Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Tao v. Canada (Canada Border Services Agency), 2013 CART 16

Date: 20130521
Docket: CART/CRAC-1654

Between:

Xiaojun Tao, Applicant

- and -

Canada Border Services Agency, Respondent

Before: **Member Bruce La Rochelle**

With: **the applicant making submissions as a self-represented applicant; and**
the respondent making submissions as represented by Denise Bergeron

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 a Notice of Violation of section 40 of the *Health of Animals Regulations,* alleged by the respondent.

DECISION

[1] Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not commit the violation and is not liable for payment of any penalty amount.

By written submissions only.

Canada

REASONS

Alleged Incident and Legislative Authority

[2] The respondent, the Canada Border Services Agency (Agency), alleges that, on July 10, 2012, at Lester B. Pearson International Airport, Toronto, Ontario, the applicant, Xiaojun Tao (Mr. Tao) imported meat, contrary to section 40 of the *Health of Animals Regulations*.

[3] A person is only permitted to import meat into Canada if he or she meets the requirements of "Part IV—Importation of Animal By-Products, Animal Pathogens and Other Things" of the *Health of Animals Regulations*, which includes section 40.

[4] The applicable provisions of Part IV of the *Health of Animals Regulations* are reproduced below:

> ***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.*
>
> ***41.*** *(1) A person may import into Canada an animal by-product, manure or a thing containing an animal by-product or manure…if*
>
> > *(a) the country of origin is the United States and the by-product, manure or thing is not derived from an animal of the subfamily* Bovinae *or* Caprinae*;*
> >
> > *(b) the country of origin, or the part of that country, is designated under section 7 as being free of, or as posing a negligible risk for, any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate of origin signed by an official of the government of that country attesting to that origin; or*
> >
> > *(c) the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in a manner that would prevent 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, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate signed by an official of the government of the country of origin that*
> >
> > > *(i) attests that the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in that manner, and*

(ii) shows the details of how it was collected, treated, prepared, processed, stored and handled...

. . .

41.1 *(1) Despite section 41, a person may import into Canada an animal by-product or a thing containing an animal by-product…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.

. . .

43. *A person may import into Canada cooked, boneless beef from a country or a part of a country not referenced to in section 41 if*

(a) it was processed in a place and in a manner approved by the Minister;

(b) it is accompanied by a meat inspection certificate of an official veterinarian of the exporting country in a form approved by the Minister; and

(c) on examination, an inspector is satisfied that it is thoroughly cooked…

. . .

52. *(1) Despite anything in this Part, a person may import into Canada an animal by-product if the person produces a document that shows the details of the treatment of the by-product and an inspector has reasonable grounds to believe—based on the source of the document, the information contained in the document and any other relevant information available to the inspector and, if necessary, on an inspection of the by-product—that the importation of the by-product would not, or would not be likely to, result in the introduction into Canada, or the spread within Canada, of a vector, disease or toxic substance.*

(2) Notwithstanding anything in this Part, a person may import an animal by-product under and in accordance with a permit issued by the Minister under section 160.

[5] The basic regulatory regime, as particularized in the legislative extracts quoted, 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. In such cases, the products are permitted to be imported on the basis that the particulars disclosed result in a conclusion that the product would not or would not be likely to introduce particular diseases or contaminants into Canada, and therefore potentially into the Canadian food supply. In addition, an inspector is accorded a particularized discretion to permit the importation of animal by-products, based on reasonable grounds to believe that the importation of the product, "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" (s. 41.1(1), *Health of Animals Regulations*).

[6] The roles of the various parties involved in the regulation of food importation are discussed in greater detail in the recent Tribunal case of *Gebru* v. *Canada (CBSA),* 2013 CART 2, particularly at paragraphs 10 to 16 of that decision.

[7] The Tribunal must determine whether the Agency has established all the elements required to support the Notice of Violation and, if Mr. Tao did import meat into Canada, whether he fails to meet the requirements that would have permitted such importation.

Procedural History

[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 (short-formed in the Notice of Violation as "LBPIA T1", with the latter term representing Terminal 1), 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*" (*sic* throughout). Such action is a violation under section 7(1)(*a*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*. The legislative and regulatory *schema* have been recently particularized in *Mak* v. *Canada (CBSA)*, 2013 CART 11 and *Gebru*, previously cited. The specific item of concern was what was asserted by the Agency to be "meat candy", imported from China.

