Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Ottawa, Canada K1A 0B7
Citation: *Falk* v *Canadian Food Inspection Agency*, 2020 CART 09

Docket: CART-1913

BETWEEN:

KEN FALK

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: **Patricia L. Farnese, Member**

WITH: **Delwen Stander, representing the Applicant; and**
Lisa Riddle and Brett Love, representing the Respondent

DECISION DATE: **April 3, 2020**

PLACE OF HEARING: **New Westminster, British Columbia**

1. OVERVIEW

[1] Mr. Falk received a Notice of Violation (NOV) pursuant to subsection 14(1) of the *Meat Inspection Act* (*MIA*) and assessed a penalty of $10,000 for obstructing or hindering a Canadian Food Inspection Agency (CFIA) inspector during an inspection of Twin Maple Ltd., operating as Fraser Valley Duck and Goose (FVDG). Mr. Falk, president of FVDG, refused to provide a customer list requested by a CFIA inspector during an inspection of FVDG. The question before the Canada Agricultural Review Tribunal (Tribunal) is whether Mr. Falk's refusal obstructed or hindered a CFIA inspector while she was engaged in carrying out her duties.

[2] FVDG is located in British Columbia and produces speciality poultry products for the British Columbian and Canadian markets. Only poultry products produced in a federally-inspected facility can be sold extra-provincially. The CFIA initiated an inspection after discovering FVDG product for sale in Alberta that had not been produced in a federally-inspected facility. The purpose of the inspection was to determine the party or parties responsible for unlawfully shipping that product outside of British Columbia.

[3] During their inspection, a CFIA inspector requested a copy of FVDG's customer list from Mr. Falk. Mr. Falk refused during that meeting and again in response to a subsequent email from the CFIA repeating that request citing FDVG's proprietary interests in the list as the reason for his refusal. In his arguments before the Tribunal, Mr. Falk further argued that the request was unreasonable given the confidential nature of customer lists. He also alleged that the request invaded his privacy and, therefore, infringed his right to be secure against unreasonable search or seizure as guaranteed by section 8 of the *Canadian Charter of Rights and Freedoms* (*Charter*).

[4] I find that, although the inspector's request was reasonable, the CFIA has not proven that Mr. Falk's refusal to provide the customer list in fact obstructed or hindered the inspector's ability to perform her duties. The NOV is set aside. Therefore, I do not need to consider the constitutional challenge.

2. LEGAL FRAMEWORK

[5] Prior to its repeal, the *MIA* regulated the slaughter, production, and sale of meat products in Canada that were traded interprovincially or were imported or exported into Canada.[1] The *MIA* required that all meat sold in a province other than where it was produced, be prepared in a federally-inspected facility. This requirement is designed to promote food safety, to ensure animal health and welfare standards are met, and to facilitate effective responses when food safety or animal health issues arise. In addition to obvious consumer protection objectives, the *MIA* was part of a food safety regime designed to support the export of Canadian products by maintaining Canada's reputation as a source of high quality and safe food products.

[6] It is not possible to inspect each meat product sold in or exported from Canada. CFIA inspectors, however, have broad powers to conduct targeted and random inspections to promote and verify compliance with Canada's food regulatory regime. The public has corresponding obligations to assist in these inspections. Mr. Falk is alleged to have failed to meet this obligation as required by subsection 14(1) of the *MIA* when he refused to provide FVDG's customer list to a CFIA inspector. Subsection 14(1) provides that:

> *No person shall obstruct or hinder, or make any false or misleading statement either orally or in writing to, an inspector while the inspector is engaged in carrying out his duties or functions under this Act or the regulations.*

[7] The *Agriculture and Agri-food Administrative Monetary Penalties Act (AAAMP Act)* and *Agriculture and Agri-Food Administrative Monetary Penalties Regulations (AAAMP Regulations)* set out a uniform process to enforce and address violations of many Acts within Canada's food regulatory regime. The *AAAMP Act* regime contains two steps: (1) a determination that the violation was committed and (2) an assessment of the appropriate penalty. The CFIA must prove both steps on a balance of probabilities. A violation of subsection 14(1) of the *MIA* is subject to the *AAAMP Act* regime.

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[1] The *MIA* was replaced by the *Safe Food for Canadians Act* (SFCA), which became fully in force in January 2019. Much of the structure of the regulatory regime that formerly only applied to meat products under the *MIA* was extended to almost all food products traded interprovincially, imported into or exported from Canada.

