Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Farzad v. Canada (Canada Border Services Agency)*, 2013 CART 33

Date: 20131009
Docket: CART/CRAC-1648

Between:

Bashir Farzad, Applicant

- and -

Canada Border Services Agency, Respondent

Before: **Member Bruce La Rochelle**

With: **Bashir Farzad, self-represented; and**
Melanie A. Charbonneau, representative for the Agency

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of section 39 of the *Plant Protection 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, as set out in Notice of Violation YYZ4971-0485, dated June 6, 2012, 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, ON,
On Friday, February 22, 2013.

REASONS

Alleged Incident and Legislative Authority

[2] This case is about two apples, allegedly imported into Canada from Afghanistan. The respondent, the Canada Border Services Agency (Agency), alleges that, on June 6, 2012, at Lester B. Pearson International Airport, Toronto, Ontario, the applicant, Bashir Farzad (Mr. Farzad) "fail to declare apples" (*sic*), contrary to section 39 of the *Plant Protection Regulations* (SOR/95-212, "Plant Protection Regulations"). That section reads as follows, in part:

> **39.** *Every person shall, at the time of importation into Canada of any thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest, declare that thing to an inspector or customs officer at a place of entry…*

[3] "Pest" is defined in section 3 of the *Plant Protection Act* (S.C. 1990, c. 22, "Plant Protection Act") is defined to mean

> **…***any thing that is injurious or potentially injurious, whether directly or indirectly, to plants or to products or by-products of plants, and includes any plant prescribed as a pest;*

[4] With respect to the importation of apples from Afghanistan being specifically prohibited, the basic regulatory regime is found in section 29 of the *Plant Protection Regulations,* which reads, in part, as follows:

> ***29.*** *(1)…no person shall import into Canada any thing that is a pest, is or could be Infested or constitutes or could constitute a biological obstacle to the control of a pest, unless the person has obtained and furnished to an inspector a valid permit number and, as applicable, a foreign Phytosanitary Certificate or a foreign Phytosanitary Certificate for Re-export*
>
> …
>
> *(2) Subject to subsections (3) and (4), a person may import a thing referred to in subsection (1) without a permit where the Minister determines, on the basis of a pest risk assessment,*
>
> *(a) that the thing is not a pest, is not or is not suspected of being infested or does not or could not constitute a biological obstacle to the control of a pest, and that the thing originates from an area free from pests listed in the List of Pests Regulated by Canada, published by the Agency, as amended from time to time; or*

(b) where the thing is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest, that the thing has been treated or processed in the country or place of origin or reshipment in a manner that eliminates any pest or biological obstacle or results in any pest or biological obstacle being non-viable.

(3) Where a thing originates from an area referred to in paragraph (2)(a), a person who imports the thing without a permit shall furnish to an inspector a document that attests to the origin of the thing.

(4) Where a permit is not required pursuant to paragraph (2)(b), the person shall, before importation, demonstrate to the Minister or an inspector that the treatment or process of the thing has

(a) eradicated any pest or biological obstacle to the control of a pest; or

(b) resulted in any pest or biological obstacle to the control of a pest being non-viable.

(5) Where a person referred to in subsection (4) does not demonstrate before importation that the treatment or process has attained a result referred to in that subsection, the person shall comply with subsection (1).

(6) Any thing referred to in subsection (2) shall be packaged, moved, handled, controlled and used in a manner that ensures that the thing does not become a pest, infested or a biological obstacle to the control of a pest.

(7) A person may import a thing referred to in subsection (1) without a foreign Phytosanitary Certificate or foreign Phytosanitary Certificate for Re-export where the Minister determines, on the basis of a pest risk assessment, that the thing is not a pest, is not or is not suspected of being infested or does not constitute or could not constitute a biological obstacle to the control of a pest.

