Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Ortiz v. Canada (Canada Border Services Agency)*, 2013 CART 23

Date: 20130719
Docket: CART/CRAC-1664

Between:

Paz Erlinda Ortiz, Applicant

- and -

Canada (Canada Border Services Agency), Respondent

Before: **Chairperson Donald Buckingham**

With: **Eduardo Antonio Ortiz Jr., representative for the applicant; and Byron Fitzgerald, representative for the respondent.**

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.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines, on the balance of probabilities, that the applicant committed the violation and is liable to pay the respondent a monetary penalty of $800 within thirty (30) days after the day on which this decision is served.

The hearing was held in Toronto, Ontario,
on May 29, 2013.

REASONS

Alleged Incident and Issues

[2] Two boxes of fried chicken purchased in El Salvador are at the heart of this matter. The respondent, the Canada Border Services Agency (Agency), alleges that, on August 8, 2012, at Pearson International Airport in Toronto, Ontario, the applicant, Paz Erlinda Ortiz (Ortiz), imported meat products into Canada contrary to section 40 of the *Health of Animals Regulations,* from El Salvador, a country from which it is unlawful to import meat products unless she has met the requirements of "Part IV – Importation of Animal By-Products, Animal Pathogens and Other Things" of the *Health of Animals Regulations*.

[3] 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, other than one described in section 45, 46, 47, 47.1, 49, 50, 51, 51.2 or 53, 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.

(2) Subsection (1) does not apply in respect of manure found in or on a vehicle that is entering Canada from the United States if the manure was produced by animals, other than swine, that are being transported by the vehicle.

***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.

. . .

***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.

. . .

46. *No person shall import into Canada meat and bone meal, bone meal, blood meal, tankage (meat meal), feather meal, fish meal or any other product of a rendering plant unless, in addition to the requirements of sections 166 to 171,*

(a) 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 product was derived is susceptible and that can be transmitted by the product, and the person produces a certificate of origin signed by an official of the government of that country attesting to that origin; and

(b) an inspector has reasonable grounds to believe that the product has been processed in a manner that would prevent the introduction of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the product was derived is susceptible and that can be transmitted by the product.

. . .

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.

[Underlining added]

[4] The Tribunal must determine whether the Agency has established all the elements required to support the impugned Notice of Violation and, if Ortiz did import meat into Canada, whether she met the requirements that would have permitted such importation.

Procedural History

[5] Notice of Violation YYZ 4974-1139, undated and unsigned, alleges that, at POE 4974 [Pearson International Airport in Toronto], in the province of Ontario, Ortiz "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*", which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[6] It is not apparent from the Notice of Violation itself when the Agency served Ortiz with the Notice Violation. The Notice of Violation, however, indicates to Ortiz that the alleged violation is a "serious violation" under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which a penalty in the amount of $800.00 is assessed.

[7] By letter to the Tribunal dated August 22, 2012, and sent by registered mail on August 23, 2012, Ortiz requested a review by the Tribunal of the facts of the violation (Request for Review), in accordance with paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. Tribunal staff spoke with Ortiz's representative and confirmed that she wished to proceed by way of an oral hearing conducted in English, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations.*

[8] On September 24, 2012, the Agency sent copies of its report regarding this matter (Agency Report) to Ortiz and to the Tribunal, the latter receiving it that same day.

[9] By letter dated September 25, 2012, the Tribunal invited Ortiz and the Agency to file with it any additional submissions in this matter, no later than October 25, 2012. Neither Ortiz, nor the Agency filed any additional submissions further to this invitation, and no documents were filed by either party at a subsequent time.

[10] By letter dated April 29, 2013, the Tribunal notified the parties that the hearing of this matter would take place in Toronto on May 29, 2013.

[11] The oral hearing requested by Ortiz took place in Toronto, Ontario, on May 29, 2013, with both parties in attendance. Ortiz was represented by her son, Eduardo Antonio Ortiz, Jr. while the Agency was represented by Mr. Bryon Fitzgerald.

