



Citation: *Lloyd v. Canada (Canada Border Services Agency)*, 2013 CART 21

Date: 20130710
Docket: CART/CRAC-1621

Between:

Ronald D. Lloyd, Applicant

- and -

Canada Border Services Agency, Respondent

Before: Chairperson Donald Buckingham

**With: Ronald D. Lloyd, self-represented at the hearing; and
No one appeared at the hearing for the respondent**

In the matter of an application for a review of a violation of subsection 16(1) of the *Health of Animals Act*, alleged by the respondent, and requested by the applicant pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

DECISION

[1] Following a hearing and review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that it was not proven, on a balance of probabilities, that the applicant committed the violation and is therefore not liable for payment of the penalty to the respondent.

The hearing was held in Midhurst (Barrie), ON,
April 12, 2013.

REASONS

Alleged Incident and Issues Arising from the Case

[2] The respondent, the Canada Border Services Agency (Agency), alleges that on March 3, 2012, Ronald D. Lloyd (Lloyd) did not present his dog “Hunter” to an inspector, officer or customs officer for inspection, contrary to the requirements of subsection 16(1) of the *Health of Animals Act*.

[3] Subsection 16(1) of the *Health of Animals Act* states:

Where a person imports into Canada any animal, animal product, animal byproduct, animal food or veterinary biologic, or any other thing used in respect of animals or contaminated by a disease or toxic substance, the person shall, either before or at the time of importation, present the animal, animal product, animal byproduct, animal food, veterinary biologic or other thing to an inspector, officer or customs officer who may inspect it or detain it until it has been inspected or otherwise dealt with by an inspector or officer.

[4] The issues arising from the case are:

- Has the Agency presented sufficient evidence to convince the Tribunal, on a balance of probabilities, that Lloyd was importing an animal, specifically, a dog named “Hunter”, into Canada on March 3, 2012?
- Has the Agency presented sufficient evidence to the Tribunal that, on a balance of probabilities, Lloyd failed at the time of importation, to present one live dog to an inspector, officer or customs officer, who could inspect it on March 3, 2012?

Procedural History

[5] Notice of Violation #YYZ-4974-1055, dated March 3, 2012, alleges that on this date, at somewhere (the space in the Notice of Violation to indicate the location of the alleged offence was not filled in when issued) in the province of Ontario, Lloyd “committed a violation, namely: FAIL TO PRESENT AN ANIMAL OR THING, TO WIT: ONE LIVE DOG Contrary to section 16(1) of the *Health of Animals Act*”, which is a violation under section 7 of the *Agriculture and Agri-Food Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Monetary Penalties Regulations*.

[Sic for the entire citation]

[6] The Agency served the Notice of Violation personally on Lloyd, on March 3, 2012. The Notice of Violation informs Lloyd that the alleged violation is categorized as a “very serious violation” under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which the penalty imposed is in the amount of \$1,300.

[7] In his letter of March 24, 2012, received by fax at the Tribunal on March 26, 2012, Lloyd requested a review of the facts of the violation (Request for Review) by the Tribunal, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. In his application for a review, Lloyd indicated that he wanted to have an oral hearing, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[8] On April 23, 2012, the Agency sent a copy of its report (Report) regarding the Notice of Violation to Lloyd and to the Tribunal, which the Tribunal received on that same day.

[9] In its letter of April 24, 2012, the Tribunal invited Lloyd and the Agency to make additional submissions (Additional Submissions) about this matter by May 24, 2012. No further written submissions were received from the parties prior to the May 24, 2012 deadline.

[10] On March 6, 2013, the Tribunal sent the parties a Notice of Hearing to the effect that the oral hearing, requested by Lloyd in this matter, would be held on Friday, April 12, 2013, at the hearing room of The Corporation of the County of Simcoe, Midhurst, (near Barrie), Ontario, starting at 10:00 a.m. The letter contained the following paragraph:

...

All parties and their representatives are required to attend. If, for any reason, attendance is impossible, the Tribunal must be advised directly and as soon as possible. Failure to attend and to notify the Tribunal may result in your application being heard and dismissed, pursuant to section 41 of the Rules of the Review Tribunal (Agriculture and Agri-Food). Adjournments may be granted but only in exceptional circumstances.

...

[11] The Tribunal confirmed that both parties received the Notice of Hearing, the Agency on March 7, 2013, and Lloyd on March 28, 2013.

