Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Tao* v. *Canada (Canada Border Services Agency)*, 2014 CART 6

Date: 20140321
Docket: CART/CRAC-1760

BETWEEN:

Xiaojun Tao, Applicant

- and -

Canada Border Services Agency, Respondent

BEFORE: **Member Bruce La Rochelle**

WITH: **Xiaojun Tao, making submissions as a self-represented applicant; and Denise Bergeron, making submissions as the representative for the Agency**

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of section 40 of the *Health of Animals Regulations*, alleged by the respondent.

AND

In the matter of the *Canada Border Services Agency v. Tao*, 2014 FCA 52, whereby the Federal Court of Appeal quashed the decision of the Tribunal and remitted the matter back to it for a fresh determination, in accordance with the reasons provided therein by the Federal Court of Appeal.

DECISION

[1] Following a further review of the evidence and submissions of the parties, in accordance with a fresh determination mandated by the Federal Court of Appeal in *Canada Border Services Agency v. Tao*, 2014 FCA 52, and after due consideration of the reasons provided therein by the Federal Court of Appeal, the Canada Agricultural Review Tribunal (Tribunal) determines that it is reasonable to conclude, following a fresh review of the evidence and submissions of the parties, that the Agency has not proved, on the balance of probabilities, an essential element of the violation, specifically that the product in question contained meat. As a result, the Tribunal finds that Mr. Tao did not commit the violation particularized in Notice of Violation YYZ4971-0490, dated July 10, 2012, and is therefore not liable for payment of any penalty amount.

By written submissions only.

REASONS

Alleged Incident and Issues

[2] The facts of this case are detailed in the Tribunal decision of *Tao v. Canada (CBSA)*, 2013 CART 16 (Tao 2013), at paragraphs 28 and 29, therein. Briefly, the Canada Border Services Agency alleges that Mr. Tao imported a meat-based product into Canada, without an appropriate permit or other basis to legally import the product, contrary to section 40 of the *Health of Animals Regulations* (C.R.C., c. 296). Mr. Tao denies that he imported a meat-based product into Canada. The issue therefore, at the time of the original Tribunal decision, and on the fresh determination herein, is whether the Agency has established, on the balance of probabilities, that the product in question contained meat.

[3] The overall legislative regime is discussed in *Tao (2013)*, at paragraphs 4 to 6. As summarized therein, at paragraph 5, in part:

> *[5] The basic regulatory regime…is that of prohibiting the importation of meat or meat by-products into Canada from countries other than the United States, unless an import permit has been obtained. In certain cases, a certificate or other document showing how the meat or meat by-product has been processed may be accepted in place of an import permit.*

[4] The product in question, to be particularized further, was described by an agency inspector as "candied beef", imported from China. If the product were established, on the balance of probabilities, to contain meat or a meat by-product, Mr. Tao would require an import permit, certificate or other document that would permit the importation of the product, in the absence of the exercise of inspector discretion to otherwise permit the importation, based on specific criteria. Mr. Tao would therefore be considered to have committed the violation alleged, as summarized in paragraph 8 of *Tao (2013)*, in part:

> *[8] In Notice of Violation YYZ4971-0490, dated July 10, 2012, the Agency alleges that, on that date at Lester B. Pearson International Airport, Toronto…Mr. Tao "committed a violation, namely: Failure to meet meat import requirements: The above named person, committed a violation, namely: import an animal by-product, to wit: meat, without meeting the prescribed requirements. Contrary to section 40 of the Health of Animals Regulations"…*

Decision History

[5] The decision of the Tribunal in *Tao (2013)* was that the Agency had not established, on the balance of probabilities, that the product contained meat. At paragraph 43, the Tribunal concluded as follows:

> *[43] Based on the rigorous nature of evidentiary review required by* Doyon [Doyon v. Attorney General of Canada, 2009 FCA 152] *the Tribunal holds that the Agency has failed to establish, on the balance of probabilities, that the product in question contained meat, based on deficiencies in proof of identification of the product contents. Having so found, the Tribunal does not consider it necessary to address the other arguments advanced by the Agency or Mr. Tao.*

[6] The Tribunal's decision turned on the weight given to the asserted admissions of Mr. Tao that the product contained meat, in the context of the weight accorded by the Tribunal to other evidence advanced by the Agency. The Tribunal's view, as expressed in paragraph 34 of *Tao (2013)*, in part, was as follows:

> *[34] …In the Tribunal's view, the Agency will rarely be able to prove its case solely based on the admissions of an alleged violator, particularly in circumstances where the alleged violator has not been cautioned beforehand as to how any such admissions might be used. In the absence of such caution, the Tribunal will generally be reluctant to accord significant weight to such admissions, assuming such evidence is accepted in any event.*

[7] The Tribunal's reasoning in relation to the foregoing, as found in paragraphs 31 and 32 of *Tao (2013)*, was based on its reading of the *Reporting of Goods Regulations* and the weight, which the Tribunal considered should be accorded to uncautioned statements made by an alleged violator, that were contrary to his or her interest:

> *[31] In the Tribunal's view, this case turns on whether the Agency has established, on the balance of probabilities, that the product in question is in fact meat; specifically, beef. The Agency asserts that Mr. Tao acknowledged that the product was beef; Mr. Tao denies having done so. In the Tribunal's view, even if it were to be accepted that Mr. Tao acknowledged that the product was beef, that acknowledgement would not, by itself, establish proof of that element of the Agency's case. This is because Mr. Tao would be making assertions that are contrary to his interest, in circumstances where he is not obliged to say anything, and has not been so cautioned. It is the Tribunal's view that a warning by the Agency to Mr. Tao that any statements made by an alleged violator may be used against him, is very important to the acceptance or the weight accorded by the Tribunal to such evidence*.
>
> *[32] The Tribunal makes reference to subsection 5(3) of the* Reporting of Imported Goods Regulations *(SOR/86-873), which reads as follows:*

> **5**. (3) Goods that are imported by a person arriving in Canada on board a commercial passenger conveyance other than a bus shall be reported in writing.

> *The Supreme Court of Canada has held that regulatory requirement to produce records that may be self-incriminating does not offend the principle against self-incrimination:* Fitzpatrick v. The Queen *[1995], 4 SCR 154. In the current case, Mr. Tao's regulatory compulsion relates only to the declarations made on the declaration card. He has no obligation to say anything further…*

[8] In arriving at these conclusions, the Tribunal expressed reservations and disagreement with previous Tribunal decisions cited by the Agency. As discussed by the Tribunal at paragraphs 34 to 36 of *Tao (2013)* in part:

> *[34] In* Ngo v. Canada (CFIA) *(RTA #60132, September 2, 2004), Ms. Ngo, in her request for review, admitted importing a piece of sausage into Canada from Vietnam, but claimed to not know how it had come to be packed in her luggage. Chairperson Barton (as he then was) used Ms. Ngo's admission as the basis for finding that Ms. Ngo had committed the violation. At page 3 of the decision, Chairperson Barton stated as follows:*
>
> > Based on the admission of the Applicant, the Tribunal has no option but to find the Applicant committed the violation*…*
>
> *The Tribunal expresses its reservations with respect to the apparent absolute nature of Chairperson Barton's logic. The Tribunal also references the legal principle that an administrative body, such as the Tribunal, is not subject to the strict doctrine of precedent…*
>
> *[35] In* Boukhliq v. Canada (CFIA) *(RTA #60156, March 8, 2005), Mr. Boukhliq admitted importing into Canada from Hungary what was agreed to be a small amount (0.6 kg) of salami. At page 3 of the decision, Chairperson Barton stated, in part, as follows:*
>
> > The Applicant's clear admission would appear to supersede the obligation of the Respondent to establish, on the balance of probabilities, the commission of the violation.
>
> *The Tribunal respectfully disagrees with the foregoing conclusion of former Chairperson Barton*.

> *[36] The case therefore turns on the extent to which the Agency has established, through evidence other than Mr. Tao's uncautioned admissions (if any), and on the balance of probabilities, that the product contained meat…*

The Tribunal's Error

[9] The Federal Court of Appeal determined that the Tribunal's decision contained one error, in two parts. The error was specifically described by the Federal Court of Appeal, per Mr. Justice Near, as follows, at paragraph 27:

> *[27] I conclude that the Tribunal erred in excluding the evidence tendered by the CBSA to the effect that Mr. Tao acknowledged that the items in his luggage were beef and that beef was meat. The evidence should have been admitted.*

[10] The first part of the error was the Tribunal's omission to consider relevant provisions of the *Customs Act,* R.S.C. 1985, c. 1 (2nd Supp), which directly countered the Tribunal's conclusion that Mr. Tao was under no obligation to say anything, beyond completing a written declaration. In particular, section 13 of the *Customs Act* provides, in part, as follows:

> ***13.*** *Every person who reports goods…inside or outside Canada or is stopped by an officer…shall*
>
> *(*a*) answer truthfully any question asked by an officer with respect to the goods…*

The Federal Court of Appeal discussed the Tribunal's error of omission to consider statutory provisions as follows, at paragraphs 24 and 25, in part:

> *[24] The first part of the Tribunal's error stems from the mistaken belief that Mr. Tao had fulfilled his statutory requirement to declare his luggage contents by filling out his Declaration Card. Mr. Tao, in fact, was under a continuing statutory obligation to declare the products he was importing, and this obligation did not end with his completion of the Declaration Card.*
>
> *[25] …Mr. Tao did not have an option to remain silent about anything found in his luggage.*

[11] In the view of the Federal Court of Appeal, the second part of the error concerned the Tribunal's view that an alleged violator should be cautioned that statements made by the violator could be used against him or her by the Agency. The Tribunal considered that the absence of such caution affected the weight to be accorded by the Tribunal to such

statements, including the potential for such statements to be excluded from further consideration (*Tao [2013]*, paragraphs 31 and 34 [part], previously quoted). The Federal Court of Appeal viewed this part of the Tribunal's error as follows, at paragraph 26:

> *[26] The second part of the Tribunal's error stems from the Tribunal's mistaken belief that Mr. Tao deserved protection against self-incrimination in this conversation with the CBSA officer in the form of a caution from the officer. There is no basis in law for the Tribunal to exclude evidence of Mr. Tao's statements to the CBSA officer due to a lack of caution from the officer.*

[12] The Tribunal views the Court's decision in *Tao* to be significantly concerned with evidence being excluded or disregarded by the Tribunal, rather than being reasonably weighed. The Tribunal must demonstrate that it has carefully considered all the evidence. This is particularly important in view of the fact that an administrative tribunal is not bound by the strict rules of evidence, including rules as to evidentiary exclusion. To the extent that there is evidence in the written or oral record that is not referenced by the Tribunal in its decision, and which a party believes to be relevant to the decision outcome, a party would normally have a right to seek judicial review on that basis alone.

Standard of Review Applied

[13] The Federal Court of Appeal determined, at paragraph 13 of *Tao*, that the correctness standard of review applied:

> *[13] In* Canada Border Services Agency v. Castillo, *2013 FCA 271 at paragraph 11, the Court has previously determined that a correctness standard should be applied to decisions involving pure questions of law and statutory interpretation made by the Tribunal.*

[14] In *Dunsmuir v. New Brunswick,* 2008 SCC 9, the Supreme Court of Canada determined that the review standard of a tribunal's interpretation of its governing statute, or one closely related to it, is presumed to be based on reasonableness, and subject to deference accordingly. Writing for the majority of the Court, Justices Bastarache and Lebel stated the principle as follows, at paragraph 54, in part:

> *[54] …Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity…*

[15] Justices Bastarache and Lebel identified the general circumstances when a reasonableness standard would be applied, as well as expressing the view that "(t)here is

nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness". At paragraphs 55 and 56, they state as follows:

> *[55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:*
>
> *— A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference*.
>
> *— A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).*
>
> *— The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, ([2003] 3 S.C.R. 77*) *at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate*
>
> *[56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated*.

[16] In *Doyon*, previously cited, a case that is widely cited in Tribunal decisions, the Federal Court of Appeal viewed the matter as being one involving a reasonableness assessment. At paragraph 32, Mr. Justice Letourneau stated as follows:

> *[32] It cannot be reasonably argued that there is a total lack of evidence of a violation in this case. The exercise undertaken by the Tribunal involved applying the law to the facts of the case. Its decision therefore involves a question of mixed fact and law reviewable on a standard of reasonableness: see* Dunsmuir v. New Brunswick*, 2008 SCC 9. It goes without saying, however, that errors of law as to the definition of the essential elements of a violation and the management of the evidence can render a decision unreasonable*.

