



Citation: *Gavryushenko v. Canada (Canada Border Services Agency)*, 2016 CART 33

Date: 20161214

Docket: CART/CRAC-1884

**BETWEEN:**

**Marina Gavryushenko,**

**Applicant**

**- and -**

**Canada Border Services Agency,**

**Respondent**

**BEFORE: Chairperson Donald Buckingham**

**WITH: Sofia Hrapunsky, representing the applicant; and  
Pierre Dastous, 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 the facts relating to a violation of subsection 16(1) of the *Health of Animals Act*, alleged by the respondent.

**DECISION**

**Following a hearing and having reviewed all the oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that, on a balance of probabilities, the applicant, Marina Gavryushenko, did commit the alleged violation, described in Notice of Violation 4974-16-0114 dated February 9, 2016, regarding events occurring on that day, and is liable for payment of the penalty in the amount of \$1,300 to the respondent within thirty (30) days after the day on which this decision is served.**

The hearing was held in Toronto, ON,  
Monday, November 28, 2016.

## OVERVIEW

[1] This case involves one large piece of beef salami imported into Canada on February 9, 2016.

[2] The applicant, Marina Gavryushenko (Ms. Gavryushenko) did not declare or present the beef salami contained in her luggage at the time of importation. As a result, the Canada Border Services Agency (Agency) issued her a Notice of Violation with Penalty in the amount of \$1,300 for failing to present the salami to Agency officers, contrary to subsection 16(1) of the *Health of Animals Act* (HA Act).

[3] Ms. Gavryushenko requested the Canada Agricultural Review Tribunal (Tribunal) review the facts surrounding the issuance of the Notice of Violation.

[4] In reviewing the facts of this case, it is my role to weigh the evidence before me and to determine whether the Agency has proven the elements that form the basis of the Notice of Violation. In the case of a violation of subsection 16(1) of the HA Act, the Agency must prove that Ms. Gavryushenko is the person who committed the violation, and that while importing beef salami into Canada, she failed to present it to Agency officers.

[5] Where the Agency meets its burden of proof, the applicant will be held liable for a violation under the AMP system, unless she can establish a defence, justification or excuse permitted under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act), the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), or as it pertains to this case, the HA Act.

[6] For the reasons below, I find that the Agency has proven the elements that form the basis of the Notice of Violation, that Ms. Gavryushenko raises no valid defence, excuse or justification for her actions and that the penalty assessed in this case is valid under the AMP Act and AMP Regulations.

## REASONS

### **Background**

[7] Ms. Gavryushenko entered Canada on February 9, 2016, from Russia, to visit her daughter Sofia Hrapunsky (Ms. Hrapunsky) and her daughter's family.

[8] After an inspection of her bags in the Customs secondary area of the Toronto Pearson International Airport, the Agency issued and served Notice of Violation 4974-16-0114 to Ms. Gavryushenko for *[verbatim]: "fail[ing] to present an animal or thing, to wit: 1 Beef Salami"*, an action that the Agency alleges is contrary to subsection 16(1) of the HA Act. The alleged violation is classified as a "very serious

violation” under section 4 and Schedule 1 of the AMP Regulations, for which the mandated penalty is either a warning or a fine of \$1,300.

[9] In a letter dated February 16, 2016 (sent by courier on February 18, 2016), Ms. Gavryushenko, via a letter penned by Ms. Hrapunsky, requested that the Tribunal review the facts of the Notice of Violation (Request for Review). Her Request for Review outlined her reasons for the request. In order to maintain her rights to launch a Request for Review under the AMP Act, Ms. Gavryushenko did not pay the assessed penalty.

[10] The Tribunal convened a hearing of this matter on November 28, 2016, in Toronto, Ontario. Pierre Dastous was present to represent the Agency with Ms. Gavryushenko not appearing herself, but instead being represented by her duly authorized representative, Ms. Hrapunsky.

### **Issues**

[11] Three issues are raised by this case:

- i. has the Agency proven each of the elements of the violation of subsection 16(1) of the HA Act;
- ii. has Ms. Gavryushenko established a permissible defence under section 18 of the AMP Act that could justify or excuse her actions of February 9, 2016; and
- iii. is the assessed penalty of \$1,300 justified in law?