[8] The Tribunal has yet to review an NOV under subsection 14(1) of the *MIA*. Therefore, I have described the elements in a manner that resembles how the Tribunal has described the elements for a comparable violation found in section 35 of the *Health of Animals Act* (*HAA*).[2] At the time of this alleged violation, section 35 of the *HAA* was identified as a serious violation in the *AAAMP Act* regime.[3] The *Safe Food for Canadians Act* (*SFCA*), which has replaced the *MIA*, also contains analogous provisions[4] and, under the *AAAMP Act* regime, defines the violation as very serious.[5] As the CFIA may be required to contemporaneously enforce both acts, this approach results in a consistent burden of proof for comparable provisions in the *SFCA* and *HAA*.

[9] The *AAAMP Act* regime creates absolute liability violations which means that there are only a few defences that can be relied upon to avoid the NOV once step one has been proven. Mr. Falk did not raise any of the acceptable defences, therefore, the NOV will stand if the CFIA proves the following four elements:

1. The identity of the person;
2. That person obstructed or hindered an inspector; OR
3. That person made, in writing or orally, a false or misleading statement to an inspector; AND
4. The inspector was carrying out his or her duties or functions under the *MIA*.

[10] Only element two, whether Mr. Falk obstructed or hindered an inspector, is at issue in this case. Mr. Falk admitted that he is the person whom the inspector encountered at the inspection and that he refused to provide the customer list. Mr. Falk also did not dispute that the inspector was carrying out her duties under the *MIA* when she initiated the inspection although he asserted that the inspector's actions were unreasonable.

[11] The CFIA argued that I explicitly incorporate a consideration of reasonableness into element four and proposed the following language:

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[2] RSC 1990, c. 21. Subsection 35(1) provides, "No person shall obstruct or hinder or make any false or misleading statement either orally or in writing to an analyst, inspector or officer who is performing duties or functions under this Act or other regulations." This Tribunal has considered this section in the following cases: *J. Clare v. Canada (CFIA)*, 2014 CART 35 and 36, para 122; *R. Clare v. Canada (CFIA)*, para 122.

[3] *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, Schedule 1, Part 1, Division 1.

[4] SC 2012, c.24 Section 15 provides, "It is prohibited for a person to make a false or misleading statement to any person who is exercising powers or performing duties or functions under this Act — or to provide him or her with false or misleading information — in connection with any matter under any provision of this Act or the regulations, including in respect of an application for a licence or registration." Section 16 provides, "It is prohibited for a person to obstruct or hinder a person who is exercising powers or performing duties or functions under this Act."

[5] *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, Schedule 1 Part 3, Division 1 https://www.canlii.org/en/ca/laws/regu/sor-2000-187/latest/sor-2000-187.html.

> *While the inspector was engaged in carrying out his/her duties under the MIA if the inspector believes on reasonable grounds that the information requested contains any information relevant to the administration or enforcement of the MIA.*

The CFIA asserted, as did the inspector during the inspection of FVDG, that what is reasonably required is a subjective determination of the inspector at the time of the inspection. I disagree. Whether the inspector's actions were reasonable, therefore, will be addressed in the analysis of element two.

[12] Although Mr. Falk was charged with violating subsection 14(1) of the *MIA*, to determine whether the violation has been committed, I am also required to consider subsection 13(1)(c). The inspector relied on the authority granted to her in subsection 13(1)(c) to request the customer lists. Subsection 13(1)(c) provides:

> *13 (1) For the purposes of this Act and the regulations, an inspector may, subject to subsections (3) to (5), at any time enter any place or stop and enter any vehicle in which the inspector believes on reasonable grounds there is any meat product or other thing to which this Act applies and may*
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> *(c) require any person to produce for inspection, or for the purpose of obtaining copies or extracts, any book, shipping bill, bill of lading or other document or record that the inspector believes on reasonable grounds contains any information relevant to the administration or enforcement of this Act or the regulations.*

If the inspector did not act within the bounds of the authority granted to her in subsection 13(1)(c), her actions would be objectively unreasonable. Mr. Falk's refusal to comply should not be considered a violation of the *MIA* if the inspector did not have reasonable grounds to believe the customer list contained relevant information to enforcing the *MIA*.

[13] If the CFIA proves the elements outlined above, the Tribunal must decide if the appropriate penalty amount was assessed. Where an absolute liability violation is alleged, this second step is important because it allows for the specific facts of the case to be considered. Step two asks whether the accused has any prior violations or convictions, acted with intent or negligence, and contemplates the harm done or that could have been done.