Evidence

[12] The evidence presented to the Tribunal in this case consists of written submissions from the Agency (Notice of Violation and Agency Report) and from Ortiz (submissions contained in her Request for Review) and oral testimony given by

witnesses at the oral hearing. The Agency called one witness, Agency Inspector 15476, while Ortiz called two witnesses, herself and her husband, Mr. Eduardo Ortiz, Sr. (Mr. Ortiz), at the oral hearing held on May 29, 2013.

[13] The Agency provided evidence with respect to the following facts:

- Ortiz and Mr. Ortiz came to Canada from El Salvador on board Flight LR620, landing at Pearson International Airport in the evening of August 8, 2012, (Canada Border Services Agency Declaration Card E311(09) at Tab 1 of the Report; Notes of Inspector 15476 at Tab 2 of Agency Report; oral testimony of Inspector 15476).

- A Canada Border Services Agency Declaration Card E311 (Declaration Card) was completed by Ortiz for Mr. Ortiz and herself, dated August 8, 2012, with Mr. Ortiz signing the Declaration Card. Ortiz marked the Declaration Card in particular by ticking the "yes" box beside the following statement: "I am/we are 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" and by handwriting, beside this ticked box, the words "HAR cheese; DRY bens; candies" *[sic]* (Tab 1 of the Agency Report, oral testimony of Inspector 15476).

- Ortiz was approached by Inspector 15476 while the latter was on roving duty inside the Pearson International Airport terminal by the baggage retrieval carousel on August 8, 2012. When Inspector 15476 encountered Ortiz, she was holding two bags of chicken in her hand. He asked her for her Declaration Card, and when he received it from her, he verified that the Declaration Card declared only hard cheese, dry beans and candies but no chicken or meat. He asked Ortiz why she had not declared the chicken and Ortiz said there was no room to declare it on the form. Ortiz further told the Inspector that she didn't tell the primary officer about the chicken because she had it in her hand and didn't need to declare it (Notes of Inspector 15476 at Tab 2 of Agency Report; oral testimony of Inspector 15476).

- Inspector 15476 prepared a declaration to the effect that on August 8, 2012, he found undeclared meat (chicken) coming in from El Salvador in the possession of Ortiz. He asked her for permits and certificates but none were produced. Having inspected the imported meat (chicken) with no documentation, Inspector 15476 declared that he was unable to satisfy himself "on reasonable grounds that it was processed in any way that would prevent disease from coming into Canada". As a result, Inspector 15476 issued Notice of Violation #YYZ 4974-1139 and served it to Ortiz personally (AMP Report Animal By-Product/Plant Product AMP #YYZ 4974-1139 at Tab 2 of the Agency Report; Notice of

Violation #YYZ 4974-1139 at Tab 4 of the Agency Report; oral testimony of Inspector 15476).

- Inspector 15476 told the Tribunal in oral testimony that Ortiz's Declaration Card was coded by the primary inspection officer for "free to leave" and so Inspector 15476 knew that the chicken had not been declared at primary, as if it had been, the Declaration Card would have been coded to require a secondary inspection for an agricultural products examination (oral testimony of Inspector 15476).

- Inspector 15476's photographs of Ortiz's product, found at Tab 5 of the Agency Report, present a product that looks like fried chicken.

- Inspector 15476 acknowledged that, in his experience and given the direction from the Automated Import Reference System (AIRS) of the Canadian Food Inspection Agency, the meat products he found in Ortiz's possession were to be refused entry into Canada (oral testimony of Inspector 20973 and AIRS report found at Tab 3 of the Agency Report).

[14] The written evidence provided by Ortiz in the Request for Review forwarded to the Tribunal on August 22, 2012, states in part as follows:

…

> *We feel our Canadian Citizenship rights were violated by the officer. We were treated like criminals for carrying two 10 piece boxed fried chicken dinners that we bought at the departing airport for personal consumption during our flight and for our relatives who reside in Toronto. We had declared on the declaration form (YES) that we were bringing food, and we were carrying in our hands visible to the officer as our intention was not to conceal it. The language and tone of voice the officer used from the start was very aggressive, disrespectful and accusatory, contrary to the Agency's commitment to fairness. He was not objective; and acted in biased, discriminatory manner. He abused his position and authority as a CBSA officer. To the best of our knowledge, we were not aware that bringing fried chicken from El Salvador for personal consumption was a criminal act. If it was something illicit, we advised the officer we had no problem if it needed to be confiscated, but instead he made false accusations that in the past 20 years we traveled, we were repeated offenders and deserved to be treated accordingly and now needed to be punished. The way he humiliated us in front of other passengers and CBSA officers was unacceptable.*

