Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Do v. Canada (Canada Border Services Agency)*, 2017 CART 13

Date: 20170329
Dockets: CART/CRAC-1945

BETWEEN:

Ngoc Do,

APPLICANT

- and -

Canada Border Services Agency,

RESPONDENT

BEFORE: **Chairperson Donald Buckingham**

WITH: **Ngoc Do, self-representing; and**
Sherri-Lynn Foran and Dannah Draper, 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 section 40 of the *Health of Animals Regulations,* alleged by the respondent.

DECISION

The Canada Agricultural Review Tribunal ORDERS that the application for a review of Notice of Violation 4971-17-0183, dated February 10, 2017, requested by the applicant, Ngoc Do, pursuant to paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, in relation to the Canada Border Services Agency alleging that the applicant violated section 40 of the *Health of Animals Regulations*, IS INADMISSIBLE and, pursuant to this order, IS DISMISSED.

By written submissions only.

Canada

OVERVIEW

[1] Ngoc Do (Ms. Do) has requested that the Canada Agricultural Review Tribunal (Tribunal) review the facts surrounding the issuance of a notice of violation with a penalty of $800 by the Canada Border Services Agency (Agency) because she allegedly failed to present to Agency officials dried beef that she imported into Canada.

[2] For her request to be admissible, Ms. Do must meet an admissibility threshold by offering some permissible basis on which she might succeed in the matter before the Tribunal.

[3] For the reasons that follow, I find Ms. Do has failed to meet this admissibility threshold.

REASONS FOR INADMISSIBILITY OF REQUEST

Background

[4] The Agency issued Notice of Violation 4971-17-0183, dated February 10, 2017, to Ms. Do for "*import[ing] an animal by-product, to wit: dried beef., without meeting the prescribed requirements*", an action that is contrary to section 40 of the *Health of Animals Regulations* (HA Regulations). The alleged violation is classified as a "serious violation" under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), for which the mandated sanction is a warning or an $800 penalty.

[5] On February 10, 2017, the Agency served Ms. Do in person with the Notice of Violation with an $800 penalty.

[6] In an email sent February 15, 2017 (Request for Review), Ms. Do requested that the Tribunal review the facts of the Notice of Violation in accordance with the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act).

[7] By letter dated February 17, 2017, the Tribunal requested Ms. Do provide, on or before March 6, 2017, all necessary information as required by the *Rules of the Review Tribunal (Canada Agricultural Review Tribunal)* (Tribunal Rules), to assist the Tribunal in making its determination on admissibility. A copy of the Tribunal Rules was attached to that letter.

[8] On February 25, 2017, Ms. Do provided, via email, an additional reason why the Tribunal should review her violation.

[9] On March 10, 2017, the Tribunal requested a second time that Ms. Do provide, this time on or before March 27, 2017, further details of the February 10, 2017 incident, that gave rise to the issuance of the Notice of Violation in question to fulfill the requirements of subsection 31(d) of the Tribunal Rules. The Tribunal informed Ms. Do that if she did not provide such information, her Request for Review risked being found inadmissible resulting in an order from the Tribunal dismissing it.

[10] No further written documentation has been received by the Tribunal from Ms. Do. Nor did Ms. Do ever file her Request for Review by registered mail, as it required by the AMP Regulations and the Tribunal Rules.

Issue

[11] There is only one issue in this case: Did Ms. Do meet the Tribunal's admissibility threshold by offering some permissible basis upon which she might succeed in this matter?

Analysis and Applicable Law

[12] A request for review is a right which Parliament has extended to applicants which allows them, for a very limited expenditure of time and money, to have their notice 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, the law places 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 Tribunal Rules, the Tribunal may rule that the applicant's request for review is inadmissible.

[13] Bars to admissibility arise where the applicant has: (1) already paid the penalty attached to the notice of violation; (2) failed to file a request for review within the prescribed time and manner; or (3) failed to provide any permissible reason for the Tribunal to review the Agency's decision.

