

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20131113**

**Docket: A-445-12**

**Citation: 2013 FCA 265**

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

**BETWEEN:**

**RICHARD W. CLARE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on October 1, 2013.

Judgment delivered at Ottawa, Ontario, on November 13, 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] Mr. Richard W. Clare has applied for judicial review of an unreported September 19, 2012 decision of the Canadian Agricultural Review Tribunal. The Tribunal refused to grant Mr. Clare an extension of time to request a review of a violation issued by the Canadian Food Inspection Agency (CFIA) under subsection 35(1)(b) of the *Health of Animals Act*, S.C. 1990, c. 21 for making a false or misleading statement to an inspector, analyst or officer.

## **I. Facts**

[2] On June 27, 2012, the CFIA issued a notice of violation #1112ON0018-04 to Mr. Clare. It alleged that he had made a false or misleading statement to an inspector on April 15, 2011 with a penalty of \$10,000 (reducible by 50% if paid within 15 days). It was served by registered mail on July 3, 2012 and was subsequently collected by an employee of Mr. Clare on July 4, 2012.

[3] Earlier that spring, Mr. Clare had received other notices of violation issued by the CFIA, relating to the same animal and allegations similar to those in this case. These other notices of violation were personally served on Mr. Clare. Through counsel, Mr. Clare requested a review before the Tribunal of those other violations.

[4] Mr. Clare and his counsel submitted that they only became aware of the existence of the violation at issue following discussions with the CFIA. This occurred after the 30 day period to request a review had elapsed. Mr. Clare then searched for the notice of violation and located it at his office premises.

## **II. Procedural History**

[5] Mr. Clare filed a request for review of the violation before the Tribunal on August 14, 2012. A request for an extension of time to file the request for a review of the notice of violation was also made at this time. Counsel for Mr. Clare admitted that Clare's "inadvertence" had resulted in the lack of a timely request for review. Furthermore, counsel conceded that the "request for review by the Tribunal was not requested within the 30 day period."

[6] The Tribunal denied the request for review on the ground that it had been filed beyond the permitted period of 30 days after service of the notice of violation.

[7] The Tribunal held that, in order for it to grant any extension, the authority to do so must be located within its statutory or regulatory framework. The Tribunal concluded that the statutory and regulatory framework did not grant it the jurisdiction to do so, and held that “in this case, the Act and Regulations are clear and the matter at hand for determination is covered explicitly by them” (paragraph 9).

### **III. Issue**

[8] Does the Tribunal have jurisdiction to grant a request for an extension of time to have a violation reviewed?

### **IV. Standard of Review**

[9] Whether or not the Tribunal has the legal authority to grant an extension of the time for requesting a review of a violation is a question of statutory interpretation.

[10] 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. Legislative Framework

[11] The *Health of Animals Act* is intended to protect Canada from the introduction and spread of animal diseases by regulating such things as the importation into Canada of animal products and by-products, the possession and transport of animals, and the sale and disposal of the same. Subsection 35(1) prohibits persons from impeding the carrying out of the *Health of Animals Act*.

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

35. (1) Il est interdit d'entraver l'action de l'inspecteur, de l'analyste ou de l'agent d'exécution dans l'exercice des fonctions qui lui sont conférées par la présente loi ou les règlements ou de lui faire, oralement ou par écrit, une déclaration fausse ou trompeuse.

[12] In order to achieve the legislative purpose of the *Health of Animals Act* and protect Canada from the introduction and spread of animal diseases, Parliament enacted the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 (the AAAMP Act). This Act, operating in combination with its Regulations, establishes an administrative monetary penalty system to enforce Canada's agriculture and agri-foods 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 administrative monetary penalty 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,

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,

...

[...]

