Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *DG Global inc. v Minister of Agriculture and Agri-Food,* 2021 CART 30

Docket: CART-2142

BETWEEN:

DG GLOBAL INC.

APPLICANT

- AND -

MINISTER OF AGRICULTURE AND AGRI-FOOD

RESPONDENT

BEFORE:	**Luc Bélanger, Chairperson**
WITH:	**Mr. Dwight Gerling, representing the Applicant; and Ms. Jennifer Caruso, representing the Respondent**
DECISION DATE:	**November 5, 2021**
VIRTUAL HEARING DATE:	**March 10, 2021**

1. OVERVIEW

[1] On January 17, 2019, the Canadian Food Inspection Agency (Agency) issued a Notice of Violation (Notice) #1819ON1518 with a penalty in the amount of $6000 against DG Global Inc. (DG Global) for allegedly exporting two containers of soybeans from Canada to Malaysia without the required Phytosanitary Certificate contrary to subsection 55(2) of the *Plant Protection Regulations*.

[2] On February 15, 2019, DG Global requested a Minister's review into the facts of the alleged violation. On July 4, 2019, the Minister upheld the finding in the Notice. The Minister's decision is now the subject of this review by the Canada Agricultural Review Tribunal (Tribunal). The request for a review in this matter was made under paragraph 13(2)(b) the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (*AAAMP Act*).

[3] The first issue is whether the Minister appropriately found that the Agency had proven all the essential elements of the violation to establish DG Global exported containers of soybean without the required Certificate. The second issue is whether DG Global raised a permissible defense that would warrant setting aside the Minister's finding.

[4] I confirm the Minister's decision to uphold the Notice because the evidence before him demonstrates that the Agency had met its burden of establishing the 3 essential elements of a violation under subsection 55(2) of the *Plant Protection Regulations*. Given DG Global did not raise a permissible defence and has been found to have committed the violation, DG Global is liable for the penalty.

2. LEGAL FRAMEWORK

[5] The *Plant Protection Act* and *Plant Protection Regulations* were enacted both to prevent the importation, exportation and spread of pest injurious to plants and to provide for their control and eradication and for the certification of plants and other things. The ambit if the legislation is to protect plant life and the agricultural and forestry sections of the Canadian economy by preventing the importation, the exportation and spread of pests and by controlling or eradicating pests in Canada.

[6] DG Global first requested a review of the facts of the violation by the Minister. DG Global then requested this further review by the Tribunal. The Tribunal can confirm, vary or set aside the Minister's decision.[1] The Tribunal conducts a *de novo* review of the facts of the violation which means that the Tribunal examines all the evidence and draws its own factual and legal conclusions about the validity of the Notice.[2]

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[1] *Agriculture and Agri-Food Administrative Monetary Penalties Act,* SC 1995, c 40, s 14(1) [*AAAMP Act*].
[2] *Hachey Livestock Transport Ltd. v. Canada (Minister of Agriculture and Agri-Food),* 2015 CART 19.

[7] In *Doyon*[3], the Federal Court of Appeal held that violations under the administrative monetary penalty system should be analyzed in accordance with their essential elements. Each of these elements must be proven on a balance of probabilities before an applicant can be found liable.[4] Accordingly, the first step of the analysis consists of outlining the essential elements of a violation of subsection 55(2) of the *Plant Protection Regulations*.

[8] The analysis must begin by defining the essential elements of subsection 55(2) of the *Plant Protection Regulations* since the Tribunal has no previous jurisprudence. As outlined in *Rizzo Shoes*[5], a modern, purposeful approach to statutory interpretation, meaning that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" will be employed.[6]

[9] While the statutory language is not ignored, the context and purpose of the statute in conjunction with the grammatical and ordinary sense of the provision will be considered to find the true intention of Parliament. However, as stated by the Supreme Court of Canada (SCC) in *Canada Trustco Mortgage Co.*.:

> *[…]* ***When the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role.*** *The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.*[7] [Emphasis added]

[10] Recently, the SCC also stated, in *Vavilov*[8], that the statutory interpretation entrusted to an administrative decision maker must be consistent with the text, context and purpose of the statute:

> *But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.*

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[3] *Doyon v. Canada (Attorney General),* 2009 FCA 152 [*Doyon*].
[4] *Ibid at* paras 28 & 42.
[5] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27.
[6] *Ibid* at para 21.
[7] *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54 at para 10 *in fine.*
[8] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65.

