Commission de révision agricole du Canada

Canada Agricultural Review Tribunal

Citation: *Ferme Alain Dufresne Inc* v. *Canada (Canadian Food Inspection Agency)*, 2015 CART 6

Date: 20150323
Docket: CART/CRAC-1774

BETWEEN:

Ferme Alain Dufresne Inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

[Translation from the official version in French]

BEFORE: **Bruce La Rochelle, member**

WITH: **Alexandre Dufresne, counsel for the applicant; and**
Louise Panet-Raymond, counsel for the respondent

In the matter of an application made by the applicant, pursuant to paragraph 8(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act,* for a review of the facts relating to a violation of subsection 139(2) of the *Health of Animals Act*, alleged by the respondent.

DECISION

Following an oral hearing and review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that the applicant did not commit the violation, as set out in Notice of Violation no. 1314AT0113-01 dated March 18, 2014.

The hearing was held in Montréal, Quebec, Tuesday, September 30, 2014; and
in Trois-Rivières, Quebec, Monday, November 10, 2014.
Additional written submissions of the parties
submitted on January 8, 2015.

REASONS

Alleged incident and procedural history

[1] In Notice of Violation No. 1314AT0113-01, dated March 18, 2014, the respondent, the Canadian Food Inspection Agency (the Agency), alleges, before the rectification of the Notice of Violation (to be discussed), that Ferme Alain Dufresne Inc. (Ferme Alain Dufresne) [translated verbatim]: ON THE 27th and 28th DAY OF February, OF THE YEAR 2013, AT Saint-François-de-Madawaska, IN THE PROVINCE OR TERRITORY OF New Brunswick THE ABOVE-NAMED PERSON COMMITTED A VIOLATION, SPECIFICALLY: load or unload, or cause to be loaded or unloaded, an animal in a way likely to cause injury or undue suffering to it CONTRARY TO SUBSECTION 139(2) of the *HEALTH OF ANIMALS REGULATIONS,* which is a violation of section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[2] Subsection 139(2) of the *Health of Animals Regulations* (C.R.C. c. 296) states:

> ***139.*** *(2) No person shall load or unload, or cause to be loaded or unloaded, an animal in a way likely to cause injury or undue suffering to it.*

[3] The Notice of Violation in question is a Notice of Violation with warning. According to subsection 7(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (S.C. 1995, c. 40), any contravention designated by the Minister of Agriculture and Agri-Food "is a violation and is liable to a warning or to a penalty". In this case, the Agency chose to issue a Notice of Violation with warning, within its absolute discretion.

[4] According to the Certificate of Service (CFIA form 5197 [2013/04]) made on March 24, 2014, Line Côté-Page, investigation specialist for the Agency, certified that on March 24, 2014, she served the Notice of Violation by fax on Ferme Alain Dufresne.

[5] After receiving service of the Notice of Violation, Ferme Alain Dufresne, through its counsel, Alexandre Dufresne, filed a request for review with the Canada Agricultural Review Tribunal, which was received by it on April 17, 2014. The Agency responded by filing its Report, received by the Tribunal on May 8, 2014. A summary of the facts and evidence relating to the alleged violation were attached to the Agency's Report, in accordance with paragraph 36(1)(*a*) of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* [SOR/99-451, hereinafter "*Rules of the Tribunal*"], which provides the following:

> ***36.*** *(1) Within 15 days from the day on which the Minister receives the copy of the request for a review, the Minister must prepare a report that includes:*
>
> *(a) any information relating to the violation …*

[6] On June 6, 2014, after receiving the Agency's Report and in accordance with section 37 of the *Rules of the Tribunal*, the applicant sent the Tribunal additional

submissions. The Agency, which also had the right to make submissions, did not submit anything other than the Agency's Report.

[7] In its letter dated September 18, 2014, the Tribunal asked the parties to submit a list of their witnesses. In the Agency's Report, it had included a list of potential witnesses, while the applicant had not submitted any. Following a series of e-mails, dated September 25, 2014, the parties' witnesses were identified.

[8] The hearing was originally scheduled for July 30, 2014, but the Agency filed a motion with the Tribunal, requesting an adjournment of the hearing, based on the unavailability of the Agency's principal investigator, Ms. Côté-Page, and Louise Panet-Raymond, counsel for the Agency, owing to the summer holidays. This request for adjournment was allowed and the hearing was adjourned to September 30, 2014, in Montréal.

[9] The hearing was held on September 30, 2014, in Montréal. Gilbert Morneau, Agency investigator and Dr. Nora Bachir, veterinarian with the Agency, testified on behalf of the Agency. Only Alain Dufresne testified on behalf of Ferme Alain Dufresne. Ms. Côté-Page was not present for medical reasons, according to Ms. Panet-Raymond.

[10] At the end of the hearing day, it was necessary to add another hearing day, which was held on November 10, 2014, in Trois-Rivières. The location of Trois-Rivières was selected by Alexandre Dufresne as the best location for him and his client.

[11] On October 3, 2014, following the hearing held on September 30, 2014, the Tribunal sent a letter to counsel for the parties to confirm some views expressed by the Tribunal. Ms. Panet-Raymond attempted to submit two documents after the time limit: (a) a form entitled "*Volaille registre ante-mortem*", dated February 28, 2013, with comments from Dr. Bachir; and (b) the document entitled "*Cet oiseau est-il apte au transport*", published online by l'Équipe québécoise de contrôle des maladies avicole. Mr. Alexandre Dufresne raised objections, by way of written arguments, in response to the late submission of documents by Ms. Panet-Raymond. The Tribunal asked the parties to submit their arguments in writing on this issue. The Tribunal also requested the submission of independent information in relation to Ms. Côté-Page's absence. Ms. Panet-Raymond replied by letter dated October 9, 2014, and received by the Tribunal on October 16, 2014. Alexandre Dufresne replied by his letter dated October 28, 2014, and received by the Tribunal the same day.

[12] On November 4, 2014, the Tribunal issued an order following the written submissions filed by counsel. On November 5, 2014, the Tribunal issued reasons relating to its order. The order and reasons are attached to this decision. First, the Tribunal recognized that the Agency has the right to proceed without a chief witness, previously identified, and that the applicant retains the right to ask the Tribunal to issue a summons to such a witness. Second, the Tribunal determined that the document entitled "*Cet oiseau est-il apte au transport*" would be admitted as a document available to the public and that the form entitled "*Volaille registre ante-mortem*" would not be, unless Dr. Bachir was available to be cross-examined by Alexandre Dufresne.

