

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120426

Docket: A-485-11

Citation: 2012 FCA 130

**CORAM: NOËL J.A.
GAUTHIER J.A.
MAINVILLE J.A.**

BETWEEN:

**IN THE MATTER OF SECTION 14 OF THE *AGRICULTURE AND
AGRI-FOOD ADMINISTRATIVE MONETARY PENALTIES
REGULATIONS*, SOR/2000-187;**

**AND IN THE MATTER OF AN APPLICATION BY WAY OF A REFERENCE
TO THE FEDERAL COURT OF APPEAL PURSUANT TO SECTIONS 18.3(1) AND
28(2) OF THE *FEDERAL COURTS ACT*, R.S.C. 1985, c. F-7**

Heard at Ottawa, Ontario, on April 24, 2012.

Judgment delivered at Ottawa, Ontario, on April 26, 2012.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application by way of reference by the Canada Agricultural Review Tribunal (the applicant or the Tribunal), pursuant to subsections 18.3(1) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Federal Courts Act). The applicant seeks the opinion of this Court on the interpretation of subsection 14(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187 (the Regulations). Specifically, the applicant submitted the following two questions:

- a. Given that sections 11 to 13 of the [...] Regulations require written notice from an applicant to commence a request for review before the [...] Tribunal, would the [...] Tribunal err, if it ruled as a matter of law, that the methods to commence a request set out explicitly in subsection 14(1) are permissive but not exhaustive?
- b. If the methods to commence a request set out in subsection 14(1) are permissive, then is the effective date of a request sent by ordinary mail the earlier of the date stamp clearly visible on the envelope or the date it is received by the [...] Tribunal?

BACKGROUND FACTS

[2] The reference arises in the context of a Notice of Violation that was issued by the Canadian Food Inspection Agency to Transport Giannone Garceau Inc. (TGG) on February 14, 2011 (affidavit of Lise Sabourin, appeal book, tab 4).

[3] TGG submitted a request by regular mail to review the Notice of Violation pursuant to subsection 11(2) of the Regulations. This request was received by the Tribunal on March 17, outside of the 30-day period established in subsection 11(2) of the Regulations. The envelope in which the request was sent bears a post stamp indicating March 14, 2011 (*idem*).

[4] The Tribunal initially notified TGG that its request was refused because it was received three days outside of the 30-day period. TGG requested reconsideration of that decision, on account of the post stamp indicating March 14, 2011 on the envelope.

[5] The Tribunal agreed to reconsider its initial decision on the basis that there are “ambiguities in section 14 of the Regulations”. The reference questions were drafted to clarify the methods for submitting requests to the Tribunal (*idem*, para. 10).

[6] On January 26, 2012, Mainville J.A. determined that the interested parties to the reference were the Tribunal, the Attorney General of Canada, the Canadian Food Inspection Agency and TGG. He further ordered that the Tribunal prepare a memorandum identifying the legal issues arising from the reference. This memorandum has been filed and the Attorney General has filed a memorandum in response. While it was open to the other interested parties to submit memoranda they have chosen not to do so.

RELEVANT LEGISLATIVE PROVISIONS

[7] Section 18.3 of the Federal Courts Act details the reference procedure for federal tribunals:

Reference by federal tribunal

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or

Renvoi d'un office fédéral

18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité,

operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

Subsection 18.3(1) is to be read as referring to the Federal Court of Appeal insofar as references made by specified instances are concerned, including the Tribunal (see subsection 28(2) of the Federal Courts Act).

[8] The Regulations were enacted pursuant to subsection 4(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 (the Act).

[9] Paragraph 9(2)(c) of the Act provides that a person who wishes to contest a Notice of Violation may do so by requesting “in the prescribed time and manner” a review by the Tribunal of the facts of the violation.

[10] While subsection 11(2) of the Regulations prescribes the time to file such requests, section 14 provides for the procedure or manner to do so as follows:

14. (1) A person may make a request referred to in section 11, 12 or 13 by delivering it by hand or by sending it by registered mail, by courier or by electronic means, including electronic registered mail and fax, to a recipient and place authorized by the Minister.