> *The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.*[9]

[11] In accordance with these principles, a proper statutory interpretation should therefore proceed in three steps: text, context, and purpose. Beginning with the text of subsection 55(2) of the *Plant Protection Regulations*, a plain reading of the provision reveals the regulator wanted to ensure that plants are not exported without having the appropriate documents issued by an inspector when the country of final destination requires such documents:

No person shall export from Canada any thing for which a Canadian Phytosanitary Certificate, Canadian Phytosanitary Certificate for Re- export or any other document is required by the phytosanitary certification authorities in the country of final destination, unless the appropriate document is issued by an inspector.	*Nul ne peut exporter du Canada une chose pour laquelle un certificat phytosanitaire canadien, un certificat phytosanitaire canadien pour réexportation ou tout autre document est exigé par les autorités responsables de la certification phytosanitaire dans le pays de destination finale, à moins que le document approprié ne soit délivré par l'inspecteur.*

[12] As a first step, a plain reading of the provision does not appear to give rise to any ambiguity. However, the meaning to be given to "export" is clearly a contentious issue because both parties proposed a different interpretation in their respective submissions. DG Global is of the view that the provision, more specifically the term "export", should be read as meaning the country where the soybeans were delivered. On the other hand, the Agency contends the requirement of the provision regarding the export of goods should be viewed as the intended destination when the soybeans left Canada, in other words, the moment they were "exported" as opposed to when they arrived at their final destination. To shed light on the intended meaning of "export" under subsection 55(2) of the *Plant Protection Regulations* and its requirements, we must turn to the purpose of the Act and the regulatory scheme created to achieve it.

[13] Section 2 of the *Plan Protection Act* clearly states its purpose:

> *The purpose of this Act is to protect plant life and the agricultural and forestry sectors of the Canadian economy by preventing the importation, exportation and spread of pests and by controlling or eradicating pests in Canada.*

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[9] *Ibid* at paras 120-121.

[14] Subsection 55(2) of the *Plant Protection Regulations* should also be interpreted by considering section 7 of the *Plant Protection Act* which provides the general prohibition with regards to importation and exportation:

> *No person shall import or admit into Canada or export from Canada any thing that is a pest, that is or could be infested with a pest or that constitutes or could constitute a biological obstacle to the control of a pest, unless*
>
> ***(a)*** *the person has produced to an inspector all permits, certificates and other documentation required by the regulations;*
>
> ***(b)*** *the thing is or has been presented to an inspector — if required by the regulations or an inspector — in the manner and under the conditions specified by the inspector and at a place designated by the regulations or an inspector; and*
>
> ***(c)*** *the thing is imported or exported in accordance with any other requirements of the regulations.*

[15] Turning to the *Plant Protection Regulations*, subsection 55(2) is located under PART IV, which encloses all the regulations related to export and more specifically the Canadian Phytosanitary Certificate and other documents required. While no specific provision outlines the objective of this Part , the Tribunal held in *Dyck*[10] that the international regulatory regime subject to phytosanitary inspection is partially reflected in the definition of a Canadian Phytosanitary Certificate under subsection 55(1). It reads as follows:

> *(1) Canadian Phytosanitary Certificate means a document, issued by an inspector, that attests to the phytosanitary status of anything exported from Canada and that*
>
> *(a) contains the information required by the Model Phytosanitary Certificate set out in the Annex to the International Plant Protection Convention approved by the Food and Agriculture Organization of the United Nations Conference at its Twentieth Session in November 1979, as amended from time to time, and*
>
> *(b) is signed by an inspector and sealed with an official Canadian Phytosanitary Certificate seal; (certificat phytosanitaire canadien)*

