



Citation: Lorraine Fernandez v. Canada (CBSA), 2012 CART 21

Date: 20121031  
Docket: CART/CRAC-1609

**Between:**

**Lorraine Fernandez, Applicant**

**- and -**

**Canada Border Services Agency, Respondent**

**Before: 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 the facts of a violation of paragraph 34(1)(b) 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 \$800.00 to the respondent within thirty (30) days after the day on which this decision is served.**

The hearing was held in Toronto, ON,  
on October 17, 2012.

## REASONS

### Alleged Incident and Issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that on January 4, 2012, at Toronto, Ontario, the applicant, Ms. Lorraine Fernandez (Fernandez), imported milk products into Canada contrary to paragraph 34(1)(b) of the *Health of Animals Regulations*.

[3] Subsection 34(1) of the *Health of Animals Regulations* states as follows:

**34. (1)** *No person shall import milk or milk products into Canada from a country other than the United States or from a part of such a country, unless*

*(a) the country or part of the country is designated as free of foot and mouth disease pursuant to section 7; and*

*(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).*

[4] The Tribunal must determine whether the Agency has established all the elements required to support the impugned Notice of Violation and, if Fernandez did import milk products into Canada, whether she met the requirements that would have permitted such importation.

### Procedural History

[5] Notice of Violation YYZ003588 dated January 4, 2012, alleges that on that date at the Pearson International Airport in Toronto, Ontario, Fernandez “committed a violation, namely: importation of milk/dairy product from UAE (canned) Contrary to section 34(1)(b) of the *Health of Animals Regulations*”, which is a violation under 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*.

[6] The Agency served the Notice of Violation personally on Fernandez on January 4, 2012. The Notice of Violation indicates to Fernandez that the alleged violation is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, and for which the penalty assessed, is in the amount of \$800.00.

[7] On February 1, 2011, Fernandez delivered by fax (and later by registered mail) to the Tribunal her request for a review of the facts of the violation (Request for Review), in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. This same day, Fernandez indicated to Tribunal personnel that she wished to

proceed with a review by way of an oral hearing in English, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[8] On February 23, 2012, the Agency sent its report (Report) concerning the Notice of Violation to Fernandez and to the Tribunal, the latter receiving it that same day.

[9] In a letter dated February 24, 2012, the Tribunal invited the parties to file with it any additional submissions in this matter, no later than March 26, 2012. No additional submissions from the parties were received prior to the Notice of Hearing that was sent to the parties by the Tribunal on September 11, 2012, indicating that the hearing of this matter would take place in Toronto, on October 17, 2012. The record contains proof of service of the Notice of Hearing, with the Agency receiving its notice by registered mail on September 12, 2012 and Fernandez receiving her notice by registered mail on September 13, 2012.

[10] Fernandez sent an email to the Tribunal at 6:56 p.m., on October 15, 2012, wherein she informed the Tribunal that she “will be out of the Country on business” and wished to have the hearing of this matter postponed to a date in February 2013. The Tribunal considered this request on October 16, 2012 (the next business day and one day before the scheduled hearing). It issued its decision that day to Fernandez and to the Agency wherein it denied Fernandez’s request and informed the parties that the hearing would proceed the next day in Toronto, as had been indicated in the Notice of Hearing sent out to the parties on September 11, 2012.

[11] The Tribunal convened the hearing of this matter at 10:00 a.m., on October 17, 2012, in Toronto, Ontario, at the Immigration and Refugee Board, 74 Victoria Street, 4<sup>th</sup> Floor, Courtroom #12. The Agency, represented by Ms. Mélanie Charbonneau, and the sole Agency witness were present, but Fernandez was not in attendance. The Tribunal ordered that the case be held in abeyance while it convened a second hearing at the same location that morning. After the Tribunal had completed the hearing of its other case, it reconvened the hearing of this case at approximately 11:30 a.m. The Tribunal called for Fernandez in the hearing room but she did not appear. Consequently, the Tribunal, satisfied that notice of the hearing had been sent to the party in accordance with the *Rules of the Review Tribunal (Agriculture and Agri-Food)* (SOR/99-451) (*Rules*), proceeded with the hearing in Fernandez’s absence pursuant to its powers set out in section 41 of the *Rules*.

## **Evidence**

[12] The evidence before the Tribunal in this case consists of written submissions from the Agency (Notice of Violation and Report) and from Fernandez (submissions contained in her Request for Review), as well as the oral testimony given by the Agency witness, Inspector 21134, at the oral hearing.