[17] The Tribunal notes the view expressed by Mr. Justice Letourneau in *Doyon*, at paragraph 32, that "errors of law as to the definition of the essential elements of a violation ***and*** the management of the evidence can render a decision unreasonable." (emphasis added)

[18] In addition to *Canada Border Services Agency v. Tao*, 2014 FCA 52 (*Tao*), the Federal Court of Appeal decision resulting in the present Tribunal decision, there are three other recent decisions of the Federal Court of Appeal in which the Tribunal's interpretations of legislation have been reviewed: *Canada Border Services Agency v. Castillo*, 2013 FCA 271, *Attorney General of Canada v. El Kouchi*, 2013 FCA 292 and *Attorney General of Canada v. Savoie-Forgeot*, 2014 FCA 26. In all of these cases, the Tribunal's interpretations of the elements of a violation were held by the FCA to amount to errors of law. Mr. Justice Near, writing for the court in *Castillo* at paragraph 11, viewed the Tribunal's decision as being reviewable on the basis of correctness:

> *[11] This Court has established that the standard of review applicable to questions of statutory interpretation made by the Tribunal is correctness:* Doyon v. Canada (Attorney General*), 2009 FCA 152 at paragraphs 30-32 (*Doyon*);* Canada (Attorney General) v. Porcherie des Cèdres Inc.*, 2005 FCA 59 at paragraph 13;* Canada (Canadian Food Inspection Agency) v. Westphal-Larsen, *2003 FCA 383 at paragraph 7 (*Westphal-Larsen*).*

[19] The effects of *Dunsmuir* and subsequent developments by the Supreme Court in this area, such as *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, were not referenced in the four recent Federal Court of Appeal decisions cited. The Court, in *Castillo*, adopted a correctness standard of review, in circumstances that did not involve a jurisdictional interpretation by the Tribunal of its governing legislation, but rather an interpretation of such legislation, as applied to specific case facts. As discussed by Mr. Justice Rothstein, writing for the Supreme Court in *Alberta (Information and Privacy Commissioner),* at paragraph 34, in part:

> *[34] …unless the situation is exceptional, and we have not seen such a situation since* Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review*

[20] In *El Kouchi*, decided by the Court subsequent to *Castillo,* the Court did not consider it necessary to determine whether there was anything to address further, in relation to the determination in *Castillo* that the standard of review was correctness. Rather, the court said that, under the circumstances of *El Kouchi,* no determination need be made as to whether the standard of review was correctness or reasonableness, since the court considered that the result would have been the same under either review standard. At paragraph 13, Madame Justice Gauthier, writing for the Court, stated as follows, in part (unofficial translation):

> *[13] The Attorney General contends that our Court established in* Castillo*, at paragraph 11, that the applicable standard of review is correctness. In my opinion, the standard of review is not important, since the result would be the same through the application of a reasonableness standard. In effect, the text of paragraph 34(1)(b) of the* [Health of Animals] Regulations *is clear and unambiguous. It is not susceptible to more than one reasonable interpretation….*

[21] Later in the judgement, the Court in *El Kouchi* considered its review to result in a conclusion as to an error in law, though as previously noted, the Court did not specify whether a correctness or reasonableness standard was to be applied in arriving at this error categorization. At paragraph 19, the court stated, in part, as follows (unofficial translation):

> *[19] …It is evident that the approach adopted by the Tribunal has the effect of circumventing a clearly expressed legislative intent. In my opinion, there is no valid reason to not apply the reasoning of our Court in* Castillo (Federal Court of Appeal) *here. The Tribunal has erred in law in requiring that the Agency establish a causal link, independent of the actions of a third party and, in particular, that the violator must have knowledge of the presence of the prohibited product in his or her luggage.*

The relationship associated with the reasonableness of a tribunal decision, a tribunal error of law in relation to an element of a violation and a tribunal error of law in relation to the management of the evidence, as discussed in *Doyon* (at paragraph 32 therein) was not explicitly addressed by the Court.

[22] When an error in law is so found, the relief available is as sanctioned by subparagraph 18.1(4)(*c*) of the *Federal Courts Act* (R.S.C. 1985, c. F-7). The section is discussed by the Supreme Court in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339. *Khosa* was a case involving what the majority of the Court viewed as a tribunal interpreting its governing statute. Mr. Justice Binnie, writing for the majority of the Court, states as follows, at paragraphs 25 (part) and 44:

> *[25] …*Dunsmuir *recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have*

*or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54).*

...

[44] Judicial intervention is authorized where a federal board, commission or other tribunal

> *(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;*

Errors of law are generally governed by a correctness standard. Mugesera v. Canada (Minister of Citizenship and Immigration), *2005 SCC 40, [2005] 2 S.C.R. 100, at para. 37, for example, held that the general questions of international law and criminal law at issue in that case had to be decided on a standard of correctness.* Dunsmuir *(at para. 54), says that if the interpretation of the home statute or a closely related statute by an expert decision-maker is reasonable, there is no error of law justifying intervention. Accordingly, para. (c) provides a ground of intervention, but the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute. This nuance does not appear on the face of para. (c), but it is the common law principle on which the discretion provided in s. 18.1(4) is to be exercised. Once again, the open textured language of the* Federal Courts Act *is supplemented by the common law.*

[23] In *Savoie-Forgeot*, at paragraph 13, Madame Justice Trudel adopted the same reasoning to that of Madame Justice Gauthier in *El Kouchi,* holding that it was not necessary to determine whether a correctness or reasonableness standard of review was applicable, since the result, in the Court's view, would be the same in either case:

[13] This case calls upon our Court to clarify the proper legal test where an individual is alleged to have violated section 40 of the [Health of Animals] Regulations*. In my respectful view, the Tribunal's interpretation cannot stand on a proper construction of the* Health of Animals Act *and its* Regulations *no matter which standard of review is applied to the Tribunal's decision.*

[24] In *Castillo*, *El Kouchi* and *Savoie-Forgeot*, the Tribunal applied its expertise to arrive at what it considered to be reasonable interpretations of the elements of a statutory violation, in relation to which the Tribunal has regulatory responsibility. Such interpretations were then applied to the case facts. In all three cases, the Federal Court of Appeal determined that there was only one reasonable interpretation of the relevant legislative provisions, and that the interpretations of the Tribunal were not reasonable.

[25] The facts and reasoning of the Court in *Castillo*, *El Kouchi* and *Savoie-Forgeot* may be contrasted with the decision of the Court in *Tao,* which has resulted in the current Tribunal review. In the *Tao* decision, in relation to the first part of the error identified (particularized in paragraph 10, *ante*), the Court was not reviewing a matter of statutory interpretation, but rather the omission by the Tribunal to consider a statutory provision that directly countered an interpretation adopted by the Tribunal in relation to a separate statutory provision. With respect to the second part of the error identified, that of the Tribunal's conclusion that the presence or absence of a caution to an alleged violator affected the weight the Tribunal would accord to statements thereafter made by such alleged violator (particularized in paragraph 11, *ante*), the Court, citing its previous decision in *Castillo*, considered that its review also involved an assessment based on correctness. Repeating the Court's conclusion in *Tao*, from paragraph 13, with emphasis added:

> *[13] In* Canada Border Services Agency v. Castillo, *2013 FCA 271 at paragraph 11, the Court has previously determined that a correctness standard should be applied to decisions involving pure questions of law* ***and*** *statutory interpretation made by the Tribunal.*

[26] Those applications by the Agency for judicial review were allowed by the Court in all four cases referenced, and to be further discussed. In all four cases, errors of law were identified by the Court. A question arises as to when an error of law, particularly if referenced to the reasonableness of statutory interpretation, will be sufficient of itself to allow an application for judicial review.

Charter Values

[27] The Tribunal is directed by the Supreme Court of Canada to consider Charter values during the course of the Tribunal's deliberations. This direction was discussed by the Supreme Court of Canada decision in *Doré v. Barreau du Québec* 2012 SCC 12, at paragraph 24:

> *[24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including Charter values (see* Chamberlain v. Surrey School District No. 36,

[2002] 4 S.C.R. 710, at para. 71; Pinet v. St. Thomas Psychiatric Hospital, *[2004] 1 S.C.R. 528, at paras. 19-23; and* Ontario (Public Safety and Security) v. Criminal Lawyers' Association, *[2010] 1 S.C.R. 815, at paras. 62-75).*

[28] An administrative tribunal is compelled to demonstrate that it has "properly balanced the relevant Charter value with the statutory objectives" in arriving at its decision. Writing for a unanimous Court, Madame Justice Abella discussed an administrative tribunal's approach to Charter values, in paragraphs 55 to 58:

> *[55] How then does an administrative decision-maker apply Charter values in the exercise of statutory discretion? He or she balances Charter values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In* Lake, *for instance* [Lake v. Canada (Minister of Justice), [2008] 1 S.C.R. 761, *the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the prima facie infringement of mobility rights under s. 6(1) (para. 27). In* Pinet, *the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).*
>
> *[56] Then the decision-maker should ask how the Charter value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the* Oakes *context* [R. v. Oakes, [1986] 1 S.C.R. 103]. *As this Court recognized in* RJR-MacDonald Inc. v. Canada (Attorney General), *[1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the Charter balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of* Dunsmuir [Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190] *"falls within a range of possible, acceptable outcomes" (para. 47).*
>
> *[57] On judicial review, the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play. As LeBel J. noted in* Multani, [Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256] *when a court is faced with reviewing an administrative decision that implicates*

> *Charter rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the* Oakes *framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing Charter values against broader objectives*.
>
> *[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant Charter value with the statutory objectives, the decision will be found to be reasonable.*

The Supreme Court also noted, at paragraph 54:

> *[54] Nevertheless, as McLachlin C.J. noted in* Catalyst [Catalyst Paper Corp. v. North Cowichan (District), [2012] 1 S.C.R. 5] *"reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18). Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where Charter values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant Charter values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of Charter values in the analysis.*

[29] The Tribunal acknowledges that the application of *Charter* values in the context of administrative proceedings is problematic, given uncertainties as to the nature and extent of such values, as distinct from *Charter* rights. For example, most relevant *Charter* protections are found in the "Legal Rights" section of the *Charter* (sections 7 to 14) and this section of the *Charter* is frequently held to be not applicable to administrative or civil proceedings generally. For example, and as was noted in *Tao (2013)* at paragraph 32, the Supreme Court of Canada has held that a regulatory requirement to produce records that may be self-incriminating does not offend the principle against self-incrimination: *Fitzpatrick v. The Queen* [1995], 4 S.C.R 154, at paragraph 32. However, the Supreme Court of Canada in *M. (A.) v. Ryan* [1997] 1 S.C.R. held, at paragraph 23, that, in circumstances where *Charter* rights do not apply, such as in civil litigation, *Charter values* must nonetheless be considered, such as in matters of interpreting the application of common law principles. In *R. v. Conway* [2010] 1 S.C.R. 765, the Supreme Court of Canada held, at paragraph 78, that an administrative tribunal, in exercising its statutory functions, is obliged to act consistently with the *Charter* and its values.

Evidence Before the Tribunal

[30] The evidence before the Tribunal consists of written representations from the Agency (Report, as amended, dated September 26, 2012, which incorporates by reference the Agency's original report, submitted August 23, 2012 [both referred to as "The Report"]) and written submissions by Mr. Tao (Request for Review, dated July 28, 2012, additional submissions via letter dated September 21, 2012, plus further submissions, as permitted by the Tribunal, via letter dated October 30, 2012).

