Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Julio Dario Meneses Benitez v. Canada (CBSA), 2012 CART 12

Date: 20120618
CART/CRAC-1547

Between:

Julio Dario Meneses Benitez, Applicant

- and -

Canada Border Services Agency, Respondent

[Translation of the official French version]

Before: **Chairperson Donald Buckingham**

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of section 40 of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

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

The hearing was held in Montreal, QC
April 23, 2012.

REASONS

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that, on June 8, 2010, at Montreal, Quebec, the applicant, Julio Dario Meneses Benitez (Meneses), imported a sandwich with meat into Canada contrary to section 40 of the *Health of Animals Regulations*, without meeting the requirements of Part IV – Importation of Animal By-Products, Animal Pathogens and Other Things – of the *Health of Animals Regulations*.

[3] Pertinent sections of the *Health of Animals Regulations* are set out below:

> ***40.*** *No person shall import into Canada an animal by-product, manure or a thing containing an animal by-product or manure except in accordance with this Part.*
>
> ***41.*** *(1) A person may import into Canada an animal by-product, manure or a thing containing an animal by-product or manure, other than one described in section 45, 46, 47, 47.1, 49, 50, 51, 51.2 or 53, if*
>
> > *(a) the country of origin is the United States and the by-product, manure or thing is not derived from an animal of the subfamily Bovinae or Caprinae;*
> >
> > *(b) the country of origin, or the part of that country, is designated under section 7 as being free of, or as posing a negligible risk for, any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate of origin signed by an official of the government of that country attesting to that origin; or*
> >
> > *(c) by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in a manner that would prevent the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate signed by an official of the government of the country of origin that*

(i) attests that the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in that manner, and

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

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

***41.1** (1) Despite section 41, a person may import into Canada an animal by-product or a thing containing an animal by-product, other than one described in section 45, 46, 47, 47.1, 49, 50, 51, 51.2 or 53, if an inspector has reasonable grounds to believe that the importation of the by-product or thing, by its nature, end use or the manner in which it has been processed, would not, or would not be likely to, result in the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product was derived is susceptible and that can be transmitted by the by-product, and the by-product or thing is not intended for use as animal food or as an ingredient in animal food.*

(2) No person shall, in respect of any animal by-product or thing containing an animal by-product that has been imported in accordance with subsection (1), use or cause it to be used as animal food or as an ingredient in animal food.

[…]

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

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

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

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

[…]

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

(a) the country of origin, or the part of that country, is designated under section 7 as being free of, or as posing a negligible risk for, any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the product was derived is susceptible and that can be transmitted by the product, and the person produces a certificate of origin signed by an official of the government of that country attesting to that origin; and

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

[…]

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

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

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

Procedural history

[5] Notice of Violation 3961-10-M-0282 dated June 8, 2010, alleges that on that date at Pierre-Elliott-Trudeau International Airport, in Montreal, Quebec, Meneses [TRANSLATION] "committed a violation, namely: import an animal by-product, to wit: meat, without meeting the prescribed requirements contrary to section 40 of the *Health of Animals Regulations*," which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[6] The Agency served the Notice of Violation personally on Meneses on June 8, 2010. The Notice of Violation indicates to Meneses that the alleged violation is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which a penalty of $200 was imposed.

[7] By letter dated June 17, 2010 (received by the Tribunal by fax on June 21, 2010), Meneses requested that the Tribunal review the facts of the violation, in accordance with paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. Tribunal staff confirmed with Meneses that he wished to proceed by way of an oral hearing in French, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations.*

[8] On July 21, 2010, the Agency sent its report (Report), concerning the Notice of Violation in question to Meneses and to the Tribunal, the latter receiving it that same day. The Report was sent after the deadline set by the Tribunal. The Tribunal was informed of the parties' mutual consent in respect to the Agency's request for an extension of the submission of the Report and so granted the request. On April 4, 2012, the Agency sent a letter to the Tribunal and Meneses with the "final report" appended.

[9] In a letter dated July 22, 2010, the Tribunal invited Meneses to file any additional submissions in this matter, no later than August 23, 2010. Meneses did not file any additional submissions in response to the Tribunal's invitation.