### **Analysis**

#### ***Issue #1 - Has the Agency proved all elements necessary for the violation of subsection 16(1) of the HA Act?***

[12] The courts have examined violations arising from various statutes and regulations covered by the AMP Act and AMP Regulations in some detail, particularly given that these violations are of absolute liability (*Doyon v. Canada (Attorney General)*, 2009 FCA 152 (*Doyon*), at paragraphs 11 and 27).

[13] Furthermore, the Federal Court of Appeal has established that enforcement agencies have the burden to prove each of the essential elements of an alleged violation under the AMP Act and AMP Regulations in order to conclude the alleged violator has committed a violation (*Doyon*, at paragraph 42).

[14] Determining the essential elements of a particular violation requires the Tribunal to apply the *Doyon* approach of parsing out the required elements from the statutory language of the provision that establishes the violation (*Doyon*, at paragraph 41).

[15] Subsection 16(1) of the HA Act reads as follows:

**16 (1)** *Where a person imports into Canada any animal, animal product, animal byproduct, animal food or veterinary biologic, or any other thing used in respect of animals or contaminated by a disease or toxic substance, the person shall, either before or at the time of importation, present the animal, animal product, animal by-product, animal food, veterinary biologic or other thing to an inspector, officer or customs officer who may inspect it or detain it until it has been inspected or otherwise dealt with by an inspector or officer.*

[16] For the Agency in this case to sustain the AMP violation under subsection 16(1) of the HA Act, it must prove the following three essential elements, each on a balance of probabilities:

- Element 1 - Ms. Gavryushenko is the person who committed the violation;
- Element 2 - Ms. Gavryushenko imported an animal product or animal by-product into Canada; and
- Element 3 - Ms. Gavryushenko failed to present the animal by-product to Agency officers before being referred to the Customs secondary area for luggage inspection.

### **Findings with respect to Elements 1 and 2**

[17] Element 1—Ms. Gavryushenko’s identity as the alleged violator—is not in dispute. Ms. Gavryushenko was the alleged violator identified by Agency Officer 35150 at the Customs secondary area and the travel documents she presented to the Agency officer confirm this. Furthermore, Agency Officer 35150 indicated that the bags he inspected belonged to Ms. Gavryushenko.

[18] With respect to the Element 2, evidence from Agency Officer 35150 is that he conducted a search of Ms. Gavryushenko’s luggage and found one large beef salami in it. Agency Officer 35150 testified that Ms. Gavryushenko had indicated on her Agency E311 Declaration Card (Declaration Card) that she was importing no food or agricultural products. When he found the beef salami, Agency Officer 35150 asked Ms. Gavryushenko why she had not declared the salami and her response was that she had no reason.

[19] In her Request for Review, Ms. Gavryushenko never denies importing the beef salami. In fact, in the Request for Review, Ms. Hrapunsky explains that her mother *[verbatim]*: “... did not feel good to visit us ‘empty handed’. So, in the airport, in a last moment she grabbed in a store salami which in her opinion had some sentimental values. In my childhood salami was rare delicious treat.” Therefore, with respect to Element 2, I find, on the balance of probabilities, that on February 9, 2016, Ms. Gavryushenko imported an animal product or an animal by-product into Canada.

### **Finding with respect to Element 3**

[20] Travellers are given an opportunity to declare and present imported goods both in writing on the Declaration Card they complete prior to entry into Canada and orally to the Agency primary officer during the initial Customs control process upon their arrival into Canada. Declaring and presenting imported animal by-products is a legal requirement under both section 16 of the HA Act and section 12 of the *Customs Act*.

[21] In *Canada v. Savoie-Forgeot*, 2014 FCA 26, the Federal Court of Appeal stated that goods should be made available for inspection, that is they must be declared or presented, at the first contact with Agency officers (paragraph 25). The declaration of goods at the Customs primary control area is generally the end point for the importation process (*Savoie-Forgeot*, at paragraphs 19 and 25), the moment when a point of finality is reached. Failure to declare or present an animal by-product at this juncture is the act which underlies the issuance of an administrative monetary penalty by the Agency.