[13] On November 6, 2015, the Tribunal sent a letter to the parties inviting them to comment on some aspects of the evidence, detailed at paragraph 25 of this decision.

[14] The second hearing day was held as scheduled, on November 10, 2014, in Trois-Rivières, Quebec. Dr. Bachir was present at the hearing and was cross-examined by Alexandre Dufresne with respect to the document entitled "*Volaille registre ante-mortem*". Following the cross-examination of Dr. Bachir, Ms. Panet-Raymond and Alexandre Dufresne presented their oral arguments. At the end of the day, Ms. Panet-Raymond did not have enough time to give her reply to Alexandre Dufresne's arguments, which lasted more than four hours, including very detailed arguments on statutory interpretation principles. Furthermore, the Tribunal asked both counsel to consider the possibility of filing submissions related to the Federal Court of Appeal decision in *Canada (Attorney General) v. Stanford*, 2014 FCA 234, a decision issued by the Federal Court of Appeal on October 20, 2014, in which the Court set aside a Tribunal decision (*Stanford v. Canada (CFIA),* 2013 CART 38). In *Stanford*, the Federal Court of Appeal discussed statutory interpretation rules and, very soon after this decision was issued, the views of the Federal Court of Appeal were applied by the Tribunal in three files with the same parties: *473629 Ontario inc. (also doing business as "Little Rock Farm Trucking") v. Canada (CFIA),* 2014 CART 29, 2014 CART 30 (two decisions issued on October 24, 2014) and 2014 CART 31 (decision issued on October 29, 2014). Furthermore, the reasoning in *Stanford* was applied by the Tribunal in *Western Commercial Carriers v. Canada (CFIA),* 2014 CART 33 (decision issued on November 17, 2014).

[15] At the end of the day of the hearing held on November 10, 2014, counsel discussed the location that would be the most convenient for a third hearing day. Following these discussions, the Tribunal decided that the third hearing day, if it were necessary, would take place in Trois-Rivières. However, after some reflection, the Tribunal asked Ms. Panet-Raymond by e-mail, dated November 13, 2014, if she would consider submitting her reply and any other additional submissions by videoconference or by written submission, so as to avoid the time and cost of a third hearing day. The Tribunal decided that Ms. Panet-Raymond's choice would also apply to Alexandre Dufresne, with respect to his limited response regarding the above-noted decisions. Ms. Panet-Raymond chose to present her reply and additional submissions by way of written submissions, before the deadline of December 18, 2014. This agreement also applied to Mr. Dufresne for the filing of his submissions.

[16] On November 13, 2014, the Tribunal sent to counsel a copy of the Federal Court of Appeal decision in *Stanford*, since this decision, made on October 20, 2014, was not yet available on the Federal Court of Appeal website. The Tribunal also provided the links to its three decisions uploaded to its website, in *Little Rock Farm Trucking*. The Federal Court of Appeal decision in *Stanford* and the Tribunal's three decisions in *Little Rock Farm Trucking* were issued in English, without concurrent translations. Counsel did not present a request for extension of time regarding the publication of the official translation of these three decisions. However, Ms. Panet-Raymond requested an extension to January 9, 2015, which was allowed by the Tribunal, without any objection from Alexandre Dufresne. Both counsel filed their additional submissions on January 8, 2015.

Preliminary issue: Right to a hearing

[17] In its request for review, Ferme Alain Dufresne asked for a review by oral hearing, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* [SOR/2000-187], a result of an initiative of the Minister of Agriculture and Agri-Food, provides as follows:

> ***15.*** *(1) A review by the Tribunal shall be conducted orally where the person named in the notice of violation requests that the review be oral.*

However, Rule 34 of the *Rules of the Tribunal*, a result of an initiative of the Tribunal, provides as follows:

> ***34.*** *An applicant who requests a review by the Tribunal must indicate the reasons for the request, the language of preference and, if the notice of violation sets out a penalty, whether or not a hearing is requested*.

[18] According to Rule 34 of the *Rules of the Tribunal*, the applicant does not have the right to a hearing, since the Notice of Violation was issued with warning and not with penalty. According to subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, which applies generally, the applicant retains the right to request a hearing, regardless of whether the Notice of Violation issues a warning or a penalty. Insofar as there is a conflict between the *Rules of the Tribunal* and the *Regulations* established by the Minister, the Tribunal chooses to follow the latter, in this case. Although this case does not relate to a Notice of Violation with penalty, the negative consequences of a warning to the business reputation of Ferme Alain Dufresne could be similar. According to Rule 3 of the *Rules of the Tribunal*: "If the application of any rule would cause unfairness to a party, the Tribunal may avoid compliance with the rule." Indeed, by admitting the request for a hearing relating to the Notice of Violation with warning, the Tribunal chose not to apply its own rules (Rule 34), so as to avoid, at least implicitly, unfairness to one of the parties.

Preliminary issue: Location of the violation and rectification of the Notice of Violation

[19] The location of the violation indicated on the Notice of Violation contained an error, since Ferme Alain Dufresne became involved only at the beginning of the loading process, which was done at Ferme Alain Dufresne, which is located in Sainte-Elisabeth, Quebec. The Tribunal decided that the rectification of the Notice of Violation was justified and that the alleged violation took place in Sainte-Elisabeth. As the Tribunal discussed in *Hassan v. Canada (CBSA)*, 2013 CART 32, at paragraph 14:

> *[14] … The Tribunal has on several other occasions been asked to grant, and in certain circumstances has granted, a rectification of the originating Notice of Violation. The Tribunal notes, for example, that in the* Kropelnicki v. Canada (CFIA) *series of decisions (2010 CART 22‑25), involving reviews of Notices of Violation issued by the Canadian Food Inspection Agency, the Tribunal ordered*

rectification based on the consent of the parties. In other cases, even where there was no consent, such as in the case of Knezevic v. Canada (CBSA), *2011 CART 21, the Tribunal granted a rectification of the Notice of Violation where it was clear to the Tribunal that such a change would not prejudice Knezevic in knowing the case against her and in preparing her defence ….*

[20] In this case, the Agency made a request for rectification and the Tribunal finds that the rectification would not prejudice Ferme Alain Dufresne.

