Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Stanford v. Canada (Canadian Food Inspection Agency),* 2013 CART 38

Date: 20131204
Docket: CART/CRAC-1651

BETWEEN:

Maria K. Stanford, Applicant

- and -

Canadian Food Inspection Agency, Respondent

BEFORE: **Member Bruce La Rochelle**

WITH: **Maria K. Stanford, self-represented; and**
Susan Eros , Legal Counsel, representative for the Agency

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 of a violation of section 15 of the *Health of Animals Act*, alleged by the respondent.

DECISION

[1] Following a review of written submissions of the Agency and a review of the applicable law, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that a contravention of section 15 of the *Health of Animals Act* cannot be legally constituted as a violation subject to an administrative monetary penalty or warning, and that Notice of Violation 1213MB0003, issued on June 11, 2012, and served on the applicant on June 23, 2012, is therefore a nullity.

By written submissions only.

REASONS

Alleged Incident and Issue

[2] This case concerns the alleged intentional importation of a horse from the United States (U.S.) without a certificate properly approved by U.S. authorities. By Notice of Violation 1213MB0003, issued on June 11, 2012, and served on the applicant on June 23, 2012, the Canadian Food Inspection Agency (the Agency) alleges that, on May 3, 2012, at or near Emerson, Manitoba, the applicant, Maria K. Stanford (Ms. Stanford) committed a violation, namely (reproduced *verbatim*) "Possess or dispose of an animal or thing known to be imported illegally", contrary to section 15 of the *Health of Animals Act* (HA Act)(S.C. 1990, c. 21).

[3] The Notice of Violation was issued as a Notice of Violation With Penalty, with the penalty amount being $10,000. The penalty amount is established pursuant to Part 1, Division 1 of Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalty Regulations* (SOR/2000-187) (AMP Regulations). Item 10 therein, referencing section 15 of the HA Act, classifies the violation of section 15 as "very serious". According to subsection 5(3) of the AMP Regulations, the penalty for a very serious violation, when "committed by a person in the course of business or to obtain a financial benefit" is $10,000. The penalty amount is subject to a maximum adjustment of 50%, upwards or downwards, based on the gravity of the violation, as particularized in section 6 and schedules 2 and 3 of the AMP Regulations. In the case at hand, the assessment of the gravity of the violation did not result in any adjustment.

[4] The Tribunal considers that the principal document that is relevant to the Tribunal's particular determination in this case is the "Submissions of the Respondent", submitted October 31, 2012, plus certain elements of the Report of the Agency, submitted August 3, 2012. The Tribunal does not consider it necessary to examine the evidence of either party, or the arguments in relation to such evidence, in view of the Tribunal's view of the legitimacy of the proceedings *ab initio*. The issue to be addressed is whether the offence under subsection 15(1) of the HA Act may be contemporaneously framed as a violation of absolute liability, given that knowledge is an essential component of the prohibited act.

Applicable Law and Analysis

[5] The alleged violation is that of contravening section 15 of the HA Act, which reads as follows:

> ***15.*** *(1) No person shall possess or dispose of an animal or thing that the person knows was imported in contravention of this Act or the regulations.*

> *(2) In any prosecution for an offence under subsection (1), an accused who is found to have been in possession of an animal or thing that was imported in contravention of this Act or the regulations shall be considered, in the absence of evidence to the contrary, to have known that the thing was so imported.*

[6] The Agency contends that subsection 15(2), which qualifies subsection 15(1) as an offence, subject to prosecution, is not applicable when a Notice of Violation is issued. In this regard, the Agency relies on the Tribunal case of *Po Wah Enterprises* v. *Canada (CFIA)*, RTA #60022, a 2001 decision of then Tribunal Chairperson Barton (paragraph 22 and Tab 2, "Submissions of the Respondent"). A review of the Tribunal case decisions, as reproduced on the Tribunal's website, reveals that this is the only Tribunal decision in which section 15 of the HA Act has been considered.

[7] In *Po Wah Enterprises*, the Applicant was issued a Notice of Violation under section 15(1), in relation to smoked bacon that was found on the premises of the Applicant's retail store. On the evidence, the President and Manager of the Applicant had purchased the bacon from a friend in Canada, who told him that the product was from China (*Po Wah Enterprises*, page 2). The Applicant did not import the product directly. Then Chairperson Barton determined that the Agency had not established that the product had been imported illegally (*Po Wah Enterprises*, page 4). Having come to this conclusion, it was not necessary for Chairperson Barton to determine whether the Applicant knew that the product was imported illegally. Chairperson Barton found as a fact that knowledge of illegal importation had not been established by the Agency (*Po Wah Enterprises*, page 4).

