meeting the prescribed requirements contrary to section 40 of the *Health of Animals Regulations*".

[Translated as it appears in the French version.]

[3] The applicable provisions of Part IV of the *Health of Animals Regulations* are reproduced below:

> ***40.*** *No person shall import into Canada an animal by-product, manure or a thing containing an animal by-product or manure except in accordance with this Part.*
>
> ***41.*** *(1) A person may import into Canada an animal by-product, manure or a thing containing an animal by-product or manure…if*
>
> > *(*a*) the country of origin is the United States and the by-product, manure or thing is not derived from an animal of the subfamily* Bovinae *or* Caprinae*;*
> >
> > *(*b*) the country of origin, or the part of that country, is designated under section 7 as being free of, or as posing a negligible risk for, any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate of origin signed by an official of the government of that country attesting to that origin; or*
> >
> > *(*c*) the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in a manner that would prevent the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate signed by an official of the government of the country of origin that*

(i) attests that the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in that manner, and

(ii) shows the details of how it was collected, treated, prepared, processed, stored and handled.

41.1 *(1) Despite section 41, a person may import into Canada an animal by-product or a thing containing an animal by-product, other than one described in section 45, 46, 47, 47.1, 49, 50, 51, 51.2 or 53, if an inspector has reasonable grounds to believe that the importation of the by-product or thing, by its nature, end use or the manner in which it has been processed, would not, or would not be likely to, result in the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product was derived is susceptible and that can be transmitted by the by-product, and the by-product or thing is not intended for use as animal food or as an ingredient in animal food.*

(2) No person shall, in respect of any animal by-product or thing containing an animal by-product that has been imported in accordance with subsection (1), use or cause it to be used as animal food or as an ingredient in animal food.

…

43. *A person may import into Canada cooked, boneless beef from a country or a part of a country not referenced to in section 41 if*

*(*a*) it was processed in a place and in a manner approved by the Minister;*

*(*b*) it is accompanied by a meat inspection certificate of an official veterinarian of the exporting country in a form approved by the Minister; and*

*(*c*) on examination, an inspector is satisfied that it is thoroughly cooked.*

…

52. *(1) Despite anything in this Part, a person may import into Canada an animal by-product if the person produces a document that shows the details of the treatment of the by-product and an inspector has reasonable grounds to believe — based on the source of the document, the information contained in the document and any other relevant information available to the inspector*

and, if necessary, on an inspection of the by-product — that the importation of the by-product would not, or would not be likely to, result in the introduction into Canada, or the spread within Canada, of a vector, disease or toxic substance.

(2) Notwithstanding anything in this Part, a person may import an animal by-product under and in accordance with a permit issued by the Minister under section 160.

[4] The basic regulatory regime, as particularized in the legislative extracts quoted, is that of prohibiting the importation of meat or meat by-products into Canada from countries other than the United States, unless an import permit has been obtained. In certain cases, a certificate or other document showing how the meat or meat by-product has been processed may be accepted in place of an import certificate. In such cases, the products are permitted to be imported on the basis that the particulars disclosed result in a conclusion that the product would not or would not be likely to introduce particular diseases or contaminants into Canada, and therefore potentially into the Canadian food supply. In addition, an inspector is accorded a particularized discretion to permit the importation of animal by-products, based on reasonable grounds to believe that the importation of the product, "by its nature, end use or the manner in which it has been processed, would not, or would not be likely to, result in the introduction into Canada of any reportable disease" (subsection 41.1(1), *Health of Animals Regulations*).

[5] The roles of the various parties involved in the regulation of food importation are discussed in greater detail in the Tribunal case of *Gebru v. Canada (CBSA)*, 2013 CART 2, particularly in paragraphs [10] to [16] of that decision.

[6] The Tribunal must determine whether the Agency has established all the elements required to support the Notice of Violation and, if Mr. Bougachouch did import meat into Canada, whether he met the requirements that would have permitted such importation.

Procedural History

[7] In Notice of Violation 3961-12-M-0098, dated March 27, 2012, the Agency alleges that, on that date at P.-E.-Trudeau International Airport, in the province of Quebec, Mr. Bougachouch [translation] "committed a violation, namely: imported an animal by-product, to wit, meat, without meeting the prescribed requirements contrary to section 40 of the *Health of Animals Regulations*".

[Translated as it appears in the French version.]

[8] The Agency served the Notice of Violation with Penalty personally on Mr. Bougachouch on March 27, 2012. In the Notice of Violation, Mr. Bougachouch is advised that the alleged violation is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187; Regulations), for which the penalty assigned, under section 5, is $800.

