



Citation: *Johnson v. Canada (Minister of Public Safety and Emergency Preparedness)*,
2017 CART 4

Date: 20170209
Docket: CART/CRAC-1910

BETWEEN:

Elton Johnson,

Applicant

- and -

Minister of Public Safety and Emergency Preparedness,

Respondent

BEFORE: Chairperson Donald Buckingham

**WITH: Elton Johnson, self-represented; and
Melanie Charbonneau, representative for the respondent**

In the matter of a request made by the applicant, pursuant to subsection 13(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review by the Tribunal of the Minister's Decision CS-79608 dated July 20, 2016, holding that the applicant on January 11, 2016, violated section 40 of the *Health of Animals Regulations*.

DECISION

Following a review of the decision of the Minister of Public Safety and Emergency Preparedness and the reasons for that decision issued July 20, 2016, and an oral hearing and a review of all written submissions of the parties, the Canada Agricultural Review Tribunal, by order, CONFIRMS the decision of the Minister. As a result, the monetary penalty of \$800 is payable by Elton Johnson to the Canada Border Services Agency under Notice of Violation 4974-16-0040 within thirty (30) days after the day on which this decision is served.

The hearing was held in Toronto, ON,
On Monday, January 23, 2017.

OVERVIEW

[1] This case is about whether the Canada Agricultural Review Tribunal (Tribunal) should confirm, vary or set aside a decision of the Minister of Public Safety and Emergency Preparedness (Minister's Decision) finding against Elton Johnson (Mr. Johnson) for importing meat without meeting the requirements to declare it to officers of the Canada Border Services Agency (Agency).

[2] The Minister's Decision, dated July 20, 2016, upholds Notice of Violation 4974-16-0040 issued to Mr. Johnson by the Agency on January 11, 2016, for events taking place on that date. The Notice of Violation indicates the appropriate penalty in this case is \$800 pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), and alleges that Mr. Johnson contravened section 40 of the *Health of Animals Regulations* (HA Regulations).

[3] Mr. Johnson does not contest he imported a meat product into Canada. Nor does Mr. Johnson contest that he did not have any certificates or permits that would have allowed the importation of the meat.

[4] The evidence before the Minister shows Mr. Johnson responded "Yes" to the importation of agricultural and food products question on the Customs E311 Declaration Card (E311 Card), which he presented to Agency officers when he first arrived in Canada.

[5] Mr. Johnson explained to the Tribunal that he was very sorry for the mistake he made, asked the Tribunal to pardon him, and informed the Tribunal he did not have the money to pay the penalty assessed under the Notice of Violation. These reasons are, however, either impermissible pursuant to section 18 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act) (see also the Federal Court of Appeal decision in *Doyon v. Canada (Attorney General)*, 2009 FCA 152, at paragraph 11), or are immaterial to the present matter.

[6] I must decide whether the Minister erred in his finding that the Agency has proven all the necessary elements of the violation required to sustain the Notice of Violation, and whether the Agency provided sufficient evidence that the meat Mr. Johnson imported into Canada was not declared and presented to Agency officers. Specifically, I must decide whether the Minister gave adequate weight and consideration to Mr. Johnson's declaration on his E311 Card.

REASONS

1. Background

[7] On January 11, 2016, at Pearson International Airport in Toronto, Agency officers examined Mr. Johnson's luggage and found meat. The Agency alleged that this meat was

“raw beef (bone-in)”, undeclared, and constituted an animal by-product or a thing containing an animal by-product.

[8] Mr. Johnson checked the “Yes” box beside the question asking whether he was bringing into Canada any “meat, fish, seafood, eggs, dairy products, fruits, vegetables, seeds, nuts, plants, flowers, wood, animals, birds, insects, and any parts, products or by-products of any of the foregoing” on his E311 Card.

[9] The Agency alleges, however, that Mr. Johnson did not verbally declare the meat to either the primary Agency officer immediately upon disembarking his airplane, or later to the secondary Agency officer prior to its discovery during luggage examination in the Customs secondary area. The Agency also alleges Mr. Johnson did not present any certificates or permits that would have allowed importation of the meat into Canada.