[5] The general regulatory regime is that of prohibiting the entry into Canada of foreign plants, which would include apples, unless it can be demonstrated that they do not pose a threat of pest infestation to existing Canadian plants. From this perspective of plant safety and, ultimately, public safety in Canada, comes the general requirement that an importer be in possession of either an importation certificate or be in a position to demonstrate an inspector that the treatment process associated with the plant is such that the risk of pestilence is eliminated. In addition, the Minister may independently determine that a particular plant item is either not a pest or poses no risk of pestilence otherwise.

[6] The Tribunal must determine whether the Agency has established all the elements required to support the Notice of Violation and, if Mr. Farzad did import apples into

Canada, whether he fails to meet the requirements that would have permitted such importation.

Procedural History

[7] In Notice of Violation YYZ4971-0485, dated June 6, 2012, the Agency alleges that, on that date, at Lester B. Pearson International Airport, Toronto, Ontario, Mr. Farzad "committed a violation, namely, fail [*sic*] to declare apples", contrary to section 39 of the *Plant Protect Regulations.* Such action is a violation under subsection 7(1)(*a*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (S.C. 1995, c. 40; "the Act") and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187; "the Regulations").

[8] Subsection 7(1)(*a*) of the Act reads as follows:

> **7.** *(1) Every person who*
>
> *(a) contravenes any provision of an agri-food Act or of a regulation made under an agri-food Act…*
>
> …
>
> *the contravention of which, or the refusal or neglect of which, is designated to be a violation by a regulation made under paragraph 4(1)(*a*) commits a violation and is liable to a warning or to a penalty in accordance with this Act*

[9] Section 2 of the Regulations reads, in part, as follows:

> ***2.*** *The contravention of a provision of the* Health of Animals Act *or the* Plant Protection Act *or of a regulation made under these Acts…is a violation that may be proceeded with in accordance with the Act*

[10] The Agency served the Notice of Violation with Penalty personally on Mr. Farzad on June 6, 2012. In the Notice of Violation, Mr. Farzad is advised that the alleged violation is a serious violation under section 4 of the Regulations for which the penalty assigned is $800.00. Section 4 of the Regulations reads as follows:

> ***4.*** *The classification of a violation as a minor, serious or very serious violation of a provision set out in column 1 of an item of Schedule 1 is as set out in column 3 of that item.*

[11] The specific prohibition is found as Item 28 of Division 4 ("*Plant Protection Regulations*") of Schedule 1, Part 2 ("Plant Protection Act and Regulations Under the Plant Protection Act"). The Tribunal notes that the columnar section reference in Division 4, in the English version of the legislation only, is wrongly titled "*Plant Protection Act*". Item 28

references section 39 of the *Plant Protection Regulations* (erroneously described in Division 4 as "*Plant Protection Act*"), and describes the violation as "Fail to declare as prescribed". The violation as described is categorized as "serious".

[12] By letter dated July 5, 2012, sent by registered mail on July 5, 2012, and received by the Tribunal on July 9, 2012, Mr. Farzad requested a review by the Tribunal (Request for Review). Mr. Farzad did not advise at that time as to whether he wished to have an oral hearing and, if so, the preferred language of hearing.

[13] By letter from the Tribunal dated July 11, 2012, sent by ordinary mail to Mr. Farzad and the Agency, the Agency was advised that its Report was required to be forwarded to the Tribunal and to Mr. Farzad by July 26, 2012. Mr. Farzad was also asked to provide a telephone number and/or email address for contact purposes, as well as to advise the Tribunal whether he wished to proceed by oral hearing and his preferred language for the hearing.

[14] By email dated July 17, 2012, and letter of the same date as a scanned attachment therewith, the Agency advised the Tribunal that it had only received the Tribunal's letter of July 11, 2012, on July 17, 2012, due to its transmission by ordinary mail. Since the timing of the Agency's response, according to the *Rules of the Review Tribunal (Agriculture and Agri-Food)* (SOR/99-451, "Tribunal Rules") was to be fifteen days from the date of receipt of the request for review, the Agency advised that Tribunal that the date for the Agency's Report should be considered to be August 1, 2012.