[22] The evidence is uncontradicted that Ms. Gavryushenko failed both to declare and present the beef salami she was importing either in writing on her Declaration Card or orally to the Agency officer in the primary control area. Therefore, with respect to Element 3, I find that the Agency has proven, on the balance of probabilities, that Ms. Gavryushenko failed to present the beef salami to Agency officers before she had passed a point of finality in the importation process.

[23] Ms. Gavryushenko raises, in her Request for Review, that she suffered a significant language barrier in English and in communicating with Agency officers, which impeded her ability to declare the salami before a point of finality in the importation process was reached. It is perhaps possible to imagine some rare circumstances where an applicant's inability to read, write or understand both of Canada's official languages might impede a required written or oral declaration of importation of goods such that an applicant might not reach a point of finality in the importation process. However, the facts in case do not reveal such circumstances.

[24] Ms. Hrapunsky argued, both in the Request for Review and at the hearing, that her mother spoke, understood and read English extremely poorly. In the Request for Review, she writes that her mother's *[verbatim]*: “...English is extremely poor and her reading skills are even worth. She did not properly understand how to feel out custom declaration and was

*planning to ask for help custom officer. However, she was approached by an officer with a dog she became anxious and totally lost ability to communicate.”*

[25] Ms. Hrapunsky testified as a general fact that her mother does not speak English, or that she speaks it extremely poorly. With respect to the incident that led to the issuance of the Notice of Violation, Ms. Hrapunsky testified that her mother was escorted by two Agency officers out of the Customs secondary area to the Arrivals waiting area to meet with her. The four of them then proceeded back into the Customs secondary area to complete the AMP process. Ms. Hrapunsky testified that once inside the Customs secondary area, she asked her mother if she had been offered the services of an interpreter and her mother told her that she had not. Under cross-examination, Ms. Hrapunsky shared that she had asked this latter question of her mother in Russian but that neither of them had asked for an interpreter while they awaited the completion of the AMP process.

[26] Evidence from the Agency of a less limited English language capacity of Ms. Gavryushenko was convincing. Agency Officer 35150, in his Narrative Report (Tab 3 of the Agency Report), which was penned by him on the day of the alleged violation, wrote *[verbatim]*: “*There was no problem with language during the interview, as both the traveller and I understood what as being said to each other.*” Agency Officer 35150 also pointed out that in his experience, the manner in which Ms. Gavryushenko filled out her Declaration Card indicated she understood English, as the Declaration Card was completely and correctly filled out and avoided common mistakes that persons with serious language deficiencies in English or French often make. Agency Officer 35150 also testified that Ms. Gavryushenko was able to answer all of the questions he put to her in English during the secondary inspection and that she never asked him during the secondary inspection for an interpreter.

[27] Ms. Gavryushenko chose not to testify in this matter, so it was impossible for me to attempt to assess the language skills of Ms. Gavryushenko in person. Moreover, the evidence is clear that Ms. Gavryushenko never requested an interpreter and no Agency officer ever indicated that he or she had reason to believe there was a significant language barrier between them and Ms. Gavryushenko. As well, as per the discussion in *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85, legitimate policy concerns militate against entertaining belated assertions about language comprehension.

[28] From the evidence presented, it is impossible to conclude that Ms. Gavryushenko’s language limitations prevented her from committing the act of failing to declare the beef salami. In other words, I am convinced that her language ability in English did not prevent her from declaring the beef salami before reaching a point of finality in the importation process.

[29] With respect to Element 3 then, I find, on the balance of probabilities, that on February 9, 2016, Ms. Gavryushenko failed to present an animal by-product to Agency officers before her referral for luggage inspection at the Customs secondary area.

[30] Therefore, I find that the Agency has proven all three elements of the violation.

***Issue #2 - Has Ms. Gavryushenko established a permissible defence under section 18 of the AMP Act that could justify or excuse her actions of February 9, 2016?***

[31] Under the AMP Act, alleged violators of subsection 16(1) of the HA Act may defend themselves by adducing evidence to proof, on a balance of probabilities, that they have a defence, excuse or justification for their actions permitted by section 18 of the AMP Act.

