

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Johnson v. Canada (CBSA), 2011 CART 17

Date: 20111027
CART/CRAC-1561

Between:

Mavis A. Johnson, 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 September 15, 2011.

REASONS

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that the applicant, Ms. Mavis Johnson (Johnson), on January 3, 2011 at the Ottawa International Airport in Ottawa, Ontario, failed to declare plant material (onions/shallots), 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:

- Johnson had plant material in her belongings as she entered Canada;
- plant material of the nature of shallots and onions could be infested with a pest; and
- Johnson failed to declare the plant material to the Agency inspector on January 3, 2011.

Procedural history

[5] Notice of Violation YOW-11-001, dated January 3, 2011, alleges that on January 3, 2011 at the Ottawa International Airport in Ottawa, Ontario, Johnson “committed a violation, namely: Fail to declare plant material (Onions/Shallots) 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 Johnson. The Notice of Violation further states that the Notice of Violation was personally served on Johnson by the Agency on January 3, 2011. At the hearing, the Agency admitted that this statement concerning service was false. The Certificate of Service found at

Tab 7 of the Agency Report concerning this matter, which was signed by Agency Inspector 17146, notes that the Inspector served a true copy of the Notice of Violation “by delivering it to him/her personally at Noticed [sic] placed in bag to be delivered by airline.” During the hearing, the Inspector told the Tribunal that in fact, he had searched and detained Johnson’s bag without her knowledge in Ottawa while she continued onwards to her final destination in Toronto. She would receive her bags later, after they were delivered by the airline to her house, and discover the Notice of Violation tucked inside the top of one of the bags when she opened it.

[7] In a letter dated January 17, 2011, received by the Tribunal on the same date, Johnson, through her agent Ms. Denise Boyce (Boyce), 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 February 2, 2011, and received by the Tribunal that same day, the Agency sent its report (Report) concerning the Notice of Violation to Johnson and to the Tribunal.

[9] In a letter dated February 4, 2011, the Tribunal invited Johnson to file any additional submissions (Additional Submissions) in this matter, no later than March 3, 2011. Boyce, on behalf of Johnson, did submit Additional Submissions on March 2, 2011. No further submissions were received from either party.

[10] The oral hearing requested by Johnson was held in Toronto, Ontario on September 15, 2011, with Johnson represented by her agent Boyce and the Agency represented by its agent, Ms. Sylvie Renaud.

Evidence

[11] The evidence before the Tribunal in this case consists of written submissions from the Agency (Notice of Violation and Report) and from Johnson (request for review and Additional Submissions). As well, both parties presented witnesses who tendered evidence at the hearing on September 15, 2011. The Agency presented Border Services Officer – Badge Number 17146 (Inspector 17146) while Johnson gave evidence in her own defence. During the hearing, Johnson tendered one exhibit for consideration by the Tribunal: a fax from Lise Sabourin of the Tribunal to Byron Fitzgerald of the Agency, which contains the exact content of Johnson’s Additional Submissions.

[12] The facts in this case are not in dispute and are as follows:

- On January 3, 2011, Johnson travelled from Jamaica, West Indies to Toronto via Ottawa.
- While her bags were being off-loaded from the Ottawa flight and before they were on-loaded to a connecting flight bound for Toronto, they were inspected by Agency inspectors.
- Inspector 17146 found plant material in the form of onions and/or shallots in the bag marked as belonging to Johnson, during his inspection, conducted in her absence, at the Ottawa airport.
- Inspector 17146 later found Ms. Johnson's bags in the transit area at the Ottawa airport, after Ms. Johnson had passed through Customs and had checked the bags for the flight on to Toronto.
- Inspector 17146 verified the name on the baggage tags on the bags as being indeed "Ms. Mavis Johnson" and then retrieved the Declaration Card E311 (Tab 2 of Report) that Johnson had completed, signed and presented to the Agency's primary inspector when she arrived in Ottawa.
- On her Declaration Card E311 Johnson marked "no" beside the box which states "I am/we are bringing into Canada: meat/meat products; dairy products; fruit; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects."
- Inspector 17146 completed the Notice of Violation YOW-11-001, as well as an incident report, photographed the plant material (onions/shallots) that he found (Tab 8 of the Report) and then destroyed the material, as it is not permitted entry into Canada without a permit, as plant materials of the nature of shallots and onions could be infested with a pest, according to the Automated Import Reference System (AIRS) of the Canadian Food Inspection Agency (Tab 4 of the Report).
- The Notice of Violation YOW-11-001 was placed in one of Johnson's bags, which were then considered delayed bags, as Johnson had already proceeded on her connecting flight to Toronto. The bags were then forwarded to Johnson through the airline which delivered them to her home.

Analysis and Applicable Law

[13] 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.*

[14] 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...*

[15] 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...*

[16] 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*.

[17] 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.*

[18] 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.

[19] 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 Johnson;
- [2] Johnson brought plant materials into Canada;
- [3] plant material of the nature of shallots and onions could be infested with a pest; and
- [4] Johnson did not declare those plant materials to any Agency inspector.

[20] Concerning each of the elements above, the evidence offered by each of the parties supports a finding by this Tribunal that the Agency has proved all of the elements, on the balance of probabilities. There is no dispute that the identity of the alleged violator is Johnson, nor that she had plant materials in her bag. The reference to the AIRS system by the Agency inspector demonstrates to the satisfaction of the Tribunal that the plant material in question could have been infested with a pest. Finally, Johnson's Declaration Card is sufficient proof that she did not declare the plant material when she entered Canada on January 3, 2011. There was no proof offered by Johnson that she ever did declare them.

Defences Available Under the Law

[21] 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.

[22] When an AMP provision has been enacted for a particular violation, as is the case for section 39 of the *Plant Protection Regulations*, Johnson has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that she has raised including “My cousin packed my suitcase ... I was completely unaware that my cousin had placed shallot inside my suitcase when she packed it.” (Additional Submissions, paras. 3 and 5) or “I have never had any plant violations before” (Additional Submissions, para. 6) or “to my knowledge there was no harm done to any human beings, animals or the environment” (Additional Submissions, para. 7). 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 none of Johnson’s actions or statements provide her with a defence that is not excluded by Parliament’s intention expressed in section 18 of the Act.

[23] 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.

[24] 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 some onions and shallots 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 relatively small amount of onions and shallots, the Tribunal must conclude that Johnson committed the alleged violation. Consequently, the Tribunal orders Johnson 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

[25] The Tribunal wishes to inform Ms. Johnson that this violation is not a criminal offence. After five years, she 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 27th day of October, 2011.

Dr. Donald Buckingham, Chairperson