

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Zhou v. Canada (CBSA), 2010 CART 021

Date: 20101014
Docket: RTA-60384;
RT-1549

Between:

Peng Zhou, 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 paragraph 34(2)(a) 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 \$200.00 to the respondent within thirty (30) days after the day on which this decision is served.

By written submissions only.

Canada

REASONS

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that on June 9, 2010, at the Vancouver International Airport in Vancouver, British Columbia, the applicant, Mr. Zhou (Zhou), imported unfertilized eggs into Canada from China, a country which is not designated free from Newcastle disease and avian influenza, contrary to paragraph 34(2)(a) 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.

Record and procedural history

[4] Notice of Violation no. YVR006681 dated June 9, 2010, alleges that on that date at the Vancouver International Airport in Vancouver, British Columbia, Zhou “committed a violation, namely: import unfertilized eggs from a country that is not designated free from Newcastle disease and avian influenza, contrary to section 34(2)(a) 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 Monetary Administrative Penalties Regulations*”.

[5] Subsections 34(2) and (3) of the *Health of Animals Regulations* state as follows:

34. ... (2) *Subject to subsection (3), no person shall import unfertilized bird eggs or egg products into Canada from a country other than the United States or from a part of such a country, unless*

(a) the country of origin or part of such a country is designated as free of avian pneumoencephalitis (Newcastle disease) and fowl plague pursuant to section 7;

(b) the person produces a certificate of origin signed by an official of the government of the country of origin that shows that the country of origin or part of such a country is the designated country or part thereof referred to in paragraph (a); and

(c) the eggs are packed in containers that are clean and free from dirt and residue of eggs.

(3) Paragraph (2)(a) does not apply to eggs imported into Canada if they are transported under seal of an inspector direct from the place of entry to a registered processed egg station approved by the Minister.

[6] The Agency served the Notice of Violation personally on Zhou on June 9, 2010. The Notice of Violation indicates to Zhou 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 \$200.00.

[7] By letter dated June 21, 2010, and received by the Tribunal June 25, 2010, Zhou filed his request to the Tribunal for a review of the facts of the violation, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. Tribunal staff confirmed, by telephone the same day, that Zhou 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] On July 12, 2010, the Agency requested an extension to file its report (Report) concerning the Notice of Violation to Zhou. On July 16, 2010, Zhou provided written reasons why he opposed the extension. On July 16, 2010, the Tribunal ordered that the Agency provide its Report to the Tribunal and to Zhou on or before July 27, 2010. On July 27, 2010, the Agency filed its Report with the Tribunal and with Zhou.

[9] In a letter dated July 28, 2010 the Tribunal invited Zhou to file with it any additional statements in the matter, no later than August 27, 2010. Zhou took this opportunity to file additional materials which the Tribunal received on August 30, 2010.

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 Zhou (his request for review, his written comments opposing the Agency's request for an extension to file its Report and his additional submissions of August 30, 2010).

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

- Zhou flew from China to Canada, landing in Vancouver in the early afternoon on June 9, 2010 (travel itinerary of Zhou at Tab 4 of Agency Report).
- Zhou completed a Canada Customs Declaration Card E311 dated June 9, 2010, and signed it. The box "No" was checked 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" (E311(09) Declaration Card signed by Zhou at Tab 2 of Agency Report).

- Zhou proceeded through Canada Customs in Vancouver after he disembarked from his plane. Zhou completed primary inspection but before secondary inspection a sniffer dog detected that his bags contained products that would require secondary inspection. (Inspector's non-Compliance Report for Travellers at Points of Entry CBSA Form 142(05) at Tab 6 of Agency Report).
- Agent 10534, at secondary inspection asked Zhou if he owned the bags in question and he responded that he did. Agent 10534 then inspected the bags and found seven (7) packages of eggs in Zhou's bags (Inspector's non-Compliance Report for Travellers at Points of Entry CBSA Form 142(05) at Tab 6 of Agency Report; Record of confiscated products form BSF 156 at Tab 5 of Agency Report).
- The eggs found in Zhou's bags were photographed (Photos at Tab 7 of the Agency Report) and determined by Agent 10534 to be from China.
- It is unlawful to import eggs from China as this country is not a country listed as being free of avian diseases (Automated Import Reference System (AIRS) report on importation of eggs into Canada at Tab 9 of the Agency Report).

[12] Zhou stated in his submissions (his request for review, his written reasons for opposing the Agency's request for an extension for filing its Report and in his additional submissions filed August 30, 2010) that during the inspection process he suffered treatment by Agency officials that was "discriminatory, insulting, and unprofessional" and that the decision to give him a monetary penalty was "based upon personal prejudice" (request for review). Zhou also stated that "During the investigation, she [the Agency official] did not respect me as a person. She was using discriminatory, insulting language and gave me a harsh penalty". (written reasons opposing extension request from Agency). Finally, Zhou takes issue with the fact that the Agency official attributed words to him that he did not say ("I am not so scared") in her report at Tab 6 of the Agency Report. Zhou also noted that the inspector interrupted him frequently and in a disrespectful way during the investigation. Zhou states that his mother packed his luggage and while he told her not to pack him any meat, "she may have thought processed and well-packed snacks were ok. My mistake is I did not check thoroughly" (additional submissions of August 30, 2010).

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 paragraph 34(2)(a) 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 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.

[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.

(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.

[19] When an AMP provision has been enacted for a particular violation, as is the case for paragraph 34(2)(a) of the *Health of Animals Regulations*, Zhou 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 Canada Customs Declaration Card E311, that his mother packed the eggs in his luggage 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 these statements by Zhou would be permitted defences under section 18.

[21] 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.

[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 Zhou 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 the agent asked Zhou if the bags in which the eggs were found were his and he responded that they were. Agent 10534 found the seven packages of eggs in Zhou's bags which had come with him from China. China is not a country from which eggs are permitted to be imported into Canada.

[25] The Tribunal did question the evidentiary weight to attribute to the Inspector's Non-Compliance Report for Travellers at Points of Entry CBSA Form 142(05) at Tab 6 of Agency Report as it was unsigned. Given that the information it contained was corroborated by other evidence in the case such as the BSF 156 Form which was signed by Agent 10534, the Tribunal finds that the Agency has proved, on the balance of probabilities, that Zhou imported eggs from China, a country which is not free from Newcastle disease and avian influenza and hence, a country from which eggs are not permitted to be imported into Canada.

[26] The Tribunal will, however, address Zhou's concerns about his alleged mistreatment by Agent 10534. Can the actions taken by Agency agents against Zhou "contaminate or negate" the Notice of Violation in question? According to the evidence given by Zhou, the secondary inspection took place in a climate of discrimination and unprofessional conduct on the part of Agency inspector.

[27] 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 traveller complaints against inspectors, where the actions of inspectors become excessive towards the travelling public.

[28] On the other hand, 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.

[29] The Tribunal therefore finds, following a review of all written submissions of the parties, that Zhou committed the violation and is liable for payment of the penalty in the amount of \$200.00 to the respondent within thirty (30) days after the day on which this decision is served.

[30] The Tribunal wishes to point out to Mr. Zhou 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 14th day of October, 2010.

Dr. Donald Buckingham, Chairperson