[15] On July 23, 2012, the Tribunal advised the Agency by email that Mr. Farzad wished to proceed by way of an oral hearing, in English.

[16] On July 25, 2012, the Tribunal advised the Agency by email and regular mail that it agreed with the Agency's calculation of the date for receipt of the Agency's Report.

[17] On August 1, 2012, the Agency submitted its Report to the Tribunal, advising that the Report had also been sent to Mr. Farzad, by ordinary mail.

[18] On August 1, 2012, via Melanie Charbonneau, Senior Program Advisor and Agency representative in the case under consideration (Ms. Charbonneau), sent to the Tribunal, via email scan, a colour photograph of the seized apples. The copy of the photograph in the Report was in black and white.

[19] On August 2, 2012, the Tribunal advised the Agency by email scan and regular mail, and Mr. Farzad by regular mail only (Mr. Farzad having advised the Tribunal that he had no email address) as to the receipt by the Tribunal of the Report. The parties were advised that any additional representations should be made on or before September 3, 2012. No further representations were made by either party, prior to the oral hearing.

[20] On January 9, 2013, the parties were advised by the Tribunal, by registered mail, that the hearing had been scheduled for the morning of February 22, 2013, in Toronto, Ontario.

[21] The hearing was held on February 22, 2013, as scheduled. At the commencement of the hearing, Mr. Farzad denied receiving a copy of the Report, and the Agency was not able to provide proof of service of the Report. The hearing continued, with Mr. Farzad's consent, subject to certain requests made by the Tribunal of the Agency, to be discussed.

[22] Following the hearing, the Tribunal, by letter to the Agency dated February 28, 2013, confirmed in writing requests for further information made by the Tribunal at the time of the hearing. The particulars requested were: (a) proof of receipt by Mr. Farzad of the Report, post-hearing, with a right of reply; (b) particulars of the origins of the specific violation wording; and (c) particulars of the reason why a case involving two apples was before the Tribunal and why a Notice of Violation with Warning, as opposed to Penalty, was not issued. The letter was sent via email to the Agency and by registered mail to Mr. Farzad, based on Mr. Farzad having advised that he had no email address.

[23] On March 5, 2013, the Agency confirmed with the Tribunal by email that Mr. Farzad had been served with the Report, by courier, on March 4, 2013. No further submissions were made by Mr. Farzad, despite him having been provided by the Tribunal with an opportunity to do so.

[24] By letter dated and received March 14, 2013, the Agency provided a response, including supporting documentation, to the Tribunal's requests for further information. On March 15, 2013, the Tribunal, by email message to the Agency, requested proof of service on Mr. Farzad of the Agency's response. On March 15, 2013, the Agency, by email message to the Tribunal, advised that a copy of the Agency's response had been sent to Mr. Farzad by regular mail and, as a consequence, the Agency was not in a position to provide proof of service.

Procedural Deficiencies on the Part of the Applicant

(i) Non Compliance With Document Submission Provisions

[25] None of the documents forwarded to the Tribunal by Mr. Farzad were sent in duplicate, as required by Rule 8 of the Tribunal Rules. In addition, Mr. Farzad did not provide either telephone or email contact information. 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. Farzad's Request for Review. Mr. Farzad later provided a telephone number to the Tribunal, while also advising that he had no email address.

(ii) No Valid Defences Specified in Request for Review

[26] Mr. Farzad's Request for Review contains reasons for review that do not provide defences at the outset. Rule 34 of the *Tribunal Rules* provides as follows:

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

[27] Mr. Farzad's Request for Review is based on two concerns: (a) he did not know that the importation of apples, however few in number, was prohibited; and (b) the $800 fine is too much for him to pay. In particular, Mr. Farzad stated as follows (reproduced *verbatim*):

> …
>
> *On June 6, 2012, I just returned from Afghanistan and I had a few apples with me. Before I enterned the Airport of Canada, I have eaten some and left over were only two small apple in my big; and I really did not know wether it's against our Agricultural act to have only two small apples. Any way I appreciate your attention into this matter, because $800.00 is way above my buget to pay. Please help me in this satuation.*
>
> …

