Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Williams v. Canada (CBSA), 2011 CART 19

Date: 20111101;
CART/CRAC-1581

Between:

Ajibola K. Williams, Applicant

- and -

Canada Border Services Agency, Respondent

Before: **Chairperson Donald Buckingham**

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 39 of the *Plant Protection Regulations,* alleged by the respondent.

DECISION

[1] After reviewing all written submissions and all submissions made at the oral hearing, the Canada Agricultural Review Tribunal ("the Tribunal") finds that the applicant did commit the violation and orders the applicant to pay the monetary penalty of $800 to the respondent within 30 days after the day on which notice of this decision is served.

The hearing was held in Toronto, ON,
on October 11, 2011.

REASONS

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that the applicant, Mr. Ajibola Williams (Williams), on May 16, 2011 at Pearson International Airport in Toronto, Ontario, failed to declare fresh wood chips and bark contrary to section 39 of the *Plant Protection Regulations.*

[3] Section 39 of the *Plant Protection Regulations* reads as follows:

> ***39****. Every person shall, at the time of importation into Canada of any thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest, declare that thing to an inspector or customs officer at a place of entry set out in subsection 40(1).*

[4] The Tribunal must decide whether the Agency has established all the elements required to support the impugned Notice of Violation in question, particularly that:

- Williams had plant material in his belongings as he entered Canada;
- plant material of the nature of fresh wood chips and bark could be infested with a pest or constitutes or could constitute a biological obstacle to the control of a pest; and
- Williams failed to declare that plant material to the Agency inspector on May 16, 2011.

Record and procedural history

[5] Notice of Violation #YYZ4971-0333, dated May 16, 2011, alleges that on May 16, 2011 at Pearson International Airport in Toronto, Ontario, Williams "committed a violation, namely: Fail to declare fresh wood chips, bark contrary to section 39 of the *Plant Protection Regulations".*

[6] The Notice of Violation also sets out that the alleged act constitutes a violation of section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and that pursuant to section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* the alleged act constitutes a serious violation for which a $800 penalty is assessed to Williams. The Notice of Violation further states that the Notice of Violation was personally served on Williams by the Agency on May 16, 2011.

[7] In a letter received by the Tribunal on June 14, 2011, Williams requested a review by the Tribunal of the facts of the violation, in accordance with subsection 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

[8] By letter dated June 30, 2011, and received by the Tribunal on July 4, 2011, the Agency sent its report (Report) concerning the Notice of Violation to Williams and to the Tribunal.

[9] In a letter dated July 4, 2011, the Tribunal invited Williams to file any additional submissions in this matter, no later than August 3, 2011. No additional submissions were received from either party.

[10] The oral hearing requested by Williams was held in Toronto, Ontario on October 11, 2011 with Williams representing himself and the Agency represented by Ms. Melanie Charbonneau.

Evidence

[11] The evidence before the Tribunal in this case consists of written submissions from the Agency (Notice of Violation and Report) and from Williams (request for review). As well, both parties presented witnesses who tendered evidence at the hearing on October 11, 2011. The Agency presented Border Services Officer – Badge Number 14613 (Inspector 14613) while Williams gave evidence in his own defence. During the hearing, Williams tendered two exhibits for consideration by the Tribunal which were photographed and returned to him by Tribunal staff: (1) a bag of wood chips which he alleges are similar to the ones he imported on May 16, 2011, and which he alleges are a herbal remedy and medical preparation called "Agbo" in Nigeria; and (2) a plastic bottle containing what appeared to be wood and plant material suspended in a cloudy liquid which Williams alleges are a herbal remedy and medical preparation called "Agbo" in Nigeria. After examining these exhibits and after hearing arguments from the Agency's counsel on the admissibility of the exhibits, the Tribunal ruled that the exhibits were admissible. The Tribunal told the parties that it would consider the appropriate relevance and weight to be attributed to the exhibits in determining the outcome of this case.

[12] Several facts in this case are not in dispute:

- On May 16, 2011, Williams arrived in Toronto from Nigeria via Frankfurt and proceeded to primary inspection before the Agency's Inspector 20007 (Inspector 20007) (page 15, Tab 2 and Tab 3 of the Report).

- Inspector 20007 received Williams' Declaration Card E311 (Tab 3 of Report) that Williams had completed and signed. On the Declaration Card E311, Williams marked "no" beside the box which states "I am/we are bringing into Canada: meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects."

- Williams then proceeded from primary inspection and was directed to undergo secondary inspection. That inspection was undertaken by Inspector 14613 who found plant material in the form of wood chips and bark in the bags belonging to Williams.

- Inspector 14613 issued Notice of Violation #YYZ4971-0333 (Tab 6 of the Report) to Williams. As well Inspector 14613 completed an Inspector's Non Compliance Report for Travellers at Point of Entry (Tab 4 of the Report) concerning the incident and photographed the wood chips and bark that he found (Tab 7 of the Report). He then destroyed the material, as he believed that it was not permitted entry into Canada.