[10] The Agency issued Mr. Johnson Notice of Violation 4974-16-0040 With Penalty in the amount of \$800 for importing undeclared animal by-products, an act which violates section 40 of the HA Regulations.

[11] Mr. Johnson first challenged the Notice of Violation with Penalty by filing a Request for Review of the facts of the case to the Minister of Public Safety and Emergency Preparedness (Minister).

[12] The Minister, in his decision of July 20, 2016, upheld the Agency’s action to issue a Notice of Violation With Penalty in the amount of \$800.

[13] Mr. Johnson then sent a Request for Review of the Minister’s Decision to the Tribunal.

2. Applicable Law and Standard of Review

[14] The Tribunal is an expert and independent body constituted by Parliament pursuant to the *Canada Agricultural Products Act* and its jurisdiction consists of responding to requests for review of matters arising from the issuance of agriculture and agri-food administrative monetary penalties.

[15] 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).

[16] 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...*”. As such, the Tribunal performs a function not as a decision-maker of first instance or as a court conducting a judicial review, but rather as a specialized or appellate administrative tribunal reviewing an administrative decision of first instance.

[17] Although the AMP Act provides for a review, as well as possible remedies, it does not specify the type of review to be conducted by the Tribunal. This Tribunal has held that relevant legislation and jurisprudence favours that the Tribunal apply a “*de novo*” type of administrative appellate review of a minister’s decision under the AMP Act (see *Hachey Livestock Transport Ltd. v. Minister of Agriculture and Agri-Food*, 2015 CART 19, at paragraphs 28 to 50).

[18] The appropriate type of review for the Tribunal to employ is to complete a *de novo* examination of the facts and draw its own factual and legal conclusions with little or no required deference to the findings, reasoning and conclusion as contained in the Minister’s Decision of July 20, 2016.

[19] A *de novo* examination of the facts does not require the Tribunal to ask the parties to present anew the evidence in this case. The Tribunal must apply the appropriate law to the factual findings of the case and determine whether the decision of the Minister should be confirmed, varied or set aside.

[20] As well, in considering the possible grounds raised by Mr. Johnson to vary or set aside the Minister’s Decision, I am mindful of the clear instructions of the Federal Court of Appeal in the decision of *Doyon*, at paragraph 11: “*Violations of the Act are absolute liability offences for which, as stipulated in section 18 [of the AMP Act], a defence of due diligence or honest and reasonable mistake of fact is not available.*”

3. Analysis

Did The Minister Err In His Finding That The Agency Has Proven All The Necessary Elements Of The Violation?

[21] For the Minister to uphold a Notice of Violation issued by the Agency for the alleged commission of a violation of section 40 of the HA Regulations, he must be convinced that, on a balance of probabilities, the Agency has proved each of the following essential elements:

- Element 1 - Mr. Johnson is the person who committed the violation;
- Element 2 - Mr. Johnson brought an animal by-product into Canada; and
- Element 3 - Mr. Johnson failed to declare the animal by-product and thus make it available for inspection.

Minister’s Findings With Respect To Elements 1 and 2

[22] Elements 1 and 2 of the violation are not disputed by the parties, except to the extent that Mr. Johnson maintains what he brought into Canada was pork while the evidence from the Agency is that the meat was beef. In any case, it is undisputed that the imported product was meat and falls within the HA Act and HA Regulations definition of “animal by-product” (HA Act, subsection 2(1); HA Regulations, section 2 and *El-Guindy v. Canada (Canada Border Services Agency)*, 2016 CART 1, at paragraph 18). I agree with the conclusions of the Minister with respect to his findings of fact regarding these two elements.

Minister’s Finding With Respect to Element 3

[23] The parties agree, and the Minister rightly held, that Mr. Johnson failed to present any certificates, permits, licences or documents that would have permitted the importation of the meat. But did he declare the animal by-product he was importing and thus make it available for inspection?

[24] Declaring and presenting imported animal by-products is a legal requirement under section 16 of the HA Act and section 12 of the *Customs Act (Canada (Attorney-General) v. Savoie-Forgeot*, 2014 FCA 26 (*Savoie-Forgeot*), at paragraph 17).

