

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131120

Docket: A-55-13

Citation: 2013 FCA 271

**CORAM: SHARLOW J.A.
MAINVILLE J.A.
NEAR J.A.**

BETWEEN:

CANADA BORDER SERVICES AGENCY

Applicant

and

MARIO CASTILLO

Respondent

Heard at Toronto, Ontario, on September 30, 2013.

Judgment delivered at Ottawa, Ontario, on November 20, 2013.

REASONS FOR JUDGMENT BY:

NEAR J.A.

CONCURRED IN BY:

**SHARLOW J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

NEAR J.A.

[1] The Canada Border Services Agency has applied for review of a November 2, 2013 decision of the Canada Agricultural Review Tribunal (*Mario Castillo v. Canada (CBSA)*, 2012 CART 22), which determined that the respondent Mr. Castillo did not commit a violation under section 40 of the *Health of Animals Regulations*, C.R.C., c. 296.

I: Facts

[2] On January 25, 2012, Mr. Castillo arrived at Pearson International Airport in Toronto on a flight from El Salvador. On entering Canada, he completed a Canada Border Services Agency (CBSA) Declaration Card. Among other questions, the Declaration Card requires entrants to Canada to answer “yes” or “no” to:

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.

[3] Mr. Castillo ticked the “no” box, indicating that he was not importing any of those products into Canada.

[4] Mr. Castillo was referred to secondary inspection and his bags were examined. His luggage contained 15 pieces of fried chicken with an approximate value of \$18.00US. Following this discovery, a CBSA Officer issued him with a Notice of Violation of section 40 of the *Health of Animals Regulations*, under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40, subsection 7(2). Mr. Castillo received an \$800 penalty with the option of reducing it to \$400 by paying the penalty within 15 days.

II: Procedural History

[5] Mr. Castillo requested an oral hearing before the Tribunal, which took place on October 17, 2012.

[6] Before the Tribunal Mr. Castillo admitted that he was the owner of the luggage. He also admitted that the chicken was in his luggage but he testified that he did not know it was there. He stated that his mother had put it in his bag in El Salvador while he was in the shower. Under cross-examination, Mr. Castillo testified before the Tribunal that he did not have any permits or certificates for importing the chicken. The parties also agreed that the CBSA Officer was not satisfied on reasonable grounds that the chicken was processed in such a way that would prevent disease from coming into Canada. Thus, none of the exemptions provided for in Part IV of the *Health of Animals Regulations* which may have permitted the importation of animal by-products from El Salvador applied.

[7] In its reasons, the Tribunal set out the elements of the violation that the Tribunal considered must be proved as:

In the case of a violation of section 40 of the *Health of Animals Regulations*, the Agency must prove the following:

- (1) Castillo is the person who committed the violation;
- (2) Castillo imported an animal by-product, in this case, fried chicken, into Canada; and
- (3) if Castillo did import meat products into Canada, Agency officials gave him a reasonable opportunity to justify the importation in accordance with Part IV of the *Health of Animals Regulations* (Reasons, paragraph 27).

[8] The Tribunal found that the first and second elements had been established, but held that the third had not been established given that no opportunity was given to Mr. Castillo to justify the importation of the chicken after it had been discovered:

The third element of an alleged violation under section 40 of the *Health of Animals Regulations* therefore legitimately requires that Agency officials give every traveller a reasonable opportunity to justify the importation of a meat product found [in] their bags, in accordance with Part IV of the *Health of Animals Regulations*, before a Notice of Violation is issued (paragraph 43).

[9] Accordingly, the Tribunal determined that Mr. Castillo did not commit the violation and was not liable for the payment of any monetary penalty.

III: Issue

[10] The issue is whether the Tribunal erred in law in concluding that, in order to prove that a person has violated section 40 of the *Health of Animals Regulations*, the Agency must prove that an Agency official gave the person a reasonable opportunity to justify the importation in accordance with Part IV of the *Health of Animals Regulations*?

IV: Standard of Review

[11] This Court has established that the standard of review applicable to questions of statutory interpretation made by the Tribunal is correctness: *Doyon v. Canada (Attorney General)*, 2009 FCA 152 at paragraphs 30-32 (*Doyon*); *Canada (Attorney General) v. Porcherie des Cèdres Inc.*, 2005 FCA 59 at paragraph 13; *Canada (Canadian Food Inspection Agency) v. Westphal-Larsen*, 2003 FCA 383 at paragraph 7 (*Westphal-Larsen*).

