Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Ting Dai v. Canada (CBSA), 2012 CART 8

Date: 20120330
CART/CRAC-1588

Between:

Ting Dai, Applicant

- and -

Canada Border Services Agency, Respondent

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 Vancouver, BC,
on February 28, 2012.

REASONS

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that, on July 31, 2011, at Vancouver, British Columbia, the applicant, Ms. Ting Dai (Dai), imported meat products into Canada contrary to section 40 of the *Health of Animals Regulations,* from China, a country from which it is unlawful to import meat products unless she met 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 Part IV 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*
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> *(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;*
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> *(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*
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> *(c) the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in a manner that would prevent the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate signed by an official of the government of the country of origin that*
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> *(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 referenced to in section 41 if*

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

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

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

…

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 Dai did import meat into Canada, whether she met the requirements that would have permitted such importation.

Procedural history

[5] Notice of Violation YVR09082 dated July 31, 2011, alleges that on that date at Vancouver International Airport, in British Columbia, Dai "committed a violation, namely: import an animal by-product, to wit: meat, without meeting the prescibed [sic] requirments [sic] Contrary to section 40 of the *Health of Animals Act*, 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 Dai on July 31, 2011. The Notice of Violation indicates to Dai that the alleged violation is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which the penalty assigned is in the amount of $800.00.

[7] By letter written by her son Mr. Jay Su (Su), dated August 7, 2011 (received by the Tribunal on August 11, 2011), Dai requested a review of the facts of the violation by the

Tribunal, in accordance with paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. By way of her request for review, the Tribunal accepts that Dai has authorized her son to act as her agent and representative in this matter. As became evident to Tribunal staff, Dai speaks no English, only Mandarin, and through conversations with her son Su, Tribunal staff confirmed that Dai wished to proceed with a review by way of an oral hearing, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations,* with her son acting as her representative and interpreter.

[8] On August 29, 2011, the Agency sent its report (Agency Report) concerning the Notice of Violation to Dai and to the Tribunal, the latter receiving it that same day. The covering letter for the Report, one addressed to the Tribunal and one to Dai, contained the following undertaking: "Please note that we have requested the original E311 card from Statistics Canada in order to provide a better copy. I am not sure how long this request to Statistic [sic] Canada will take. I will forward the copy of the E311 once it has been received." The Tribunal never received any such copy nor any further communication from the Agency concerning this undertaking.

[9] In a letter dated August 30, 2011, the Tribunal invited Dai to file with it any additional submissions (Additional Submissions) in this matter, no later than September 29, 2011. A letter from Dai dated September 20, 2011, and received by the Tribunal on September 28, 2011, set out additional facts and arguments in response to the Agency Report.

[10] By letter dated January 16, 2012, the Tribunal provided the parties with notice that the hearing of this matter would take place in Vancouver on February 28, 2012. On February 21, 2012 (with the Tribunal receiving a hard copy on February 24, 2012), the Agency sent the Tribunal a request for eight amendments to the Agency Report. No further written submissions were received from the parties prior to the hearing of this case.

[11] The oral hearing requested by Dai was held in Vancouver, B.C. on February 28, 2012, with Dai represented by her son Su and the Agency represented by Mr. Jan Wojcik. At the commencement of the hearing, the parties presented their legal arguments with respect to the request by the Agency for the eight amendments to the Agency Report. The requested amendments were as follows: six amendments to the "Case Summary" section of the Agency Report; one amendment to the Notice of Violation itself to reflect that the alleged violation was for a violation of section 40 of the *Health of Animals Regulations* and not of the *Health of Animals Act*; and one amendment to the evidence recorded on the "Canada Customs Vancouver International Airport Passenger Terminal Operations Interpreters Report" found at Tab 10 of the Agency Report.

