

Date: 20070419

Docket: T-1496-06

Citation: 2007 FC 421

MONTREAL, Quebec, April 19, 2007

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

SHAWN CARMICHAEL

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Shawn Carmichael (Applicant) is seeking judicial review of the Canadian Food Inspection Agency's (CFIA) decision, dated July 17, 2006, cancelling the registration of his Registered Egg Station 0-116 pursuant to s. 7.2 of the *Egg Regulations* (Regulations) promulgated under the *Canada Agricultural Products Act* (Act). The applicant seeks an Order setting aside this decision.

Facts

[2] The Applicant owns and operates egg station 0-116 in the county of Grenville, Ontario. This station has been registered since January 17, 1995.

[3] Dr. Bashir Manji (Director) is the Director for the purposes of the *Egg Regulations*. His role is to consider the submissions of the CFIA and the Operator (the Applicant) and render a decision on any cancellation request.

[4] CFIA alleges that the Applicant has a history of failing to comply with the Regulations, including operating under unsanitary conditions. He had received warnings in November 1997, January 1999 and April 1999, culminating in a cancellation order in early December 2003, which was subsequently postponed to later that month.

[5] In 2004, CFIA had concerns over the egg station as there was no product available for inspection for an “extended period of time”. Complaints were received by CFIA in 2005 from the retail level that the eggs did not meet the grade. CFIA began to monitor the station.

[6] On April 7, 2006, the Applicant was contacted by CFIA and informed he must comply with the regulations or face suspension or cancellation and, on April 26, 2006, he was sent another letter asserting the same.

[7] On May 9, 2006, CFIA met with the Applicant and his counsel to explain the deficiencies in his production method that needed to be corrected. Among these concerns were, eggs being stored at improper temperature, unacceptable dry storage and inadequate pest control.

[8] On May 11, 2006, CFIA determined that the issues had not been resolved, and, in particular, the temperature of the egg cooler was found faulty. The Applicant would not allow inspectors to examine eggs on his truck during this inspection.

[9] On May 16, 2006, the operating license for the egg station was suspended as a result of the failure to allow inspection. This decision was made by Dr. Bashir Manji, who at the time was director of the Agri-Food division of the CFIA.

[10] A letter was sent to the Applicant explaining that the suspension would be lifted once inspectors could verify that the operation complied with the Regulations and that a failure to comply may result in cancellation of the egg station. This letter did not set out a timeline as to when cancellation may occur after the imposition of the suspension. But it set out a tentative date for the cancellation hearing as May 24, 2006 with the understanding that if Applicant was not available that day, he should advise CFIA by May 22, 2006 in order to re-schedule. The Applicant was informed in this letter that he would have an opportunity to question any person regarding such information that was relevant to the issue and be able to present documents and be represented by counsel.

[11] On May 19, 2006, counsel for the Applicant wrote the Director to assert that the suspension was invalid, and that the CFIA was breaking its agreement made on May 9, 2006 that the Applicant would be allowed time to implement an action plan to correct the issues raised at the inspection. Additionally, counsel for the Applicant advised CFIA that all deficiencies were rectified by May 15, 2006, and counsel requested a re-inspection which did not take place.

[12] On May 20, 2006 the Applicant was found to be delivering eggs to Ottawa retailers in contravention of the suspension. The seized eggs from this delivery failed the grade upon inspection.

[13] On May 23, 2006, the Director advised the Applicant that the hearing scheduled for May 24, 2006 was postponed until further notice.

[14] On May 24, 2006, at the request of the regional North East Director of CFIA, the Applicant was notified by letter of CFIA's intention to cancel the registration of his egg station on the basis that he failed to provide his weekly reports and continued to market eggs in cartons bearings "Canada A Grade". A hearing for that purpose was set down for May 29, 2006 and, if he could not attend, he was to inform CFIA by May 27, 2006.