[12] By letter dated April 5, 2013, Mr. Byron Fitzgerald, Manager, Litigation Unit, Recourse Directorate, Canada Border Services Agency, wrote to the Chairperson of the Tribunal, stating as follows:

...

The CBSA will unfortunately not be attending the oral hearing in this matter due to the location, costs and timing of the hearing.

As the Tribunal has decided not to accept submissions by the parties at a number of recent oral hearings, relying instead on written representations, the CBSA considers that its attendance may no longer be necessary at all oral hearings. In this particular case, the CBSA believes that the written materials provided in its report are satisfactory for the Tribunal to render a decision.

...

[13] The hearing requested by Lloyd was held on April 12, 2013, in the locale as out in the Notice of Hearing, with Lloyd in attendance. Lloyd also had one witness in the hearing room, his wife, Mrs. Donna Lloyd. No other persons were in the hearing room.

[14] At the beginning of the hearing, the Chairperson adjourned the hearing for 10 minutes to determine if any representative for the Agency was in the building. At 10:10 a.m., the Chairperson reconvened the hearing. On the basis of the lack of an Agency representative in the hearing room, and on the statement of the Agency in its letter of April 5, 2013, the Chairperson invoked section 41 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)*, and ordered that the hearing proceed in the absence of a representative of the Agency.

The Evidence

[15] The evidence before the Tribunal in this case consists of written submissions from the Agency (Notice of Violation and Agency Report) and from Lloyd (Request for Review), as well as the oral testimony given by the witnesses, Lloyd and Mrs. Donna Lloyd at the hearing and three exhibits tendered by Lloyd at the hearing. Lloyd submitted:

- a. Exhibit 1: seven colour photos marked as follows:
 - i. Exhibit 1.1 (photo of black dog);
 - ii. Exhibit 1.2 (photo of animal crate);
 - iii. Exhibit 1.3 (photo of animal crate);
 - iv. Exhibit 1.4 (photo of label);
 - v. Exhibit 1.5 (photo of label);
 - vi. Exhibit 1.6 (photo of handling declaration label); and
 - vii. Exhibit 1.7 (photo of label).

- b. Exhibit 2: two veterinarian certificates marked as follows:
 - i. Exhibit 2.1 (certificate of vaccination); and
 - ii. Exhibit 2.2 (health certificate).
- c. Exhibit 3:
 - i. a letter dated March 17, 2012, from Lloyd to the Canada Border Services Agency Recourse Directorate.

[16] The Agency's Notice of Violation issued to Lloyd shows that Agency Inspector ID #15039 issued Notice of Violation #YYZ-4974-1055 and served it on Lloyd. The Notice of Violation states that the alleged violation is for Lloyd's failing to present one live dog. The time (23:30) is noted on the Notice of Violation. There is, however, no indication as to the geographical location where the alleged offence took place.

[17] The Agency's Report dated April 23, 2013, consists of 17 pages and 7 annexes. Pages 1 to 16 set out several matters, including a summary of events surrounding the issuance of, and arguments for the validity for, the Notice of Violation. Page 17 and the seven "annexes" to the Report set out the Agency's evidence in support of its case. There were no witnesses or representatives at the hearing from the Agency available to explain or elaborate on the documents presented in these annexes. The Agency evidence included in the "annexes" to its Report is as follows:

- Annex 1 of the Report is listed as "Traveller's E311 Declaration Card and Identification" (as indicated at page 17 of the Report). Annex 1 includes the Agency E311 Declaration Card of Lloyd and Mrs. Donna Lloyd. It is dated March 3, 2012, and signed by both persons and has been filled out with the "no" box checked off in answer to the question of whether Lloyd and Mrs. Donna Lloyd were bringing into Canada any "Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects." Two stamps are at the side of the photocopy of the notes, one which states: "CERTIFIED TRUE COPY, Date: 2012-03-03, Badge #: 15039, AMP #: YYZ4974-1055, Initials: (illegible)"; and the other: "Canada Customs Douanes, 1544, MAR 03 2012, P.I.A./A.I.P. 497". Annex 1 also contains photocopies of the photo page of the passports, and of the Ontario drivers' licences and of the flight boarding passes of March 3, 2012, of both Lloyd and Mrs. Donna Lloyd.
- Annex 2 of the Report is listed as "Border Service Officer notes" (as indicated at page 17 of the Report). In reviewing the document, the Tribunal notes that the photocopy bears two stamps, one which states: "CERTIFIED TRUE COPY, Date: 2012-03-03, Badge #: 15039, AMP #: YYZ4974-1055, Initials: (illegible)", and the other "Canada Customs Douanes, 1544, Mar 03 2012, P.I.A./A.I.P. 497". However, the document itself does not indicate its author by any name or badge number.