14. (1) Toute personne peut présenter la demande visée aux articles 11, 12 ou 13 en la livrant en mains propres ou en l'envoyant par courrier recommandé, par messagerie ou par tout moyen électronique, notamment par courrier recommandé électronique et par télécopieur, au destinataire et au lieu autorisés par le ministre.

(2) If a person makes a request, the date of the request is

- (a) the day on which the request is delivered to the authorized recipient, if the request is delivered by hand;
- (b) the earlier of the day on which the request is received by the authorized recipient and the date indicated in the receipt issued by the postal or courier service, if the request is sent by registered mail or courier; or
- (c) the date on which the fax or other electronic transmission is received.

(3) Where a request is sent by fax or by other electronic means, a copy of the request shall be sent by registered mail.

(2) La date de la demande visée au paragraphe (1) est :

- a) la date à laquelle la demande est livrée au destinataire autorisé, si elle est livrée en mains propres;
- b) la date de réception par le destinataire autorisé ou, si elle est antérieure, la date indiquée sur le récépissé du bureau de poste ou du service de messagerie, si la demande est envoyée par courrier recommandé ou par messagerie;
- c) la date de réception de la télécopie ou autre copie transmise électroniquement.

(3) Lorsque la demande est transmise par télécopieur ou autre moyen électronique, une copie doit aussi en être envoyée par courrier recommandé.

[11] Section 10 of the Regulations is also useful for the analysis:

PAYMENT

10. (1) For the purposes of subsection 9(1) of the Act and subject to subsection (2), any payment shall be paid within 30 days after the day on which the notice is served.

(2) A person named in a notice of violation that contains a penalty may pay an amount equal to one half of the

PAIEMENT

10. (1) Pour l'application du paragraphe 9(1) de la Loi et sous réserve du paragraphe (2), tout paiement doit être fait dans les trente jours suivant la date de notification du procès-verbal.

(2) La personne nommée dans un procès-verbal qui comporte une

penalty if the person pays the amount within 15 days after the day on which the notice is served.

(3) For the purposes of the Act and these Regulations, the payment of a penalty or an amount in default shall be made by means of a certified cheque or money order made payable to the Receiver General for Canada and may be made

- (a) in person;
- (b) by regular mail;
- (c) by registered mail; or
- (d) by courier.

(4) A payment made in accordance with subsection (3) is deemed to be made

- (a) on the day on which it is made in person;
- (b) on the date indicated in the postmark stamped on the envelope, if the amount is sent by regular mail; and
- (c) on the date indicated in the receipt issued by the postal or courier service, if the payment is sent by registered mail or courier.

sanction peut ne payer qu'une somme égale à la moitié de la sanction si elle le fait dans les quinze jours suivant la date de notification du procès-verbal.

(3) Pour l'application de la Loi et du présent règlement, le paiement d'une sanction ou d'une somme en souffrance se fait par chèque visé ou par mandat émis à l'ordre du receveur général du Canada, transmis :

- a) soit en personne;
- b) soit par courrier ordinaire;
- c) soit par courrier recommandé;
- d) soit par messagerie.

(4) Le paiement visé au paragraphe (3) est réputé avoir été effectué :

- a) à la date où il a été transmis en personne;
- b) à la date indiquée sur le cachet postal apposé sur l'enveloppe, s'il est transmis par courrier ordinaire;
- c) à la date indiquée sur le récépissé du bureau de poste ou du service de messagerie, s'il est transmis par courrier recommandé ou par messagerie.

SUBMISSIONS OF THE PARTIES

[12] Pursuant to Mainville J.A.'s order, the applicant submitted a memorandum developing what it considers to be the two possible interpretations of section 14. Ordinary mail is not one of the listed methods for making a request, but it is not specifically excluded by the Regulations. It contends that section 14 can be read as permissive inasmuch as it allows other methods of delivery to satisfy the requirements for filing a request. By contrast, an exhaustive interpretation would only allow the listed methods. The applicant develops both possible interpretations in its submissions.

[13] In support of a permissive interpretation, the applicant points to the "fair, large and liberal" interpretative approach provided at section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 (the Interpretation Act). As the object of sections 11 to 14 of the Regulations is to provide persons an opportunity to request a review of the violation, a permissive interpretation would further this objective (applicant's memorandum, para. 19).