[15] On May 25, 2006, counsel for the Applicant confirmed attendance, but informed that she was not ready to proceed as she had not received the information CFIA would be relying upon.

[16] On May 28, 2006 the Director advised Applicant's counsel that he had been informed *ex parte* by CFIA legal counsel that the hearing needed to be postponed. The reason provided for the postponement was "security concerns" with respect to the Lanark Landowners Association urging its members to attend the hearing.

[17] On May 29, 2006, counsel for the Applicant complained to the Director that it was inappropriate for him to hold *ex parte* discussions with CFIA's legal counsel and that this constituted a breach of procedural fairness.

[18] No hearing took place on May 29, 2006.

[19] On May 30, 2006, counsel for the Applicant informed the Director of her concern to learn he was the adjudicator of the cancelled hearing despite the fact of being also the same person who recommended the cancellation of the registration. Counsel requested that another person be appointed to adjudicate on this matter. Additional concerns were raised with respect to the late disclosure of documents relied upon by the CFIA, the *ex parte* conversation, and a failure to allow counsel to make submissions as to the procedural issues, namely the security concerns.

[20] On May 30, 2006, counsel for CFIA requested that the hearing be moved in camera, by way of video-conference or by teleconference due to security concerns.

[21] On May 31, 2006, counsel for the applicant requested particularization of the security concerns so as to be able to make submissions as to how the hearing ought to be conducted. Counsel also contacted the CFIA's president to request the appointment of a new adjudicator for the issue.

[22] On June 6, 2006, the hearing was set down by the Director for either June 14 or 19, 2006, in Ottawa, and was to be held *in camera*. The Director informed the Applicant that if neither of these dates were available he would then proceed by way of written submissions.

[23] On June 7, 2006, counsel for the Applicant informed the Director of her unavailability on those two dates, as she was attending Court in other matters. In the same letter, she also reminded the Director that she had already represented that she would be unavailable on those date and reiterated her concerns over Dr. Manji being the adjudicator, the lack of particulars as to the reasons of an in camera hearing and the nature of the security concerns. Counsel also objected to proceeding by way of written submissions given that credibility was an issue and the applicant required the right to cross-examination that had been promised to him.

[24] On June 8, 2006 the Director advised that the hearing would occur in camera and that if counsel for the Applicant could not be available by June 30, 2006, the hearing would proceed by way of written submissions.

[25] On June 9, 2006, counsel for the Applicant requested dates in July or August as she was unavailable in June. The Director nevertheless informed her that the hearing would proceed by way of written submissions, with the CFIA's submissions due on June 21, 2006 and the Applicant's submissions due on June 30, 2006.

[26] On July 17, 2006, the Director cancelled Mr. Carmichael's egg station registration and, on August 18, 2006, the Applicant filed his request for judicial review of that decision.

Impugned Decision of July 17, 2006

[27] The Director determined that a cancellation hearing is not an appeal from the suspension and the legislation does allow him to preside over the cancellation hearing despite being involved in the suspension investigation.

[28] The core issue as framed by the Director was the failure by Mr. Carmichael to allow CFIA to inspect the eggs on the truck on May 11, 2006. The Director found that there were reasonable grounds under 21(1) of the Act for the inspectors to believe that the truck carried products defined under the Act. The Director therefore concluded that Mr. Carmichael was hindering the inspectors from their duties in contravention of s. 19(4) of the Act.

[29] The Director recognized that the Applicant notified that he had rectified all shortcomings by May 15, 2006. However it appears that CFIA did not make efforts to re-inspect despite previous correspondence that the Applicant would have that opportunity.

[30] The Director relied, however, on paragraph 7.1(3)(a) of the Regulations that states: "a suspension of registration under subsection 1 shall remain in effect until the required corrective measures have been taken and have been verified". Also, on paragraph 7.1(3)(b) that a suspension

remains in effect where “a cancellation procedure has been commenced under s. 7.2, until the resolution of the cancellation issue”.

