Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Dyck* v. *Canada (Canadian Food Inspection Agency),* 2017 CART 3

Date: 20170127
Docket: CART/CRAC-1845

BETWEEN:

David Dyck,

APPLICANT

- and -

Canadian Food Inspection Agency,

RESPONDENT

BEFORE: **Member Bruce La Rochelle**

WITH: **David Dyck, self-represented; and**
Heather Willis, 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 an alleged violation of section 57 of the *Plant Protection Regulations*, alleged by the respondent.

DECISION

Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal by order, determines, that the Agency has not established, on the balance of probabilities, a principal element of the alleged violation, that being the legal requirement of a phytosanitary certificate by the importing country. The applicant therefore cannot be found to have committed the violation, as set out in Notice of Violation 1516WA0032, dated June 30, 2015.

By written submissions only.

REASONS

Introduction

[1] Mr. David Dyck (hereinafter "Mr. Dyck"), who self-identifies and will be accepted by the Canada Agricultural Review Tribunal (hereinafter "Tribunal")as the President of Dyck Forages and Grasses Ltd., of Elia, Manitoba, is alleged to have violated section 57 of the *Plant Protection Regulations* (SOR/95-212), which provides as follows:

> ***57*** *No person shall export or re-export any thing from Canada unless it meets the laws of the importing country respecting phytosanitary import requirements.*

[2] The alleged violation relates to a shipment of alfalfa from Canada to Italy, in March of 2015.

[3] The international regulatory regime in relation to phytosanitary inspection is reflected in part in the definition of a "Canadian Phytosanitary Certificate" under section 55 of the *Plant Protection Regulations*, as follows:

> ***55 (1)*** *In this Part,*
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> *Canadian Phytosanitary Certificate means a document, issued by an inspector, that attests to the phytosanitary status of anything exported from Canada and that*
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> ***(a)*** *contains the information required by the Model Phytosanitary Certificate set out in the Annex to the* International Plant Protection Convention *approved by the Food and Agriculture Organization of the United Nations Conference at its Twentieth Session in November 1979, as amended from time to time, and*
>
> ***(b)*** *is signed by an inspector and sealed with an official Canadian Phytosanitary Certificate seal; (*certificat phytosanitaire canadien*)*

[4] Broadly, the purpose of the certificate is to provide assurance by the exporting country that a shipment is free of pests and disease. In the present case, a principal issue is whether the laws of Italy, the importing country, require such a certificate, since the violation in question relates to the laws of the importing country.

Procedural History

[5] By Notice of Violation 1516WA0032, dated June 30, 2015, it is alleged that, on or about March 25, 2015, at Elie, Manitoba, Mr. Dyck committed a violation contrary to section 57 of the *Plant Protection Regulations*, particularized in the Notice of Violation as

(*verbatim*) "fail to meet the phytosanitary requirements of the importing country". The violation is categorized as "very serious", involving a monetary penalty of $10,000. The Notice of Violation was served on Mr. Dyck by Xpresspost Courier on June 30, 2015. Further to subsection 9(3) of the *Agriculture and Agri-Food Administrative Monetary Penalty Regulations* (SOR/2000-187) "a document sent by courier is served on the 10th day after the date indicated in the courier's receipt issued to the sender". Assuming that the courier receipt is the same date as the Certificate of Service filed by the Canadian Food Inspection Agency (hereinafter "Agency"), Mr. Dyck is deemed to have been served ten days thereafter, on July 10, 2015. Mr. Dyck then had, according to subsection 11(2) of the *Agriculture and Agri-Food Administrative Monetary Penalty Regulations*, 30 days in which to file a Request for Review. According to Rule 13 of the *Rules of the Tribunal (Canada Agricultural Review Tribunal)* (SOR/2015-103; hereinafter "Tribunal Rules"), the Request for Review must be sent by Registered Mail.