V: Legal Framework

The *Health of Animals Act* and its Regulations

[12] The *Health of Animals Act*, S.C. 1990, c. 21, operates to protect Canada from the introduction of foreign animal diseases by regulating whether and how animal products and by-products may be brought into Canada. Section 40 of the *Health of Animals Regulations*, the

provision which Mr. Castillo allegedly violated, prohibits the importation into Canada of animal by-products, except in accordance with Part IV of the *Health of Animals Regulations*:

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.	40. Il est interdit d'importer un sous-produit animal, du fumier ou une chose contenant un sous-produit animal ou du fumier, sauf en conformité avec la présente partie.
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[13] “Animal by-product” is a defined term in the *Health of Animals Regulations*:

“animal by-product” means an animal by-product that originated from a bird or from any mammal except a member of the orders <i>Rodentia</i> , <i>Cetacea</i> , <i>Pinnipedia</i> and <i>Sirenia</i> ;	« sous-produit animal » Sous-produit animal provenant d'un oiseau ou d'un mammifère, à l'exception des rongeurs, des cétacés, des pinnipèdes et des siréniens.
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[14] Part IV of the *Health of Animals Regulations* operates to permit the importation of animal by-products from El Salvador in four circumstances:

- 1) Where the importer produces documentation from the government of the country of origin attesting to certain safety requirements (paragraph 41(1)(c));
- 2) Where an inspector has reasonable grounds to believe that the animal by-product would not introduce disease into Canada (subsection 41.1(1));
- 3) Where the importer produces documentation showing the treatment of the by-product and where an inspector has reasonable grounds to believe (based on the document, its information, and any other relevant information, including potentially an inspection of the by-product) that the importation of the by-product would not, or would likely not, introduce disease (subsection 52(1)); or
- 4) Where the Minister of Agriculture and Agri-Food has issued a permit allowing the importation of the animal by-product (subsection 52(2) and section 160);

Administrative Monetary Penalties

[15] In order to achieve the goal of the *Health of Animals Act* to protect Canada from the introduction of foreign animal diseases, Parliament enacted the *Agriculture and Agri-Food*

Administrative Monetary Penalties Act. This Act establishes an administrative monetary penalty (AMP) system to enforce Canada's agriculture and agri-food acts, including the *Health of Animals Act*. It permits the Minister (in this case of violations under the *Health of Animals Act*, the Minister of Agriculture and Agri-Food) to make regulations enabling the AMP scheme to be used for contraventions of an agri-food act:

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,

...

if the contravention, or the failure or neglect to perform the duty, as the case may be, is an offence under an agri-food Act;

(b) classifying each violation as a minor violation, a serious violation or a very serious violation;

(c) fixing a penalty, or a range of penalties, in respect of each violation;

(d) respecting the circumstances under which, the criteria by which and the manner in which a penalty may be increased or reduced, including the reduction of a penalty pursuant to a compliance agreement under subsection 10(1);

(e) respecting the determination of a lesser amount that may be paid in complete satisfaction of a penalty if paid within the prescribed time and

4. (1) Le ministre peut, par règlement :

a) désigner comme violation punissable au titre de la présente loi la contravention — si elle constitue une infraction à une loi agroalimentaire :

(i) aux dispositions spécifiées d'une loi agroalimentaire ou de ses règlements,

[...]

b) qualifier les violations, selon le cas, de mineures, de graves ou de très graves;

c) fixer le montant — notamment par barème — de la sanction applicable à chaque violation;

d) prévoir les critères de majoration ou de minoration — notamment pour les transactions — de ce montant, ainsi que les modalités de cette opération;

e) régir la détermination d'un montant inférieur à la sanction infligée dont le paiement, dans le délai et selon les modalités réglementaires, vaut

manner;

(f) respecting the circumstances under which reviews under this Act by the Tribunal shall be oral or in writing;

(g) respecting the service of documents required or authorized to be served under this Act including, without restricting the generality of the foregoing, the manner of serving such documents, the proof of their service and the circumstances under which such documents shall be deemed to have been served;

(h) prescribing anything that by this Act is to be prescribed; and

(i) generally, for carrying out the purposes and provisions of this Act.

règlement;

f) prévoir les cas dans lesquels la Commission peut procéder, dans le cadre du paragraphe 14(1), par écrit ou par la tenue d'une audience;

g) régir, notamment par l'établissement de présomptions et de règles de preuve, la notification des documents autorisés ou exigés par la présente loi;

h) prendre toute mesure d'ordre réglementaire prévue par la présente loi;

i) prendre toute autre mesure d'application de la présente loi.

[16] Pursuant to section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, S.O.R./2000-187, contraventions of the *Health of Animals Act* or its Regulations may be proceeded with in accordance with the AMP system:

2. The contravention of a provision of the *Health of Animals Act* or the *Plant Protection Act* or of a regulation made under these Acts, or the contravention of an order — or class of orders — made by the Minister under the *Plant Protection Act*, or the refusal or neglect to perform any specified duty — or class of duties — imposed by or under the *Health of Animals Act* or the *Plant Protection Act* that is set out in column 1 of an item of Schedule 1, is a violation that may be proceeded with in accordance with the Act.

