

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131218

Docket: A-145-13

Citation: 2013 FCA 292

**CORAM: BLAIS C.J.
GAUTHIER J.A.
MAINVILLE J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

BOUCHAIB EL KOUCHI

Respondent

Heard at Ottawa, Ontario, on December 10, 2013.

Judgment delivered at Ottawa, Ontario, on December 18, 2013.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**BLAIS C.J.
MAINVILLE J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131218

Docket: A-145-13

Citation: 2013 FCA 292

CORAM: BLAIS C.J.
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

BOUCHAIB EL KOUCHI

Respondent

REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The Attorney General of Canada (AGC) has brought an application for the judicial review of a decision of the Canada Agricultural Review Tribunal (the Tribunal), 2013 CART 12, declaring that Bouchaïb El Kouchi (the respondent) did not violate paragraph 34(1)(b) of the *Health of Animals Regulations*, C.R.C., c. 296 (the Regulations), essentially because there was no causal link between the act of importing the artisanal butter found in his suitcase and the respondent himself, independent of the acts of a third party.

[2] For the reasons that follow, the application for judicial review should be allowed.

Background

[3] On April 25, 2013, the respondent arrived at the Montréal international airport on a flight from Morocco. He signed his Canada Border Services Agency (the Agency) Declaration Card E311 after, among other things, ticking the “no” box next to the statement “I am/we are bringing into Canada: . . . dairy products”.

[4] After being processed at the Canadian customs primary inspection line, the respondent was required to undergo a secondary inspection. Before that inspection, in reply to a question by the inspector, the respondent indicated that he owned the bags he was carrying, that he had packed them himself and that he knew their contents. The inspector then searched the respondent’s luggage and found in a plastic bag a bowl containing approximately one kilogram of artisanal butter. The inspector asked the respondent whether he had any permits or certificates allowing him to import this dairy product from Morocco, to which the respondent replied “no”.

[5] In his non-compliance report, the inspector stated that the respondent had not declared the product and that the product was seized and destroyed. He then issued the respondent a notice of violation of paragraph 34(1)(b) of the Regulations. This notice also stated that such a violation is, under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, a serious violation for which the penalty is \$800.

[6] The respondent challenged the notice of violation. Although most of the facts were not in dispute before the Tribunal, two witnesses testified, namely, the inspector and the respondent. In his

testimony, the respondent stated that he was unaware that there was butter in his suitcase because his sister had packed it before he left Morocco and she had not told him about it. The inspector, on the other hand, testified that when he found the butter, the respondent told him that he was unaware that the law required him to declare milk products.

Decision of the Tribunal

[7] After a brief review of the statutory framework and the case law, the Tribunal noted that it was incumbent on the Agency to prove, on a balance of probabilities, all the elements of the violation. The Tribunal then explained that to establish a violation of paragraph 34(1)(b) of the Regulations, the Agency had to prove the following four elements:

- (i) Mr. El Kouchi is the person who committed the violation;
- (ii) Mr. El Kouchi brought (imported) milk or milk products from a country other than the United States;
- (iii) Mr. El Kouchi did not provide an Agency inspector with 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; and
- (iv) there is a direct causal link between the act of importing the milk product and the violator, independent of the acts of a third party.

[8] The Tribunal found that the first three elements had been established to its satisfaction. However, it noted that the Agency had not proved the required direct causal link (element (iv), above). After summarizing the respondent's testimony regarding his sister's actions, the Tribunal stated that the Agency had not produced any evidence to the contrary. According to the Tribunal, if

the respondent was unaware that there was butter in his suitcase, it was impossible for him to declare it. The Tribunal noted that it had come to similar conclusions in *Castillo v. Canada (CBSA)*, 2012 CART 22 (*Castillo 2012*), a decision that this Court later set aside in *Canada (Border Services Agency) v. Mario Castillo*, 2013 FCA 271 (*Castillo FCA*).

