

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Wu v. Canada (CBSA), 2010 CART 13

Date: 20100716
Docket: RTA-60376;
RT-1529

Between:

Xiaohua Wu, Applicant

- and -

Canada Border Services Agency, Respondent

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 paragraph 34(2)(a) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not commit the violation and is not liable for the payment of the penalty.

Hearing held in Ottawa, Ontario,
May 3, 2010.

Canada

REASONS

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that on September 8, 2009, at the Macdonald-Cartier International Airport in Ottawa, Ontario, the applicant, Mr. Wu, imported unfertilized eggs into Canada from China, a country from which it is unlawful to import eggs unless proper documentation is secured for such importation, 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; and
- particularly, if Mr. Wu, the person named in the Notice of Violation, as opposed to some other family member, was the individual who imported the eggs into Canada.

Record and procedural history

[4] Notice of Violation #YOW-09-141, dated September 12, 2009, alleges that on September 8, 2009 at the Macdonald-Cartier International Airport in Ottawa, Ontario, Mr. Wu “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*”.

[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 alleges in the above-noted Notice of Violation that it served the Notice of Violation personally on Mr. Wu on September 12, 2009. Mr. Wu, when he delivered his request for review to the Tribunal, informed the Tribunal that he had received the Notice of Violation by Xpresspost on October 9, 2009. At the hearing, the Agency admitted that the above attestation in the Notice of Violation was false and that it had not served Mr. Wu personally, but that his Notice of Violation had been sent by post and received by Mr. Wu at sometime later than September 12, 2009.

[7] The Notice of Violation indicates to Mr. Wu 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.

[8] On October 26, 2009, Mr. Wu personally attended the Tribunal offices to advise that he wished to request a review by the Tribunal of the facts of the violation, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. At that same time, Mr. Wu requested that the review be oral, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[9] On November 23, 2009, the Agency sent its report (Report) concerning the Notice of Violation to Mr. Wu and to the Tribunal. The covering letters to the Tribunal and to Mr. Wu were later amended by the Agency on November 25, 2009 to correct certain typographical errors contained in the original covering letters.

[10] In a letter dated November 24, 2009, the Tribunal invited Mr. Wu to file with it any additional statements in this matter, no later than December 24, 2009.

[11] On December 21, 2009, Mr. Wu provided additional materials outlining his case to the Tribunal. The Tribunal forwarded copies of these additional materials to the Agency that same day.

[12] The oral hearing requested by Mr. Wu was held on May 3, 2010, in Ottawa, in the province of Ontario. Mr. Wu was self-represented while the Agency was represented by Ms. Rosemary Copeland-Jones.

Evidence

[13] The evidence before the Tribunal in this case consists of written submissions from both the Agency (specifically, the Notice of Violation of September 12, 2009 and its Report dated November 23, 2009, as amended in writing on November 24, 2009, and orally on May 3, 2010) and from Mr. Wu (specifically, his submissions dated October 26, 2009 and December 21, 2009). As well, both parties presented witnesses who tendered evidence at the hearing on May 3, 2010.

[14] Certain elements of the evidence are not in dispute:

- The Wu family (Mr. Wu, Ms. Wu and their two children) flew from China to Canada, landing at Ottawa in the late evening on September 8, 2009.
- The Wu family was travelling with eight checked bags and six carry-on bags.
- The Wu family proceeded through Canada Customs in Ottawa after they disembarked from their plane.
- The Wu family completed only one Canada Customs Declaration Card E311 dated September 8, 2009. It was signed by Mr. Wu and Ms. Wu. The box “No” was checked beside the following statement: “I am/we are bringing into Canada: Meat/meat products; dairy products; fruit; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects.”
- The Wu family completed primary inspection by the Agency and was directed to submit to secondary inspection.
- Agent 20794, who assisted Agency Agent 17175 to complete the secondary inspection, found eight eggs amongst the eight checked bags and six carry-on bags of the Wu family.
- The eggs found were from China.
- It is unlawful to import eggs from China unless proper documentation is secured for such importation and the Wu family presented no such documentation to agents on the evening of September 8, 2009 or any time thereafter.