Evidence and arguments raised before the Tribunal

[21] Following the two hearing days, the evidence and arguments raised before the Tribunal are as follows:

(a) The reasons of the applicant, in its request for review dated April 17, 2014;

(b) The Agency's Report dated May 8, 2014, with exhibits;

(c) The additional submissions from the applicant dated June 6, 2014, with exhibits;

(d) The oral arguments from Ms. Panet-Raymond and Alexandre Dufresne during the hearing held on November 10, 2014;

(e) The written submissions from Ms. Panet-Raymond and Alexandre Dufresne dated January 8, 2015;

(f) The exhibits submitted by the parties during the hearing.

The written submissions from Ms. Panet-Raymond dated October 9, 2014, and the written submissions from Mr. Dufresne dated October 28, 2014, are related to the Tribunal's order, dated November 4, 2014.

Facts not in Dispute

[22] The facts not in dispute are as follows:

(i) Alain Dufresne is one of the two shareholders of Ferme Alain Dufresne (the other shareholder being his spouse) and President of Ferme Alain Dufresne (Agency's Report, Tab 1). Alain Dufresne has been a poultry farmer for 30 years (testimony of Alain Dufresne during the hearing).

(ii) On February 27, 2013, at 9 p.m., a load of approximately 20,074 poultry started at Ferme Alain Dufresne, located in Sainte-Elisabeth, Quebec. Three transports were hired. The catching crew arrived 90 minutes later.

(iii) During the loading, the temperature was approximately -1° C, with wind. Furthermore, it was snowing (Agency's Report, Tab 17).

(iv) The poultry was transported from Ferme Alain Dufresne to the abattoir Nadeau Ferme Avicole, in St-François-de-Madawaska, New Brunswick. The duration of the trip was seven to eight hours.

(v) After arriving at the abattoir and unloading, 221 of the 20,074 poultry were discovered dead in their cages.

Facts disputed

[23] The disputed facts are as follows:

(i) According to the Agency, Ferme Alain Dufresne remained in control of the poultry during the loading. Therefore, it was responsible for the well-being of the poultry by being a participant or by being part of the transport of the poultry. Ferme Alain Dufresne vigorously denies this fact.

(ii) The nature and amount of the snow are disputed. According to the Agency, there was major snowstorm at the time of loading. Ferme Alain Dufresne does not admit this.

(iii) According to the Agency, the cages were filled with snow at the time of loading. Ferme Alain Dufresne does not admit this.

(iv) According to the Agency, and based on veterinary conclusions, the poultry died from hypothermia. The Agency argued that there is a link between hypothermia and undue suffering. Ferme Alain Dufresne disputes the veterinary conclusions and the link to undue suffering.

Decision

[24] According to the Tribunal, the Agency did not establish the violation on a balance of probabilities, because Ferme Alain Dufresne relinquished control of the poultry to the catchers and transporters, at the time of catching and loading. Therefore, it is impossible to consider Ferme Alain Dufresne as being responsible for the loading. Ferme Alain Dufresne is not a party that acted to "load or cause to be loaded" the poultry, according to subsection 139(2) of the *Health of Animals Regulations*. Ferme Alain Dufresne relinquished control before loading and, thus, cannot be considered to be part of the causal link related to the loading.

Reasons for the decision

[25] After issuing the order dated November 4, 2014, and issuing on November 5, 2014, the reasons for order dated November 4, 2014, the Tribunal, per Member La Rochelle, asked the parties, by letter dated November 6, 2014, the following (translated verbatim):

> *Given the documents and evidence submitted to the file during the hearing of September 30, 2014, I invite you to consider the following questions, if you have not already done so, during the hearing of November 10, 2014:*
>
> *(1) Who was the owner of the chickens (a) before loading; (b) at the time of loading; and (c) during transport? Relevance, if any, in an administrative penalties system?*
>
> *(2) What is the nature of the contract between Ferme Alain Inc. and the abattoir Nadeau Ferme Avicole? Written, oral or standard contract? Contractual agreement typical in the poultry industry? Clauses relevant to this file?*
>
> *(3) Provincial law applicable to the contract?*
>
> *(4) Is there a contract of bailment between the producer and the abattoir? Relevance, if any, in an administrative penalties system?* …

[26] During the hearing that was held on November 10 2014, the two counsel discussed industry policy, by referring to various documents, such as "*l'Arbitrage de la Convention de mise en marché du poulet"* and a decision of the Régie des marchés agricoles et alimentaires du Québec (Decision 9829, February 7, 2012). In these documents, there are discussions relating to the parties' responsibilities. Nevertheless, no document was presented before the Tribunal to demonstrate the contractual relationships between the producer Ferme Alain Dufresne, located in the province of Quebec, and the abattoir Nadeau Ferme Avicole, located in New Brunswick. In addition, no document was presented before the Tribunal to demonstrate the contractual relationships between Ferme Alain Dufresne, the transporters and the catchers. The Tribunal must draw its own conclusions as to the contractual relationships from the testimony given and the other documents submitted. In other similar cases, there was evidence before the Tribunal of the parties' contractual relationships. For example, in *S & S Transport*, cited as *0830079 B.C. Ltd. v. Canada (Canadian Food Inspection Agency)*, 2013 CART 34, at paragraph 29, there was evidence (contested, but still evidence) and arguments on the contractual relationships between the producer, the transporter and the processor. In this case, the evidence and the arguments relating to the contractual relationships come from Ferme Alain Dufresne.

[27] In responding to questions from the Tribunal, Alain Dufresne made the following comments:

> (a) The control of loading remains the responsibility of the abattoir that directs the transporters and the catchers. The producer must act according to the directives of the abattoir, since the abattoir has a precise production schedule to follow. At the time when the catching and loading begin, the

producer relinquishes control of the poultry to the catchers and the transporters.

(b) Alain Dufresne has been a poultry producer for 30 years. During all these years, he delayed, or recommended a transport be delayed only once, because of rain.

(c) If he assists with loading, it is to help the catchers and the transporters, on request, but he is not a catcher or a transporter. For example, Alain Dufresne admitted that, during the night of February 27, 2013, he shoveled the snow on the road to the chicken barn.

[28] The Tribunal noted that Alain Dufresne's testimony regarding the parties is similar to the testimony discussed in *R. v. Maple Lodge Farms*, 2013 ONCJ 535 (for example, at paragraphs 75 to 77), where Madame Justice Kastner described the industry at paragraph 77, as follows:

> *[77] The meat industry is generally "just in time", meaning the whole life cycle of the chickens is managed within tight parameters to meet regulated demand, and maintain the slaughter schedules as planned.* …

[29] In a "just in time" industry, it is the producer (or, in this case, the abattoir) that manages the cycle. Without evidence to the contrary, such as a contract between Ferme Alain Dufresne and Nadeau Ferme Avicole or an agreement between the producers of Quebec and the abattoirs of New Brunswick, the Tribunal gives more weight to Alain Dufresne's testimony, with respect to his relationships among the parties. That said, Ferme Alain Dufresne did not commit the violation, since in this case, it cannot be considered to be part of the loading.