[14] Finally, Mr. Falk questioned the constitutionality of subsection 13(1)(c) of the *MIA*. He argued that the requests made by the CFIA inspector to provide a list of customers he distributes his products to (i.e. a customer list) invaded his privacy. Consequently, his right to be secure against unreasonable search or seizure as guaranteed by section 8 of the *Charter* was infringed. The inspector made these requests under the authority granted to her by subsection 13(1)(c) of the *MIA*. Mr. Falk argued that he has not committed the section 14 violation because he is not obliged to follow requests that interfere with his *Charter* rights. If the CFIA proves, on a balance of probabilities, the elements of the violation, whether the CFIA interfered with Mr. Falk's constitutionally protected right to a reasonable expectation of privacy will be considered.

3. ISSUES

[15] As elements one, two, and four of the violation are not contested, the CFIA has the burden to establish, on a balance of probabilities, that Mr. Falk engaged in conduct that obstructed or hindered an inspector. To decide whether CFIA has met this burden, three issues arise:

- Did Mr. Falk have the option to refuse the inspector's repeated requests for the customer lists?
- Did the inspector have reasonable grounds to believe the customer lists contained information relevant to enforcing the *MIA*?
- Did Mr. Falk's failure to provide his customer list in fact obstruct or hinder the inspector?

4. ANALYSIS

Issue 1: Did Mr. Falk have the option to refuse the inspector's repeated requests for the customer lists?

[16] The CFIA alleges Mr. Falk violated of subsection 14(1) of the *MIA* by refusing to provide a customer list requested by a CFIA Inspector. The inspector first requested the list at an in-person inspection and then again in a follow-up email to Mr. Falk. There is no dispute that a customer list was asked for and Mr. Falk has not provided the list to the CFIA. At the hearing, however, Mr. Falk argued that he could not be found to have violated subsection 14(1) because the Inspector merely *requested* and did not *require* that the list be provided.

[17] I am unconvinced that the CFIA's failure to explicitly require that Mr. Falk provide his customer list is legally significant in this case. Subsection 13(2) speaks to the obligation to assist inspectors by providing any information the inspector may "require." Mr. Falk argues that I should adopt a definition of require that speaks to mandating or making compulsory. But when read in context of subsection 13(2), a definition of require that reflects necessity is more appropriate:

> *13 (2) The owner or person in charge of a place referred to in subsection (1) and every person found in that place or vehicle shall give the inspector all reasonable assistance to enable the inspector to carry out his duties and function under this Act and shall furnish the inspector with any information the inspector may reasonably require with respect to the administration or enforcement of this Act and the regulations.*

[18] Whether Mr. Falk believed he had the option to refuse to provide the list because the inspector used the word "request" rather than "require" in her communication, is not relevant. Instead, whether Mr. Falk provided the information that the investigator reasonably needed to enforce or administer the *MIA* must be decided in order to determine if the violation has occurred.

[19] Even if Mr. Falk's subjective belief about having the option to refuse the inspector's requests was a relevant consideration, Mr. Falk testified that he told the two CFIA inspectors during the in-person inspection and, subsequently, the CFIA investigator that they would require a court order before he would provide the list. Such a statement is inconsistent with the belief that he had the option to provide the list. I find that complying with the CFIA's request was not discretionary.

Issue 2: Did the inspector have reasonable grounds to believe the customer lists contained information relevant to enforcing the MIA?

[20] What information an inspector has reasonable grounds to believe is relevant to an inspection will vary based on a contextual analysis that considers the purpose of the specific inspection. Adopting an inflexible standard of what is reasonable would frustrate the purpose of the *MIA* and would be inconsistent with the broad powers granted to inspectors by the *MIA*. In a random compliance inspection, one would not expect inspectors to be particularly circumspect in their request for information and a relatively low standard would be appropriate for assessing reasonable grounds. In a random inspection, as long as the information requested can be used to verify compliance with the *MIA*, the requested information would likely meet the standard.

[21] Regardless of the context, however, fairness requires that reasonable grounds be assessed on an objective basis. The *MIA*, and its replacement, the *SFCA*, grant inspectors broad powers to verify compliance with this regulatory regime and to respond where non-compliance is suspected. These powers are essential to protecting the integrity of Canada's food system.

[22] An objective assessment of what constitutes reasonable grounds is an important balance for the broad powers granted to inspectors. Individuals have little opportunity to challenge decisions of inspectors without running up against provisions of the legislation such as the one facing Mr. Falk. If the standard is determined through a subjective analysis of what each inspector believed was reasonable at the time of the inspection, consistency and fairness is at risk. While being required to comply with inspections is in many ways a cost of doing business in the food sector, the integrity of our food system also requires that industry be assured that inspections are conducted consistently and fairly.