[13] The facts of the case consist of the following:

- a. Fernandez came to Canada from United Arab Emirates, via Delhi, India on board flight AI 187, landing at the Pearson International Airport on January 4, 2012 (Tabs 2 and 3 of Report).
- b. Fernandez completed and signed a Canada Border Services Agency Declaration Card E311(09) (Declaration Card) dated January 4, 2012. Fernandez marked "no" beside the following statement: "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." (Tab 3 of Report).
- c. Fernandez reported to the Canada Border Services Agency in Toronto (Pearson) upon deplaning. She completed the primary inspection, but was required to undergo a secondary inspection. Inspector 21134, prior to performing the secondary inspection, asked Fernandez if the luggage before her was her, whether she prepared the bags and whether she knew the contents of them, to which she responded "yes". The Inspector then searched Fernandez's luggage and found 36 cans of "Rainbow" brand evaporated milk in Fernandez's luggage. Inspector 21134 asked Fernandez whether she had any permits or certificates to which she replied "no" (Fernandez's Request for Review, Tab 2 of Report, and oral evidence of Inspector 21134).
- d. The milk products found in Fernandez's luggage were photographed (Tab 4 of the Report). Inspector 21134 noted that he found 36 cans of milk which were not concealed within the contents of Fernandez's baggage. (Tab 2 of the Report and oral evidence of Inspector 21134).
- e. The importation of milk products into Canada is prohibited unless proper documentation is secured for importation. The Automated Import Reference System (AIRS) of the Canadian Food Inspection Agency confirmed to Agency Inspector 21134 that milk products from the United Arab Emirates are to be refused entry into Canada. The AIRS report recommends that the Agency therefore "Refuse Entry" of such products (Tab 9 of Report; and oral testimony of the Inspector 21134).
- f. Fernandez did not present any documents, permits or certificates to the Agency's representatives on January 4, 2012, or at any time after that date (Tab 2 of the Report, and oral evidence of Inspector 21134).
- g. Inspector 21134 stated in his Non Compliance Report that Fernandez's products were not declared and that they were seized and destroyed (Tab 2 of the Report). Inspector 21134 issued Fernandez a Notice of Violation and explained the options she had, should she wish to pay or contest it (oral evidence of Inspector 21134).

[14] The only points on which the claims of the Agency and Fernandez differed was with respect to: (a) one point of evidence in that Fernandez maintains that the imported milk was from Europe and not the United Arab Emirates (Request for Review, which is also at Tab 1 of the Report); and (b) one point of argument in that Fernandez proposes that the basis for relief in this case should be on grounds that this was her first offence and she did not know that the product was a “banned item”. (Request for Review).

[15] As Fernandez failed to appear at the hearing to give oral evidence and argument, the entirety of her claim is contained in her Request for Review which reads as follows:

*I, Lorraine Fernandez would like a review of this matter orally or written. This is my first time I am bringing canned milk and was unaware that this is a banned item. The milk is evaporated milk made by a reputable company from Europe sealed in can and available locally in Canada. The brand “Rainbow” is a world famous brand and comparable to Carnation evaporated milk. I have seen many passengers bring dairy products like chocolate and cheese and was not aware that canned milk was banned. I know better now and will make it a point to learn what is not allowed into Canada, as it is my first offense please be lenient when you review this case.*

### **Applicable Law and Analysis**

[16] 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.*

[17] 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[.]*

[18] 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, ...*

[19] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187 (AMPs Regulations), which designates as a violation several 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 AMPs Regulations and include a reference to paragraph 34(1)(b) of the *Health of Animals Regulations*. Moreover, Schedule 1, Part 1, Division 2 of the AMPs Regulations specifically sets out the classification, or severity, that must be attributed, by enforcement Agencies and this Tribunal, to a violation of paragraph 34(1)(b) as follows:

<b>Item</b>	<b>Section of HAR</b>	<b>Short-form Description</b>	<b>Classification</b>
67.	34(1)(b)	Import an animal product without the required certificate	serious

[20] The Act's scheme of administrative 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 (*Doyon*), the Federal Court of Appeal described the AMP system as follows, 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.*

[21] The Act creates a liability scheme that is not very permissive since it allows neither a due diligence, nor a mistake of fact, defence. Section 18 of the Act states as follows:

**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.*

[22] Since an AMP provision has been enacted for a particular violation, in this instance paragraph 34(1)(b) of the *Health of Animals Regulations*, Fernandez has very few defences available to her. In the present matter, section 18 of the Act excludes practically any excuse that Fernandez might raise, such as her limited knowledge of the law on food and products that are prohibited while travelling, this being her first offence under this legislation, or that the milk product she imported is available locally in Canada. Given Parliament's clear intent in this regard, the Tribunal accepts that none of the statements made by Fernandez in her Request for Review could be relied on in her defence under section 18.

