

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Ottawa, Canada K1A 0B7

Docket: CART – 1913

BETWEEN:

KEN FALK

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Patricia L. Farnese, Member

**WITH: Mr. Delwen Stander representing the Applicant; and
Ms. Brett Love and Ms. Lisa Riddle representing the Respondent**

ORDER DATE: September 16, 2019

In the matter of an application to the Canada Agricultural Review Tribunal (Tribunal) pursuant to subsection 12(2) of the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#) (AAAMP Act), for a review of Notice of Violation #1516WA0112, accompanied by a \$10,000 penalty issued pursuant to subsection 14(1) of the [Meat Inspection Act](#).

**ORDER ARISING FROM THE CASE MANAGEMENT CONFERENCE CALLHELD ON
SEPTEMBER 11, 2019**

1. BACKGROUND TO THE CURRENT ORDER

[1] On September 5, 2019, the Applicant sent a request to the Tribunal, via email, asking the Tribunal to provide him with the opportunity to present further submissions on what consideration I should give to the proceedings and decision in *Twin Maple Produce Ltd. v Canadian Food Inspection Agency*, 2019 CART 7 (*Twin Maple*).

[2] Following the Applicant's request, a case management conference call (CMCC) was held on September 11, 2019.

[3] On September 12, 2019, the Tribunal sent a letter, via email, to the parties indicating that a transcript has not been prepared from the audio recordings of *Twin Maple*. The Applicant replied that his request and submissions to have recourse to transcripts equally apply to audio recordings.

[4] On September 13, 2019, the Respondent filed affidavit evidence with Tribunal. The Applicant sent an email to the Tribunal alleging the Respondent's submission is improper and requesting that I reject the submission.

2. ADMISSIBILITY OF STATEMENTS MADE IN HEARING FOR FILE CART - 1918

[5] During the CMCC, the Applicant requested that he be permitted to refer to the transcript of *Twin Maple*.

[6] The Applicant confirmed that he intends to only refer to the sworn oral evidence of Mr. Falk and Investigator Davies.

[7] It is accepted practice to permit a witness to refer to a transcript of that witness' prior testimony ([Reference re Regina v. Coffin, \[1956\] S.C.R. 191](#)). Therefore, I will allow the use of a transcript of Mr. Falk and Investigator Davies examinations-in-chief and cross-examinations to refresh the witnesses' memory of their own testimony during *Twin Maple*.

[8] That being said, I wish to remind the parties, that the Supreme Court of Canada held that evidence at trial of statements made by a witness in a prior adjudicative proceeding represents a form of hearsay ([R v. Hawkins \[1996\] 3 SCR 1043](#)) (*R v. Hawkins*).

[9] Hearsay statements will be admissible for the truth of their content if they meet the separate requirements of necessity and reliability ([R v. Hawkins](#)). Therefore, when deciding this matter, I will consider the trustworthiness and reliability of the evidence presented before me at the hearing to determine the appropriate weight to be attached to the evidence.

[10] In regards to the procedure to follow, the Tribunal will make available to the parties the recordings from the hearing for *Twin Maple*, at their request, prior to hearing scheduled for September 30, 2019.

[11] Further, I require the parties to follow the process outlined in section 10(1) of the [Canada Evidence Act](#), which stipulates how previous statements from previous proceeding are to be put before a witness:

On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

3. TREATMENT OF THE DECISION IN *TWIN MAPLE*

[12] During the CMCC, the Applicant expressed concern that I may disturb the findings of Chairperson Bélanger in *Twin Maple*.

[13] The law is clear, I am not bound by previous decisions of this Tribunal even where the Notice of Violations arise from the same events ([Ellis Don Ltd v Ontario \(Labour Relations Board\)](#), [2001] 1 SCR 221) (*Ellis Don Ltd*).

[14] That said, I take the Supreme Court's direction seriously that "[i]t lay on the shoulders of the administrative bodies themselves to develop the procedures needed to ensure a modicum of consistency between its adjudicators or divisions" ([Domtar Inc. v. Quebec \(Commission d'appel en matière de lésions professionnelles\)](#), [1993] 2 S.C.R. 756, and [Ellis Don Ltd](#)). I do not anticipate disturbing Chairperson Bélanger's findings unless the parties convince me that he has made a mistake of law or fact and that mistake is relevant to the matter before me.

4. RESPONDENT'S REQUEST ON THE ADMISSION OF ADDITIONAL DOCUMENTS

[15] Rule 36 of the [*Rules of the Review Tribunal \(Canada Agricultural Review Tribunal\)*](#) ([*Rules of the Tribunal*](#)) provides that no further submissions are to be filed with the Tribunal after the expiry of the time limit for the filing of a Minister's report or the filing of the applicant's additional submissions.

[16] Therefore, the Respondent asked that I rely on the authority given to me in rule 9 of the [*Rules of the Tribunal*](#) to disregard rule 36 and admit additional documents.

[17] As I was not prepared to rule on the question of admissibility without the benefit of additional arguments, I informed the parties that I will deal with the Respondent's request at the hearing.

[18] I asked the Respondent to provide the Applicant with a copy of any additional documents they are asking that I admit in advance of the hearing.

[19] In response, the Respondent forwarded an affidavit to the Tribunal in relation to the question of admissibility of additional documents on September 13, 2019. I will decide whether I will review the affidavit submitted by the Respondent at the hearing.

5. ORDERS

[20] I **ORDER** that the recordings of the examinations-in-chief and cross-examinations of Mr. Falk and Investigator Davies can be admitted.

[21] The previous depositions, however, cannot be used as proof of the truth of the facts in this current matter. I will consider the appropriate weight to be attached to this evidence and expect the parties to speak to its trustworthiness and reliability at the hearing.

[22] I further **ORDER** the parties to follow the process outlined in section 10(1) of the [*Canada Evidence Act*](#) to reference previous statements at the hearing.

[23] I **ORDER** that the parties be prepared to discuss the Respondent's request to admit additional documents, including the affidavit provided to the Tribunal on September 13, 2019. This matter will be addressed during the time assigned for preliminary matters in the final Joint Hearing Plan filed on September 12, 2019.

Dated at Saskatoon, Saskatchewan, on this 16th day of September, 2019.

(Original signed)

Patricia L. Farnese
Member
Canada Agricultural Review Tribunal