Commission de révision agricole du Canada

Canada Agricultural Review Tribunal

Citation: *Lemotomo v. Canada (Canada Border Services Agency),* 2013 CART 30

Date: 20130925
Docket: CART/CRAC-1632

Between:

Ghislain Lemotomo, Applicant

- and -

Canada Border Services Agency, Respondent

[Translation of the official French version]

Before: **Member Bruce La Rochelle**

With: **Ghislain Lemotomo, self-represented; and**
Sylvie Renaud, 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 a Notice of Violation of section 40 of the *Health of Animals Regulations,* alleged by the respondent.

DECISION

[1] Following a review of all submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by Order, determines that the applicant did commit the violation and is liable for payment of $800 to the respondent within thirty (30) days after the day on which this decision is served.

Hearing held in Montreal, Quebec,
On March 8, 2013.

REASONS

Alleged Incident and Legislative Authority

[2] The respondent, the Canada Border Services Agency (Agency), alleges that, on April 16, 2012, at P.-E.-Trudeau International Airport, Montreal, Quebec, the applicant, Ghislain Lemotomo (Mr. Lemotomo) imported an animal by-product, specifically 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" (section 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 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. Lemotomo 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 3961-12-M-0111, dated April 16, 2012, the Agency alleges that, on that date, at P.-E.-Trudeau International Airport, Montreal, Quebec, Mr. Lemotomo "committed a violation, namely: importation of 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* (Act) and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (Regulations). The legislative and regulatory *schema* have been recently particularized in *Mak* v. *Canada (CBSA)*, 2013 CART 11 and *Gebru*, previously cited. The specific items of concern in the current case were pieces of lard and dried pork sausage, imported from France.

[9] The Agency served the Notice of Violation with Penalty personally on Mr. Lemotomo on April 16, 2012. In the Notice of Violation, Mr. Lemotomo is advised that the alleged violation is a serious violation under section 4 of the Regulations, for which the penalty assigned is $800.00.

[10] By letter dated May 15, 2012, and received by the Tribunal by fax the same day, Mr. Lemotomo requested a review by the Tribunal (Request for Review), by way of oral hearing. By way of a telephone conversation with Tribunal staff, Mr. Lemotomo advised that he wished the hearing to be held in French.

[11] By letter to the Tribunal dated and received on May 17, 2012, the Agency submitted its report (Report) to the Tribunal. In this letter, the Agency advised the Tribunal that the Report had been sent to Mr. Lemotomo.

[12] By letter dated May 18, 2012, forwarded to the parties by email and regular mail, Mr. Lemotomo and the Agency were invited to make any additional representations by June 18, 2012. No additional representations were made by either party.

[13] On January 11, 2013, a Notice of Hearing was sent by email and registered mail to Mr. Lomotomo and the Agency. Mr. Lemotomo and the Agency were advised of a hearing location and hearing date in Montreal on March 8, 2013.

[14] The oral hearing was held in Montreal, as scheduled, on March 8, 2013. At the hearing, Mr. Lomotomo denied receiving a copy of the Report. The Tribunal chose to adjourn the hearing, following this disclosure, pending receipt of proof of service of a copy of the Report on Mr. Lemotomo. In order to provide Mr. Lemotomo with an adequate time to respond to the Report, the Tribunal accorded Mr. Lemotomo 15 days from the receipt of the Report to submit a reply to the Tribunal and to the Agency. The Agency was accorded a right of reply within 15 days of the receipt of any response from Mr. Lemotomo.

[15] The Tribunal further noted that, following proof of service of the Report on Mr. Lemotomo and the receipt of any additional submissions, the Tribunal would determine whether it was necessary to reconvene the hearing or whether the Tribunal considered itself to be in a position to render a decision based on the documents filed.

[16] On March 14, 2013, the Agency advised Mr. Lemotomo by email that the Report would be sent to him by registered mail on March 17, 2013. For reasons of confidentiality, the Agency advised Mr. Lemotomo that the Agency chose to send the Report by registered mail, rather than by email. The Report is assumed to have been deposited on March 14, 2013, for registered delivery on March 17, 2013, given that the Agency provided Mr. Lemotomo with a mail confirmation number in its email of March 14, 2013.