[9] The Agency served the Notice of Violation with Penalty personally on Mr. Tao on July 10, 2012. In the Notice of Violation, Mr. Tao is advised that the alleged violation is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which the penalty assigned, is the amount of $800.00.

[10] By letter dated July 28, 2012, and received by the Tribunal by fax on August 7, 2012, Mr. Tao requested a review by the Tribunal (Request for Review), wherein he listed several grounds in support of his request.

[11] Mr. Tao's request for review was forwarded by the Tribunal to the Agency on August 8, 2012, by email scan and regular mail. Pursuant to Rule 36 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* (SOR 99/451) (Tribunal Rules), the Agency, acting on behalf of the Minister of Agriculture and Agri-Food, was required to submit the Minister's Report (Report) by August 23, 2012.

[12] By letter to the Tribunal dated and received on August 22, 2012, the Agency requested an extension of time of 10 business days in which to submit its Report. Notwithstanding such request, on August 23, 2012, the Agency submitted its Report, under cover of a letter signed by Ms. Denise Bergeron (Ms. Bergeron), Senior Programs Advisor of the Agency. The Agency advised that the Report had been forwarded to Mr. Tao.

[13] By letter dated August 28, 2012, forwarded to the parties by email and regular mail, Mr. Tao and the Agency were invited to make any additional representations by September 27, 2012.

[14] By letter dated September 21, 2012, and sent by email to the Tribunal on September 24, 2012, plus by fax and email noted as received September 26, 2012, Mr. Tao made additional representations. On September 28, 2012, Mr. Tao's letter was forwarded by the Tribunal, via email, to the Agency.

[15] Under cover of a letter dated September 26, 2012, signed by Ms. Bergeron, the Agency submitted an amended Report to the Tribunal, and advised the Tribunal that the amended Report had been sent to Mr. Tao.

[16] By letter dated September 28, 2012, and sent to the Tribunal via email and fax on Saturday, September 29, 2012, Mr. Tao included additional submissions, which he requested be accepted by the Tribunal.

[17] By email from the Tribunal to Mr. Tao, dated October 3, 2012, Mr. Tao was advised that it was necessary for him to make a formal request for an extension of time to file his most recent additional submissions.

[18] By letter from Mr. Tao to the Tribunal dated October 12, 2012, and received by the Tribunal on October 15, 2012, by email and fax, Mr. Tao requested an extension of time to October 28, 2012, to file additional material.

[19] On October 25, 2012, the Agency, via letter under the signature of Ms. Bergeron and received by fax October 25. 2012, advised the Tribunal that it did not oppose Mr. Tao's request for an extension of time.

[20] By Tribunal Order dated October 25, 2012, Tribunal Chairperson Dr. Donald Buckingham granted an extension of time to October 31, 2012 for Mr. Tao and the Agency to file any additional submissions. The Order was communicated to Mr. Tao and the Agency by Tribunal letter dated October 26, 2012, sent via email and regular mail.

[21] By letter to the Tribunal and the Agency dated October 30, 2012, sent via fax and email to the Agency and to the Tribunal, and received by the Tribunal on October 30, 2012, Mr. Tao made additional submissions. No additional submissions were made by the Agency.

Procedural Discussion

[22] Following his submission by fax of a Request for Review, Mr. Tao failed to send a copy to the Tribunal by registered mail, as required by subsection 14(3) of the *Agriculture and Agri-Food Administrative Monetary Penalty Regulations* (Regulations). Nor were any of the documents forwarded to the Tribunal sent in duplicate, as required by Rule 8 of the *Rules of The Tribunal (Agriculture and Agri-Food)* (Tribunal Rules). In its discretion, and further to Rule 4 of the Tribunal Rules, whereby a defect in form or a technical irregularity may be overlooked by the Tribunal, the Tribunal chooses to overlook these defects in Mr. Tao's request for review.