[31] The Director found that no evidence was presented by either party that verification had been done and thus the suspension was still in force. Therefore, the Director could not conclude if the deficiencies were rectified or not.

[32] The Director concluded that Mr. Carmichael was selling eggs bearing the name “Canada A Grade” under suspension, and in so doing, contravened s. 5 of the Regulations.

[33] The Director’s finding that the Applicant was in violation of s. 9(25) of the Regulations for not sending in weekly reports to the Executive Director was conceded by counsel for the Applicant who argued that there would be no difficulty in providing such reports in the future.

[34] The Director found that, even if he accepted that the deficiencies were corrected, he could only rely on what was factually grounded since he noted that there was still evidence that Mr. Carmichael marketed his eggs for retail, knowing that his registration was suspended. He reasoned further that if Mr. Carmichael had his eggs graded elsewhere, he should have presented evidence of this to rebut the allegations that he was grading eggs while under suspension. He also noted that CFIA contacted almost all of the surrounding egg stations to confirm that none of them were grading Mr. Carmichael’s eggs.

[35] Additionally, whether or not the deficiencies were rectified, the Director found that it was undisputed the Applicant was in violation of the requirement to send weekly reports to the Executive Director. This remained a violation of the regulations irrespective if the egg station had been brought up to standards.

[36] The Director noted that the rejection rates for the eggs posed a risk for the consumer, and that the levels of dirt, cracks, and other defects were unacceptable from a food safety perspective.

[37] Consequently, the Director cancelled the registration for egg station 0-116 on July 17, 2006.

[38] The relevant legislation reads as follows:

| Egg Regulations (C.R.C., c. 284) | Règlement sur les oeufs (C.R.C., ch. 284) |
|--|---|
| <i>Suspension of Registration</i> | <i>Suspension de l'agrément</i> |
| <p>7.1 (1) The Director may suspend the registration of a registered</p> <p>(a) where</p> <p>(i) the egg station does not meet the provisions of the Act or these Regulations,</p> <p>(ii) the operator does not comply with the provisions of the Act, these Regulations, the <i>Egg and Processed Egg Fees Order</i> or the <i>Canadian Food Inspection</i></p> | <p>7.1 (1) Le directeur peut suspendre l'agrément d'un poste d'oeufs agréé si :</p> <p>a) d'une part, l'une des situations suivantes existe :</p> <p>(i) le poste d'oeufs n'est pas conforme,</p> <p>(ii) l'exploitant ne se conforme pas à la Loi, au présent règlement, à l'<i>Arrêté sur les prix applicables aux oeufs et aux oeufs transformés</i> ou à l'<i>Avis sur les prix de l'Agence canadienne</i></p> |

Agency Fees Notice, or

d'inspection des aliments,

(iii) it is reasonable to believe that public health will be endangered if the egg station is allowed to continue operating; and

(iii) le maintien de l'exploitation du poste d'oeufs risque vraisemblablement de mettre en danger la santé du public;

(b) where the operator has failed or is unable to take immediate corrective measures to remedy any situation referred to in paragraph (a).

b) d'autre part, l'exploitant n'a pas pris ou est incapable de prendre immédiatement des mesures pour corriger la situation visée à l'alinéa a).

(2) No registration shall be suspended under subsection (1) unless

(2) L'agrément d'un poste d'oeufs agréé ne peut être suspendu en vertu du paragraphe (1) que si :

(a) an inspector has at the time of inspection, notified the operator of the failure to comply with any provision of the Act or these Regulations;

a) au moment de l'inspection, l'inspecteur a avisé l'exploitant qu'il ne s'est pas conformé à la Loi ou au présent règlement;

(b) an inspector has prepared an inspection report setting out the reasons for the suspension, the length of the suspension and the corrective measures required and has forwarded a copy of that report to the operator; and

b) l'inspecteur a rédigé un rapport d'inspection qui précise les motifs et la durée de la suspension, ainsi que les mesures correctives qui s'imposent, et en a transmis un exemplaire à l'exploitant;

(c) a notice of suspension of registration is delivered to the operator.

c) un avis de suspension de l'agrément a été remis à l'exploitant.