[9] Sections 4 and 5 of the Regulations provide, in part, as follows:

> ***4.*** *The classification of a violation as a minor, serious or very serious violation of a provision set out in column 1 of an item of Schedule 1 is as set out in column 3 of that item.*
>
> ***5.*** *(1) The amount of the penalty in respect of a violation that is committed by an individual otherwise than in the course of business and that is not committed to obtain a financial benefit is…*
>
> *(*b*) $800, for a serious violation…*

[10] The classification of the violation as serious is found in Schedule 1, Part 1, Division 2 of the Regulations. In particular, in item 70 and as specifically referenced in section 40, the violation is described as "import an animal by-product without the required certificate" and is classified as "serious".

[11] In analyzing the procedures undertaken in the present case, it is to be noted that the Tribunal is subject to two sets of procedural directives. The first set is found in the Regulations, established under the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. The second set is found in the *Rules of the Review Tribunal (Agriculture and Agri-Food)* (SOR/99-451; Rules), established under the *Canada Agricultural Products Act*.

[12] By letter dated April 1, 2012, sent by facsimile and received by the Tribunal on April 4, 2012, Mr. Bougachouch requested a review by the Tribunal, by way of oral hearing, in French. In his letter, Mr. Bougachouch presented arguments in support of his request; those arguments will be discussed later in this decision.

[13] The Tribunal forwarded Mr. Bougachouch's request for review to the Agency by e-mail and regular mail on April 10, 2012. The Agency, acting on behalf of the Minister, was required to submit its Report by April 25, 2012, being within fifteen days of the time of receipt of the request for review. Rule 36 provides, in part, as follows:

> ***36.*** *(1) Within 15 days from the day on which the Minister receives the copy of the request for a review, the Minister must prepare a report that includes*
>
> *(*a*) any information relating to the violation…*

[14] On April 19, 2012, the Agency submitted its Report to the Tribunal, which was received on April 23, 2012; the Agency also advised that a copy of the Report had been forwarded to Mr. Bougachouch. Pursuant to Rule 37 of the Rules, the Tribunal was required to send an acknowledgement letter to the parties, as follows:

> ***37.*** *Within two days after receiving the report, the Tribunal must send an acknowledgement letter to each party indicating that the report has been received and that the parties have 30 days after the date of the letter to submit any additional information or representations including any documents or other evidence.*

[15] On April 24, 2012, the Tribunal sent, by e-mail and regular mail, a letter acknowledging receipt of the Agency's Report to Mr. Bougachouch and the Agency and informing both parties that [translation] "any additional submissions that you wish to make must be submitted to the Tribunal on or before May 24, 2012. After that date, no documentation will be admissible without the Tribunal's consent". No additional submissions were made by Mr. Bougachouch or the Agency.

[16] On January 11, 2013, the Tribunal sent a Notice of Hearing by e-mail and registered mail to the Agency and Mr. Bougachouch, to advise them that the hearing would be held in Montreal on March 8, 2013, in the Courts Administration Service building. The hearing was so held on March 8, 2013. Mr. Bougachouch represented himself, and the Agency was represented by Sylvie Renaud (Ms. Renaud), Senior Appeals Officer at the Agency.

[17] At the oral hearing before the Tribunal on March 8, 2013, the Tribunal asked the Agency to respond to one of Mr. Bougachouch's written arguments, which will be discussed later in this decision.

[18] Following the hearing on March 8, 2013 and the Agency's comments, the Agency requested by letter dated March 12, 2013, that the Tribunal submit its request in writing. By letter dated March 15, 2013, sent by e-mail and regular mail to the Agency and copied to Mr. Bougachouch, Member Bruce La Rochelle (who had conducted the hearing) expressed his concerns and requested that the Agency provide further information, on or before April 8, 2013. The Agency sent its response, by letter dated April 4, 2013, and by e-mail to the Tribunal and Mr. Bougachouch on April 5, 2013.

Evidence and Arguments of the Parties

[19] In his request for review dated April 1, 2012, Mr. Bougachouch wrote as follows:

> *…I am of Moroccan origin. I arrived on an airplane on which half the passengers were of European, American or Canadian origin, and only Arabs were targeted en masse for baggage inspection…*
>
> [Translated as it appears in the French version.]

[20] At the hearing on March 8, 2013, the Tribunal commented that the Agency had not addressed this point in its Report. The responses of the Agency's inspector who attended the hearing, and the responses of the Agency's representative, did not include any denial of Mr. Bougachouch's allegations. Under oath, Mr. Bougachouch testified that from what he could see, more than half of the passengers on his flight were not Arab, but only Arabs were sent to secondary inspection. In answer to a question from the Tribunal, the Agency's representative confirmed that fact.