[23] Rule 34 of the Tribunal Rules provides as follows:

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

[24] Mr. Tao did not specify whether he wanted an oral hearing. As illustrated by the procedural discussion in paragraph 28 of the *Gebru* decision, previously cited, in the absence of a specific request for an oral hearing, the Request for Review is treated by the Tribunal as involving a request for a review by written submissions only.

[25] Mr. Tao did not specify which Official Language of Canada was preferred by him for the review. The Tribunal has previously held that, in the absence of Official Language choice by the applicant, the Tribunal treats the Official Language of the proceeding as being the Official Language in which the applicant submits his or her Request for Review (*Gebru*, previously cited, at paragraph 30; *Roelands* v. *Canada (CFIA),* 2013 CART 8, at paragraph 34; *Mak* v. *Canada (CBSA),* 2013 CART 11, at paragraph 24). The Official Language choice remains that of the applicant, rather than that of the Agency or the Tribunal.

[26] Mr. Tao's Request for Review presents a fulsome discussion of facts and arguments. The Tribunal notes that, in a number of previous cases, an applicant has not provided reasons, at the time of submission of the Request for Review. In its discretion, in many such cases, the Tribunal has proceeded with the Request for Review, requiring the Agency to submit a report, to which an applicant is invited to respond, despite the absence of any reasons being initially provided by the applicant. The provisions of Tribunal Rule 34, referenced *ante*, must be considered by the Tribunal where it assesses the initial admissibility of a Request for Review. Where an applicant, in submitting a Request for Review, fails to provide reasons, as required by Rule 34, the applicant risks being subject to a finding by the Tribunal that the Request for Review is inadmissible. Reference is made to paragraph 3.3 of the Tribunal's *Practice Note #11 - Determining Admissibility of Requests for*

Review and Practices Regarding the Exchange of Documents Amongst Applicants, Respondents and the Tribunal, issued on May 1, 2013, in which the requirement for the inclusion of reasons in the Request for Review is emphasized.

Evidence Before The Tribunal

[27] The evidence before the Tribunal therefore 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 Mr. Tao (Request for Review, dated July 28, 2012, additional submissions via letter dated September 21, 2012, plus further submissions via letter dated October 30, 2012).

Arguments and Evidence of The Agency

[28] The arguments of the Agency, and the supporting evidence associated therewith, are as follows:

(a) Mr. Tao declared that he had purchased or received goods abroad in the amount of $1,000, and further declared that he was not bringing into Canada meat or meat products (Report, Respondent's Arguments, paragraph 4; Report, Tab 1; copy of Declaration Card).

(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"]).

(c) Mr. Tao had three opportunities to declare the items, despite his contention that he was rushed and therefore did not have time to verify the contents of his bag, "and that later on he attempted to make a supplementary declaration before Inspector 17220 gave him a fine." He could have made the declaration on his Declaration Card, or at the counter, or before the inspector opened his bag. The Notice of Violation was therefore appropriately issued (Report, Rebuttal of Applicant's Arguments, paragraphs 15, 18).

(d) Mr. Tao was asked by the inspector whether he had any permits for the product. Mr. Tao advised the inspector that he did not have permits (Report, Rebuttal of Applicant's Arguments, paragraph 12; Report, Tab 5; Inspector's "will testify" report).

(e) In the absence of permits or certificates, the inspector could not determine whether the goods had been processed in such a way as to prevent the introduction of disease or pests into Canada (Report, Respondents Arguments, paragraph 5).

(f) After being advised by the inspector that he was subject to an $800 fine, Mr. Tao's advised the inspector, on more than one occasion, that the product should be thrown out, and that Mr. Tao should not be subject to a fine (Report, Tab 5; Inspector's "will testify' report).

(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).

(h) Mr. Tao's assertions that he had no time to verify what was in his bag, prior to presenting it for inspection and the fact that he was not aware of the presence of the product in his carry-on bag, and would not have known what the product was unless it was opened, are all not valid defences, based on section 18 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Report, Rebuttal of Applicant's Arguments, paragraph 10).

(i) Mr. Tao's argument that he was unaware that family members had placed the items in his luggage is not a valid defence, based on previous decisions of the Tribunal (Report, Rebuttal of Applicant's Arguments, paragraph 13; Tribunal decisions referenced in Tab 12).