[17] On March 18, 2013, Mr. Lemotomo submitted by email to the Tribunal and to the Agency, a document entitled “Summary of Facts” (Lemotomo Summary). While the document was indicated as having been “Signed Mr. Lemotomo Ghislain Arnaud”, the document was in fact unsigned.

[18] On March 21, 2013, the Agency requested that the Tribunal inform the Agency in writing as to the time limit for the Agency to respond to the Lemotomo Summary.

[19] On March 25, 2013, the Tribunal, via email, sent directly to the Agency and to Mr. Lemotomo by presiding Tribunal Member La Rochelle, confirmed what was ordered at the hearing: the Agency was accorded a right of reply within 15 days from the date of receipt of Mr. Lemotomo's submission.

[20] On March 26, 2013, Mr. Lemotomo submitted by email to the Tribunal and to the Agency, a request to submit, as additional evidence, the invoice for the items he had purchased in France. The same day, the Tribunal inquired of the Agency, by email copied to Mr. Lemotomo, as to whether the Agency had any objection to the submission of the invoice as evidence. On April 3, 2013, the Agency advised the Tribunal and Mr. Lemotomo by email that the Agency had no objection to the submission by Mr. Lemotomo of the invoice as additional evidence.

[21] On April 3, 2013, the Agency made additional representations, by faxed correspondence received by the Tribunal on that date, with the Agency specifying thereon that the additional representations had been copied to Mr. Lemotomo.

[22] Mr. Lemotomo did not submit the invoice for the items he had purchased in France, assuming such was relevant in any event, and notwithstanding lack of Agency objection to his request in relation to later submission of same.

Procedural Discussion

Procedural Deficiencies on the Part of the Applicant

(i) Non Compliance With Document Submission Provisions

[23] Following his submission by fax of a Request for Review, Mr. Lemotomo failed to send a copy to the Tribunal by registered mail, as required by subsection 14(3) of the 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. Lemotomo's request for review.

(ii) Lack of Reasons Specified in Request for Review

[24] Mr. Lemotomo's Request for Review contains no specified reasons for the review request, contrary to Rule 34 of the *Tribunal Rules*. Rule 34 reads 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.*

The Tribunal notes that, in the current and 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. In the Tribunal's view, this case exemplifies why the Tribunal has considered it advisable to issue Practice Note #11. Clearly, it is in the public interest, relative to hearing costs and related time and expenditure of resources, that an applicant in a case such as this be compelled to provide substantive reasons at the outset, in relation to his or her request for review.

Procedural Deficiencies on the Part of the Respondent: Lack of Proof of Service of Report

[25] In this case, the Tribunal chose to adjourn the hearing, upon Mr. Lemotomo denying that he had received a copy of the Report, and in the absence of evidence of proof of service by the Agency. The Tribunal is uncertain why the Agency does not, as a matter of course, send its Report to an applicant by registered mail, thereby eliminating any doubt as to whether an applicant has received the Report. In the Tribunal's view, certain resource expenditures in the current case could have been avoided, if the Agency established proof of service of its Report at the outset.

[26] The Tribunal makes reference to section 8 of the Regulations, which addresses the service of documents:

> ***8.*** *(1) Service of any document originating from the Minister, including a notice of violation, on an individual named in the document may be made*
>
> *(a) personally, by leaving a copy of it*
>
> *(i) with the individual at any place, or*
>
> *(ii) if the individual cannot conveniently be found, with someone who appears to be an adult member of the same household at the last known address or usual place of residence of the individual. The day on which the document is left with that person is deemed to be the day on which the document is served; or*

(b) by sending a copy of it by registered mail, courier, fax or other electronic means to the last known address or usual place of residence of the individual.

...

(3) Where a document is sent by fax or by other electronic means, another copy of the document shall be sent by registered mail.

