

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Peachey v. Canada (Minister of Agriculture and Agri-Food), 2011 CART 008

Date: 20110510
Docket: RT-1550

Between:

Jon Peachey, doing business as Northern Rockies Bison, Applicant

- and -

Minister of Agriculture and Agri-Food, Respondent

Before: Chairperson Donald Buckingham

In the matter of an application made by the applicant, pursuant to paragraph 13(2)(b) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review by the Tribunal of the Minister's decision dated June 15, 2010 holding that the applicant has violated subsection 138(4) of the *Health of Animals Regulations*.

DECISION

[1] Following a review of the decision made by the Minister of Agriculture and Agri-Food (Minister) on June 15, 2010 and all the submissions by the parties relevant to the violation, the Canada Agricultural Review Tribunal (Tribunal), by order, sets aside the Minister's decision, dismisses the Notice of Violation issued to the applicant, and, as a result, finds that no monetary penalty is payable by the applicant to the respondent.

By written submissions.

REASONS

Alleged incident and issues

[2] The Minister, on June 15, 2010, concluded his review pursuant to subsection 13(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, of the facts pertaining to issuance of the Notice of Violation #0809BC0063 dated May 15, 2009, to the applicant Jon Peachey, doing business as Northern Rockies Bison (Peachey).

[3] The Notice of Violation states that the events which gave rise to its issuance to Peachey by the Canadian Food Inspection Agency (Agency) occurred on February 16, 2008 at or near Beaver Valley, in the province of British Columbia when Peachey is alleged to have continued to transport an animal that was unfit for transport, contrary to subsection 138(4) of the *Health of Animals Regulations*. (see Notice of Violation).

[4] The Minister states in his review decision that “the facts as presented confirm that the violation was committed and the Notice of Violation issued pursuant to section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* is confirmed and remains in effect” and that the monetary penalty assessed in the amount of \$2,000 is due to the Receiver General for Canada (see Notice of Minister’s decision, paragraph 4).

[5] Peachey, by way of a request for review to the Tribunal, has challenged the Minister’s decision and the validity of the Agency’s issuance of the Notice of Violation 0809BC0063 and has not paid the assessed penalty.

[6] The issue raised in this case is whether the Minister’s decision should be confirmed, varied or set aside by the Tribunal given the record now before it and according to the legislation and jurisprudence under which it carries out its mandate.

Procedural history and record of documents filed in the case

[7] Notice of Violation #0809BC0063 dated on May 15, 2009, was issued by the Agency alleging that Peachey, “on or about 08:00 hrs, on the 16th day of February, year of 2008, at Beaver Valley, in the Province or Territory of British Columbia ... committed a violation, namely: Continue to transport an animal that is unfit for transport, contrary to section 138(4) of the *Health of Animals Regulations* which is a violation under 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*.”

[8] Service by the Agency of the above Notice of Violation on Peachey was deemed to have occurred on May 29, 2009. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (Regulations), Peachey's alleged infraction is a serious violation for which the penalty assessed is \$2000.

[9] Subsection 138(4) of the Regulations reads as follows:

...

(4) No railway company or motor carrier shall continue to transport an animal that is injured or becomes ill or otherwise unfit for transport during a journey beyond the nearest suitable place at which it can receive proper care and attention.

[10] Having received the Notice of Violation, Peachey chose to exercise his right of review of the facts of the violation before the Minister by faxing a written submission and request for review (Request for Review to Minister) on June 10, 2009. This documentation was received and acknowledged by the Minister on June 18, 2009.

[11] On July 2, 2009, Peachey provided the Agency with additional submissions (Additional Submissions to Minister) relating to the Notice of Violation and the issues surrounding the events leading up to the issuance of the Notice of Violation.

[12] The Minister issued his review decision and reasons (Decision) on June 15, 2010 and it was transmitted to Peachey by way of a letter from the Agency dated June 28, 2010. In that letter, the Agency informed Peachey that he could request a review of the Minister's decision if he sent a copy of the Notice of Minister's Decision and Reasons within 15 days (must be received by July 23, 2010) of the date he was deemed served with the decision to the Tribunal Registrar (he was deemed served on July 8, 2010) indicating to the Registrar that he wished to have the Tribunal undertake a review of the Minister's decision.

[13] On July 23, 2010, Peachey, through his legal counsel Frank Schober (Schober), filed a request for review and written submissions (Request for Review to Tribunal) to the Tribunal, requesting that the Tribunal review the Minister's decision, pursuant to paragraph 13(2)(b) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

[14] By letter dated July 26, 2010, the Tribunal invited the Agency to file with it a Ministerial report (Report) relating to the violation, no later than August 10, 2010. On August 6, 2010, the Agency sent its Report to the Tribunal; it was received by the Tribunal on August 9, 2010. The Agency indicated to the Tribunal that a copy of the report had been forwarded to Peachey on August 5, 2010. There is no evidence before the Tribunal, however, which suggests that this Report or its contents were provided to Peachey prior to August 2010 as part of the documentation he might have found useful in the preparation and presentation of his case arising from his initial request for review and written submissions to the Minister.