[23] In this case, a higher standard of what constitutes reasonable grounds is warranted because the inspector was not engaged in a random inspection of FVDG's overall compliance with the *MIA*. The inspector initiated the inspection after the CFIA received a complaint and confirmed that FVDG's provincially-inspected products, referred to as BC03 products, was for sale in Alberta. Because BC03 product is not produced in a federally-inspected facility, its availability for sale in Alberta was a presumptive violation of the *MIA*. The inspector testified that the purpose of her investigation was to determine who was likely responsible for the BC03 product's extra-provincial movement and to determine whether the non-compliance was ongoing. Therefore, reasonable grounds are defined by what would assist in verifying compliance with the parts of the *MIA* regulating interprovincial trade and, specifically, in identifying who was shipping BC03 product to Alberta.

[24] Using this higher standard, I find that the inspector had reasonable grounds to believe that the customer lists may contain relevant information to assist in identifying who was shipping BC03 product to Alberta. I accept the inspector's testimony that she had no idea who was responsible for shipping BC03 products to Alberta when she inspected FVDG. Her testimony is supported by a plain reading of the Inspection Non-Compliance Report (INCR) she prepared and submitted to the CFIA's Enforcement and Investigation Services after the inspection of FVDG. The INCR lists a number of other parties whom she had reasons to suspect may have been responsible for shipping BC03 products to Alberta.

[25] Moreover, the evidence presented by the CFIA at the hearing demonstrates that the inspector had reason to suspect that someone other than Mr. Falk was responsible for the non- compliance. The inspectors present at the in-person inspection of FVDG both testified that they were accompanied by a provincial inspector who had worked with Mr. Falk and who reassured them that Mr. Falk would not be the source of the non-compliance. During the inspection, Mr. Falk also explained that he would be able to demonstrate that FVDG was not responsible for shipping the product outside of British Columbia. The movement of the BC03 product found in Alberta could be traced with a unique code on their labels. Therefore, the customer list may have aided in determining who else was in possession of BCO3 products.

[26] Mr. Falk also has a duty to assist investigators when they are verifying the compliance of third parties and, thus, a request for information about third parties in this context is not unreasonable. The fact Mr. Falk could track the movement of the specific BC03 product found in Alberta only demonstrated that he was not involved in the extra-provincial trade. The inspector, however, was not solely interested in verifying Mr. Falk's compliance. The request for the customer list was necessary to verify the compliance of others especially if the non-compliance was not isolated to the specific instances already identified.

[27] Finally, I find that the request for the customer list although initially not reasonable, became reasonable once the inspector narrowed the request. The evidence presented at hearing outlined that in an email to Mr. Falk following the in-person inspection, the inspector narrowed her initial request for a customer list to a list FVDG's "distribution list for out of province customers" and "local, British Columbia customers that further distribute (no need to include restaurants or retail stores)." As mentioned, whether the inspector had reasonable grounds to believe that the customer list contained relevant information for enforcing the *MIA* is a contextual analysis. At issue in this case was the interprovincial distribution of BC03 products. A request for a customer list that would include customers not relevant to assessing compliance with regulations dealing with the interprovincial distribution of inspected poultry would not be reasonable. An overbroad request by an inspector during a targeted inspection, especially one that follows a complaint of non-compliance and where food safety or animal health are not in jeopardy, runs the risk of crossing the Rubicon to engaging in an investigation.[6]

Issue 3: Did Mr. Falk's failure to provide his customer list actually obstruct or hinder the inspector?

[28] Given this is the first time the Tribunal has dealt, in detail, with a violation involving obstructing or hindering an inspector, I feel it is necessary to clearly state that context is important to this analysis. Where public safety or animal health is at risk, mere refusal to comply with a request may be sufficient to establish the violation. In the public safety or animal health context, the integrity of the regulatory regime is more likely to be frustrated if regulated parties believe they can delay or ignore requests from inspectors. The same may be true where the inspector is engaged in a random audit. But in this case, we have an inspection for a specific purpose arising from concerns over interprovincial trade. The burden the CFIA has to meet must reflect this context to comply with the expectations the Federal Court of Appeal outlined in *Doyon*[7] that this Tribunal be circumspect when reviewing a NOV.

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[6] "Crossing the Rubicon" is the expression used by the Supreme Court of Canada in *R v. Jarvis* to explain the limits on the powers of inspectors. These limits ensure that the exercise of the government's broad inspection powers in highly regulated areas does not intrude on the protection against self-incrimination granted to individual under section 7 of the *Charter*.