[27] A reading of section 8 of the Regulations discloses that service by ordinary mail is not contemplated. Service by electronic mail (via email scan of the documents, as an example) is contemplated, but must be followed by the sending of the document by registered mail, given that electronic service typically does not involve the ability to readily prove receipt independently, as is the case with registered mail. The Tribunal notes that the Report is a report prepared by the Agency on behalf of the Minister of Agriculture and Agri-Food. Therefore, the Report is a "document originating from the Minister" and, pursuant to section 8 of the Regulations, cannot be effectively served by ordinary mail.

[28] When Mr. Lemotomo denied receiving the Report, there were several procedural options available to the Tribunal. The Tribunal could have concluded that the Agency had effectively submitted no evidence, since the filing of a document without effective service of same on the party affected amounts to a procedural nullity. The Tribunal could have accorded the Agency time to effect proper service. In the event that the Agency had a complete copy of its Report at the hearing, it could personally serve the applicant at that time, whereafter the Tribunal could either proceed with the hearing or, in fairness to the applicant being accorded time to review the Report, adjourn the hearing.

[29] In the current matter, the Tribunal determined that fairness to Mr. Lemotomo required that he be served with the Report and be accorded an opportunity to formally respond. This was so despite the reservations expressed earlier in relation to Mr. Lemotomo's request for review being deficient on several procedural bases.

Evidence and Arguments Before The Tribunal

[30] The evidence and arguments before the Tribunal therefore consist of the following:

(i) The Report submitted May 17, 2012;

(ii) Supplementary Submission from the Agency, dated April 3, 2013;

(iii) Lemotomo Summary dated March 18, 2013.

[31] Given that the adjournment of the hearing occurred following Mr. Lemotomo's denial, at the outset of the hearing, of receipt of the Report, no oral evidence was presented

by either party. The Tribunal considers that is in a position to render a decision based on the documents filed, and that the hearing need not be reconvened.

Evidence

(i) Facts Supported by Evidence

[32] The evidence presented by the parties that was not disputed is as follows:

(a) Mr. Lemotomo, upon his arrival in Canada from France, declared that he was not bringing into Canada meat or meat products. However, at primary inspection, when asked the same questions verbally, Mr. Lemotomo responded that he had yogurt and other items (Report, Tab 1: copy of Declaration Card; Lemotomo Summary, p. 1).

(b) Mr. Lemotomo was referred to secondary inspection. The secondary inspector, following determination of ownership of the luggage, found pieces of lard and dried pork sausage in Mr. Lemotomo's luggage. The inspector determined that importation of these items into Canada was prohibited, in the absence of prescribed documents, such as import certificates or permits. Mr. Lemotomo was not in possession of any such documents (Report, Tab 2: AMPS Official Service Statement, signed by Inspector 17911, dated April 16, 2012. Report, Tab 6: Inspector's Non Compliance Report, undated and unsigned. Report, Tab 7: copy of AIRS Report, in relation to pork from France being a prohibited item).

(c) The yogurt containers were also seized, but were returned to Mr. Lemotomo, after the secondary inspector had consulted with his superior (Lemotomo Summary, p. 2).

(d) The secondary inspector issued a Notice of Violation, which was served on Mr. Lemotomo at that time (Report, Tab 4: copy of Notice of Violation, including executed Proof of Service, dated April 16, 2012. Report, Tab 5: photograph of seized items).

(e) Mr. Lemotomo was advised that the seized items could be destroyed within 48 hours, if corrective actions were not taken by him (Report, Tab 4: copy of Tag for Intercepted Item).

(ii) Facts Not Supported by Evidence

(a) Unsigned and Undated Inspector's Non Compliance Report

[33] Two facts are asserted by the Agency, via the Inspector's Non Compliance Report (Report, Tab 6):

(i) The items were found in several valises, wrapped in paper and in plastic bags.

(ii) The location where the items were detained was "international waste".

