

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Tovstiuk v. Canada (Minister of Agriculture and Agri-Food), 2011 CART 004

Date: 20110302
Docket: RTA-60393;
RT-1554

Between:

Ihor Tovstiuk, 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 September 15, 2010 holding that the applicant has violated section 40 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 September 15, 2010 and all the submissions by the parties relevant to the violation, the Canada Agricultural Review Tribunal (Tribunal), by order, confirms the Minister's decision, and orders the applicant to pay the Canada Border Services Agency (Agency) the monetary penalty of \$200 within 30 days of notification of this decision.

By written submissions.

REASONS

Alleged incident and issues

[2] The Minister confirmed that the applicant Ihor Tovstiuk (Tovstiuk) on November 23, 2009, at the Calgary International Airport in Calgary, Alberta, imported, without declaring and without proper importation documentation, five sausages weighing in total about four kilograms, contrary to section 40 of the *Health of Animals Regulations* and was thus validly issued a Notice of Violation by the Agency with a penalty levied in the amount of \$200.

[3] Tovstiuk challenged the Agency's issuance of the Notice of Violation 09-YYC-049 and argued before the Minister that the Agency improperly exercised its discretion in failing to issue him a Notice of Violation with Warning rather than a Notice of Violation with Penalty in the amount of \$200.

[4] In his submission before the Minister and also now before the Tribunal, Tovstiuk does not dispute that he imported the sausage without declaring the meat and without proper importation documentation, in violation of section 40 of the *Health of Animals Regulations*.

[5] The Minister's decision maintained the enforcement action of the Agency with a penalty in the amount of \$200 and therein stated that he, the Minister, had no discretion to change the nature of the sanction from a penalty to a warning. Given this result, Tovstiuk requested that the Tribunal review the Minister's decision.

[6] The issue raised in this case is whether Tovstiuk presents sufficient evidence and argument for the Tribunal to modify or cancel the Minister's decision, either as a result of an error in the exercise of the Minister's jurisdiction or as a result of an error in law.

Record and procedural history

[7] Notice of Violation 09-YYC-049, dated November 23, 2009, issued by the Agency, alleged that Tovstiuk, around 16:15 on November 23, 2009 in Calgary, Alberta, "committed a violation, namely You Did: import an animal by-product to wit: meat, without meeting the prescribed requirements, contrary to: section 40 of the *Health of Animals Regulations*", which 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*.

[8] This violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* is a serious violation for which the penalty amount was set at \$200.

[9] 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.*

[10] On December 2, 2009, Tovstiuk requested that the Minister review the facts of the violation alleged by the Agency.

[11] On September 15, 2010, the Minister rendered his decision and the enforcement action taken by the Agency was upheld under subsection 13(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

[12] The Agency attempted to provide Tovstiuk with a copy of the Minister's decision, but it was sent to the wrong address on September 16, 2010. A copy of the decision was resent to the correct address of Tovstiuk on October 25, 2010.

[13] By letter dated October 28, 2010, and received by the Tribunal on November 5, 2010, Tovstiuk requested 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] On November 23, 2010, the Agency sent Tovstiuk and the Tribunal its report (Report) concerning the Notice of Violation and its arguments supporting the validity of the Minister's decision.

[15] In a letter dated November 24, 2010, the Tribunal informed Tovstiuk that, if he wished to file any additional submissions in the case, he must do so no later than December 24, 2010. On December 15, 2010, the Tribunal did receive additional written submissions from Tovstiuk which the Tribunal provided to the Agency. On December 22, 2010, the Agency also provided additional written submissions to the Tribunal, and to Tovstiuk.

Evidence

[16] The evidence before the Tribunal in this case consists of written submissions from both the Agency (the Notice of Violation, the Minister's decision, the Report and its additional submissions) and from Tovstiuk (his request for review and his additional submissions).