We expected the officer to be respectful, professional and considerate especially since my husband is a senior and with serious health concerns. At various times my husband got agitated at the tone of voice the officer was using and was told to be quiet in a disrespectful manner. We believe the officer was not considerate of our age in handling us an $800 fine for carrying two boxed of fried chicken. Even though, we had indicated that we were bringing food on the declaration from, he proceeded with the fine. We explained to him that we were not aware that we had violated the law and asked again that if he wished to confiscate the fried chicken, that it was fine. Other passengers who also had fried chicken with them, we later found out, walked away with a warning. The harshness exhibited by the officer towards seniors needs to be corrected.

…

[15] In her oral testimony, Ortiz stated that: she had filled in the Declaration Card; her husband Mr. Ortiz signed it; she did not write "chicken" on the Declaration Card or verbally declare the product to the Primary Inspector as one of the products she was bringing into Canada, as she didn't think she needed to, as she was holding it in her hand; Inspector 15476 had met her at the baggage carousel and had asked her about her baggage and the boxes of chicken she was holding and for her Declaration Card; and Inspector 15476 had been very rude, offensive and impolite to her and her husband at the baggage carousel and throughout the secondary inspection. She also told the Tribunal that she had declared food on her Declaration Card, but not specifically chicken, and that she did not have any permit or certificate for the chicken.

[16] Mr. Ortiz's evidence was that he was very happy to be returning back home on August 8, 2012, until he saw his wife being humiliated by Inspector 15476. Mr. Ortiz told the Tribunal that the Inspector was very rude, shouted at both of them, and felt that when the Inspector told him to sit down that the Inspector might use force against them to make them sit down. When the situation was over and he and his wife were outside in the parking lot, he was so agitated that he could not drive and they had to call their son to come and pick them up. Mr. Ortiz visited a doctor the next day to assess any effects that the situation may have had on his fragile health.

Applicable Law and Analysis

[17] This Tribunal's mandate is to determine the validity of agriculture and agri−food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (the Act). The purpose of the Act is set out in section 3:

3. *The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.*

[18] Section 2 of the Act defines "agri−food Act":

"*agri−food Act*" *means the* Canada Agricultural Products Act, *the* Farm Debt Mediation Act, *the* Feeds Act, *the* Fertilizers Act, *the* Health of Animals Act, *the* Meat Inspection Act, *the* Pest Control Products Act, *the* Plant Protection Act *or the* Seeds Act.

[19] Pursuant to paragraph 4(1)(*a*) of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health depending on the circumstances, may make regulations:

designating as a violation that may be proceeded with in accordance with this Act

(i) the contravention of any specified provision of an agri−food Act or of a regulation made under an agri−food Act....

[20] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187 (AMPs Regulations), which designates as a violation several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 of the AMPs Regulations and include a reference to section 40 of the *Health of Animals Regulations*. Moreover, Schedule 1, Part 1, Division 2 of the AMPS Regulations, specifically sets out the classification, or severity, that must be attributed, by enforcement Agencies and this Tribunal, to a violation of section 40 as follows:

Item	***Section HAR***	***Short-form Description***	***Classification***
79.	40	*Import an animal by-product without meeting the prescribed requirements.*	*Serious*

[21] The Act's system of administrative monetary penalties (AMP), as set out by Parliament, is very strict in its application. In *Doyon v. Attorney General of Canada (Doyon)*, 2009 FCA 152, the Federal Court of Appeal describes the AMP system as follows, at paragraphs 27 and 28:

> *[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.*

[22] Moreover, the Federal Court of Appeal, in *Doyon*, points out that the Act imposes an important burden on the Agency. At paragraph 20, the Court states:

> [*20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation and the legal burden of persuasion. 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: see section 19 of the Act.*

[23] Section 19 of the Act reads 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.*

[24] 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:

- Ortiz is the person who committed the violation;
- Ortiz imported an animal by-product, in this case, fried chicken, into Canada; and
- if Ortiz did import meat products into Canada, Agency officials gave her a reasonable opportunity to justify the importation in accordance with Part IV of the *Health of Animals Regulations*.