[10] The hearing was postponed three times since 2010 for various reasons. On March 16, 2012, a fourth notice of hearing was sent to the parties. The hearing was scheduled for April 23, 2012, in Montreal, Quebec. The notes on file confirm that both parties received the Notice of Hearing, indicating the date, time and location of the hearing. On April 19, 2012, the Tribunal received a fourth request for postponement, this time from Meneses. By order issued that same day, the Tribunal denied the last request for postponement on the basis that it had been received late and that a similar request had already been granted in 2011.

[11] As a result, the oral hearing requested by Meneses was held in Montreal, Quebec, on April 23, 2012, at the Courts Administration Service, 30 McGill Street. The Tribunal convened the hearing of this matter at 10:00 a.m. The Agency was represented by Ms. Sylvie Renaud and the Agency's sole witness was present. However, Meneses failed to appear. The Tribunal adjourned until 11:30 a.m. to await the arrival of Meneses, but he never appeared. Satisfied that the Notice of Hearing had been sent to Meneses in accordance with the Tribunal's rules, the Tribunal proceeded with the hearing in the absence of the applicant, pursuant to its authority under section 41 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* SOR/99-451 (Rules).

[12] Before presenting its evidence, the Agency made three preliminary motions. First, the Agency asked that the Tribunal accept as evidence the Agency's "final report," cited in paragraph 8 above. The Agency claimed that the final report contained only grammatical corrections and formatting changes, and contained no changes to the Agency's arguments. That being said, this copy of the report included one additional page, at Tab 8: Standard Annex to the Inspector's Non-Compliance Report entitled "AMPs Official Service Statement" and a few additional comments in the section "Case Summary," particularly on pages 12 and 13. Between the "initial report" and the "final report," there were two types of changes. The additional page at Tab 8, namely the Standard Annex of the Inspector's Non-Compliance Report entitled "AMPs Official Service Statement", is an element of the Agency's evidence and was duly admitted into evidence. However, the new comments in the section "Case Summary," more specifically at pages 12 and 13, are not evidence. Rather, they are comments on the Agency's evidence that can be presented at the hearing, and that are not received through the "final report." Once the Agency sent its Report to the Tribunal and to Meneses, by the deadline set by the Rules, the Agency must wait for the hearing to present submissions and additional arguments.

[13] The second preliminary motion asked that the Tribunal make a correction to the Agency inspector number cited in the Report. The Tribunal, therefore, ordered that the reference on pages 12 and 14 be changed from "Inspector 17898" to "Inspector 17989."

[14] The third preliminary motion asked that the Tribunal hear a witness from the Agency, Inspector 17739, who was not on the premises on the day of the alleged violation, but has general knowledge of customs inspection procedures. The Tribunal granted this motion.

Evidence

[15] Evidence before the Tribunal consists of:

i. written submissions from the Agency (Notice of Violation, Agency Report and additional elements of the "final report" as admitted by the Tribunal);

ii. written submissions from Meneses (submissions contained in his request for review); and

iii. oral testimony given by the Agency's sole witness, Inspector 17739, at the oral hearing.

Neither Meneses nor the Agency's inspectors who were on site at the premises on June 8, 2010, at Pierre-Elliot-Trudeau International Airport in Montreal, Quebec, were present at the hearing to give oral testimony.

[16] The parties agreed to the following fact: Meneses came to Canada on board flight TS 189 from France, landing at Pierre-Elliot-Trudeau International Airport in Montreal, Quebec, on June 8, 2010.

[17] Pertinent evidence presented by the Agency was as follows:

i. Meneses completed and signed a Canada Border Services Agency Declaration Card E311(09) (Declaration Card) dated June 8, 2010. Meneses marked "no" beside the following statement: "I am/we are bringing into Canada: Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects," but following discussions between Meneses and the customs officer who conducted the primary inspection, the word "chips" was written following the word "insects" and the "no" was circled in ink. On the same Declaration Card, in the lower box asking for the "Value of goods — CAN$ purchased or received abroad (including gifts, alcohol & tobacco)," "1 bottle of wine $10 Snack" was written and circled in ink (E311 Customs Declaration Card signed by Meneses at Tab 3 of Agency Report).

