

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: *LinkGlobal Food Inc. v. Canada (Canadian Food Inspection Agency)*, 2013 CART 22

Date: 20130711
Docket: CART/CRAC-1663

Between:

LinkGlobal Food Inc., Applicant

- and -

Canada (Canadian Food Inspection Agency), Respondent

Before: Chairperson Donald Buckingham

**With: Yu Chen, President of the company, for the applicant; and
Wendy Wright, Counsel, for the respondent.**

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 subsection 16(1) of the *Health of Animals Act*, 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 to pay the respondent a monetary penalty of \$11,000 within thirty (30) days after the day on which this decision is served.

The hearing was held in Toronto, ON,
on May 29, 2013.

REASONS

Alleged Incident and Issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, LinkGlobal Food Inc. (LinkGlobal), on April 3, 2012, at Vancouver, British Columbia, committed a violation in failing to present approximately 550 kilograms of pig legs or cured hams imported from China to an inspector, officer or customs officer for inspection, contrary to the requirements of subsection 16(1) of the *Health of Animals Act*.

[3] Subsection 16(1) of the *Health of Animals Act* states as follows:

16. (1) *Where a person imports into Canada any animal, animal product, animal byproduct, animal food or veterinary biologic, or any other thing used in respect of animals or contaminated by a disease or toxic substance, the person shall, either before or at the time of importation, present the animal, animal product, animal byproduct, animal food, veterinary biologic or other thing to an inspector, officer or customs officer who may inspect it or detain it until it has been inspected or otherwise dealt with by an inspector or officer.*

[4] The issues arising from the case are:

- Has the Agency presented sufficient evidence to convince the Tribunal, on the balance of probabilities, that LinkGlobal imported pig legs or cured hams from China on April 3, 2012?
- Has the Agency presented sufficient evidence to the Tribunal, on a balance of probabilities, that LinkGlobal failed at the time of importation, to present the imported pig legs or cured hams to an inspector, officer or customs officer who could inspect them on April 3, 2012?
- If the Agency has proved all the elements of the alleged violation, has it also, based on the evidence presented, correctly calculated the penalty to be assessed against LinkGlobal?

Procedural History

[5] Notice of Violation #1213BC0059, dated July 9, 2012, alleges that on April 3, 2012, at Vancouver, in the province of British Columbia, LinkGlobal “COMMITTED A VIOLATION, NAMELY: Fail to present an animal or thing CONTRARY TO SECTION 16(1) OF THE *HEALTH OF ANIMALS ACT* which is a violation under section 7 of the *Agriculture and Agri-Food Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Monetary Penalties Regulations*” [Sic for the entire citation].

[6] The Notice of Violation was deemed to have been served by the Agency on LinkGlobal on August 3, 2012. The Notice of Violation informs LinkGlobal that the alleged violation is a “very serious violation” under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which the penalty imposed is in the amount of \$11,000.

[7] In a letter dated August 30, 2012, received by fax at the Tribunal on August 31, 2012, LinkGlobal requested a review of the facts of the violation (Request for Review) by the Tribunal, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. LinkGlobal indicated that it wished to have an oral hearing in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[8] On September 12, 2012, the Agency sent a copy of its report (Report) regarding the Notice of Violation to LinkGlobal and to the Tribunal, the latter receiving it on September 13, 2012.

[9] In its letter of September 14, 2012, the Tribunal invited LinkGlobal and the Agency to make additional submissions (Additional Submissions) about this matter by October 15, 2012. The Agency provided Additional Submissions on October 11, 2012. No Additional Submissions were received from LinkGlobal by the October 15, 2012 deadline and no further submissions were received from the parties after this date.

[10] On April 29, 2013, the Tribunal sent the parties a Notice of Hearing to the effect that the oral hearing requested by LinkGlobal in this matter would be held on May 29, 2013, in Toronto, Ontario. The Tribunal confirmed that both parties received the Notice of Hearing. The hearing requested by LinkGlobal was held on that day with LinkGlobal represented by its President, Mr. Yu Chen (Chen) and the Agency represented by its counsel, Ms. Wendy Wright. With the consent of the parties, the Tribunal ordered that both of the Agency witnesses would provide their testimony at the hearing via videoconferencing.