Evidence of Statements Allegedly Made by Mr. Tao in relation to Meat

[31] There is a conflict as to whether Mr. Tao actually said that the products discovered in his luggage contained meat. The product is described by the Agency inspector as "candied beef" (Report, Tab 6, "Tag for Intercepted Item"). As summarized in *Tao (2013)*, the conflicting evidence between the Agency and Mr. Tao as to what was said at the time of discovery of the item is as follows:

Agency Evidence, as summarized in *Tao (2013)*, paragraph 28(b):

> *[28](b) The secondary inspector, following determination of ownership of the luggage, examined Mr. Tao's luggage and found several packages decorated with pictures of cows. Mr. Tao was asked by the inspector what the product was, to which Mr. Tao replied "beef". The inspector then asked Mr. Tao "is beef meat?", to which Mr. Tao replied "yes", and spelled the word "meat" correctly, further to the inspector's request. When the inspector asked him why he had failed to declare the product, Mr. Tao was asserted to reply that "in China, this is candy; it is meat, but it is candy". Since Mr. Tao was readily able to identify the item as beef, this counters his argument that he could not know what the contents were unless he opened them. (Report, Rebuttal of Applicant's Arguments, paragraphs 12, 14; Report, Tab 5; signed "will testify" report of secondary Inspector 17220, dated July 10, 2012; ["Inspector's 'will testify' report"]).*

Mr. Tao's evidence, as summarized in *Tao (2013),* at paragraphs 29(g) and (h):

> *[29](g) The product in question was packaged to look like candy. Mr. Tao contends that "a kind of meat is different from a product made from meat" (Request for Review, page 2). Mr. Tao also contends that he doesn't know what "beef candy" is, never described the product as either*

> *"Beef Candy" or "Meat Candy" and that the term was one used by the inspector, not Mr. Tao (Letter of October 30, 2012, pages 2, 3).*
>
> *[29](h) Mr. Tao acknowledges that the inspector opened one of the packaged products, smelled it and then asked Mr. Tao if it was beef. Mr. Tao asserts that he responded to the question with the same question: "Beef?" (Letter of October 30, 2012, page 2).*

[32] On a fresh review of the evidence, it is beneficial to review Mr. Tao's specific recounting of the facts. In his letter of October 30, 2012, at paragraphs 3 and 4, Mr. Tao states as follows (as extracted; extracts reproduced *verbatim*):

> *3. …In addition, as proof, the officer provided with the packages of something which are definitely of the Beef but not "Beef Candy". I don't know what "Beef Candy" is! In fact, I and the inspection officer never said or mentioned of "Beef Candy"…*
>
> *4. Further, I never said and declared that the seized stuff was of beef product. Because the seized stuff was packaged and looked like candy, I couldn't make sure it is a beef product or some others even though I could make sure it is something made from meat (pork or beef?). This is why I brought it to the officer and discussed with him about what category it is belonging to. The officer opened one of them and took smelling on it, which was wrapped with two layers of packaging papers, one is a tin-foil paper and one is a transparent packaging paper. After then, the officer confirmed: "Em, Beef?". I felt unsure of it and replied "Beef?" This stuff was then seized as a proof violated against law. The officer made record on the information tag and the statement. In this course, I never said "Beef Candy" or "Meat Candy" such as a kind of childish words…*

[33] On a fresh review of the evidence of the inspector, contained in his signed "will testify" statement, dated July 10, 2012, and contained in Tab 5 of the Agency Report, the inspector states as follows (as extracted; extracts reproduced *verbatim*):

> *…I examined TAO's carry-on bag first. Contained within this bag were several packages containing what I believe to be meat products. Several of these packages were decorated with pictures of cows. In an effort to confirm my belief, I asked TAO what the products were, he replied "beef". To confirm that TAO could read and understand the declaration card, I asked him "is beef meat?" TAO replied "yes." I then asked "how do you spell meat?" "M-E-A-T" was his reply. I then asked why he failed to declare the meat products and he replied something to the effect of "in China this is candy; its meat but its candy."…*

[34] As directed by the Federal Court of Appeal in *Tao*, the Tribunal cannot exclude Agency evidence, based on the fact that Mr. Tao was not cautioned in relation to how his statements might be used by the Agency *and* based on the Tribunal's view that Mr. Tao has no obligation to say anything further, beyond completing the written declaration. These are the two components of the error of the Tribunal, as identified by the Court in *Tao*. The Tribunal's identified error is consistent with the view of the Court that evidence before an administrative tribunal must generally be weighed, rather than excluded, particularly since the strict rules of evidence do not apply to administrative proceedings. For example, in *Doyon,* the Tribunal is directed, at paragraph 54, as follows:

> *[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… If it decides to reject the evidence, it must explain why…*

The Tribunal's error in *Tao (2013)* may be regarded as that of excluding or disregarding evidence at first instance, rather than weighing such evidence and then rejecting it, or according it minimal weight. The erroneous exclusion of such evidence may be viewed as an error of law. As stated by Madame Justice Sharlow, speaking for the Court in *Madison v. Canada*, 2012 FCA 80, at paragraph 11:

> *[11] … It is an error of law to exclude evidence, solely on the basis that it is hearsay, without first considering whether it is necessary and reliable…*

[35] The direction of the Court in *Tao*, read in the context of the earlier directions of the Court in *Madison* and *Doyon*, are viewed by the Tribunal as meaning that the Tribunal must weigh the evidence in the circumstances, but should not exclude or disregard it. The Tribunal must also consider the direction of the Court in *Tao*, at paragraph 26, that "(t)here is no basis in law for the Tribunal to exclude evidence of Mr. Tao's statements to the CBSA officer due to a lack of a caution from the officer." The Tribunal is also subject to the direction of the Supreme Court of Canada in *Doré,* to both incorporate Charter values in its decision-making, and to balance Charter values with statutory objectives.

[36] In weighing the evidence as to what was said by Mr. Tao and the inspector in relation to the product at the time of its discovery, the Tribunal views the evidence as being of comparable probative value, but contradictory. This is illustrated as follows:

(a) The inspector's evidence is that Mr. Tao stated the product was beef, when asked by the inspector. Mr. Tao asserts that, based on Mr. Tao's uncertainty as to what the product was, he answered the inspector's question with a question: "Beef?"

(b) The inspector's evidence is that he asked Mr. Tao whether beef was meat, to which Mr. Tao replied in the affirmative. The inspector asked Mr. Tao to spell the word "meat", which Mr. Tao did. Mr. Tao's evidence is that he was uncertain from the packaging as to what the product was made from: "Because the seized stuff was packaged and looked like candy, I couldn't make sure it is a beef product or some others even though I could make sure it is something made from meat (pork or beef?)." At another point, Mr. Tao asserts that "In addition, as proof, the officer provided with the packages of something which are definitely of the Beef but not 'Beef Candy'. I don't know what 'Beef Candy' is!"

(c) The inspector provided a summary, rather than a *verbatim* recollection of Mr. Tao's sentiments in relation to the "candy" element of the product: "I then asked why he failed to declare the meat products and he replied something to the effect of 'in China this is candy; its meat but its candy.'" In the Tag for intercepted item, the product is described as "Beef (Candied Beef)". Mr. Tao vehemently denies ever using the term "candy" in relation to the product: "In this course, I never said 'Beef Candy' or 'Meat Candy' such as a kind of childish words".

[37] Since the Tribunal's review in the current case is by written submissions only, the Tribunal does not have the benefit of seeking clarification from the parties as to what was actually said or meant, as would be readily the case in an oral hearing. The Tribunal in its discretion also did not seek further written clarifying representations from the parties, choosing instead to rely on the documentation filed. There are representations made by Mr. Tao in three permitted submissions: his initial Request for Review, his submission of September 26, 2012, and his submission of October 30, 2012. Mr. Tao attempted to make submissions dated September 28, 2012, which required a request for an extension of time to be accepted. His submission of October 30, 2012, further to the granting of permission by the Tribunal, was accepted in lieu of his submission of September 28, 2012. While the submission of September 28, 2012, is included as part of the record, it was not incorporated into the decision-making processes of the Tribunal.

[38] The Tribunal notes that the evidence may be coloured by the highly emotive reactions, intemperate demeanour and scurrilous phrasing adopted by Mr. Tao. As described by the inspector in the inspector's signed "will say" statement, and not contradicted by Mr. Tao at any point in the proceedings (extract reproduced *verbatim*):

> *…I then advised him that there was an $800.00 fine for failing to declare regulated food products. He stated "You're not going to fine me. The fine is too much. You can throw it out but I am not going to pay a fine." I asked if TAO had any permits for the meat products; he did not. TAO became argumentative and kept insisting that I was only going to dispose of the items and not issue a fine. I*

decided that a fine was necessary to impress upon TAO the seriousness of his violation. Once I concluded the examination of the remaining luggage I asked TAO to have a seat for his comfort while I complete my paperwork. A short time later, I called TAO back up and began to explain the Notice of Violation, the reduction of the fine for voluntary payment and the appeals procedure. TAO interrupted me on several occasions to again tell me that the fine is too much and that I can keep the candy but I cannot fine him. He stated that he did not accept this and refused to sign anything and that he did not need me to read or explain anything to him because he is a lawyer and can read it himself. I eventually managed to satisfactorily explain the Notice of Violation and appeal procedure to him and I directed him to the exit…

[39] Mr. Tao in turn described the circumstances and evidence as follows (extracts reproduced *verbatim*):

> *So, all the evidence the officer provided with his response are false and not acceptable*.
> (Submission of September 21, 2012, paragraph 1).
>
> *He took advantage of my unknowing the information and imposed unfair fine. I believe this charge is improper and dishonourable.*
> (Submission of September 21, 2012, paragraph 2)
>
> *Because the officer provided with false evidence to support his statement, the officer intentionally made negligence to my requests when I did my due diligence to avoid a violation in the inspection station, and he intentionally took advantage of a person unknowing of the special regulations in this matter, the charge against is not fair and justice. I request you to dismiss this charge*.
> (Submission of September 21, 2012, paragraph 4)
>
> *…the Officers are madding false statement with wrongful proofs to mislead your honour and the board*.
> (Submission of October 30, 2012, paragraph 2)
>
> *It is totally make-up story. …The officer told a false story again in his amended statement. Second, it is more ridiculous. …Those words are fabricated by the officer who made the amended statement. I believe that any of the fabricated statement are not true and honest. I prefer the board to ignore of what the amended statement alleged.*
> (Submission of October 30, 2012, paragraphs 2, 3 and 4)

[40] The Tribunal must be mindful to not be unduly influenced by the demeanour associated with testimony, when assessing the credibility of such testimony. In this regard,

the Tribunal benefits from guidance as developed by the courts in criminal prosecutions. Demeanour may be associated with credibility, in the context of an overall assessment of facts, rather than when viewed in isolation. Conclusions as to credibility are not to be made solely based on an assessment of demeanour. Summarizing the law in this regard in *R. v Smith*, 2011 ONSC 5377 (CanLII), Mr. Justice MacDonnell of the Ontario Superior Court stated as follows, at paragraph 8:

> *[8] …I acknowledge that the Ontario Court of Appeal has stated on a number of occasions that it is an error to base credibility decisions solely on the demeanour of witnesses: see, e.g.,* R. v. J.F. (2003), *177 C.C.C. (3d) 1, at paragraph 101;* R. v. Norman *(1993), 87 C.C.C. (3d) 153, at 173;* R. v. Gostick *(1999), 137 C.C.C. (3d) 53, at 59-61. However, I do not take those statements to be inconsistent with what Lacourciere J.A. said in* Owens [(1986), 33 C.C.C. (3d) 275] *nor with the use that the trial judge made of the demeanour evidence in this case. In neither Owens nor this case was the in-court behaviour of the accused the sole basis for the credibility determination…*

[41] In the present case, the Tribunal seeks further clarification as to what Mr. Tao said or meant, through an examination of Mr. Tao's submission of September 21, 2012. In this submission, at paragraph 1, in part, Mr. Tao states as follows (reproduced *verbatim*):

> *[1] As I said and also as the piece of blue paper the officer made, the food looks like "Candies". …Due to its looking like candy, I told inspector it was a food looking like "a candy". …In addition, the officer wrote down "Beef (Candied Beef)", with which I couldn't agree. I have never eat or exam of them. And, the candied products couldn't be confirmed as a Beef or Pork! I was not informed about that. In my knowledge to Chinese industry, the most of meat products made in China, if the products I brought in would have been confirmed, should be of Pork but not Beef. In current situation, the most of Beef products manufactured in China are imported from the USA or Canada! It is because China is not a traditional producer of Beef or Mutton. So, I can't figure out whether the officer's evidence is correctly provided to your tribunal, for this matter. In his statement, evidently, the officer didn't provide with entire true proofs.*

Furthermore, in paragraphs 1 and 4 of Mr. Tao's Request for Review, dated July 28, 2012, Mr. Tao describes the items as follows (extracts reproduced *verbatim*):

> *[1] …Because I have never touched the packs which were put into my luggage by my family members without notification to me, I have no idea about the content what they are unless the bags were tore and opened…*

…

> *[4] In my knowledge, a kind of meat is different from a product made from meat. In particular, the pack of product was made and looks like candy (packaged as a kind of candy style). With no knowledge of importing business,. I couldn't figure out what catalogue they should be.*

[42] The submissions of the Agency in relation to the statements made is that "Mr. Tao readily identified the goods in issue as beef to Inspector 17220 when asked to identify the product." ("Rebuttal of Applicant's Arguments", paragraph 12, part). Based on a review of the evidence of Mr. Tao and the Agency in relation to what transpired at the time the goods in question were discovered, the Tribunal concludes as follows. The Tribunal is of the view that a reasonable conclusion in relation to Mr. Tao's expressed sentiments is that he wasn't certain what the product was made of, but suspected that it was made of meat and that the meat type was likely pork, rather than beef. This conclusion is considered to be reasonable, notwithstanding any reservations as to Mr. Tao's demeanour, as represented by his conduct towards the Agency inspector and Mr. Tao's written representations thereafter. Mr. Tao's sentiments as to the likely product type are independent of his dispute with the Agency as to who originally described the item as a form of candy, and whether Mr. Tao understood "meat candy" or a similar term to refer to an item that was not meat in fact.