(3) A suspension of registration under subsection (1) shall remain in effect

(3) La suspension de l'agrément prévue au paragraphe (1) demeure en vigueur :

(a) until the required corrective measures have been taken and have been verified by an inspector;

a) soit jusqu'à ce que les mesures correctives requises soient prises et qu'elles aient été vérifiées par l'inspecteur;

(b) where a cancellation procedure has been commenced under section 7.2, until the resolution of the cancellation issue; or

(c) where a cancellation procedure has not been commenced under section 7.2, until a period of 90 days has elapsed.

SOR/90-110, s. 3; SOR/96-124, s. 1; SOR/2000-183, s. 1.

Cancellation of Registration

7.2 (1) The Director may cancel the registration of a registered egg station where

(a) the egg station does not meet the provisions of the Act or these Regulations; or

(b) the operator does not comply with the provisions of the Act or these Regulations.

(2) No registration shall be cancelled under subsection (1) unless

(a) an inspector has, at the time of the inspection, notified the operator of the failure to comply with any provision of the Act or these Regulations;

(b) a copy of the inspection report is delivered to the operator

(i) identifying the provision of the Act or these Regulations that has

b) soit jusqu'à ce qu'une décision soit prise, si une procédure de retrait a été entamée en vertu de l'article 7.2;

c) soit jusqu'à l'expiration d'une période de 90 jours, si aucune procédure de retrait n'a été entamée en vertu de l'article 7.2.

DORS/90-110, art. 3; DORS/96-124, art. 1; DORS/2000-183, art. 1.

Retrait de l'agrément

7.2 (1) Le directeur peut retirer l'agrément d'un poste d'oeufs agréé dans l'un ou l'autre des cas suivants :

a) le poste d'oeufs n'est pas conforme;

b) l'exploitant ne se conforme pas à la Loi ou au présent règlement.

(2) L'agrément d'un poste d'oeufs agréé ne peut être retiré en vertu du paragraphe (1) que si :

a) au moment de l'inspection, l'inspecteur a avisé l'exploitant qu'il ne s'est pas conformé à la Loi ou au présent règlement;

b) un exemplaire du rapport d'inspection a été remis à l'exploitant, dans lequel il est fait mention :

(i) de la disposition de la Loi ou du présent règlement qui n'a pas

| | |
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| not been complied with, | été respectée, |
| (ii) specifying the period for compliance with that provision of the Act or these Regulations in order to prevent the cancellation of the registration, and | (ii) du délai accordé à l'exploitant pour s'y conformer et éviter ainsi le retrait de l'agrément, |
| (iii) advising that the operator may be given an opportunity to be heard in respect of the cancellation; | (iii) de la possibilité de se faire entendre; |
| (c) the operator has been given an opportunity to be heard in respect of the cancellation; and | c) l'exploitant a eu la possibilité de se faire entendre; |
| (d) a notice of cancellation of registration is delivered to the operator. | d) un avis de retrait d'agrément a été remis à l'exploitant. |
| SOR/90-110, s. 3. | DORS/90-110, art. 3. |

[39] The issues before the Court are the following:

- a) **Was there an apprehension of bias on the part of the Director as he was adjudicating on his own recommendation and given his conduct in this matter?**
- b) **Was there a breach of procedural fairness in denying an oral hearing, specifically removing the applicant's ability to test the evidence by cross-examination?**
- c) **Did the Director lose jurisdiction by committing an error of law, by cancelling the registration without first determining if the conditions precedent to cancellation as set out in s 7.2 of the *Egg Regulations* were fulfilled?**
- d) **Did the Director lose jurisdiction by committing an error of law, by failing to determine if the applicant had complied with the *Egg Regulations*, or by denying the applicant a reasonable opportunity to comply with the *Egg Regulations*?**

[40] The parties do not address the appropriate standard of review in their written submissions.