[25] The Tribunal must consider all the evidence, both written and oral, before it to determine whether the Agency has proven, on the balance of probabilities, each of the elements of the alleged violation.

[26] With respect to element 1, Ortiz's identity, as the alleged violator, is not in dispute. Throughout the entire inspection process, the identity of Ortiz, the alleged violator, and her care, control and ownership of the boxes of fried chicken, have not been disputed. The Tribunal finds as fact that Ortiz was the alleged violator identified by Inspector 15476, and the chicken she was holding can rightly be attributed as belonging to her, albeit that she would be sharing it with her husband, and eventually as she stated, with relatives residing in Toronto.

[27] With respect to element 2, the Tribunal accepts, as a finding of fact, that the Agency has established, on the balance of probabilities, that the product that Ortiz imported was fried chicken imported from El Salvador on August 8, 2012.

[28] The third element is also essential to proving a violation of section 40 of the *Health of Animals Regulations*. That section, as noted above, states as follows: "*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*." Moreover, the Minister of Agriculture and Agri-Food, in the AMPs Regulations, has found it necessary to designate in the listing of section 40 of the *Health of Animals Regulations* in Schedule 1, Part 1, Division 2 (Violation #79, section 40) of those *Regulations* that the violation relates to the: "Import an animal by-product without meeting the prescribed requirements". In both instances—in the *Health of Animals Regulations* themselves, and in the listing of the violation under the AMPS Regulations—the violation mentions and permits a justification from the alleged offender.

[29] There can be no doubt, that alleged violators of section 40 may defend themselves by adducing evidence proving they met the prescribed requirements permitted under Part IV of the *Health of Animals Regulations*. Moreover, the responsibility and burden for persuading the Agency, or eventually the Tribunal, that a person has met the prescribed requirements of Part IV falls on the alleged violator and he or she must take all necessary and reasonable steps to make such a justification known. Normally, this justification will take one of two forms, either by:

- the traveller declaring any animal by-products to the Agency, either in writing on that person's Declaration Card or in person to an Agency official once that person had deplaned and entered Canada on his way through an airport, such that an Agency Inspector could inspect the product and determine if it should be allowed entry into Canada pursuant to section 41(1)(*a*) or section 41.1(1) of the *Health of Animals Regulations*; or

- the traveller producing a certificate (section 41(1)(*b*); section 41(1)(*c*); section 43; section 46), document (section 52(1)), or permit (section 52(2)) such that the meat product would be permitted to be imported into Canada under Part IV.

[30] The third element of the violation – if Ortiz did import meat products into Canada, that Agency officials provided a reasonable opportunity to her to justify the importation in accordance with Part IV of the *Health of Animals Regulations* – in the grand majority of cases would be an element of the violation that will be very easily met by the Agency, as the threshold for adducing sufficient evidence is extremely low. Normally, the Agency would have only to prove to the Tribunal that the traveller's Declaration Card was falsely marked or that the person understood and answered "no" to the Primary Inspector's question about whether the traveller was bringing meat products into Canada; and that the traveller was given an opportunity to produce a certificate, document or permit, which would permit importation of a meat product. In the case of a person who understands either of Canada's official languages, the Agency's burden to prove that they had afforded a traveller a reasonable opportunity to justify any importation of meat products in accordance with Part IV of the *Health of Animals Regulations* would normally be quickly and easily met.

[31] The Tribunal finds, in this case, that the Agency has met this burden. Ortiz's conduct by marking "yes" on the Declaration Card but failing to declare the fried chicken on the card or to the Agency at primary inspection, or at any time before Inspector 15476 found it in her hand at the baggage carousel while he was on roving duty prior to any formal secondary inspection, is sufficient to prove that Ortiz was given a reasonable opportunity to declare the product or to produce a certificate, document or permit, which would permit importation of a meat product. The evidence presented by both parties does not support any finding by the Tribunal that Ortiz actually had such a permit or certificate in her possession on August 8, 2012, or that she presented the fried chicken for inspection prior to meeting Inspector 15476 by the baggage carousel. Moreover, Inspector 15476 prepared a document (Tab 2 of the Agency Report) attesting to the fact that he was unable to satisfy himself that the chicken imported into Canada that day by Ortiz was disease-free.

