

**AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE
MONETARY PENALTIES ACT**

DECISION

In the matter of an application for a review of the facts of a violation of subsection 23(1) of the *Plant Protection Act*, 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*.

United Wings Enterprise Inc. , Applicant

- and -

Canadian Food Inspection Agency, Respondent

CHAIRMAN BARTON

Following a review of the written submissions of the parties including the report of the Respondent, the Tribunal, by order, determines the Applicant did not commit the violation and is not liable for payment of the penalty.

REASONS

The Applicant did not request an oral hearing.

The Notice of Violation dated August 28, 2003, alleges that the Applicant, on or about 0900 hours on the 4th day of July 2003, at Vancouver, in the province of British Columbia, committed a violation, namely: “Make a false or misleading statement to an inspector” contrary to subsection 23(1) of the *Plant Protection Act*, which states:

23(1) No person shall obstruct or hinder or make any false or misleading statement either orally or in writing to an inspector who is performing duties or functions under this Act or the regulations.

This subsection contains two separate violations under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, one being to “hinder an inspector” and the other to “make a false or misleading statement to an inspector.” This violation deals with the latter.

The following facts are not in dispute.

The Applicant carries on business in the wholesaling of Chinese herbs for the supply of Chinese traditional medicine practitioners in Canada.

A recent shipment from its longtime supplier in China sent by container ship contained 781 cartons of Chinese herbs.

The Respondent noted the cargo manifest listed 648 pounds of *Semen cuscatae* (dodder seeds), an item of quarantine concern. The Respondent rejected the shipment and requested from the Applicant’s broker a clear description of the container contents and particulars of several commodities, including the dodder seeds.

The reply by the broker to this request was prefaced “as per United Wings Enterprise Inc., all following items can only be used as Chinese dried herbs.” The dodder seeds were described as “dried fruit nuts, have been soaked in saline then sun-dried, cannot be used as seeds.”

It is those statements by the broker that gave rise to the issuance of the Notice of Violation.

Since the statements were not made by the Applicant, but by the Applicant's broker, an initial question arises as to whether or not the Applicant can be held responsible.

Subsection 20(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* states as follows:

20(2) A person is liable for a violation that is committed by any employee or agent of the person acting in the course of the employee's employment or the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.

The broker indicated its statements were "as per United Wings Enterprise Inc.," and the Applicant has not subsequently denied the broker was acting in the scope of its authority. Accordingly, pursuant to this subsection, the Applicant would be liable if the broker is liable.

It is clear from the evidence that the broker's statements were made in writing to the Respondent's inspector, who was performing duties or functions under the *Plant Protection Act*.

The key issue, then, is whether the statements by the broker to the Respondent's inspector were false or misleading.

The words themselves are somewhat ambiguous. Do they mean that the seeds are prohibited from being used as seeds or does it mean the seeds are physically unable to reproduce?

Subsequent evidence given in affidavit form by an officer of the Applicant would lead to the conclusion that the broker meant the dodder seeds were unable to be used to reproduce other plants (were not viable seeds).

The Respondent's inspection report indicated the seeds contained chaff and had the appearance of not having been processed, treated or cleaned. Some seeds were said to have sprouted under laboratory conditions. The Respondent further provided a certificate of analysis from the Respondent's purity laboratory indicating that 200 seeds were tested by the germination method: TB, 20 - 30C showing that 8% of the seeds were viable. Pictures of test dishes showed a few shoots.

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In reply, the Applicant reported the results of the Respondent's findings to its supplier who subsequently conducted investigations of its own with similar seeds, providing

somewhat different findings. The extensive treatment used by the supplier consisted of washing and soaking the seeds with saline waters, sun-drying the seeds, then oven drying them at 60° - 70° C. This would ensure 70% - 80% would be sterilized and the embryo broken or dead. The remaining 20% - 30% would be able to germinate and continue to grow under very special conditions. In order for them to survive and reproduce they must first be soaked for 4 - 8 hours in lukewarm water at a temperature between 20° - 30° C and at a constant humidity, between 40% - 45% with the seeds being watered frequently. Further, the seeds cannot come into contact with direct sunlight and the air must be free flowing. According to the supplier, it is only under these very special conditions that the seeds would sprout, germinate and reproduce.

The broker did not say the seeds would not reproduce under very special conditions or under controlled laboratory conditions, but only that they cannot be used as seeds. The ordinary meaning of this is that they cannot be planted under normal growing conditions and produce plants. There was no evidence on that point, the Respondent's evidence being restricted to reproduction under laboratory conditions. There is also no evidence the broker had any special knowledge of dodder seeds or that the broker was acting dishonestly. (It should be noted that ss. 18(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* does not apply in this case as the broker is not named in the Notice of Violation.)

On a balance of probabilities, the Tribunal finds the Respondent has failed to establish the broker's statements were false or misleading. Accordingly, the Applicant is not liable.

Dated at Ottawa this 3rd day of December, 2003.

Thomas S. Barton, Q.C., Chairman