[25] Travellers are given an opportunity to declare and present imported goods in writing on the E311 Card they complete prior to entry into Canada. In some instances, the evidence also demonstrates that they were given the opportunity to make an oral declaration of all or some of the products they are importing to the Agency primary officer during the initial Customs control process upon arrival into Canada.

[26] Where individuals declare they are carrying animal by-products and thereafter voluntarily make them available for inspection, they ought not be found to have violated section 40 of the HA Regulations (*Savoie-Forgeot*, at paragraph 18). But individuals who fail to declare the animal by-products they are carrying and thus do not make them available for inspection are in violation of section 40 of the HA Regulations (*Savoie-Forgeot*, at paragraph 19).

[27] It is critical, therefore, to determine if and when individuals declare the products they are importing. Where an individual checks “No” on the E311 Card that he or she presents to the Agency officer at primary inspection, and there is no evidence of any oral interaction between the two setting out any change in that declaration, then the law is clear that it will be too late at some subsequent point during the Customs clearance process to declare and voluntarily make available any imports for inspection (*Savoie-Forgeot*, at paragraph 25).

[28] Does the evidence that was available to the Minister reveal, on a balance of probabilities, that Mr. Johnson failed to declare the items he was carrying and make them available for inspection to the Agency officer at primary inspection on January 11, 2016?

[29] A face-value reading of the Mr. Johnson's E311 Card, which he presented to the Agency primary officer during the initial Customs control process upon his arrival into Canada, would be *prima facie* proof that he did declare the items he was carrying and make them available for inspection on January 11, 2016. On his E311 Card, he clearly marked "Yes" to the agricultural and food question. The first of the items listed in that question is "meat".

[30] Without evidence that this was a false, mistaken or incomplete declaration, it would be difficult to conclude Mr. Johnson failed declare or present he was bringing meat into Canada on January 11, 2016. Without further evidence, this declaration would give notice to the Agency that he was importing various agricultural and food items, including any or all of the items listed in the agricultural and food question. So, it would not be unexpected or unannounced to Agency officers if they were then to find some of these items in Mr. Johnson's luggage during a search in the secondary inspection area.

[31] Therefore, checking "Yes" to the E311 Card question pertaining to agricultural and food products creates a rebuttable presumption that the agriculture and food items have been properly declared by the traveller in question. However, a simple and broad declaration of the importation of agricultural and food items as indicated by a "Yes" response on the E311 Card may not, in some circumstances, be sufficient to exonerate a traveller who is subsequently found to have agricultural and food items in his possession. Particularly when a traveller is asked about the exact nature of the agricultural and food item being imported, he or she has an obligation to be more exact than simply answering "Yes" generally.

[32] Where there is evidence the traveller was asked to specify which agricultural and food products he or she is importing, and the traveller fails to do so, then it will be difficult to hold the traveller has met the burden of declaring and presenting the products being imported. While it is not necessary for a traveller to demonstrate perfect culinary exactitude, the traveller cannot meet the burden of declaring and presenting by simply responding "Yes" to the general agriculture and food question on the E311 Card where he or she is then asked to provide greater specificity at primary inspection. However, where there is no such evidence, the E311 Card declaration that a traveller is importing agricultural and food products should be sufficient in law for that traveller to meet the standard of presenting and voluntarily making the products covered by that declaration available for inspection and the traveller therefore ought not be found to have violated section 40 of the HA Regulations (*Savoie-Forgeot*, at paragraph 18).

[33] Is there evidence in this case, on the balance of probabilities, that Mr. Johnson was asked and failed to provide, at primary inspection, greater specificity than he declared on his E311 Card of the type of goods he was bringing into Canada?

[34] Evidence before the Minister, presented to the Tribunal as the Minister's Record at Tab 9, contains a copy of Mr. Johnson's E311 Card as well as a document entitled "Narrative Report" completed on January 12, 2016, by the Agency Officer 15010, who seized the meat from Mr. Johnson's luggage.