[6] Mr. Dyck initially communicated to the Tribunal by registered letter received on July 27, 2015, in which he stated "I do not believe that I have violated Section 57 of the Health of Animals Regulations as described in the violation, and wish to exercise my right to defend my position." No further reasons were provided. Mr. Dyck's communication was in a letter dated July 21, 2015, where the Registered Mail stamp is July 22, 2015. Therefore, according to subsection 17(1) of the *Tribunal Rules*, Mr. Dyck's letter is deemed to be received by the Tribunal on July 22, 2015, notwithstanding later receipt in fact:

> ***17*** *(1) The filing or service of a document by registered mail or courier is effective on the day indicated on the receipt issued by the post office or courier service, as the case may be.*

[7] On July 28, 2015, the parties were advised by the Tribunal to comply with the requirements of Tribunal Rule 30 (the Agency) and Tribunal Rules 13 and 31 (Mr. Dyck). Under Rule 30, the Agency must provide proof of service and information as to whether the penalty has been paid. Such information was provided by the Agency on July 29, 2015. Under Rules 13 and 31, Mr. Dyck was required to file a Request for Review by Registered Mail (which he had done), plus other information, including the reasons in support of his request. By way of email scan and Registered Mail sent August 11, 2015, Mr. Dyck provided the additional information, including reasons in support of his Request for Review. These reasons will be later discussed in detail. Briefly, Mr. Dyck alleged that he was subject to a Notice of Violation due to the refusal of the Agency to issue a phytosanitary certificate in circumstances where a sample was available for testing.

[8] Based on the information filed by Mr. Dyck, the Tribunal determined that Mr. Dyck's Request for Review was admissible on two bases, specifically "that evidence is required to prove what the exact phytosanitary requirements were in this case and whether the Agency induced the Applicant into error, if such requirements were not in fact met." This decision was communicated to the parties by email and regular mail on August 20, 2015, at which time the Agency was advised that it had until September 21, 2015, to submit its Report, pursuant to Tribunal Rule 33. Under Tribunal Rule 33(a), the report is to contain "any information relating to the violation, along with any supporting documents".

[9] The Agency submitted its report (hereinafter "Agency Report")on August 26, 2015, copied to Mr. Dyck, after which Mr. Dyck was advised by the Tribunal that he had until September 21, 2015, to make any additional representations in response to the Agency Report. Under Tribunal Rule 35(b), it is only the Applicant who has a right to make additional submissions, following the filing of the Agency's Report, though the Tribunal has discretion to accord to the Agency a right to make further submissions in response: *Christensen v. Canada (Canadian Food Inspection Agency)*, 2016 CART 23, at paragraphs 8 to 13.

[10] No further submissions were made by Mr. Dyck by the due date of September 21, 2015. On October 17, 2016, the file was assigned to this Tribunal member for deliberation and decision.

[11] Following a review of the file by the Tribunal member, by letter to the parties of November 24, 2016, Mr. Dyck and to the Agency were accorded "an opportunity to provide further evidence as to whether a phytosanitary certificate is a requirement of the importation laws of Italy, in relation to the product under consideration". In addition, the Agency was asked to identify its representative, "legal or otherwise, who has carriage of this matter". The parties were requested to provide any responses by December 19, 2016.

[12] Under cover of a letter dated December 2, 2016, and received by the Tribunal via Registered Mail on December 5, 2016, the Agency made additional submissions and identified Ms. Heather Willis, an Investigation Specialist with the Agency, as its representative. Mr. Dyck made no additional submissions.

Facts Not in Dispute

[13] Based on the documents from the parties on file, the facts that are not in dispute are as follows:

(i) On December 31, 2014, Agency inspectors attended at Dyck Forages and Grasses Ltd., to sample alfalfa for seed certification purposes. At the time of the attendance by Agency inspectors in December of 2014, Mr. Dyck informed them that he had previously shipped alfalfa to Italy without a phytosanitary certificate and that the shipments were not detained at Italian customs. Mr. Dyck was cautioned by inspectors that a phytosanitary certificate was required for importation of alfalfa to Italy.