[9] The Tribunal also noted that the requirement to prove a causal link had been clearly laid down in *Doyon v. Attorney General of Canada*, 2009 FCA 152 (*Doyon*). It concluded from this that its position was consistent with subsection 18(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 (*Penalties Act*), in which Parliament has expressly provided that a person named in a notice of violation cannot raise a defence of due diligence or of a reasonable belief in the existence of facts that, if true, would exonerate him or her.

Legislation

[10] The relevant statutory provisions are reproduced in Appendix “A”, as is section 138 of the Regulations, on which this Court commented in *Doyon*.

Issue

[11] The sole issue is whether the Tribunal erred in its statement of the elements that the Agency had to prove to establish a violation of paragraph 34(1)(b) of the Regulations, particularly by requiring that the Agency establish a direct causal link between the act of importing a milk product and the violator, independent of the acts of a third party.

[12] It should be noted that the respondent did not file a memorandum and did not attend the hearing before us.

[13] The AGC argues that this Court established in *Castillo (FCA)*, at paragraph 11, that the standard of review applicable to this issue is correctness. However, in my view, the applicable standard is of no importance here because, even if the reasonableness standard were applied, the outcome would be the same. The wording of paragraph 34(1)(b) of the Regulations is clear and unambiguous. It does not allow of more than one reasonable interpretation: *Qin v. Canada (Citizenship and Immigration)*, 2013 FCA 263 at paragraphs 32-33; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraph 38.

[14] As the Tribunal stated, it had already set aside a notice of violation under the Regulations in a situation in which the unauthorized product (in that case, a prohibited animal by-product under section 40 of the Regulations) had been placed in the violator's luggage by a third party (his mother) without his knowledge, in *Castillo 2012*. Two comments must be made on this point.

[15] First, in that decision, rendered a few months prior to the decision under review here, the Tribunal also set out the elements that the Agency had to prove. It is disconcerting to see that, despite the similarity of the provisions involved, which deal with prohibitions against importing products, the Agency's burden of proof was limited to three elements (which more or less match the first three elements used in the present case). There was no question in the earlier case of proving a direct causal link between the importation and the violator.

[16] Second, in *Castillo (FCA)*, this Court very clearly held, at paragraph 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* [2003 FCA 383] 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.

[17] As regards the statement in *Doyon* (paragraph 41) of the elements to be established in order to prove a violation of paragraph 138 (2)(a) of the Regulations, it is difficult to imagine that it could apply to a violation of paragraph 34(1)(b) of the Regulations, since the wording of these two provisions is completely different.

[18] The language itself of paragraph 138(2)(a) of the Regulations, which deals with the transportation of animals, refers to various factors causing undue suffering during the expected journey. This is the vocabulary that was the basis for the reference to a causal link between the transportation, the undue suffering and the factors described in that provision. Paragraph 34(1)(b) simply and clearly states that no person shall import a milk product into Canada from a country other than the United States, unless the country is designated as free of foot and mouth disease or a certificate of origin is produced.

[19] The Tribunal did not explain on what basis it could apply the above-mentioned passage from *Doyon* in the present case. Moreover, the distinction it made to avoid applying subsection 18(1) of the *Penalties Act* simply does not stand up. It is obvious that the approach adopted by the Tribunal circumvents the intention so clearly expressed by Parliament. In my view, there is no valid reason not to apply the reasoning of this Court in *Castillo (FCA)* to the present case. The Tribunal erred in law in requiring the Agency to prove that there was a causal link

independent of the acts of a third party and, more specifically, that the violator knew that the prohibited product was in his luggage.

[20] This Court has stated in the past that the current system is highly punitive, even draconian: *Doyon* at paragraph 21. Whether it agrees or not with this system or how it is applied, the Tribunal must apply the law.

[21] The application for judicial review should be allowed, the decision of the Tribunal set aside and the matter referred back to the Tribunal for reconsideration in accordance with these reasons, without costs.

