

CANADA / JUDGMENT

Estensen v. Canada (Attorney General)

2007 FC 538

COURT

Federal Court

DECIDED

22 May 2007

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Decision Content

Date: 20070522

Docket: T-740-06

Citation: 2007 FC 538

Ottawa, Ontario, the 22nd day of May, 2007

PRESENT: The Honourable Barry Strayer

BETWEEN:

RALPH ESTENSON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] In this application, the Applicant asks the Court to:

1. Quash the suspension by the Canadian Food Inspection Agency (CFIA) of his functions and duties under his Accredited Veterinarian Agreement (AVA), such suspension being dated April 3, 2006;

2. Prevent the CFIA from taking further steps to cancel his accreditation, arising out of Canadian Export Certificate VABD-2005-774 issued by him on December 7, 2005;
3. Order retroactively to December 12, 2005 the restoration of the Applicant's full accreditation under the AVA;
4. To award costs to the Applicant on a solicitor-client basis.

FACTS

- [2] The statutory and contractual arrangements under which this matter arises should first be noted.
- [3] Section 2 and subsection 69(1) of the Health of Animals Regulations, C.R.C., c. 296 provide in part as follows:

INTERPRETATION

2. In these Regulations,

“accredited veterinarian” means a veterinarian who is authorized to perform certain duties or functions under an agreement made under section 34 of the Act; (vétérinaire accrédité)

“Act” means the Health of Animals Act; (Loi)

PART VIII EXPORTATION OF ANIMALS AND ANIMAL PRODUCTS General 69. (1) Subject to this Part, no person shall export out of Canada livestock, poultry, animal embryos or animal semen unless

- (a) the person has obtained a certificate of a veterinary inspector or a certificate of an accredited veterinarian endorsed by a veterinary inspector issued before shipment that clearly identifies the livestock, poultry, animal embryos or animal semen and shows
 - (i) that a veterinary inspector or an accredited veterinarian has inspected the livestock, poultry, animal embryos or animal semen and found it to be free from any communicable diseases,
 - (ii) the date and place of inspection, and
 - (iii) where tests have been performed, the nature of each test and that the livestock, poultry, animal embryos or animal semen proved negative to such tests; and
- (b) the importation requirements of the country to which the livestock, poultry, animal embryos or animal semen are exported have been complied with.

INTERPRÉTATION

2. Dans le présent règlement,

«Loi» La Loi sur la santé des animaux. (Act)

«vétérinaire accrédité» Vétérinaire autorisé à exercer certaines fonctions conformément à un accord conclu aux termes de l'article 34 de la Loi. (accredited veterinarian)

PARTIE VIII

EXPORTATION D'ANIMAUX ET DE PRODUITS ANIMAUX

Dispositions générales

69. (1) Sous réserve des autres dispositions de la présente partie, il est interdit d'exporter des animaux de ferme, de la volaille, des embryons animaux ou du sperme animal, à moins que les conditions suivantes ne soient réunies :
- a) l'exportateur a obtenu un certificat délivré par un vétérinaire-inspecteur ou un certificat délivré par un vétérinaire accrédité et contresigné par un vétérinaire-inspecteur avant l'expédition, qui identifie clairement les animaux de ferme, la volaille, les embryons animaux ou le sperme animal et indique :
 - (i) qu'un vétérinaire-inspecteur ou un vétérinaire accrédité les a inspectés et les a trouvés exempts de toute maladie transmissible,
 - (ii) les date et lieu de l'inspection,
 - (iii) lorsque des tests de dépistage ont été effectués, la nature de chaque test, et le fait qu'ils y ont réagi négativement;
 - b) les exigences d'importation du pays importateur ont été respectées.
- [4] It will be noted that paragraph 69(1)(a) of the Health and Animals Regulations requires that an exporter of Canadian livestock must obtain a certificate of a "veterinary inspector or . . . an accredited veterinarian" indicating that such veterinarian has inspected the livestock. The applicant has served as an accredited veterinarian for the CFIA for some time and last entered into an AVA with the CFIA on July 19, 2005. Paragraph 10 of that agreement provides as follows:

An accredited veterinarian shall not:

- a. sign, issue, or allow any document to be used relevant to duties as an accredited veterinarian and bearing that individual's name, unless it is fully completed, legible and accurately records the results of an examination, test or inspection performed or required to be performed, in respect of the document including the name of the owner, the type, result, date, and location of any and all inspections, tests or treatments conducted, and clearly identifies the animal or product to which it applies;
- b. pre-sign any document relevant to duties as an accredited veterinarian prior to the completion of tests or inspections required by that document;
- c. test and certify the veterinarian's own animals for export.

Le vétérinaire accrédité:

- a. ne signe, n'émet et ne délivre aucun document officiel portant son nom, ou il n'en autorise pas l'utilisation, si ce document n'est pas dûment rempli, lisible, véridique quant au résultat de tout examen, épreuve ou inspection effectué ou requis d'être effectué en regard du document. Le document doit mentionner le nom du propriétaire, le type, le résultat, la date, l'emplacement de chacun et de la totalité des inspections, des épreuves ou des traitements effectués et clairement identifier à quels animaux ou produits il s'applique;
- b. ne signe aucun document à l'avance qui se rapporte aux tâches effectuées en tant que vétérinaire accrédité avant la fin des épreuves ou des inspections exigées dans ce document selon le cas;
- c. ne soumet pas à des épreuves, ni ne certifie ses propres animaux aux fins d'exportation.

[5] Paragraph 14 of the same agreement provides as follows:

An accredited veterinarian's failure to comply with the terms and conditions of this agreement or any of its predecessor agreements to which the veterinarian was a party, may result in suspension of accreditation or suspension and cancellation of accreditation and the accredited veterinarian's accreditation agreement in accordance with the provisions of articles 15 to 17 of this agreement.

Le vétérinaire accrédité qui ne se conforme pas aux modalités de la présente entente ou à celles stipulées dans les ententes précédentes auxquelles il prenait part peut voir son accréditation suspendue, ou son accréditation et l'entente d'accréditation suspendues et annulées, conformément aux dispositions des articles 15 à 17 de la présente entente.

[6] The only aspect of inspection relevant to this case is that of the determination by a veterinarian that animals destined for export to the United States are not over 30 months (OTM) in age. Because of the previous discovery in Canada of Bovine Spongiform Encephalopathy (BSE), Canadian cattle had for a time been barred from the United States. Imports of live cattle from Canada were restored in July 2005, one of the conditions being that in future such cattle must be 30 months or less of age.

[7] On December 7, 2005 by Canadian Export Certificate VABD-2005-774, the Applicant certified a load of 36 cattle as being fit and at an age permissible for export. These cattle belonged to Henry Tebrinke, a Canadian cattle grower. At the time of inspection, these cattle bore Canadian Cattle Identification Agency (CCIA) tags. One of the animals in question inspected by the Applicant had a CCIA ear tag number 271 629 357. He stapled his own tag number 8Z07478 to the ear of this Hereford cow also. This load of cattle was subsequently shipped to a facility of Tyson Fresh Meats Inc. in Wallula, Washington, USA. According to the report of CFIA's own investigators, the animals were apparently slaughtered on the morning of December 10, 2005. Shortly after noon that day, Inspector Jose Gabiola, a United States Department of Agriculture inspector, happened to notice a newly slaughtered skinned head with "matured dentition"; that is, it was OTM. This diagnosis was confirmed by a

veterinarian. When the CFIA investigators, Dr. Robert Sturm and Pamela Davies visited the Tyson plant on December 14, 2005, they were shown the skinned head of a Hereford cow and with it was CCIA tag 271 629 357, the number of a cow inspected by the Applicant.