[28] Given the provisions of section 18(1)(*b*) of the Act, ignorance of the laws in relation to agricultural product importation is not a valid defence. Specifying such lack of knowledge in the Notice of Violation should generally provide no basis for the Notice of Violation to be reviewed. The provisions of section 18(1)(*b*) of the Act are as follows:

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

Furthermore, while not raised by Mr. Farzad, pursuant to section 18(1)(*a*), due diligence is also not a defence:

> **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…*

[29] The Tribunal also has no jurisdiction to reduce a penalty amount, based on considerations of hardship, however strongly particularized, which is not the case here.

Specifying grounds for review that are not in any way recognized should be regarded, in most cases, as having specified no grounds at all.

[30] The Tribunal notes that, in the current and in a number of previous cases, an applicant, at the time of submission of the Request for Review, has not provided reasons, or any reasons that would accord a justification in accordance with section 18(2) of the Act, the provisions of which are as follows:

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

Such common law defences are primarily associated with impairment of volition, such as insanity, automatism, duress, coercion and necessity. The Tribunal has discussed these defences further in *Ziha v. Canada (CBSA)*, 2013 CART 13, at paragraphs 29 to 32 therein.

[31] In its discretion, in many cases involving the submission of no reasons or statutorily unrecognized reasons in support of a Request for Review, the Tribunal has nonetheless proceeded with the Request for Review, requiring the Agency to submit a report, to which an applicant is invited to respond. 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 recognized by section 18 of the Act and 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. Implicit in such requirement is that the reasons specified not be specious at the outset. The provision of specious reasons is the equivalent to providing no reasons at all.

[32] 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, at the outset, substantive reasons not otherwise prohibited by section 18 of the Act.

Procedural Deficiencies on the Part of the Respondent

(i) Lack of Proof of Service of Agency Report

[33] In this case, Mr. Farzad filed his Request for Review with a different return address from that on the Notice of Violation. It became unclear at the hearing as to whether he had received the Agency Report. The Agency, having sent the report by regular mail, was unable

to prove service of the Report at either address. With Mr. Farzad's consent, the Tribunal chose to proceed with the hearing, with Mr. Farzad reviewing a copy of the Report at the hearing. The Report that was available for Mr. Farzad to review at the hearing was a copy of the Report contents, without the supporting, tabbed exhibits. Accordingly, the Tribunal required that the Agency submit to Mr. Farzad, with proof of service to the Tribunal, a fully tabbed report, whereafter Mr. Farzad was accorded fifteen days from the date of receipt of the Report to submit any additional representations. As has been noted, the Agency provided proof of service on Mr. Farzad of a fully tabbed Report, but Mr. Farzad chose not to make any further submissions.

(ii) Wording of the Notice of Violation

[34] The violation that Mr. Farzad is alleged to have committed is "fail to declare apples" (*sic)* contrary to section 39 of the *Plant Protection Regulations*. That section reads as follows, in part:

> **39.** *Every person shall, at the time of importation into Canada of any thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest, declare that thing to an inspector or customs officer at a place of entry…*

[35] The actual violation wording is "fail to declare apples". The wording could be more precise in terms of the section wording, such as "failure to declare a thing that is a pest, or could be infested or constitutes or could constitute a biological obstacle to the control of a pest, to wit, apples". In addition, the violation wording could be challenged on the basis that apples generally are not considered to be a pest, but rather apples in particular circumstances, or from particular locales, or in the absence of specific permits or ministerial determination, as has been discussed in paragraphs 4 and 5, *ante*.