[8] In its current submission, counsel for the Agency acknowledges that the elements of the violation were not particularized in *Po Wah Enterprises*. Counsel submits ("Submissions of the Respondent", paragraph 22) that the elements of the violation are as follows:

1. That the person named in the NOV (Notice of Violation) possessed or disposed of an animal or thing;

2. That the animal or thing was imported in contravention of the Act or the Regulations; and

3. That the person knew that the animal or thing was imported in contravention of the Act or Regulations.

[9] Counsel further submits ("Submissions of the Respondent, paragraph 23) that the knowledge element required is a *mens rea* element that concerns either actual knowledge, as inferred from the facts, or wilful blindness.

[10] Counsel refers to section 12 of the *Health of Animals Regulations* (HA Regulations) and, in particular, subsection 12(1), which reads as follows:

> ***12.*** *(1) Subject to section 51, no person shall import a regulated animal except*
>
> *(a) in accordance with a permit issued by the Minister under section 160; or*
>
> *(b) in accordance with subsections (2) to (6) and all applicable provisions of the import reference document.*

[11] Section 51 of the HA Regulations, to which section 12 is explicitly subject is, in many respects, a similar but more particularized version of section 12. Whereas subsection 12(1) refers to the importation of "a regulated animal", section 51 and sections following concern the importation of an "animal pathogen, animal or other organism, animal blood or animal serum" (section 51.1, summarizing elements of section 51). Both under section 12 and section 51, the general rule is that such importation requires a permit from the Minister under section 160 of the HA Regulations, in the absence of specified exception conditions. Under subsection 160(1.1) the Minister is to issue a permit if the Minister is satisfied that "the activity for which the permit or licence is issued would not, or would not be likely to, result in the introduction into Canada, the introduction into another country from Canada or the spread within Canada, of a vector, disease or toxic substance."

[12] Given that no permit was issued by the Minister in this case, counsel for the Agency submits ("Submissions of the Respondent" paragraphs 25 to 30) that, as related to paragraph 12(1)(*b*), Ms. Stanford was required to have imported the horse in question in accordance with "all applicable provisions of the import reference document", as qualified by subsection 12(4), which states as follows:

> ***12.*** *(4) A regulated animal may be imported without a permit from an area that is an undesignated area for an animal of that species if there are provisions in the import reference document that relate to the importation of that species and those provisions are complied with*.

[13] The Import Reference Document is a document prepared by the Agency which is authorized by regulation, in particular, section 10 of the HA Regulations. Counsel for the Agency established to the satisfaction of the Tribunal that a horse can be imported from the U.S., in accordance with the Import Reference Document, when accompanied by a certificate of a veterinarian of the U.S., in which the following information is provided ("Submissions of the Respondent", paragraph 29, citing section 3 of Part III of the Import Reference Document, plus copy of Import Reference Document at Tab 6):

a. *the animal was inspected by a veterinarian within 30 days preceding the date of importation;*

b. *the animal was found by a veterinarian to be free from any communicable disease;*

c. *the animal was, to the best of the knowledge and belief of the veterinarian not exposed to any communicable disease within 60 days preceding the date of inspection;*

d. *the applicable conditions set out in the Regulations and in this Document [the Import Reference Document] respecting the importation of that species have been satisfied; and*

e. *the animal meets the conditions shown on the certificate.*

[14] Counsel for the Agency notes ("Submissions of the Respondent", paragraph 31) that contraventions of paragraph 12(1)(*b*) and subsection 12(4) of the HA Regulations are subject to the issuance of a Notice of Violation. In the submission of counsel, the elements of a violation of the two sections collectively are as follows ("Submissions of the Respondent", paragraph 31):

1. *That a person imported a regulated animal; and*

2. *That in importing that animal, the person failed to comply with the provisions in the Import Reference Document that relate to the importation of the species.*