[32] When an administrative monetary penalty has been enacted for a particular violation, section 18 of the AMP Act leaves Ms. Gavryushenko with little room to mount a defence. The defences, excuses and justifications that she raises are as follows: (1) that she could barely understand and speak either of Canada's official languages; (2) that she thought she could bring beef salami into Canada because she could bring the product into other countries; (3) that she thought this product was a modified and processed product and so could be imported into Canada; (4) that she wanted to bring a special treat for her family; (5) that she is in a difficult financial situation and (6) that this kind of thing has never happened to her before and will not happen to her again in the future.

[33] Each of these defences, excuses and justifications are specifically excluded as permissible defences under section 18 of the AMP Act (mistake of fact or due diligence defences not available) or are immaterial to the actual occurrence of the event of failing to present an animal by-product to Agency officers at the time of its importation.

[34] Significant language barriers in rare circumstances (but such rare circumstances were not present in this case) might amount to impediments to the commission of the act under review (as elaborated upon in the previous section) rather than act as a defence in the proper sense of the term. Mistakes as to which goods a person can import into Canada are not permissible defences under section 18 of the AMP Act. Finally, the motivation for importing products, the financial situation of an importer and statements as to past or future behaviour of an importer of animal products are immaterial to the actual occurrence of the event of failing to present an animal by-product to Agency officers at the time of its importation.

[35] Agency officers must protect 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 officers must exercise these duties diligently, respectfully and responsibly.

Travellers, who feel aggrieved by the Agency, may take up their concerns via the Agency's website service under the title "Compliments, Comments and Complaints".

***Issue #3 - Is the penalty of \$1,300 assessed in this matter justified in law?***

[36] The only issue that remains to be determined by me is whether the penalty of \$1,300 is justified under the AMP Act and the AMP Regulations. I find that this amount is justified under the AMP Act and the AMP Regulations for the following reasons.

[37] Calculation of the appropriate penalty begins with a determination of the status of the violation being minor, serious or very serious, as per Schedule 1 to the AMP Regulations. A violation of subsection 16(1) of the HA Act belongs to the category designated under the AMP Regulations of "very serious violations". On the day on which the violation was committed, section 5 of the AMP Regulations, stated that a very serious violation committed by an individual, otherwise than in the course of a business and that is not committed to obtain a financial benefit, carried a penalty of \$1,300. This is the case for Ms. Gavryushenko.

[38] The very strict AMP system established by Parliament and set out in the AMP Act and the penalties arising there under can, nonetheless, have important repercussions for someone like Ms. Gavryushenko. Ms. Gavryushenko has indicated to the Tribunal that she is in a difficult financial situation and so has asked the Tribunal to waive for financial, humanitarian or compassionate reasons, the penalty imposed in this case. Unfortunately, once the Agency has established all the facts of the alleged violation, on a balance of probabilities, the Tribunal's power is limited to confirming the Notice of Violation and ordering the offender to pay the fine specified in this Notice of Violation. According to these laws, the Tribunal has neither the mandate, nor the jurisdiction, to set aside or dismiss a notice of violation for humanitarian, compassionate, medical or financial reasons.

**Disposition**

[39] I find that:

- i. the Agency has proven each of the necessary elements to establish that Ms. Gavryushenko committed the violation set out in Notice of Violation 4974-16-0114, issued February 9, 2016;
- ii. Ms. Gavryushenko has not raised a valid defence, justification or excuse for her failure to present to Agency officers the beef salami she imported into Canada on that same date; and



- iii. the penalty of \$1,300 is correctly assessed as the amount to be paid by her under the AMP Act and AMP Regulations.

[40] Therefore, it is hereby ordered that Ms. Gavryushenko pay \$1,300 to the Agency within thirty (30) days after the day on which this decision is served.

[41] Ms. Gavryushenko may wish to contact the Agency's representatives directly to inquire whether they would agree to a manageable payment schedule for the penalty amounts.

[42] This violation is not a criminal offence. After five years, Ms. Gavryushenko is entitled to apply to the Minister of Agriculture and Agri-Food to have the violation removed from the records, in accordance with section 23 of the AMP Act.

Dated at Ottawa, Ontario, on this 14<sup>th</sup> day of December, 2016.

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Dr. Donald Buckingham, Chairperson