[36] In support of the wording used in the Notice of Violation, the Agency produced a document "FPA – Violation Wording for Notice of Violation with Penalty Wording", which was entered as Exhibit 1, being the sole exhibit introduced at the hearing. In this document, the suggested violation wording is "fail to declare (name of thing) as prescribed". Based on testimony from the Agency Inspector, the source of this document appears to be from Standard Operating Procedures of the Canadian Food Inspection Agency (CFIA), regarded as a "legacy document", and where this Standard Operating Procedure was adopted by the Canada Border Services Agency (CBSA), upon its establishment and assumption of responsibilities previously undertaken by the CFIA.

[37] The purpose of filing Exhibit 1, according to the Agency representative, was to demonstrate to the Tribunal, and as intended to be complemented by inspector testimony that, in using the term "fail to declare apples", the inspector was complying with well-established standard operating procedures. It was contended that such compliance with standard operating procedures demonstrated an intention to comply with the wording of section 39 of the *Plant Protection Regulations*, even if the wording of section 39 was not

explicitly contained in the Notice of Violation. The Agency advised that the issue had arisen in previous cases before the Tribunal, though the Agency representative was not able to cite specific case precedents, and also questioned whether it was a valid issue in any event. In the past, according to Ms. Charbonneau, the Agency had been able to cure any perceived defect in the violation description through corollary testimony by the inspector. The Agency proposed to similarly cure any perceived defect in the case at hand, by way of testimony from the secondary inspector.

[38] The inspector testified that the wording used in the Notice of Violation was adopted from Exhibit 1. The Tribunal is satisfied that the nature of the violation is sufficiently particularized using the wording of Exhibit 1. The Tribunal would also be prepared to hold that the wording used in the Notice of Violation involves sufficient particularization of the violation in any event. The violation is the failure to declare anything that is or could be considered to be a pest, in the absence of an import permit or equivalent authorization.

[39] At the hearing, the Agency representative was uncertain as to the source of the "Violation Wording" document and, further to the Tribunal's request, agreed to provide post-hearing evidence as to its source. In its Supplementary Submission, the Agency included a copy of the Agency document *Agriculture and Agri-food Administrative Monetary Penalty (AA AMPs) Travellers Standard Operating Procedures*, in which the specific violation wording page is included. The Agency further asserted that the *Travellers Standard Operating Procedures* document was prepared in consultation with the CFIA.

[40] Under the circumstances of the particular case before the Tribunal, the Tribunal holds that the wording "fail to declare apples" in the Notice of Violation is an adequate description of the violation, as referenced to section 39 of the *Plant Protection Regulations*. The Tribunal notes that it was faced with similar Notice of Violation wording *Boukadida v. Canada (CBSA)*, 2010 CART 9, where the violation wording "failure to declare an apple", without further specifics, was not considered to be objectionable.

Evidence and Arguments Before The Tribunal

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

(i) The Report submitted by the Agency on August 1, 2012;

(ii) The Supplementary Submission by the Agency of March 14, 2013, including annexes;

(iii) The "FPA – Violation Wording for Notice of Violation with Penalty Warning" form, submitted as Exhibit 1 at the hearing;

(iv) The oral testimony by Agency personnel and arguments by Ms. Charbonneau, as the Agency's representative, made at the hearing of February 22, 2013;

(v) The oral testimony of Mr. Farzad, made at the hearing of February 22, 2013; and

(vi) The Request for Review submitted by Mr. Farzad on July 5, 2012.

Evidence

(i) Facts Alleged, Supported by Evidence

[42] Facts alleged by the Agency, supported by evidence and not disputed by Mr. Farzad, are as follows:

(a) Mr. Farzad, upon his arrival at the Lester B. Pearson International Airport in Toronto, signed a Canada Border E311 Declaration Card (Declaration Card) in which he replied in the negative as to whether he was bringing any "fruits" into Canada (Report, Tab 1, copy of the Declaration Card).

(b) For unspecified reasons, Mr. Farzad was referred to secondary inspection, where, after his luggage was searched, he was found to be in possession of two apples (Report, Tab 4 – Copy of Inspector's Non Compliance Report for Travellers at Point of Entry).