[13] The only disputed facts concerning the material imported by Williams and discovered by Inspector 14613 is the physical nature of the wood chips and bark and the ability of this plant material to be infested with a pest or to constitute or to be able to constitute a biological obstacle to the control of a pest. The evidence from the parties differs on the physical nature of the products in question, a factual determination which is essential for the Tribunal in making its determination as to whether these wood chips and bark do or do not constitute a "thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest" (s. 39 of the *Plant Protection Regulations*).

[14] The Agency's witness, Inspector 14613 testified that he was working at Pearson International Airport on May 16, 2011, and that his contact with Williams that day consisted of dialoguing with Williams and inspecting his bags at secondary inspection. Inspector 14613 told the Tribunal that he confirmed Williams' identity by inspection of his passports. He asked Williams if the two bags he presented for inspection were his and if he had packed them himself to which Williams answered "yes" to both questions. Inspector 14613 told the Tribunal that he also asked Williams if he had anything to declare and Williams said "no". Inspector 14613 then proceeded to search the two bags belonging to Williams and found two bags of wood chips and one plastic bottle containing wood bark. The wood chips were a dark brown earthy colour, smelled of fresh soil and also contained cut twigs and roots. The wood bark in the bottle was lighter in colour and was dry. Inspector 14613 told the Tribunal that he relied on his more than 20 years experience of agriculture and food product inspection to identify the plant material as wood products, including wood chips, wood pieces and wood bark. Moreover, this plant material was of a kind that could be infested with a pest according

to the Automated Import Reference System (AIRS) reference system of the Canadian Food Inspection Agency (Tab 5 of the Report). When Inspector 14613 had completed his inspection of the two bags, he asked Williams if he had certificates or permits to import the goods and Williams said “no”. He then explained to Williams that his actions constituted a violation, issued the Notice of Violation, and explained payment and review options to Williams, including the option of requesting a review from this Tribunal. Inspector 14613 then photographed the wood products (Tab 7 of the Report) before seizing and destroying them as international waste. The oral evidence tendered by Inspector 14613 is echoed in his written Inspector’s Non Compliance Report for Travellers at Points of Entry (Tab 4 of Report) relating to the May 16, 2011 incident.

[15] In cross-examination, Inspector 14613 told the Tribunal that the wood chips he examined from Williams’ bags were fresh because they smelled wet when he inspected them, a condition that would be consistent with condensation being formed in the bag from the fresh wood being in a confined space during the flight from Nigeria. When asked if Exhibit 1 was similar to the product Inspector 14613 examined on May 16, 2011 from Williams’ bags, Inspector 14613 replied that it was not the same product because Exhibit 1 was dry wood chips. The wood chips he found on May 16, 2011 were fresh and contained soil, which could, in his opinion, carry diseases of both fungal and parasitic origins. Fresh wood chips, Inspector 14613 continued, even if they can be used as medical remedies, are not allowed entry into Canada.

[16] Williams, in his testimony to the Tribunal, explained that he did not declare the wood chips and bark because he considered them a herbal remedy and a medical product used by him for his own medical condition. He told the Tribunal that he purchased the product in Nigeria for his own personal use. Williams maintained that the product was not fresh wood because he “did not visit a forest to chop off this [sic] roots”. Williams told the Tribunal that he had purchased the product abroad on former occasions, bringing it into Canada without incident even after it had been examined by Agency inspectors. Williams told the Tribunal he was surprised that on this occasion, when Inspector 14613 found the wood chips, he said it was a violation and issued Williams a Notice of Violation. Williams testified that in light of the issuance of the Notice of Violation, he talked to Inspector 14613, inquiring why this incident should not be treated with only a Notice of Violation with Warning rather than with Penalty.

[17] In cross-examination, Williams told the Tribunal that he has been using this medical product for the past five years. He re-iterated that although he was aware of the product in his bag, he did not declare it because in the past he had brought the product into Canada. On these occasions, he had shown it to Agency inspectors, they had inspected it and had returned it to him without any problem or incident for him to import and use in Canada.

Analysis and Applicable Law

[18] This Tribunal's mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (the Act). The purpose of the Act is set out in section 3:

> **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.*

[19] Section 2 of the Act defines "agri-food Act":

> ***2.*** *"agri-food Act" means the* Canada Agricultural Products Act*, the* Farm Debt Mediation Act*, the* Feeds Act*, the* Fertilizers Act*, the* Health of Animals Act*, the* Meat Inspection Act*, the* Pest Control Products Act*, the* Plant Protection Act *or the* Seeds Act*...*

[20] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations:

> **4.** (1) *The Minister may make regulations*
>
> (a) *designating as a violation that may be proceeded with in accordance with this Act*
>
> *(i) the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act...*

[21] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187, which designates as a violation several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and include a reference to section 39 of the *Plant Protection Regulations*.

[22] The Act's system of monetary penalties (AMP), as set out by Parliament is very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal points out that the Act imposes an important burden on the Agency. At paragraph 20, the Court states:

[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation, and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.

