

Canada Agricultural  
Review Tribunal



Commission de révision  
agricole du Canada

Citation: Kherrachi v. Canada (CBSA), 2011 CART 25

Date: 20111230  
Docket: CART/CRAC-1556

**Between:**

**Toufik Kherrachi, Applicant**

**- and -**

**Canada Borders Services Agency, Respondent**

[Translation of the official French version]

**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 40 of the *Health of Animals Regulations* alleged by the respondent.

## **DECISION**

**[1] Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable for payment of a penalty in the amount of \$800 to the respondent within thirty (30) after the day on which this decision is served.**

By written submissions only.

## REASONS

### **Alleged incident and issues**

[2] The respondent, the Canada Border Services Agency (Agency), alleges that, on December 2, 2010, at Dorval Airport in Québec, the applicant, Mr. Toufik Kherrachi (Kherrachi), entered Canada in possession of bone-in chicken from France, a country from which it is unlawful to import meat products unless proper documentation is secured for such importation, contrary to section 40 of the *Health of Animals Regulations*.

[3] The Tribunal must determine whether the Agency has established all the elements required to support the impugned Notice of Violation.

### **Procedural history**

[4] Notice of Violation #3961-10-M-0575 dated December 2, 2010, states that on that date, at Dorval in the province of Québec, Kherrachi [TRANSLATION] “committed a violation, namely: importing an animal by-product, specifically meat, without meeting the prescribed requirements, contrary to section 40 [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*.

[5] Section 40 of the *Health of Animals Regulations* reads as follows:

**40.** *No person shall import into Canada an animal by-product, manure or a thing containing an animal by-product or manure except in accordance with this Part.*

[6] The Agency served the Notice of Violation personally on Kherrachi on December 2, 2010. The Notice of Violation informs Kherrachi that the alleged violation is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which the penalty assigned is in the amount of \$800.

[7] By letter dated December 6, 2010, and received by the Tribunal on December 8, 2010, Kherrachi relied upon paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* to request that the Tribunal review the facts of the violation. Tribunal staff then confirmed with Kherrachi by telephone that he wished to proceed with a review by way of written submissions alone. The Tribunal, therefore, conducted its review on the basis of all written submissions presented to the Tribunal by the parties.

[8] Further to a decision by the Tribunal allowing an extension to the deadline for submitting its report, the Agency filed its report (Report) with the Tribunal and with Kherrachi on January 4, 2011.

[9] In a letter dated January 5, 2011, the Tribunal invited Kherrachi to file with it any additional statements in the matter, no later than February 4, 2011. However, the Tribunal received no further written submissions from Kherrachi or the Agency in this matter.

## **Evidence**

[10] The evidence before the Tribunal in this case consists of written submissions from both the Agency (the Notice of Violation and its Report) and from Kherrachi (his request for review).

[11] The Agency, through its Report, presented the following evidence:

- Kherrachi arrived in Canada from France aboard flight TS329, on December 2, 2010. His plane landed at Dorval International Airport (Tab 2 of Agency Report-E311(09) Declaration Card signed by Kherrachi).
- Kherrachi completed and signed an E311 Canada Customs Declaration Card dated December 2, 2010. He answered “no” to the statement: “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.” (Tab 2 of Agency Report-E311(09) Declaration Card signed by Kherrachi).
- Kherrachi proceeded through Canada Customs in Dorval after disembarking from his plane. He completed primary inspection, but was directed through secondary inspection. The officer who conducted the secondary inspection signed a statement, wherein she states that she asked the passenger if the suitcase was his, to which the passenger answered “yes”. The officer also stated that she had asked for the required permits and certificates and none were produced for the meat product, so that product was seized and destroyed. (Tab 7 of Agency Report-CBSA Form 142(05) - Inspector's Non-Compliance Report for Travellers at Points of Entry).
- The meat product found in Kherrachi's luggage was photographed (Tab 6 of Agency Report-Photos) by Agent 17120. She noted that she had found [Translation] “1 Container of bone-in meats. Approx. 0.5 kg ... In a container at the bottom of the carry-on bag” (Tab 7 of Agency Report – CBSA Form 142(05) - Inspector's Non-Compliance Report for Travellers at Points of Entry).
- It is unlawful to import chicken or chicken products from France unless proper documentation is secured for such importation, and Kherrachi presented no such documentation to Agency officials on December 2, 2010, or any time thereafter (Tab 7 of Agency Report-CBSA Form 142(05) - Inspector's Non-Compliance Report for Travellers at Points of Entry, and Tab 10 of Agency Report - Automated Import Reference System (AIRS) report for chicken meat).