(j) Mr. Tao's argument that he was not provided with import restriction information until the plane landed is countered by the fact that such information is readily available on the internet and on related government websites (Report, Rebuttal of Applicant's Arguments, paragraph 16).

(k) The fact that Mr. Tao does not understand the Notice of Violation—in particular, the use of the term, "to wit, meat" does not provide grounds for challenging the Notice of Violation, which has been issued in accordance with the related *Agriculture and Agri-Food Administrative Monetary Penalty Regulations*. The Tribunal lacks the jurisdiction to reduce or cancel the penalty for reasons of hardship or compassion (Report, Rebuttal of Applicant's Arguments, paragraph 17).

Arguments and Evidence of The Applicant

[29] The arguments of Mr. Tao, and the supporting evidence associated therewith, are as follows:

(a) Mr. Tao had orally declared, before the inspection officer, that he did not intend to import "an animal by-product". He was compelled to make the oral declaration, without examining his luggage, due to the crowd wishing to pass through in a hurry (Request for Review, page 1). It is not specified whether Mr. Tao made this declaration at the primary or secondary inspection.

(b) Mr. Tao further declared before the inspector that he "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" (Request for Review, page 1). He specifically told the inspector that "I would like to destroy any of improper products before I entered if I was informed of what it was in the regulated catalogue" (Letter of September 21, 2012, page 1). It is not specified whether Mr. Tao made this declaration at the primary or secondary inspection.

(c) Mr. Tao contends that he was taken advantage of by the inspector, despite Mr. Tao's best efforts: "…when I did my due diligence to avoid a violation in the inspection station, and he [the inspector] intentionally took advantage of a personal unknowing of the special regulations in this matter…" (Letter of September 21, 2012, page 2).

(d) Mr. Tao does not agree with the inspector's description of the product as "Beef (Candied Beef)", given that the product was neither examined nor eaten. Furthermore, the product could have been made of pork, not beef (Letter of September 21, 2012, pages 1, 2).

(e) In Mr. Tao's view, an oral declaration should be considered to be equivalent to a written one (Request for Review, page 2).

(f) The items in question were placed in his luggage by family members, without notification to him, and were never touched by him, prior to being discovered by Agency inspectors (Request for Review, page 1).

(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).

(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).

(i) Mr. Tao asked for, but "was not provided with any of necessary guides and explanation on "the prescribed requirements" for such an "importing" (Request for Review, page 2). The first time he saw a brochure detailing import restrictions was at the time of review of the officer's statement. While the Declaration Card had been provided to him on the plane, prior to landing, the brochure had not been (Letter of September 21, 2012, page 2).

(j) The Declaration Card is too vague—"meat/meat by-product" is different from "animal/animal by-product" (Letter of September 21, 2012, pages 2, 3).

(k) In the Notice of Violation, Mr. Tao was not provided with particulars of the "prescribed requirements" for importing meat that he had contravened; "the allegation is too vague to be a reason to charge me of a violation" (Request for Review, page 2). The Notice of Violation also is not clear as to whether Mr. Tao's violation is "To wit, meat" or in not filling out the Declaration Card correctly (Letter of September 21, 2012, page 3).

(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).

(m) Mr. Tao vehemently denies the Agency assertions in relation to certain facts, relating to excess amounts of "gifts, alcohol and tobacco". In particular, Mr. Tao states: "This is totally make-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. I really don't know where the story happened. I request a strict examination on the proof for this allegation. In fact, I was led to the secondary examination area because I declared I bought some medicine products." (Letter of October 30, 2012, page 2).

(n) Mr. Tao contends that, even if the product were beef, it is subject to the exemption contained in section 41.1 of the *Health of Animals Regulations*, that it is "one of animal by-products that has been treated, prepared, processed, stored and handled in a matter as the Regulation set out that would prevent the introduction into Canada of any reportable disease" and that the inspection officer should have viewed it accordingly (Letter of October 30, 2012, pages 3, 4).

[*Sic* throughout]

Asserted Facts, for Which There is No Evidence

[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.

Assessment of the Arguments

Whether The Product Contained Meat

(a) Admissions by Applicant

[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.

[33] In its Report, at Tab 12, the Agency submitted copies of Tribunal decisions in support of various arguments advanced. Some aspects of those decisions will now be discussed.