[23] Section 19 of the Act reads as follows:

> **19.** *In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.*

[24] Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities. For a violation of section 39 of the *Plant Protection Regulations*, the Agency must prove that

(1) the violator is Williams;

(2) Williams brought plant material into Canada;

(3) plant material of the nature of wood chips and bark could be infested with a pest or constitutes or could constitute a biological obstacle to the control of a pest could be infested with a pest; and

(4) Williams did not declare the plant material to any Agency inspector.

[25] The evidence offered by Agency supports a finding by this Tribunal that the Agency has proved each of the elements, on the balance of probabilities.

[26] With respect to elements 1 and 2, there is no dispute that the identity of the alleged violator is Williams, nor that he had plant materials in the nature of wood chips and bark in his bags on May 16, 2011. With respect to element 4, Williams' Declaration Card shows that he did not declare the plant material when he entered Canada on May 16, 2011. Furthermore, the testimony of both Inspector 14613 and Williams is to the effect that Williams did not declare the plant material prior to secondary inspection of his bags by Inspector 14613.

[27] It is only with respect to element 3 that is there any discrepancy in the evidence offered by the parties. Williams presented evidence that the wood chips and bark he imported on May 16, 2011 were an herbal remedy or medical preparation and, if one was to conclude that it was like the sample offered in Exhibit 1, it was dry. On this basis, Williams

might argue that the product he imported was not something that needed to be declared because it was of the nature that was not, nor could it be, infested with a pest. On the other hand, Inspector 14613 presented evidence for the Agency that the plant materials he found in Williams' bag were fresh, wet and contained and smelled of soil. Inspector 14613's experience and reference to the AIRS system for importation of wood products and soil into Canada from Nigeria led him to conclude that the product did indeed need to be declared because it was "*thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest"* (section 39 of the *Plant Protection Regulations*).

[28] The Tribunal found both witnesses to be credible but, regarding the evidence pertinent to a factual finding with respect to element 3, the evidence of Inspector 14613 was more exact and scientific regarding the potential or real threat that the wood chips and bark posed to Canadians and Canadian agriculture and food. The Tribunal finds, as a fact, that the wood chips were, on the balance of probabilities, fresh and smelled of soil, thus posing a significant risk of being infested by a pest or constituting a biological obstacle to the control of a pest. If the wood chips had been dry, as was the wood bark in the plastic bottle, or if the wood chips would have been packaged in a more controlled or pharmaceutical manner, the Tribunal's finding on this element of the violation might have been different. As it is, the evidence offered by Inspector 14613 is sufficient to demonstrate to the satisfaction of the Tribunal that the plant material in question could have be infested with a pest, and constituted or could have constituted a biological obstacle to the control of a pest.

Defences Available Under the Law

[29] The Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the Act states:

> **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.*

[30] When an AMP provision has been enacted for a particular violation, as is the case for section 39 of the *Plant Protection Regulations*, Williams has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that he has raised including ones such as “I have brought this product into Canada before without any incident, even after it has been inspected by Agency inspectors”; “I have on several occasions bought these same roots here in Toronto from African and Chinese Stores”; or “I did not brought [sic] the roots intentionally”. AMP violations are, according to Parliament, made out simply by proving the elements of the violation and the Agency has proved all necessary elements in this case. The Tribunal in this case finds that Williams’ actions or statements do not provide him with a defence that is permitted under section 18 of the Act.

Moreover, the Act and the Regulations are also clear that penalty amounts are not subject to Agency discretion or to the particular circumstances of any case. Nor is the Tribunal empowered under its enabling laws to alter a penalty amount unless the Agency has failed to apply the correct amount as set out in the legislation. For the alleged violation, the correct amount for the monetary penalty is indeed $800. The Agency inspector chose to exercise his discretion by issuing Williams a Notice of Violation with Penalty rather than with Warning. Once he exercised his discretion, the Tribunal is not empowered under its enabling legislation to challenge, amend or in any other way change the exercise of that discretion.

[31] Agency inspectors are charged with the task of protecting Canadians, the food chain and agricultural production in Canada from risks posed by pests, pathogens and parasites. Of course, a monetary penalty of $800 for wood chips and bark imported as an herbal remedy or medical preparation for Williams’ personal use may seem excessive, but the Act is clear. In this case, the Tribunal finds that all the elements of the violation have been established. Even for a small amount of wood chips and bark, the Tribunal must conclude that Williams committed the alleged violation. Consequently, the Tribunal orders Williams to pay the Agency the $800 penalty within 30 days after the day on which notice of this decision is served.

Removal of Any Record of the Penalty After Five Years

[32] The Tribunal wishes to inform Mr. Williams that this violation is not a criminal offence. After five years, he will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act:*

> **23.** (1) *Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from*

(*a*) *where the notice of violation contained a warning, the date the notice was served, or*

(*b*) *in any other case, the payment of any debt referred to in subsection 15(1),*

unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.

Dated at Ottawa, this 1st day of November, 2011.

_____

Dr. Donald Buckingham, Chairperson