(c) The seized items were disposed of as international waste (Report, Tab 4 – Copy of Inspector's Non Compliance Report for Travellers at Point of Entry).

(ii) Facts Alleged, Not Supported by Evidence

(a) Country of Origin of Seized Items

[43] The Agency states that the apples originated from the United Arab Emirates (UAE). The basis of such statement is asserted to be the CBSA Seizure Receipt, a photocopy of which is asserted to be in Tab 1 of the Report. There is no document in Tab 1 referencing the UAE, either in terms of the flight taken by Mr. Farzad or as referenced to the country of origin of the apples. In his Request for Review, Mr. Farzad specifies that he was returning from Afghanistan. The Agency also supports its assertion as to the country of origin by way of reference to the Inspector's Non Compliance Report for Travellers at Point of Entry, contained in Tab 4 of the Report. There remains no independent evidence of the country of origin. All that is found in the Non Compliance Report is a statement from the inspector that "The client had two apples from the UAE". One way to establish the country of origin would have been to photocopy Mr. Farzad's boarding pass, but no such photocopy was included in the Report. The Tribunal notes that there is no evidence of supervisory review of the Non Compliance Report of the inspector, which might have assisted in identifying and addressing report deficiencies at an earlier stage; the space for supervisor identification and signature is blank.

(b) Lack of Prescribed Phytosanitary Certificate or Other Certificate Permitting Importation

[44] The Agency asserts that "The inspector subsequently determined that Mr. Farzad was not in the possession of the prescribed phytosanitary certificate or other certificates for the importation of plant products from the UAE". (Report, p. 14, "Statement of Facts") In support of this statement, the Agency relies on the Inspector's Non Compliance Report for Travellers at Point of Entry, contained in Tab 4 of the Report. There is no such statement in the Inspector's Non Compliance Report.

(c) Inspector Photograph of Seized Items

[45] The Agency asserts that the inspector at secondary inspection took a photograph of the seized apples, prior to disposing of same as international waste. Reliance for both of these statements is based on Tab 5 of the Report, which is the photograph purported to have been taken by the inspector. There is nothing in Tab 5 as to the disposition of the apples. There is a statement, "Destroyed as International Waste" in the Inspector's Non Compliance Report for Travellers at Point of Entry, found in Tab 4, found in the section of the Non Compliance Report in relation to the location of the product being detained.

Arguments of Mr. Farzad

[46] Mr. Farzad's arguments have been previously detailed, in paragraph 27 herein. As was previously noted, his argument that he didn't know about the prohibition of the importation of apples is not a recognized defence, in accordance with the provisions of section 18(1)(*b*) of the Act. This is his only argument. His other point is that the penalty amount is too high. The Tribunal has no jurisdiction to adjust penalty amounts in a case of this nature. It remains, therefore, to assess whether the Agency has established its case, on the balance of probabilities.

Arguments of The Agency

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

(a) In his Request for Review, Mr. Farzad admits to having committed the violation (Report, p. 16, "Respondent's Arguments, paragraph 4).

(b) The CFIA's Automated Import Reference System (AIRS) confirms that personal use importation of apples from the UAE is prohibited. (Report, p. 14, "Statement of Facts"; Tab 2, copy of AIRS recommendation)

(c) In the Agency's submission, all of the elements of the violation are present: Mr. Farzad is the person named in the Notice of Violation and he is also the person who committed the violation. The violation is that of importing a prohibited plant product from the UAE.