- Annex 3 of the Report is listed as “CFIA AIRS Report” (as indicated at page 17 of the Report). In reviewing the document, the Tribunal notes that it contains the following recommendations to the Agency for documentation and registration requirements for accompanied personal dogs arriving from Florida in the United States, Florida:

CBSA Inspection – Border Service Officers (BSO) trained and authorized in FPA inspection (must be accompanied by the following documents\registrations): Rabies Vaccination Certificate ... – issued and signed by a licensed veterinarian [Sic for the entire citation].

- Annex 4 of the Report is listed as “Notice of Violation and CFIA Non-Compliance Report for Travellers at Points of Entry” (as indicated at page 17 of the Report). The Notice of Violation is signed by Inspector #15039 and dated 2012-03-03, shows the nature of the alleged violation, date and time (but indicates no place of the offence), the name of the alleged violator as Lloyd, the provision of the *Health of Animals Act* that has allegedly been violated, and the amount of the monetary penalty, as well as the recto verso page, which explains the options for the alleged violator with respect to dealing with the Notice of Violation. Annex 4 also contains the document “INSPECTOR’S NON COMPLIANCE REPORT FOR TRAVELLERS AT POINTS OF ENTRY”. This document is signed by Secondary officer ID/Badge No. 15039, and dated 12-03-03 at 2300 pm at the Location (terminal) 4974 T3, and includes the following information: the alleged violator as Lloyd; his address and that identification has been secured; the product in violation is “one live dog” and, to the question “how was product concealed”, the response listed is “Minimal, on cart pushed by porter.” In the section listed as “Remarks”, Secondary officer ID/Badge No. 15039 recounts details similar to as those found in the notes in Annex 2. His verbatim notes in Annex 4 are as follows:

Inspectors Reporter Regarding AAMP YYZ4974-1055

On 2012-03-03 at approximately 2330 hours, I BSO ... #15039 was conducting secondary inspection of LLOYD, Ronald and LLOYDA, Donna. Mr. and Mrs. LLOYD approached by secondary counter along with an airport porter, pushing a large cart with a dog crate on it. The LLOYD’s were arriving from Florida, USA. The LLOYD’s failed to declare the live dog on their E311, answering “no” to all mandatory questions. I asked the LLOYD’s why they did not declare it, to which they replied that they thought they only had to declare new items. Agricultural Administrative Monetary Penalty #YYZ4974-1055 was issued under Section 16(1) of the Health of Animals Act. Mr. LLOYD assumed responsibility for the undeclared dog and was given all options for payment or to address the AAMP. Mr. LLOYD opted to take home the AAMP and stated he would

consider either a tribunal or paying the penalty within the 15 day discount period. The live dog was photographed and it's rabies paperwork was verified and the LLOYD's and their dog left the secondary area at approximately 2353 hours.

Note: At one point Mr. LLOYD pointed to the BSF134's section on the tribunal option and stated to his wife "I know these guys" and then stated "Richardson".

I had no further contact with the LLOYD's after their departure from the secondary inspection area. [Sic for the entire citation].

- Annex 5 of the Report is listed as "Photographs of the Imported Animal" (as indicated at page 17 of the Report) and contains one photo of a large black dog in an animal crate.
- Annex 6 of the Report is listed as "Request for Review (CART 1621) and Minister's Decision" (as indicated at page 17 of the Report), contains only Lloyd's request for review dated March 24, 2012, filed with the Tribunal and the Tribunal transcription of that request, dated March 29, 2012, indicating that Lloyd was requesting an oral hearing to be held as close as possible to Barrie, Ontario.
- Annex 7 of the Report is listed as "BSF5056 – 'I Declare' Pamphlet" (as indicated at page 17 of the Report) and contains only a photocopy of the first page of the pamphlet.

[18] In his letter to the Tribunal of March 24, 2012, requesting a review of the violation to which he attached a copy of the Notice of Violation, Lloyd states as follows:

Please accept this letter as my official request for a "Verbal Review" of the above mentioned AMPS Violation #YYZ4974-1055, with the Review Tribunal."

Prior to the hearing, Lloyd provided no other written submissions. At the hearing, both Lloyd and Mrs. Donna Lloyd gave evidence under oath.