[32] The Tribunal is aware that the Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the Act states:

> **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.*

[33] When an AMP provision has been enacted for a particular violation, as is the case for section 40 of the *Health of Animals Regulations*, Ortiz 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 she did not know she was breaking the law, that she did not intend to break the law, or that she did not think she had to declare the fried chicken verbally or on the Declaration Card because she was carrying it in her hand, all of which Ortiz did verily believe given the evidence presented. However, given Parliament's clear statement on the issue, the Tribunal accepts that none of the statements made by Ortiz in her submissions to this Tribunal and in her communications with Agency Inspectors, are permitted defences under section 18.

[34] The Tribunal finds, therefore, that the Agency has proved, on the balance of probabilities, each of the three elements necessary for a finding that Ortiz has committed the violation.

Applicant's Arguments Concerning Defects in Notice of Violation and Inspector's Abuse of Discretion Through Rude Conduct

[35] While the Tribunal finds that the Agency has proved all of the necessary elements and, as a result, that the Notice of Violation should be upheld, the applicant has presented evidence and arguments in the case that point to several less-than-best practices concerning the Agency's actions in detecting, investigating and issuing this Notice of Violation against her.

Defects in the form of the Notice of Violation

[36] First, Ortiz raised arguments concerning defects in the form of the Notice of Violation itself. Nowhere on the Notice of Violation is the form signed or dated. Particularly, there is nothing written where there is a specific place for the issuing Inspector of the Agency to sign and date the document in the section of the Notice of Violation entitled "Service of Notice of Violation". Are such deficiencies fatal to the validity of the Notice of Violation itself?

[37] The Act dictates the steps that an inspector must follows when issuing a notice of violation. Specifically, under section 7(2), where an officer has reasonable grounds to believe that a person has committed a violation, the officer may issue a notice of violation. The notice must include the following:

- Name of the offender;
- Particulars of the violation;
- Penalty;

- Particulars for timing of payment;
- Manner of payment; and
- Options for reduced penalty if paid early.

[38] It is a statutory requirement to serve a Notice of Violation under the *AMPA*. Section 7(2) states that "the designated person may issue, and shall cause to be served on the person, a notice of violation that names the person, identifies the violation …." However, neither the Act nor the *Health of Animals Regulations*, under which Ortiz was charged, require a specific form or manner of service. Therefore, there is no legal requirement that the Inspector sign and date the certification of personal service section on the Notice of Violation in order for it to be valid, and a failure to do so does not render the notice incomplete or irregular on its face.

[39] The central question in reviewing effective service, is whether or not the applicant has knowledge of the proceedings against her/him so she/he can choose an appropriate recourse (*Durham (Regional Municipality) v. Verma*, 2011 ONCJ 19, at paragraph 10). The certification of service section, included in a notice of violation is an efficient and practical way for an inspector to satisfy the proof of service required by the Act. This manner of proof, however, is not the sole route to proving service. Service can also be proven through:

- Inferring service from the actions taken by the applicant such as requesting a review and appearing on the date of the review hearing;
- Inferring service from the reproduction of information within the applicant's request for review under section 9(2) of the Act, uniquely contained in the Notice of Violation (i.e. date, CBSA Inspector number, and the AMPS violation number);
- Oral evidence of the Inspector who issued and served the Notice of Violation; or
- Admission of service by the applicant.

[40] In this case, the evidence is overwhelming that Ortiz was served with the Notice of Violation. This can be inferred through her decision and action of requesting a review under section 9(2) of the Act; her reproduction of unique information contained within the notice, including the date, the Agency Inspector number, and the AMPS violation number; and her appearance on the review date. The failure of the Inspector to sign the certification of service section in the Notice of Violation does not affect the validity of the notice, or the proceedings against Ms. Ortiz in this case.