[30] The Tribunal remains mindful of Mr. Justice Létourneau's directives in *Doyon v. Canada (Attorney General)*, 2009 FCA 152 relating to the need for the Tribunal to be circumspect in its deliberations. As Mr. Justice Létourneau advised the Tribunal, at paragraph 28 of *Doyon*:

> *[28] … This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.*

[31] The Agency's case is based on the following arguments. If there were a major snowstorm at the time of loading (as is alleged), the producer had the right and the obligation to stop the loading, if he believed that there was a danger to the poultry's health. If he chose to do nothing, then he is part of the *actus reus* of the violation. The Tribunal does not agree, based on the evidence before it. With his years of experience in the field, it could be argued that Alain Dufresne could predict the outcome of the loading and transport. This remains a supposition, all the same; there was no evidence that Alain Dufresne and, through him, Ferme Alain Dufresne, is an expert in matters of loading or transport. It could be said that Dufresne retains a moral obligation to protect the poultry's health. But was it

still Alain Dufresne's poultry? If he is no longer the owner of the poultry, does he have a bailment agreement? These questions remain unanswered by the Agency.

[32] Since the Tribunal has determined that Ferme Alain Dufresne relinquished control of the poultry to the catchers and transporters, it is not necessary to discuss *Stanford* and *Little Rock Farm Trucking*, previously cited, as was expected when counsel for both parties were invited to provide comments on those decisions. The Tribunal recognizes the possibility that the Agency could one day succeed in establishing that a poultry farmer had "caused to be loaded" poultry, based on the facts, but *Ferme Alain Dufresne* is not that case.

Alain Dufresne as witness for the Agency; interview with Alain Dufresne, on request of the Agency

[33] At the beginning of the first hearing day, Ms. Panet-Raymond stated that she had discussed with Alexandre Dufresne the subject of the testimony of Alain Dufresne, as a witness for the Agency. Alexandre Dufresne did not give his consent to Ms. Panet-Raymond's request. She then made the same request of the Tribunal. The request was not granted by the Tribunal, for the simple reason that Alain Dufresne was not required to testify against himself.

[34] The Agency then relied on a *verbatim* report of an interview between Ms. Côte-Page and Mr. Morneault, Agency investigators, and Alain Dufresne, which was held on January 28, 2014, at Alain Dufresne's home (Agency's Report, Tab 6). The interview was conducted at the Agency's request. On March 18, 2014, following this meeting, a Notice of Violation was issued against Ferme Alain Dufresne regarding the incidents of February 27, and 28, 2013.

[35] In answering the Tribunal's questions, Alain Dufresne testified that he was under the impression that the purpose of the interview with the investigators was to find out general information on the industry. He revealed that he was a long-standing executive member of the local chapter of his provincial association of poultry producers. He never thought that the information that he provided to the investigators would be linked to the issuing of a Notice of Violation or that it would be used for such a purpose.

[36] The Tribunal expressed its reservations regarding the way that the Agency used the recording of the interview with Alain Dufresne as testimony against him. The Agency obtained the recordings of the interviews with two truck drivers (two of the three who transported the poultry) in a similar manner.

[37] The Tribunal takes note of the sentiments of Mr. Justice Létourneau in *Doyon*, previously cited, with respect to the weighing of the evidence, at paragraph 54:

> *[54] The main function of a tribunal of first instance is to receive and analyse the evidence. In carrying out this important function, it may reject relevant evidence, but it cannot disregard it, especially if it contradicts other evidence of an essential element of the case: see* Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13;* Parks v.

> Canada (Attorney General), *[1998] F.C.J. No. 770 (QL);* Canada (Attorney General) v. Renaud, *2007 FCA 328; and* Maher v. Canada (Attorney General), *2006 FCA 223. If it decides to reject the evidence, it must explain why:* ibidem.

[38] Ms. Panet-Raymond cited the decision of the Federal Court of Appeal in *Canada (Border Services Agency) v. Tao,* 2014 FCA 52, in support of her argument that the Tribunal could admit the recording of the interview with Alain Dufresne (and, consequently, the interviews with the truck drivers) without any reservation or caution. One can distinguish *Tao,* by the fact that, in *Tao,* the Tribunal neglected to consider a section in the *Customs Act,* which requires an individual to testify against himself, without right to remain silent (*Tao* [FCA], paragraphs 25 and 26). In the legislative regime of the Agency, even though an individual must not act to hinder the action of the inspector, analyst or officer (see, for example, the Tribunal's decision in *Clare v. Canadian Food Inspection Agency*, 2014 CART 35), it would seem that one retains a right to silence before an Agency investigator. The issue of whether the Agency has the obligation to warn or caution a potential witness and, especially, a potential violator, in these circumstances, remains for another case.

[39] The Tribunal would like to point out that it did not reject the recording of the interview with Alain Dufresne. The Tribunal finds that it is not necessary to discuss this testimony further, as it found that the control of the poultry had been relinquished.

[40] Nevertheless, as the Tribunal discussed recently in *Guy D'Anjou Inc. v. Canadian Food Inspection Agency*, 2015 CART 2, the Tribunal remains concerned with respect to some investigative approaches adopted by the Agency. The Tribunal expressed its views at paragraph 36 of *Guy D'Anjou*:

> *[36] The Tribunal remains concerned about the evidence obtained by the Agency from the alleged violator, or on behalf of the alleged violator, particularly before the notice of violation is issued. In the Tribunal's opinion, it is better and more fair if the Agency, as in the present case, could establish the violation by other means. In* Doré v. Barreau du Québec*, 2012 SCC 12, the Supreme Court directed administrative tribunals to incorporate "Charter values" into their deliberations, even though "Charter rights" are not applicable to administrative offences. The Tribunal discussed* Doré *in* Ferme Dion*, previously cited* [2014 CART 36]*, at paragraphs 57 to 59, by referring to the Tribunal's decision in* Tao v. Canada (Canada Border Services Agency)*, 2014 CART 6. At paragraph 59 in* Ferme Dion*, the Tribunal asked several questions:*
>
> > [59] Several questions remain. How can the Tribunal follow the directions of the Supreme Court in *Doré*? Does a right against self-incrimination still have "no basis in law" in cases of administrative violations? How can the Tribunal incorporate, or at least consider, "Charter values" in reviewing statutory provisions in administrative law that require self-incriminating admissions? Should an admission be given a different weight if it is in a request for review or other written form, as opposed to oral admissions made during questioning by the Agency? The answers will come from other cases.