[43] In the Tribunal's view, it cannot reasonably be concluded, based on an assessment of the evidence advanced, that Mr. Tao explicitly admitted that the product was either meat generally or beef in particular. At best, the Tribunal considers it reasonable in the current circumstances to accord equal weight to the Agency evidence in this regard and that of Mr. Tao. Alleged admissions by Mr. Tao are considered to be reasonably controverted by him.

[44] As has been noted, the Tribunal is subject to directions of both the Federal Court of Appeal and the Supreme Court, in relation to the statements made by Mr. Tao. Beyond particularizing such directions, as has been discussed earlier, the interplay among same need not be addressed further at this point, given the Tribunal's views as to the reasonableness of testimony concerning Mr. Tao's alleged admissions.

Other Evidence and Arguments Considered in Tao (2013)

[45] The Tribunal has determined that it is reasonable to conclude that it has not been established, on the balance of probabilities, that Mr. Tao explicitly admitted that the items in question were meat and, in particular, beef. If the Tribunal had determined that it was reasonable to conclude that Mr. Tao had made an explicit admission as to meat or beef, the weight to be accorded to any such explicit admission would be considered to be a separate issue. The Tribunal must now review the other evidence and arguments advanced by the

Agency, to determine whether the nature of the item seized and the other elements of the violation have been established, on the balance of probabilities.

[46] In *Tao (2013)*, the evidence and arguments advanced by the Agency and considered by the Tribunal to be relevant to its decision related to photographic evidence and proof purported to be advanced as to the nature of the items depicted in the photographs. The Agency first presented two photographs that were accepted by the Tribunal to be photographs of the items seized. As described by the Tribunal in *Tao (2013),* at paragraph 36, in part:

> *[36] …The Tribunal accepts that these photographs were taken by Inspector 17220. What are displayed are several bags, one of which is opaque, the others of which are of plastic with the bag contents visible, but where the contents are individually wrapped. One of the bags has apparently been opened. However, the photographs provide no indication as to the content of the various products. There is no translation provided of any of the packaging, and to the eye, the items look like candies.*

[47] The Agency attempted to establish the nature of the items seized through obtaining internet photographs of what the Tribunal accepted were identical items, where the product content was described in Chinese. The Agency then submitted Google translations and other unsourced translations, not specifically linked to the internet photographs submitted. The Tribunal concluded that the nature of the items seized had not been established, on the balance of probabilities, through such procedures. The reasoning and conclusion of the Tribunal is found at paragraphs 41 to 43 of *Tao (2013)*:

> *[41] The Tribunal accepts that the three photographs in Tab 10 are photographs of the same types of items that were in possession of Mr. Tao at the time of the inspection. The Tribunal accepts that the items in possession of Mr. Tao at the time of the inspection are as represented in the photographs in Tab 6. The difficulty is in tying in the translations of the alleged package contents to the contents of the packages seized from Mr. Tao. With respect to one package, a Google translation is attached, referencing the product as "beef/beef jerky". There is a further translation, specified as "Untitled", that references "shredded beef" in the translation, the translation source of which is unspecified. With respect to the second package type, there appears to be an abbreviated translation of much more detailed Chinese, describing the product as having "good marinade beef flavor", but nowhere specifying that it is in fact beef. The translation source is again unspecified. With respect to the third package type, there is again provided what appears to be an abbreviated translation of much more detailed Chinese, in which the product is described as "spiced shredded beef" and "dried beef jerky", containing "beef round selection". The translation source is again unspecified. The Agency chose not to discuss*

these documents in argument. The Agency did not provide evidence linking the specific packages to the translations. The Agency did not provide particulars of the nature and authority of the translation sources. Under the circumstances, the Tribunal is, by virtue of Doyon, *strictly cautioned against drawing inferences from the evidence, or making the Agency's case for it.*

[42] The Tribunal also notes that package content particulars may be inadequate to definitively establish the prohibited nature of an item contained therein. For example, in the current case, even if the translation of the contents of the second package type were to be accepted, the phrase "good marinade beef flavor", without more, does not establish that the product contains beef. The Tribunal reached a similar conclusion in Taylor v. Canada (CBSA), *2010 CART 32.*

[43] Based on the rigorous nature of evidentiary review required by Doyon, the Tribunal holds that the Agency has failed to establish, on the balance of probabilities, that the product in question contained meat, based on deficiencies in proof of identification of the product contents. Having so found, the Tribunal does not consider it necessary to address the other arguments advanced by the Agency or Mr. Tao.

[48] On a fresh consideration of the photographic evidence submitted by the Agency, the Tribunal considers it reasonable to adopt herein its reasoning and conclusion in *Tao (2013)*, in relation to such evidence.

[49] The Tribunal noted, in *Tao (2013)*, that the Agency was not prejudiced through a conclusion that the photographic evidence was inadequate to establish proof of the nature of the items, on the balance of probabilities. This is because the Agency has been accorded, by statute, significant seizure and testing powers. The Tribunal's views in this regard were expressed in *Tao (2013)* at paragraph 44:

[44] The Agency is reminded that it has the right to seize and test items that it believes are prohibited from importation without a certificate, whereafter a Notice of Violation can be issued, depending on the test results. As is provided in subsection 26(1)(b) of the Agriculture and Agri-Food Administrative Monetary Penalties Act, *for a serious violation, such as the violation so categorized in the current case, the Agency has two years to issue the Notice of Violation, from the time that the Agency, on behalf of the Minister of Agriculture and Agri-Food, became aware of the alleged violation. In the case of a minor violation, the Agency has six months to issue a Notice of Violation. Therefore, in all cases involving an alleged violation, there is significant time available to the Agency to marshal and submit its evidence. The Agency is*

encouraged to take advantage of this right, in circumstances where the nature of the item is not otherwise readily determinable.

[50] The Agency's seizure and disposal authority under the *Health of Animals Act* is particularized in sections 40, 42, 43 and 45 as follows:

> ***40.*** *Where an inspector or officer believes on reasonable grounds that a violation, or an offence under this Act, has been committed, the inspector or officer may seize and detain any animal or thing*
>
> *(a) by means of or in relation to which the inspector or officer believes on reasonable grounds the violation or offence was committed; or*
>
> *(b) that the inspector or officer believes on reasonable grounds will afford evidence in respect of the commission of a violation, or of an offence under this Act.*
>
> ...
>
> ***42.*** *An inspector or officer who seizes and detains an animal or thing under this Act shall, as soon as is practicable, advise its owner or the person having the possession, care or control of it at the time of its seizure of the reason for the seizure.*
>
> ***43.*** *(1) An inspector or officer who seizes and detains an animal or thing under this Act, or any person designated by the inspector or officer, may*
>
> *(a) store it at the place where it was seized or remove it to any other place for storage*.
>
> ...
>
> *(3) An inspector or officer who seizes and detains an animal or a perishable thing under this Act may dispose of it and any proceeds realized from its disposition shall be paid to the Receiver General.*
>
> ***45.*** *(1) An animal or thing seized and detained under this Act, or any proceeds realized from its disposition, shall not be detained after.*
>
> *(a) a determination by an inspector or officer that the animal or thing is in conformity with the provisions of this Act and the regulations, or*

> *(b) the expiration of one hundred and eighty days after the day of seizure, or such longer period as may be prescribed,*
>
> *unless before that time proceedings are instituted in relation to the animal or thing, in which case it, or the proceeds from its disposition, may be detained until the proceedings are finally concluded.*

[51] Therefore, the Agency could have detained the seized items for up to six months, for the purpose of determining what the composition of the items was. The Agency then had up to two years from the time of such determination to issue a Notice of Violation. Instead, the Agency destroyed the items following seizure, disclosing that they were disposed of in an international waste container, "as per regulations", further to details provided in a "Tag for Intercepted Item" (Report, Tab 5; Inspector's "will testify" report; Tab 6, "Tag for Intercepted Item").

[52] In the Tribunal's view, the foregoing circumstances illustrate what Madame Justice Abella was discussing in *Doré,* at paragraph 56:

> *[56] Then the decision-maker should ask how the Charter value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the* Oakes *context…*

The statutory objectives in the present case were identified by the Court in *Tao,* at paragraph 14:

> *[14] The* Health of Animals Act *S.C. 1990, c. 21 operates to protect Canada from the introduction of foreign animal diseases by regulating whether and how animal products and by-products may be brought into Canada.*

The proportionality dimension discussed by Madame Justice Abella relates to whether an application of *Charter* values by an administrative body would unreasonably interfere with statutory objectives. Given the statutory seizure powers accorded to the Agency under the *Health of Animals Act*, plus the limitation periods under that statute for the issuance of a Notice of Violation, an application of *Charter* values that may benefit an alleged violator would not appear to unreasonably interfere with the statutory objectives of the *Health of Animals Act*. These conclusions need not be discussed further herein, given the other bases for the Tribunal's decision.

Other Evidence and Arguments Not Considered in *Tao (2013)*

[53] The Tribunal, in *Tao 2013*, considered that it was in a position to arrive at a decision based on what it considered to be reasonable conclusions as to Mr. Tao's alleged admissions and the related photographic evidence submitted, without considering a number of other arguments made by the parties. At paragraph 43, the Tribunal in *Tao (2013)* concluded as follows:

> *[43] Based on the rigorous nature of evidentiary review required by* Doyon*, the Tribunal holds that the Agency has failed to establish, on the balance of probabilities, that the product in question contained meat, based on deficiencies in proof of identification of the product contents. Having so found, the Tribunal does not consider it necessary to address the other arguments advanced by the Agency or Mr. Tao.*

Given the fresh review of the evidence and arguments herein, as directed by the Federal Court of Appeal, the Tribunal considers that it must address the other evidence and arguments that were not considered in *Tao (2013)*, prior to arriving at a conclusion.

(a) Why Mr. Tao was referred to secondary inspection

[54] The Tribunal noted, in *Tao 2013,* that there was a dispute between the Agency and Mr. Tao, as to why he was referred to secondary inspection. As the Tribunal discussed at paragraph 30 of *Tao (2013):*

> *[30] The Agency is reminded by the Tribunal that a case summary is not evidence. In the "Statement of Facts" of the Report, it is asserted that Mr. Tao was referred to secondary inspection because he declared that he had purchased or received goods, while abroad, in the amount of $1,000, and that he was referred to secondary examination in order to pay the duty and taxes on the amount that was over his exemption of $750. While the Declaration Card does indicate the $1,000 amount, there is no direct evidence from any party involved in the inspection that this is why Mr. Tao was referred for secondary inspection. Mr. Tao vehemently contests this assertion, stating instead that, in his impression, he was referred to secondary inspection based on having purchased various Chinese medicines. There is no evidence from the Agency or Mr. Tao that he actually paid any duty or taxes on any excess declared amount*.

[55] The basis of the Agency assertion as to why Mr. Tao was referred to secondary inspection was found in the "Statement of Facts" section of its Report, as follows:

> *Mr. Tao also declared that he had purchased or received goods while abroad, including gifts, alcohol and tobacco, for $1,000. The Primary Inspector referred*

> *Mr. Tao to the secondary examination area to pay for the duty and taxes on the amount that was over his exemption of $750.*

[56] Mr. Tao vehemently denied the facts asserted in the Agency report, as follows (Submission of October 30, 2012, paragraph 2, in part. Extract reproduced *verbatim,* as bolded by Mr. Tao):

> *It is totally made-up story. I never declared, bought or was gifted any* ***alcohol and tobacco*** *from abroad and brought any of them into Canada at that border entrance and in that day. The alcohol and tobacco is printed out in the paper but not declared in my person! It did not cause a tax payment. Also, I was never referred to pay any duty and tax as the officer alleged due to over exemption of* ***$750.00****. I really don't know where the story happened. I request a strict examination of the proof for this allegation. In fact, I was led to the secondary examination area because I declared a bought some of medicine products. The officer told a false story again in his amended statement*.