The Evidence

[11] The evidence before the Tribunal in this case consists of written submissions from the Agency (Notice of Violation, Agency Report and Additional Submissions) and from LinkGlobal (Request for Review), as well as the oral testimony given by Agency witnesses Ms. Pamela Davies (Davies) and Mr. Scott Green (Green) and by LinkGlobal witness, Chen.

[12] Many of the facts in this case, as set out below, are not in dispute:

- On April 3, 2012, a ship, the M/V Hanjin Newport, arriving from China, unloaded into Canada a container consigned to LinkGlobal.

- April 26, 2012, Green, a CFIA Inspector, was advised by CBSA officers that 20 boxes of pig legs (6 legs per box) weighing in total about 550 kilograms were found in the container consigned to LinkGlobal at the Canada Border Services Agency Container Examination Facility in Burnaby, British Columbia.
- Dr. Ray Fletcher of the Agency confirmed that the boxes contained processed pork legs. The boxes were detained by the Agency, as they were non-compliant with importation requirements.
- Green notified LinkGlobal that its shipment did not conform to importation requirements and would have to be re-exported out of Canada or be destroyed.
- When requested to do so by Green, a LinkGlobal employee, Wen Gao (Gao), provided Green with the import documentation for the shipment containing the 20 boxes of pig legs. That documentation included two invoices, one in English, which did not list the pig legs with a total value for the goods of the container equalling \$25,433.60 USD and one in Chinese which was reputed to list the pig legs with a total value for the goods of the container equalling \$38,485.40 USD (While the fact that the Chinese invoice did list the pig legs was not in dispute between the parties, the Tribunal would like to remind the Agency of the general legal difficulties relating an institution's relying on a translation of evidence from another language completed by its own internal staff, such as was done at Tab 6 of Report).
- To prevent the entry into Canada of the pig legs, LinkGlobal, under the supervision of Green, re-exported the pig legs.
- Chen confirmed to the Tribunal that there is no doubt that LinkGlobal imported pig legs into Canada.
- The parties agreed that LinkGlobal committed a violation under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* in 2009 for importing pig legs without meeting the prescribed requirements contrary to section 40 of the *Health of Animals Regulations*.

[13] The only point on which Chen's evidence differed from that of Agency witnesses was to the effect that he, as President of LinkGlobal, did not order the pig legs from his Chinese supplier. He testified that the Chinese supplier shipped them without his knowledge or approval. Chen told the Tribunal that he placed the order for many supplies in this consignment with his Chinese supplier while he was in China in April 2012, and that the order was shipped to Canada before his return to Canada in early May 2012. Chen explained that the process by which LinkGlobal gets its supplies from China is as follows: Chen organizes a shipment from China to Canada, the supplier faxes LinkGlobal a *pro forma* invoice in Chinese, and then a later invoice in English. When the supplier told Chen that he was shipping pig legs with the shipment, he told the supplier not to ship them, but the

shipper only said that he would take care of them. Chen told the Tribunal that it was “my negligence that I did not take care of this as I was out of the country.”

[14] In cross-examination, Chen told the Tribunal that: he placed the order for the shipment in question by telephone, sometime before March 13, 2012; the exporter sent the *pro forma* invoice to Canada on March 13, 2012; Gao, his wife, told him that the pig legs were listed on the invoice sometime after March 13, 2012; he then instructed the exporter not to ship the pig legs but that the exporter told Chen that he will take care of them; and he (Chen) never informed the Agency, prior to their arrival in Canada, that the pig legs might form part of his next food shipment coming to Canada.

[15] In responding to questions from the Chairperson, Chen testified that: he was not involved in the preparation of any invoice for the shipment; he told the exporter that he didn't need the pigs legs; the exporter told him that he would take care of it for him; and he knew that the pig legs had been shipped and had arrived in Canada when he arrived back in Canada on May 7 or 8, 2012.