The Tribunal's questions and concerns still remain.

Judicial review of the Tribunal

[41] During the Osgoode Hall Law School 10th Annual National Forum on Administrative Law and Practice, which took place in October 2014 (hereinafter, "Osgoode Forum"), the decision of the Supreme Court of Canada, *McLean v. British Columbia (Securities Commission),* 2013 SCC 67, was the topic of discussion by several participants. At paragraphs 40 and 41 of this decision, the Supreme Court of Canada stated the following:

> *[40] The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (Pezim, at p. 596* [Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557]*), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.*
>
> *[41] Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is unreasonable. …*

[42] Further, Mr. Justice Stratas, of the Federal Court of Appeal, in one of the speeches during the Osgoode Forum, stated that the Supreme Court, at paragraph 48 of *Dunsmuir* (*Dunsmuir v. New Brunswick,* 2008 SCC 9), was wrong. The Supreme Court, at paragraph 48, stated the following:

> *[48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam *formalism* [Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748]. *In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, per L'Heureux-Dubé J., dissenting). We*

> *agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed.,* The Province of Administrative Law *(1997), 279, at p. 286 (quoted with approval in* Baker [Baker v. Canada (Minister of Citizenship and Immigration*)*, [1999] 2 S.C.R. 817], *at para. 65, per L'Heureux-Dubé J.;* Ryan [Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247], *at para. 49).*

[43] Previously, it was thought that the concept of reasonableness, in matters of judicial review in administrative law, was focused on the facts, while the concept of correctness was focused on the interpretation of law. It seems that everything is now mixed, so much so that there are suggestions made, by Mr. Justice Stratas and others, that the only standard of judicial review for administrative decisions is effectively that of reasonableness.

[44] According to this member of the Tribunal, the perspectives of superior court judges, along the theme of of "reasonableness everywhere" in matters of standards of judicial review in administrative law, are regrettable. The members of an administrative tribunal may possess a level of expertise in some specific matters in an industry or a technical field. On the other hand, this level of expertise is not necessarily the same as an expert witness or a specialist. Members are not infallible in matters of the assessment of the evidence, even though members are not required to follow evidence standards generally applied in a trial. In addition and in particular, members of administrative tribunals are not infallible in matters of interpretation and application of law. The members of a number of administrative tribunals are not lawyers, or even individuals with an education, complete or partial, in law. At the Tribunal, both members are lawyers with the same qualifications required of individuals appointed as superior court judges. Under subsection 4.1(2) of the *Canada Agricultural Products Act* (R.S.C. (1985), c. 20 (4th suppl.)):

> ***4.1*** *(2) A person is not eligible to be appointed a member of the Tribunal unless the person is knowledgeable about or has experience related to agriculture or agri-food and the Chairperson of the Tribunal and at least one other member of the Tribunal must, in addition, be a barrister or advocate of at least ten years standing at the bar of any province or a notary of at least ten years standing at the Chambre des notaires du Québec.*

In addition, according to section 8(1) of the *Canada Agricultural Products Act*, the Tribunal is a court of record. Most administrative tribunals are not.

[45] Despite the legislative constitution of the Tribunal and the legal training of its two members, the Federal Court of Appeal has, on several occasions, shown less deference toward the Tribunal's decisions, with beneficial results for all. One could suppose that the risk of committing errors in law and the assessment of evidence in an unreasonable manner could increase in administrative tribunals where the members are not lawyers or where the tribunals are not established as courts of record. The evidence from academic research remains to be studied.

[46] In the opinion of this Tribunal member, if there is too much deference by a superior court to the decisions of administrative tribunals, it is possible that the public interest is poorly served. The fact that decisions of administrative tribunals do not create judicial precedents is also a very important consideration. Judicial precedents are established by the courts. Clarity in matters of law, as well as clarity in matters of the methodologies of interpreting facts, in a manner generally considered to be defensible by law, are established by the courts, and not by administrative tribunals.

[47] Apart from the potential effect of the Supreme Court decision in *McLean*, the Tribunal has been the beneficiary of Federal Court of Appeal decisions, serving to correct and also to demonstrate more detailed and legally grounded reasoning. Where necessary, the Federal Court of Appeal has adopted the standard of review of correctness. As the Federal Court of Appeal stated (per Mr. Justice Noël), at paragraph 28 of *Canada (Attorney General) v. Vorobyov*, 2014 FCA 102:

> *[28] This Court has recently reiterated that the standard of review applicable to decisions of the Tribunal involving pure questions of law is correctness* (Canada (Border Services Agency) v. Tao*, 2014 FCA 52, para. 13;* Canada Border Services Agency v. Castillo*, 2013 FCA 271, para. 11*). *…*

[48] The Federal Court of Appeal has provided important directions to the Tribunal. Here are some examples:

> *Canada (Attorney General) v. Stanford*, 2014 FCA 234
> (setting aside *Stanford v. Canada (Canadian Food Inspection Agency)*, 2013 CART 38)
>
> - The Federal Court of Appeal, per Madame Justice Dawson, found that the Tribunal erred in its legislative interpretation. The Tribunal failed to consider the presumption of legislative coherence (paragraph 46). Further, the Tribunal was advised that it must adopt a legislative interpretation referenced to the context of the legislation (paragraphs 54 and 55) and in accordance with the objective of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (S.C. 1995, c. 40) (paragraphs 58 to 60).
>
> *Canada (Attorney General) v. Tam*, 2014 FCA 220
> (setting aside *Tam v. Canada (Canada Border Services Agency)*, 2013 CART 41)
>
> - The Federal Court of Appeal, per Mr. Justice Nadon, determined (at paragraph 13) that a decision of an inspector, based on his intuition and considering his experience and the observation of an individual's demeanor, is not, in itself, racial profiling. The Tribunal's view that the law of profiling, developed in criminal law, applies in this case is "unsupportable in the circumstances of this case and is therefore totally devoid of merit." (paragraph 15)

Canada (Attorney General) v. Vorobyov, 2014 FCA 102
(partially upholding *Vorobyoy v. Canada (Agriculture and Agri-Food*, 2012 CART 25)

- The Federal Court of Appeal, per Mr. Justice Noël, determined, at paragraph 40, that the Tribunal was correct in its legislative interpretation and that the Tribunal correctly determined that the Minister of Public Safety did not have the legal authority to make a decision in relation to a Notice of Violation. Nevertheless, the Federal Court of Appeal determined that the declaratory judgement rendered by the Tribunal, by which the Tribunal nullified the Notice of Violation, exceeded its jurisdiction (paragraphs 5 and 47).