[15] By letter dated August 11, 2010, the Tribunal invited Peachey to make any additional submissions in response to the Agency Report on or before September 10, 2010. Peachey, through his counsel Schober, did file additional submissions (Additional Submissions to Tribunal) to the Tribunal on September 10, 2010 which the Tribunal provided to the Agency on September 13, 2010. No further submissions were received from the parties.

[16] The record before the Tribunal in this case, therefore, consists of the following documents: from the Minister and the Agency -- the Notice of Violation, the Minister's Decision, and the Report; and from Peachey -- his Request for Review to the Minister, his Additional Submissions to the Minister, his Request for Review to the Tribunal and his Additional Submissions to the Tribunal.

Analysis and Applicable Law

[17] In reviewing a Minister's decision, the Tribunal may confirm it, vary it or set it aside (paragraph 14(1)(a) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*). Grounds for varying or setting aside a Minister's decision include an error in the exercise of the Minister's jurisdiction or an error in law, or more specifically that:

1. The powers were exercised in bad faith.
2. The powers were delegated in an inappropriate manner.
3. The powers were exercised without regard for the principles of natural justice or fairness.
4. The powers were exercised for inappropriate purposes.
5. No element of the evidence supports the Minister's decision.
6. The decision was based on irrelevant considerations.
7. An error was committed in the interpretation of the connected or enabling legislation, the principles of common law in general or in the application of legal principles to the facts.

8. A decision is so unreasonable that no reasonable person in the Minister's place would have made such a decision.

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[18] When requested to complete a review of a Minister's decision, the Tribunal must be diligent in examining the record to ascertain whether any of the above defects occurred in the Minister's coming to his decision. If there was no defect, then, even if the decision is not one that the Tribunal would necessarily have rendered, the Tribunal is not at liberty to vary or set aside the Minister's decision for the one that it might have taken in this case.

[19] The Tribunal is convinced, however in this case, that the Minister's decision must be set aside on the basis of ground (5) set out in paragraph 17 above. On the record before the Tribunal, there is not a single element of evidence to support the Minister's decision that "the facts as presented confirm that the violation was committed and the Notice of Violation issued pursuant to section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*", as set out in the Notice of Minister's Decision, paragraph 4, given that the Notice of Violation alleges that the violation occurred "on or about 08:00 hrs, on the 16th day of February, year of 2008, at Beaver Valley, in the Province or Territory of British Columbia". All the evidence provided by the Agency, and accepted by the Minister as the basis for his decision, points to events and activities that happened in 2009. There is no element of the evidence to support a finding by the Minister that any violation by Peachey, under the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, occurred on February 16, 2008.

[20] In his reasons, the Minister reiterates that "the Notice of Violation for which a review has been requested states that on February 16, 2008 at or near Beaver Valley, in the Province of British Columbia, Jon Peachey continued to transport an animal that is unfit for transport, contrary to subsection 138(4) of the *Health of Animals Regulations*." (paragraph 1 of the "Reasons for Minister's Decision). This finding is paraphrased and presented again in the second paragraph in the covering letter which accompanied the Minister's decision, which was sent to Peachey on June 28, 2010. It states "On June 15, 2010, the Minister concluded his review pursuant to subsection 13(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, of the facts pertaining to the Notice of Violation with Penalty. A copy of the Notice of Minister's Decision is enclosed. The facts, as presented, are now confirmed by the Minister that a violation was committed on February 16, 2008, and the Notice of Violation was properly issued to you at Beaver Valley, BC." The only other reference to the date of February 16, 2008 in the entire file is on the front cover of the Report (page 1 of 21) titled "Case Summary" under the heading "Date of Violation: on or about February 16, 2008".

[21] In his reasons, however, the Minister states that “the following are the facts on which I base my findings that the violation was committed: ... on or about February 16, 2009, the applicant arrived at Rodear Meats, in Beaver Valley with a trailer of 16 bisons” (bullet 2 of paragraph 5, page 1 of the Reasons for Minister’s Decision) .