- [8] As a result, a Review Committee within CFIA on January 4, 2006 recommended the suspension of the Applicant and he was advised on January 5, 2006 by the acting chief veterinarian that he was suspended for having issued a certificate of inspection which was false, this being prohibited by paragraph 10 of the AVA as quoted above. He was notified that CFIA proposed to cancel his accreditation and that a hearing would be held by an adjudicator on January 17, 2006 in Burnaby, B.C. The hearing actually took place on January 26, 2006. On February 3, 2006 he was advised that the adjudicator had determined that he had issued a false certificate in respect of this particular animal. The adjudicator was a Dr. Beres. It emerged that after the hearing on January 26 and before his decision, Dr. Beres had, without the knowledge of the Applicant, conducted further post-hearing interviews.
- [9] On February 26, 2006 the Applicant filed a notice of application to quash this decision alleging denial of natural justice, denial of fairness, a reasonable apprehension of bias, and various errors of law, fact, and jurisdiction. In April the Applicant received two letters dated April 3, 2006 from the CFIA: one advised him that the cancellation of his accreditation had been revoked; and the other advised him that he was newly suspended for the same reason as his original suspension. The Respondent states, and it is not contested, that the CFIA had reviewed the situation after the first application for judicial review was filed and realized that there were procedural problems of unfairness in the way the first decision had been reached, in particular that the adjudicator had received further evidence after the hearing without the knowledge of the Applicant. It therefore revoked that decision. As a result the application for judicial review filed on February 26, 2006 remains in abeyance, the decision it attacked having been revoked.
- [10] The CFIA by its letter of April 3, 2006, having once again suspended the Applicant, set a hearing date eventually fixed for May 30, 2006. On April 26, 2006 a notice of application in this proceeding was filed by the Applicant originally seeking a wide variety of remedies. The remedies presently being sought are as set out under the heading "Introduction" above. The Applicant also sought and obtained a stay from this Court of the second cancellation procedure set for May 30, 2006 pending disposition of this judicial review.
- [11] In the meantime the CFIA had commenced proceedings against the exporter of the cow in question, Mr. Henry Tebrinke. He was accused in an administrative procedure of having violated paragraph 69(1)(b) of the Health of Animals Regulations. As I understand it, a determination was made by the Minister under the Agriculture and Agri-Food Administrative Monetary Penalties Act, SC 1995, c. 40 that he had so violated the regulations. He appealed to a Review Tribunal under that Act. Its hearing was conducted by the Chairman, Thomas S. Barton, Q.C.. Notably absent from the witnesses at this hearing was U.S. Inspector Jose Gabiola whose assertions originally initiated the accusations that the Applicant had certified, and Mr. Tebrinke had exported, an OTM cow. The Chairman

concluded that the respondent had not established that Mr. Tebrinke committed the violation charged. Essentially he found on the basis of evidence before him that identifying tags including the CCIA tag and the Applicant's tag had been removed from the head and carcass of the animal in question during slaughter and processing. He could not determine what happened to the Applicant's tag but the evidence indicated that the CCIA tag, having been removed from the animal, had been put in a box and was later brought out to exhibit along with an undoubtedly OTM head to the investigators Sturm and Davies from the CFIA when they visited the plant December 14. Ms Davies took a photograph of this skinned head and the tag and this picture was provided both to the tribunal and to this Court. The chairman of the tribunal was not satisfied from such evidence that the tag 271 629 357, the CCIA tag attached to the animal the Applicant had examined, had ever been attached to this particular head.