“Johanne Gauthier”

J.A.

“I agree
Pierre Blais”

“I agree
Robert M. Mainville”

Certified true translation
Erich Klein

APPENDIX "A"

Health of Animals Regulations

Règlement sur la santé des animaux

C.R.C., c. 296

C.R.C., ch. 296

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

34. (1) Il est interdit d'importer du lait ou des produits du lait d'un pays autre que les États-Unis, ou d'une partie d'un tel pays, à moins :

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

a) que le pays ou la partie de pays n'ait été désigné comme étant exempt de la fièvre aphteuse en vertu de l'article 7;

(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).

b) de produire un certificat d'origine signé par un fonctionnaire du gouvernement du pays d'origine du produit attestant que le pays d'origine ou la partie de ce pays est celui visé à l'alinéa a).

[...]

...

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.

...

[...]

138. (2) Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal

138. (2) Sous réserve du paragraphe (3), il est interdit de charger ou de faire charger, ou de transporter ou de faire transporter, à bord d'un wagon de chemin de fer, d'un véhicule à moteur, d'un aéronef ou d'un navire un animal :

(a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey;

(b) that has not been fed and watered within five hours before being loaded, if the expected duration of the animal's confinement is longer than 24 hours from the time of loading; or

(c) if it is probable that the animal will give birth during the journey.

*Agriculture and Agri-Food
Administrative Monetary Penalties
Regulations*

SOR/2000-187

4. The classification of a violation as a minor, serious or very serious violation of a provision set out in column 1 of an item of Schedule 1 is as set out in column 3 of that item.

...

SCHEDULE 1 (Sections 2 to 4)

**PART 1 HEALTH OF ANIMALS
ACT AND HEALTH OF ANIMALS
REGULATIONS**

...

a) qui, pour des raisons d'infirmité, de maladie, de blessure, de fatigue ou pour toute autre cause, ne peut être transporté sans souffrances indues au cours du voyage prévu;

b) qui n'a pas été alimenté et abreuvé dans les cinq heures précédant l'embarquement, si la durée prévue de l'isolement de l'animal dépasse 24 heures à compter de l'embarquement; ou

c) s'il est probable que l'animal mette bas au cours du voyage.

*Règlement sur les sanctions
administratives pécuniaires en matière
d'agriculture et d'agroalimentaire*

DORS/2000-187

4. La violation d'une disposition mentionnée à la colonne 1 de l'annexe 1 est qualifiée de mineure, de grave ou de très grave selon ce qui est prévu à la colonne 3.

[...]

ANNEXE 1 (articles 2 à 4)

**PARTIE 1 LOI SUR LA SANTÉ
DES ANIMAUX ET RÈGLEMENT
SUR LA SANTÉ DES ANIMAUX**

[...]

**Division 2 Health of Animals
Regulations
(C.R.C., c. 296; SOR/91-525)**

...

67. 34(1)(b) Import an animal product without the required certificate Serious

**Section 2 Règlement sur la santé des animaux
(C.R.C., ch. 296; DORS/91-525)**

[...]

67. 34(1)(b) Importer un produit animal sans le certificat prévu Grave

*Agriculture and Agri-Food
Administrative Monetary Penalties Act*

S.C. 1995, c. 40

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.

Loi sur les sanctions administratives pécuniaires en matière d'agriculture et d'agroalimentaire

L.C. 1995, ch. 40

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.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-145-13

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. BOUCHAIB EL
KOUCHI

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: DECEMBER 10, 2013

REASONS FOR JUDGMENT

BY: GAUTHIER J.A.

CONCURRED IN BY: BLAIS C.J.
MAINVILLE J.A.

DATED: DECEMBER 18, 2013

APPEARANCES:

Talitha A. Nabbali FOR THE APPLICANT

SOLICITORS OF RECORD:

William F. Pentney FOR THE APPLICANT
Deputy Attorney General of Canada