Assessment of the Arguments

General

[48] 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.*

Photographic Evidence in Support of Arguments

[49] In the photographic evidence presented in the current case, two apples are clearly depicted (Report, Tab 5). In addition, as has been noted, the Agency supplemented the Report photograph, which was in black and white, with a colour version of the same photograph, forwarded separately. The Tribunal takes the position, similar to that adopted in *Mak v. Canada (CBSA),* 2013 CART 11 in relation to deficiencies in the connection between the photograph and the case at hand; specifically, that there is no evidence as to who actually took the photograph, and therefore no evidence as to its association with the current case. Such deficiencies are considered to have been addressed through the separate submission of such photograph by responsible Agency personnel. As the Tribunal noted at paragraph 45 of *Mak*:

> *[45] …there is no evidence that the photographs submitted in evidence were in fact taken by the inspector. …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.*

Admissions by Applicant

[50] The Tribunal has taken the position in several recent cases that an oral admission by an applicant should be accorded relatively little weight, particularly when the applicant has not been cautioned at the time of the discovery of facts giving rise to the Notice of Violation that statements made may be used against the applicant. The sentiment expressed by the Tribunal in this regard has generally been with reference to statements made by an applicant at the time of the inspection discovery. See, as examples, *Tao v. Canada (CBSA),* 2013 CART 13 and *Yan v. Canada (CBSA),* 2013 CART 26. In the case under consideration, the admission comes at a different time and in a different form than that found in either the *Tao* or the *Yan* case. Mr. Farzad, in his Request for Review, stated as follows (reproduced *verbatim*):

…

> *On June 6, 2012 I had just returned from Afghanistan and I had a few apples with me. Before I enterned the Airport of Canada I have eaten some and left over were only two small apple in my big…*

[51] Following these written admissions, Mr. Farzad then raises an invalid defence of lack of knowledge of the law, plus expresses a concern about the amount of the penalty. The Tribunal regards this written admission as amounting to a form of what is sometimes referred to in criminal law as a "guilty, with an explanation" plea. Such a plea is not recognized in criminal law; the permissible plea is generally either guilty or not guilty. See, as an illustration of this point, *R. v. Lambrecht* 2008 CanLII 14892 (ON SC), at paragraph 33. In the case at hand, there is an "admission, with an explanation" by Mr. Farzad, which the Tribunal considers to amount to an admission to having committed the violation, since the explanation given is not a defence accorded statutory recognition. The Tribunal considers such admission to be substantially different from an admission at the time of inspection discovery, particularly in response to inspector questions, where the traveller has not first been cautioned. The Tribunal has also noted, in paragraphs 26 to 30 herein, that a case of this nature would not likely be before the Tribunal, in terms of current procedures, based on considerations at the outset of admissibility of the Request for Review.

Place of Origin of The Apples

[52] There is a remaining issue as to whether the Agency's identification of the UAE as the place of origin of the apples, in contrast to Mr. Farzad's assertion that they came from Afghanistan, makes any difference. In the Tribunal's view, the absence of specific evidence of prohibited importation from Afghanistan is not fatal to the Agency's case. There is no basis for assuming that concerns about pestilence importation are any less grave in relation to Afghanistan, as they are in relation to the UAE. The specific pestilence of concern, according to the testimony of the secondary inspector, is apple maggot. No particulars of current infestation levels or the risk of increased infestation levels from specific countries were provided by the Agency. That being said, the Tribunal is satisfied, based on a review of the evidence, that apples from either Afghanistan or the UAE are

subject to personal importation prohibitions, and thus a failure to declare them would result in a violation of section 39 of the Regulations.

Other Remarks

Notice of Violation With Warning Versus Notice of Violation With Penalty

[53] During the course of the hearing, the Tribunal questioned why, given that the facts of the violation involved two apples, the Agency would have not issued a Notice of Violation with a Warning, rather than a Notice of Violation with a Penalty. The Tribunal accepts that it has no jurisdiction to interfere with the discretion exercised by officers of the Agency: see, for example, *Zhou v. Canada (CBSA),* 2010 CART 20, at paragraph 28. The position of the Tribunal involves an assumption that such discretion is in fact exercised and further, that such discretion is not exercised for an improper purpose. The exercise of discretion for an improper purpose is to be distinguished from aggressive or hostile behaviours of Agency personnel, where the Agency has its own procedures for reviewing traveller complaints. The Tribunal does not have the jurisdiction to cancel a Notice of Violation for reasons solely related to the conduct of Agency personnel; see *Boukadida* (previously cited) at paragraphs 22 and 23. The "improper purpose" consideration was canvassed by the Supreme Court of Canada in *Roncarelli v. Duplessis* [1959] S.C.R. 121, at p. 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…*

The reasoning of the Supreme Court of Canada was recently applied by the Tribunal in the case of *Bougachouch v. Canada (CBSA),* 2013 CART 20, at paragraphs 31 to 34.