However, the Court is satisfied that all of the issues in the case at bar relate to procedural fairness.

[41] *Sketchley v. Canada*, 263 DLR. (4th) 113 at para. 46, held “The pragmatic and functional analysis does not apply, however, to allegations concerning procedural fairness, which are always reviewed as questions of law” and no deference is owed to the Director of the Agri-Food Division of the CFIA, as “[i]t is for the courts, not the Minister, to provide the legal answer to procedural fairness questions.” [*C.U.P.E. v. Ontario*, [2003] 1 S.C.R. 539 at para. 100].

[42] Although in relation to the import of animal by-products, and statutory interpretation, the Federal Court of Appeal has conducted a pragmatic and functional analysis on the Agri-Food Division, in *Canadian Food Inspection Agency v. Westphal-Larsen*, 232 D.L.R. (4th) 486, at para. 7. The instant case is analogous to *Westphal-Larsen*, in that the Director engaged in some interpretations of the Regulations and the following passage therefore applies:

I note that the Review Tribunal is not protected by a privative clause. Section 12 of the *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.), the legislation under which the Review Tribunal is constituted, provides that decisions of the Tribunal may only be reviewed under the *Federal Court Act*, R.S.C. 1985, c. F-7, which I take to mean that its decisions are reviewable on the grounds set out in s. 18.1(4) of that Act, including error of law. The nature of the question before the Tribunal is a pure question of statutory interpretation which does not draw upon its particular expertise in agriculture and the agri-food industry. To that extent, the Tribunal does not have any relative legal expertise vis-à-vis this Court. The particular proceedings giving rise to this application involve an administrative penalty for non-compliance with certain regulatory provisions. The Tribunal was therefore not required to engage in the kind of polycentric analysis to which certain deference is owed by a reviewing Court. Taking these factors together, I conclude that the standard of review of the Review Tribunal in relation to the question raised by this application is that of correctness.

[43] The Applicant argues that it is entirely inappropriate for an adjudicator to rule on his own recommendations. The Applicant suggests this causes an apprehension of institutional bias. The Applicant asserts the apprehension of bias was exacerbated by the Director's conduct – in particular:

- The *ex parte* communications with CFIA's legal counsel;
- The adjournment at CFIA's legal counsel's request without input from the Applicant;
- The *in camera* hearing, reasons for which, were not particularized for the Applicant;
- The Director failing to hear submissions on bias or security;
- The setting of the June 30, 2006 date, knowing that Applicant's counsel was unavailable until July, 2006;
- The need for cross-examination, given that the applicant denies many of the allegations of fact;
- The initial granting of an oral hearing to the applicant, which was reduced to written submissions;
- The Directors failure to require that the CFIA prove that the eggs in question (from the May 20, 2006 inspection) were not graded elsewhere.

[44] The Applicant insists that to allow the Director to rule on his own recommendations cannot help but to erode the confidence the public has in our systems impartiality. The Applicant argues that this case requires not only that justice be done, but that it is also seen to be done. And, in the event that he was allowed to preside, the Applicant submits that he ought to have conducted himself with the utmost circumspection to preserve the public confidence while the above issues demonstrate that the Director's conduct fell short of this standard.

[45] The Applicant relies on *Vennat v. Canada (A.G.)*, [2006] F.C.J. No. 1251 (QL), for the proposition that the whole of the circumstances need to be considered when considering if the end result was reached in a procedurally fair manner.

[46] The Applicant also insists that given the severity of the results, and the disagreement on the factual issues that a right to cross-examination not only exists but was recognized by the Director in two occasions when he set out the procedure of the hearing, and indicating this right: "...All information concerning the issues will be presented in your presence and you will have the opportunity to question any person regarding such information..." [Applicant's record, tab C and F, letters dated May, 16 and 24, 2006].

