



Canada Agricultural
Review Tribunal
Ottawa, Canada
K1A 0B7

Commission de révision
agricole du Canada

Citation: *Krazy Cherry Fruit Company Ltd. v Canadian Food Inspection Agency*, 2022 CART 22

DOCKET: CART-2171

BETWEEN:

KRAZY CHERRY FRUIT COMPANY LTD.

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Luc Bélanger, Chairperson

WITH: Mr. Harman Bahniwal representing the Applicant; and
Mr. Jordan Marks representing the Respondent

DECISION DATE: August 5, 2022

HEARING DATE: March 8, 2022

1. OVERVIEW

[1] Krazy Cherry Fruit Company Ltd. (Krazy Cherry) requested that the Canada Agricultural Review Tribunal (Tribunal) review the Notice of Violation (Notice) #1920WA0203 with a \$7000 penalty. Krazy Cherry allegedly obstructed, hindered or made a false or misleading statement to an inspector contrary to subsection 23(1) of the [Plant Protection Act](#).

[2] The Notice concerns a statement made in writing by Krazy Cherry to an inspector which may have contained false or misleading information between August 3 and August 8, 2019, near Oliver, British Columbia. The Canadian Food Inspection Agency (Agency) Inspector Kitzel recommended the issuance of the Notice after interviewing Mr. Harman Bahniwal, manager of sales and operations at Krazy Cherry, and other Agency inspectors. She concluded that a document sent to an inspector by Mr. Bahniwal contained false or misleading information. The Tribunal must determine whether the document contained false or misleading information and contravened to subsection 23(1) of the [Plant Protection Act](#).

[3] Violations issued under the administrative penalty regime are absolute liability in nature, meaning the most punitive elements of penal law have been imported while excluding useful defences and reducing the prosecutor's burden of proof.¹ The Agency must rely on conclusive evidence before issuing violations. In this case, the evidence presented by the Agency demonstrates that Krazy Cherry sent false or misleading information in writing to an inspector who was performing duties or functions under the [Plant Protection Act](#).

[4] I find that the Agency proved all the essential elements of the violation under subsection 23(1) of the [Plant Protection Act](#). Krazy Cherry did not raise a permissible defence and is liable for the \$7000 penalty.

¹ [Doyon v. Canada \(Attorney General\)](#), 2009 FCA 152 [Doyon], at paras 27 and 28.

2. LEGAL FRAMEWORK

[5] One of the purposes of the [Plant Protection Act](#) or its [Regulations](#) 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.² The [Plant Protection Act](#) also provides inspectors with the ability to enforce the act. Sections 25 and 27 grant the authority to inspectors to seize and detain any thing they reasonably believe contravenes the [Plant Protection Act](#). Further provisions grant Inspectors the power to dispose of any thing it seized and detains under the Act. In order to allow inspectors to perform their duties in an efficient manner, Parliament has created violations for people who make it difficult for inspectors or provide them with information that is not true or give the wrong ideal or impression.

[6] The Tribunal has the power to review the facts of a violation upon request.³

[7] The [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (AAAMP Regulations)⁴ set out administrative monetary penalties for the violation of the [Plant Protection Act](#) or its [Regulations](#). Subsection 23(1) of the [Plant Protection Act](#) is a very serious violation. The Agency issued the Notice to Krazy Cherry with a \$7000 penalty.⁵

[8] Subsection 23(1) of the [Plant Protection Act](#) reads:

(1) No person shall obstruct or hinder or make any false or misleading statement either orally or in writing to an inspector who is performing duties or functions under this Act or the regulations.

² [Plant Protection Act, \(S.C. 1990, c. 22\)](#), section 2.

³ [Agriculture and Agri-Food Administrative Monetary Penalties Act, SC, c 40, s 8\(1\) \(1995\)](#) [AAAMP Act].

⁴ [Agriculture and Agri-Food Administrative Monetary Penalties Regulations, SOR 2000-187](#) [AAAMP Regulations].

⁵ [Ibid](#) at s 5(1).

[9] In [Doyon](#)⁶, the Federal Court of Appeal (FCA) held that violations under the administrative monetary penalty system should be analyzed according to their essential elements, each of which must be proven on a balance of probabilities before an applicant can be found liable⁷. Proving on the balance of probabilities means that it is more likely than not that all the elements of the violation occurred.