[54] At the hearing, the Agency inspector was unable to provide particulars of the circumstances giving rise to his decision to issue a Notice of Violation With Penalty, as opposed to a Notice of Violation With Warning. He acknowledged that his notes in the Inspector's Non Compliance Report could have provided more detail. In the "Remarks" section, the inspector wrote as follows (reproduced *verbatim*):

> *Client made a nil declaration and answered all the questions in the negative. The client had two apples from the UAE. The client chose Option One and will pay in the next 14 days.*

According to the inspector, because Mr. Farzad had advised that he would pay the penalty amount within 14 days, the inspector did not provide the degree of detail as might otherwise be the case. As it turned out, Mr. Farzad changed his mind.

[55] The inspector testified that, based on his experience of over two decades, Notices of Violation With Penalty are issued based on one of three factors: knowledge, action or intent. Intent is referenced to a false statement on the Declaration Card. Since such falsehood will only be discovered at secondary inspection, when a traveller's baggage is opened, the Tribunal questioned whether the issuance of a Notice of Violation With Warning at that point was effectively eliminated as an option. The Agency representative, Ms. Charbonneau, asserted that, in the vast majority of cases, either a verbal or a written warning is given and that reviews of Notice of Violation With Warning were less likely to come before the Tribunal. This contrasts with comparatively recent evidence before the Tribunal, in *Eustergerling v. Canada (CBSA),* 2012 CART 19, at paragraph 17, where the Agency inspector in that case advised the Tribunal that, during her service period of in excess of six years, she had never issued a Notice of Violation With Warning.

[56] By way of analogy to a record of traffic ticket warnings, the Tribunal suggested that a record of Notice of Violation With Warning could be one way to ensure future compliance, given that a Notice of Violation With Penalty would be more readily justified in a subsequent violation situation. Ms. Charbonneau advised that no records of the issuance of Notices of Violation With Warning were kept, at this time. Such information was to be "in the system" only as of 2014. Notwithstanding such absence of records, Ms. Charbonneau stated, in the Agency's Supplementary Submission that (reproduced *verbatim*, including emphasis) "between July-September 2012 (one of CBSA's busiest seasons), the CBSA only issued NOVs <u>with penalty</u> to **3%** of the travelers who were intercepted importing regulated plant or animal products. The remaining **97%** were given either verbal or written warnings."

[57] In the Supplementary Submission, the Agency also submitted that it was not required to establish that a Notice of Violation With Penalty was only issued in exceptional circumstances and, further, that the comparative percentage of notices issued with warning or with penalty was irrelevant to the assessment of the current case. The Tribunal agrees with the Agency submission, to the extent that it may be reasonably assumed that a choice between issuing a Notice of Violation With Warning and a Notice of Violation With Penalty was in fact made. Evidence of the systematic issuance of penalty-based notices only is a separate matter, calling into question whether any discretion was in fact exercised. In the current case, particularly in view of the testimony of the inspector, the Tribunal is satisfied that the penalty versus warning option was considered.

<u>Conclusion</u>

[58] Based on the foregoing analysis, the Tribunal finds that the Agency has proven, on the balance of probabilities, the necessary elements of the case. The Tribunal, therefore finds, following a review of all submissions of the parties, that Mr. Farzad committed the violation, as set out in Notice of Violation YYZ4971-0485, dated June 6. 2012, 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.

[59] The Tribunal wishes to inform Mr. Farzad 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 *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*
>
> *(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 9th day of October, 2013.

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Dr. Bruce La Rochelle, Member