- [12] That tribunal decision was issued on November 2, 2006. Unfortunately the Applicant's counsel did not take steps to add this decision, and the argument based on it, to the material already filed on this judicial review until a Notice of Motion was filed on April 17, 2007, over five months later. In this Notice of Motion, which I heard at the beginning of the judicial review application, he sought leave to add this decision to the record and to base further arguments on it against the continuation of the accreditation cancellation proceedings, mainly on the grounds of *functus officio*, issue estoppel, and abuse of process. While this delay was never properly explained, and certainly reasons were not confirmed by affidavit, and notwithstanding understandable objections by the Respondent, I directed that the Tebrinke decision be added to the record so that a complete argument based on issue estoppel, *functus officio*, and abuse of process could be carried out. This raised no new issue of contested fact and the legal issues were closely related to the matters already in issue. The Respondent had also had three weeks notice that this new material might be in issue.
- [13] In the main judicial review proceeding before me as filed on April 26, 2006 the Applicant seeks to quash the suspension of his accreditation and to prevent the CFIA from proceeding with its intended hearing for the cancellation of his accreditation. He contends that the CFIA, having held one hearing, cancelled his accreditation as a result, and then revoked the cancellation, cannot repeat the process of suspension and hearing in respect of the same incident. It is said that the CFIA, having made the decision once and then having cancelled it, is *functus officio*. To repeat the suspension and cancellation hearing would be an abuse of process. Further, issue estoppel prevents it from trying the case all over again when its first decision has been nullified. A reasonable apprehension of bias is also alleged.
- [14] In respect of the new issue involving the Tebrinke decision now made a part of this case, it is argued that that decision determined that there was insufficient proof to identify the OTM cow in question with Mr. Tebrinke's herd and this creates an issue estoppel to prevent the same issue from being relitigated in cancellation proceedings against the Applicant who inspected that herd.

ANALYSIS

[15] First I would confirm that the pragmatic and functional approach to determining a standard of review has little application in this matter since I am not reviewing any decision of the CFIA except to the extent that I need to determine whether it properly decided to renew the suspension and cancellation proceedings against the Applicant. In my view that involves principally a question of law. In part it is an issue of fairness or natural justice. In both cases it appears to me that the Court is in the best position to determine whether the CFIA is acting within the law or in accordance with the requirements of fairness and for both matters the standard should be correctness.

[16] I am not persuaded that the CFIA, having determined to cancel the Applicant's accreditation and then, concluding that their first decision was really a nullity because tainted with an unfair procedure, having reversed it, and having recommenced a new suspension and cancellation process, is thereby guilty of any impropriety. It is not *functus officio* so as to be unable to commence a new proceeding: see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at paragraph 21; Brown and Evans, "Judicial Review of Administrative Action in Canada", (Toronto, 2004) at p. 12-105. Nor can such conduct be seen as an abuse of process: see *Findlay v. College of Dental Surgeons of British Columbia*, [1997] B.C.J. No. 2040 (B.C.S.C.) at paragraph 46.

[17] In the circumstances, I do not think it necessary to consider whether the second hearing by another adjudicator appointed by the CFIA should be prohibited on the grounds of a reasonable apprehension of bias.

[18] I believe the critical issue here is as to whether, because of the *Tebrinke* decision of the Review Tribunal as described above, issue estoppel precludes the CFIA from holding another hearing to make a determination as to the Applicant's conduct in respect of the same cow and the same exportation as was involved in the *Tebrinke* case.

[19] It is well established that for issue estoppel to prevent further proceedings to try a question:

- i) the same question must have been decided in an earlier proceeding;
- ii) the decision in the earlier proceeding must be final;
- iii) the parties to the previous decision or their privies are the same persons as the parties to the proceedings in which the estoppel was raised or their privies.

(see e.g. *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at paragraph 254; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at paragraphs 54-61.)

[20] Looking at the second condition first, I think it is not in dispute that the decision of the Chairman of the Review Tribunal under the Agriculture and Agri-Food Administrative Monetary Penalties Act is final. There is no provision for appeal under that Act and the time for judicial review has long since passed.