Canada (Attorney General) v. Bougachouch, 2014 FCA 63
(setting aside *Bougachouch v. Canada (Canada Border Services Agency)*, 2013 CART 20)

- The Federal Court of Appeal, per Mr. Justice Noël, determined that the Tribunal acted unreasonably in shifting the burden of proof to the Agency (paragraph 36). An individual who applies for a review by the Tribunal must himself support his reasons.

Canada (Border Services Agency) v. Tao, 2014 FCA 52
(setting aside *Tao v. Canada (Canada Border Services Agency)*, 2013 CART 16)

- The Federal Court of Appeal, per Mr. Justice Near, determined that the Tribunal erred in finding that an individual had a right to remain silent when faced with questions from a Canada Border Services Agency inspector. The Tribunal neglected to consider a statutory provision in which an individual is obliged to answer questions from an inspector (paragraphs 23, 24 and 25). In addition, the Tribunal erred in excluding an individual's oral statements, based on the fact that the individual had to be protected against self-incrimination, through a caution from the inspector (paragraph 26).

Canada (Attorney General) v. Savoie-Forgeot, 2014 FCA 26
(setting aside *Savoie-Forgeot v. Canada (Canada Border Services Agency)*, 2013 CART 7

- The Federal Court of Appeal, per Madame Justice Trudel, found, at paragraph 26, that the Tribunal erred in its interpretation of the law, in finding that the Agency's officer must give a reasonable opportunity to the applicant to show that the importation was done in compliance with

the law. In addition, the Court used the opportunity to discuss the legal implications of the primary inspection and the secondary inspection, in finding, at paragraph 18, that "where individuals declare that they are carrying animal by-products and thus voluntarily make them available for inspection, they ought not to be found to have violated section 40 of the Regulations. Even if upon inspection they are found to have in their possession animal by-products that do not fall within the exceptions enumerated in Part IV of the Regulations, they have not yet completed the process of importing these by-products into Canada." The Court acknowledged, at paragraph 24, that it had used the occasion to modify precedent established by the Federal Court of Appeal.

Canada (Attorney General) v. El Kouchi, 2013 FCA 292
(setting aside *El Kouchi v. Canada (Canada Border Services Agency*, 2013 CART 12)

- The Federal Court of Appeal, per Madame Justice Gauthier, found, at paragraph 19, that the Tribunal erred in law by requiring that the Agency establish a causal link, independent of the actions of a third party, and more specifically, that the violator knew that the prohibited product was in his luggage. In addition, one notes that Madame Justice Gauthier, at paragraph 13, quoted the decision of the Supreme Court, *McLean*, to support the actions of a reviewing court when a legislative provision does not allow for more than one reasonable interpretation.

Canada Border Services Agency v. Castillo, 2013 FCA 271
(setting aside *Castillo v. Canada (Canada Border Services Agency)*, 2012 CART 22)

- The Federal Court of Appeal, per Mr. Justice Near, found that the Tribunal had erred in law in holding that, according to the legislative regime, an individual should be given a reasonable opportunity to justify the importation of animal by- products after their discovery (paragraph 26).

Clare v. Canada (Attorney General), 2013 FCA 265
(upholding an unreported policy decision of the Tribunal)

- The Federal Court of Appeal affirmed the existing jurisprudence of the Court, by which the Tribunal does not have the power overlook legislatively–established timelines, as set out in *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (paragraph 24).

[49] According to this member of the Tribunal, one asks whether important decisions, such as *Doyon*, previously cited, and *Porcherie des Cèdres* (*Canada (Attorney General) v. Porcherie des Cèdres Inc.*, 2005 FCA 59, could be made in the current legal climate of

"deference everywhere". The judicial precedents that provide direction come from a court, not an administrative tribunal. In the present case, the Tribunal welcomes a second review, without deference, if one of the parties considers it to be beneficial.

Submissions of counsel

[50] The Tribunal would like to acknowledge and thank both counsel for their oral and written submissions, that were of exemplary quality. If the Tribunal had not based its decision on the question of cessation of control over the poultry, it would have undoubtedly been necessary to discuss the different dimensions of counsels' arguments with a level of detail very much deserved by their superb arguments.

Order

[51] Following a hearing and after reviewing all oral and written submissions from the parties, the Canada Agricultural Review Tribunal, by order, determines that the applicant did not commit the violation, as described in the Notice of Violation no. 1314AT0113-01, dated March 18, 2014.

Dated at Ottawa, Ontario, this 23th day of March 2015.

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Bruce La Rochelle, member

Annex 1

Date: 2014-11-04
Docket: CART/CRAC-1774

Ferme Alain Dufresne Inc.

Applicant

- and -

Canadian Food Inspection Agency

Respondent

[Translation of the official French version]

Bruce La Rochelle, Member

WITH: **Alexandre Dufresne, Counsel for the Applicant and**
Louise Panet-Raymond, Counsel for the Agency

ORDER

Following the written representations of the parties, the Canada Agricultural Review Tribunal (the Tribunal) ORDERS that:

1. The document "*Poultry record of ante-mortem"*, dated February 28, 2013, will not be admitted unless Dr. Nora Bachir attends the hearing on November 10, 2014, so that Mr. Dufresne can cross-examine her in relation to the document.

2. The information sheet *"Is this bird suitable for transport?"* will be admitted as a public document. Both parties will have sufficient time to review the document and prepare their arguments.

3. The Tribunal acknowledges the Agency's position concerning the absence of the lead investigator, Line Côté-Page. However, Mr. Dufresne has the right to request further details regarding the duration of her absence and to ask that the hearing be postponed until she is available to testify before the Tribunal. Moreover, Mr. Dufresne preserves his right to request that the Tribunal issue a summons to this witness. The Tribunal's decision is based on Practice Note #6 – *Witnesses, their evidence and procedures for obtaining a summons to secure the attendance of a witness at an oral hearing of the Tribunal.* The Tribunal asks that the parties' respective positions on subsection (*c*) of the order be communicated to the Tribunal by 12:00 p.m. on Friday, November 7, 2014.