(ii) In response to inspector inquiries, Mr. Dyck informed Agency inspectors that the lot being sampled for seed certification purposes was destined for Italy and that he would inquire as to whether the importer required a phytosanitary certificate. On March 9, 2015, alfalfa from the lot was shipped to Italy without a phytosanitary certificate, based on no such certificate being contractually required by the importer.

(iii) The shipment arrived in Livorno, Italy on March 25, 2015, and was detained by Italian customs officials, based on a phytosanitary certificate from Canada not being presented.

(iv) On March 25, 2015, the Italian importer requested a post-dated phytosanitary certificate from Mr. Dyck. On March 25, 2015, via email, Mr. Dyck informed Agency personnel of the circumstances and the importer's request to Mr. Dyck.

(v) On March 28, 2015, the Italian importer advised Mr. Dyck by email that unless a phytosanitary certificate was received, the importer would be compelled to reject the seed. The importer also emphasized the urgency of obtaining a phytosanitary certificate, as referenced to demurrage charges that would commence as of March 30, 2015. The importer authorized Mr. Dyck to communicate its request directly to the Agency, which Mr. Dyck did, on March 28, 2015.

(vi) On March 31, 2015, Mr. Dyck was informed of the decision of the Agency to complete the nematode testing, and Mr. Dyck was requested to submit an application for a phytosanitary certificate. Alfalfa from the same lot that was shipped still remained in Canada, so nematode testing justifying the issuance of a post-dated phytosanitary certificate was possible.

(vii) Following internal discussions as to the policy to be adopted, the Agency decided not to issue a phytosanitary certificate and so informed Mr. Dyck, by email, on April 16, 2015. The Agency did not disclose whether the lot had been subject to nematode testing, prior to this decision being taken.

(viii) Mr. Dyck subsequently appealed the decision internally, to the Complaints and Appeals Office of the Agency. The decision to not issue a phytosanitary certificate was upheld.

(ix) The seed was subsequently cleared for import at an alternate port, in Naples, Italy. However, Mr. Dyck's customer demanded an invoice reduction of USD $4,400, based on no phytosanitary certificate being present and notwithstanding that no such certificate had been contractually required. The invoice reduction was made, based on the cost of the reduction being comparable to the cost to ship the seed back to Canada.

(x) The Notice of Violation which is the subject of the Request for Review was issued on June 30, 2015.

Facts in Dispute

[14] The principal fact in dispute is whether a phytosanitary certificate is required to import alfalfa to Italy. Mr. Dyck has also challenged procedures adopted by the Agency, which led to its refusal to issue a post-dated phytosanitary certificate.

Requirement of a Phytosanitary Certificate and Related Evidence

[15] The Agency asserts that a phytosanitary certificate is required to import alfalfa to Italy. The Agency's argument in this regard is found on page 4 of its Report, under "Investigative Findings":

> *Phytosanitary Certificates are official documents issued by the National Plant Protection Organization (hereinafter "NPPO") of the exporting country to the NPPO of the importing country. Phytosanitary Certificates are issued to indicate that consignments of plants, plant products or other regulated articles meet specified phytosanitary import requirements and conform to the certifying statement printed on the certificate. Most countries stipulate their import requirements in legislation, regulation, other official rules or by Permits to Import issued by the NPPO of the importing country.*

[16] While the Agency describes the regulatory regime, at issue is whether there are specific legislative or regulatory requirements in Italy whereby a phytosanitary certificate is required to import plant or plant products generally or alfalfa in particular. In its Report, the Agency relied on the fact that there is a European Union directive with respect to a phytosanitary certificate requirement. This reliance is based primarily on an email exchange between Agency personnel, confirming the existence of the Directive. The Agency did not provide evidence as to how a directive is implemented in a specific country, or whether a directive need be implemented in order to be considered part of a specific country's laws.