[15] The Tribunal notes that there is a violation specified with respect to subsection 12(4), as found in Division 2 of Schedule 1 of the AMP Regulations. The summary description of the violation, as found in the Division 2 particulars (Item 9) is to "import a regulated animal without a permit from an undesignated area for an animal of that species, if there are no applicable provisions in the import reference document". The Agency has established ("Submissions of the Respondent", paragraphs 27 to 29) that the U.S. is an undesignated area, and that the requirement of the Import Reference Document in relation to horses is that a horse must be accompanied by a certificate of an official veterinarian of the U.S., in which certain particulars are provided. To the extent that Ms. Stanford imported a horse without a completed certificate from a U.S. veterinarian, she may be viewed as having imported the horse without a permit, and could be subject to a Notice of Violation in relation to subsection 12(4) of the HA Regulations. It is to be noted that such a violation is categorized as "very serious" in Division 2. This is the same classification ("very serious") as the alleged violation to which Ms. Stanford is subject, under section 15 of the HA Act. In Schedule 1, Division 1, Item 10 of the AMP Regulations, this similarly "very serious" violation is summarily described as to "Possess or dispose of an animal or thing known to be imported illegally".

[16] Similarly, Ms. Stanford could have been subject to a Notice of Violation issued with reference to specific contraventions of the Import Reference Document itself, which violations are again categorized as "very serious". As summarized in Schedule 1, Division 3 of the AMP Regulations, a "very serious" violation occurs under either section 3 or section 4 of the Import Reference Document in relation to importing an animal without the required certificate, or with an incomplete certificate. Either of these circumstances may have occurred in the case at hand.

[17] The violations discussed in relation to the Import Reference Document and the HA Regulations do not incorporate knowledge, or *mens rea*, as a specific element. In the Tribunal's view, it is legally impossible for an offence where *mens rea* is an explicit component, to be treated, in the alternative, as a violation, subject to an administrative monetary penalty.

[18] The Tribunal notes that in both the HA Act and the HA Regulations, of a total number of approximately 500 offences, contemporaneously framed as violations in the alternative, there is only one other section in which knowledge is a legislatively explicit component. That section, being section 12 of the HA Act, provides as follows:

> ***12.*** *No person shall throw or place in any body of water the carcass or any part of an animal that at the time of its death was to the person's knowledge affected or contaminated by, or was exposed to, any disease or toxic substance, or that was destroyed because it was, or was suspected of being, affected or contaminated by a disease or toxic substance.*

[19] In the Tribunal's view, section 12 of the HA Act is similar in nature to section 15. Due to knowledge being a legislatively explicit component of the offence, it cannot legally be treated, in the alternative, as a violation.

[20] The Tribunal's reasoning in relation to section 15 is based on considerations of statutory interpretation, as well as general considerations of fairness to Ms. Stanford. Reference is made to the legislative purpose expressed in section 3 of the AMP Act*:*

> **3.** *The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.*

The question of concern to the Tribunal is as follows: How can it be considered fair to Ms. Stanford when the violation she is alleged to have committed involves knowledge as an essential component, yet she is legislatively prohibited from raising lack of knowledge as a defence?

[21] A hallmark of an administrative monetary penalties regime is the absolute liability nature of the violation, where knowledge is explicitly rendered irrelevant to the occurrence of the violation. The only exceptions provided are common law defences not otherwise specifically excluded legislatively. Such common law offences are generally concerned with impairment of volition, such as capacity issues. The foregoing is made explicit in section 18 of the AMP Act, which provides as follows:

> ***18.*** *(1) A person named in a notice of violation does not have a defence by reason that the person*
>
> *(a) exercised due diligence to prevent the violation; or*
>
> *(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.*
>
> *(2) 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.*

[22] If the violation were to be upheld in the current case, Ms. Stanford would be unfairly subject to legislative contradictions. Ms. Stanford's primary defence to a Notice of Violation issued in relation to subsection 15(1) of the HA Act is that she did not know that the animal was imported contrary to the HA Act or the HA Regulations. At the same time, section 18 of the AMP Act does not permit such a defence to be recognized. It is the Tribunal's view that this contraction would appear to arise through legislative oversight, whereby it appears to have been assumed by legislative drafters that all offences under the HA Act and the HA Regulations were capable of being transformed into violations. In the Tribunal's view, there are two sections of the HA Act where this is not the case, one of which is the section that Ms. Stanford is alleged to have violated.