[16] In *Dyck*, Member La Rochelle stated that the purpose of the certificate is to provide assurance by the exporting country that a shipment is free of pests and disease. This finding is consistent with the information found in the *Plant Protection Regulations Regulatory Impact Analysis Statement* (*RIAS*)[11]. The *RIAS* provides that the Regulations protect the agricultural and forestry sectors of the Canadian economy by preventing the introduction of pests and spread of pests and disease in Canada. Specifically, regarding export under Part IV, the *RIAS* includes provisions to prevent the spread of plant pests from Canada on vessels and other modes of transportation, the governing of inspections and the issuance of phytosanitary certificates.

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[10] *Dyck v. Canada (Canadian Food Inspection Agency),* 2017 CART 3.

[11] Canada Gazette, Part 2, Vol 129, No 10 – SOR/95-212.

[17] A phytosanitary certificate is issued based on the importing country's requirements. For the Agency to issue a certificate, exporters are responsible for demonstrating they met these requirements by submitting a sample for testing. Without these samples and a way to confirm the product meets the requirements for issuing a phytosanitary certificate prior to leaving Canada, the capacity to prevent the spread of pests on vessels and to the importing country is greatly undermined.

[18] When analyzing the purpose of the *Plan Protection Act* and the regulatory scheme created to achieve the purpose, the term "export" under subsection 55(2) of the *Plant Protection Regulations* cannot, as proposed by DG Global, be read as meaning the time at which the goods reach their final destination. It must be read as referring to the time at which the goods are leaving Canada to its intended destination. The interpretation is consistent with the scheme's objective and the purpose of PART IV of the *Plant Protection Regulations* to prevent the spread of plant pests from Canada on vessels to importing countries, through issuing phytosanitary certificates.

[19] Given, the words in subsection 55(2) of the *Plant Protection Regulations* are precise; the Tribunal finds they should be interpreted using their ordinary meaning. Accordingly, I find the Agency must establish on the balance of probabilities the following 3 essential elements for DG Global to be liable for the violation:

- Element 1 – DG Global is the person who allegedly committed the violation;
- Element 2 – DG Global exported any thing for which a Canadian Phytosanitary Certificate is required; and
- Element 3 – DG Global exported the thing without obtaining the required documentation issued by an inspector.

3. ISSUES

[20] The first issue is whether the Minister appropriately found the Agency had proven all the essential elements of the violation to establish DG Global exported containers of soybean without the required Phytosanitary Certificate.

[21] The second issue is determining whether DG Global raise a permissible defense that would warrant setting aside or varying the Minister's finding?

4. ANALYSIS

I. General Facts

[22] On April 25, 2018, James Ann, a Logistics Coordinator at DG Global, submitted a phytosanitary application and Malaysian Import Permit via email to the London office of the Agency. This application was for two containers (DGLDU3498897 and TCLU2114762) of soybeans being exported to Malaysia with a shipping date of April 13, 2018.

[23] On May 16, 2018, Inspector Graham from the Agency contacted James Ann via email. The purpose of the email was to request follow up on the application as it showed the containers had been shipped on April 13, 2018, and the Agency had not received any sampling results in relation to the export. DG Global indicated they would investigate the missing samples results.

[24] After a further investigation, it was determined that the automatic sampling program did not send sampling instructions to the facility supplying grain. A sample was therefore not collected and submitted for testing.

[25] On May 16, 2018, Inspector Graham informed DG Global of the Agency's decision not to issue the phytosanitary certificates. The email also informed DG Global the containers would need to be redirected to a destination that did not require a phytosanitary certificate.

[26] On May 24, 2018, Inspector Graham inquired as to where the containers were redirected. DG Global responded they were working on having it rerouted. The MSC Ocean Bill of landing No. MSCUOT791057 provided by DG Global confirms the two containers were eventually rerouted from Malaysia to Singapore, a destination where a phytosanitary certificate is not required.

[27] On January 17, 2019, the Agency issued Notice #1819ON1518 with a penalty in the amount of $6000 against DG Global.

