

Citation: Bacalu v. Canada (CBSA), 2011 CART 23

Date: 20111214  
Docket: CART/CRAC-1579

**Between:**

**Stelian Bacalu, 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 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 the penalty in the amount of \$800.00 to the respondent within thirty (30) days 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 May 17, 2011, at Dorval, Quebec, the applicant, Mr. Bacalu (Bacalu), imported meat products into Canada from Moldova, 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] Section 40 of the *Health of Animals Regulations* states 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.*

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

### Procedural history

[5] Notice of Violation #3961-11-M-0162 dated May 17, 2011, alleges that on that date at Dorval, Quebec, Bacalu “committed a violation, namely: import an animal by-product, to wit: 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*.

[6] The Agency served the Notice of Violation personally on Bacalu on May 17, 2011. The Notice of Violation indicates to Bacalu 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 \$800.00.

[7] Bacalu’s request for review of the facts of the violation was filed with the Tribunal by facsimile on June 8, 2011, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. Tribunal staff confirmed by email with Bacalu on June 9, 2011, that he wished to proceed with a review by way of written submissions alone. The Tribunal has, therefore, conducted its review on the basis of all written submissions presented to the Tribunal by the parties.

[8] The Agency sent its report concerning the alleged violation (Report) on June 23, 2011, to the Tribunal, which received it that same day, and to Bacalu.

[9] On June 27, 2011, the Tribunal invited Bacalu to respond to the Report and to file any additional statements in the matter, no later than July 25, 2011.

[10] In response to the Tribunal's invitation, Bacalu filed a package of documents (Additional Submission) outlining his position with regards to the Report, which pointed out discrepancies, as well as filing a letter with photographs attached from a commercial grocery store in Moldova called TVIM-SDL. This material was received by the Tribunal on July 24, 2011 and forms part of the evidence of this case. No further materials were filed by either party in this proceeding.

## **Evidence**

[11] 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 Bacalu (his request for review and Additional Submission).

[12] This is a case in which the parties agree on very little with respect to the facts of what happened on the day of the alleged violation, May 17, 2011. The evidence, as presented by the Agency, is set out immediately below followed by the evidence, as presented by Bacalu.

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

- Bacalu returned to Canada from Moldova (via Munich) on flight LH474 on May 17, 2011, landing at Pierre-Elliott Trudeau International Airport in Montreal (Tabs 1 and 2 of Agency Report).
- Bacalu completed and signed a Canada Customs Declaration Card E311 dated May 17, 2011 (Tab 2 of Report). Bacalu checked "No" beside the following 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." He also declared goods worth \$50 Cdn.
- While in the baggage area, Bacalu was approached by Agency dog handler Officer #17752 and an agricultural products dog named "Bailey." Bailey is trained to detect meat/meat products, apples, plums, roots/bulbs, and soil. Officer #17752 made notations on Bacalu's E311 card and referred Bacalu to secondary inspection.
- At secondary inspection, Secondary Line Inspector #19228 reviewed Bacalu's E311 card and asked if he had been approached by a detector dog. Bacalu signaled that he had and explained that the dog must have detected a broken jar of raspberry jam in his luggage. After Inspector #19228 told him that dogs are not trained to detect jam, Bacalu claimed he had no other food in his luggage. However,

opening his luggage, Inspector #19228 found: a broken jar of jam, cheese, a package of fish, and a package of 1.1 kg of meat encased in fat (as shown in the photo found at Tab 7 of Report). Inspector #19228 states that Bacalu called the meat “bacon” and claimed his wife had packed his bags and, therefore, he had no idea the meat was in his bags.

- As Bacalu was adamantly denying that he knew he had meat in his bag, a further identification of the meat was requested. Agency Superintendent #17738, an agriculture specialist, was consulted to identify the product and identified the product as meat encased in fat. Inspector #19228 relied on Agency Superintendent #17738’s agricultural knowledge and did not consult further sources of identification.

- As the product had been identified as meat, Bacalu was asked to present proper documentation, which would permit the import of the meat from Moldova. Bacalu presented no such documentation to Agency officials on May 17, 2011, or any time thereafter. As a result, Inspector #19228 issued Notice of Violation # 3961-11-M-0162 and assessed an \$800.00 penalty to Bacalu.