[19] Lloyd gave the following evidence. Lloyd and Mrs. Lloyd got off their plane in Toronto, went through Customs and proceeded to where they were to pick up their luggage, which included their black lab retriever "Hunter". Because they had to pick up Hunter and his crate, they had to go to a different luggage area because the dog was going to come out of a different chute. At that point, a porter offered his services and they accepted, with the porter loading the dog crate and their luggage on the porter cart. The porter proceeded to the secondary inspection counter and they presented the dog to officials there. Lloyd stated to the Tribunal that he had not filled out his documentation

appropriately because of his misinterpretation. At this point, while Lloyd was trying to have a conversation with the Inspector, Hunter was barking and so Lloyd turned his attention to try to console the dog. As a result, about 90% of the conversation that the Inspector had was with Mrs. Donna Lloyd. Lloyd presented the Tribunal with Exhibit 1, seven colour photos, all taken by Mrs. Donna Lloyd, within a few days of the alleged violation. The exhibits indicate that Hunter was the dog in question, and that all of his health records were in order prior to his entry into Canada on March 3, 2012. Exhibit 1.6 (photo of handling declaration label) for Hunter is issued by the airline WestJet and is signed by Ms. Donna Lloyd. The two veterinarian certificates marked as Exhibit 2.1 (certificate of vaccination) and Exhibit 2.2 (health certificate) show Lloyd as the “owner of the animal”. Lloyd told the Tribunal that, even though he presented both certificates to the Inspector, he seemed uninterested in their contents.

[20] Mrs. Donna Lloyd told the Tribunal that:

- She did about 90% of the talking with the Inspector, as Lloyd was trying to console Hunter;
- The Inspector asked both Lloyd and herself who was going to accept the charge but she never responded that she would accept any charge;
- When they left the baggage claim area with Hunter, they followed the porter who was walking in front of them, and went to the right to secondary inspection and then presented their dog and all his paperwork, that is the health and rabies certificate, as well as their own passports and declaration form, to the Inspector;
- She said: “I don’t know how else we could have done it, other than having not filled out the declaration form in the wrong spot.”;
- Nowhere in the documentation collected and presented to the Tribunal by the Agency did it include Hunter’s health or rabies certificate that the Lloyds gave to the Inspector on March 3, 2012;
- She does not understand that if the Notice of Violation was issued to her husband Lloyd, why all of her identification, including passport and driver’s licence, were included in the Agency Report;
- She was very disappointed that her husband had been charged with a “very serious violation”, and yet, it was not very serious enough for the Agency to be present at the hearing of the matter;
- She said that Hunter is the family dog, that he was given to them as a puppy, was a wedding anniversary gift and that this was the first time they had ever travelled with a family pet; and

- She was very confused by the Agency's practices given that recently she and her husband crossed into Canada at a land crossing and they were not questioned about their two dogs with them.

[21] Lloyd asked to introduce Exhibit 3, and asked his wife to speak about the document. Mrs. Donna Lloyd explained that although she drafted a letter to the CBSA on March 17, 2012, she never sent it. Mrs. Donna Lloyd testified that she and her husband had an appointment on March 19, 2012, for their interview with Agency officials to obtain NEXUS cards to facilitate their travel to the United States. They took the letter, their Notice of Violation and Hunter's health and rabies certificates to the interview. Mrs. Donna Lloyd told the Tribunal that she was afraid the Notice of Violation would affect their ability to obtain a NEXUS card. The Agency officer then did a computer search of her name in an Agency database and her file came up with a Notice of Violation attached to her entry, even though on no part of the actual Notice of Violation does her name appear. Mrs. Donna Lloyd told the Tribunal that she indicated to the Agency official that they were going to choose option 3 for their review of the Notice of Violation (review of the Notice of Violation by the Minister of Public Safety), but that she was advised by the Agency official during this interview in the NEXUS office not to send the letter (which is Exhibit 3 in this case) that she had drafted, as "nothing would become of it". The official said "Choose option 4 and go to the Tribunal." Mrs. Donna Lloyd said she and her husband found it interesting that the Agency official made this recommendation to them. She stated that the official said he also "was astounded that we were hit with this violation when it was just an "x" when the CBSA officer at the airport was provided with the dog's travel documentation."