The Inspector's Non Compliance Report is neither dated nor signed. The Agency's "Summary of Facts" indicates that the product was destroyed as international waste, and relies on the Inspector's Non Compliance Report in support (Report, p. 11; Report, Tab 6). To the extent the facts asserted in the Inspector's Non Compliance Report are relevant to the Agency's case, the Tribunal considers that the Inspector's Non Compliance Report, being undated and unsigned, both as to the inspector and the inspector's supervisor, is of little probative value. The Tribunal also notes that classifying a seized item as "international waste" on the Inspector's Non Compliance Report does not appear to mean that such product is destroyed forthwith. On the contrary, the traveller is advised, in the Tag for Intercepted Item, that the product will be held for 48 hours, prior to being subject to destruction. How the fact or timing of the destruction of an item may be relevant in the case at hand is not clear, despite being asserted by the Agency. Relevance is similarly unclear in relation to how the prohibited items were wrapped or contained, apart from evidence that they were found in Mr. Lemotomo's luggage.

(b) Unattributed Photograph of Items Seized

[34] The Agency asserts that the inspector took the photograph of the seized items that is included in the Report (Report, p. 11; Report, Tab 5). Nowhere in the documents submitted is there a photographer identification or independent linkage, apart from the Agency's "Summary of Facts", which is not evidence. On the evidence, the photograph could arguably be from a completely different seizure. The lack of nexus between the photograph and the inspector or any other Agency representative associated with this specific case will be discussed, *post*.

(iii) Disputed Facts

[35] The Agency asserts that Mr. Lemotomo was asked whether he had any permit or certificate in relation to the prohibited items, to which Mr. Lemotomo replied in the negative. The Agency relies on the AMPS official service statement, signed by Inspector 17911, dated April 16, 2012 (Report, Tab 2). Mr. Lemotomo denies having been asked whether he had any permit or certificate in relation to the prohibited items (Lemotomo Summary, p. 1).

Arguments of Mr. Lemotomo

[36] The arguments of Mr. Lemotomo are as follows:

(a) It was Mr. Lemotomo's habit to always respond "No" to the questions on the Declaration Card (Lemotomo Summary, p. 1).

(b) One of the primary inspectors circled one of Mr. Lemotomo's responses, may have changed it to "Yes" and then directed him to secondary inspection (Lemotomo Summary, p. 1).

(c) Mr. Lemotomo received a Notice of Violation in relation to the pieces of lard and the dried pork sausage. He received no Notice of Violation in relation to the yogurt containers. Therefore, in Mr. Lemotomo's view, the inspector and the inspector's superior have also committed a violation, in seizing certain items and returning others (Lemotomo Summary, p. 2).

(d) Given all of the circumstances, Mr. Lemotomo considers the decision to be "very severe" towards himself (Lemotomo Summary, p. 2).

Arguments of the Agency

[37] The arguments of the Agency are as follows:

(a) Mr. Lemotomo misunderstands the actions of the primary inspector in relation to the Declaration Card. There is an internal coding system as a means of communication between the primary and secondary inspectors. For example, in relation to a prohibited product declared at primary inspection, a secondary inspector would be advised to seize the product, but would also be informed that it had been declared. In Mr. Lemotomo's case, he did not explicitly declare the meat products, but only the yogourt (Supplementary Submission, p. 4).

(b) Contrary to Mr. Lemotomo's assertion, yogourt is permitted to be imported personally from France. His oral declaration therefore didn't concern any prohibited product (Supplementary Submission, p. 4).

(c) Prior to the secondary inspection, Mr. Lemotomo had two occasions to correctly declare that he was importing meat products: once, when filling out the Declaration Card while on the airplane, and a second time, when at the primary inspection (Supplementary Submission, pp. 2, 5).

(d) Mr. Lemotomo admitted to the Tribunal, in his submission, that he had made a false written declaration (Supplementary Submission, p. 3).

(e) Mr. Lemotomo responded in the affirmative when the secondary inspector asked him if the luggage belonged to him. This shows that Mr. Lemotomo is

both the owner and importer of the luggage in which the animal by-products were found (Report, "Arguments of Respondent", para. 4).

(f) The product labels clearly indicate what they are: dried pork sausages and pieces of lard (Report, "Arguments of Respondent", para. 5).