[47] The unavailability of counsel – by a matter of weeks – should not have dissolved this right of procedural fairness that could have been exercised, for instance, to challenge the evidence accepted by the Director to the effect that the inspectors on May 20, 2006 had reasonable grounds to search the truck under the Regulations.

[48] Again, the Applicant relies on *Vennat* that the whole of the circumstances must be considered when determining the appropriate level of procedural fairness.

[49] For instance, although informed by counsel for the Applicant "...that all corrective measures have been taken and in fact were completed ... three (3) days after the inspection, in anticipation of a follow-up inspection as already arranged ..." the follow-up inspection never took place.

[50] Consequently the Director could not therefore conclude in all fairness that the deficiencies were not corrected therefore the cancellation should not have occurred.

[51] The Respondent suggests that the test for bias must be met on a balance of probabilities, and one should not be overly sensitive or microscopic, as explained in *R. v. S. (R.D.)* (1997), 118 C.C.C. (3d) 353, and therefore argues that the Applicant has not demonstrated an apprehension of bias to this level. He also submits that the Applicant has not taken issue with any of the substance of the *ex parte* discussions with CFIA counsel; therefore, an informed person apprised of the situation could not believe there was bias on the part of the Director.

[52] On the right to cross-examination, as claimed by Applicant, the Respondent relies upon *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, for the proposition that procedural fairness is contextual and, in this case, the level of procedural fairness should be low for the following reasons:

- This is not a trial model with legal analysis; it is much more closely related to administrative justice.
- The nature of the statutory scheme is such that there is no privative clause, and there exists a right to judicial review.
- The importance of this decision to the individual is minimal, as the applicant's livelihood is not as stake, as he may still have his eggs graded at another station. Or, in the alternative, if the applicant complies with the regulations, he may apply to have the egg station re-registered.

- There were no legitimate expectations created, and the Director was clear that he would proceed by written submissions.

- The Director is master of his own procedure, and it was in his power to proceed in an *ad hoc* manner.

[53] For these reasons, the Respondent argues there was no obligation for an oral hearing, no right of cross-examination was created, no right to the particularization of the security concerns, no need to hear submissions on the issue of bias, and it was also acceptable for the Director to have *ex parte* conversations with the CFIA counsel. He insist that *Sutton v. Canada (Employment & Immigration Commission)*, [1994] F.C.J. No. 202 (T.D.) (QL), (is clear that administrative tribunals are masters of their own procedure, and so long as they are not in violation of their enabling statute, the right to be heard will be fulfilled. Thus, the Respondent submits that in the present case, there was no need for any additional right to be heard, other than what was granted.

[54] The Respondent points out further that the letter of suspension set a clear deadline whereby the Applicant had to remedy the defects by May 24, 2006 [RR at 16], otherwise the egg station would be subject to cancellation. For him this letter fully complied with the Regulations. It is argued that the Applicant had been suspended on May 16, 2006, had continued to violate the regulations by selling un-graded eggs and failed to submit weekly reports, therefore, even though CFIA did not inspect the egg station, the Applicant was clearly in non-compliance. Consequently the lack of

inspection was without legal consequence as the Applicant had not fixed all deficiencies indicated in the letter of suspension.

[55] The Court accepts the finding in *Vennat* that the matter should be looked at as a whole to determine if there was a breach of procedural fairness. It also notes that in *Vennat* the judge took issue with the unreasonableness of the government in denying an extension to file submissions.

[56] Therefore a parallel can be drawn to the instant case, where counsel for the Applicant was clear that she would be unable to attend a hearing in June. The Court has some concerns that the Director acted in an unreasonable manner in not allowing an adjournment as requested by counsel in her May 30, 2006 letter, and reiterated in her June 7, 2006 letter. She clearly stated to the Director her unavailability for the June 12, or the June 19, 2006 tentative hearing dates [AR at 90]. It appears that these unavailability of counsel for these dates resulted in the Director not granting the oral hearing, and proceeding by way of written submissions.