[12] After hearing arguments from the parties, the six amendments to the "Case Summary" section of the Agency Report were accepted, as these amendments were primarily of a grammatical and typographical nature and did not prejudice Dai's ability to know the case against her and prepare and present a defence to that case. As well, after hearing arguments from the parties with respect to the Agency's request to seek to amend the Notice of Violation

itself, to reflect that the alleged violation was for a violation of section 40 of the *Health of Animals Regulations* and not of the *Health of Animals Act*, the Tribunal accepted this amendment, making the alleged violation against Dai one for a violation of section 40 of the *Health of Animals Regulations.* This change would not prejudice Dai in knowing the case against her and preparing her defence, as no confusion or prejudice was likely to have been caused to Dai by this mistake by the Agency as the Agency's Report in no less than four other locations (page 1, 4, 6 and 7) referred to the alleged violation as having occurred under the Regulations and not the Act. The Tribunal, therefore, ordered that the Notice of Violation be amended to refer to section 40 of *Health of Animals Regulations* and not of the *Health of Animals Act.* With respect to the final requested amendment by the Agency to amend evidence in Tab 10 of the Agency Report, the Tribunal ordered that no such amendment would be permitted, as Dai would have no opportunity to prepare her case based on this change to evidence. The Tribunal informed the Agency that, if it so wished, it could call the person who drafted the document to testify as to the accuracy of the document.

Evidence

[13] The evidence before the Tribunal in this case consists of written submissions from the Agency (Amended Notice of Violation and Agency Report) and from Dai (submissions contained in her request for review and Additional Submissions) as well as the oral testimony given by the witnesses at the oral hearing. The Agency presented two witnesses, Inspector 15999 and Maria Law (Law) while Dai presented only one witness—herself—at the hearing on February 28, 2012. The Agency also tendered one exhibit at the hearing: a colour photo of the black-and-white photo located at Tab 7 of the Agency Report. The hearing was made somewhat complicated by the fact that Dai does not speak English, only Mandarin. Her evidence, and all the Tribunal oral proceedings, were translated to her and from her, by her son, Su, who completed this task under affirmation. Law, as a witness for the Agency, also under affirmation, provided evidence as to her role in the events of July 31, 2011, and testified as to the accuracy of Su's translation of his mother's evidence.

[14] The parties agreed to the following fact: Dai came to Canada from China on board flight MU 581 landing at Vancouver International Airport on July 31, 2011.

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

a. Dai completed and signed a Canada Border Services Agency Declaration Card E311(09) (Declaration Card) dated July 31, 2011. Dai 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" (Declaration Card signed by Dai at Tab 2 of Agency Report; and oral testimony of Inspector 15999).

b. During secondary inspection, Inspector 15999 found in Dai's luggage approximately three kilograms of meat products, which he described as "1.5 kg

of beef jerky and 1.5 kg of packaged chicken meat" (Canada Border Services Agency Tag for intercepted item BSF 156 (BSF 156) at Tab 5 of Agency Report; and Inspector's Non Compliance Report for Travellers at Points of Entry (Non Compliance Report) at Tab 6 of the Agency Report; and oral testimony of Inspector 15999).

c. Inspector 15999 stated in his Non Compliance Report as follows: "I approached Mrs. DAI at Carousal 23 in the customs hall at Vancouver International Airport. Mrs. DAI presented her E311 card. I informed Mrs. DAI that I would be verifying her declaration, and brought Mrs. DAI into the secondary examination area to conduct a customs examination. I asked her the baggage ownership questions and she said yes, she did to all 3 questions. During the examination of her bags, I found 8 packaged bags of beef jerky and packaged chicken meat. I asked her why she did not declare the meat.. Mrs. DAI reasoned that the meat was cooked, she has brought it before and that she knows your not allowed to bring it but still wanted to because my son really likes it. I asked if she had an import permit and a health certificate for the meat. She said NO. I informed Mrs. DAI that she would be getting a Notice of Violation for importing meat from Beijing, China with no permits or certificates…." Also noted in the report by Inspector 15999 was that the products were not declared and that they were seized, confiscated and destroyed (Non Compliance Report at Tab 6 of the Agency Report).

d. Inspector 15999 took a photo of the meat products he found (Photo at Tab 7 of the Report; Exhibit 1 of the hearing; and oral testimony of Inspector 15999).

