

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Wu v. Canada (CBSA), 2010 CART 14

Date: 20100716
Docket: RTA-60377;
RT-1530

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 section 40 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 committed the violation and is liable for payment of the penalty in the amount of \$200.00 to the respondent within 30 days after the day on which this decision is served.

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 meat products into Canada from China, 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] 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 meat products into Canada.

Record and procedural history

[4] Notice of Violation #YOW-09-142, 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 an animal by-product, to wit: Meat, without meeting the prescribed requirement contrary to section 40 of the *Health of Animals Regulations*”.

[5] 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.*

[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, as amended in writing on November 24, 2009 and orally on May 3, 2010) and from Mr. Wu (specifically, his submissions dated October 6, 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 17175 found beef, pork and wood products amongst the eight checked bags and six carry-on bags of the Wu family.
- The meat products found were from China.

- It is unlawful to import meat products from China unless proper documentation is secured for such importation and the Wu family presented no such documentation to Agency 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 meat products. 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 one with knowledge of the presence of meat products in the luggage of the Wu family, as it was her parents who gave meat products 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 any meat products in the Wu family baggage.

[16] The written and oral evidence of the Agency and its agents contradicts the evidence of Mr. Wu on the point of knowledge, ownership and control of at least some meat products and the luggage in which meat products were found by the agents.

[17] At Tab 4 of the Agency's Report, Agent 17175 recorded in a signed document that he found "a small amount of meat products (beef) undeclared from China inside a suitcase" during a secondary inspection. He further recorded that "I asked Mr. WU if the suitcase was his and he said yes. I also asked if he had any permits or certificates for the goods; he could produce none. I then asked if there were any other meat products in his suitcase and Mr. WU replied 'No'. I also asked Mr. WU if he had any other food products in his suitcases and he replied 'No'." Agent 17175 then asked another agent to assist him and they found more meat, wood and eggs in other of the Wu family's suitcases.

[18] The oral testimony of Agent 17175 paralleled his written evidence. In both the written and oral testimony of Agent 17175, he makes references to specifically asking Mr. Wu about the ownership of the bag in which he found the initial small amount of beef. Thereafter, and particularly once a second agent was assisting with the secondary inspection, the Agency adduced insufficient (if any) evidence as to whether such a question was posed concerning ownership of other food products or of the bags in which they were found.

Analysis and Applicable Law

[19] 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.

[20] 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;

[21] 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,*

[22] 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 section 40 of the *Health of Animals Regulations*.

[23] 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.*

[24] 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.

[25] When an AMP provision has been enacted for a particular violation, as is the case for section 40 of the *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.

[26] 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.

[27] 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.

[28] 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.*

[29] 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.

[30] The Tribunal finds that the Agency has proven every element of the violation that forms the basis of the Notice of Violation, including the pivotal element of proving that the person named in the Notice of Violation did commit the violation identified in the Notice. The crucial element in this case is whether the agent did establish that all or any of the meat product found belonged to Mr. Wu. The Tribunal acknowledges that there is contradictory evidence on this point from Agent 17175 and from Mr. Wu. However, at least with respect to the first “small amount of meat products (beef)” found by Agent 17175, the Tribunal accepts that the agent asked Mr. Wu if the bag in which the meat was found was his and he responded that it was. This admission provides clear evidence that the Agency has established that the ownership and/or the control of that meat lay with Mr. Wu. As regards the other meat, eggs and wood products, there is insufficient (if any) evidence tendered by the Agency on the question of possession and ownership of the food products or of the bags in which they were found.

[31] 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. 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.

[32] In the present case, however, the Tribunal finds that the Agency has proved, on the balance of probabilities, that the “small amount of meat products (beef)” found in the first suitcase examined by Agent 17175 which Mr. Wu admitted was his, was imported by Mr. Wu in contravention of section 40 of the *Health of Animals Regulations*.

[33] The Tribunal wishes to point out to Mr. Wu 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.

The Tribunal concludes that the Agency has made out all of the essential elements of the violation. The Tribunal therefore finds that Mr. Wu 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.

[34] 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 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).

[35] 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 the 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