2. L'infraction à une disposition de la *Loi sur la santé des animaux*, de la *Loi sur la protection des végétaux* ou de leurs règlements, à tout arrêté ou toute catégorie d'arrêtés pris par le ministre au titre de la *Loi sur la protection des végétaux*, ou à toute obligation ou catégorie d'obligations — par refus ou omission de l'accomplir — découlant de la *Loi sur la santé des animaux* ou de la *Loi sur la protection des végétaux*, qui figure à la colonne 1 de l'annexe 1, est une violation punissable au titre de la Loi.

[17] According to Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, a contravention of section 40 of the *Health of Animals Regulations* is classified as a “serious violation.”

[18] Paragraph 5(1)(b) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* provides that the penalty for a serious violation committed by an individual (and neither committed in the course of business nor to obtain a financial benefit) is \$800:

5. (1) The amount of 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

- (a) \$500, for a minor violation;
- (b) \$800, for a serious violation; and
- (c) \$1300, for a very serious violation.

5. (1) Le montant de la sanction applicable à la violation commise par une personne physique, sauf dans le cadre d’une entreprise ou à des fins lucratives, est de :

- a) 500 \$, dans le cas d’une violation mineure;
- b) 800 \$, dans le cas d’une violation grave;
- c) 1 300 \$, dans le cas d’une violation très grave.

[19] Where a recipient of a Notice of Violation requests a hearing, the Tribunal may review the “facts of the violation” (*Agriculture and Agri-Food Administrative Penalties Act*, at s. 9(2)(c)). The burden of proof falls on the Minister to prove, “on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice” (*Agriculture and Agri-Food Administrative Monetary Penalties Act* at s. 19); *Doyon* at paragraph 20.

[20] The defences of due diligence and reasonable and honest mistake of fact are not available to a person accused of contravening the *Agriculture and Agri-food Administrative Monetary Penalties Act*:

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.

18. (1) Le contrevenant ne peut invoquer en défense le fait qu'il a pris les mesures nécessaires pour empêcher la violation ou qu'il croyait raisonnablement et en toute honnêteté à l'existence de faits qui, avérés, l'exonéreraient.

[21] This Court has confirmed previously that violations under the *Agricultural and Agri-Food Administrative Monetary Penalties Act* are absolute liability offences for which the defences of due diligence and honest or reasonable mistake of fact are not available: *Doyon* at paragraph 11; *Fermes G. Godbout et Fils Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FCA 408; *Westphal-Larsen* at paragraph 9.

[22] Further, in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, Justice Dickson, writing for a unanimous Supreme Court, described the nature of absolute liability offences in Canada (emphasis added):

In sharp contrast [with true criminal offences], “absolute liability” entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such (at 1310).

Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category (at 1326).

VI: Analysis

[23] The facts before the Tribunal clearly show that there was an importation by Mr. Castillo of an animal by-product as defined in the *Health of Animals Regulations* to which none of the exceptions set out within Part IV of these regulations applied.

[24] Mr. Castillo may have been unaware that the chicken was in his luggage, but this is of no assistance to him given a plain reading of the provisions and the clear intention of Parliament to provide for an absolute liability regime for these types of violations. As this Court has noted before, the AMP system can be harsh (*Westphal-Larsen* at paragraph 12) but it is clear that Parliament intended that it be so, given the important stated objective of protecting Canada from the introduction of foreign animal diseases.

[25] It is conceivable that a person served with a notice of a violation of section 40 may wish to present evidence to the Tribunal that the Agency official who issued the notice of violation did so without providing an opportunity to produce documentation that would justify the importation pursuant to one or more of the provisions mentioned above in paragraph 14. Such evidence might well explain why the documentation was not presented to the Agency official when the importation was reported or discovered, as the case may be. However, such evidence cannot, as a matter of law, relieve the person of liability for the violation if, as in this case, no such documentation ever existed.

[26] Upon a plain reading of the legislative provisions, the Tribunal's decision that Mr. Castillo was to have been provided with a reasonable opportunity to justify his importation of animal by-

products from El Salvador beyond the provisions of Part IV after they were discovered amounts to an error of law.

VII: Conclusion

[27] I would allow the application for judicial review, quash the decision of the Tribunal, and remit the matter back to it for a fresh determination in accordance with these reasons. I would make no order as to costs.

"David G. Near"

J.A.

"I agree
K. Sharlow J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-55-13

**AN APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE CANADA
AGRICULTURAL REVIEW TRIBUNAL DATED NOVEMBER 2, 2012, NO. 2012 CART
22**

STYLE OF CAUSE: CANADA BORDER SERVICES
AGENCY v. MARIO CASTILLO

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 30, 2013

REASONS FOR JUDGMENT BY:
NEAR J.A.

CONCURRED IN BY: SHARLOW J.A.
MAINVILLE J.A.

DATED: NOVEMBER 20, 2013

APPEARANCES:

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