[57] In *Tao (2013),* the Tribunal did not further consider this factual disagreement between Mr. Tao and the Agency. Implicitly, the Tribunal did not consider the reason Mr. Tao had been referred to secondary inspection to be relevant to the other issues in the case. The Tribunal is of a similar opinion in the current review. A referral to secondary inspection is a discretionary action by a primary inspector. The Tribunal's view is that it has no jurisdiction to challenge a discretionary action of an Agency representative (*Williams v. Canada (CBSA),* 2011 CART 19, at paragraph 30), provided that discretion was in fact exercised (*Bougachouch v. Canada (CBSA),* 2013 CART 20, at paragraphs 31 and 32; *Tam v. Canada (CBSA)*, 2013 CART 41, at paragraphs 7 to 15) and was exercised in good faith (*Eustergerling v. Canada (CBSA)*, 2012 CART 19, at paragraphs 41 to 45). In the absence of evidence of bad faith or a lack of discretion being exercised, the reason for referral to secondary inspection is not a matter for Tribunal review or concern. More precise reasoning is found in the Federal Court of Appeal decision in *Attaran v. Canada (Foreign Affairs)*, 2011 FCA 182, where Madame Justice Dawson, writing for the Court, states as follows, at paragraphs 17 and 18 (part):

> *[17] As stated by the Supreme Court in* Criminal Lawyers' Association [*Ontario (Public Safety and Security) v. The Criminal Lawyers' Association*, [2010] 1 S.C.R. 815] *at paragraph 46, a discretion conferred by statute must be exercised consistently with the purposes underlying its grant. This is consistent with* Telezone [*3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421], *where this Court stated, at paragraph 47, "when the Act confers on the head of a government institution a discretion to refuse to disclose an exempted record, the lawfulness of its exercise is reviewed on the grounds normally available in administrative law for the review of administrative discretion, including unreasonableness." One ground of administrative review is that a discretion*

> *conferred by statute must be exercised within the boundaries imposed by the statute. See:* Baker v. Canada (Minister of Citizenship and Immigration), *[1999] 2 S.C.R. 817 at paragraph 56. Thus, the parties do not dispute that this Court may intervene if the respondent did not consider the exercise of discretion.*
>
> *[18] If the Court is satisfied that the discretion was exercised, the second question is whether the discretion was exercised reasonably.*

In addition, the general principles have been articulated by the Supreme Court in *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2. As stated by Mr. Justice McIntyre at pp. 7-8:

> *It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.*

[58] In the circumstances of the present case, the Tribunal does not consider it necessary to further address the dispute between Mr. Tao and the Agency as to the reasons why he was referred to secondary inspection.

(b) Mr. Tao's arguments that the photographs presented by the Agency did not represent the items seized, and are not accurately reflected in the Notice of Violation

[59] Given the submissions on the record, the Tribunal, in *Tao (2013)*, implicitly considered but did not explicitly discuss Mr. Tao's argument that the photographs presented did not represent, at least in part, photographs of the items seized. The Court in *Tao* noted, at paragraph 22, that Mr. Tao, while not submitting a memorandum of fact and law, did submit a Notice of Appearance and made a similar argument before the Court:

> *[22] …He [Mr. Tao] argues that the CBSA lacks evidence to support the violation. In his oral submissions made before this Court Mr. Tao asked that the Tribunal's decision be upheld and questioned the authenticity of the photographic evidence put forward by CBSA*.

[60] The Tribunal's conclusion in *Tao (2013)*, as to the representative nature of the photographs was implicitly based on its weighing of the evidence, as summarized by the Tribunal, and its conclusions in relation thereto, as found in paragraphs 28(g), 29(l) and 41 (part) of *Tao (2013)*:

28(g) The inspector took photographs of the items, which were thereafter disposed of in an international waste container, "as per regulations" (Report, Tab 5; Inspector's "will testify" report; Tab 6, "Tag for Intercepted Item", described as "Beef (Candied Beef"), accompanied by photograph referenced to Tag). [From "Arguments and Evidence of The Agency" section of decision]

29(l) The photographic evidence relied on by the Agency are not photos of the products found in Mr. Tao's luggage (Letter of September 21, 2012, page 1; Letter of October 30, 2012, pages 1, 2). [From "Arguments and Evidence of The Applicant" section of decision]

[41] The Tribunal accepts that the items in possession of Mr. Tao at the time of the inspection are as represented in the photographs in Tab 6…

[61] In the fresh review of the evidence herein, the specifics of Mr. Tao's arguments, in addition to the general "questioning of authenticity of the photographic evidence" by Mr. Tao before the Court, are as follows (extracts reproduced *verbatim*; bolding by Mr. Tao):

Evidence false. The food packs in the photos are not some of mine

…It is about a pound weight in a plastic transparent bag! Why do the photos look unlike that? Surely, it was packed with a piece of small lump of food product looking like candy in a plain white convenient bag without any printing mark or picture. …I don't know why the officer provided with the different products that I have not brought in! In fact I can say, absolutely, some of them are not of the products I brought to the inspector. So, all of the evidence the officer provided with his response are false and not acceptable. [Submission of September 21, 2012, paragraph 1]

*About Tab 6 in the disclosure provided by the officer…**the information tag "B 03343"** clearly and explicitly indicates that the seized good is only one item in this action and nothing else. The officer wrote down the good as "Beef (Candied Beef)". Aslo (sic), he wrote correctly that it is "0.5 kg" in weight. However, in the attached photos, there are five items put together that are not declared and indicated in the information tag. They are totally not matched with the information tag from weight, form, or pattern. As I stated previously, the stuff seized by the office is packed with plain white convenient plastic bag without any advertising image and description. Yes, it is about 0.5 kg in weight as the information tag indicated. The point is that the officer provided with incorrect evidence and stuff to support their allegation against me. The evidence doesn't*

> *match with the fact that had been written down and recorded here on the officer's own hand.*
> [Submission of October 30, 2012, paragraph 1]

[62] Countering Mr. Tao's assertions, the Agency provided a signed statement by the inspector, in which he stated that he "took photos of the regulated items". The photographs included in the Agency Report are identified with the Notice of Violation number corresponding to Notice of Violation issued to Mr. Tao. This statement was also dated July 10, 2012, and is therefore contemporaneous to the date of the Notice of Violation. The contemporaneous nature of a signed statement enhances the credibility to be associated with it, and also may affect the weight accorded to later testimony. For example, in terms of the relative weight to be accorded to contemporaneous notes and a later affidavit, Madame Justice Mactavish in *Alam v. Canada (Citizenship and Immigration)* 2004 FC 182, states as follows, at paragraph 19:

> *[19] I have reviewed the visa officer's CAIPS* [Computer Assisted Immigration Processing System] *notes. These notes are supported by an affidavit from the officer, which provides considerable elaboration on the officer's reasoning in refusing the application. It is apparent from the affidavit that, at the time that the affidavit was signed, the officer continued to have a specific recollection of the interview with Mr. Alam. Nevertheless, the affidavit was sworn several months after the interview, presumably at a point where the officer was aware that her decision was being challenged. In the circumstances, I prefer to focus my attention on the reasons expressed in the CAIPS notes, and to give little weight to the after-the-fact explanation provided by the officer.*

[63] The Tribunal has previously held that there must be a nexus between the photographs submitted by the Agency and the circumstances of the alleged violation: *Mak v. Canada (CBSA)*, 2013 CART 11, at paragraph 57; *Yan v. Canada (CBSA),* 2013 CART 26 at paragraph 59. The Agency is required to establish, on the balance of probabilities, that the photographs submitted are representations of the items seized. In the Tribunal's view, the nexus has been established in the present case through the statement as to photo-taking contained in a signed statement by the Agency inspector, contemporaneous to the seizure of the goods, and where the photographs are then specifically identified as representing the goods related to the particular Notice of Violation.

[64] In one of the two photographs, there is a white bag similar to that described by Mr. Tao. A reasonable conclusion, in the Tribunal's view, is that the items in question have been removed from the larger white bag and are placed with same in the photographs. The Tribunal views Mr. Tao's sentiments as involving an argument that the products seized must be described in the Notice of Violation in itemized form, consistent with what is represented in the photographs. The Tribunal considers this argument of Mr. Tao to be without merit.

[65] The Tribunal notes that in Column 2 of Item 79 of Division 2, Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations,* SOR/2000-18, the violation under section 40 of the *Health of Animals Regulations,* listed in Column 1 is described as "Import an animal by-product without meeting the prescribed requirements". In section 3 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, the use of such short-form descriptions is authorized:

> ***3.*** *The short-form descriptions that are set out in column 2 of Schedule 1 are established to be used in notices of violations in respect of violations of the corresponding provisions that are set out in column 1 of Schedule 1.*

In *Finley Transport v. Canada (CFIA)*, 2013 CART 42, at paragraph 24, the Tribunal considered that the use of such short-form descriptions was mandatory, rather than permissive, while also expressing the view that "it is still open to an applicant to raise concerns that an applicant's initial defence has been prejudiced, through the omission of essential elements of the violation in the short-form description." Given that the Tribunal has earlier concluded that the Agency has not established, on the balance of probabilities, that the product contained meat, whether beef or pork, any issue of whether pork might be an essential element of the violation, rather than beef, does not arise.

[66] Based on a review of the evidence of the Agency inspector and that of Mr. Tao, the Tribunal is of the opinion that the photographs submitted by the Agency represent, on the balance of probabilities, the items that were in Mr. Tao's possession and which were seized.

(c) Tao made an oral declaration at primary inspection, which should have been accepted, but which was ignored

[67] Mr. Tao argues that he had tried to make an oral declaration, but was frustrated or ignored in the attempt. Mr. Tao believes that his attempted oral declaration should be treated as equivalent to a written declaration. Mr. Tao's arguments are expressed as follows (extracts reproduced *verbatim*)

> Request for Review, dated July 28, 2012:
>
> *The allegation is not true because I had declared before the officer I was not going to import any of "an animal-by-product"…*
> (Paragraph 1)
>
> *Due to be pushed to the desk (many people wanted to go through the inspection in rash) I have no time to check up my luggage and look up all of stuff one by*

one. I had to make an oral declaration to the officer but he was impatient to hear from passenger like me.
(Paragraph 2)

As an oral declaration, I told to the officer in several times that I preferred to take any goods out and destroy them before going through the border if the goods were not proper to bring into the border. To my oral declaration, the officer ignored.
(Paragraph 3)

I believe that an oral declaration is effective and legal as same as writing one under law. So, it shall be allowed to do something correct if a passenger like me requests a supplementary declaration prior to going to pass through the inspection…
(Paragraph 5)

Submission of September 21, 2012:

…Finally, I have taken all of action I may do for due diligence to avoid a violation by asking the officer the relevant question, pre-declaration of eliminating the products before my entry, and correctly filling out the Declaration Card. Therefore, the charge against me is unfair without reasonable ground.
(Paragraph 3)

[68] The Agency argues in response that the rush at the counter did not impair Mr. Tao's ability to make a declaration, as he was required to do:

Mr. Tao says that he had no time to verify what was in his carry-on bag before he presented himself to the primary inspection line and that he preferred to destroy goods that are not proper to bring into Canada. He explained that there was a rush at the inspection line.
(Agency Report, paragraph 9, "Rebuttal of Applicant's Arguments")

The Respondent submits that subsection 16(1) of the Health of Animals Act *requires that a person who imports into Canada any animal product or by-product present that good for inspection to an inspector or customs officer.*
(Agency Report, paragraph 12, "Rebuttal of Applicant's Arguments")

Mr. Tao submits that because of a rush at the counter he did not have time to verify the content of his bag and that later on he attempted to make a supplementary declaration before inspector 17220 gave him a fine.

