



Citation: *Cikotic v. Canada (Canada Border Services Agency)*, 2017 CART 11

Date: 20170328

Docket: CART/CRAC-1912

**BETWEEN:**

**Ajkuna Cikotic,**

**APPLICANT**

**- and -**

**Canada Border Services Agency,**

**RESPONDENT**

**BEFORE: Chairperson Donald Buckingham**

**WITH: Semira Causevic, representing the applicant; and  
Melanie A. Charbonneau, 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, Ajkuna Cikotic, did commit the alleged violation, described in Notice of Violation 7011-16-0475 dated August 14, 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 Calgary, AB,  
Monday, March 13, 2017.

## OVERVIEW

[1] This case involves four small cans of chicken paté imported into Canada on August 14, 2016.

[2] The applicant, Ajkuna Cikotic (Ms. Cikotic) did not declare or present the chicken paté 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 chicken paté to Agency officers, contrary to subsection 16(1) of the *Health of Animals Act* (HA Act).

[3] Ms. Cikotic 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. Cikotic is the person who committed the violation, and that while importing chicken paté 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. Cikotic 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. Cikotic entered Canada on August 14, 2016, from Bosnia, from a visit to her family living there.

[8] After an inspection of her bags in the Customs secondary area of the Calgary International Airport, the Agency issued and served Notice of Violation 7011-16-0475 to Ms. Cikotic for *[verbatim]: “fail[ing] to present an animal or thing, to wit: Chicken Meat”*, 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. In

order to maintain her rights to launch a Request for Review under the AMP Act, Ms. Cikotic did not pay the assessed penalty.

[9] In an email dated August 25, 2016 (also sent by registered mail as a letter dated August 25, 2016), Ms. Cikotic requested that the Tribunal review the facts of the Notice of Violation (Request for Review). Included in her Request for Review, Ms. Cikotic outlined her reasons for the request and Ms. Cikotic named Semira Causevic (Ms. Causevic) as her representative. On September 25, 2016, Ms. Cikotic sent the Tribunal additional material, including a statement from her nephew, Emin Kalac (Mr. Kalac) with whom she was travelling on August 14, 2016.

[10] On November 29, 2016, the Agency filed a report (Agency Report) outlining evidence of its version of the events of August 14, 2016.

[11] The Tribunal convened a hearing of this matter on March 13, 2017, in Calgary, Alberta. Melanie Charbonneau was present to represent the Agency with Ms. Cikotic also present and represented by Ms. Causevic.

### **Issues**

[12] 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. Cikotic established a permissible defence under section 18 of the AMP Act that could justify or excuse her actions of August 14, 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?***

[13] 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).

[14] 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).

[15] 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).

[16] 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.*

[Emphasis added]

[17] 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. Cikotic is the person who committed the violation;
- Element 2 - Ms. Cikotic imported an animal product or animal by-product into Canada; and
- Element 3 - Ms. Cikotic 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**

[18] Element 1—Ms. Cikotic’s identity as the alleged violator—is not in dispute. Ms. Cikotic was the alleged violator identified by Agency Officer 11489 at the Customs secondary area and the travel documents she presented to the Agency officer confirm this. Furthermore, Agency Officer 11489 indicated that the bag he inspected belonged to Ms. Cikotic.

[19] With respect to the Element 2, evidence from Agency Officer 11489 is that he conducted a search of Ms. Cikotic’s luggage and found in it four small cans of what he believed to be chicken paté. Agency Officer 11489 testified that Ms. Cikotic had indicated on her Agency E311 Declaration Card (Declaration Card) that she was importing no food or agricultural products.

[20] Ms. Cikotic, both in her Request for Review and in oral testimony, agreed that she had four small cans of chicken paté in her luggage that day.

[21] While some evidence at the hearing hinted that the actual content of the cans might not have contained “real meat”, Agency Officer 11489’s testimony and his experience in inspecting products, such as the ones found in Ms. Cikotic’s luggage, confirm on a balance of probabilities, that what Ms. Cikotic imported did contain “meat”, which constitutes an animal product or an animal by-product.

[22] Therefore, with respect to Element 2, I find, on the balance of probabilities, that on August 14, 2016, Ms. Cikotic imported an animal product or an animal by-product into Canada.

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

[23] 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*.

[24] 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.

[25] There was uncontradicted evidence that Ms. Cikotic relied on her nephew, Mr. Kalac, to fill out several parts of her Declaration Card, and that there were linguistic difficulties concerning the filling out of the Declaration Card by Ms. Cikotic, due to her limited English and by Mr. Kalac, due to the meaning of words “animal by-products”. That said, the evidence is equally uncontradicted that Ms. Cikotic failed both to declare and present the chicken paté she was importing either in writing on her Declaration Card or orally to any Agency officer, prior to its discovery in her luggage in the Customs secondary inspection area. Therefore, with respect to Element 3, I find that the Agency has proven, on the balance of probabilities, that Ms. Cikotic failed to present the chicken paté to Agency officers before she had passed a point of finality in the importation process.

[26] Language difficulties continue to be raised by applicants as reasons why they fail to declare and present their food and agriculture imports. Section 18(1) of AMP Act permits little room for the Tribunal to consider these reasons in defending, excusing or justifying applicant’s best efforts or mistake of fact in undertaking or not undertaking actions.