ii. At secondary inspection, according to the documents completed by Inspector 17989, the Inspector found a "sandwich with meat" in Meneses' luggage (CBSA Tag for intercepted item BSF 156 at Tab 4 of Agency Report; Inspector's Non-Compliance Report for Travellers at Points of Entry (Non-Compliance Report at Tab 8 of Agency Report).

iii. At secondary inspection, according to the documents completed by Inspector 17989, she noted that the "sandwich with meat" weighed either 300 g (CBSA Tag for intercepted item BSF 156 at Tab 4 of Agency Report), or 200 g (Non-Compliance Report at Table 8 of Agency Report).

iv. In her Non-Compliance Report, Inspector 17989 said that she found the sandwich in Meneses' luggage, among his personal belongings, and that the passenger "declared at Stats that he only had snacks, which he showed to the agent. Pax showed a bag of chips." In her report, Inspector 17989 also noted that because the products were not declared,

they were seized, confiscated and destroyed (Non-Compliance Report at Tab 8 of Agency Report).

v. On the additional page of her Non-Compliance Report of the "Final Report," which the Tribunal ordered be added to the "Initial Report" [see paragraph 12 above], Inspector 17989 noted that she had asked Meneses whether the suitcase containing the sandwich belonged to him and "he/she answered "yes," and whether he/she had a permit or certificate and he/she answered "no". The product was seized and destroyed. (Non-Compliance Report at Tab 8 of Agency Report).

vi. Inspector 17989 took a photograph of the product in question (copy of photo at Tab 7 of the Report). This copy, of poor quality, shows two sandwiches not one, with slices of products that are relatively indiscernible.

vii. The Agency presented as evidence a copy of the Automated Import Reference System (AIRS) of the Canadian Food Inspection Agency (CFIA), which establishes a list of the details of import requirements for "[HS Description: 020312] Meat and Edible Meat Offal; Meat of swine, fresh, chilled or frozen; Fresh or chilled: hams, shoulders and cuts thereof with bone in; [OGD Extension: 505408] Pork, fresh or chilled – bone-in; Shoulders, picnic – bone-in from Europe, France" with the following comment: "Recommendations to CBSA/Documentation and Registration Requirements: Refuse Entry; Importer/Broker Instructions: CONDITIONS OF IMPORT****PERSONAL SHIPMENTS OF MEAT (MAXIMUM 20 KG) ACCOMPANIED BY AN OFFICIAL EXPORT CERTIFICATE ARE TO BE REFERRED TO ONE OF THE THREE CFIA'S IMPORT SERVICE CENTRE" (Tab 2 of Report).

viii. On page 3 of Tab 8 of the "Initial Report," there is a copy of an email dated June 8, 2010, at 3:31 p.m. from Abi-Malhab, Andrea à Diaz de la Serna, Alicia having as its subject "Julio Meneses TS 189" with the following text: "The passenger Meneses, Julio came to my counter at Stats on June 08 2010 coming off the Paris flight TS 189. The passenger was working the flight since he is a flight attendant for Air Transat. Although when at Stats the phone does ring and it is our priority, when there is a passenger at my counter if I have to answer the phone I put my primary questioning on hold, finish my phone call and than continue my primary. There was no exception in Mr. Meneses case. The passenger had answered "No", to the OGD questions but had written snacks. When I asked what the snacks were Mr. Meneses began to take the item out of his bag. The item he showed me was a bag of chips, I confirmed that that was all he had and he stated "Yes". Whish is why I circled the OGD question, to confirm that Mr. Meneses re-confirmed that he had no foods that were prohibited and I wrote what he declared which was the chips. At no time did I answer the phone and simply let the passenger leave."

[18] The only witness at the hearing was Inspector 17739 of the Agency. She told the Tribunal that she had been conducting inspections for 12 years and that she had taken the primary and secondary inspection training. She also said that she was not at work on June 8, 2010. The Agency conducts, on average, roughly 50 secondary inspections a day at Pierre-Elliot-Trudeau International Airport. Passengers referred for secondary inspection are often selected by the primary inspectors, after examining their Declaration Card, regardless of whether they go through the ordinary inspection line or through the "Stats" line, which is the line for diplomats and airline crew. Inspector 17739 also said that during a secondary inspection, the officer checks the passenger's passport and luggage, after asking the three questions regarding luggage. She also told the Tribunal that the primary tool for helping inspectors determine whether a food or agricultural product can enter Canada is the CFIA's AIRS system.