[15] The only element of evidence that is pivotal to the case and that is in dispute is whether Mr. Wu, as the person named in the Notice of Violation, was the importer of the eight eggs. Mr. Wu presented written evidence (request for review dated October 26, 2009; submission of December 21, 2009) and oral evidence that it was his wife, Ms. Wu, who was the owner, importer and the only person with knowledge of the presence of the eggs in the luggage of the Wu family, as it was her parents who gave the eggs to Ms. Wu prior to leaving China. Mr. Wu testified that he had no knowledge of this gift and had no knowledge of the presence of the eggs in the Wu family baggage.

[16] The written and oral evidence of the Agency and its agents, at least with respect to the eight eggs found in the Wu family baggage, does not contradict either the fact that Ms. Wu had ownership and control of the eggs the moment that she received them from her parents or that she continued to exercise such ownership and control up to and including the moment that they were discovered by Agent 20794.

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. "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, 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*.

[21] The Act's system of 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.

[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.

(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.

[23] When an AMP provision has been enacted for a particular violation, as is the case for paragraph 34(2)(a) *Health of Animals Regulations*, Mr. Wu 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 or that he simply forgot to declare or present any food product to the inspector, as is required.

[24] Given Parliament's clear statement on the issue, the Tribunal accepts that none of these statements by Mr. Wu 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 Mr. Wu 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] The Tribunal finds that the Agency has failed in this case to prove that the person named in the Notice of Violation did commit the violation identified in the Notice. In evidence given by Mr. Wu, and not contradicted by the Agency, the eggs were given to Ms. Wu as a gift from her parents. Mr. Wu's evidence before the Tribunal was that Ms. Wu accepted these eggs, packed them in the family suitcases, and, without the knowledge of her husband, transported these eggs to Canada. In this case, unlike that of certain meat products found in the baggage of the Wu family that were the subject of *Wu v. Canada* (CBSA) 2010 CART 014, the Agency did not present sufficient or convincing evidence that the eggs were found in a bag that was owned by, or under the control, of Mr. Wu. The Agency failed to convince the Tribunal that the agents' investigation established in which bag the eggs were found and to whom any such bag belonged. In effect there was insufficient evidence to determine that the eggs were imported by Mr. Wu, rather than to some other member of the Wu family.

[29] The Tribunal, in several cases that have come before it, has had to determine if the person named in a Notice of Violation is, in fact, the person who has imported the product without proper documentation to support such importation. In each of *Datuin v. CFIA* (RTA-60005), *Sandaljian v. CFIA* (RTA-60102), *Pricop v. CBSA* (RTA-60344) and *Kozicka v. CBSA* (RTA-60366), the Tribunal found that the Agency in question had not adduced sufficient (if any) evidence to prove that the person named in the Notice of Violation was indeed the person who imported the plant, animal or agricultural product that was the subject of the Notice of Violation.

[30] In the present case, the Tribunal finds that the Agency has not proved, on the balance of probabilities, that the eight eggs in the Wu family baggage were imported by Mr. Wu, rather than by some other Wu family member. The Tribunal therefore finds that the Agency has failed to prove an essential element of the case, namely that the person named in the Notice of Violation committed the violation identified in the notice. If such a violation occurred, there is insufficient evidence tendered by the Agency that it was Mr. Wu who committed it. The Tribunal therefore finds that Mr. Wu did not commit the violation and is not liable for payment of the penalty.

[31] The Tribunal finds it necessary to comment on the quality of some aspects the Agency's written evidence presented in this case. Both the Agency's Report and its covering letter to Mr. Wu contained an unacceptable number of errors. The covering letter for the Report to Mr. Wu contained references to an applicant other than Mr. Wu and referred to an unrelated review of a Ministerial decision. In the Report itself, there were references to agents who were to appear as witnesses that had no connection to the case. There was also mention of Mr. Wu's "British Columbia" driver's licence when, in fact, he had presented the Agency with an Ontario driver's licence (page 14 of the Report).

[32] These errors, as well as the false declaration concerning the date of service of the Notice of Violation, discussed in paragraph [6] above, did not in this case impede the Tribunal in accepting the evidence offered by the Agency and Mr. Wu, as both parties presented clear and reliable oral evidence at the hearing. However, avoidance in the future of such errors and inconsistencies in the Agency's written submissions would enhance the Agency's credibility in its use of administrative monetary penalties under the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

Dated at Ottawa this 16th day of July, 2010.

Dr. Donald Buckingham, Chairperson