II. Did the Agency prove all the essential elements of the violation under subsection 55(2) of the *Plant Protection Regulations*?

Element 1 – DG Global is the person who allegedly committed the violation

[28] The evidence before the Minister supports the finding that it was DG Global who exported the containers of soybeans. In coming to this conclusion, the Minister's delegate appropriately relied on the application for Export Inspection and Phytosanitary Certification submitted by James Ann, a trader, which identified DG Global as the exporter. Furthermore, an email correspondence between DG Global and the Agency, confirms they were responsible for exporting the soybeans. Accordingly, the Agency established the first element of the violation.

Element 2 – DG Global exported a thing for which a Canadian Phytosanitary Certificate is required

[29] The evidence submitted by the Agency establishes that a phytosanitary certificate is required to export soybeans to Malaysia. The Minister's decision finds support in the application for Export Inspection and Phytosanitary Certification submitted by DG Global and the importation permit (JPK141104060342018) from the Malaysian Department of Agriculture on file which demonstrates the destination for the soybeans is Malaysia. The importation permit also shows a Phytosanitary Certificate from the originating country is required for import into Malaysia. I find that the Agency established the second element of the violation.

Element 3 – DG Global exported the thing without obtaining the required documentation issued by an inspector

[30] Again, the evidence adduced by the Agency demonstrates the two containers of soybean destined to Malaysia were exported and the Agency did not issue the required Phytosanitary Certificate because they had not any sampling results. In an email dated May 16, 2018, Inspector Graham informed DG Global of the Agency's decision not to issue the phytosanitary certificates. In fact, this is not contested and is the reason why DG Global took measures to have the containers rerouted to Singapore. Accordingly, I find that the Agency established the third element of the violation.

[31] Based on the above, I find the Minister appropriately determined the Agency had established all the essential elements of the violation subsection 55(2) of the *Plant Protection Regulations*. The question is now whether DG Global raised a permissible defence.

III. Did DG Global raise a permissible defence?

[32] Violations issued pursuant to the *AAAMP Act* are absolute liability in nature, meaning that due diligence and mistake of fact defences are not available to applicants.[12] As for the permissible defences, subsection 18(2) of the *AAAMP Act* states the following:

> *Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.*

[33] In practice, very few common law defences will be applicable. However, those who have been explicitly recognized by the Tribunal are necessity[13], automatism[14] and officially induced error of law.[15]

[34] Before the Tribunal DG Global argued that the Minister's decision and the Notice should be set aside because although the intended destination for the soybeans was Malaysia they were delivered to Singapore, a country where a phytosanitary certificate is not required. This is undisputed. The record shows that after being informed by the Agency the containers had to be rerouted, DG Global did send its two containers to Singapore. However, as explained earlier, setting aside the Minister's decision based on DG Global's interpretation of subsection 55(2) of the *Plant Protection Regulations* would be contrary to its objective to prevent the spread of plant pests from Canada on vessels to importing countries, by requiring that phytosanitary certificates be issued. The fact that the containers of soybean ultimately were delivered to Singapore does not constitute a valid defence.

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[12] *Ibid* at para 11; see also *AAAMP Act*, SC 1995 c 40, s 18(1).
[13] See *Maple Lodge Farms Ltd v Canada (CFIA);* RTA nº 60291, RTA nº 60295, RTA nº 60296, and RTA nº 60297.
[14] See *Klevtsov v Canada (MPSEP),* 2017 CART 10.
[15] See *Shar Kare Feeds Limited v Canada (CFIA),* 2013 CART 15, at paras 38-39, and *Guy D'Anjou Inc. v. Canada (CFIA*), 2015 CART 2 at para 28.

[35] DG Global also clarified that the reason why the Agency had not received any sampling results needed to issue the phytosanitary certificate is because of a logistic error. DG Global explained its supplier never received a request for sampling because its automated logistics systems use the buyer's company address rather than the destination to generate a phytosanitary request for its shipment. For this shipment, although the buyer's address is in Singapore, the destination was Malaysia. DG Global's staff did not catch the mistake.