> *The Respondent submits that Mr. Tao was provided an opportunity to declare on his E311 card in writing, than* (sic) *he had a second opportunity to declare the goods at the front counter, in a third instance Mr. Tao had nothing to declare to inspector 17220 who found the goods in the course of an examination of his bags.*
> (Agency Report, paragraph 15, "Rebuttal of Applicant's Arguments")

[69] The Tribunal accepts the rebuttal arguments of the Agency. In *Tao (2013)*, at paragraph 32, the Tribunal made reference to subsection 5(3) of the *Reporting of Imported Goods Regulations* (SOR/86-873), which provides as follows:

> ***5.*** *(3) Goods that are imported by a person arriving in Canada on board a commercial passenger conveyance other than a bus shall be reported in writing.*

There is therefore a mandatory requirement for a written declaration or report. Furthermore, as referenced by the Agency, subsection 16(1) of the *Health of Animals Act* requires that any animal product or animal by-product be physically presented for inspection. In addition, as referenced by the Federal Court of Appeal in *Tao*, at paragraphs 18 and 19, correcting the Tribunal's erroneous omission to refer to sections 12 and 13 of the *Customs Act,* there is both a mandatory requirement to report all imported goods and a statutory obligation to (a) answer truthfully any question asked by an officer with respect to the goods and (b) upon the request of an officer, to present any such goods, including removing any covering and opening any package.

[70] Read together, the sections of the *Health of Animals Act*, the *Customs Act* and the *Reporting of Goods Regulations* do not permit Mr. Tao to make a general oral declaration to the effect that "I don't want to import anything not permitted", without much more, assuming that an oral declaration would ever be considered equivalent to a written declaration, which need not be decided here. In *Savoie-Forgeot* v. *Canada (CBSA),* 2013 CART 7 ("*Savoie-Forgeot [2013]*") a flight attendant familiar with import regulations presented a receipt for a number of items imported, but where such items were not particularized on her declaration card. She had nonetheless answered "Yes" to the question on the Declaration Card as to whether she was bringing into Canada "Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects". The primary inspector changed her response to "No". Forgeot was found at secondary inspection to be in possession of canned meat products, for which she was issued a Notice of Violation, notwithstanding that such products had been itemized on the receipt that she presented with her Declaration Card at the primary inspection. As described by the Tribunal at subparagraph 16 (iii):

> *16 iii. After the primary inspection, Forgeot proceeded to the secondary inspection with her receipt in order to pay the taxes on her wine and have her*

bags checked. When the secondary officer asked her what she had to declare, Forgeot replied that she had wine and some other products, including canned food and bread. She testified that as a flight attendant, she knew what products she was not allowed to import, such as milk, butter, goat cheese, fresh meat and cold cuts. On cross-examination, Forgeot specified that during the primary inspection, she had declared cheese, a salad, some canned food and some bread and that she had listed what appeared on her receipt. During the secondary inspection, she declared bottles of the wine, the canned food and the bread and then opened her suitcase to allow the secondary officer to check its contents. She stated that there had been a miscommunication between the primary and secondary officers regarding what she had declared during the primary inspection and that she had not in fact told the primary officer that she was bringing back only cheese.

[71] The Tribunal concluded in *Savoie-Forgeot (2013)* that, under the circumstances, the traveller had in fact declared all of the items at primary inspection and that, based on what the Tribunal considered to be a reasonable interpretation of the relevant legislative provisions, there was an obligation on the part of the Agency to accord to her an opportunity to justify the importation. At paragraphs 25, 34 and 35, the Tribunal reasoned as follows:

[25] Therefore, it is incumbent on the Agency to prove, on the balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation. In the case of a violation of section 40 of the Health of Animals Regulations, *the Agency must prove the following:*

i. Forgeot is the person who committed the violation;

ii. Forgeot brought an animal by-product, in this case two cans containing meat, into Canada; and

iii. If Forgeot did import meat products into Canada, that Agency officials provided a reasonable opportunity for Forgeot to justify the importation in accordance with Part IV of the Health of Animals Regulations.

[34] In this case, the evidence provided by the Agency and by Forgeot has been insufficient to convince the Tribunal that Agency officials provided a reasonable opportunity for Forgeot to demonstrate that she was importing meat products. The evidence provided by Forgeot and by the Agency shows that Forgeot marked "Yes" beside the question of whether she was bringing the following products into Canada: "Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects".

> *[35] The Tribunal accepts Forgeot's testimony, which is not contradicted by the Agency, to the effect that she told the primary officer that she had something to declare, that she produced her receipt and that it was the officer who had modified her declaration (on card E311) from "Yes" to "No". The Tribunal is of the view that this change by Agency staff does not support the Agency's argument that Forgeot had not declared her food, including the animal products. In reality, this declaration was not made by Forgeot. Rather than asking her to explain in detail the nature of the products that she had declared appearing on her receipt, the primary officer marked on the declaration that she didn't have any, and the second officer, who searched Forgeot's luggage, issued a Notice of Violation against her for products that she had declared to begin with. Accordingly, the Tribunal makes a finding of fact that Forgeot's response on her declaration card indicated that she had the following types of products: "Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects". Accordingly, the Agency had an obligation to question Forgeot further and more carefully regarding what she was bringing into Canada.*

[72] In *Attorney General of Canada v. Savoie-Forgeot*, 2014 FCA 26, the Federal Court of Appeal, on judicial review of the Tribunal decision in *Savoie-Forgeot (2013)*, determined that, on a proper construction of the *Health of Animals Act* and the related regulations, irrespective of the review standard applied, there was no statutory obligation on the part of the Agency to accord to the traveller an opportunity to justify the importation. At paragraphs 13 and 26 (with emphasis added herein), the Court, per Madame Justice Trudel, concluded as follows:

> *[13] This case calls upon our Court to clarify the proper legal test where an individual is alleged to have violated section 40 of the [Health of Animals] Regulations. In my respectful view, the Tribunal's interpretation cannot stand on proper construction of the* Health of Animals Act *and its Regulations, no matter which standard of review is applied to the Tribunal's decision.*
>
> ...
>
> *[26] I find therefore that the Tribunal erred in its interpretation of section 40 of the Regulations. This provision does not impose an obligation on the CBSA to demonstrate that its officers gave Ms. Savoie Forgeot a "reasonable opportunity […] to justify the importation" (Reasons at paragraph 25).* ***The duty falls on the individual transporting animal by-products into Canada to declare fully what they*** **(sic)** ***are bringing into the country.*** *The question the Tribunal ought to have asked is simply whether, on the facts of this case, Ms.*

> *Savoie-Forgeot declared the items she was carrying and made them available for inspection. If so, she would not have violated section 40 of the Regulations, as she would have allowed for the items to be inspected and confiscated if they posed a risk of spreading diseases. If she had not declared thes items, however, she would have violated section 40, as she was found to have prohibited items in her possession which she did not voluntarily make available for inspection.*

[73] To the extent that there were statutory justifications available, it was for the traveller to raise such justifications, concurrently with presenting the goods. At paragraphs 17 (with emphasis added herein) and 18, the Court's reasoning is as follows, in relation to the procedures to be expected at primary and secondary inspection, relative to a determination as to whether the goods have been imported:

> *[17] The term "import" is undefined in the Health of Animals Act and its Regulations. However, a purposive and contextual reading of section 40 of the Regulations suggests that while the process of importing an animal by-product may begin when an item is brought onto Canadian soil, it is not complete at that point. Upon arrival in Canada, individuals have the obligation to declare the items they are carrying in accordance with section 12 of the Customs Act. They also have the obligation, either before or at the time of importation, to present any animal by-products to an inspector, officer or customs officer for inspection in accordance with section 16 of the Health of Animals Act. If an inspector or officer finds that the by-product does not pose a risk of spreading disease* ***or the individual presents a certificate attesting to its country of origin and safety****, then the importation will be allowed in accordance with subsection 41(1) and 41.1(1) of the Regulations. The process of importing the by-product will be complete at this point, as individuals will be free to leave the inspection area with these items. However, if the by-product poses a risk of spreading disease or is otherwise ineligible for importation, the inspector or officer will require that it be forfeited or be removed from Canada in accordance with sections 17 or 18 of the Health of Animals Act. The importation of these products would then be stopped at this point, as these items would not be permitted further entry into Canada.*
>
> *[18] It follows 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.*

[74] In *Savoie-Forgeot (2013),* the goods were itemized by the traveler by virtue of being included in a receipt, which she presented. In the present case, there is little beyond

Mr. Tao's general statements to the inspector that he didn't want to be importing anything that couldn't be imported, and would prefer to throw out any item where importation was prohibited. However, unlike in *Savoie-Forgeot (2013)*, where the traveller answered "Yes" to the relevant question on the Declaration Card, in this case Mr. Tao answered "No". If he were uncertain as to the correctness of his response, it was open to him to open his carry-on luggage at primary inspection and to then present and review the items with an inspector. Instead, he proceeded to secondary inspection, where he again declared that he didn't want to be importing items otherwise prohibited from importation, but where the goods that are now the subject of the Notice of Violation were discovered, following secondary inspection. At secondary inspection, any such declaration is regarded by the Federal Court of Appeal in *Savoie-Forgeot* as being out of time:

> *[25] It should be noted that disclosure of goods and making them available for inspection should occur at the first contact with customs officials and not later, when a search is imminent or under way. A traveller is not allowed to gamble that he or she will not be directed to the secondary search area and to declare the goods only if it appears they will be discovered as a result of a search…*

(d) Mr. Tao did not understand the import restrictions and was not accorded a reasonable opportunity to inform himself

[75] Mr. Tao argues that he should have been informed about any import restrictions. His arguments are as follows (extracts reproduced *verbatim*, with emphasis by Mr. Tao):

> *…I feel I have rights to know about the necessary requirements for importing something as required under the Act if I was considered as n importer. Evidently, it is no fault at my party if I asked for that but was not provided with any of necessary guides and explanation on "the prescribed requirement" for such an "importing".*
> (Request for Review, July 28, 2012, paragraph 4)
>
> ***About the relevant information for tourist into the Canadian Border.***
>
> *The officer alleged in his statement that the relevant information is provided in full for the tourists to enter the border. As a tourist, I have been given only the Declaration Card before the landing and first seen the brochure attached with the statement by the officer. I believe the full information would be provided but at the Airport or the Border Stations only. However, in the air plane, I never saw any detailed information about the custom's requirements. And, once landing on the ground, everyone rushed to pick up their luggage and no one can sit there to browser internet to find out and read the brochures thoroughly. In such circumstance, the tourists are in difficulty to enjoy the information even*

> *though the information as the officer alleged is fully provided. I believe that the tourists, in such circumstance, should be allowed to have inquiry on the regulations for their products. The officer of the governments shouldn't refuse to provide with the relevant information and impose a fine by taking advantage of the tourists' unknowing of the knowledge…*
> (Submission of September 21, 2012, paragraph 2)

[76] Mr. Tao's expectations as to information appear to be derived from the rebuttal submissions of the Agency, rather than from statements or information attributable to any inspector. At paragraph 16 of the "Rebuttal of Applicant's Arguments" in the Agency report, the Agency states as follows (reproduced *verbatim*):

> *16. Mr. Tao contends that he is entitled to be provided with information about the necessary requirements to import these goods into Canada and that he was not provided with that information.*
>
> *The Respondent submits that information is readily available through the Internet, on government web sites and the Canada Border Services Agency and the Canada Food Inspection Agency provides* (sic) *information leaflets and brochures at Canada's border crossings and points of entry/departure to inform travellers about goods subject to requirements about their importation into Canada.*

[77] The Agency refers to Internet and Brochure publications in support of its contention that information on importation was readily available to Mr. Tao. In the Tribunal's view, the nature and extent of any such information available to Mr. Tao is irrelevant as to whether a violation has occurred. The maxim that "ignorance of the law is no defence" (as exemplified by the Supreme Court in *R. v. Pontes*, [1995] 3 SCR 440) is particularly applicable to circumstances of an absolute liability violation. The Tribunal has applied this principle on a number of occasions. Recent examples are found in *Farzad v. Canada (CBSA),* 2013 CART 33 and *Abou-Latif v. Canada (CBSA),* 2013 CART 35. The information provided by the Agency to travelers is viewed by the Tribunal as being provided as a courtesy. In the Tribunal's view, any deficiencies in such information, or in traveler access to such information, are irrelevant to whether a violation has in fact occurred.