[14] The applicant also notes the choice of the word "may" at section 14. It points that pursuant to section 11 of the Interpretation Act, this expression is to be construed as permissive. The result is that other methods of delivery could be permitted.

[15] The applicant also looks to the purpose of the Act, provided for in section 3. It contends that the objective of establishing an alternative to the penal system by a fair and efficient administrative monetary penalty system supports the permissive interpretation. It contends that applicants before the Tribunal are unrepresented and would consider sending a letter by regular mail to be an effective

means to request a review. It further notes that using regular mail to conduct business is a common practice in Canada.

[16] It also points to section 10 of the Act which permits applicants to make early payments by regular mail. In these cases, the Regulations indicate that the date of the sending, not of receipt, is considered.

[17] In support of the exhaustive interpretation, the applicant notes that the word “may” can be found in some circumstances to mean “must”. As for the purpose of the Act, the applicant points to the objective of efficiency. An exhaustive interpretation would promote efficiency by requiring adherence to the timeframes specified by the Regulations. This allows the process to be fast, simple and less expensive.

[18] The Attorney General for his part takes the position that the modern principle of statutory interpretation only admits to one interpretation and that a reading of the words of section 14 in their ordinary sense, harmoniously with the scheme and object of the Act and the Regulations and the intention of the drafters makes it clear that a request cannot be submitted to the Tribunal by ordinary mail.

ANALYSIS

[19] The two reference questions appear to have been framed on the assumption that if subsection 14(1) is permissive and not exhaustive, it would follow that regular mail is an authorized means of communicating a request.

[20] This does not necessary follow. For instance, there is no doubt that subsection 14(1) is permissive and not exhaustive with respect to requests communicated by “electronic means” which are described as “including electronic registered mail and fax”. This language obviously contemplates that a request may be communicated by “electronic means” other than the two that are specified. To that extent at least, subsection 14(1) is permissive but it does not follow from this that regular mail is an authorized means of communicating a request.

[21] When regard is had to the record placed before the Court and the context in which the reference arose, the relevant question, it seems, is whether section 14 can be construed as authorizing regular mail as a means of communicating a request to the Tribunal. The second question needs only be answered in the event that this last question is answered in the affirmative.

[22] In my view, section 14 cannot be construed as authorizing regular mail as a means of communicating a request. Subsection 9(2) of the Act provides that a person may request a review by the Tribunal “in the prescribed time and manner”. Section 14 of the Regulations simply does not prescribe regular mail as a manner of requesting a review by the Tribunal.

[23] The common thread that appears to run through section 14 is that the question whether a request has been filed within the time allowed for doing so can either be assessed independently by the Tribunal based on the time when a request is actually “delivered” or “received” by hand or by electronic transmission pursuant to paragraphs 14(2)(a) or (c), or by reference to independent third party evidence as to when a request has been “sent” when registered mail or courier service are resorted to as a mode of transmission. In such a case, paragraph 14(2)(b) provides that the request is considered to have been made on the earlier of the date on which the request is received or the date indicated on the receipt issued by the postal or courier service.

[24] In contrast, regular mail if read into section 14 would allow for no independent means of establishing whether and when the mailed request was sent in the event that it does not reach its proper destination. This problem could have been resolved by deeming such a request to have been made on the date indicated on the postmark stamped on the envelope as was done with respect to the payment of reduced penalties pursuant to section 10 (see in particular paragraph 10(4)(b)). However, this approach was not adopted and the drafters of the Regulations did not prescribe anything in that respect at subsection 14(2). The Court would have to engage in an improper exercise of legal drafting if it was to read into section 14 the approach set out in section 10 (compare *Canada (Attorney General) v. Mowat*, 2009 FCA 309 at paras. 97 to 99).

[25] I therefore conclude that section 14 cannot be construed as including regular mail as an authorized mode of transmission. Given this conclusion, it is not necessary to address the second question.

“Marc Noël”

J.A.

“I agree

Johanne Gauthier J.A.”

“I agree

Robert M. Mainville J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-285-10

STYLE OF CAUSE: **IN THE MATTER OF** section 14 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR 2000-187 **AND IN THE MATTER OF** an application by way of a reference to the Federal Court of Appeal to sections 18.3(1) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7

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REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Gauthier J.A.
Mainville J.A.

DATED: April 26, 2012

APPEARANCES:
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