[17] Further to the invitation to the parties by the Tribunal to provide additional evidence as to whether phytosanitary certificates are required under Italian law, and in particular whether such a certificate is required in relation to imported alfalfa, the Agency presented evidence of internal categorizations of the regulatory regime in Italy concerning phytosanitary certificates—specifically, the Agency's own database, which shows that a phytosanitary certificate is required by Italy in relation to imported alfalfa. In particular, the Agency provided the following information:

> (a) Printouts of what are asserted to by the Agency be Foreign Plant Quarantine Import Regulations (Tribunal emphasis), relating to export of alfalfa from Canada and importation to the European Union generally and Italy in particular (Tabs A and B, Agency supplementary submission). The nature of the Foreign Plant Quarantine Import Regulations is not specified and the legislative adoption of same by Italy is not particularized. Rather, the Agency specifies that the information comes from an Agency database contained in an Agency internal website.

(b) Information publicly available on the Agency website concerning the issuance of phytosanitary certificates, plus an email summary of procedures associated therewith, as related to a discussion concerning Foreign Plant Quarantine Import Requirements (Tribunal emphasis; Tabs C and D, Agency supplementary submission). Included is a copy of Agency Policy D-99-06: *Policy on the issuance of phytosanitary certificates and phytosanitary certificates for re-export.* The effective date of this specified third version of the policy is January 11, 2016, subsequent to the date of the alleged violation in question. The policy in effect as of the time of the alleged violation, being March of 2015 and assuming such policy is in any event relevant, is not particularized.

[18] What the Agency does not present is any evidence of the actual laws or regulations passed in Italy in relation to phytosanitary certificates and the importation of alfalfa. For example, in relying on Policy D-99-06 and assuming for the moment that the policy or this January, 2016 version of the policy is relevant in any event, this policy does not establish that Italian importation laws concerning alfalfa involve mandatory phytosanitary certificate requirements. Instead, from Policy D-99-06, one learns the following:

2,2 International Plant Protection Convention

The IPPC (International Plant Protection Convention) is a treaty relating to plant health adopted by the Food and Agriculture Organization (FAO) of the United Nations. It is an international agreement to secure common and effective action to prevent the spread and introduction of regulated pests of plants, plant products and other regulated articles and to promote appropriate measures for their control.

The IPPC (International Plant Protection Convention) came into force in 1952 and was amended in 1979 to include a model for a phytosanitary certificate. The IPPC (International Plant Protection Convention) was further revised in 1997 to align it with the agreement on the Application of Sanitary and Phytosanitary Measures (the SPS (Sanitary and Phytosanitary) Agreement) of the World Trade Organization. The IPPC (International Plant Protection Convention) is recognized under the SPS (Sanitary and Phytosanitary) Agreement as the international organization responsible for phytosanitary standard testing and harmonization of phytosanitary measures that affect trade.

There are two international standards for phytosanitary measures (ISPMs) that are particularly relevant to this policy:

- *ISPM (International Standard for Phytosanitary Measures) 7:* Phytosanitary certification system*, that describes components of a phytosanitary certification system to be established by NPPO (National Plant Protection Organization)s; and*

- *ISPM (International Standard for Phytosanitary Measures) 12:* Phytosanitary certificates*, that provides the requirements and guidelines for the preparation and issuance of phytosanitary certificates.*

[…]

4.1 Foreign Plant Quarantine Import Requirements (FPQIR)

4.1.1 Phytosanitary Import requirements:

The CFIA (Canadian Food Inspection Agency) recognizes only official phytosanitary regulations of the importing country, or other official documentation.

Most countries have legislation such as Acts, Laws, Decrees, Regulations, etc. (et cetera), outlining the phytosanitary import requirements for plants and plant products, and other regulated articles imported into their territories. The Export Commodity Officer (ECO) group [a group of officers within the Plant Health and Biosecurity Directorate, (PHBD) located in Ottawa, Ontario] maintains information in the Export Certification System that contains the FPQIR (Foreign Plant Quarantine Import Requirements) of most countries…

[19] Presenting a Canadian policy document, which summarizes various international conventions and practices, does not provide evidence of such international conventions or practices, let alone the laws which may have emanated from such conventions or practices, including the specific laws and regulations in place in a particular country. Despite having had two opportunities to do so, the Agency has failed to establish what relevant laws and regulations existed in Italy at the time of the alleged violation. The Tribunal notes that the Agency was not represented by legal counsel in this matter.