[10] This is the first time the Tribunal has had to review a violation under subsection 23(1) of the [Plant Protection Act](#). An identical violation exists under subsection 14(1) of the [Meat Inspection Act](#) and was reviewed by the Tribunal in *Falk*⁸. The Tribunal will review the current violation based on the essential elements established in *Falk*.

[11] I believe the Agency must prove the following essential elements in order for a person to be found liable under subsection 23(1) of the [Plant Protection Act](#):

Element 1: The identity of the person;

Element 2: That person obstructed or hindered an inspector; **OR**

Element 3: That person made, in writing or orally, a false or misleading statement to an inspector; **AND**

Element 4: The inspector was carrying out his or her duties or functions under the *Plant Protection Act* or its *Regulations*.

[12] In this case, the first element is not in dispute. Mr. Bahniwal confirmed he sent the spreadsheet to the Oliver Office email address. The main question to be decided by the Tribunal is whether the Agency proved Krazy Cherry made false or misleading statements in writing to an inspector carrying out his or her duties under the [Plant Protection Act](#) or its [Regulations](#) by sending the spreadsheet to the Agency's email box.

⁶ [Doyon v. Canada \(Attorney General\)](#), 2009 FCA 152 [Doyon].

⁷ *Ibid* at paras 20, 28, 42.

⁸ [Falk v. Canada \(Canadian Food Inspection Agency\)](#), 2020 CART 9.

3. ISSUES

[13] The first issue is whether the Agency proved all the essential elements of the violation on a balance of probabilities to establish Krazy Cherry made false or misleading statements to an inspector carrying out his or her duties under the [Plant Protection Act](#) or its [Regulations](#).

[14] The second issue is whether Krazy Cherry raised a permissible defense relieving them of their responsibility in the event they committed the violation.

[15] The third issue is to verify that the amount of the penalty complies with the [AAAMP Act](#) and [Regulations](#).

4. ANALYSIS

a) General Facts

[16] Krazy Cherry is a fruit and vegetable producer who also operates a packaging facility in Oliver, British Columbia. Krazy Cherry exports its cherries to the Asian market.

[17] To legally export its cherries to Thailand, China or Japan, Krazy Cherry was required to participate in the Agency's "2019 Export Programs of Fresh British Columbia (BC) Cherries to Thailand, People's Republic of China (PRC) and Japan" Program (*Cherry Program*). The *Cherry Program* is a pest management program to ensure all the importing country's phytosanitary requirements are met. The *Cherry Program* specifies all the requirements for packaging facilities and producers including pest control, inspections, packaging, quarantines periods, inventory, and record management for the product traceability.

[18] In March 2019, Mr. Bahniwal signed up for the *Cherry Program* and received the Agency's approval for its participation. They signed *Packing Facility Compliance Agreement & Registration*

Application Form for the *Cherry Program* which provides details on the Protocols Krazy Cherry has in place, prior to shipping its products, including the Agency's inspections. Their Protocols include updating a packaging sheet which displays all the required information for fruits being exported. The Protocols also indicates that the spreadsheet will be sent to the Agency.

[19] On July 27, 2019, at 10:14, Mr. Bahniwal, emailed Krazy Cherry's packaging spreadsheet to the Agency's Plant Health Office. The spreadsheet indicated that lot 207_GL had not received an Agency's inspection.

[20] The same day, Inspector Deanne Pasquale, conducted a pre-clearance fresh cherry inspection from lot 207_GL at Krazy Cherry. She observed that when the samples of crushed cherries were submerged in a bucket of brown sugar and water solution, they yielded three pests: two *Drosophila* larvae and one *Rhagoletis* pupa. As a result, Inspector Pasquale, did not provide a Phytosanitary Certificate for lot 207_GL.

[21] Later, the same day, the Agency informed Mr. Bahniwal via email that a *Rhagoletis* was detected in the lot and that exports "requiring CFIA export certification are now suspended from this orchard until further notice".

[22] Between July 28 and August 2, 2019, Krazy Cherry emailed six versions of its packaging spreadsheet to the Agency's Plant Health Office all indicating that lot 207_GL had "NOT PASSED" the Agency Inspection.

[23] On August 3, 2019, Ms. Sarah Bistriz, Transportation and Logistics Manager at Sutherland S.A. Produce Inc., sent by email an "Application for Export Inspection and Phytosanitary Certification" requesting that the Agency inspects 251 boxes of fresh BC cherries destined to Dubai, United Arab Emirates. The Remarks section stated that the cherries were from lots 2122202303, 2132206501, and 207_GL.