[12] Kherrachi stated in his submissions in his request for review that his carry-on luggage contained a piece of bone weighing about 100 grams that was left over from his lunch, not 500 grams as the customs officer alleged. Kherrachi also pointed out that he had recently become a permanent resident of Canada and, therefore, his knowledge of the legislation on foods and prohibited products during travel was limited. Moreover, due to his current financial situation, he is unable to pay the fine.

### **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* (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. In this Act, “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 various infractions against 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 40 of the *Health of Animals Regulations*.

[17] The Act's system of administrative monetary penalties (AMP), as set out by Parliament is, however, very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes the AMP system as follows, at paragraphs 27 and 28:

[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.*

[18] 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.*

[19] When an AMP provision has been enacted for a particular violation, as is the case for section 40 of the *Health of Animals Regulations*, Kherrachi has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that he might raise, such as the fact that he recently became a permanent resident of Canada and therefore his knowledge of the legislation regarding foods and prohibited products during travel was limited or that he misunderstood the E311 Customs Declaration Card, or that he simply forgot to declare or present any food product to the inspector, as is required.

[20] Given Parliament's clear statement on the issue, the Tribunal accepts that none of the statements made by Kherrachi in his request for review would be permitted defences under section 18.

[21] However, the Federal Court of Appeal, in *Doyon*, also pointed 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.*

[22] 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.*

[23] The strictness of the AMP system reasonably must apply to both Kherrachi and the Agency. Therefore, it is incumbent on the Agency to prove, on the balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation.

[24] The Tribunal finds that the Agency has proven every element of the violation set out in the Notice of Violation. The identity of the alleged violator is not in dispute. The Tribunal accepts that Agent 17120 found cooked bone-in chicken in Kherrachi's luggage that he brought from France. Kherrachi had no documentation that would have permitted him to import such an animal by-product.

[25] The Act's AMP system, as set out by Parliament, provides for hard justice to protect Canada's agriculture and food systems from contamination and disease. Still, the Act's fines, in individual cases like the present one, can have a harsh impact on a newcomer to Canada who is actively looking for work and would like to [TRANSLATION] "be involved in Quebec's influence and development" (Kherrachi's words in his request for review). It appears that Kherrachi is asking the Tribunal for the fine to be revoked or annulled in these circumstances, on compassionate and financial ground. Unfortunately, once the elements of the alleged violation have been proved on the balance of probabilities by the Agency, the Tribunal has no power to do anything other than to uphold the Notice of Violation and order that the person pay the penalty as set out in the Notice of Violation.

[26] Agency inspectors are charged with the task of protecting Canadians, the food chain and agricultural production in Canada from risks posed by biological threats to plants, animals and humans. These duties, no doubt, must be exercised responsibly. The Tribunal is aware that the Agency has its own procedure for reviewing travellers' complaints against inspectors, where the actions of inspectors become excessive towards the travelling public. Whether this was such a case is not for this Tribunal to determine. Moreover, the Tribunal's jurisdiction to review notices of violation comes from its empowering legislation. According to these laws, the Tribunal does not have the mandate, nor the jurisdiction, to cancel, annul or dismiss a notice of violation for reasons relating solely to the conduct of Agency inspectors towards an applicant or on compassionate grounds.

[27] The Tribunal therefore finds, following a review of all written submissions of the parties, that Kherrachi committed the violation and is liable for payment of the penalty in the amount of \$800 to the respondent within thirty (30) days after the day on which this decision is served.

[28] The Tribunal wishes to point out to Kherrachi that this is not a criminal or federal offence but a monetary violation, and that he has the right to apply after 5 years to have the notation of this violation removed from the Minister's records, in accordance with subsection 23(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, which states as follows:

*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 30<sup>th</sup> day of December, 2011.

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Dr. Donald Buckingham, Chairperson