[20] One issue is whether the Tribunal has a discretion to go beyond the evidence before it, and to either take notice of certain facts or independently investigate a particular matter in order to satisfy itself in relation to perceived evidentiary deficiencies. Tribunal Rule 22 provides as follows:

22. *The Tribunal may take notice of any matter in order to expedite any proceeding.*

[21] In the Tribunal's view, to the extent that this Rule could apply to the issue of taking notice of the laws of Italy, it is discretionary in nature. Furthermore, its purpose would appear to be more administrative, in the interest of expediting proceedings, rather than in the interest of the Tribunal providing focused assistance to a party in making its case. The Tribunal should not be required to independently research whether there are specific laws or regulations in Italy requiring phytosanitary certificates as a condition of the importation of alfalfa. That is a matter upon which it is incumbent on the Agency to produce cogent evidence, consistent with the direction to the Tribunal by the Federal Court of Appeal in

Doyon v. Canada (Attorney General), 2009 FCA 152, at paragraph 28 (per Mr. Justice Létourneau, Mr. Justice Blais and Madame Justice Trudel concurring):

> *[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] To the extent that the concept of judicial notice applies to an administrative tribunal and to the extent that such concept could involve a mandatory, rather than discretionary acceptance of certain facts without further proof, Foreign laws are not considered to be facts with respect to which a judicial (and, presumably, quasi-judicial) entity should accept, without further proof. In *The "Mercury Bell" v. Amosin* (1986), 27 DLR 4th 641, the Federal Court of Appeal (per Mr. Justice Marceau with Mr. Justice Lacombe and Mr. Justice Hugesson concurring, the latter adding separate commentary) discussed the issue as follows, at paragraph 6:

> *[6] It is well known that in countries governed by the English law, a court is not entitled to inquire* proprio motu *as to the content of the foreign law on the basis of which an action brought before it should be disposed of. The court will not in principle take judicial notice of foreign law; it will not even consider foreign law as an ordinary fact (which it is not, in any event) about which it may require the parties to adduce satisfactory evidence. If the parties, wilfully or inadvertently, fail to bring expert evidence of the foreign law, the court will act as if the foreign law is the same as its own law, it will apply the* lex fori*. This rule is peculiar to English law. It is contrary to that followed in other countries such as France where the judge is not only entitled to take judicial notice of the foreign law but, at least according to the leading doctrine, is even required to do so in view of the public order character of the rules of conflict of laws…*

[23] By way of concurring commentary in *The "Mercury Bell"*, Mr. Justice Hugesson expressed the following sentiment, at paragraph 18:

> *[18] …The proper expression of the rule, as it seems to me, is that the court will apply only those parts of the* lex fori *which form part of the general law of the country.*

[24] In *The "Mercury Bell"* the Federal Court of Appeal held, supporting the decision on a question of law by the motions judge that, in the absence of proof of Liberian law, the general labour relations laws in Liberia would be considered to be similar to the *Canada Labour Code*. The *Canada Labour Code* was regarded as being a general law of Canada. At the same time, the regulatory regime associated with the Canada Labour Relations Board was considered to not form part of the general law of Canada, in such a manner that it would be reasonable to determine matters as if such a regime existed in Liberia. The Court of Appeal discussed this distinction in paragraph 12 of *The "Mercury Bell",* as follows:

> *[12] The law of Liberia is the law which is applicable here. We have no proof of that law so we must presume that it is similar to our law but only in so far as the substantial provisions thereof are concerned. Looking at the* Canada Labour Code*, it seems to me that the provisions recognizing the role of labour unions, giving effect to collective agreements and, as interpreted by the courts, recognizing the right of each individual employee to sue for his wages under the agreement…are fundamental and have that potential degree of universality, while the others, namely, those dealing with the role of the Canada Labour Relations Board…are linked to Canadian circumstances and purposes…*