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

- Tovstiuk flew from the Ukraine to Canada, landing in Calgary in the afternoon of November 23, 2009.
- Tovstiuk completed a Canada Customs Declaration Card E311, dated it November 23, 2009 and signed it. He indicated on that Card that he arrived in Calgary from a country other than the United States on Air Canada flight 8766, on November 23, 2009. He answered "no" to all the questions on the E311 Customs Declaration Card, including the one stating that he was not bringing into Canada any "meat/meat products; dairy products; fruits; vegetables; seeds, nuts; plants and animals, or their parts/products; cut flowers; soil; wood/wood products; birds, insects".
- Inspectors of the Agency that day determined that Tovstiuk would be required to go to a secondary inspection to verify his declaration. This secondary inspection revealed the presence of meat in his luggage, resulting in the Notice of Violation.

[18] Tovstiuk, in his submission to the Tribunal dated December 9, 2010 (received on December 15, 2010), states that he did bring meat into Canada without declaring it, but that "In my layman's perspective, it only makes sense to issue a warning to the one who committed the violation first time. And this is all I am asking for: to change the penalty from 'Notice of Violation With Penalty' to 'Notice of Violation With Warning'".

Analysis and Applicable Law

[19] In reviewing the Minister's decision, the Tribunal cannot change or cancel the decision unless there was an error in exercise of the Minister's jurisdiction or there was an error in law. The following are ground that could lead the Tribunal to change or cancel the Minister's decision:

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.

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

[20] The Tribunal must examine, therefore, if the Minister's decision was in error or unreasonable under the circumstances. If it was not in error or unreasonable, then, even if the decision is not one that the Tribunal would necessarily have rendered, the Tribunal is not at liberty to replace the Minister's decision for the one that it might have taken in this case.

[21] The Agency, on page 11 of its Report, provides the following evidence to support the reasonableness of the Minister's decision: Tovstiuk did not truthfully answer the questions asked by the agents as part of their duties; Tovstiuk did not declare any animal by-products on his E311 Customs Declaration Card, neither orally to the primary inspector, nor to the secondary inspector; Tovstiuk did not present for inspection the products he had in his baggage; and Tovstiuk had in his possession no certificate or permit for importing these products into Canada.

[22] The Tribunal is satisfied that the evidence presented in this case is sufficient to support the Minister's decision. His decision is reasonable under the circumstances.

[23] In his submission before the Minister, and also now before the Tribunal, Tovstiuk does not dispute that he imported the sausage without declaring the meat and without proper importation documentation, in violation of section 40 of the *Health of Animals Regulations*. He simply disputes that he was given a penalty with the Notice of Violation rather than a warning only with the Notice of Violation. The choice of whether to give a Notice of Violation with Penalty or a Notice of Violation with Warning is wholly within the discretion of the Agency issuing the Notice. There are likely a number of factors that affect the Agency's choice in exercising that discretion. As there is no evidence at all on the record that this discretion was inappropriately exercised by the Agency at the time the Notice of Violation was issued, the Minister rightly determined that he has no power to re-evaluate or overrule the discretion exercised by the Agency in the issuance of the Notice of Violation with Penalty to Tovstiuk. Given the evidence, the Tribunal does not have any basis to overturn the Minister's decision on this point.

[24] In his decision, the Minister concluded that the failure to declare the meat and its unauthorized importation is a violation under the *Health of Animals Regulations*. The Tribunal finds it is reasonable to conclude that four kilograms of meat found in Tovstiuk's suitcases

correspond to a category clearly listed on the E311 Customs Declaration Card. It is mandatory to declare such meat at the point of entry. That did not happen and the inspection revealed Tovstiuk had meat in his luggage and no authorization to import it. Faced with this evidence, the Tribunal concludes that the Minister's decision is reasonable that the elements of the violation were established.

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[25] Therefore, the Tribunal orders Tovstiuk to pay the \$200 penalty to the Agency within 30 days of receiving notification of this decision.

[26] The Tribunal wishes to inform Mr. Tovstiuk that this violation is not a criminal offence. After five years, he 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 2nd day of March 2011.

Donald Buckingham, Chairperson