Inspector's Abuse of Discretion Through Rude Conduct

[41] Ortiz argued in her Request for Review, and at the hearing, that the Notice of Violation in this case has been tainted and is therefore invalid because Inspector 15476 acted in a "biased, discriminatory manner".

[42] Ortiz alleges that the angry, aggressive and rude manner in which she and her husband were treated by Inspector 15476 made her feel that he abused his authority with her, her husband and seniors in general. As a result, Ortiz alleges that Inspector 15476 based his decision to issue a Notice of Violation with Penalty on irrelevant considerations rather than relevant considerations in this exercise of discretion.

[43] The Tribunal, in several cases, has had to consider applicant arguments concerning the effect of Agency officials' conduct on the validity of a notice of violation.

[44] There is no doubt now in Canadian law that the conduct of public officials can have implications for the validity of actions taken by such officials. The Supreme Court of Canada has considered the abuse of discretion in the case of *Roncarelli v. Duplessis* [1959] S.C.R. 121, and has stated the law as follows at page 140:

…

> *In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentionned in the statute but they are always implied as exceptions. 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.*

…

[45] In *Zhou v. Canada (CBSA)*, 2010 CART 20 and *Zhou v. Canada (CBSA)*, 2010 CART 21 (both issued October 14, 2010) at paragraphs 26 to 28 in both decisions, the Tribunal held that improper conduct of Agency Inspectors "relating solely" to a particular applicant would not invalidate a Notice of Violation:

> *[26] The Tribunal will, however, address Zhou's concerns about his alleged mistreatment by Agent 10534. Can the actions taken by Agency agents against Zhou "contaminate or negate" the Notice of Violation in question? According to the evidence given by Zhou, the secondary inspection took place in a climate of discrimination and unprofessional conduct on the part of Agency inspector.*

[27] Agency inspectors are charged with protecting Canadians, the food chain and agricultural production in Canada from the risks posed by biological threats to plants, animals and humans. These duties, no doubt, must be exercised responsibly. The Tribunal is aware that the Agency has its own procedure for reviewing traveller complaints against inspectors, where the actions of inspectors become excessive towards the travelling public.

[28] On the other hand, the Tribunal's jurisdiction to review Notices of Violation comes from its empowering legislation. According to these laws, the Tribunal does not have the mandate, nor the jurisdiction, to cancel, annul or dismiss a Notice of Violation for reasons relating solely to the conduct of Agency inspectors towards an applicant.

[46] The Tribunal refined its approach to this issue in the case of *Amalia Eustergerling v. Canada (CBSA)*, 2012 CART 19 (issued October 22, 2012) (*Eustergerling)*, in holding that where there was an Agency official's action in issuing a notice of violation that was based "on capricious or discriminatory criteria such as race, or gender or other irrelevant considerations", there could be a basis for invalidating a Notice of Violation. Although not finding such a basis in that case, at paragraphs 44 and 45, Chairperson Buckingham wrote:

[44] In the present case however, in discharging her public duty, Inspector 10481 did not depart from the lines or objects of the statute under which she was acting. She did not abuse her discretion towards Eustergerling or act in bad faith. First, Inspector 10481 acted at all times within the authority granted to her under relevant legislation and within the scope of the legislation's objectives—to protect the Canadian agriculture and food system from threats, both declared and undeclared posed by imported products. Unlike the official in Roncarelli v. Duplessis*, who exercised his authority for a purpose wholly unrelated to the statute, Inspector 10481 never overstepped her authority under the* Customs Act *and related regulations, the* Health of Animals *[Act] and regulation and the* Agriculture and Agri-Food Administrative Monetary Penalties Act *and AMPs Regulations. In acting within the parameters of these legislative instruments, Inspector 10481 was free to exercise her discretion, once she was convinced that Eustergerling had committed a violation, by issuing to her a Notice of Violation with Penalty. No doubt, Inspector 10481 had a choice, and not a duty, to issue a Notice of Violation with Penalty or a Notice of Violation with Warning, and given the circumstances, Inspector 10481 felt that the issuance of a Notice of Violation with Penalty was warranted. While Inspector 10481 told the Tribunal during her oral testimony that she had never issued a Notice of Violation with Warning in her six-and-one-half years with the Agency, there was no evidence that she believed she was unable or not permitted to issue such a Notice of Violation.*