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;

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

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

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

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

(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 manner;

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

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

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) 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;

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

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

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

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

[13] Pursuant to section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, S.O.R./2000-187 (the AAAMP Regulations), contraventions of the *Health of Animals Act* may be proceeded with in accordance with the administrative monetary penalty system:

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| <p>2. The contravention of a provision of the <i>Health of Animals Act</i> or the <i>Plant Protection Act</i> or of a regulation made under these Acts, or the contravention of an order — or class of orders — made by the Minister under the <i>Plant Protection Act</i>, or the refusal or neglect to perform any specified duty — or class of duties — imposed by or under the <i>Health of Animals Act</i> or the <i>Plant Protection Act</i> 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.</p> | <p>2. L'infraction à une disposition de la <i>Loi sur la santé des animaux</i>, de la <i>Loi sur la protection des végétaux</i> ou de leurs règlements, à tout arrêté ou toute catégorie d'arrêtés pris par le ministre au titre de la <i>Loi sur la protection des végétaux</i>, ou à toute obligation ou catégorie d'obligations — par refus ou omission de l'accomplir — découlant de la <i>Loi sur la santé des animaux</i> ou de la <i>Loi sur la protection des végétaux</i>, qui figure à la colonne 1 de l'annexe 1, est une violation punissable au titre de la Loi.</p> |
|--|---|

[14] Pursuant to the combination of section 3 and Schedule 1 of the AAAMP Regulations, the contravention of subsection 35(1) of the *Health of Animals Act* is split into two-short-form descriptions, carrying two different classifications, and therefore, two different penalties:

- |   |   |
|---|---|
| <p>3. The short-form descriptions that are set out in column 2 of Schedule 1 are established to be used in notices of violations in respect of violations of the corresponding provisions that are set out in column 1 of Schedule 1.</p> | <p>3. Les sommaires figurant à la colonne 2 de l'annexe 1 sont établis pour caractériser, dans un procès-verbal, la violation de la disposition correspondante figurant à la colonne 1 de la même annexe.</p> |
|---|---|

[15] Schedule 1 of the AAAMP Regulations provides that a contravention of subsection 35(1) of the *Health of Animals Act* is classified either as a “serious violation,” in the case of hindering an inspector, analyst, or officer contrary to subsection 35(1)(a), or a “very serious violation,” in the

case of making a false or misleading statement to an inspector, analyst or officer contrary to subsection 35(1)(b).

[16] Subsection 5(3) of the AAAMP Regulations provides that the penalty for a very serious violation committed in the course of business or to obtain financial benefit is \$10,000, subject to adjustment (Mr. Clare appears to have received an unadjusted \$10,000 penalty):

5. (3) The amount of the penalty in respect of a violation that is committed by a person in the course of business or in order to obtain a financial benefit is \$6,000 for a serious violation and \$10,000 for a very serious violation, with adjustments, if any, determined for each total gravity value, as established in accordance with section 6, that is set out in column 1 of Schedule 2 in accordance with the calculation set out in column 2.

5. (3) Le montant de la sanction applicable à une violation commise par une personne dans le cadre d'une entreprise ou à des fins lucratives est de 6 000 \$, dans le cas d'une violation grave, et de 10 000 \$, dans le cas d'une violation très grave. Ce montant peut être rajusté, selon le calcul prévu à la colonne 2 de l'annexe 2 et en fonction de la cote de gravité globale figurant à la colonne 1, laquelle est établie conformément à l'article 6.

[17] Where a person receives a notice of violation with a penalty, as Mr. Clare did, the person named in the violation has the option to request a review of the facts of the violation by the Tribunal pursuant to paragraph 9(2)(c) of the AAAMP Act:

9. (2) Instead of paying the penalty set out in a notice of violation or, where applicable, the lesser amount that may be paid in lieu of the penalty, the person named in the notice may, in the prescribed time and manner,

9. (2) À défaut d'effectuer le paiement, le contrevenant peut, dans le délai et selon les modalités réglementaires :

(a) if the penalty is \$2,000 or more, request to enter into a compliance agreement with the Minister that ensures the person's compliance with the agri-food Act or regulation to which the violation relates;

a) si la sanction est de 2 000 \$ ou plus, demander au ministre de conclure une transaction en vue de la bonne application de la loi agroalimentaire ou du règlement en cause;

(b) request a review by the Minister of the facts of the violation; or

b) contester auprès du ministre les faits reprochés;

(c) request a review by the Tribunal of the facts of the violation.

c) demander à la Commission de l'entendre sur les faits reprochés.

