



Citation: Thong v. Canada (CBSA), 2010 CART 15

Date: 20100727
Docket: RTA-60378;
RT-1538

Between:

Kim Thong, 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 did not commit the violation and is not liable for the payment of the penalty.

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

REASONS

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that on January 2, 2010, at Ottawa, Ontario, the applicant, Ms. Thong, imported meat 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 Ms. Thong, the person named in the Notice of Violation, actually imported meat, as opposed to some other product, into Canada on January 2, 2010.

Record and procedural history

[4] Notice of Violation #YOW-10-0004, dated January 6, 2010, alleges that on January 2, 2010, in Ottawa, Ontario, Ms. Thong “committed a violation, namely: Import an animal by-product, to wit: Meat, without meeting the prescribed requirements Contrary to section 40 of the *Health of Animals Regulations*”.

[5] Sections 2 and 40 of the *Health of Animals Regulations* state as follows:

2. *In these Regulations,*

...

“animal by-product” means an animal by-product that originated from a bird or from any mammal except a member of the orders Rodentia, Cetacea, Pinnipedia and Sirenia; (sous-produit animal)

...

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] Section 2 of the *Health of Animals Act* states as follows:

2. (1) *In this Act,*

...

“animal by-product” includes blood or any of its components, bones, bristles, feathers, flesh, hair, hides, hoofs, horns, offal, skins and wool, and any thing containing any of those things;

...

[7] The Agency alleges in the above-noted Notice of Violation that the violation occurred on January 2, 2010 and that it served the Notice of Violation personally on Ms. Thong on January 6, 2010. After hearing evidence at the hearing of this matter, both of these allegations are in doubt. Ms. Thong's bags did not arrive with her on January 2, 2010. The parties do not dispute the fact that two of her bags did not arrive in Ottawa before January 6, 2010. It is difficult to imagine how Ms. Thong could import anything in the missing bags before at least January 6, 2010, the date on which the bags arrived in Canada.

[8] With respect to service of the Notice of Violation, Ms. Thong, at the oral hearing, informed the Tribunal that she had received the Notice of Violation only when she opened her missing suitcase when it was delivered to her home on January 8, 2010. At the hearing, the Agency admitted that the above attestation in the Notice of Violation was false and that it had not served Ms. Thong personally, but that the Notice of Violation had been tucked into the top of Ms. Thong's suitcase, prior to its delivery to her on January 8, 2010.

[9] The Notice of Violation indicates to Ms. Thong 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.

[10] On January 12, 2010, Ms. Thong's husband personally attended the Tribunal offices to advise that he was delivering his wife's request for 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*. Ms. Thong's hand-delivered letter indicated that she requested that the review be oral, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and Rule 34 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)*.

[11] On February 12, 2010, the Agency sent its Ministerial report (Report) concerning the Notice of Violation to Ms. Thong and to the Tribunal.

[12] In a letter dated February 15, 2010, the Tribunal invited Ms. Thong to file with it any additional statements in this matter, no later than March 17, 2010.

[13] Ms. Thong filed no additional statements or materials.

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

Evidence

[15] The evidence before the Tribunal in this case consists of written submissions from both the Agency (specifically the Notice of Violation of January 6, 2010 and its Report dated February 12, 2010) and from Ms. Thong (specifically her request for review received by the Tribunal on January 12, 2010). As well, both parties presented witnesses who tendered evidence at the hearing on May 3, 2010.

[16] Certain elements of the evidence are not in dispute.

- Ms. Thong travelled from China to Canada, landing at Ottawa on January 2, 2010.
- Two of Ms. Thong's checked suitcases did not arrive in Ottawa with her on January 2, 2010. They were delayed somewhere outside of Canada.
- Before Ms. Thong left the Ottawa airport, she completed a claim for the lost bags (Form A23(08), Agency's Report, Tab 2). On that form, which she signed, Ms. Thong marked the "No" box in response to the question "Do the missing bags contain any of the following? Food (fruit, vegetables, meats, eggs, dairy products), animals, birds, insects, plants, plant parts, soil, living organisms, vaccines".
- When the two delayed bags arrived at the Ottawa International Airport on January 6, 2010, they were inspected by the Agency, and on the basis of that inspection, the Agency issued the above Notice of Violation.
- One of Ms. Thong's delayed bags was delivered to her house on January 8, 2010 and one on January 9, 2010.
- When Ms. Thong opened the bag she received on January 8, on the top of its contents, she found the Notice of Violation that is the subject of this case.