[57] There is no doubt that counsel for the Applicant was most diligent in seeking to protect the interests of her client and raised all issues to the Director at the first opportunity. Asking for an adjournment was not unreasonable especially noting that the Director was open to any date prior to June 30, 2006. The file shows no correspondence acknowledging an attempt to find a date that suited the applicant. Additionally one cannot ignore the speed in which this matter proceeded: the suspension began on May 16, 2006, and it does not appear to be unreasonable that counsel would be unavailable the next month.

[58] Why rush to proceed? The Director could not ignore that the Applicant's registration was already suspended and would remain suspended until the resolution of the cancellation issue. Who would have suffered most by delaying the hearing to accommodate Applicant's counsel if not the Applicant himself?

[59] The unreasonableness of this lack of accommodation as to hearing dates is highlighted when one considers that the Director took part in an *ex parte* conversation with CFIA counsel, and rescheduled a hearing without input from the applicant or his counsel. Also given the "security concerns" and their impact on the hearing – causing adjournments – it was not unreasonable for the Applicant to request particularization of these concerns.

[60] While the Court agrees with the Respondent that there is a low level of procedural fairness required in CFIA matters, if there was sufficient "danger" to justify an adjournment, then the Applicant and his counsel should have been made aware of the details inasmuch as possible. The Director unfortunately failed in this regard.

[61] Although none of the actions of the Director are clearly demonstrative of bias, in the circumstances of this case, the Court can nevertheless see that considering the whole of the circumstances a reasonable person may still perceive bias. While the Court does not suggest that members of the CFIA can never rule on their own recommendations – unlike a judge for example – prudence, however, requires a higher level of conduct to ensure public confidence when

adjudicating on one's own recommendation. Given that the Director was not accommodating to the Applicant in several respects, when combined with the fact he was arbitrating on his own recommendation, the Court can see how the perception of bias could and would allow this judicial review on this point.

[62] While no doubt the Applicant has his own version of the events, this information can be presented by written submissions. Therefore the Court does not see that cross-examination would have assisted the Director in determining that the eggs were graded properly or otherwise since the Applicant could have presented documentary evidence that another egg station had graded the eggs.

[63] However, the Court cannot ignore that the legitimate expectation here was for the oral hearing itself and not just the right to cross-examination. Neither the initial May 16, 2006 letter, nor the May 24 letter, expressed that a failure to an immediate hearing date would result in a loss of procedural rights and that the matter would instead move forward by way of written representations. Rather, both these letters informed the applicant that rescheduling of the hearing was available.

[64] But the Court cannot disagree with the Applicant that the May 16 and 24, 2006 letters both provided the "opportunity to question any person..." *Baker* [at 26] is clear that "[i]f the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness". The Applicant here had that legitimate expectation; and taking it away, without any valid reason, creates a breach of procedural fairness.

[65] While the Court concedes that the Respondent Director is master of his own procedure so long as he complies with the Regulations, this concept does not override common law administrative principle of legitimate expectation.

[66] Also the Court cannot ignore that when the registration of a registered egg station is suspended under subsection (2.1), the inspector shall without delay specify in writing to the operator the deadline by which the situation must be remedied to avoid cancellation of that registration.

[67] Clearly, the May 16, 2006 letter was sent indicating May 24, 2006 as the deadline to remedy the situation. But the Director ignored the May 19, 2006 letter received from the Applicant's counsel stating that the defects had been cured. Therefore s. 7.2(2)(b)(ii) was not complied with by the CFIA. And since s. 7.2(2)(b)(ii) acts as a condition precedent to cancellation, it therefore gives rise to grant this judicial review, especially in light of the passage in the May 16, 2006 letter from the CFIA [AR at 66]:

Should you advise that all appropriate corrective measures have been taken and that our inspectors can confirm that your operation complies with the [R]egulations, this suspension will be lifted. However, this suspension will lead to the cancellation of the registration should you fail to comply...