[16] The evidence of the Agency on whether LinkGlobal had knowledge or intent to import the pig legs included the following:

- Gao, Vice-President of LinkGlobal, told Agency Investigator Davies in an interview on June 19, 2012, that: “someone ordered it, doesn't know who; “5 people work there but don't know who ordered pig legs.” In response to Davies' question of: “Who in your company actually ordered this shipment?”, Davies recorded Gao's answer as: “Thinks the president makes all orders”. In response to Davies' question of: “Did you order the pig legs?”, Davies recorded Gao's answer as: “No, doesn't know who”. Finally, in response to Davies' question of: “Why are the pig legs not listed on the Commercial Invoice or the Packing List?”, Davies recorded Gao's answer as: “Not in charge, doesn't know”; “maybe President Daniel Yu Chen.”
- Chen was interviewed by Agency Investigator Davies on June 19, 2012, and Davies recorded Chen's remarks as follows: “2-3 years ago had this experience where pig legs rejected + destroyed; he ordered shipment; Wen Gao (wife); he was in China at time. He gets a pro forma invoice normally which is faxed to the office. This happened in this case. His wife does read English well and left it in his Canadian office. Then Chinese company sent him the shipment; His wife noticed pig legs on Chinese invoice and told him; He says he spoke to exporter + told him pig legs were not allowed. Exporter said they wd take care of it; Maybe (his best guess) is the exporter put them in to make profit; he has done business with the exporter for many years (+5 years) and he feels it is realistic they would risk \$7000 on chance he might pay for them.” [Sic for the entire citation]

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 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 *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and include a reference to section 16 of the *Health of Animals Act*.

[21] The Act's system of monetary penalties (AMP), including its severity, has been the subject of comment by the Federal Court of Appeal. In the case of *Michel Doyon v. Attorney General of Canada*, 2009 FCA 152, the court states 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] Moreover, in *Doyon*, the Federal Court of Appeal 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.

[23] The legislation is clear that the burden of proof for each element of the violation rests with the respondent, as set out in section 19 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*:

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.*

[24] The strictness of the AMP system reasonably must apply to both GlobalLink and the Agency. Therefore, it is incumbent on the Agency to prove, on a balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation. A violation of subsection 16(1) of the *Health of Animals Act* requires the Agency to prove the following three elements:

1. LinkGlobal is the person who committed the alleged violation;
2. an animal product was imported into Canada; and
3. LinkGlobal failed to present the animal product before or at the time of importation to “an inspector, officer or customs officer who may inspect it or detain it until it has been inspected or otherwise dealt with by an inspector or officer” (subsection 16(1) of the *Health of Animals Act*).

[25] Based on the evidence presented by the Agency, and not contested by LinkGlobal, the Tribunal finds that the Agency has proven, on a balance of probabilities, each of the elements of the alleged violation. The Agency has proved, and LinkGlobal does not contest,

that LinkGlobal imported 20 boxes of pig legs from China without ever presenting them for inspection by an Agency official.

[26] 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.

[27] When an AMP provision has been enacted for a particular violation, as is the case for subsection 16(1) of the *Health of Animals Act*, LinkGlobal has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that the company might raise, including LinkGlobal's efforts to impress on its Chinese supplier that it did not want any pig legs included in the shipment in the spring of 2012, or that LinkGlobal might not have known in advance that the shipment, when it landed in Canada, would contain the pig legs. Given Parliament's clear statement on the issue, the Tribunal accepts that LinkGlobal's efforts will not amount to permitted defences under section 18.

Penalty, Quantum and Removal of All Record of the Penalty After Five Years

[28] Consequently, the Tribunal concludes that the Agency has, on a balance of probabilities, proven all the essential elements of the violation and, therefore, the Notice of Violation with Penalty is upheld. The only issue that remains to be determined by the Tribunal is whether the Agency has proven that a penalty of \$11,000 is justified under the Act and *Agriculture and Agri-Food Administrative Monetary Regulations*.