[19] With respect to the Declaration Card in question, Inspector 17739 suggested to the Tribunal that Meneses was a crew member and therefore had to go through the "Stat" primary inspection line. Inspector 17739 told the Tribunal that it may have been the primary inspector who wrote "chips" on the Declaration Card, but not the word "snack," which was probably written by Meneses himself. The inspector closed her testimony by explaining the procedure followed by customs officers for conducting secondary inspection. If an undeclared product is found, the officer asks the passenger to produce an import certificate or permit and if the passenger is unable to do so, the officer issues a notice of violation.

[20] In response to a question by the Tribunal Chairman, Inspector 17739 stated that she did not think it would have been possible for Meneses to have a certificate or permit justifying the importation of a sandwich with meat because that would have been too costly and Meneses would have had to apply for such a document before leaving Canada and would have had to provide a second document from the country in which he purchased the sandwich.

[21] The evidence presented by Meneses consists of the submissions contained in his request for review filed with the Tribunal in June 2010. The evidence he provided is as follows [TRANSLATION]: "To Whom It May Concern, I, Julio Meneses, a flight attendant with Air Transat, duly completed the customs declaration form on my return from a duty flight on June 8, 2010. I declared that I had "Snacks" and that I was not legal because I had bought a bottle of wine in Paris and I didn't have the 48-hour exemption. I checked the box declaring that I exceeded the legal limit allowed by Canadian law. The customs officer asked me what I meant by "SnackM" I told him that I had Chips and a Sandwich in my possession. She wrote down Chips and answered the telephone at the same time, and did not write down anything about the sandwich. I arrived at the search and inspection point, and when the customs officer noticed my Sandwich (it was not concealed at all), she immediately imposed a fine of $200CAD. At no time did I intend to hide my sandwich!!!!!!! I always declare my items and I have been working as a flight attendant for seven years. I believe there was some kind of misunderstanding. I wish to seek your indulgence to request a review of my file in order to have the fine withdrawn, please. You may contact me at any time for more information. Sincerely, Julio Meneses."

Analysis and Applicable Law

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

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

[23] Section 2 of the Act defines "agri-food Act":

> ***2.*** *In this Act*
>
> *"agri-food Act" means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act.*

[24] Pursuant to subsection 4(1) of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health depending on the circumstances:

> **…** *may make regulations:*
>
> *(a) designating as a violation that may be proceeded with in accordance with this Act*
>
> *(i) the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act, […]*

[25] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187), which designates as a violation several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and include a reference to section 40 of the *Health of Animals Regulations*.

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

> *[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude*

useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him - or herself.

[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

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

> [20] *Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation, and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.*

[28] Section 19 of the Act reads as follows:

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

[29] Therefore, it is incumbent on the Agency to prove, on the balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation. In the case of a violation of section 40 of the *Health of Animals Regulations*, the Agency must prove the following:

i. that Meneses is the person who committed the violation;

ii. that Meneses imported an animal by-product, in this case a sandwich with meat, into Canada; and

iii. that if Meneses did in fact have meat products in his possession when he entered into Canada, that Agency officials provided him a reasonable opportunity to Meneses to justify his importation, in accordance with Part IV of the *Health of Animals Regulations*.

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

[31] With respect to element 1, Meneses' identity as the alleged violator is not in dispute.

[32] With respect to element 2, the Tribunal noted that no evidence was provided by the Agency apart from the statements made by Inspector 17989, alleging that there was meat in the sandwich found in Meneses' luggage. "Meat" was mentioned three times in the entire case before the Tribunal: 1) in the Notice of Violation; 2) in the CBSA Tag for intercepted item (BSF 156, Tab 4 of Agency Report); and 3) in the Non-Compliance Report (Tab 8 of Agency Report). Each time, Inspector 17989 was unable to provide adequate reasons justifying her statements that the product in question was in fact meat. The same is true for the documents submitted to the Tribunal. The photo, at Tab 7 of the Report, is of little assistance in determining the composition of the product. The Tribunal also noted that Meneses never referred to a sandwich "with meat" or "with ham", etc. in his request for review submissions. Therefore, on the basis of the oral and written evidence presented, the Tribunal finds as fact that it is impossible to conclude, on the balance of probabilities, that what Meneses imported into Canada on June 8, 2010, was an animal by-product.

