

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Boukadida v. Canada (CBSA), 2010 CART 9

Date: 20100331
Docket: RTA-60372;
RT-1526

Between:

Marouane Boukadida, Applicant

- and -

Canada Border Services Agency, Respondent

[Translation of the official French version]

Before: Chairperson Donald Buckingham

In the matter of an application for a review of the facts of a violation of section 39 of the *Plant Protection Regulations*, alleged by the respondent, and requested by the applicant pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

DECISION

After reviewing all written submissions and all submissions made at the oral hearing, the Canada Agricultural Review Tribunal (“the Tribunal”) finds that the applicant did commit a violation and orders the applicant to pay the monetary penalty of \$200 to the respondent within 30 days of notification of this decision.

The hearing was held in Montreal, QC,
on January 27, 2010.

REASONS

Alleged Incident and Issues Raised in the Case

[2] The respondent alleges that on 28 September 2009, Mr. Boukadida, at the Pierre-Elliott-Trudeau International Airport in Dorval, Quebec, imported an apple without declaring it, in violation of section 39 of the *Plant Protection Regulations*.

[3] The issues raised in this case are as follows:

- Did the respondent prove all the elements required to support the Notice of Violation in question?
- If so, did the actions taken by the respondent's agents against Mr. Boukadida "contaminate or negate" the Notice of Violation in question?

The Record and Pertinent Aspects of the Procedural History of the Case

[4] Notice of Violation #3961-09-M-0527, dated 28 September 2009, alleges that around 4:00 p.m. on 28 September 2009 in Dorval, in the province of Quebec, Mr. Boukadida "committed a violation, namely the failure to declare an apple, contrary to section 39 of the *Plant Protection 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*.

[5] The respondent issued the Notice of Violation to Mr. Boukadida on 28 September 2009. This violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* is a serious violation for which the penalty amount has been set at \$200.

[6] Section 39 of the *Plant Protection Regulations* reads as follows:

39. *Every person shall, at the time of importation into Canada of any thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest, declare that thing to an inspector or customs officer at a place of entry set out in subsection 40(1).*

[7] In his letter dated 4 October 2009, Mr. Boukadida asked that this case be reviewed by the Tribunal in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. His only written observation was included in this letter. He wrote: [TRANSLATION] "In fact, I believe that the penalty issued by inspector 17739 was excessive, given the facts."

[8] Mr. Boukadida also confirmed with the Tribunal that he wanted a hearing, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*. The hearing took place in Montréal, in the province of Quebec, on 27 January 2010. Mr. Boukadida represented himself while the respondent was represented by Mr. Jean-Marc Dupuis of the Canada Border Services Agency ("the Agency").

[9] On 13 November 2009, the Agency sent its report (“Report”) regarding this Notice of Violation to Mr. Boukadida and the Tribunal.

[10] In a letter dated 16 November 2009, the Tribunal asked Mr. Boukadida to present any additional submissions in this case no later than 16 December 2009. The Tribunal did not receive any such submissions.

The Evidence

[11] The Agency’s Report contained the following evidence and comments: a summary of the case, identification of the alleged violator (Tab 5); a copy of the Notice of Violation completed and signed by agent 17739 on 28 September 2009 (Tab 6); a copy of the E311 Customs Declaration Card signed by Mr. Boukadida (Tab 2); a copy of form BSF 156 “Tag for intercepted item” completed by agent 17739 on 28 September 2009 indicating that the incident involved an apple (Tab 4); a photo, signed by agent 17739 and dated 28 September 2009, of an apple beside a backpack (Tab 7); and an “Inspector’s Non Compliance Report for Travellers at Points of Entry”, unsigned (Tab 8).

[12] Mr. Boukadida is not challenging the fact he completed and signed the E311 Customs Declaration Card (Tab 2). Furthermore, the answer “no” is clearly indicated on that card for the question: “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.”

[13] The written evidence provided by the Agency was clear and convincing. During the secondary inspection of Mr. Boukadida’s luggage, the agent found an apple in his backpack. Mr. Boukadida’s evidence did not deny this fact. Mr. Boukadida also added that not only was there an apple in his backpack that he forgot to declare, there was also a banana and an orange that he forgot to declare as well.

Analysis and Applicable Law

[14] The Tribunal’s mandate is to rule on the validity of the agriculture and agri-food administrative monetary penalties established by the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (“the Act”). The purpose of the Act is stated 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.

[15] The scope of the Administrative Monetary Penalty (AMP) System stipulated in the Act, in the sense intended by the legislator is very narrow. In *Doyon v. Canada (Attorney General)*, 2009 FCA 152, the Federal Court of Appeal described the AMP system as follows, in 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.

[16] The Act contains no *de minimus* legislative provision and does not allow offenders to use as a defence the fact they exercised due diligence to prevent the violation. Section 18 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* states the following:

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.

[17] When an AMP is established for a violation of a specific provision, the applicant has very limited manoeuvring room to establish a defence. In this case, section 18 offers Mr. Boukadida very little means of exculpation. Given the clear position of the legislator on this issue, the Tribunal recognizes that it cannot negate the Notice of Violation due to the fact Mr. Boukadida forgot to declare his apple. Such a response cannot by itself be considered a means of defence authorized by section 18 and could not exonerate Mr. Boukadida.

[18] However, the Federal Court of Appeal also pointed out in *Doyon* that the Act imposes a heavy burden on the respondent. In paragraph 20, the Court says:

[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.

[19] Section 19 of the *Act* states the following:

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.*

[20] The narrow scope of the AMP system must be applied in a reasonable manner to both the respondent and the applicant. Consequently, the respondent must prove all the elements of the violation, on the balance of probabilities. The Tribunal has concluded that, on the balance of probabilities, the Agency in this case has proven all the essential elements of the violation. The identity of the alleged violator is not being challenged. Mr. Boukadida declared nothing on his E311 Customs Declaration Card. Inspector 17739, during the secondary inspection, found an apple in Mr. Boukadida's backpack.

[21] One must therefore examine the second issue: can the actions taken by Agency agents against Mr. Boukadida "contaminate or negate" the Notice of Violation in question? During the hearing, the Agency did not present as a witness the inspector who completed the secondary inspection of Mr. Boukadida's luggage. But according to the evidence given by Mr. Boukadida at the hearing, the secondary inspection took place in a climate of aggressiveness, excess and overzealousness on the part of Agency inspectors. He also stated that the inspection was unduly prolonged by the inspector.

[22] Agency inspectors are charged with the task of protecting Canadians, the food chain and agricultural production in Canada from risks posed by parasites. If the actions of inspectors become excessive towards their clientele, the Agency has its own procedure for reviewing traveller complaints against inspectors.

[23] The Tribunal's jurisdiction comes from its empowering legislation. According to these laws, the Tribunal does not have the mandate, nor the jurisdiction, to cancel a Notice of Violation for reasons relating to the conduct of Agency inspectors towards an applicant.

[24] Of course, a monetary penalty of \$200 for an apple given to Mr. Boukadida by a hotel employee in Paris may seem excessive, but the *Act* is clear. In this case, all the elements of the violation have been established. Even for a single apple, the Tribunal must conclude that Mr. Boukadida committed the said violation. Consequently, the Tribunal orders Mr. Boukadida to pay the Agency the \$200 penalty within 30 days of receiving notification of this decision.

[25] Otherwise, the Tribunal informs Mr. Boukadida that this violation is not a criminal act. After five years, he will have the right to ask the Minister to have this violation stricken from his file, 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 31st day of March 2010.

Donald Buckingham, Chairperson