[45] Therefore, the Tribunal is convinced that the decision of Inspector 10481 was not based on capricious or discriminatory criteria such as race, or gender or other irrelevant considerations. It would appear to the Tribunal that Inspector 10481 made her decision strictly on the basis of the particular case at hand, without letting her judgment be clouded by irrelevant or extraneous considerations. Moreover, even if proper and improper purposes underlying Inspector 10481's action would have existed, intervention by this Tribunal would only be merited where the improper purpose contributed to a material extent in the issuance of the Notice of Violation with Penalty. As no abusive purpose and no flagrant impropriety has been proved, on the balance of probabilities in this case, the Tribunal concludes that there is no improper purpose which underlies the actions of Inspector 10481 in her issuance of a Notice of Violation with Penalty to Eustergerling.

[47] Most recently, in *Youssef Bougachouch v. Canada (CBSA)*, 2013 CART 20 (issued June 24, 2013) (*Bougachouch)*, the Tribunal held that the evidence demonstrated in that case that the conduct of an Agency official was so egregious that it did necessitate a finding of invalidity of the Notice of Violation. In paragraphs 29 to 34, Tribunal Member La Rochelle stated as follows:

[29] The Agency argued that the Tribunal had acknowledged [translation] "that it did not have either the mandate or the jurisdiction to analyze matters of discrimination that might have been the primary concern of an applicant," *citing paragraphs [26] to [28] of* Zhou v. Canada (CBSA), *2010 CART 20*...

[30] With respect to Mr. Bougachouch's concerns in relation to the conduct of Agency officers, he has the right to raise this directly with the Agency, or with the Minister. In most cases, this will not be an issue that is relevant to the subject matter dealt with by the Tribunal. However, despite the Agency's sentiments on this matter, the Tribunal must determine whether the reasons and actions of the inspector demonstrate that she abused her discretionary power and thus based her decision to issue a Notice of Violation to Mr. Bougachouch on arbitrary and discriminatory criteria.

[31] The Tribunal is of the view that it has the right to reject a Notice of Violation, due to the conduct of Agency officers towards an applicant. In effect, the Tribunal has the right to judge that the conduct of Agency officials has been so highly egregious that the Tribunal refuses to admit evidence obtained as a result of such conduct, based on the fact that, to do otherwise could potentially cause the system of justice to fall into disrepute. The current state of the law is able to accord to the Tribunal a discretionary power to bar evidence obtained as a result of flagrant disregard for the applicant's rights. See, for example, the decision of Madame Justice Spies in R. v. Johnson, 2007

> CanLII 2007 57813 (ONSC), *and the decision of Mr. Justice Kruzick in* R. v. Nguyen, 2006 CanLII 1769 (ONSC). *The Tribunal, in a decision by Chairperson Buckingham, expressed related sentiments in* Amalia Eustergerling v. Canada (CBSA), 2012 CART 19*, in paragraphs [41] to [45]....*
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> *[32] Despite having been given three opportunities (in the Agency's Report, at the hearing and in the Agency's additional submission) to submit evidence to counter the appearance of bias, the Agency chose not to submit anything. Consequently, the Tribunal finds that there was bias in the selection of Mr. Bougachouch and his luggage.*
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> *[33] The Tribunal acknowledges that the decisions of Agency inspectors are made under great pressure and that the discretion of inspectors must be respected under most circumstances. However, there are rare circumstances under which discretion and decision-making are seriously compromised. There is no imputation of bad faith. For some reason, without any convincing explanation, only Arabs were referred to secondary inspection in this case. Discretion is not being exercised when only Arabs, arriving on a flight with many other individuals, are required to undergo secondary inspection. The Tribunal remains without a convincing explanation from the Agency for this "Arab waiting line".*
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> *[34] In the view of the Tribunal, the case at hand is one of those rare cases where the discretionary power to bar evidence should be exercised. As a result, the Tribunal considers the Notice of Violation to be a nullity. To do otherwise could cause the system of justice to fall into disrepute.*