[27] However, when a language difficulty is raised as the context for determining what an applicant's declaration actually is, a language difficulty does not relate to a defence envisaged by section 18 of the AMP Act, but rather as part of the evidence of what information was heard, understood and exchanged in making a declaration or presenting an item for inspection and so could have an impact on the outcome of a AMP Act Request for Review (see *Gavryushenko v. Canada (Canada Border Services Agency)*, 2016 CART 33 at paragraph 34). For example, a severe language barrier at primary inspection between an Agency officer and an applicant might make it impossible to reach a point of finality with respect to presenting a declaration of what the applicant was importing. Again, a significant language barrier between an Agency officer at a baggage carousel or at an exit point might re-open the primary inspection. As well, this Tribunal has also found that language barriers can be raised by an applicant where there is real confusion as to whether the applicant's "Yes" on her Declaration Card applied to all or only certain imported products (*Hemeng v. Canada (Canada Border Services Agency)*, 2017 CART 5, at paragraphs 37 and 41).

[28] In the present case, the testimony of Agency Officer 11489 shed some light on the procedures adopted by the Agency, in situations where a serious language barrier prevents a passenger's declaration from reaching a point of finality in the importation process. In such situations, officers would inscribe the mention "No POF", on the Declaration Card to indicate to subsequent officers that the declaration had not reached a point of finality. Presumably, a passenger whose card included a "No POF" inscription would not be issued a notice of violation, even if agricultural products were later discovered during a luggage inspection.

[29] Evidence from the Agency officers indicates there was no language barrier at all between them and Ms. Cikotic. Nor was there a "No POF" inscription marked on her Declaration Card. However, evidence from Ms. Cikotic herself (who testified exclusively in Bosnian), as well as from Mr. Kalac and James Gardener with respect to the language abilities of Ms. Cikotic in English, leave me with no doubt that Ms. Cikotic has significant struggles in understanding and communicating in written and oral English.

[30] Unfortunately for Ms. Cikotic, even with this language difficulty in English, the facts of the case reveal no defence permitted by the AMP Act to her actions on August 14, 2016. Her defences are more in the nature of defences of due diligence and mistake of fact, both prohibited by the AMP Act. Evidence shows that Ms. Cikotic relied on her nephew, Mr. Kalac, to fill out several parts of her Declaration Card, and that he had difficulty not with the English language itself but rather with the specific meaning of "animal by-products". So, instead of inquiring further as to the meaning of "animal product" and whether he and his aunt were importing such products, he simply checked "No" for his Declaration Card and for that of his aunt, Ms. Cikotic. This might have been a normal response but it was one that precluded him and Ms. Cikotic from later arguing, as a successful defence, that they were mistaken as to the law that was applicable to their situation.

[31] As a result, when Ms. Cikotic and Mr. Kalac presented their cards at primary inspection, there was no lack of a basic understanding of the English language or confusion

as to what each was declaring. Nor is there any evidence that Ms. Cikotic's primary inspection was re-opened by subsequent actions of Agency officers. So despite language barriers at secondary inspection, which Mr. Kalac attempted to remedy for his aunt, it was much too late at that point to make a declaration or presentation so as to avoid liability under the AMP Act for importing chicken paté.

[32] As explored above, it is possible to imagine some rare circumstances where an applicant's inability to read, write or understand both of Canada's official languages might impede, preclude or confuse 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.

[33] From the evidence presented, it is impossible to conclude that Ms. Cikotic's language limitations prevented her from committing the act of failing to declare or present her four cans of chicken paté. In other words, I am convinced that her language ability in English did not prevent her from declaring the chicken paté before reaching a point of finality in the importation process.

[34] With respect to Element 3 then, I find, on the balance of probabilities, that on August 14, 2016, Ms. Cikotic failed to present an animal by-product to Agency officers before her referral for luggage inspection at the Customs secondary area.

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

***Issue #2 - Has Ms. Cikotic established a permissible defence under section 18 of the AMP Act that could justify or excuse her actions of August 14, 2016?***

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

[37] When an administrative monetary penalty has been enacted for a particular violation, section 18 of the AMP Act leaves Ms. Cikotic 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 and her nephew didn't know that they couldn't bring chicken paté into Canada; (3) that she and her nephew thought this product was a modified and processed product, and so, could be imported into Canada; and (5) that this kind of thing has never happened to her before and will not happen to her again in the future.

[38] 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.

[39] 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.

[40] 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?***

[41] 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.

[42] 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". Neither the Agency, nor this Tribunal can adjust that designation. 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. Cikotic.

[43] Ms. Cikotic has indicated to the Tribunal that this is her first and only violation. 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**

[44] I find that:

- i. the Agency has proven each of the necessary elements to establish that Ms. Cikotic committed the violation set out in Notice of Violation 7011-16-0475, issued August 14, 2016;
- ii. Ms. Cikotic has not raised a valid defence, justification or excuse for her failure to present to Agency officers the chicken paté 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.

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

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

[47] This violation is not a criminal offence. After five years, Ms. Cikotic 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 28<sup>th</sup> day of March, 2017.

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Dr. Donald Buckingham, Chairperson