



Citation: *El Fahem v. Canada (Minister of Public Safety and Emergency Preparedness)*,
2017 CART 2

Date: 20170120
Docket: CART/CRAC 1938

BETWEEN:

Hasnaoui El Fahem,

Applicant

- and -

Minister of Public Safety and Emergency Preparedness,

Respondent

BEFORE: Chairperson Donald Buckingham

**WITH: Hasnaoui El Fahem, self-represented; and
Sherri-Lynn Foran and Michèle Hobbs, representatives for the
respondent**

In the matter of an application made by the applicant, pursuant to subsection 13(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of a Minister's decision upholding a violation relating to a section 7 of the *Plant Protection Act*.

DECISION

The Canada Agricultural Review Tribunal ORDERS that the application for a review of the Minister's Decision 16-01611 (CART/CRAC-1938), requested by the applicant, Hasnaoui El Fahem, IS INADMISSIBLE and, pursuant to this order, IS DISMISSED.

By written submissions only.

OVERVIEW

[1] On April 12, 2016, Hasnaoui El Fahem (Mr. El Fahem) brought undeclared garlic bulbs into Canada. The Canada Border Services Agency (Agency) found the garlic bulbs during a secondary inspection of his luggage at Pierre-Elliott-Trudeau International Airport. On this basis, the Agency issued Mr. El Fahem a Notice of Violation. Mr. El Fahem sought review of the facts concerning this Notice of Violation to the Minister of Public Safety and Emergency Preparedness (Minister). The Minister issued his decision upholding the Notice of Violation.

[2] Mr. El Fahem has now requested that the Canada Agricultural Review Tribunal (Tribunal) review the Minister's Decision 16-01611 (CART/CRAC-1938), dated December 5, 2016, pursuant to subsection 13(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act), in relation to the Minister's finding that Mr. El Fahem violated section 7 of the *Plant Protection Act* (PP Act).

[3] A request for review is a right that Parliament extends to applicants which allows them, for a very limited expenditure of time and money, to have their notices of violation, or Minister's decisions concerning such notices 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 AMP Act, the AMP Regulations and the *Rules of the Review Tribunal (Canada Agricultural Review Tribunal)* (Tribunal Rules), the Tribunal may rule that the applicant's request for review is inadmissible.

[4] For the reasons that follow, I find Mr. El Fahem has failed to meet the basic requirements of the AMP Act, the AMP Regulations, and the Tribunal Rules, and as a result, I find that his Request for Review is inadmissible.

REASONS FOR INADMISSIBILITY OF REQUEST

Issue

[5] There is only one issue in this case: Did Mr. El Fahem meet the Tribunal's admissibility threshold to have this matter reviewed by the Tribunal?

Analysis and Applicable Law

[6] The Tribunal is an expert and independent body constituted by Parliament pursuant to the *Canada Agricultural Products Act*, R.S.C., 1985, c. 20 (4th Supp.) (CAP Act) and its jurisdiction consists of responding to requests to review matters arising from the issuance of agriculture and agri-food administrative monetary penalties.

[7] The AMP Act provides for a review by the Tribunal of a first-instance decision made by the Minister (subsection 12(2) and paragraph 13(2)(b) of the AMP Act).

[8] Powers given to the Tribunal by Parliament in conducting this exercise are set out in paragraph 14(1)(a) of the AMP Act, *“After concluding a review requested under this Act, the Tribunal shall, by order, as the case may be, (a) confirm, vary or set aside any decision of the Minister...”*.

[9] In a letter dated December 10, 2016, sent by regular mail and received by the Tribunal on December 16, 2016, Mr. El Fahem filed a request for review (Request for Review), asking the Tribunal to review the facts of the Minister’s Decision, a request permitted by subsection 13(2) of the AMP Act.

[10] The Tribunal sent a letter on December 23, 2016, via email and by ordinary mail, to Mr. El Fahem and to the Agency, requesting information on or before January 9, 2017, as required by sections 46 and 47 of the Tribunal Rules, as well as requesting that Mr. El Fahem file his Request for Review immediately by registered mail. A copy of the Tribunal Rules was attached to the letter.

[11] By email dated January 4, 2017, the Agency provided additional information, indicating December 7, 2016, as the date of service of the Minister’s Decision on Mr. El Fahem and that the penalty amount due under the Notice of Violation had not been paid.

[12] By letter sent by registered mail dated January 3, 2017, Mr. El Fahem sent the Tribunal a second written communication, providing information required by section 47 of the Tribunal Rules.

Analysis and Applicable Law

[13] The AMP Act, the AMP Regulations and the Tribunal Rules require that the Tribunal, before it proceeds to a full hearing of a matter, make a decision on the admissibility of an applicant’s request for the review. Absolute bars to admissibility arise when the applicant has already paid the penalty attached to the Notice of Violation, or has failed to file its Request for Review within the prescribed time and manner as set out in the AMP Act and AMP Regulations.

[14] Subsection 13(b) and subsection 14(1) of the AMP Regulations outline the required statutory period and the permitted modes of delivery for the filing of a request for review of the facts of a violation before the Tribunal:

13. If a person is notified that the Minister, having concluded a review, has decided that the person committed a violation

(a) the time within which the person may request a review of the Minister's decision by the Tribunal is 15 days after the day on which the notice is served and the request must be in writing;

(b) if the review is in respect of a penalty, the time within which the person may pay the penalty that the Minister has maintained or the corrected amount that the Minister has decided on is 15 days after the day on which the notice is served.

14. (1) A person may make a request referred to in section 11, 12 or 13 by delivering it by hand or by sending it by registered mail, courier, fax or other electronic means to a person and place authorized by the Minister.