[35] The E311 Card shows that, while Mr. Johnson answered “Yes” to the agriculture and food question, only the words “fish” and “fruits” in the listed products are specifically checked and not “meat”. While there is no evidence in the file as to the identity of who exactly checked off “fish” and “fruits”, there is evidence from the seizing Agency Officer 15010 in his typed Narrative Report that Mr. Johnson:

“declared only ‘fish, ackee, and mangoes’ to the primary officer, and again to me in secondary. I specifically asked him, ‘Do you have any meat in the bags?’. He responded ‘No’. He made an effort to conceal the undeclared meat as it was discovered at the bottom of his checked luggage, beneath several bags of frozen fish. During the secondary examination, I asked the passenger if the suitcase is his, and the passenger said ‘Yes’. I asked for permits or certificates, and none were produced. I seized, photographed and explained the options to the passenger.”

[36] At Tab 13 of the Minister’s Record, the handwritten notes of Agency Officer 15010 contain the notation “declared only ‘fish, ackee, and mangoes’, and ‘prior to discovery, I asked him specifically, ‘Do you have any meat in the bags?’ He answered ‘No’.”

[37] There was no evidence from Mr. Johnson before the Minister regarding the nature or content of the conversation, if any, he had with the Agency officer at primary inspection who took, examined, and marked his E311 Card. Nor did Mr. Johnson provide any evidence as to what was said between Mr. Johnson and Agency Officer 15010, while he was conducting the search of Mr. Johnson’s luggage in the secondary inspection area.

[38] In spite of Mr. Johnson’s answer of “Yes” to the agricultural and food question, the notation beside two specific products “fish” and “fruit” indicates that, prior or in response to a question from the primary inspector as to exactly what kind of agricultural and food products he was importing, he gave a positive response to these two types of food items, but not to “meat”.

[39] Other evidence in the file supports this interpretation. In the secondary inspection area, when asked what he was importing Mr. Johnson told the Agency officers that he was importing “fish, ackee, and mangoes”. When asked specifically whether he had any meat in his luggage, Mr. Johnson responded “No”. Finally, the evidence shows that when his bags were searched and the meat found, it was concealed at the bottom of his luggage, beneath several bags of frozen fish, concealment which was consistent with evidence of a non-declaration by him of “meat” at primary inspection.

[40] Therefore, the evidence before the Minister is sufficient to conclude that the declaration made by Mr. Johnson on his E311 Card, while generally truthful, was not sufficient when he was specifically asked to declare what agricultural or food items he was importing when asked by Agency officers. Without a fully truthful and exact response from Mr. Johnson, I agree with the Minister’s finding the Agency has proved, on a balance of probabilities, that Mr. Johnson did not declare he was importing meat and thereafter

voluntarily make it available for inspection in violation of section 40 of the HA Regulations (*Savoie-Forgeot*, at paragraph 19).

[41] I, therefore agree with the conclusion of the Minister with respect to his findings of fact regarding the third element of the violation.

[42] Mr. Johnson stated in his Request for Review he is unable to pay the fine because of his limited means. The AMP Regulations strictly classify the nature of the violation under section 40 of the HA Regulations as “serious”, which means that if a Notice of Violation with Penalty is assessed, a mandatory \$800 penalty follows. I have no discretion to alter that classification, to substitute a Notice of Violation with Penalty for a Notice of Violation with Warning, or to alter the penalty amount for humanitarian reasons or financial hardship.

4. Disposition

[43] The Tribunal CONFIRMS the Minister’s Decision. The Tribunal also CONFIRMS the amount of the penalty is correct under the enabling law. Consequently, the monetary penalty is payable by Mr. Johnson to the Agency under Notice of Violation 4974-16-0040 within thirty (30) days after the day on which this decision is served.

[44] Mr. Johnson may wish to contact the Agency’s representatives to inquire whether they would agree to a payment schedule for the penalty amount.

[45] The Tribunal wishes to inform Mr. Johnson that this violation is not a criminal offence. After five years, Mr. Johnson 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 9th day of February, 2017.

Dr. Donald Buckingham, Chairperson