[17] What is in dispute in this case is whether the bag that Ms. Thong received on January 8, 2010 ever contained any meat or animal by-product, and if that meat or animal by-product was imported, in violation of section 40 of the *Health of Animals Regulations*.

[18] Evidence from Ms. Thong that is relevant to this point was presented in her request for review of January 12, 2010 and at the oral hearing. In her request for review, Ms. Thong states that "I would like to review my violation because I know the product that I brought in is "dried seafood" for Chinese soup, not an animal by-product." During the hearing, Ms. Thong testified that she did not bring any chicken from Hong Kong, but that she had received a gift from her mother of dried seafood. Ms. Thong also testified that the dried seafood consisted of two packages, one of sea snails dried in a large block and one of clam meat dried in small cubes. She packed both packages into one suitcase, the one that she would not actually see again until it was delivered to her house on January 8, 2010. When she arrived at Canada Customs and filled out Form A23(08) (Agency's Report, Tab 2), Ms. Thong stated that she did not declare the dried seafood because the form did not mention seafood in the list of items to be declared.

[19] Ms. Thong testified that when she opened her bag on January 8, 2010, there was no dried seafood in the bag, and instead there was the Notice of Violation. At the hearing, Ms. Thong presented, as Exhibit 1, a package of sea snails, similar to the ones that her mother had given to her and that had been in her suitcase. She emphatically denied that her bags contained any other products particularly any chicken, either in a frozen or dried state. She testified that she knew it was against the law to bring meat into Canada. Having a long overseas flight Ms. Thong stated that she would never have taken a frozen product in her luggage and if she would have had a meat product like chicken wings, which she did not, she would have just paid the Notice of Violation.

[20] Evidence from the Agency's witness was in stark contrast to that of Ms. Thong. In both the written and oral evidence of Agent 16317, he stated that the product that was the subject of the Notice of Violation and that was found in Ms. Thong's bag was chicken wings. As to the state of the chicken wings, some of the agent's evidence suggested that the chicken wings were frozen, or thawed, or dried. As to the origin of the chicken wings, the product photographed at Tab 3 of the Report shows a meat product with a label with Chinese writing on it, stating that the package was packed in Hong Kong, but that the meat was a product of Brazil. The agent testified that he cut open the package to verify its contents and found chicken inside. He also testified that the product was from China and that he verified that chicken from China was non-admissible into Canada.

[21] The agent also stated at the hearing that he did find seafood in Ms. Thong's bag, although no photos were taken of the seafood. The agent testified that the seafood was a permissible item and so it was allowed into Canada. In response to Ms. Thong's question in cross-examination, as to why she did not, therefore, get her seafood back, the agent was unable to provide an answer. In contrast to oral evidence given, nothing in the written record provided by the Agency, mentions the existence of, the detention of, or the destruction of, any seafood found in Ms. Thong's bags.

Analysis and Applicable Law

[22] 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.

[23] 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;

[24] 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...

[25] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, 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*.

[26] 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.

[27] 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.

[28] When an AMP provision has been enacted for a particular violation, as is the case for section 40 of the *Health of Animals Regulations*, Ms. Thong has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that she might raise, such as she misunderstood the Canada Customs Form A23(08) that she filled out or that she simply forgot to declare or present any food product to the inspector, as is required.

[29] Given Parliament's clear statement on the issue, the Tribunal accepts that none of these statements by Ms. Thong are permitted defences under section 18.

[30] However, the Federal Court of Appeal, in *Doyon*, also points out that the Act imposes an important burden on the respondent. 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.