[33] The Tribunal is, therefore, of the opinion that the Agency did not prove element 2 of a violation under section 40 of the *Health of Animals Regulations*. The Tribunal, therefore, finds that the applicant did not commit the violation and is not liable to pay the penalty.

[34] However, even if the Tribunal had been convinced that the Agency had established the second element on the balance of probabilities, which is not its conclusion, the Tribunal would have rejected the validity of the Notice of Violation on the grounds that the third element of the alleged violation was also not supported by the evidence, on the balance of probabilities.

[35] In order to prove this third element, it is absolutely essential to demonstrate that there was in fact a violation of section 40 of the *Health of Animals Regulations*. Section 40 reads: "*No person shall import into Canada an animal by-product, manure or a thing containing an animal by-product or manure except in accordance with this Part.*" Moreover, the Minister of Agriculture and Agri-Food, in the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, has found it necessary to designate, in the listing of section 40 of the *Health of Animals Regulations* in Schedule 1, Part I, Division 2 (Violation 79, section 40) of those Regulations, that the violation relates to the: "Import an animal by-product without meeting the prescribed requirements." In both instances—in the *Health of Animals Regulations* themselves and in the listing of the violation under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*—the violation mentions and permits a justification from the alleged offender.

[36] The severity of the AMPs regime noted by the Federal Court of Appeal in *Doyon*, noted above in paragraph 26, requires that this Tribunal be very careful in determining the required elements for any alleged violation it is asked to review. In the case of an alleged violation of section 40 of the *Health of Animals Regulations*, clearly the first two elements already analyzed—the identity of the alleged violator and whether

that person imported an animal by-product—must be established to prove that the violation has occurred. However, a third element is also required to give any reasonable significance to the other words in section 40 of the *Health of Animals Regulations* – "except in accordance with this Part" – or to the wording in the listing of the violation under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* – "without meeting the prescribed requirements."

[37] There can be no doubt that alleged violators of section 40 may defend themselves by adducing evidence proving they met the prescribed requirements permitted under Part IV of the *Health of Animals Regulations*. Moreover, the responsibility and burden for proving that persons have met the prescribed requirements of Part IV falls on the alleged violators and they must take all necessary and reasonable steps to make such a justification known to the Agency. As a general rule, this justification can take one of two forms, either:

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

b. the traveller produces a certificate (s. 41(1)(*b*); s. 41(1)(*c*); s. 43; s. 46), document (s. 52(1)), or permit (s. 52(2)) such that the meat product would be permitted to be imported into Canada under Part IV of the *Health of Animals Regulations* .

[38] In the present case, the evidence submitted by Inspector 17739 indicates that the second means, namely (b) above, of justifying the importation of an animal by-product, such as the meat in a sandwich, was not available to Meneses. It would have been virtually impossible and impractical to obtain a certificate, document or permit. Thus, in this case, did the Agency officials provide Meneses a reasonable opportunity to justify the importation in accordance with Part IV of the *Health of Animals Regulations*? Of course, in the majority of cases, this element of the violation would be very easily met by the Agency as the threshold for adducing sufficient evidence would be extremely low. Normally, the Agency would have only to prove to the Tribunal, if, on the Customs Declaration Card: 1) the traveller falsely marked "No" beside the question of whether the traveller had meat products in his or her possession; or 2) if the traveller understood the question the primary inspector asked, as to whether the traveller was in possession of meat products when he or she had answered "No" to this question; and 3) if the traveller understood the Agency's request to produce a certificate, document or permit that would permit importation of a meat product.