And also this other passage [AR at 67]:

Should we not be advised that all corrective measures have been implemented, a hearing shall be held, at which time you will be given the opportunity to be heard...?

[68] The Applicant clearly informed the CFIA the letter of May 19, 2006, that all matters were corrected as of May 15, 2006, and further requested therein a subsequent inspection [AR at 72] Thus

the CFIA is now estopped from proceeding with the cancellation procedure until they inspected the alleged corrections. The Respondent cannot now argue that there were no legitimate expectations created. A plain reading of CFIA's letters implies an expectation that the Applicant would be re-inspected prior to the hearing.

[69] Again *Baker* is clear that “[i]f the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness” [AR at 72]. A re-inspection is not a substantive result and therefore Applicant had here another legitimate expectation that went unfulfilled.

[70] Furthermore, the letters sent by the Director on May 23 [AR at 73], and May 24 2006 [AR at 74] both ignored the Applicant's request for a re-inspection, and prematurely sought a date for the hearing.

[71] Additionally, on page 7 of the Director's reasons [AR at 17], he states: “There was no follow-up by the CFIA with Mr. Carmichael to re-inspect...I cannot therefore conclude if the deficiencies were or were not in fact corrected”. This passage clearly wrong in light of the applicant's request for a re-inspection. And since CFIA ignored that legitimate request, the Director cannot use CFIA's lack of follow-up to question the alleged rectification of the defects.

[72] The Respondent submits that since the applicant sold eggs under suspension during this period, namely the May 20, 2006 incident, and did not submit weekly reports, the failure to re-inspect was without legal consequence. This reasoning is hard to follow for the following reasons:

- First, selling eggs while under suspension – while no doubt a violation of the Regulations and conduct that could result in alternative punishment – cannot be used to support the CFIA’s failure to re-inspect.

- Second, the initial hearing was not intended for the purpose of the Applicant selling while under suspension; it was for grading and storing eggs improperly, and failing to submit reports to the Executive Director.

[73] Additionally, and given the short time-span -May 19th when the Applicant informed CFIA he was up to standards, and May 24th when the Director made the recommendation to cancel the egg station- there is insufficient evidence to show that the Applicant did not send his weekly reports. While I have some doubt the Applicant sent these reports, despite the continual correspondence, still there is no letter from the Director stating that there will not be a re-inspection as the Applicant sold eggs under suspension, or failed to file reports with the Executive Director. Therefore, an inference can be drawn that the Respondent is using this information in hindsight and that the CFIA failed to re-inspect the Applicant because of these two new violations.

[74] In brief, and considering all the facts of this case, the Court concludes that there was a clear obligation, and a legitimate expectation, for CFIA to re-inspect before proceeding with the

cancellation procedure. Consequently the judicial review should be allowed on this point because if CFIA did not conduct a follow-up investigation as promised and requested, then the remaining issues all fall, as they are derivative of this error.

[75] For all these reasons, the Court concludes that there could be a reasonable apprehension of bias in the impartial observer and, in addition, there was a denial of procedural fairness with respect to the oral hearing and the promise of a re-inspection. Additionally, the CFIA did not comply with regulation 7.2(2)(b)(ii) before cancelling the egg station.

JUDGMENT

THIS COURT ADJUDGES that for these reasons the application is allowed, the decision of the Director of July 17, 2006 cancelling the registration of Applicant's Registered Egg Station 0-116 is set aside and the matter referred to CFIA for a new hearing and decision before a different Director.

“Maurice E. Lagacé”

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1496-06

STYLE OF CAUSE: SHAWN CARMICHAEL v. CANADIAN FOOD
INSPECTION AGENCY

PLACE OF HEARING: OTTAWA, Ontario

DATE OF HEARING: April 11, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** The Honourable Maurice E. Lagacé, Deputy Judge

DATED: April 19, 2007

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