[25] The Tribunal is mindful that, since it is part of the executive function of government, rather than being a component of an independent judiciary, the Tribunal has greater laxity in terms of the evidence that it might consider acceptable to establish a particular fact. This is represented in part by Tribunal Rule 22, previously discussed. The Tribunal also has discretion to seek better evidence from the parties, in circumstances where the Tribunal has concerns about the quality of evidence before it. This is what the Tribunal did in the present case, when requesting further evidence from the parties concerning the laws or regulations of Italy in relation to phytosanitary certificates. Quite apart from its general discretion to so request, such actions are explicitly sanctioned by Tribunal Rule 10, which provides as follows:

> ***10 (1)*** *The Tribunal may draw the attention of a party to any gap in the evidence of its case or any non-compliance with these Rules.*
>
> ***(2)*** *On request, the Tribunal may permit the party to remedy any gap in its evidence or non-compliance on any conditions that the Tribunal considers just, before the end of the proceedings.*

[26] The variation from Rule 10 in the present case is that the parties have been invited to make additional submissions in relation to the laws of Italy concerning phytosanitary certificates, rather than being required to seek permission to explicitly remedy "gaps". By virtue of the Tribunal's invitation, the parties might have reasonably surmised that the Tribunal was concerned about the quality of evidence concerning the phytosanitary requirements of Italian law. Notwithstanding such invitation, the Tribunal is still without evidence as to the specific laws of Italy in relation to phytosanitary certificates generally, and phytosanitary certificates affecting the importation of alfalfa in particular. Based on the decision of the Federal Court of Appeal in *The "Mercury Bell"* and despite any greater laxity accorded to an administrative tribunal in the assessment of evidence, it does not appear reasonable or fair in the present circumstances to view the regulatory regime in Italy as substantially identical to that in Canada, in relation to the importation of alfalfa, in the absence of specific evidence from the Agency as to the legislative particulars associated with the Italian regulatory regime. Furthermore, since the violation under consideration is extraterritorial in nature, involving the alleged contravention of Italian importation requirements, rather than the application of a foreign law to circumstances arising in

Canada, it is all the more important that cogent evidence of the specific foreign laws alleged to have been contravened be before the Tribunal.

[27] The Tribunal has on a previous occasion addressed the evidence that it considers to be necessary to establish a violation of this nature. In the 2004 decision of *Tropical Wholesale v. Canada (Canadian Food Inspection Agency)* (2004), RTA 60121, 2004 CANLII 72450, the Tribunal, per then Chairperson Barton, held that there was an obligation on the part of the Agency to establish the specific laws that were contravened. In *Tropical Wholesale*, a Notice of Violation was issued in which it was alleged that the applicant had contravened section 57 of the *Plant Protection Regulations.* The applicant's employee had been stopped at the U.S. border, whereafter an inspection disclosed a box of curry leaves in the transport, for which there was no phytosanitary certificate. A Notice of Alleged Violation was issued by the U.S. authorities to the driver, which was followed by the Canadian authorities issuing a Notice of Violation to the applicant, the employer of the driver. According to the U.S. form submitted in evidence at the outset of the hearing before the Tribunal, the driver had waived his or her right to a hearing, and had paid a monetary penalty. The Tribunal in *Tropical Wholesale* concluded that evidence of the fact and resolution of the U.S. process in relation to the employee, implicitly or explicitly involving an admission, was not sufficient to establish a violation in relation to the employer. Rather, at page 3 of the decision, the Tribunal held that the absence of evidence from the Agency as to the particulars of the relevant U.S. laws was fatal to its position:

> *Counsel for the Respondent submitted there would have been compliance with U.S. laws if the Applicant had obtained and produced a phytosanitary certificate. However, no U.S. jurisprudence was cited. Further there was no evidence of any U.S. laws in any of the evidence submitted by the Respondent.*
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> *Since there is no evidence as to the specific laws of the United States respecting phytosanitary import requirements for curry leaves exported from Canada, it is not possible to determine whether the legal requirements were met.*
>
> *This being an essential element of the violation, the Respondent has not established, on a balance of probabilities, that the Applicant committed the violation.*
>
> *As a result, it is than not necessary to address the other legal issues on which submissions at the hearing were made*

[28] The Tribunal does not consider that there is any compelling reason to deviate from the position adopted by former Chairperson Barton in the *Tropical Wholesale* case. As administrative tribunals have recently been advised by the Federal Court of Appeal in *Canada (Attorney General) v. Bri-Chem Supply Ltd.,* 2016 FCA 257, while such tribunals are not bound by a formal system of internal precedent, tribunals should follow their own previous decisions unless there are compelling reasons not to. In effect, when a tribunal reverses itself, it does so in a similar fashion to a court reversing its own judicial direction, in the absence of superior judicial or legislative authority to the contrary. As the Federal

Court of Appeal stated in *Bri-Chem* at paragraphs 40 to 42 (per Mr. Justice Stratas, Madame Justice Trudel and Mr. Justice Scott concurring)

> *[40] The starting point for tribunals is that while they should try to follow their earlier decisions, they are not bound by them:* IWA v. Consolidated Bathurst Packaging Ltd*., [1990] 1 S.C.R. 282 at pages 327-28 and 333;* Tremblay v. Quebec (Commission des affairs sociales), *[1992] 1 S.C.R. 952 at pages 974*; Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 at pages 798-799. Further, within limits, it is possible for one tribunal panel to disagree with another and still act reasonably:* Wilson v. Atomic Energy of Canada*, 2016 SCC 29, 399 D.L.R. (4th) 193.*
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> *[41] However, that is only the starting point. Other principles come to bear. To name one, a tribunal is constrained by any rulings and guidance given by courts that govern the facts and issues in the case:* Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, 444 NR 120 at paras. 18-19.*
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> *[42] Another principle is that, in a case like this, Parliament—with a view to furthering efficient and sound management over an area of administration—has passed a law empowering a tribunal to decide certain issues efficiently and once and for all. Certainty, predictability and finality matter. Allowing tribunal panels to disagree with each other without any limitation tears against the need for a good measure of certainty, predictability and finality.*

[29] For a tribunal to be able to justify reversing a previous decision, the Federal Court of Appeal in *Bri-Chem* provides specific guidance. While the guidance is directed to administrators wishing to challenge a tribunal decision, the guidance is also relevant to a tribunal determining in a particular case whether a previous tribunal decision must be, or should be followed. At paragraphs 47 and 51 of *Bri-Chem*, the Federal Court of Appeal provides the following guidance as to when it may be considered that a previous tribunal decision should not be followed:

> *[47] It is uncontroversial that as long as an administrator is acting* bona fide *and in accordance with its legislative mandate, an administrator can assert—where principled and warranted—that an earlier tribunal decision on its facts does not apply in a matter that has different facts. In other words, in pursuit of its legislative mandate, an administrator can sometimes distinguish an earlier tribunal decision on its facts and act accordingly.*
>
> *[…]*
>
> *[51] ….the administrator must be able to identify and articulate with good reasons one or more specific elements in the tribunal's earlier decision that, in the administrator's* bona fide *and informed view, is likely wrong. The flaw must*

> *have significance based on all of the circumstances known to the administrator, including the probable impact of the flaw on future cases and the prejudice that will be caused to the administrator's mandate, the parties it regulates, or both.*

[30] Thus, an administrator, as well as a tribunal itself, can argue or, in the case of a tribunal, determine that a previous tribunal decision does not apply to the facts currently before it. Alternatively, the administrator or the tribunal can argue or, in the case of a tribunal, determine that the tribunal's previous position is wrong. Such an erroneous prior position is presumably based on errors in relation to logic associated with facts or the weighing of same, or in relation to legal principles applied. The Federal Court of Appeal advises that the flaw must "have significance", where "significance" is referenced to prejudicial impacts on future cases, including prejudice to either the regulator's mandate or to the regulated, in what appears to be a more general sense. Such arguments as to prejudicial impact on future cases is in addition to either party having a right to later seek judicial review on matters of law or fact. Given the degree of deference shown by reviewing courts to tribunal decision processes, a party could be well advised to first seek reversal by a tribunal itself.