[21] The Agency's representative said that an internal mechanism is in place to review traveller complaints, implying that because of that mechanism, questions concerning the conduct of inspectors were not relevant before the Tribunal. The Tribunal responded that the existence of such an internal mechanism did not mean that the question of bias in relation to the Notice of Violation could be avoided.

[22] Under oath, the Agency's witness, Inspector 17121, who was present at Mr. Bougachouch's secondary inspection, suggested that Mr. Bougachouch's impression came from the fact that there were two "streams" in the secondary inspection: immigrants and travellers. She did not explain how it was possible to distinguish between the two groups. She also suggested that the large number of Arabs in the secondary inspection line was justified because the flight had come from Morocco.

[23] The Agency did not provide any explanation why only Arabs (who could have been Canadians or citizens of another country) were directed to the secondary inspection line. The Tribunal decided to give the Agency an opportunity to demonstrate that the preliminary impression of bias was not correct. One of the Tribunal's suggestions was that the Agency could submit the information to the individuals on the flight to whom Notices of Violation had been issued. The Tribunal suggested a deadline of thirty days to submit a response, with the possibility of an extension, in order to gather the information.

[24] By letter dated March 15, 2013, to the Agency, the Tribunal made the following request [translation]:

> *In his request for review dated April 1, 2012, Mr. Bougachouch wrote as follows:*
>
> > *…I am of Moroccan origin. I arrived on an airplane on which half the passengers were of European, American or Canadian origin, and only Arabs were targeted en masse for baggage inspection…*
>
> *At the hearing of March 8, 2013, I commented that the Agency had not responded to this point raised by Mr. Bougachouch. Your responses to my questions, and [the inspector's] responses on this subject, gave me the impression that Mr. Bougachouch was correct and, as a result, there was an issue of bias.*
>
> *I invited you to submit evidence to the contrary, without specifying the type of evidence. One suggestion I made was to analyze the Notices of Violation that were issued to individuals on the flight with Mr. Bougachouch. Nonetheless, the choice of which evidence to the contrary to submit remains yours.*
>
> *As well, I suggested a deadline of 30 days (April 8, 2013), if that suits you, to submit evidence to the contrary. You also have the option of not submitting any additional evidence.*
>
> [Translated as it appears in the French version.]

[25] In its submission dated April 4, 2013, the Agency informed the Tribunal that the Agency would not be submitting evidence to counter the allegations of discrimination. In that same submission, the Agency provided the following response (submission dated April 4, 2013, page 3) [translation]:

…

> *The CBSA therefore maintains that the Notice of Violation must be analyzed independently of any allegations of discrimination. We believe that you are in a position to render a final decision in light of these comments, without considering the allegations of discrimination. If that is not the case, your interlocutory decision to consider these allegations justifies our request for an additional delay, in order to discuss the merits of this question, notably and without limiting the generality of the foregoing, in terms of the need for a Notice of Constitutional Question and the burden of proof of the applicant.*

> *Under the circumstances, the Agency will not submit any additional information to the Tribunal on the matter of discrimination raised by Mr. Bougachouch, unless the Tribunal decides that the matter is within its mandate, in which case we request a delay of 60 days, in order to complete our arguments.*
>
> …

[26] In its submission dated April 4, 2013 (page 1), the Agency argued as follows [translation]:

> …
>
> *The Agency…would like to reaffirm that the* Agriculture and Agri-Food Administrative Monetary Penalties Act *(Act) and its regulations do not establish any requirement that the Agency provide reasons why an individual is referred for a verification of the declaration. Moreover, the Act does not give the Tribunal the power to review the reasons for the verification in the secondary inspection line.*
>
> …
>
> [Translated as it appears in the French version.]

[27] In addition, the Agency repeated its arguments from the hearing, in particular that an internal mechanism is already in place to review complaints from travellers, such as Mr. Bougachouch (submission dated April 4, 2013, page 2).

[28] The Agency argued that the Tribunal had recognized that its mandate was limited, citing the following excerpt from *Marin v. Canada (CBSA)*, 2013 CART 6 (paragraph [22]):

> *The Tribunal's mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the Agriculture and Agri-Food Administrative Monetary Penalties Act….*
>
> …

Confirmation of the Tribunal's mandate, as was done in *Marin*, does not amount to a recognition of restriction in the mandate.