[31] 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.*

[32] The strictness of the AMP system reasonably must apply to both Ms. Thong 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.

[33] The Federal Court of Appeal in the *Doyon* case, cited above, has cautioned this Tribunal to 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.*” In the current case, there are evidentiary problems with respect to two aspects of the case. First, there is direct, contradictory evidence from the parties as to whether there ever was any meat in Ms. Thong’s bag which she was reunited with on January 8, 2010. Second, there is an important time delay of several days between the time at which any product might have been placed in Ms. Thong’s bag until the time the bag was delivered to her at her home. The time delay of at least six days and the loss of control over the bag and its contents significantly challenge the Agency in proving a solid and uninterrupted causal link between Ms. Thong and the presence of any meat product in her bags.

[34] The Tribunal finds Ms. Thong’s testimony to be very reliable and consistent. Her evidence, both in writing and at the hearing four months later, was to the effect that she never had any kind of meat, only seafood, in her suitcase. The *Health of Animals Regulations* and the *Health of Animals Act* do not define “meat” but do define “animal by-product”. Those definitions, set out in paragraphs 5 and 6 above, do not include fish or seafood products. Ms. Thong’s reasoning was that as the form that she was asked to complete did not refer to seafood, she did not acknowledge the presence of seafood in her declaration form for her missing baggage. Honestly and in good conscience, she marked “No” to that question on the form. Moreover, the Act and Regulations do not suggest that seafood is covered by the legislation.

[35] The Agency’s evidence on the meat product found in Ms. Thong’s bag that underlies the Notice of Violation is not without ambiguity. The product that the agent identified as the basis of the violation was chicken wings, but whether those wings were a frozen, thawed, or dried product was not clear. There was also ambiguity about the origin of the product. It was either from Brazil or from China. There is also the issue of whether Ms. Thong’s bags contained meat only or meat and seafood. In the written submissions of the Agency, there is no mention by the agent of having found both meat and seafood, while in oral testimony, evidence was tendered that both meat and seafood were found in Ms. Thong’s bag. Evidence was presented that the seafood, however, was permitted to enter and was not subject to a Notice of Violation. Yet, Ms. Thong testified that when her bag was returned to her, it contained no seafood and the agent could offer no explanation to the whereabouts of the seafood he had discovered in Ms. Thong’s bag.

[36] Given the reliable and consistent evidence of Ms. Thong, the Tribunal accepts her version of the facts over that of the Agency. The Tribunal therefore finds that the Agency has not proved, on a balance of probabilities, that Ms. Thong had meat in her bag when her bag came into Canada on January 6, 2010, four days after Ms. Thong arrived in Canada and had made her declaration to Agency officials.

[37] Causation and proving the causal link in this case also poses a significant hurdle for the Agency. Ms. Thong's bag was out of her possession for six days. It was opened and examined by the Agency in her absence. Only one agent of the Agency provided any evidence on the examination of Ms. Thong's bags. Given this state of affairs, neither Ms. Thong nor any other Agency witness was able to provide to the Tribunal an account of any details concerning the manner in which the inspection was carried out and the products that were, or were not, present in Ms. Thong's suitcase when it was inspected.

[38] The Federal Court has instructed the Tribunal that searching for the causal link in AMP cases must be "*based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay*". The Tribunal would have to engage in speculation to be convinced that the bag, which left China on January 2, 2010, which was inspected in the Ottawa airport on January 6, 2010, and which was finally delivered to Ms. Thong at her house on January 8, 2010, did actually contain meat as alleged in the Notice of Violation.

[39] In the present case, the Tribunal finds that the Agency has failed proved, on the balance of probabilities, that Ms. Thong's bag contained any meat, and hence finds that she did not import meat in contravention of section 40 of the *Health of Animals Regulations*. 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 actually imported meat. The Tribunal therefore finds that Ms. Thong did not commit the violation and is not liable for payment of the penalty.

Dated at Ottawa this 27th day of July, 2010.

Dr. Donald Buckingham, Chairperson