[36] The Tribunal understands that logistic and human errors happen. I do not doubt that DG Global never intended to ship the containers to Malaysia without meeting the requirements under the *Plant Protection Regulations* . I can appreciate DG Global's effort in investigating the issue to hopefully ensure these mistakes don't reoccur. However, this cannot exonerate DG Global's responsibility because the fact remains that a shipment for which a phytosanitary certificate was required was exported without one. A violation under the *Plant Protection Regulations* is an absolute liability offence and subsection 18(1) of the *AAAMP Act* expressly excludes the argument put forward by DG Global as a defences.

IV. Was the penalty established in accordance with the regulations?

[37] Section 5 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (*AAAMP Regulations*) classifies subsection 55(2) *Plant Protection Regulations* as a serious violation that warrants a penalty of $6000. The *AAAMP Regulations*, however, contain a process to adjust the penalty in some cases. The Agency has the burden of proving that an adjustment to the penalty is justified based on three criteria: prior violations or convictions, intent or negligence, and the harm done or could have been done.[16] A numerical score is associated with each of the three criteria. Those scores are totalled to determine whether the penalty should be increased or decreased based on the total gravity value.

[38] In its submission, DG Global questioned the Minister's finding that the Agency appropriately assessed a "total gravity value" of 9 (History (3), Intent or Negligence (3), Harm (3)). More specifically, it argues that the violation was not committed because of negligence nor was there harm caused. DG Global restates that this was simply the result of a human error and that no harm was caused since it took immediate action to rectify the situation by shipping the containers to Singapore. The first criterion is not contested. We only need to examine whether the Minister's finding regarding the second and third criterion should be varied.

[16] *A. S. L'Heureux Inc. v. Canada (CFIA),* 2018 CART 9.

V. The second criterion involves the nature of the intent or the extent of negligence in committing the violation

[39] In assessing a gravity value of 3 for *Intent or Negligence*, the Agency was required to show that the violation had been committed intentionally or by negligence. I find that the Agency met its burden. The Minister relied on the fact that DG Global was aware of the requirement to obtain a phytosanitary certificate and failed to obtain and confirm the necessary samples were submitted and the documents completed at the time of export. Based on the record before the Minister, I find the Minister appropriately determined that the Agency correctly assessed the gravity value for this criterion.

VI. The third criterion requires an evaluation of the gravity of the harm that was caused or could be caused by the violation

[40] The Minister confirmed the Agency assessed a value of 3 for this criterion. I must determine whether the Agency established the violation could cause: (a) serious or widespread harm to human, animal or plant health or the environment;(b) serious or widespread harm to any person as a result of false, misleading or deceptive practices; or (c) serious monetary losses to any person.

[41] The evidence before the Minister shows DG Global exported soybean onto a vessel to a destination for which a phytosanitary certificate was required. As put forward by the Agency, these requirements arise from negotiated trade agreements. Not complying with these agreements by exporting products that contain pests could cause widespread harm to plant health or the environment and/or serious monetary loss to a person. I find the Minister appropriately determined the Agency had proven a gravity value of 3 was warranted.

[42] Since DG Global did not raise a permissible defence, I find, the Minister appropriately found the Agency had proven all the elements of a violation of subsection 55(2) of the *Plant Protection Regulations* on a balance of probabilities. I see no reason to set aside or vary the Minister's decision.

5. ORDER

[43] I confirm the Minister's decision and that DG Global committed the violation, in Notice #1819ON1518, dated January 17, 2018.

[44] I wish to inform DG Global that this violation is not a criminal offence. Five years after the date the payment of the debt, DG Global is entitled to apply to the Minister to have the violation removed from the records, in accordance with section 23 of the *AAAMP Act*.

[45] I **ORDER** that DG Global must pay the $6000 penalty within the next 30 days.

Dated at Ottawa, Ontario, on this 5th day of November 2021.

(Original Signed)

Luc Bélanger
Chairperson
Canada Agricultural Review Tribunal