(g) The secondary inspector relied on his experience and other assistance available to him to determine that the products in question were not admissible to Canada without the required documentation. In this regard, the Automated Import Reference System (AIRS), supports the inspector's determination (Report, "Arguments of Respondent, paras. 6, 7. Report, Tab 7; Extract of AIRS Report.) The secondary inspector also asked Mr. Lemotomo whether he had and permit or certificate in relation to the prohibited item, to which he responded in the negative (Report, "Arguments of Respondent", para. 8. Report, Tab 2: AMPS Official Service Statement, signed by Inspector 17911, dated April 16, 2012.).

(h) All of the elements of the violation have therefore been established. In particular:

- Mr. Lemotomo, the person named in the Notice of Violation, is in fact the person who committed the violation;
- The imported product is an animal by-product, in particular, meat;
- No certificate was presented that would permit the importation of the product and
- Mr. Lemotomo neither declared nor presented the products, notwithstanding being accorded by the Agency opportunities to do so.

(Supplementary Arguments, pp. 3, 4)

(i) The Agency relies on the Tribunal decision in *Castillo* v. *Canada (CBSA)*, 2012 CART 22, as reflecting the elements that the Agency must prove, on the balance of probabilities, as noted above and, in particular, as summarized by the Agency (and as discussed in paragraph 43 of *Castillo*): "That if the person has imported an animal by-product, the Agency has accorded such person a reasonable opportunity to justify such importation, in accordance with Part IV of the *Health of Animals Regulations.*" (Supplementary Arguments, p. 3)

Assessment of the Arguments

Admissions by Applicant and Photographic Evidence

[38] 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. The Agency points out, as part of establishing its case, that Mr. Lemotomo has never contested that the products seized were meat products. However, whether Mr. Lemotomo does not deny or in fact admits that the products seized were meat products is not determinative of the Agency's case, in the absence of other evidence. As the Tribunal held in the case of *Tao v. Canada (CBSA),* 2013 CART 16, at paragraph 33, in part:

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

In the Tribunal's view, such evidence is weaker when it is based on the simple assertion that the applicant did not deny the composition of the product, as is the case herein. That being said, there are circumstances where evidence that initially appears to be weak is strengthened by its association with other circumstances or case facts. The case at hand is one such case, as will be discussed.

[39] The Tribunal has also recently had occasion to assess the strength of photographic evidence, in the cases of *Tao* and *Mak*, both previously cited, as well as in *Yan v. Canada (CBSA),* 2013 CART 26. In *Mak*, the Tribunal found, as a fact, that the goods, as represented in the photograph, were of the nature as alleged by the Agency. In *Tao* and *Yan,* the Tribunal found the photographic evidence to be less persuasive, particularly when coupled with minimal evidence as to actual product contents.

[40] In the current case, the Tribunal is of the view that the photographic evidence is of a persuasive value similar to, if not greater than that found in *Mak*. In the photographic evidence presented in the current case, the packaged sausages are clearly depicted and the contents of the packaging of the lard pieces reads "lardons". However, nowhere in the evidence is there an explicit association with the photographic evidence presented and the specific case at hand. As noted earlier, the Inspector's Non Compliance Report was undated and unsigned, and is, therefore, of little probative value. No mention is made in such report in any event as to the inspector taking the photograph in question. The Tribunal is therefore faced with an issue as to on what basis, if any, may the photographic evidence be taken to be associated with the case at hand.

[41] The Tribunal notes that it was faced with a similar issue in the *Mak* case. In *Mak*, the Tribunal had to decide, based on the submissions, whether the nexus between photographic evidence and the Agency case had been established. The Tribunal (at paragraph 45, part) concluded as follows:

> *[45] …there is no evidence that the photographs submitted in evidence were in fact taken by the inspector. After reviewing the photographs, the Tribunal considers that, on the balance of probabilities, the product contained meat. In addition, the nexus of connection between the photographs and the case at hand is considered to have been established by the early and independent electronic submission to the Tribunal of such photographs by [Agency personnel]… The Tribunal considers it to be highly unlikely that Agency personnel, with such a degree of responsibility, would end up submitting, through oversight, photographs relating to an entirely different case.*