[23] However, in *Doyon*, the Federal Court of Appeal also pointed out that the Act places a heavy 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.*

[24] 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.*

[25] The strictness of the AMP scheme must reasonably apply to both Fernandez and the Agency. Therefore, it is the Agency's duty to prove, on a balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation. While Notice of Violation YZ003588 dated January 4, 2012 refers to Fernandez's importation of milk/dairy product from UAE (canned), a violation of paragraph 34(1)(b) of the *Health of Animals Regulations* requires the Agency to prove, not whether the products were from Europe or from the United Arab Emirates, but rather the following three elements:

- (1) Fernandez is the person who committed the violation;
- (2) Fernandez brought (imported) milk or milk products into Canada from a country other than the United States;
- (3) Fernandez did not produce to an Agency inspector a certificate of origin signed by an official of the government of the country of origin that shows that the country of origin is designated as free of foot and mouth disease.

[26] The Tribunal is of the opinion that the Agency has established all of the elements of the violation set out in the Notice of Violation. Elements 1 and 2 have been proved by the Agency. The identity of the person who committed the violation is Fernandez. Furthermore, the Tribunal acknowledges, and Fernandez does not challenge, in her Request for Review, that Inspector 21134 found in her luggage, several cans of evaporated milk she had imported from a country other than the United States, specifically, a product made in either Europe or the United Arab Emirates and bought outside the United States. Lastly, regarding the third element, evidence from Inspector 21134 demonstrated that Fernandez did not present any document or certificate of origin signed by an official of the government of the country of origin that shows that the country of origin is designated as free of foot and mouth disease, a certificate that would have allowed her to import the milk product in question.

[27] The Tribunal finds therefore that the Agency has proved, on the balance of probabilities, each of the three elements necessary for a finding that Fernandez has committed the violation.

### **Applicant's Request for "Leniency", that is, a Reduction of Penalty Amount**

[28] The very strict AMP system established by Parliament, and set out in the Act, protects Canada's agricultural and food systems against contamination and disease. The penalties set out in the Act, as in this case, can nonetheless have important repercussions for Canadians, especially someone like Fernandez. Fernandez has asked the Tribunal in her Request for Review to be "lenient" with her when reviewing her case as it is her first offence.

[29] With respect to Fernandez's request to have the penalty in her case reduced or eliminated, the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and AMPs Regulations preclude such reductions. First, the AMPs Regulations strictly classify the nature of violation under paragraph 34(1)(b) of the *Health of Animals Regulations* as "serious". The Tribunal has no discretion to alter that classification. Second, section 5 of the AMPs Regulations stipulates that the penalty "in respect of a violation that is committed by an individual otherwise than in the course of business and that is not committed to obtain a financial benefit is ... \$800, for a serious violation". The Tribunal has no discretion to alter that amount. Finally, according to its enabling legislation, the Tribunal has neither the mandate, nor the jurisdiction, to set aside or dismiss a Notice of Violation, nor to reduce or increase penalties arising from such Notices, for reasons relating to humanitarian or financial situations facing particular applicants.

[30] The Tribunal appreciates that Agency inspectors are charged with the important task of protecting individuals, animals, and plants, agricultural production and the food system in Canada from risks posed by pests, pathogens and parasites. There is no doubt that these tasks must be carried out conscientiously. Furthermore, the Tribunal knows that the Agency has established its own process for handling travellers' complaints against Agency inspectors and it would seem appropriate and transparent that Agency officials systematically inform Canadians as they interact with them during secondary inspections that this process exists.



[31] In conclusion, the Tribunal finds that Fernandez committed the violation and is liable for payment of the penalty in the amount of \$800.00 to the respondent within thirty (30) days after the day on which this decision is served.

[32] The Tribunal wishes to point out to Ms. Fernandez that this violation is neither a criminal nor a federal offence but a violation punishable by a monetary penalty and that, after five years, she has the right to apply 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.*

Dated at Ottawa, this 31<sup>th</sup> day of October, 2012.

---

Dr. Donald Buckingham, Chairperson