- [21] A more difficult question is as to whether the same question was involved before that Review Tribunal as would be before an adjudicator in respect of the Applicant's accreditation under his AVA. Admittedly the legal issues are different. The former involved a possible violation of paragraph 69(1)(b) of the Health of Animals Regulations whereas the latter will involve what is essentially a breach of contract of the Applicant's accredited veterinarian agreement. It is sufficient, however, for issue estoppel that there be some question vital to the outcome of both cases which is the same in all material respects. See *Rasanen v. Rosemount Instruments Ltd.* (1994), 68 O.A.C. 284 at paragraphs 31, 32, 88, 89. While the different legal framework might well preclude cause of action estoppel, here we have a determination of fact which is equally applicable in both cases. The factual question fundamental to any finding of responsibility in respect to either the Applicant or Mr. Tebrinke is: was the OTM head discovered at the Tyson plant from an animal in the load certified by the Applicant and exported by Mr. Tebrinke to the United States? Unless that question can be answered in the affirmative, then neither one should be responsible: not Mr. Tebrinke under the Health of Animals Regulations, nor the Applicant under his contract which requires him to certify accurately.
- [22] The most difficult question to answer is the third, namely are the same parties involved or their privies? I should first say that in my view that test should be applied more rigorously to the person who suffers the negative impact of estoppel. In this case that party is in reality the same in both cases, namely the CFIA. Admittedly in this case the party seeking to take advantage of estoppel was not personally a party to the Tebrinke proceedings which found Tebrinke not guilty but I have concluded that for these purposes the Applicant and Mr. Tebrinke were privies. I think there must be some flexibility in identifying privies for this purpose. In *Sopinka, Lederman, Bryant, The Law of Evidence in Canada* (Butterworth's, second edition) at paragraph 19.86 it is said:

It is impossible to be categorical about the degree of interest which will create privity. It has been said that "there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party".

- [23] An authority cited there was the case of *Gleeson v. J. Wippell & Co. Ltd.*, [1977] 3 All E.R. 54 at paragraph 60. This passage from the *Law of Evidence in Canada* was quoted with approval by Justice Binnie in the Supreme Court of Canada in the *Danyluk* case *supra* at paragraph 60. In the case of *Rasanen*, *supra*, an employee who was terminated initiated proceedings under the Employment Standards Act of Ontario for termination pay and also brought an action in the Superior Court for damages for constructive dismissal. Under the Employment Standards Act it was ultimately held that he was not entitled to termination pay. In his court action that decision was held to create issue estoppel so he could not prosecute a claim there for termination pay. On appeal, the Ontario Court of Appeal, in affirming the trial judge's decision noted that the parties in the two proceedings were actually different: in the Employment Standards Act proceeding the parties were the employer and an Employment

Standards officer whereas in the court action the parties were the employee and the employer. Nevertheless, an identity of interest was found between the employee and the Employment Standards officer and they were held to be privies: see particularly paragraphs 34 and 88. Here, the Applicant and Mr. Tebrinke had an identical interest in challenging the allegation that the offending cow had been in the load which the Applicant certified and the grower exported. They had been engaged in a joint enterprise to effect the exportation of authorized cattle. The Applicant gave evidence for Mr. Tebrinke and the chairman of the Tribunal attached considerable weight to his evidence. The CFIA having had the opportunity to prove the identity of the OTM head and having failed to do so in the Tebrinke case, should not have the opportunity to relitigate the exact same question of fact even within a different legal setting.

- [24] I therefore find that the CFIA is estopped from further proceedings against the Applicant in respect of this particular animal. As it was at liberty to proceed until the decision in the Tebrinke case of November 2, 2006 estopped it, I will direct that the suspension issued on April 3, 2006, be terminated as of November 2, 2006 and that all further proceedings as notified to the Applicant by the CFIA's letter of April 3, 2006 in respect of the animal bearing the CCIA ear tag 271 629 357 be terminated.
- [25] Because it could not be said that the CFIA was proceeding illegally when the second suspension decision was rendered in the case, I am not in a position to reinstate the Applicant retroactively. It appears that his contract would have expired on September 19, 2006.
- [26] Counsel for the Applicant asks that I not dispose of costs until counsel has had an opportunity to see my reasons. I will therefore not issue a judgment at this time. If the parties cannot agree on costs within 30 days of the date of these reasons, then counsel for the Applicant should bring a motion in writing under Rule 369 and the deadline for replies under that rule will be applicable.

"Barry L. Strayer"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING: Vancouver

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REASONS FOR ORDER: STRAYER, J.

DATED: May 22, 2007

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