[22] Both Lloyd and Mrs. Donna Lloyd were found by the Tribunal to be credible witnesses. None of the oral evidence given by Lloyd and Mrs. Donna Lloyd was tested through cross-examination, as no representative appeared on behalf of the Agency. Additionally, Lloyd confirmed to the Tribunal that he does not know the Chairperson of the Tribunal and had never met him before the day of the hearing.

Analysis and Applicable Law

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

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.

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

“agri-food Act” means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act;

[25] Pursuant to section 4 of the *Act*, the Minister of Agriculture and Agri-Food, or of Health, depending on the circumstances, may make regulations “designating as a violation that may be proceeded with in accordance with this *Act* the contravention of any specified provision of an agri-food Act or of a Regulation made under an agri-food Act”.

[26] 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 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 subsection 16(1) of the *Health of Animals Act*.

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

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor’s burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him – or herself.

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

[28] Moreover, the Federal Court of Appeal, in *Doyon*, points out that the *Act* imposes a heavy burden on the Agency. At paragraph [20], the Court states the following:

[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.

[29] Section 19 of the *Act* states:

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.

[30] Notice of Violation #YYZ4974-1055, dated March 3, 2012, alleges that Lloyd failed to present one live dog, a violation of subsection 16(1) of the *Health of Animals Act*. The strictness of the AMP system applies to both Lloyd and the Agency. Therefore, it is incumbent on the Agency to prove, on a balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation. In this case, the Agency must prove the following three elements:

- 1) Lloyd is the person who committed the alleged violation;
- 2) One live dog was imported into Canada; and
- 3) Lloyd failed to present the live dog before or at the time of importation to “*an inspector, officer or customs officer who may inspect it or detain it until it has been inspected or otherwise dealt with by an inspector or officer*” (subsection 16(1) of the *Health of Animals Act*).

[31] The Tribunal must consider the totality of the evidence before it, both written and oral, in order to determine whether the Agency has proven each of the elements of the alleged violation on a balance of probabilities. With respect to the second element, the evidence presented by the Agency, demonstrates that one live dog was imported on March 3, 2012. Lloyd does not contest this fact. However, the Tribunal finds that the Agency has failed to provide sufficient evidence, on a balance of probabilities, to prove the first and third elements of the alleged violation.

First Element – Identity of the person who committed the alleged violation

[32] On a balance of probabilities, the evidence presented by the Agency is insufficient to prove that it was Lloyd himself who failed to present the dog Hunter to Agency officials. On the evidence, it is equally likely, in the absence of further explanation from the Agency, that the identity of the violator was Mrs. Donna Lloyd. Undoubtedly, the evidence from the Agency is that one, or both, of the Lloyds imported Hunter from Florida on March 3, 2013. However, evidence, on a balance of probabilities, that it was Lloyd himself, rather than Mrs. Donna Lloyd who imported the dog and was responsible for its presentation to Agency officials, is equivocal. No oral evidence or oral argument was tendered by the Agency. In its absence, the Tribunal is necessarily left with an unclear picture as to the exact identity of who imported Hunter.

[33] At Annex 1 of the Report, the evidence presented by the Agency does not distinguish between information collected pertaining to Lloyd and Mrs. Donna Lloyd. The evidence shows no preference as to whether it was Lloyd or Mrs. Donna Lloyd, who was the alleged violator. Annex 2 also fails to explain why the author declares Lloyd the “subject” and Mrs. Donna Lloyd, the “wife”. The only statement in the Agency evidence to support a finding that Lloyd was the violator is the Inspector’s comment in that document that “Mr. Lloyd assumed responsibility for the undeclared dog and was given all options for payment or to address the AAMP....”

[34] Oral and written evidence submitted by Lloyd and Mrs. Donna Lloyd was unequivocal. Hunter was the family dog and they both cared for it jointly. Documents provided to the Tribunal by Lloyd and Mrs. Donna Lloyd showed that in certain instances Mrs. Donna Lloyd was responsible for Hunter and in other instances, Lloyd himself was named. The severity and draconian nature of the AMP regime noted by the Court in *Doyon*, requires that this Tribunal be very careful in examining each of the required elements for any alleged violation, and make its finding on “*evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay*”. Given the evidence presented, the Tribunal is unable to make the finding, on a balance of probabilities, that it was indeed Lloyd rather than Mrs. Donna Lloyd who imported Hunter. Where two persons could have committed the violation, it is incumbent on the Agency to provide sufficient evidence that the alleged violator is the person who committed the violation. Without further evidence or explanation as to why the Agency identified Lloyd, rather than Mrs. Donna Lloyd, as the perpetrator of the violation in this case, the Tribunal holds the first element of the alleged violation (identity) has not been proven.