[23] The Tribunal is guided in its deliberations by the views of the Federal Court of Appeal (FCA), as expressed in the case of *Doyon v. Canada (Attorney General),* 2009 FCA 152. It is fair to describe the Court's view as one of significant reservation in relation to the fairness of the administrative monetary penalties regime. Speaking for the Court, Mr. Justice Létourneau commented as follows, at paragraphs 21, 24, 25 and 27 of *Doyon*, with the subtitle of this section of the judgement, plus the bolding and underlining, being that of the Court:

A draconian administrative monetary penalty system

> *[21] The Act [*Agriculture and Agri-Food Administrative Monetary Penalties Act*] contains a combination…of elements that make the established system which is intended to be fair a highly punitive one…*
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> …
>
> *[24] …the Act punishes diligent individuals, even if they took every reasonable precaution to prevent the commission of the alleged violation. …the Act denies individuals who committed a violation the right to make a mistake, even if the mistake could have been made by a reasonable person in the same circumstances.*
>
> …
>
> *[25] …the Act denies those individuals the benefit of any reasonable doubt which they would be entitled to in case of a penal offence, instead deciding guilt on the basis of a mere balance of probabilities…*
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> …
>
> *[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an* actus reus *which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.*

[24] In *Doyon*, based on the judgement extracts quoted, the FCA may be viewed as having expressed reservations concerning pervasive elements of unfairness in an administrative monetary penalties regime. Stemming from its concerns about the administrative monetary penalties regime as a whole, the FCA in *Doyon* has cautioned the Tribunal as follows (at paragraph 28):

> *[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.*

The Tribunal is accordingly of the view that it should be reluctant to interpret subsection 15(1) of the HA Act in a manner that supports the issuance of a Notice of Violation, in circumstances where knowledge is a legislatively explicit element of the violation.

[25] The recent decision of the FCA in *Canada Border Services Agency v. Castillo*, 2013 FCA 271, is considered by the Tribunal to be supportive of the Tribunal's position herein on statutory interpretation. The *Castillo* case is part of a line of cases where parties found importing prohibited food, and issued Notices of Violation as a consequence, attempted to raise a defence of third party intervention, resulting in a break in causality. For example, a family member had packed the food in the luggage, without the knowledge of the alleged violator. In many respects, this is not so much a defence as it is an alleged violator raising the fact that, in accordance with *Doyon*, an essential element of the violation has not been established, with reference to the "causal link", about which the Tribunal is directed by *Doyon* to be circumspect. As reported in *Mario Castillo v. Canada (CBSA)*, 2012 CART 22, Mr. Castillo had raised such a defence or challenge to causation, which was initially accepted by the Tribunal, based on an assessment of Mr. Castillo's credibility. Tribunal Chairperson Buckingham reasoned as follows (paragraphs 36 to 38):

> *[36] …Castillo's testimony under oath was that his mother had packed it in his bags without his knowledge. This was very credible evidence from Castillo and is accepted by the Tribunal. Evidence presented by the Agency does not cast any doubt on this testimony, nor has the Agency in any way impugned the general credibility of Castillo.*
>
> *[37] In the circumstances of this case, the evidence provided by the Agency and by Castillo has been insufficient to convince the Tribunal that Agency officials provided any reasonable opportunity for Castillo to demonstrate that he had imported meat products, not as a result of language or comprehension problems, but due to the lack of evidence on the balance of probability, that Castillo even knew he had meat in his possession before the inspector searched his luggage at secondary inspection. The Tribunal finds as fact that the Agency did not prove that Castillo had a reasonable opportunity to declare his meat products. Rather than ask Castillo to explain why he had not declared the products which to Castillo's surprise he saw for the first time when the secondary inspector found them, the inspector served him with a Notice of Violation.*
>
> *[38] Castillo could not have indicated on his Declaration Card that he had meat when he did not know he had it…*

[26] Upon review by the FCA in *Castillo*, Mr. Justice Near, writing for the Court, stated as follows, at paragraphs 20 and 24:

> *[20] The defences of due diligence and reasonable and honest mistake of fact are not available to a person accused of contravening the* Agriculture and Agri-Food Administrative Monetary Penalties Act:

> ***18.*** *(1) A person named in a notice of violation does not have a defence by reason that the person*
>
> *(a) exercised due diligence to prevent the violation; or*
>
> *(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.*
>
> *[24] Mr. Castillo may have been unaware that the chicken was in his luggage, but this is of no assistance to him given a plain reading of the provisions and the clear intention of Parliament to provide for an absolute liability regime for these types of violations. As this Court has noted before, the AMP system can be harsh (*Westphal-Larsen *at paragraph 12) but it is clear that Parliament intended that it be so, given the important stated objective of protecting Canada from the introduction of foreign animal diseases.*

[27] Paragraph 12 in the *Westphal-Larsen* case, referred to by Mr. Justice Near (*Canada [Canadian Food Inspection Agency] v. Westphal-Larsen*, 2003 FCA 383), involved the Court acknowledging that an interpretation of the "plain reading" of legislative provisions (in that case, whether "import" had the same meaning in the HA Act and the HA Regulations) could have a harsh result.

[28] In support of the Court's "plain reading" conclusion, Mr. Justice Near, at paragraph 22 of *Castillo*, cited Mr. Justice Dickson, speaking for a unanimous Supreme Court of Canada in *R. v. Sault Ste. Marie* [1978], S.C.R. 1299, at 1326:

> *Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category (at 1326).*

[29] The Supreme Court of Canada in the *Sault Ste. Marie* case, also expressed general concerns about absolute liability offences, at 1311:

> *Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure,*

> *is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others?*

[30] Mr. Justice Near did not discuss subsection 18(2) of the AMP Act, which provides that "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". A break in causality therefore was not considered by the Court, at least implicitly, to raise a potential common law defence. Rather, when Parliament makes it explicit that knowledge is not a component of responsibility for a prohibited outcome, a person is considered responsible for a prohibited outcome, even though he or she has no primary causal connection to that outcome. This is so despite the caution expressed in paragraph 28 of *Doyon,* quoted *ante*, that "the decision-maker must be circumspect…in analysing the essential elements of the violation and the causal link." Read together, the general directions provided by the FCA in the *Doyon* and *Castillo* cases would appear to be as follows:

(i) When legislation is viewed as having a "plain reading" and evidencing "the clear intention of Parliament to provide for an absolute liability regime for these types of violations", the Tribunal is not at liberty to interpret the legislation in a manner considered by the Court to be contrary to such "plain reading". A corollary principle is that the Tribunal's interpretation of the "plain reading" of legislation is reviewable as a question of law. (*Castillo*) The specific error of law made by the Tribunal in *Castillo* was to consider third party intervention as a break in causality—which, at first instance, would appear to have been consistent with concerns about causality, as expressed in *Doyon*.

(ii) Given the "draconian" nature of an absolute liability regime, the Tribunal should carefully consider all circumstances and possible consequences (circumspection) during the course of its analysis of the essential elements of a violation, causal linkages and the management and analysis of the evidence (*Doyon*).

[31] Based on the decisions in *Doyon* and *Castillo*, as well as the earlier concerns expressed by the Supreme Court of Canada in *Sault Ste. Marie*, the Tribunal cannot interpret section 15 of the HA Act as involving such "plain reading" or "precision of language used" to permit a Notice of Violation to be supported.

[32] As has been discussed in paragraphs 10 to 14, *ante*, counsel for the Agency reviewed section 12 of the HA Regulations, and argued that a violation of subsection 12(4) of the HA Regulations had also occurred in the present case. Counsel did not explicitly plead section 12 as an alternative violation to which Ms. Stanford could be subject. The Tribunal in any event does not accept that a Notice of Violation, issued in relation to a particular statutory violation, somehow includes violations of any related section not explicitly referenced in the Notice of Violation. While "included offences" may be a feature of the criminal law under subsection 662(1) of the *Criminal Code* (R.S.C. 1985, c. C-46), there is no comparable concept of an "included violation" in relation to administrative monetary penalties. In view of the sentiments of the FCA in *Doyon* and *Castillo*, the Tribunal should be reluctant to establish such a concept, in the absence of explicit legislative direction.

Conclusion

[33] The Tribunal therefore determines that a contravention of section 15 of the HA Act cannot be legally constituted as a violation subject to an administrative monetary penalty or warning, and that Notice of Violation 1213MB0003, issued on June 11, 2012, and served on Ms. Stanford on June 23, 2012, is therefore a nullity.

Dated at Ottawa, Ontario, this 4th day of December, 2013.

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Dr. Bruce La Rochelle, Member