[18] According to subsection 11(2) of the AAAMP Regulations, a person who wishes to commence such a review must do so with 30 days after the day on which the notice is served:

11. (2) Where a person named in a notice of violation that contains a penalty requests, pursuant to subsection 9(2) of the Act, a review of the facts of the violation by the Minister or the Tribunal or, if the penalty is \$2,000 or more, to enter into a compliance agreement with the Minister, the request shall be made in writing within 30 days after the day on which the notice is served.

11. (2) Lorsque, en vertu du paragraphe 9(2) de la Loi, la personne nommée dans un procès-verbal qui comporte une sanction conteste les faits reprochés auprès du ministre ou demande à la Commission de l'entendre sur ces faits ou, si la sanction est de plus de 2 000 \$, demande au ministre de transiger, elle le fait par écrit dans les 30 jours suivant la date de notification du procès-verbal.

[19] It is important that a review be requested within the appropriate time frame, because the failure to do so will result in the person being deemed to have committed the violation pursuant to subsection 11(3) of the AAAMP Act:

11. (3) Where a person does not pay the amount referred to in paragraph (1)(a) in the prescribed time and manner or does not request a review under paragraph (1)(b), the person is deemed to have committed the violation identified in the notice of violation.

11. (3) Le défaut du contrevenant d'exercer l'option dans le délai et selon les modalités prévus vaut déclaration de responsabilité à l'égard de la violation.

[20] The AAAMP Regulations also set out the permissible manners in which a document, including a notice of violation may be served on a person. Pursuant to paragraph 8(1)(b), service

via registered mail may be effected by sending a copy of the violation to the last known address or usual place of residence of an individual named in the document:

8. (1) Service of any document originating from the Minister, including a notice of violation, on an individual named in the document may be made

(a) personally, by leaving a copy of it

(i) with the individual at any place, or

(ii) if the individual cannot conveniently be found, with someone who appears to be an adult member of the same household at the last known address or usual place of residence of the individual. The day on which the document is left with that person is deemed to be the day on which the document is served; or

(b) by sending a copy of it by registered mail, courier, fax or other electronic means to the last known address or usual place of residence of the individual.

8. (1) La notification de tout document émanant du ministre, y compris un procès-verbal, à la personne physique qui y est nommée peut se faire :

a) par remise à personne d'une copie :

(i) à la personne en tout lieu,

(ii) s'il est en pratique impossible de trouver la personne, à quiconque semble être un membre adulte du même ménage à la dernière adresse connue ou au lieu de résidence habituel de la personne; la date à laquelle le document est laissé à la personne est réputée être la date de notification;

b) par envoi d'une copie par courrier recommandé ou par messagerie, ou par télécopieur ou autre moyen électronique, à la dernière adresse connue ou au lieu de résidence habituel de la personne

[21] Where a document is sent via registered mail, the AAAMP Regulations deem it to have been served on the 10<sup>th</sup> day after it was sent:

9. (1) A person who signs a certificate of service, in a form approved by the Minister, stating that the notice of violation was served on the person named in the certificate and the means by which service was effected is

9. (1) La personne qui signe le certificat de notification, en une forme approuvée par le ministre, indiquant que la personne qui y est nommée a été notifiée et précisant le mode de notification est réputée avoir procédé

<p>deemed to have served the document on the date that is determined pursuant to subsections (2) to (4).</p>	<p>à la notification à la date établie selon les paragraphes (2) à (4).</p>
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<p>(2) A document sent by registered mail is served on the 10th day after the date indicated in the receipt issued by a post office.</p>	<p>(2) Le document envoyé par courrier recommandé est notifié le 10<sup>e</sup> jour suivant la date indiquée sur le récépissé du bureau de poste.</p>
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[...]

## VI. Analysis

[22] The notice of violation in this case was issued June 27, 2012. It appears as if the Tribunal calculated the 10 day deeming provision for service in subsection 9(2) of the AAAMP Regulations by using the date of the notice of violation as the starting point and concluding that the 30 days period for commencing a review began on July 9, 2012. This does not appear to be correct but, in my view, nothing turns on this. The Tribunal conceded that “based on the information currently before [it], a precise determination of that date [on which Mr. Clare was served] is not possible” (paragraph 7). It would have been preferable for the Tribunal to have a complete record before making a decision. However, on the facts set out in the record before this Court, it is clear that the Mr. Clare’s request was beyond the 30 days permitted in the legislation.