[24] On the same date, Inspector Charlton, conducted an export inspection on lots 2122202303, 2132206501 and 207_GL. Following the inspection, the inspector issued Phytosanitary Certificate # 3353895.

[25] On August 4, 2019, Mr. Bahniwal again emailed Krazy Cherry's packaging spreadsheet to the Agency which indicated that cherries from lot 207_GL had passed inspection on July 27, 2019.

[26] On August 6, 2019, Inspector Charlton contacted Mr. Bahniwal by telephone to inform him that his packaging spreadsheet incorrectly indicated that the cherry boxes from lot 207_GL were eligible for export. She reiterated that Inspector Pasquale had declined export eligibility for lot 207_GL on July 27, 2019 and that cherries from this lot should never have been presented a second time for inspection.

[27] On August 12, she summarized the conversation held on August 6 with Mr. Bahniwal where she noted that he acknowledged responsibility for the spreadsheet and apologized for his error. I rely on the testimony and the notes of Inspector Charlton to determine that Mr. Bahniwal admitted committing the error in the spreadsheet.

b) Did the Agency prove all the essential elements of the violation under subsection 23(1) of the Plant Protection Act that were in dispute?

[28] The first element of the violation is not in dispute as Mr. Bahniwal confirmed he was the one who sent the spreadsheet to the Agency. There are many emails introduced as evidence confirming this as well.

[29] Since elements two and three are alternative ways that the violation may occur, element two, which states that a person obstructed or hindered an inspector, does not have to be proven and I will proceed to discuss element three directly.

[30] The third element of the violation states that a person made, in writing or orally, a false or misleading statement to an inspector. Based on the evidentiary record I conclude that the Agency proved this element of the violation.

[31] The spreadsheet that was sent to the Agency contained information in writing in alphanumeric format in an excel document. This constitutes a statement made in writing.

[32] The second part of this element is that the statement contained false or misleading information. I find that the Agency has proven this element on the balance of probabilities.

[33] Krazy Cherry created the spreadsheet alongside another company. The Agency does not require the use of the spreadsheet in question – the format is not obligatory and is left to the discretion of companies. Krazy Cherry is part of the *Cherry Program*; hence they must provide a way for the Agency to verify their inventory.

[34] The testimony of Inspector Charlton explained why the information contained in the spreadsheet sent by Krazy Cherry to an Agency generic mailbox was false or misleading.

- a. The information on the spreadsheet on July 27, 2019 indicated that lot 207_GL had been tested and failed;
- b. On August 3, 2019, Krazy Cherry sent a request for a phytosanitary certificate for 3 lot, including lot 207_GL which did not pass prior inspection made by Inspector Pascale on July 27, 2019;
- c. The ineligible cherries were presented a second time for inspection to Inspector Charlton;
- d. Later that day, an updated spreadsheet was sent to the same generic mailbox and the information regarding lot 207_GL was modified;

- e. This modification indicated that lot 207_GL passed inspection on July 27, 2019 even though that lot had been tested and Krazy Cherry was informed it did not pass and that cherries from that orchard had to be put aside.

[35] Krazy Cherry did not adduce evidence to rebut the Agency's evidence on this element.

[36] The fourth element requires the Tribunal to assess whether the inspector was carrying duties or functions under the *Plant Protection Act* or its *Regulations* when the false or misleading statement was made. Part of the role of inspectors is to conduct inspections and grant phytosanitary certificates for the export of the cherries. As explained by Inspector Charlton during her testimony, the *Cherry Program* requires that participants provide a system to track inventory and inspection by the Agency.

Krazy Cherry is part of the *Cherry Program* which is a pest management program to ensure all the import requirements of the importing country are met. Therefore, Krazy Cherry had obligations including inventory tracking and record management for the product traceability. The spreadsheet was sent to Agency inspectors working at the Oliver Office as part of Krazy Cherry's obligations under the *Cherry Program*. Although it was not sent directly to a specific inspector, it was meant for any inspector working at that office. Inspector Charlton reviewed the submitted spreadsheet as she was carrying out her duties and functions under the *Plant Protection* and *Regulations*. Therefore, the fourth element of the violation is established.

[37] I conclude that the Agency has proven all the elements of the violation and that Krazy Cherry committed the violation.

c) Did Krazy Cherry raise a permissible defense?