(e) Whether officer should have permitted the importation of the product, as not likely to involve introduction of disease into Canada

[78] Under section 41.1 of the *Health of Animals Regulations*, subject to certain exceptions which are not discussed here, an inspector has the discretion to determine whether certain goods may be imported into Canada. In summary, the exercise of such discretion results in a conclusion by an inspector that he or she has reasonable grounds to

believe that, based on how the product has been processed, how it is to be used or by virtue of its nature, the introduction of a disease into Canada is unlikely. Importation is permitted, based on the inspector's judgement, provided that the product will not be used as animal food. The specifics of section 41.1 are as follows:

> ***41.1*** *(1) Despite section 41, a person may import into Canada an animal by-product or a thing containing an animal by-product, other than one described in section 45, 46, 47, 47.1, 49, 50, 51, 51.2 or 53, if an inspector has reasonable grounds to believe that the importation of the by-product or thing, by its nature, end use or the manner in which it has been processed, would not, or would not be likely to, result in the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product was derived is susceptible and that can be transmitted by the by-product, and the by-product or thing is not intended for use as animal food or as an ingredient in animal food.*
>
> *(2) No person shall, in respect of any animal by-product or thing containing an animal by-product that has been imported in accordance with subsection (1), use or cause it to be used as animal food or as an ingredient in animal food.*

Mr. Tao argues that the inspector should have exercised his discretion to permit the importation of the product (extract reproduced *verbatim*):

> *I feel that the seized product in this matter is or should be one of animal by-product that has been treated, prepared, processed, stored and handled in a manner as the Regulation set out that would prevent the introduction into Canada of any reportable disease. Therefore, I am suspected whether or not the seized product is of violation against law.*
>
> *In particular, the inspection officer should has reasonable ground to believe on his Knowledgeable sense and experience that the importation of the by-product or thing, by its nature, end use or the manner in which it has been processed, would not, or would not be likely to result in the introduction into Canada of any reportable disease…Therefore, he shouldn't take any of excessive acts to allege of an violation I made against the law. However, he did. I suspected of the reasons he did such act against me.*
> (Submission of October 30, 2012, paragraph 5)

[79] The discretion exercised by an inspector, if in fact exercised and exercised in good faith, is not a matter over which the Tribunal has jurisdiction to intervene as previously discussed (paragraph 57, ante). Therefore, an inspector's decision to refuse to permit the

importation of a product and to issue a Notice of Violation in relation to such importation are not matters with respect to which the Tribunal will generally intervene. Having chosen to prohibit the importation of the product and to seize it, in the context of issuing a Notice of Violation, the inspector is nonetheless under an obligation to establish, on the balance of probabilities, that his or her decision to refuse importation was well-founded.

(f) Third party intervention – goods not packed by Mr. Tao

[80] Mr. Tao argues that the items were packed by family members, without his knowledge, and that accordingly he should not be responsible for the outcome (extracts reproduced *verbatim*):

> *Because I have never touched the packs which were put into my luggage by my family members without notification to me, I have no idea about the content what they are unless the bags were tore and opened.*
> (Request for Review, July 28, 2012, paragraph 1)

[81] The Agency, in response, cited a number of Tribunal decisions in support of the Agency's argument that items packed in one's luggage by third parties, without one's knowledge, did not amount to a defence. The Agency further argues that a claim of third party intervention amounts to an "ignorance of the law" defence, which is not recognized:

> *The Respondent submits that section 18(2) of the* Agriculture and Agri-Food Administrative Monetary Penalties Act *states that a justification or an excuse to the Agri-Food Act abides by the principles of Common Law to the effect that [the lack of knowledge about a legal requirement is never an excuse].*
>
> (Agency Report, paragraph 13, "Respondent's Arguments"; parenthetical summary by the Agency)

Subsection 18(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* provides as follows:

> ***18.*** *(2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.*

The Tribunal has earlier addressed, at paragraphs 75 to 77 herein, Mr. Tao's specific claim that he was unaware of the importation prohibitions. The Tribunal discussed the lack of defence as to "ignorance of the law" at that time and, at paragraph 77, emphasized that a defence of legal ignorance is particularly inapplicable to circumstances of an absolute

liability violation. The Tribunal did not consider that it was necessary to refer to subsection 18(2) to come to this conclusion. In the Tribunal's view, lack of knowledge as to what is in one's luggage is different from lack of knowledge of a legal prohibition in relation to what is in one's luggage

[82] The cases cited by the Agency were *Tourgeman* (RTA-60104, [2004]), *Ngo* (RTA-60132, [2004]), *Boukhliq* (RTA-60156, [2005]), *Yang* (RTA-60216, [2006]), *Younes* (RTA-60186, [2005]) and *Buxton* (2012 CART 6). *Ngo* and *Boukhliq* were discussed by the Tribunal in *Tao (2013)* at paragraphs 34 and 35, as also referenced in paragraph 8 herein, in relation to the unqualified and uncautioned declaration by an applicant as to the composition of a product. As noted by the Federal Court of Appeal in *Tao*, at paragraph 26, such evidence cannot be excluded, but must be weighed. Both *Ngo* and *Boukhliq* were also cases where the applicant argued that a family member had packed the prohibited item, without the applicant's knowledge. Based on its reading of subsection 18(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, the Tribunal held (*Ngo* page 3; *Boukhliq* at page 3) that the fact that the Applicant did not know that the item had been packed was not a defence. Section 18(1) provides as follows:

> ***18.*** *(1) A person named in a notice of violation does not have a defence by reason that the person*
>
> *(a) exercised due diligence to prevent the violation; or*
>
> (b) *reasonably and honestly believed in the existence of facts that, if true, would exonerate the person*.

The other Tribunal cases cited by the Agency generally came to the same conclusion. The lack of knowledge of the items in one's luggage, due to such items having been packed by a family member without one's knowledge, is not a defence: *Tourgeman* (at page 4), *Yang* (at pages 3-4) and *Buxton* (at paragraph 19). In *Younes*, the issue (raised at page 3) did not have to be addressed, since the decision was based on other reasons. In *Buxton*, at paragraph 19, in part, the Tribunal stated as follows:

> *[19] …Buxton has little room to mount a defence. In the present case section 18 of the Act will exclude practically any excuse that she might raise, such as her sister packed the meat in her luggage (with or without her knowledge)…*

[83] Subsequent to *Buxton*, the Tribunal revisited the issue of third party intervention in the cases of *Castillo v. Canada (Canada Border Services Agency),* 2012 CART 22 ("Castillo [2012]") and *El Kouchi v. Canada (Canada Border Services Agency)*, 2013 CART 12 ("El Kouchi [2013a]"). In both of these cases, the Tribunal did not consider whether subsection 18(1) permitted a defence of third party intervention; the Tribunal had

concluded on multiple occasions that a reasonable interpretation of the legislation did not permit such a defence. Rather, the Tribunal examined the elements of the violation itself.

[84] In *Castillo (2012),* the alleged violation was under section 40 of the *Health of Animals Regulations*, which provides as follows:

> ***40.*** *No person shall import into Canada an animal by-product, manure or a thing containing an animal by-product or manure except in accordance with this Part.*

[85] In *Castillo (2012)*, the Tribunal addressed what it considered to be a reasonable interpretation of the elements of the particular statutory violation, rather than reconsidering its previous position on defences in relation to subsection 18(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. The elements of the violation identified by the Tribunal were as follows, at paragraph 27:

> *[27] Therefore, it is incumbent on the Agency to prove, on the balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation. In the case of a violation of section 40 of the Health of Animals Regulations, the Agency must prove the following:*
>
> > *(1) Castillo is the person who committed the violation;*
> >
> > *(2) Castillo imported an animal by-product, in this case, fried chicken, into Canada; and*
> >
> > *(3) if Castillo did import meat products into Canada, Agency officials gave him a reasonable opportunity to justify the importation in accordance with Part IV of the* Health of Animals Regulations*.*

[86] Based on such interpretation of the elements of the particular violation, the Tribunal considered that it was necessary for Castillo to have been accorded a reasonable opportunity to justify the importation. If, on the facts, third party intervention was accepted by the Tribunal as a credible explanation as to how the products had ended up in Castillo's luggage and that the products had been placed there without his knowledge, Castillo would never have a reasonable opportunity to declare them, or to justify their importation. As the Tribunal discussed, at paragraphs 35 to 38:

> *[35] Normally, the Agency would prove to the Tribunal it had met the threshold for this third element of the violation where: (1) it proved either that the traveller: (i) had falsely marked "No" beside the meat question on his or her Declaration Card when the traveller knew he or she had meat products in his or her possession; or (ii) where the traveller understood this same question as*

posed orally by a primary inspector and answered "No" to this question; and (2) the traveller understood the Agency's request to produce a certificate, document or permit that would permit importation of a meat product or was given a reasonably opportunity to present such a document and did not.

[36] The Tribunal found Castillo and Inspector 20973 both to be very credible witnesses. Their respective demeanours were calm, forthright and composed. There was no hint of selective memories or accounts that raised any suspicion of lack of authenticity from either witness. Inspector 20973 found fried chicken in Castillo's baggage. Castillo openly admitted that the inspector found it in his bag upon inspection but also told the Tribunal that he was surprised when the inspector found it as he did not know the chicken was there. Castillo's testimony under oath was that his mother had packed it in his bags without his knowledge. This was very credible evidence from Castillo and is accepted by the Tribunal. Evidence presented by the Agency does not cast any doubt on this testimony, nor has the Agency in any way impugned the general credibility of Castillo.

[37] In the circumstances of this case, the evidence provided by the Agency and by Castillo has been insufficient to convince the Tribunal that Agency officials provided any reasonable opportunity for Castillo to demonstrate that he had imported meat products, not as a result of language or comprehension problems, but due to the lack of evidence on the balance of probability, that Castillo even knew he had meat in his possession before the inspector searched his luggage at secondary inspection. The Tribunal finds as fact that the Agency did not prove that Castillo had a reasonable opportunity to declare his meat products. Rather than ask Castillo to explain why he had not declared the products which to Castillo's surprise he saw for the first time when the secondary inspector found them, the inspector served him with a Notice of Violation.

[38] Castillo could not have indicated on his Declaration Card that he had meat when he did not know he had it. In the circumstances, it would have been natural for Castillo to mark "no" on his Declaration Card as to whether he had meat products in his luggage. Also at primary inspection, his response would have been the same. It was only at secondary inspection that he would have become aware that he indeed did have undeclared meat. This would have been the first reasonable opportunity for him to declare such a product to Canadian authorities. It was incumbent on the Agency to further question Castillo on what he had in his possession even if this was only able to be done during a secondary inspection when the surreptitious meat was found. Simply completing and then handing over a Notice of Violation to the bewildered traveler does not meet the very low threshold of evidence needed by the Agency

to prove the third element of a violation under section 40 of the Health of Animals Regulations. Had Castillo known about the chicken in his bags, only then could he have taken, or foregone, the reasonable opportunity to demonstrate that he was complying with the relevant provisions of Part IV of the Health of Animals Regulations, more specifically by declaring to the inspector that he had in his possession products for which he might have been uncertain as to whether he would be permitted to keep upon entering Canada.

[87] It is to be noted that in *Castillo (2012),* a lack of reasonable opportunity to justify the importation was commingled (at paragraph 38 of *Castillo [2012]*) with the concept of a lack of reasonable opportunity to declare, due to having no knowledge that the item had been placed in one's baggage by another.