[31] In the current matter, particularly as referenced to the guidance provided by the Federal Court of Appeal in *Bri-Chem*, the Tribunal does not consider that there is any reasonable basis for it to deviate from the position previously adopted by the Tribunal in *Tropical Wholesale*.

[32] The Tribunal must be mindful that it is not a court and its members do not have the same degree of independence that is associated with members of the judiciary. Everything that the Tribunal does, similar to the actions of any administrative tribunal, could be done within a department of government, where such decisions could be subject to direct review by the independent judiciary. Government has chosen that certain decisions may be subject to review by tribunals that are nominally independent, but which are still accountable to a Minister. In the current review regime, one Tribunal (the Canada Agricultural Review Tribunal) is reviewing the decision of a government Agency (the Canadian Food Inspection Agency). Both the Tribunal and the Agency report to the Minister of Agriculture and Agri-Food.

[33] The current regime is similar to a departmental internal complaints procedure, with the Tribunal being the internal reviewing body, but where there is less perception of bias, due to the reviewing Tribunal being quasi-independent. In addition, there is an actual internal review procedure associated with the present case, found within the Canadian Food Inspection Agency. Mr. Dyck availed himself of such internal review procedure, without success, following which a Notice of Violation was issued against him. The Tribunal has not been provided with information as to the reasoning and evidence in support of the conclusions from the internal review procedure, notwithstanding an assumption that they would likely be supportive of or consistent with the Agency's reasoning. It would have been of benefit to know whether the evidence on the internal review included specific evidence of Italian laws concerning phytosanitary certificates and the importation of alfalfa.

[34] Given the Tribunal's association with the executive role of government, as well as based on its own governing rules, the Tribunal could have requested, for the second time, further particulars from the parties and from the Agency in particular. The Tribunal could have specified that the evidence in relation to Italian law was deficient, and particularized what the Tribunal needed in order to render a decision on the merits. The executive function should, wherever possible, not be impeded by correctible technical deficiencies. Such a view must be balanced against general considerations of fairness in an absolute liability regime, as well as the general cautions by the Federal Court of Appeal in *Doyon* as to the Tribunal being particularly "circumspect" in relation to the evidence of the alleged violation. Mr. Dyck has been waiting since September of 2015, for his objections to be evaluated, in relation to an incident that occurred in March of 2015. The Agency has been accorded an opportunity to supplement its initial evidence in relation to Italian law, and has not effectively done so. The Agency should not be accorded a further opportunity to remedy the evidentiary deficiencies.

[35] Mr. Dyck also alleged that the conduct of the Agency in not issuing a post-dated phytosanitary certificate should be challenged on the basis that it amounted to a "sting operation" (letter of Mr. Dyck, August 11, 2015, particularizing reasons of Request for Review). This line of argument need not be considered further by the Tribunal, having determined that that action of the Agency fails on other grounds. However, the Tribunal wishes to emphasize that an allegation of officially induced error has been recognized in this case as a ground for the admissibility of a Request for Review. The issue is left to be addressed in a subsequent file.

Conclusion

[36] Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal by order, determines, that the Agency has not established, on the balance of probabilities, a principal element of the alleged violation, that being the legal requirement of a phytosanitary certificate by the importing country. The applicant therefore cannot be found to have committed the violation, as set out in Notice of Violation 1516WA0032 dated June 30, 2015**.**

Dated at Ottawa, Ontario, this 27 day of January, 2017.

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Dr. Bruce La Rochelle, Member