[14] Permissible reasons would include any information provided by the applicant that the alleged violation did not occur, that the person named in the notice of violation is not the person who committed the violation, or in more rare circumstances, that the conduct of the Agency or of the applicant has been such that the elements of the violation cannot be proved to have occurred, on a balance of probabilities.

[15] Non-permissible defences include those specifically excluded under the AMP Act: that the applicant tried not to commit the violation (due diligence); or, that the applicant was mistaken about the facts that led to committing the violation (mistake of fact).

[16] In the present case, the Tribunal has received from Ms. Do certain explanations as to why she believes she was justified in failing to present and declare to Agency officials the dried beef that she imported into Canada.

[17] Ms. Do has provided the Tribunal with the following reasons for her Request for Review:

(a) she did not know that importing animal by-products into Canada was not permitted;

(b) she was not feeling well when getting ready to return to Canada, and so her mother helped her pack her luggage. As a result when she was asked by the Agency officer whether she was bringing meat products into Canada, she answered with "uncertainty" because she was not sure if her mother had added items to her suitcase, and in fact, her mother had put beef jerky into her luggage;

(c) if she had known that meat products were prohibited, she would never have brought them into Canada and she promises never to do this next time;

(d) after she told the Agency officer that she did not know meat was prohibited, he was very impolite to her; and

(e) she asks that the amount of the penalty be reduced.

[18] None of the reasons provided reveals a basis on which Ms. Do could possibly succeed in her request to have the Tribunal rule that the alleged violation was not committed.

[19] Grounds (a), (b), and (c) offered by Ms. Do are impermissible pursuant to section 18 of the AMP Act (and the Federal Court of Appeal decision in *Doyon v. Canada (Attorney General)*, 2009 FCA 152, at paragraph 11), which prohibits defences of mistake of fact (that is, the applicant was mistaken about the facts that led to committing the violation) and due diligence (that is, the applicant tried her best not to commit the violation).

[20] Essentially, an element of justification raised by Ms. Do was that she did not know the meat was in her luggage, so she could not have declared it until found by Agency officers. The issue of claiming not to have known the contents of one's luggage as an excuse to the importation of undeclared food items has been held by the Federal Court of Appeal not to be a permissible reason to invalidate a notice of violation (see *Canada Border Services Agency v. Castillo*, 2013 FCA 271, at paragraph 24). The violation in question is one of absolute liability.

[21] Ground (d) raised by Ms. Do has no material bearing on the violation that was committed on February 10, 2017. 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 website, in its page entitled "Contact Us: Compliments, Comments and Complaints".

[22] Finally, ground (e) offered by Ms. Do relates to the ability and the discretion of Agency to administer a warning, a penalty, or a reduced penalty. With respect to the choice between a warning and a penalty, unless that discretion is administered in bad faith or for an improper purpose, a reviewing tribunal or court is not at liberty to modify the choice selected by the Agency. There is no evidence in this case that the decision to give Ms. Do a penalty rather than a warning was based on bad faith or for an improper purpose. If the alleged violator pays the penalty within 15 days, he or she will only have to pay 50% of the imposed penalty. After this time, however, only the full amount is payable.

[23] Otherwise, with respect to Ms. Do's request for a reduction of the penalty, it is clear that the very strict administrative monetary penalties system established by Parliament under the AMP Act and the AMP Regulations can have harsh repercussions for Canadians. Unfortunately, the Tribunal cannot cancel or 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.

[24] On the record before me then, I find that Ms. Do has failed to meet the Tribunal's admissibility threshold of offering some permissible basis upon which she might succeed before the Tribunal in this matter.

Disposition

[25] The Tribunal therefore orders that Ms. Do's Request for Review of Notice of Violation 4971-17-0183 is inadmissible. Furthermore, by operation of subsection 9(3) of the AMP Act, Ms. Do is deemed to have committed the violation indicated in the Notice of Violation with Penalty, and thus, the penalty of $800 is due to the Agency.

[26] Ms. Do may wish to contact the Agency's representatives to inquire whether they would agree to a payment schedule for the penalty amount.

[27] These violations are not criminal offences. After five years, Ms. Do 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 29th day of March, 2017.

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Dr. Donald Buckingham, Chairperson