Reasons to follow.

Dated at Ottawa, Ontario, this 4th day of November 2014.

Original signed by

_____

Bruce La Rochelle, Member

Annex 2

Date: 2014-11-05
Docket: CART/CRAC-1774

Ferme Alain Dufresne Inc.

Applicant

– and –

Canadian Food Inspection Agency

Respondent

[Translation of the official French version}

Bruce La Rochelle, Member

WITH: **Alexandre Dufresne, counsel for the applicant, and Louise Panet-Raymond, counsel for the Agency**

REASONS FOR THE ORDER OF NOVEMBER 4, 2014

4. After the first day of the hearing in the present case, held in Montreal, Quebec, on September 30, 2014, two issues remained to be resolved. The two issues relate to (i) the absence of the Canadian Food Inspection Agency's (the Agency's) lead investigator as a witness at the hearing and (ii) the Agency's late submission of two documents. A decision needs to be made on these two issues before the second day of the hearing, which is scheduled for November 10, 2014, in Trois-Rivières, Quebec. The issues are summarized in a letter to the parties, dated October 3, 2014, from Mr. La Rochelle, the Tribunal member hearing the case.

5. Louise Panet-Raymond (Ms. Panet-Raymond) responded to the Tribunal member's letter with a letter of her own, dated October 9, 2014, received by the Tribunal on October 16, 2014, and duly copied to Alexandre Dufresne (Mr. Dufresne). For his part, Mr. Dufresne had, at first instance, sent a request regarding the deadline for responding to the Tribunal's letter (which had not been specified in the Tribunal's letter). Mr. Dufresne made his submissions in a letter to the Tribunal, dated October 28, 2014, copied to Ms. Panet-Raymond.

Absence of the lead investigator

6. The first issue relates to the absence of Line Côté-Page (Ms. Côté-Page), the Agency's lead investigator on the case. At first instance, in a letter dated September 18, 2014, the Tribunal asked the parties to submit their list of witnesses who would attend the hearing on September 30, 2014. Ms. Panet-Raymond and Mr. Dufresne both responded. Ms. Côté-Page's name did not appear on the Agency's list of witnesses. Mr. Dufresne did not object to the Agency's list before, during or after the first day of the hearing, which was held on September 30, 2014.

7. In his letter of October 3, 2014, Mr. La Rochelle summarized the problem as follows:

> [Translation]
> *During the hearing, in response to my question, Ms. Panet-Raymond informed me that Line Côté-Page would not attend the hearing, because she was on sick leave. Instead of admitting into evidence the statements of Ms. Panet-Raymond, I asked Ms. Panet-Raymond to submit independent evidence relating to the sick leave of Line Côté-Page. The reason for my request was due to the fact that Line Côté-Page is the lead investigator on the case, and an adjournment of the hearing had already been granted by the Tribunal, since Line Côté-Page was on vacation the week that the hearing was supposed to take place.*

8. In response to the Tribunal's question, the Agency's position, as expressed by Ms. Panet-Raymond in her letter dated October 9, 2014, was that it had decided not to use Ms. Côté-Page's direct testimony, for the following reasons:

> [Translation]
> *A postponement had been requested this summer, based on the absence of the undersigned and the absence of the investigator, Line Côté-Page.*
>
> *Upon receipt of the new hearing date, it was decided by the undersigned, in her capacity as counsel on the case, to proceed without the investigator's testimony, to avoid another adjournment due to her absence, and as it was possible to prove the constituent elements of the violation, on the balance of probabilities, without this potential witness.*
>
> *Consequently, the Canadian Food Inspection Agency (CFIA) did not request an adjournment, and was not required to justify the absence of this potential witness. It is the Tribunal's responsibility to determine whether the CFIA has discharged its burden of proof after examining all of the evidence and the testimony of the witnesses present at the hearing.*

9. It was during the first day of the hearing that this question was initially raised. It was the Tribunal itself that asked for a reason for the absence of Ms. Côté-Page, because her name appeared on the list of "potential witnesses" submitted by the Agency with its report (Report, page 10). Moreover, it was Ms. Côté-Page who issued the penalty and formulated the case, by way of the report concerning the notice of violation (Report, Title Page, Summary of Evidence).

10. In answer to the Tribunal's question, Ms. Panet-Raymond stated that Ms. Côté-Page was on sick leave. The Tribunal responded that it would be better if the evidence of her sick leave were otherwise than from the statements of Ms. Panet-Raymond. Ms. Panet-Raymond decided to rely on the testimony of the other witnesses and on the written evidence that she had already submitted. The Tribunal agrees with Ms. Panet-Raymond that it is not necessary to explain the reasons for Ms. Côté-Page's absence. However, the testimony of the Agency's witnesses is not entirely in its control.

11. The second hearing day was not initially planned. The parties had anticipated only one hearing day for this case. A second day was necessary because the two lawyers did not have enough time to summarize their arguments, following the submission of evidence at the hearing.

12. Following a request from Mr. Dufresne, the Tribunal sent a copy of the recording of the first day of the hearing to counsel for both parties. As a result, the Tribunal is of the opinion that both counsel have had enough time to reflect on the positions of their respective clients and further or additional testimony for this second hearing day.

13. The Tribunal considers that the additional time therefore benefits the two parties and may lead to a greater degree of fairness. Procedural fairness remains a fundamental principle in administrative review hearings. It is for this very reason that administrative tribunals are not required to follow the strict rules of evidence that apply to proceedings in criminal law. Nevertheless, the Tribunal remains mindful of the written arguments submitted by Mr. Dufresne regarding the admission of new elements of evidence after the parties had declared that their evidence is complete.

Late submission of documents

14. The second issue relates to the request made by Ms. Panet-Raymond, during the course of her examination of Dr. Nora Bachir, to submit two documents. Agreeing with Mr. Dufresne's objections, the Tribunal decided not to admit the documents into evidence but, at the same time, allowed Ms. Panet-Raymond to make a request to the Tribunal to submit the documents late. The documents in question are: (a) *Poultry record of ante-mortem*, dated February 28, 2013, with observations

by Doctor Bachir and (b) an information sheet entitled *Is this bird suitable for transport?*, published online by the Équipe québécoise de contrôle des maladies avicoles.