[7] *Doyon v. Canada (Attorney General),* 2009 FCA 152.

[29] The first stage of this analysis is to define what it means to "obstruct or hinder" an inspector. Despite very similar provisions in much of the legislation subject to review by this Tribunal, the Tribunal has not discussed in any detail what it means to obstruct or hinder an inspector. A review of case law on this question has not revealed a case with similar facts. Many of the cases occur in a criminal or quasi-criminal context, involve physical acts of blocking, resisting or intimidating an inspector, or involve the disclosure of personal information that attracts a high level of privacy protection. Business documents, such as a customer list, are not afforded the same level of protection, especially in the context of commercial activities that are closely regulated by the state.[8]

[30] The existing jurisprudence, however, does provide some guidance that helps define subsection 14(1) of the *MIA*. To obstruct or hinder an inspector can be understood as impeding the progress of the inspector in manner that makes it more difficult for the inspector to do their job.[9] It is not necessary that the inspector be completely frustrated in carrying out their duties or that the obstruction involve a physical act.[10] Therefore, failing to respond to an inspector's request may result in an inspector being obstructed or hindered in carrying out her duties.[11]

[31] I find, however, that the CFIA has not met the burden required to prove that Mr. Falk's actions obstructed or hindered the inspector as she carried out her duties under the *MIA*. In *Doyon*,[12] the Federal Court of Appeal directed the Tribunal to be "circumspect in managing and analyzing the evidence and in analyzing the essential elements of the violation and the casual link" due to the paucity of available defences. The court further stated that a finding that a violation has occurred must be based on facts "and not mere conjecture, let alone speculation, hunches, impressions or hearsay." While it is true that the standard is not that the inspector be entirely impeded in their efforts, the legislation is clear that there has to be some evidence of an obstruction or hindrance. If that were not the case, the legislator would have merely included the requirement to provide assistance to inspectors found in subsection 13(2) in the *MIA*. There would be no need for the separate violation in subsection 14(1) for obstructing or hindering an inspector.

[32] Access to a customer list is not essential to complete an inspection in this context. Neither CFIA inspectors who testified were able to recall an instance outside of the food safety context where a customer list had been requested. More importantly, although the inspector who requested the customer list explained how she might have used the list had it been received, she did not give any evidence as to how the lack of access to the customer list impeded the inspection. For example, the Inspector stated that she could have used the list to verify that Mr. Falk was honest in his responses to her questions. She did not, however, testify that she was concerned that Mr. Falk was dishonest or that she was unable to verify the truth of his statements.

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[8] *Thomson Newspapers v. Canada* at p.507.
[9] See *R. v. Bill Prodromidis* and *R. v. Adams*.
[10] See *R. v. Tortalano*.
[11] See *R. v. Ohara* (1993), 119 N.S.R. (2d) 128 (P.C.).
[12] *Doyon*, *supra* note 7.

[33] The evidence before me leads to the conclusion that the customer list did not obstruct or hinder the inspection. An inspection was completed. I accept that access to the list may have given the CFIA information about parties, other than Mr. Falk, who might be in possession of BC03 products and could be moving the product outside of British Columbia. To meet the burden of proof, however, the CFIA was required to lead some evidence that demonstrated, at a minimum, how the inspection was slowed, made more difficult, or frustrated by the lack of this information. They failed to do so and instead, the evidence before me was that the inspector was able to complete an INCR where three other parties were listed as having knowledge or involvement in the conveyance of BC03 products to Alberta.

[34] Accordingly, I find that, on a balance of probabilities, the CFIA has failed to prove all of the essential elements of the violation. Consequently, no monetary penalty is due in this case. Because of this finding, it is not necessary for the Tribunal to consider whether the CFIA has proven that the amount of the penalty is justified under the *AAAMP Act* and *AAAMP Regulations*.

5. CONSTITUTIONAL QUESTION

[35] Mr. Falk also raised a constitutional question in defence to the NOV. Given my findings in this case, whether the inspector's request infringed Mr. Falk's right to be secure against unreasonable search or seizure as guaranteed by section 8 of the *Charter* will not be considered.

6. ORDER

[36] I order that NOV #1516WA0112 issued against Mr. Ken Falk be set aside.

[37] Pursuant to section 14 of the *AAAMP Act*, the Tribunal's authority when reviewing an NOV is limited to determining whether or not the Applicant committed the violation. The Tribunal does not have the authority to award costs.

Dated at Saskatoon, Saskatchewan, on this 3rd day of April 2020.

(Original signed)

Patricia L. Farnese

Member
Canada Agricultural Review Tribunal