[48] The Tribunal considers that the evidence presented in this present case makes the treatment of the issue of the Inspector's conduct more akin to that in *Eustergerling* than in *Bougachouch.* In the present case, in discharging his public duty, Inspector 15476 did not depart from the lines or objects of the statute under which he was acting. The evidence did not demonstrate, on a balance of probabilities, that he abused or clouded his discretion towards Ortiz, discriminate against her or act in bad faith by stereotyping Ortiz into some identifiable group. First, Inspector 15476 acted at all times within the authority granted to him under relevant legislation and within the scope of the legislation's objectives—to protect the Canadian agriculture and food system from threats, both declared and undeclared posed by imported products. Unlike the official in *Roncarelli*, who exercised his authority for a purpose wholly unrelated to the statute, Inspector 15476 never overstepped his authority under the *Customs Act* and related regulations, the *Health of Animals Act* and *Regulations* and the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and *Regulations*. In acting within the parameters of these legislative instruments, Inspector 15476 was free to exercise his discretion, once he was convinced

that Ortiz had committed a violation, by issuing to her a Notice of Violation with Penalty. No doubt, Inspector 15476 had a choice, and not a duty, to issue a Notice of Violation with Penalty or a Notice of Violation with Warning, and given the circumstances, Inspector 15476 felt that the issuance of a Notice of Violation with Penalty was warranted. Inspector 15476 even told the Tribunal, during his oral testimony, that in his 10 years of experience at the Agency, he had issued more Notices of Violation with Warning than with Penalty. There was, therefore, no evidence to support a finding by the Tribunal that he believed he was unable or not permitted to issue a Notice of Violation with Warning rather than with a Penalty. Despite vague statements concerning their poor treatment because they were seniors, Ortiz's evidence and that of the Agency did not support any finding on a balance of probabilities that Inspector 15476 had based his decision on criteria such as race, or gender or age.

[49] Therefore, the Tribunal is convinced that the decision of Inspector 15476 was not based on capricious or discriminatory criteria or other irrelevant considerations. It would appear to the Tribunal that Inspector 15476 made his decision strictly on the basis of the particular case at hand, without letting his judgment be clouded by irrelevant or extraneous considerations. Moreover, even if there were improper purposes underlying Inspector 15476's action that were proved by significant evidence, intervention by this Tribunal would only be merited where the improper purpose contributed to a material extent in the issuance of the Notice of Violation with Penalty.

[50] The Tribunal appreciates that Agency Inspectors are charged with the important task of protecting individuals, animals, and plants, agricultural production and the food system in Canada from risks posed by pests, pathogens and parasites. There is no doubt that these tasks must be carried out conscientiously. Furthermore, the Tribunal knows that the Agency has established its own process for handling travellers' complaints against Agency inspectors. There was evidence presented in this case showing that Ortiz had pursued this avenue. However, as stated above, unless Agency officials' conduct results in an abuse of discretion, the Tribunal is not responsible for commenting on the propriety of such conduct. As the Tribunal's jurisdiction to review Notices of Violation comes from its empowering legislation, the Tribunal has a very limited mandate to cancel or reject a Notice of Violation for reasons relating to the conduct of Agency inspectors with applicants.

[51] In conclusion, the Tribunal finds that Ortiz committed the violation and is liable for payment of the penalty in the amount of $800.00 to the respondent within thirty (30) days after the day on which this decision is served. While it might appear from the evidence presented that the conduct of Inspector 15476 lacked the respect and courtesy that is a hallmark of Canadian society, his conduct was not so outrageous that it tainted the exercise of his discretion to issue Ortiz a Notice of Violation with Penalty in a situation where all the elements of such a violation were present to the satisfaction of the Agency Inspector.

[52] The Tribunal wishes to inform Ms. Ortiz that this is not a criminal or a federal offence but a monetary violation, and that she has the right to apply after five years to have the notation of this violation removed from the Minister's records, in accordance with subsection 23(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, which states as follows:

> **23.** (1) *Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from*
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> (a) *where the notice of violation contained a warning, the date the notice was served, or*
>
> (b) *in any other case, the payment of any debt referred to in subsection 15(1),*
>
> *unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.*

Dated at Ottawa, this 19th day of July, 2013.

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Dr. Donald Buckingham, Chairperson