15. Ms. Panet-Raymond made a request for late submission of the two documents, by way of her letter of October 9, wherein she provided her reasons, as follows:

> [Translation]
> *The first document is a contemporaneous business document of probative value, and the second is an information sheet designed to help industry stakeholders comply with poultry transport regulations.*

16. For his part, Mr. Dufresne strongly opposes the late submission of these two documents. His sentiments are as follows:

> [Translation]
> *The applicant believes that it is good law that the admissibility into evidence of these two documents was refused at the hearing and questions the relevance of giving the CFIA a second chance to submit the documents, especially since the evidence of the parties is henceforth closed…*
>
> *Moreover, in view of the surprise resulting from the late and negligent submission of these documents, the applicant will not have had an opportunity to prepare a rebuttal nor to have had the opportunity to cross-examine Dr. Nora Bachir in relation to the document "Poultry record of ante-mortem".*
>
> *Finally, the reopening of the evidence at the moment when counsel in the case were about to give their closing arguments would cause the applicant an undue economic prejudice. The CFIA's tardiness or negligence should not have the effect of prejudicing the applicant.*

17. Mr. Dufresne's other arguments are based on Rule 37 of the *Rules of the Review Tribunal*, the Supreme Court's decision in *R.* v. *Stinchcombe* [1991], 3 SCR 326 and the inequality of the position of the parties under the administrative monetary penalties regime.

18. Rule 37 of the *Rules of the Review Tribunal* provides as follows:

> ***37.*** *Within two days after receiving the report, the Tribunal must send an acknowledgement letter to each party indicating that the report has been received and that the parties have 30 days after the date of the letter to submit any additional information or representations including any documents or other evidence.*

The deadlines are not absolute. Rules 3 and 6 provide as follows:

> ***3.*** *If the application of any rule would cause unfairness to a party, the Tribunal may avoid compliance with the rule*.
>
> ***6.*** *The Tribunal may extend the time limits fixed in these Rules either before or after the end of the time limits fixed*.

Therefore, the Tribunal preserves the right to admit the documents, in circumstances where it is just or fair to do so.

19. With respect to the *Stinchcombe* decision, Mr. Dufresne submitted that [Translation] "the pronouncements of the Supreme Court…should guide the Agricultural Review Tribunal in its application of the rules regarding disclosure of evidence." Furthermore, he stated that his position was supported by the fact that there are [Translation] "similarities between the Administrative Monetary Penalty System and criminal and penal law." The Tribunal disagrees with Mr. Dufresne's position. The Tribunal must act with caution when considering the circumstances where criminal law pronouncements or directions apply, more or less, in the domain of administrative law. For example, in *Tam* v. *Canada (Canada Border Services Agency)*, 2013 CART 41, the Tribunal concluded, at paragraph 7, that there was a situation of racial profiling. In paragraphs 8 to 13, the Tribunal relied on developments in the law concerning profiling, derived from criminal law and, at paragraph 13, concluded as follows:

> *[13] In the Tribunal's view, the concept of racial profiling and the prohibitions against same, as developed in criminal law, are equally applicable to proceedings involving a determination to issue a Notice of Violation in relation to an administrative monetary penalty*. . .

The Federal Court of Appeal, by way of judicial review (*Attorney General* v. *Tam*, 2014 FCA 220), per Mr. Justice Nadon, determined at paragraph 15 that the Tribunal's conclusion was "totally devoid of merit", without referring to the jurisprudence in criminal law upon which the Tribunal based its decision, and that it had cited and discussed.

20. In addition, it is possible that the Tribunal does not have the right to refuse to admit any evidence. The Tribunal instead has the obligation to weigh all evidence. In *9153-7225 Québec Inc.* (also doing business as "Ferme Dion" and "Dion Farm") v. *Canada* (Canadian Food Inspection Agency), 2014 CART 26, the Tribunal discussed this issue, at paragraphs 38, 39 and 49.

> *[38] Ms. Morency began introducing the details of the previous violations of 9153-7225 Québec Inc. as part of her closing arguments. The Tribunal questioned the purpose of introducing old facts, and*

> *Ms. Morency did not insist on introducing the details. The Tribunal considers that one purpose of such an attempt is to challenge the credibility of the defences of 9153-7225 Québec Inc., based on the testimony of Gilles Dion.*
>
> *[39] Even though the Tribunal is not convinced that the previous violations are relevant, the Tribunal is not entitled to refuse to admit an element of proof. The principal role of the Tribunal relates to the weight to be accorded to the evidence submitted. See for example* Canada (Border Services) *v.* Tao, 2014 FCA 52 *(hereafter "Tao (FCA)"). Therefore, if Ms. Morency had insisted on filing the details of the previous violations of 9153-7225 Québec Inc., for whatever reason, the Tribunal would have been obliged to weigh them, not exclude them...*
>
> *[49] The Tribunal notes that in* Bougachouch [Canada (Attorney General) *v.* Bougachouch, 2014 FCA 63]*, Mr. Justice Noël held that it was not necessary to determine whether the Tribunal has the power to exclude evidence. At paragraph 30, the judge writes, "It is neither necessary nor appropriate to consider the question of whether the Tribunal had the power to exclude the evidence because in any event exclusion, although permitted, is unreasonable". On the other hand, Justice Near suggested, at least, in* Tao (FCA), *cited above, at paragraphs 24 and 26, that the exclusion of evidence is an error of law. As was discussed earlier, the Tribunal believes that the approach to take is that of weighing the evidence, rather than excluding it.*

21. In the decisions of the Federal Court of Appeal cited (*Tao* and *Bougachouch*), the discussions of Judge Near and Judge Noël are related to determinations by the Tribunal on its own initiative. In this case, the Tribunal's decision is in response to the objections raised by one party, with reasons.

22. The Tribunal finds that there would be an unfairness, if it were to permit the submission of "Poultry record of ante-mortem", dated February 28, 2013, with observations by Doctor Bachir, without giving Mr. Dufresne the opportunity to cross-examine Doctor Bachir on the contents of the document. In addition, the Tribunal finds that there would not be an unfairness if it were to permit the submission of a document that is already publicly available ("Is this bird suitable for transport?"), particularly given that Mr. Dufresne has had enough time, since the notice of submission of this document, to prepare his arguments in relation to it. Finally, Mr. Dufresne alleged, in relation to the two documents in question, that there would be an economic prejudice to his client, if they were to be admitted into evidence. On the other hand, he provided no particulars to support this allegation of prejudice to his client.

23. The reasons of the Tribunal are provided with the objective of explaining and supporting the Order of November 4, 2014.

Dated at Ottawa, Ontario, this 5th day of November, 2014.

Original signed by

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Bruce La Rochelle, Member