[29] The Agency argued that the Tribunal had acknowledged [translation] "that it did not have either the mandate or the jurisdiction to analyze matters of discrimination that might have been the primary concern of an applicant," citing paragraphs [26] to [28] of *Zhou v. Canada (CBSA)*, 2010 CART 20, which read as follows:

> *[26] The Tribunal will, however, address Zhou's concerns about his alleged mistreatment by Agent 10534. Can the actions taken by Agency agents against*

Zhou "contaminate or negate" the Notice of Violation in question? According to the evidence given by Zhou, the secondary inspection took place in a climate of discrimination and unprofessional conduct on the part of Agency inspector.

[27] 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. These duties, no doubt, must be exercised responsibly. The Tribunal is aware that the Agency has its own procedure for reviewing traveller complaints against inspectors, where the actions of inspectors become excessive towards the travelling public.

[28] On the other hand, the Tribunal's jurisdiction to review Notices of Violation comes from its empowering legislation. According to these laws, the Tribunal does not have the mandate, nor the jurisdiction, to cancel, annul or dismiss a Notice of Violation for reasons relating solely to the conduct of Agency inspectors towards an applicant.

(The Agency underlined paragraph [28].)

[30] With respect to Mr. Bougachouch's concerns in relation to the conduct of Agency officers, he has the right to raise this directly with the Agency, or with the Minister. In most cases, this will not be an issue that is relevant to the subject matter dealt with by the Tribunal. However, despite the Agency's sentiments on this matter, the Tribunal must determine whether the reasons and actions of the inspector demonstrate that she abused her discretionary power and thus based her decision to issue a Notice of Violation to Mr. Bougachouch on arbitrary and discriminatory criteria.

[31] The Tribunal is of the view that it has the right to reject a Notice of Violation, due to the conduct of Agency officers towards an applicant. In effect, the Tribunal has the right to judge that the conduct of Agency officials has been so highly egregious that the Tribunal refuses to admit evidence obtained as a result of such conduct, based on the fact that, to do otherwise could potentially cause the system of justice to fall into disrepute. The current state of the law is able to accord to the Tribunal a discretionary power to bar evidence obtained as a result of flagrant disregard for the applicant's rights. See, for example, the decision of Madame Justice Spies in *R. v. Johnson*, 2007 CanLII 2007 57813 (ONSC), and the decision of Mr. Justice Kruzick in *R. v. Nguyen*, 2006 CanLII 1769 (ONSC). The Tribunal, in a decision by Chairperson Buckingham, expressed related sentiments in *Amalia Eustergerling v. Canada (CBSA)*, 2012 CART 19, in paragraphs [41] to [45] and, in particular, paragraphs [43] and [45], which read as follows:

[43] The Supreme Court of Canada has considered the abuse of discretion in the case of Roncarelli v. Duplessis *[1959] S.C.R. 121, and has stated the law as follows at page 140:*

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute….
>
> …
>
> *[45] Therefore, the Tribunal is convinced that the decision of Inspector 10481 was not based on capricious or discriminatory criteria such as race, or gender or other irrelevant considerations. It would appear to the Tribunal that Inspector 10481 made her decision strictly on the basis of the particular case at hand, without letting her judgment be clouded by irrelevant or extraneous considerations. Moreover, even if proper and improper purposes underlying Inspector 10481's action would have existed, intervention by this Tribunal would only be merited where the improper purpose contributed to a material extent in the issuance of the Notice of Violation with Penalty….*
>
> …

[32] Despite having been given three opportunities (in the Agency's Report, at the hearing and in the Agency's additional submission) to submit evidence to counter the appearance of bias, the Agency chose not to submit anything. Consequently, the Tribunal finds that there was bias in the selection of Mr. Bougachouch and his luggage.

[33] The Tribunal acknowledges that the decisions of Agency inspectors are made under great pressure and that the discretion of inspectors must be respected under most circumstances. However, there are rare circumstances under which discretion and decision-making are seriously compromised. There is no imputation of bad faith. For some reason, without any convincing explanation, only Arabs were referred to secondary inspection in this case. Discretion is not being exercised when only Arabs, arriving on a flight with many other individuals, are required to undergo secondary inspection. The Tribunal remains without a convincing explanation from the Agency for this "Arab waiting line".

[34] In the view of the Tribunal, the case at hand is one of those rare cases where the discretionary power to bar evidence should be exercised. As a result, the Tribunal considers the Notice of Violation to be a nullity. To do otherwise could cause the system of justice to fall into disrepute.

Conclusion

[35] Following a review of all oral and written submissions of the parties, the Tribunal, by order, determines that the applicant did not commit the alleged violation and is not liable for payment of the monetary penalty.

Dated at Ottawa, this 24th day of June, 2013.

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Bruce La Rochelle, Member