[38] Krazy Cherry did not raise a permissible defence that would excuse them from being liable for the violation outlined in the Notice. In their submissions to the Tribunal, Krazy Cherry asserts that there was no intention to send false or misleading information to the Agency and that it was a human error. They argued there was a problem with their own excel spreadsheet. They argued that the Notice should have been issued with a warning instead of a fine.

[39] The [AAAMP Act](#) does not allow the Tribunal to consider any of these factors when reviewing the facts of the Notice. The Act also does not grant the Tribunal the power to turn a notice of violation with a monetary penalty into a notice of violation with a warning.

[40] The fact that the false information was sent without intent does not constitute a permissible defense in this case. Intent is only assessed when evaluating the Total Gravity Value for the purpose of determining the appropriate amount of the penalty.

[41] Pursuant to section 18 of the [AAAMP Act](#) which explicitly excludes defences of due diligence and mistake of facts, the fact that Krazy Cherry argued that it was a human error does not constitute a permissible defense in the absolute liability regime.

[42] Krazy Cherry argued that there was a problem with the algorithm in the excel spreadsheet. It was their responsibility to send the required information under any format to the Agency. The use of a heavy populated excel spreadsheet is not mandatory and is the choice of Krazy Cherry. It does not constitute a permissible defense.

[43] Finally, Krazy Cherry argued, and Mr. Bahniwal testified that an Agency agent named Martin Corban tried to fix the spreadsheet during a meeting. No more information was provided. Martin Corban did not testify during the hearing and what was presented is far below the threshold of what could constitute a permissible defense of officially induced error.

d) Was the penalty assessed in conformity with the Act and Regulations?

[44] I find that the \$7000 penalty issued to Krazy Cherry was imposed following the process outlined in the [AAAMP Act](#) and [AAAMP Regulations](#). Section 5 of the *AAAMP Regulations* provides that a penalty of \$10,000 is warranted for very serious offences although the penalty can be adjusted in some cases. Section 5(1) of the [AAAMP Regulations](#) mandates a \$10 000 penalty for violations which are categorized by the [AAAMP Regulations](#) as very serious. Schedule 1 of the [AAAMP Regulations](#) classifies subsection 23(1) of the [Plant Protection Act](#) as a very serious violation.

[45] 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 that could have been done (*A.S. L'Heureux*). Schedule 3 of the [AAAMP Regulations](#) attaches a numerical score to each of the three criteria. Those scores are totalled to determine the “total gravity value”. If an adjustment is required, Schedule 2 the [AAAMP Regulations](#) outlines the percentage the penalty should be increased or decreased based on the total gravity value.

[46] The Total Gravity Value (TGV) in this case amounts to 3 points therefor the amount of the sanction was reduced by 30% per Schedule 2 of the [AAAMP Regulations](#) for a total penalty of \$7,000.

[47] The Agency gave Krazy Cherry a score of 0 in the compliance history category because no minor or serious violation has occurred within the proceeding 5 years.

[48] Krazy Cherry argued that the violation was committed without intent. Although the Tribunal agrees with this conclusion as there is no evidence to support a finding that the violation was committed intentionally, the Agency had already awarded 0 point for this criterion. No further adjustment to the penalty is permitted by the [AAAMP Regulations](#).

[49] The only criterion in dispute is harm. The Agency awarded 3 points to Krazy Cherry, meanwhile Krazy Cherry argued that no harm was done as the error was caught before the cherries arrived at its destination.

[50] The Tribunal agrees with the Agency's score for the following reasons. Although no damages occurred, Part 3 of Schedule 3 of the [AAAMP Regulations](#) specifies that if a violation could cause serious monetary loss to any person, a score of 3 should be attributed.

[51] In this case, the harm did not materialize because the cherries from lot 207_GL never arrived at their destination. In the event a country had received the cherries and realized they had been imported under false pretences, this could have had a serious impact on the importation of agricultural goods from Canada, causing serious economic damage to the exportation of Canadian agricultural products.

5. ORDER

[52] I find that Krazy Cherry has committed the violation in the Notice and must pay the penalty of \$7000 to the Agency within thirty days of being notified of this decision as required by paragraph 15(3) of the [AAAMP Act](#).

[53] This violation is not a criminal offence. After five years, the Applicant 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 [AAAMP Act](#).



Luc Bélanger
Chairperson
Canada Agricultural Review Tribunal