[15] The Federal Court of Appeal (FCA) has interpreted these provisions very strictly as not permitting the delivery of a request for review by regular mail. In *Re: Section 14 of the AMP Regulations, SOR/2000-187*, 2012 FCA 130 (*Re: Section 14 of the AMP Regulations*), the FCA held as follows:

[22] In my view, section 14 cannot be construed as authorizing regular mail as a means of communicating a request. Subsection 9(2) of the Act provides that a person may request a review by the Tribunal "in the prescribed time and manner". Section 14 of the Regulations simply does not prescribe regular mail as a manner of requesting a review by the Tribunal.

[23] The common thread that appears to run through section 14 is that the question whether a request has been filed within the time allowed for doing so can either be assessed independently by the Tribunal based on the time when a request is actually "delivered" or "received" by hand or by electronic transmission pursuant to paragraphs 14(2)(a) or (c), or by reference to independent third party evidence as to when a request has been "sent" when registered mail or courier service are resorted to as a mode of transmission. In such a case, paragraph 14(2)(b) provides that the request is considered to have been made on the earlier of the date on which the request is received or the date indicated on the receipt issued by the postal or courier service.

*[24] In contrast, regular mail if read into section 14 would allow for no independent means of establishing whether and when the mailed request was sent in the event that it does not reach its proper destination. This problem could have been resolved by deeming such a request to have been made on the date indicated on the postmark stamped on the envelope as was done with respect to the payment of reduced penalties pursuant to section 10 (see in particular paragraph 10(4)(b)). However, this approach was not adopted and the drafters of the Regulations did not prescribe anything in that respect at subsection 14(2). The Court would have to engage in an improper exercise of legal drafting if it was to read into section 14 the approach set out in section 10 (compare *Canada (Attorney General) v. Mowat*, 2009 FCA 309 at paras. 97 to 99).*

[25] I therefore conclude that section 14 cannot be construed as including regular mail as an authorized mode of transmission. ...

[16] This scenario is precisely the situation that Mr. El Fahem finds himself with respect to the filing of his Request for Review to the Tribunal to review the facts of the violation. The statutory deadline for Mr. El Fahem to deliver his Request for Review by a permitted method was 15 days after the date of service of the Minister's Decision. Mr. El Fahem was served on December 7, 2016. Therefore, the last day on which Mr. El Fahem could meet the 15-day limit to file his Request for Review with the Tribunal in time, would be to have filed it on or before Thursday, December 22, 2016.

[17] The first communication received by the Tribunal from Mr. El Fahem, while within the required 15-day limit for filing a request for review, was unfortunately sent by regular mail. That letter was dated December 10, 2016, and received by the Tribunal on December 16, 2016. According to the law set out in the *Re: Section 14 of the AMP Regulations* case, this letter does not meet the requirements of the AMP Act and AMP Regulations, and thus, does not constitute a valid filing of a request for review.

[18] Mr. El Fahem's second communication, although sent by registered mail and date-stamped by Canada Post on January 3, 2017, on the other hand, does not constitute a valid filing of a request for review because it is outside the 15-day limit for filing.

[19] While a harsh and seemingly unfair result, given the strict interpretation of the applicable rules by the FCA, Mr. El Fahem's Request for Review is not admissible, as it was not filed within the required statutory period by a permitted mode of delivery.

[20] Therefore, as Mr. El Fahem's first letter was not filed by one of the permitted methods of transmission and its second letter was not filed within the permitted deadline, there is no valid request for review from Mr. El Fahem before the Tribunal. Unfortunately in both instances, Mr. El Fahem has failed to meet the prescribed time and manner of filing requirements set out the AMP Act and AMP Regulations. This is a failure which cannot now be remedied either by the Tribunal or by Mr. El Fahem, given the interpretation advanced by the FCA in the case of *Re: Section 14 of the AMP Regulations* cited above.

[21] The very strict administrative monetary penalties system established by Parliament under the AMP Act and the AMP Regulations, as in this case, can nonetheless have harsh repercussions for Canadians, especially someone like Mr. El Fahem who is currently in a difficult financial situation. Unfortunately, the Tribunal cannot vary the penalty imposed based on circumstantial, humanitarian or financial grounds. The Tribunal's power to grant a remedy comes from its enabling statutes. According to these statutes, the Tribunal does not have the mandate to set aside or dismiss a notice of violation or a decision of the Minister on circumstantial, humanitarian or financial grounds, nor is it empowered to do so.

[22] Agency officers 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 complaints from Canadians against its actions or officers as set out in the Agency's "Statement of Rights and Service for Producers, Consumers and Other Stakeholders", which is available on the Agency's website.

Disposition

[23] The Tribunal therefore orders that Mr. El Fahem's Request for Review of the Minister's Decision 16-01611 (CART/CRAC-1938) is inadmissible and is dismissed. Furthermore, by operation of subsection 9(3) of the AMP Act, Mr. El Fahem is deemed to have committed the violation indicated in the Notice of Violation with Penalty 3961-16-0685 dated April 12, 2016, and thus the indicated penalty of \$1,300 is due to the Agency.

[24] Mr. El Fahem may wish to contact the Agency's representatives directly to inquire whether they would agree to a manageable payment schedule for the penalty amounts.

[25] These violations are not criminal offences. After five years, Mr. El Fahem is entitled to apply to the Minister of Agriculture and Agri-Food to have the violations removed from the records, in accordance with section 23 of the AMP Act.

Dated at Ottawa, Ontario, on this 20th day of January, 2017.

Dr. Donald Buckingham, Chairperson