[29] The Tribunal finds that a penalty of \$11,000, as assessed by the Agency, has been justified, on a balance of probabilities, and is appropriate under the Act and *Agriculture and Agri-Food Administrative Monetary Regulations*. Calculation of the appropriate penalty begins with a determination of the status of the violation being minor, serious or very serious, as per Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Regulations*. A violation of section 16 of the *Health of Animals Act*, carries with it, the classification of being a "very serious violation". At the time of the violation, section 5 of the *Agriculture and Agri-Food Administrative Monetary Regulations*, states that a very

serious violation carries with it a penalty of \$10,000. From the base amount of, in this case \$10,000, the penalty can either be increased or decreased based on three factors: (1) prior violations; (2) degree of intentionality; and (3) harm done. Values between 0 and 5 are assessed by the Agency for each of the three factors and then totalled to determine the total gravity factor, which will then determine the final adjusted penalty amount. If the total gravity factor is between 6 and 10, the base penalty amount is not adjusted. If the total is below 6, the penalty is reduced and if it is above 10, the penalty is increased.

[30] In the present case, the Agency has assessed LinkGlobal with a total of 11 and, therefore, increased the penalty by 10%, as per Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations*. The Agency has arrived at the total of 11 by assessing: (1) 3 points for prior violations, alleging that LinkGlobal has had one serious violation within the previous five years; (2) 5 for degree of intentionality, alleging that LinkGlobal committed the present violation intentionally; and (3) 3 for harm done, alleging LinkGlobal's violation could have caused serious or widespread harm to human, animal or plant health or the environment.

[31] On the first and third factor, the Tribunal agrees with the Agency's gravity assessment as 3 and 3 respectively, and LinkGlobal does not contest either of these assessments. However, on the second factor, LinkGlobal alleges that its actions were merely negligent while the Agency argues LinkGlobal intentionally imported the pigs legs on April 3, 2012. The Tribunal finds that the Agency has adduced sufficient evidence, on the balance of probabilities, to support its penalty adjustment calculation for the second factor. With respect to this assessment of intentionally, Schedule 3, Part 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations* outlines four options: (1) 0 points for "the violation subject to the assessment is committed without intention or negligence"; (2) 0 points for "the person who commits the violation subject to the assessment makes a voluntary disclosure of the violation and takes necessary steps to prevent its re-occurrence"; (3) 3 points for "the violation subject to the assessment is committed through a negligent act"; (4) or 5 points for "the violation subject to the assessment is committed through an intentional act". The evidence submitted by the Agency supports a finding by the Tribunal that "the violation subject to the assessment is committed through an intentional act". LinkGlobal makes the argument that it felt it was only negligent and not intentional in having the pig legs appear in its container on April 3, 2012. However, the Agency presented ample evidence that both Chen and Gao, the President and Vice President, respectively, of LinkGlobal knew, before April 26, 2012, when Agency officials found the pig legs in the container that the pig legs were in, or might likely be in, the shipment. Whether Chen could have taken further steps to try to stop the shipment of the pigs legs is open to question, but it is a fact that neither he nor his wife, the primary officers of LinkGlobal, took any steps to notify Canadian border, agricultural or food authorities of the risk that might be associated with the contents of the shipment that they knew from past experience were subject to strict import control requirements. Instead, LinkGlobal intentionally took the chance that either the pig legs were not in the container or if they were, that they would not be discovered by Canadian authorities. Therefore, the Tribunal finds that the assessment for degree of intentionality was correctly assessed by the Agency.

[32] The Tribunal, therefore, on the basis of the evidence presented, finds that total gravity value for the penalty adjustment in this case is 11, as alleged by the Agency, as follows: (1) 3 for prior violations; (2) 5 for degree of intentionality; and (3) 3 for degree of harm done. As the Tribunal assesses the total gravity value for the present violation at 11, Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations*, directs that the original penalty amount shall be adjusted upward by 10% from the base amount of \$10,000, as set out in the *Agriculture and Agri-Food Administrative Monetary Regulations* for very serious violations.

[33] Consequently, the Tribunal, by order, determines that LinkGlobal committed the violation and orders it to pay the Agency a monetary penalty of \$11,000 within 30 days after this decision is served.

[34] The Tribunal wishes to inform LinkGlobal that this violation is not a criminal offence. After five years, it will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*:

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 11th day of July, 2013.

Dr. Donald Buckingham, Chairperson