e. The Automated Import Reference System (AIRS) of the Canadian Food Inspection Agency (CFIA) confirmed to Agency Inspectors that beef jerky and chicken meat from China are to be prohibited entry into Canada. The AIRS report recommends that the Agency "Refuse Entry" of such products (Tab 9 of Report).

f. By way of oral testimony, Inspector 15999 added that on July 31, 2011 he was working for the Agency as a roving officer, which meant that he was not assigned to primary or secondary inspection areas but instead his responsibility was to randomly identify travellers in between primary and secondary inspection areas and require them to undergo a secondary inspection performed by him. When he first saw Dai, she was one of the last persons left waiting for her baggage at the luggage carousel. He approached her, greeted her in both English and French and asked her for her Declaration Card and her passport. Inspector 15999 told the Tribunal that because Dai gave them to him, he assumed she understood him. Inspector 15999 told the Tribunal he believed that the Declaration Card was marked with a "No" to all questions on it as if any questions had been answered "Yes", Dai would have been sent to the secondary inspection area but instead her Declaration Card had been "free

carded" by the primary inspector, meaning she would be free to leave the customs area once she had collected her bags.

g. Inspector 15999 then told the Tribunal that he escorted Dai to the secondary inspection area and asked her the three baggage questions and when he did so, he became aware that she did not understand these questions, as she did not respond. So at that point he asked for an interpreter to come in to assist in the secondary inspection. When the interpreter arrived, he asked the three baggage questions again, they were translated into Mandarin by the interpreter, who Inspector 15999 identified as Law from his notes, and then Dai answered yes to all three questions. Inspector 15999 then proceeded to search Dai's baggage and found approximately three kilograms of meat products therein. Inspector 15999 then told the Tribunal that he, through the interpreter, asked Dai if she had any health certificates for the importation, and she answered, through the interpreter, that she did not. Throughout the time that the interpreter was present, Inspector 15999 was under the impression that Dai understood all that was being said via the Mandarin translation.

[16] In cross-examination, Inspector 15999 told the Tribunal that his conclusion that Dai's Declaration Card was fully completed, including the box for meat and meat products, was based on his experience, not on his actual observation or memory of what was on the Declaration Card. When questioned by Dai's representative at the hearing, Inspector 15999 also testified that he believed Dai comprehended his request for her to give him her Declaration Card and passport because she give both to him and, as a result, he did not call for an interpreter at that time as he had no idea that she might need help.

[17] The Agency's other witness, Law, is an interpreter whose first language is Cantonese and who also speaks English and Mandarin. She has, since 2009, provided interpretation services to the Agency at Vancouver International Airport, both at the primary and secondary inspection areas. Law informed the Tribunal that she worked for the Agency on the day of July 31, 2011, and that she completed the "Canada Customs Vancouver International Airport Passenger Terminal Operations Interpreters Report" (Interpreter's Report) located at Tab 10 of the Agency Report. She asked the Tribunal to allow her to correct the entry to the third question of the Interpreter's Report which states "Using this dialect [Mandarin], I asked if there was any difficulty in understanding my speech. The traveller replied _____. Law told the Tribunal the answer she meant to include on the report was "No" rather than "Yes" and that she entered the wrong answer because she was unfamiliar with the report, had only used it a few times, had filled it out in poorly lit surroundings and the wording of the question was unnatural in form.

[18] In cross-examination, Law told the Tribunal that she could not remember if she was at the primary inspection area on July 31, 2011, but that she certainly was at the secondary inspection area that day. While her first language is Cantonese, she has upgraded her Mandarin so she can work in this language as well. Law told the Tribunal that, while she remembers recording the Interpreter's Report on July 31, 2011, she had no recollection from

that day and, as she put it, whether she had a “meaningful conversation with the traveller, but I usually am assured that the traveller understands me.”

[19] At the conclusion of her testimony, when asked by the Chairperson “Are any of the people you met on July 31, 2011, in the hearing room?”, and “Did you work on the night shift of July 31, 2011, and what were your hours of works that day?” Law replied, respectively, “I have no recollection.” and “I can’t remember.”