[42] In the current case, similar to *Mak*, the Tribunal concludes, based on considering all the circumstances, that a nexus exists between the photographic evidence submitted and the facts of the current case otherwise established. The Tribunal so concludes, based on the fact that Mr. Lemotomo has never challenged the photographic representation as being that of the goods seized and, further, has admitted that goods of the nature in the photograph were in fact the goods that were seized from him. The Tribunal considers that such lack of challenge by Mr. Lemotomo is an example of how, in the larger context of other, independently-established evidence, such inaction or lack of challenge by an applicant may be considered to be supportive of the Agency's position.

[43] The Tribunal adopts this position out of a sense of fairness to the Agency, which had the inspector present at the oral hearing, ready to testify, but who was not accorded an opportunity to do so, resulting from the adjournment of the hearing. While the adjournment of the hearing was due to Agency service deficiencies—specifically, not being able to provide proof of service of the Report on Mr. Lemotomo—the Tribunal nonetheless is of the opinion that some reasonable inference should be made, short of making a request from the Agency for further evidence. If the case had been based on written submissions at the outset, rather than being written submissions largely as directed by the Tribunal, the conclusion might well have been different. The Tribunal remains mindful of the constraints on its role, as enunciated by the Federal Court of Appeal in *Doyon v. Attorney General of Canada*, 2009 FCA 152, at paragraph 28:

> *[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.*

[44] In view of the foregoing, the Tribunal therefore holds that, based on the photographic evidence presented, the products contained meat or meat by-products.

Whether Mr. Lemotomo was Accorded a Reasonable Opportunity to Raise Any Defences Available to Him

[45] The Tribunal holds that, under the circumstances, Mr. Lemotomo was accorded a reasonable opportunity to raise any defences available to him. With respect to Mr. Lemotomo's specific assertion that he was not asked whether he had any permits or certificates, the Tribunal holds that, based on a review of all of the case circumstances, it is not reasonable to conclude that such permits or certificates either existed or were available to be presented. In this regard, the Tribunal adopts the reasoning in *Krasnobryzhyy v. Canada (CBSA),* 2012 CART 11, as found in paragraph 35 of that decision (part):

> *[35] …Krasnobryzhyy's conduct by marking "Non" on his E311 Declaration Card and by failing to declare the dry sausage to the Agency at any time before Inspector 17739 found it in his luggage during secondary inspection, is sufficient to prove that he 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, even if as Krasnobryzhyy testified, no Agency officer actually directly asked him for certificates or permits that would have allowed entry of the meat product into Canada. The evidence presented by both parties does not support any finding by the Tribunal that Krasnobryzhyy actually had such a permit or certificate in his possession…*

The Tribunal notes that the reasoning in *Krasnobryzhyy* was also applied in *Yan*, previously cited, at paragraphs 57 and 58 of the latter decision.

Conclusions

[46] Based on the foregoing analysis, the Tribunal is in agreement with the Agency in relation to the establishment of its case and its rebuttal of Mr. Lemotomo's arguments. Had Mr. Lemotomo declared explicitly at the primary inspection that he had meat products in his luggage, the products would have been seized, though without Mr. Lemotomo receiving a Notice of Violation, based on the declaration having been made prior to importation into Canada occurring. Because Mr. Lemotomo only declared the yogourt, where importation was permitted, and falsely declared in writing that he was not importing meat or meat by-products, the Tribunal finds that Mr. Lemotomo committed the violation, as alleged by the Agency.

[47] The Tribunal, therefore finds, following a review of all submissions of the parties, that Mr. Lemotomo 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.

[48] The Tribunal wishes to inform Mr. Lemotomo that this is not a criminal or a federal offence but a monetary violation, and that he has the right to apply after 5 years to have the notation of this violation removed from the Minister's records, in accordance with subsection 23(1) of the 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*

(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, Ontario, this 25th day of September, 2013.

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Dr. Bruce La Rochelle, Member