[88] In *El Kouchi (2013a)*, the alleged violation was under subsection 34(1) of the *Health of Animals Regulations*, which provides as follows:

> **34.** (1) *No person shall import milk or milk products into Canada from a country other than the United States or from a part of such a country, unless*
>
> *(a) the country or part of the country is designated as free of foot and mouth disease pursuant to section 7; and*
>
> *(b) the person produces a certificate of origin signed by an official of the government of the country of origin that shows that the country of origin or part of such a country is the designated country or part thereof referred to in paragraph (a).*

In *El Kouchi (2013a),* the Tribunal determined that unbroken causal linkage as between the violation and the violator was an essential element of the violation. As particularized in paragraph 25 of *El Kouchi (2013a)*:

> *[25] The strictness of the AMP system reasonably must apply to both El Kouchi and the Agency. Therefore, it is incumbent on the Agency to prove, on a balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation. Although Notice of Violation 3961-12-M-0124, dated April 25, 2012, addresses El Kouchi's failure to produce the required certificate, a violation of paragraph 34(1)(b) of the Health of Animals Regulations requires the Agency to prove the following four elements:*
>
> *(1) El Kouchi is the person who committed the violation;*
>
> *(2) El Kouchi brought (imported) milk or milk products from a country other than the United States;*

> *(3) El Kouchi did not provide an Agency inspector with a certificate of origin signed by an official of the government of the country of origin that shows that the country of origin is designated as free of foot and mouth disease; and*
>
> *(4) There is a direct causal link between the act of importing the milk product and the violator, independent of the acts of a third party.*

[89] The Tribunal reasoned in *El Kouchi (2013a)* that the causal link had been broken, as a result of determining that El Kouchi's testimony that the item had been packed in his luggage by his mother, without his knowledge, was credible. *Castillo (2012)* was cited in support, though the violation element discussed in *Castillo (2012)* is somewhat different. At paragraphs 35 and 36 of *El Kouchi (2013a)*, the Tribunal stated as follows:

> *[35] Today, the severity and draconian nature of the AMP regime noted by the Court in* Doyon *requires that this Tribunal be very careful in determining the required elements for any alleged violation it is asked to review. Normally, the Agency would prove to the Tribunal that it had met the threshold for this fourth essential element of the violation by establishing that the traveller knew, or should have known, that the product in question was in his or her possession. There is normally a presumption that travellers are aware of the contents of their bags, especially since the inspector often asks travellers this question. However, there are certainly rare cases in which a person is not fully aware of the contents of his or her bags, for example, when a stranger, or even a friend or family member, inserts something without his or her knowledge. In* Castillo v. Canada (CBSA*), 2012 CART 22, the Tribunal found that even if a person imports goods unknowingly, it is reasonable to expect that these will be confiscated. However, in such cases, a Notice of Violation and a monetary penalty should not be automatic. It would be unfair to issue a Notice of Violation in such circumstances.*
>
> *[36] Moreover, in* Exceldor v. Canada (CFIA), *2013 CART 9 and* Exceldor v. Canada (CFIA)*, 2013 CART 10, the Tribunal found that if the causal link is broken by a third party, it is impossible to establish the causal link required to support a violation under the* Agriculture and Agri-Food Administrative Monetary Penalties Act *and its Regulations. Therefore, in this case, the evidence provided by the Agency is insufficient to convince the Tribunal that El Kouchi knew that there was butter in his suitcase. Therefore, El Kouchi could not have indicated on his Declaration Card that he had any of it because he did not know. In the circumstances, it was natural for El Kouchi to check the "no" box on his Declaration Card in response to the question regarding the presence of milk products in his luggage. Furthermore, during primary inspection, he*

gave the same answer. It was not until the secondary inspection that he became aware that he had butter in his possession and that he had failed to declare it. This was his first reasonable opportunity to declare the product to the Canadian authorities. It was incumbent on the Agency to ask El Kouchi further questions about what he had in his possession, even if this could only be done during the secondary inspection, when the undeclared butter was discovered. At this point, the Inspector issued him a Notice of Violation with a penalty. Simply completing and then handing over a Notice of Violation to the bewildered traveller does not meet the very low threshold of evidence needed by the Agency to prove the fourth element of the violation under paragraph 34(1)(b) of the Health of Animals Regulations*.*

[90] Both *Castillo (2012)* and *El Kouchi (2013a)* were subject to applications by the Agency for review by the Federal Court of Appeal. The applications of the Agency for review in both cases were allowed by the Court, which sent the matters back to the Tribunal for a fresh determination. On a fresh determination, the Tribunal upheld the violations in both cases, reversing its original decisions: *Castillo v. Canada (Canada Border Services Agency),* 2013 CART 36; *El Kouchi v. Canada (Canada Border Services Agency),* 2013 CART 40 ("*El Kouchi [2013b]").* The Court decisions in *Castillo* and *El Kouchi* have previously been discussed at paragraphs 13 to 25 herein, in relation to standards of review applied.

[91] The Court in *Castillo* reasoned as follows, at paragraphs 24 to 26:

*[24] Mr. Castillo may have been unaware that the chicken was in his luggage, but this is of no assistance to him given a plain reading of the provisions and the clear intention of Parliament to provide for an absolute liability regime for these types of violations. As this Court has noted before, the AMP system can be harsh (*Westphal-Larsen [2003 FCA 383] *at paragraph 12) but it is clear that Parliament intended that it be so, given the important stated objective of protecting Canada from the introduction of foreign animal diseases.*

[25] It is conceivable that a person served with a notice of a violation of section 40 may wish to present evidence to the Tribunal that the Agency official who issued the notice of violation did so without providing an opportunity to produce documentation that would justify the importation pursuant to one or more of the provisions mentioned above in paragraph 14. Such evidence might well explain why the documentation was not presented to the Agency official when the importation was reported or discovered, as the case may be. However, such evidence cannot, as a matter of law, relieve the person of liability for the violation if, as in this case, no such documentation ever existed.

> *[26] Upon a plain reading of the legislative provisions, the Tribunal's decision that Mr. Castillo was to have been provided with a reasonable opportunity to justify his importation of animal by-products from El Salvador beyond the provisions of Part IV after they were discovered amounts to an error of law.*

Thus, the Court concluded that what the Tribunal considered to be a reasonable interpretation of the component elements of particular statutory violation was not so, on the Court's plain reading of the legislative provisions. The Tribunal's discussion of unbroken causation was not explicitly addressed.

[92] The Court in *El Kouchi* disagreed that unbroken causation was a fourth element to the violation. The Court concluded that the violation contained only the first three elements referenced in paragraph 88, *ante*. The court reasoned, comparing the wording of the legislative provision under consideration in *Doyon*, that causation must be specifically referred to in the statutory violation description for it to be considered to be an element of the violation. As the Court stated, at paragraphs 14-20 (unofficial translation):

> *[14] As has been indicated, The Tribunal, in* Castillo 2012*, had already annulled a Notice of Violation, in a situation where the non-authorized product (in that case, an animal by-product prohibited by virtue of section 40 of the Regulations) had been placed in the luggage of a violator by a third party (his mother) without his knowledge. Two comments are necessary in this regard.*
>
> *[15] Firstly, in that decision, rendered a few months before the decision under consideration, the Tribunal had also specified the elements that the Agency was obliged to prove. It is disconcerting to observe that, despite the similarities in the legislative provisions under consideration in relation to prohibitions on the importation of products, the burden of proof of the Agency was limited to three elements (corresponding more or less to the first three elements particularized here). Accordingly, there is no issue of proving a direct causal link between the importation and the violator.*
>
> *[16] Secondly in* Castillo (Federal Court of Appeal), *our Court has clearly decided, at paragraph 24:*
>
> > [24] Mr. Castillo may have been unaware that the chicken was in his luggage, but this is of no assistance to him given a plain reading of the provisions and the clear intention of Parliament to provide for an absolute liability regime for these types of violations. As this Court has noted before, the AMP system can be harsh (Westphal-Larsen [2003 FCA 383] at paragraph 12) but it is clear that Parliament intended that it be so, given the important stated objective of protecting Canada from the introduction of foreign animal diseases.

> *[17] With respect to the elements identified to prove a violation of paragraph 138(2)(a) of the Regulations, as found in* Doyon *(paragraph 41), it is difficult to conceive how these are applicable to a violation of paragraph 34(1)(b) of the Regulations, since the wording of these two legislative provisions is completely different.*
>
> *[18] The text of paragraph 138(2)(a) of the Regulations, concerning the transport of animals, makes reference to diverse factors causing undue suffering during the course of the anticipated journey. It is this wording that causes there to be reference to a causal link between the transport, the undue suffering and the factors specified in the legislative provision. Paragraph 34(1)(b) states simply and clearly that it is prohibited to import a milk product from a country other than the United States, unless the country is designated as being exempt from BSE or where a certificate of origin is produced.*
>
> *[19] The Tribunal did not explain the basis upon which it was able to apply the passage in* Doyon *to the current case. In addition, the distinction that the Tribunal made to avoid the application of paragraph 18(1) of the* Agriculture and Agri-Food Administrative Monetary Penalties Act *simply does not hold. It is evident that the approach adopted by the Tribunal has the effect of circumventing a clearly expressed legislative intent. In my opinion, there is no valid reason to not apply the reasoning of our Court in* Castillo (Federal Court of Appeal) *here. The Tribunal has erred in law in requiring that the Agency establish a causal link, independent of the actions of a third party and, in particular, that the violator must have knowledge of the presence of the prohibited product in his or her luggage.*
>
> *[20] Our Court has stated in the past that the present regime is very punitive, referring to it as draconian:* Doyon, *at paragraph 21. Whether it is or is not in agreement with the regime or the manner in which it is applied, the Tribunal must apply the law.*

[93] In *El Kouchi (2013a)*, the focus of the Tribunal was on the elements of the violation in section 34 of the Regulations. As has been discussed, the Tribunal has not, in the past, recognized third party intervention as a defence under section 18 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, when addressing the limited nature of the defences available under that section. The Court in *El Kouchi*, from the judgement extracts quoted, considered the Tribunal's interpretation of a statutory violation and consequent identification of a particular violation element to be an error in law, which had the effect of circumventing the application of section 18.

[94] The Tribunal views the decisions of the Court in *Castillo* and *El Kouchi*, as holding that the violations in sections 34 and 40 of the *Health of Animals Regulations,* are substantially similar, and that therefore there should be no difference in the elements of the violation. Certain elements identified by the Tribunal are viewed by the Court as amounting to necessarily correctable errors on judicial review. This is particularly the case in relation to causation. The Court has held in *El Kouchi* that third party causation is not relevant to the violation elements. Unbroken causation is also not a violation element. Furthermore, as held by the Court in *Castillo*, a "reasonable opportunity to justify the importation" is also not a violation element. As has been noted, the original Tribunal decision in *Castillo (2012)* equated such "reasonable opportunity to justify the importation" with a "reasonable opportunity to declare". The holding of the Court in *Castillo* was reaffirmed by the Court in *Savoie-Forgeot*, at paragraph 26. What remains unclear is how, if at all, at break in causation or a "reasonable opportunity to declare" might relate to the views of the Court in *Savoie-Forgeot* as to the legal nature of importation. This need not be addressed here.

[95] Therefore, in the present case, Mr. Tao's argument that the items were placed by family members in his luggage without his knowledge is, according to the present state of the law (*El Kouchi*), not relevant to proving the elements of the violation under section 40 of the *Health of Animals Regulations*. Furthermore, the Tribunal has held (as illustrated by *Buxton*) that such third party intervention is not recognized as a defence under subsection 18(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

Summary

[96] In summary, Mr. Tao raised six arguments in support of his view that the Notice of Violation should not be upheld:

a. Mr. Tao did not make an oral statement definitively acknowledging or identifying the composition of the product;

b. The photographic evidence did not represent the items seized, plus the Notice of Violation should itemize and correspond to that which is submitted as photographic evidence;

c. An oral declaration was effectively made at primary inspection, and should in any event be treated as equivalent to a written declaration;

d. Mr. Tao did not understand the import restrictions and was not accorded a reasonable opportunity to inform himself;

e. The Agency inspector should have admitted the product, in the inspector's discretion;

f. The items were not packed by Mr. Tao, but by family members, without his knowledge

[97] On a fresh consideration of the evidence and arguments, the Tribunal has carefully reviewed Mr. Tao's submissions and the comprehensive responses of the Agency, as well as the related evidence. The extent of Mr. Tao's submissions and the comprehensive nature of the Agency responses are associated with the extent and comprehensiveness of the Tribunal's decision. The Tribunal has concluded that none of Mr. Tao's arguments are supportable, save and except for that associated with his alleged declaration as to product composition at secondary inspection where, at best, the Tribunal concludes that equal weight should be given to the evidence of the Agency and the evidence of Mr. Tao in that regard. In the Tribunal's view, it is therefore incumbent upon the Agency to otherwise prove, on the balance of probabilities, that the product in question contained meat. Whether, relative to the wording of the Notice of Violation, it was necessary for the Agency to prove that the product was specifically beef, need not be addressed. The ambiguities associated with the photographic evidence submitted do not, in the Tribunal's view, provide a reasonable basis for concluding that the Agency has established, on the balance of probabilities, that the product contained meat. In the Tribunal's view, this is a case where all parties would have benefitted from the Agency exercising its right to test the product, and providing such test results as a component of its case.

Conclusion

[98] Following a further review of the evidence and submissions of the parties, in accordance with a fresh determination mandated by the Federal Court of Appeal in *Canada Border Services Agency v. Tao*, 2014 FCA 52 and after due consideration of the reasons provided therein by the Federal Court of Appeal, the Canada Agricultural Review Tribunal (Tribunal) determines that it is reasonable to conclude, following a fresh review of the evidence and submissions of the parties, that the Agency has not proved, on a balance of probabilities, an essential element of the violation, specifically that the product in question contained meat. As a result, the Tribunal finds that Mr. Tao did not commit the violation particularized in Notice of Violation YYZ4971-0490, dated July 10, 2012, and is therefore not liable for payment of any penalty amount.

Dated at Ottawa, Ontario, this 21st day of March, 2014.

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Dr. Bruce La Rochelle, Member