Third Element – Lloyd failed to present Hunter for inspection

[35] The Tribunal finds, as a fact, that the Agency has proven, on a balance of probabilities, that Lloyd and Mrs. Donna Lloyd did mark signed and mark their E311 Customs Declaration Card (Annex 1 of the Report) on March 3, 2012, with the “no” box checked off. This portion of the card asks for a response to the question: “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.” A mark on this box is important evidence as oftentimes it corroborates other evidence adduced by the Agency needed to establish the third element - that the alleged violator failed to present the live animal before or at the time of importation to “*an inspector, officer or customs officer who may inspect it or detain it until it has been inspected or otherwise dealt with by an inspector or officer.*”

[36] However, proof that the alleged violator filled out the “no” box for this question does not, in this case, constitute absolute proof of the element on its own. All the evidence put before the Tribunal must be considered as a whole. The evidence from the Agency and from the witnesses at the hearing was that the Lloyds filled out the “no” box in error. This fact is not in dispute. The Tribunal, however, also heard uncontested *viva voce* evidence from both

Lloyd and Mrs. Donna Lloyd, that despite this error, they, with the porter who took Hunter and their baggage to a secondary inspector, did present their dog Hunter for inspection. At this point, the Inspector was able to inspect and review Hunter's health documentation, which was in order according to the CFIA AIRS Report, found at Annex 3 of the Report. No other evidence was presented by either party on this issue or concerning what occurred during the primary inspection. The Tribunal is therefore not satisfied that the Agency has proven this element of the violation on a balance of probabilities. In this case, more evidence is required to prove that the alleged violator Lloyd actually failed to present his dog Hunter at the time of importation to an inspector, officer or customs officer. The E311 Declaration Card is distributed to persons before they enter Canada, and it is often the case that the Agency presents additional evidence that the alleged violator made declarations to an inspector, officer or customs officer that he had no animals, usually at the point of first entry where the primary inspection occurs. The Agency elected to present no such evidence in this case. This is not to suggest however, that additional evidence is a requirement in all cases to prove this element, and that the checking of the "no" box on the E311 Declaration Card cannot constitute proof of this element in some cases.

[37] Other comparable cases have come before the Tribunal, such as *Abhari v. Canada (CBSA)*, 2010 CART 6. In that case the Agency provided evidence that the alleged violator Abhari failed to declare his dog and present it for inspection both verbally and in writing at point inspection, prior to secondary inspection. In the present case, the evidence shows that the Lloyds did present their dog to an inspector, officer or customs officer, albeit at secondary inspection. It is unclear what happened at primary or point inspection in this case and the Tribunal finds that there is an insufficient record, a paucity of evidence and a lack of any explanation from the Agency on this point. In light of this, it would be unduly severe and draconian (words of the Federal Court of Appeal in *Doyon*) for this Tribunal to find that Lloyd failed to present Hunter to an Agency official, in the absence of more conclusive evidence. Without knowing what occurred during the primary inspection, the Tribunal is left with evidence of what happened only at secondary inspection. During the secondary inspection, it is clearly evident that the Lloyds did present Hunter with his health papers for inspection by Agency officials.

[38] Based on the Tribunal's findings that the Agency has adduced insufficient evidence to prove elements 1 and 3, on a balance of probabilities, the Tribunal finds that it is not proved that Lloyd committed the violation and he is therefore not liable for payment of the penalty imposed.

[39] The Tribunal fully appreciates that Agency inspectors are charged with the important task of protecting individuals, animals and plants, agricultural production and the food system in Canada from risks posed by pests, pathogens and parasites. In this case, it is clear from the evidence that any potential threat from the importation of a dog was averted when Hunter was willingly presented and subsequently inspected by Agency officials on March 3, 2012. The role of the Tribunal is only to determine whether the Agency has proven the essential elements of the violation that underlie the valid issuance

of the Notice of Violation under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and its Regulations, and in this case the Agency has not.

[40] The Tribunal is mindful 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.

[41] To be clear, the decision of the Tribunal does not rely on any finding that Lloyd's actions constitute defences of due diligence or mistake of fact. Clearly, had Lloyd raised such arguments, Parliament's unequivocal statement on the issue in subsection 18(1) of the *Act* would have disallowed them.

Dated at Ottawa, this 10th day of July, 2013.

Dr. Donald Buckingham, Chairperson