[39] In the circumstances of this case, the evidence provided by the Agency and by Meneses has been insufficient to convince the Tribunal that Agency officials provided any reasonable opportunity for Meneses to demonstrate that he had imported meat products, not as a result of language or comprehension problems, but due to the lack of

evidence by the Agency, on the balance of probability, that the declarations by Meneses, that fact that he had a sandwich in his luggage, were actually considered before the inspector searched his luggage at secondary inspection. There is a direct conflict between the testimony of Meneses and that of the Agency's inspectors as to whether or not Meneses declared his sandwich at primary and secondary inspection. Given that neither Meneses nor the inspectors gave oral testimony, and given that there was already significant discrepancies in the evidence provided by Inspector 17989 as to the number of sandwiches (one in the reports and two in the photograph) and as to the weight of the product in question (200 or 300 g) and the lack of reasons for which Inspector 17989 was convinced that the product in question was meat, the Tribunal would have found as fact that the Agency did not prove that Meneses had a reasonable opportunity to declare his meat products. Rather than ask Meneses to explain the products he had declared, the inspectors searched his luggage and served him with a Notice of Violation for products he had in fact declared. Consequently, the Tribunal concludes that, since Meneses indicated on the Declaration Card that he had "snacks," it was incumbent on the Agency to further question Meneses on what he had in his possession at the point of entry into Canada.

[40] Given that Meneses presented a duly completed Declaration Card indicating that he was carrying "snacks", the Tribunal finds that there was a duty on the Agency to take certain steps, before serving him with a Notice of Violation, to ensure that Meneses understood that he could have a reasonable opportunity to demonstrate that he was complying with the relevant provisions of Part IV of the *Health of Animals Regulations*, more specifically by declaring to the inspector that he had in his possession products for which he was uncertain he would be permitted to keep upon entering Canada. It would appear that Meneses was not given a reasonable opportunity to exercise his right to choose to declare the products that might have been covered by the question. If the impugned Notice of Violation was upheld, the current AMP system, established as "an alternative to the existing penal system and as a complement to existing measures for the enforcement of agri-food Acts" (*Doyon*, paragraph 8), would be an "[even more] draconian administrative monetary penalty system" than that to which Justice Létourneau makes reference in his decision. As a result, the Tribunal would have found that the Agency failed to prove element 3 of the alleged violation in that it failed to provide sufficient evidence that it had met the very low threshold of proving that the Agency or its officials in this case provided a reasonable opportunity to justify the importation of meat products in accordance with Part IV of the *Health of Animals Regulations*.

[41] The Tribunal is aware that the *Agriculture and Agri-Food Administrative Monetary Penalties Act* creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Subsection 18(1) of the Act states:

18. (1) *A person named in a notice of violation does not have a defence by reason that the person*

(a) exercised due diligence to prevent the violation; or

(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.

[42] The conclusion of the Tribunal, in paragraph 40 above, however, do not relate to a defence of due diligence or mistake of fact by Meneses. Clearly, had Meneses raised such arguments, Parliament's unequivocal statement on the issue in subsection 18(1) would have disallowed them.

[43] The Tribunal fully appreciates that the Agency inspectors are charged with the important task of protecting individuals, animals and plants, agricultural production and the food system in Canada from risks posed by pests, pathogens and parasites. In the present case, it is clear from the evidence that any potential threat from the importation of meat products by Meneses was averted because those products were, at any rate, seized and destroyed by Agency officials. That Agency officials were validly empowered under Canadian law to complete this task is not, however, a question before this Tribunal.

[44] The role of the Tribunal is only to determine if the Agency has proved the essential elements of a violation that underlie the valid issuance of a Notice of Violation under the Agriculture and *Agri-Food Administrative Monetary Penalties Act* and the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*. It is the conclusion of the Tribunal that the Agency failed to prove, on the balance of probabilities, that Meneses imported an animal by-product, in this case meat (and that even if the Agency had proven it, it would have failed to prove the third element of the alleged violation — that it provided Meneses with a reasonable opportunity for him to justify the importation in accordance with Part IV of the *Health of Animals Regulations*). The Tribunal, therefore, holds that the applicant did not commit the violation and is not liable for payment of the penalty.

Dated at Ottawa, this 18th day of June, 2012.

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Donald Buckingham, Chairperson