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[22] Moreover, the evidence submitted by the Agency and used by the Minister to support his finding, points to the alleged violation occurring on February 16, 2009 and not in February 2008. This evidence is found in the following documents:

1. The Minister’s Report – Case Summary (page 10 of 21), first heading “February 16, 2009” outlines the events that are alleged to underlie the violation.
2. The Minister’s Report – Case Summary (page 13 of 21), first heading “April 20, 2009” makes reference to transportation of bison on February 16, 2009 in two different entries.
3. The Minister’s Report – Case Summary (page 15 of 21), first heading “Committed Violation” makes reference to the events that are alleged to underlie the violation as occurring “on or about February 16, 2009”.
4. The Minister’s Report – Tab 1 Report of Inspector, date of entries of the Inspector (at bottom of page 1 and top of page 2) is “2009-02-16” with a notation at the end of the report that “This incident occurred between 0745 and 0900 Monday, February 16, 2009. The animals had been loaded at 1000 Sunday, February 15, 2009 in the Fort Nelson, BC area ”.
5. The Minister’s Report – Tab 1 Inspector Non-compliance Report (Short Form), date of occurrence for report (top of the page) is marked as “2009-02-16”, date reported for report (top of the page) is marked as “2009-02-17”.
6. The Minister’s Report – Tab 2 Regional Investigator Report – Complainant Insp. Dana Schofield, date of entries (at middle of page) is “2009-02-16”
7. The Minister’s Report – Tab 6 Photos, third and fourth pages – Livestock Manifest Photos, date of entries (at top of upper photos) is “FEB 16 2009”
8. The Minister’s Report – Tab 8 Notes of Inspector D. Schofield, date of signature (at bottom of page) is “Feb 16/09”

9. The Minister's Report – Tab 9 Witness Interview of Dave Fernie, which was recorded on 2009-04-06 at 1440 hrs by Investigator Rousell (see page 21 of the Case Summary), includes the following question and answer: "On February 16, 2009 were you present at RODEAR MEATS when Mr. Jon Peachey arrived with a trailer of bison?" Witness' answer: "Yes".

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[23] Finally, there is the evidence provided by Peachey himself. At Tab 10 of the Minister's Report, there is a Witness Interview of John [sic] Peachey. The interview report does not indicate the actual time of the interview but it appears to have been completed on 2009-04-20 by Investigator Rousell (see top of page of interview and page 21 of the Case Summary) and contains several prepared questions, two of which, questions 1 and 7, making reference to the date of February 16, 2008. In both cases Peachey's answers to the questions do not refer to any date of the events in question but rather provide substantive details to the questions asked: "15 or 16" to question 1 and "-series of pens in Fort Nelson; - 2 locations – location I loaded didn't have a "squeeze" didn't have the "squeeze "squeeze" – clamps down on the neck to add ear tag." to question 7. With Peachey making no direct comment in his Witness Interview statement as to the date of the occurrence of the events in question, he unequivocally states the date of these events was February 16, 2009 in his Request for Review to the Tribunal. Schedule "A" attached to that Request states that "On February 16, 2009, Jon Peachey (the "Applicant") arrived at the Rodear Meats Slaughter Plant ("Rodear Meats") transporting 16 bison yearlings in a trailer."

[24] The whole AMPs system, including its severity, has been the subject of comment by the Federal Court of Appeal. In the case of *Michel Doyon v. Attorney General of Canada*, 2009 FCA 152, the Court cautions the finder of facts under the system to be "circumspect in managing and analysing the evidence and in analysing the essential elements of the violation" in any alleged AMP violation. At paragraphs 27 and 28, the Court states:

[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.

[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.

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[25] In order to avoid an error of law in the upholding of any Notice of Violation, the Minister must be convinced, on the balance of probabilities, that each of the elements of the alleged violation has been proved by the Agency. Moreover, the legislation is clear that the burden of proof for each element of the violation rests with the respondent, as set out in section 19 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*:

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.

[26] Again quoting from *Doyon*, at paragraph 20:

[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.

[27] One of the key elements of any proceeding where a violation is alleged is proof, on the balance of probabilities, that the person named in the Notice of Violation was the person who committed the alleged violation and that the time and place indicated in the Notice of Violation were, in fact, the time and place when and where the person named in the notice of violation committed it. In the present case, the Minister's decision must be set aside, as there is no evidence on which he could base a decision that Peachey committed a violation of subsection 138(4) of the *Health of Animals Regulations* on February 16, 2008, as set out in Notice of Violation. Whether Peachey might have committed any violation of these Regulations at some other time is not a relevant consideration to these proceedings.

[28] Therefore, by reason that the record reveals no evidence upon which the Minister could have based his finding in his decision of June 15, 2010 that the alleged violation by Peachey occurred on February 16, 2008, the Minister's decision must be set aside as being based on an error of law. As a consequence, the Tribunal orders that the Minister's decision of June 15, 2010 be set aside, that the Notice of Violation issued to the applicant be

dismissed, and, that as a result, no monetary penalty is payable by the applicant to the respondent.

Dated at Ottawa, this 10th day of May, 2011.

Donald Buckingham, Chairperson