[23] The notice of violation was sent by registered mail on July 3, 2012 and the receipt provided by Canada Post confirming such service was entered as an exhibit before this Court. It is acknowledged that the notice of violation was received by an agent of Mr. Clare on July 4, 2012. Mr. Clare raised a new issue in this Court that there was slight variation in the Applicant’s address but, in my view, this is not a material error that invalidates service of the notice of violation given that the notice of violation was admitted as being received on July 4, 2012 by an employee of the Applicant. Pursuant to subsection 9(2) of the AAAMP Regulations, service by registered mail is

deemed to be effective on the 10th day after the date indicated in the receipt issued by the post office. Thus, effective service upon the Applicant was July 13, 2012.

[24] It is evident from the record that the request for review was made by Mr. Clare on August 14, 2012 which is one day outside the 30 day period set out in the AAAMP Act. The jurisprudence of this Court has determined that the Tribunal does not have the jurisdiction to deviate from the timelines set out in the AAAMP legislation: *Reference re section 14 of the Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, 2012 FCA 130, *Adam v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 373 (C.A.), *Wilbur-Ellis Co. of Canada v. Canada (Deputy Minister of National Revenue, Customs and Excise – M.N.R.)*, [1995] F.C.J. No. 1435 (C.A.). Thus the Tribunal was correct in deciding that it did not have the jurisdiction to provide relief to soften the strict application of the provisions found in the AAAMP Act and AAAMP Regulations.

[25] Mr. Clare also raised an argument for the first time before this Court in his written submissions based on section 11 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*(U.K.), 1982, c. 11.

[26] These submissions were not elaborated upon in oral argument. In my view, section 11 of the Charter does not apply in this matter. As per *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 and *Martineau v. Canada (Minister of National Revenue)*, 2004 SCC 81, for section 11 protections to apply, the matter must be either 1) a matter that is by its nature a criminal proceeding; and 2) where

the penalty imposed is a true penal consequence. Neither of these elements apply to the violation at hand.

[27] Parliament has been very clear that a violation under the AAAMP Act is not an offence attracting penal sanction, indicating this for greater certainty in the Act itself:

<p>17. For greater certainty, a violation is not an offence and, accordingly, section 126 of the <i>Criminal Code</i> does not apply.</p>	<p>17. Les violations n'ont pas valeur d'infractions; en conséquence nul ne peut être poursuivi à ce titre sur le fondement de l'article 126 du <i>Code criminel</i>.</p>
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[28] It is evident that the objective of the AAAMP Act is to establish a fair and efficient system of administrative penalties as an alternative to the existing penal system. For while the possible fines may be considerable - in this case up to \$10,000 - these amounts are well within the parameters of most administrative penalty schemes: see, for instance, *Re Cartaway Resources Corp.*, 2004 SCC 26 (a Securities Commission penalty of \$100,000); *Canada v. Guindon*, 2013 FCA 153 (an *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) penalty of \$564,747); and *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176 (a penalty of \$10,000 per day for each day of a breach of an undertaking).

## VII. Conclusion

[29] Mr. Clare's deemed service date was July 13, 2012, from which he had 30 days to request a review. Having failed to pursue a review within that window, he is no longer able to do so. The Tribunal lacks jurisdiction to extend the clear timelines which the AAAMP Act and AAAMP Regulations provide.

[30] I would dismiss the application for judicial review with costs.

"David G. Near"

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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-445-12

**AN APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE CANADIAN AGRICULTURAL REVIEW TRIBUNAL DATED SEPTEMBER 19, 2012 BEARING NOTICE OF VIOLATION NOV #1112ON0018-04**

**STYLE OF CAUSE:** RICHARD W. CLARE v.  
ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 1, 2013

**REASONS FOR JUDGMENT BY:** NEAR J.A.

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

**DATED:** NOVEMBER 13, 2013

**APPEARANCES:**

Ian C. Wallace FOR THE APPLICANT

Andrew Law FOR THE RESPONDENT  
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