- In her Inspector’s Non Compliance Report for Travellers at Points of Entry (Tab 6 of the Report), Inspector #19228 recorded that Bacalu claimed during inspection that he knew that food products other than the meat were in his bag and did not declare them. Bacalu needed to make a connecting flight to Toronto and wanted to get through Customs more quickly and accordingly did not declare any of the food in his bag.

[14] Bacalu’s submissions were strikingly different from the Agency’s Report. In his request for review, Bacalu corroborated the Agency’s assertions that he was on flight LH474 from Moldova (via Munich) and that there was raspberry jam in his bag. There the similarity in evidence ended. Through his request for review, Bacalu presented the following evidence:

- He arrived at Pierre-Elliott Trudeau International Airport on May 17, 2011, and was approached by an officer who made notes on the Customs declaration card he had completed.

- Upon reaching secondary inspection, Bacalu asked the inspector for clarification on his E311 card as he was unsure if he needed to declare fish products. The inspector went through his luggage and found a small bag of smoke fish (which was allowed) and a vacuum-sealed package containing white fatty fish fillets, which were identified as bacon.

- He contended that the customs officials did not correctly identify the goods in question and, by not listening to his explanations, may have committed an infraction against the *Canadian Charter of Rights and Freedoms*.

[15] Bacalu submitted additional evidence in his Additional Submission to the Tribunal after reading the Agency's Report. In his subsequent submissions, Bacalu provided the following distinctions and clarifications:

- He denied that he was ever approached by a dog in the baggage area. He maintained that he was sent to secondary inspection by an official who was not accompanied by a dog. When Inspector #19228 asked him if he was approached by a dog, he did not affirmatively say that he had; rather, he said that if he was searched by a dog, it was perhaps due to the broken bottle of jam in his bag.
- He stated that he also threw away the bottle of jam immediately after claiming his bag and it was not in his bag at secondary inspection.
- He never called the package "bacon."
- He had a small piece of cheese in his bag that his wife had given to him as a snack for his trip.
- The Agency Report incorrectly states that inspection officials used his driver's license to identify him when it was clear from the Report that they used his Ontario health card.
- He insists that Inspector #19228 never made him aware of his recourse options and asked repeatedly how he was going to pay his fine.

[16] Bacalu also provided the Tribunal with a letter with photographs attached from a commercial grocery store in Moldova called TVIM-SDL. The letter from TVIM-SDL was penned by the Store Manager, Tamara Strajescu, and dated July 18, 2011. In the letter, the store manager states that she "would like to confirm that the product sold to Mrs. Bacalu on 15<sup>th</sup> of May 2011 is in fact a sea food product (Atlantic whitefish fillet with black pepper, paprika and other herbs and spices) and does not contain any meat or product of animal origin. The accuracy of my statement is based on the purchase receipt issued by our store. I'm also attaching some pictures from our sea products shelves that feature the whitefish fillet mentioned above. Please note that the red color of the package is caused by paprika and other spices."

### **Analysis and Applicable Law**

[17] 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.*

[18] 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;*

[19] 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...*

[20] 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 40 of the *Health of Animals Regulations*.

[21] The Act's system of administrative 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 describes the AMP system as follow, 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.*

[22] 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.*

[23] When an AMP provision has been enacted for a particular violation, as is the case for section 40 of the *Health of Animals Regulations*, Bacalu 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 he misunderstood the Customs Declaration Card E311, his wife packed the meat in his luggage (with or without his knowledge), or that he simply forgot to declare or present any meat product to the inspector, as is required.

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

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

[26] 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.*

[27] The strictness of the AMP system reasonably must apply to both Bacalu 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.

[28] There is no doubt that with such a body of conflicting written evidence provided by the parties, this case would have been one where an oral hearing would have permitted a more fulsome assessment of the evidence and the credibility of the witnesses tendering such evidence. As it is, the Tribunal must consider all the written evidence before it to determine whether it is sufficient to establish a finding that the Agency has proven, on the balance of probabilities, all the elements of the alleged violation. There can be no doubt concerning the identity of the alleged violator. Bacalu was the individual who entered Canada on May 17, 2011 and it was he who had certain products in his bags that were inspected by Customs inspectors. The element which the Agency must prove to the satisfaction of the Tribunal to uphold the alleged violation is that Bacalu had a meat product in his bags. Given the divergence of evidence presented by the Agency and Bacalu on this point, the Tribunal will have to accept one party's evidence and reject the other's, a finding which, in part, will rely on assessing the reliability of evidence offered.