[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. As discussed by Mr. Justice Bastarache of the Supreme Court of Canada in *Paul* v. *British Columbia (Forest Appeals Commission),* [2003] 2 SCR 585, at paragraph 31:

> *Unlike the judgments of a court, the Commission's decisions do not constitute legally binding precedents, nor will their collective weight over time amount to an authoritative body of common law.*

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.

[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 Agency presented in evidence the "Tag for Intercepted Item" in relation to the product, as well as two photographs associated therewith, of the items seized. 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.

(b) Evidence of Agency Not Referenced in Argument

[37] There are several tabs in the Report of the Agency that are not referenced in its arguments. The issue becomes whether the Tribunal can or should make reference to such material when the Agency has not. The tabs that are not referenced by the Agency in its arguments are as follows:

Tab 7	Copy of online guidance, "*What Can I Bring Into Canada in Terms of food, Plant, Animal and Related Products?*"
Tab 8	Copy of *"I Declare: A guide for residents of Canada returning to Canada",* published by the Canada Border Services Agency.
Tab 9	Copies of various documentation: the Notice of Violation, Mr. Tao's initial Request for Review, plus correspondence from the Tribunal to the Agency and Mr. Tao.
Tab 10	Internet photograph of a bag with identical lettering to that of the opaque bag that is found in the group of bags photographed and included in Tab 6. Internet photographs of bags with identical lettering to the other bags photographed and included in Tab 6.
Tab 11	Copy of e-mail change between Ms. Bergeron and Inspector 17220 providing further information of the circumstances of inspection.

[38] In the Tribunal's view, Tab 10 is particularly important to the Agency's case, in relation to product identification. The issue is whether the Tribunal may now consider such evidence, of its own volition.

[39] The Agency, acting on behalf of the Minister of Agriculture and Agri-Food, is nonetheless obliged to prove its case on the balance of probabilities, as provided in section 19 of *the Agriculture and Agri-Food Administrative Monetary Penalties Act*, as follows:

> ***19.*** *In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.*

[40] In the Tribunal's view, it is possible for the Agency to prove its case, solely on the basis of presenting evidence, without further argument or, as is the case at present, where there is argument presented on some, but not all of the evidence. However, in not relating the evidence to argument, the Agency runs the risk of failing to meet the balance of probability burden of proof, since the Tribunal is not required to draw a conclusion which is not transparent from the evidence, and solely from the evidence. In this regard, the Tribunal is obliged to be mindful of the direction of the Federal Court of Appeal in the case of *Doyon v. Attorney General of Canada*, 2009 FCA 152. In that case, the Federal Court of Appeal cautioned the Tribunal as follows (at paragraphs 27 and 28 of *Doyon*):

> [27] *In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an* actus reus *which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him - or herself.*
>
> *[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.*

(c) Assessment of the Evidence

[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.

[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.

[45] With respect to the use of photographic evidence, the Tribunal draws a distinction between the current case and the recent Tribunal decision in *Mak* v. *Canada* (CBSA), 2013 CART 11. In the *Mak* case, there was photographic evidence of buns which were asserted to contain meat (Mak, paragraphs 27 and 45). The Tribunal accepted that the photographs, as presented, depicted meat. While not particularized by the Tribunal in *Mak,* a review of the Report of the Agency in *Mak*, which is a matter of public record, discloses that one of the photographs depicted a bun that had been opened, and where the bun filling shown is supportive of the Tribunal's conclusion in *Mak* that the bun contained meat. In the present case, the photographic evidence is quite different. It is not possible to conclude from the photographs submitted by the Agency in the present case that the product in question contains meat. Furthermore, as noted, *ante*, translated content details of apparently identical products, as found on the internet, are not at all determinative in the present case, particularly in the absence of further information verifying the integrity and association of the translations.

Conclusion

[46] The Tribunal, therefore finds, following a review of all submissions of the parties, that the Agency has not proved, on a balance of probabilities, all the elements of the violation. As a result, the Tribunal finds that Mr. Tao did not commit the violation and is not liable for payment of any penalty amount.

Dated at Ottawa, this 21st day of May, 2013.

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Dr. Bruce La Rochelle, Member