[29] After considering the evidence of both parties, the Tribunal finds that the Agency's evidence is the most reliable in this case and, when considered in its ensemble, establishes on a balance of probabilities that Bacalu's bags on May 17, 2011 when inspected at the Dorval airport did contain undeclared meat or meat products. The Tribunal finds as fact that a Customs dog, Bailey, signalled to its handler that Bacalu's bag contained products that it was trained to detect, which included meat and meat products. The evidence of the Agency, including the statement by Inspector #19228 in her Inspector's Non Compliance Report (Tab 6 of Report) reported that Bacalu was sent to secondary inspection because of the detector dog. Both parties agree that Bacalu's E311 card (Tab 2 of the Report) had marks on it from a preliminary inspector, and the Tribunal accepts the Agency's explanation that where dogs search luggage and detect a suspect product, the dog-handling inspector marks the passenger's E311 card with a special notation, such that the passenger will have to go to secondary inspection. Both parties agree that, when Bacalu arrived at secondary inspection, Inspector #19228 saw the notations and asked Bacalu if he was searched by a detector dog. If the marks automatically trigger a secondary inspector to ask if a dog searched a bag, it is very reasonable to infer that this was the Agency procedure that was followed on May 17, 2011, and that it is more likely than not that Bailey detected meat rather than fish in Bacalu's bag.

[30] However, it is not just the dog upon which the Tribunal relies for its factual finding. The food product found in Bacalu's bags that is at the heart of this case was identified by two Customs inspectors at two different times as "meat". At secondary inspection, Inspector #19228 described the product she found in Bacalu's bag as meat or meat encased in fat. Lastly, Agency Supervisor #17738, an agricultural specialist, when asked to identify the product by Inspector #19228, described it as "meat" or "meat encased in fat".



[31] Bacalu maintains that the product in question was fish and he has secured evidence from a store in Moldava to attest to the fact that it sold the product to his wife on May 15, 2011. The Tribunal is unable to attribute a great amount of weight to the Moldavian store's evidence. There was no mention in Bacalu's original request for review of the place of purchase of the product or that it had been purchased by Bacalu's wife. Moreover, the Moldavian store refers to a "purchase receipt" in its July 18, 2011 letter, which would have lent more reliability to its claims, but no such "purchase receipt" is attached to the letter. Given the non-contemporaneous references from Bacalu to prove that the goods were in fact fish, the reliability of this evidence and consequently the weight to be given to such evidence is not sufficient to displace the contrary evidence offered by the Agency from a dog and two inspectors. Bacalu rightly points out that the Agency report did contain some inaccuracies (such as the Agency misidentifying in one place the photo ID used to determine his identity), but such inaccuracies are not sufficient, in the view of the Tribunal, to negate the essential finding that the product in question was meat and not fish as he alleges.

[32] The Tribunal therefore finds that the Agency has proven every element of the violation set out in the Notice of Violation. Bacalu's identity as the alleged violator is not in dispute. Throughout the inspection process, it was never disputed that the bag containing the goods in question belonged to Bacalu. The package in question was, on the balance of probabilities, meat or meat encased in fat and Bacalu did not have the proper import permits to bring the product into Canada. The Tribunal also finds that the facts as presented do not suggest that any section of the *Canadian Charter of Rights and Freedoms* can be successfully raised by Bacalu as a defence to the present Notice of Violation.

[33] 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.

[34] The Tribunal therefore finds, following a review of all written submissions of the parties, that Bacalu committed the violation and is liable for payment of the penalty in the amount of \$800.00 to the respondent within thirty (30) days after the day on which this decision is served.

[35] The Tribunal wishes to point out to Mr. Bacalu that this is not a criminal or a 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 14<sup>th</sup> day of December, 2011.

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Dr. Donald Buckingham, Chairperson