[20] Dai’s written evidence is contained in her submissions in her request for review filed with the Tribunal in August 2011 and in her Additional Submissions filed with the Tribunal in September 2011. In her request for review letter, which was written in English by Su, Dai states that “Onboard the plane, I received the ‘Declaration Card’ prior to approaching YVR. Due to the lack of my English reading and comprehensive skills, I was only able to fill in what I could understand to the best of my abilities. There was one section below in which I could not understand, therefore, it was not completed: *“Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or parts and products; cut flowers; soil; wood/wood products; birds; insects;”* Once I was in front of the first customs officer, I handed her the ‘Declaration Card’ and my passport. Unfortunately, I was unable to understand what the officer was asking. She went forth and wrote something on the back of the “Declaration Card” and returned it to me, along with my passport. I was then allowed to leave and to retrieve my luggage from the luggage carousel. As I was wheeling my luggage towards the exit gate, another customs officer (no. 15999) waved at me and signalled for me to go towards him. He asked if I spoke English and I answered no. He then directed me to the examination room and began to open and search through my luggage. When he found an approximately 500 g of sealed package containing beef jerky, in which I had brought for personal consumption, he went out and located a CBSA interpreter for assistance. When the CBSA interpreter arrived in to the room, she explained to me the violation and penalty. It was there than, I became fully aware of the situation.” Dai also raises several complaints in the submissions in her request for review, two of which were that “I was not able to exercise my right nor was I able to obtain an opportunity to fully understand the declaration and to dispose of the products without penalty or violation” and “Officer No. 15999 arrogantly advised me to not dispute the violation because he informed the CBSA interpreter to tell me, he has never lost a dispute before.”

[21] In her September 2011 Additional Submissions letter containing responses to the Agency Report, Dai raises several issues but evidentiary ones that are of particular import are the following: (1) Dai states that two of the packages of meat products allegedly found in her bags included in the photo at Tab 7 were never in her bag and did not belong to her; (2) Dai states that “the Agency stated that the E311 card was completely filled and a negative response was written for the question stating if any ‘meat’ products was entering Canada. The fact is, it was not marked. The poorly scanned card presented shows the box being empty. I would like to ask the Agency to re-scan that specific card for a clearer presentation.”; (3) Dai states that “At the primary inspection station, I was not given the option of an interpreter, nor was I aware there was an interpreter present.”; (4) Dai states “In respect to the E311 card, I had made a true declaration of goods to the best of my understanding. I had left the box blank to seek further understanding and to inquire about my options.”; and (5) Dai

denies as completely false Inspector 15999's observation in his report that Dai had told him that she had brought meat into Canada before and that she knew she was not allowed to bring meat products, but did so anyhow.

[22] At the hearing Dai was self-represented and gave her evidence to the Tribunal in Mandarin. This evidence was translated for the parties and for the Tribunal by her son, Su, who was her representative. The Tribunal granted the Agency permission to have Law record any discrepancies in the translation by Su of Dai's testimony and then to report those discrepancies to the Tribunal under oath or affirmation at the conclusion of Dai's examination and cross-examination.

[23] Dai testified at the hearing that while she was on flight MU 581, just prior to landing at Vancouver International Airport on July 31, 2011, she received a Declaration Card from the flight attendant. She tried to fill out the Declaration Card but was unsure about what to put beside the third question [meat and meat products]. She asked the flight attendant for clarification but did get any answer, so Dai left the question unanswered. Dai testified that she deplaned and, after passing through a first inspection point, she was waiting for her bags by the baggage carousel. As she was getting her baggage she was approached by Agency Inspector 15999 who asked her for her passport and her Declaration Card. Dai told the Tribunal that she showed the inspector that the third box on the Declaration Card had no marking. Inspector 15999 then pointed at the box and Dai assumed that the officer was asking why there was no marking in the box and that was why he wanted to take her to the secondary examination area. In this area, the inspector pointed to her luggage and, while she did not understand what he was saying, assumed that he was asking if this was her luggage. Dai testified that the inspector then "hand-signed" asking if the bags had been packed by Dai and she affirmed that they had. Then the inspector began opening her bag and, after having some difficulty opening it, he opened and searched the bag and found several packages of meat products and one that had the symbol of a tree on it. Dai told the Tribunal that this latter product she tried to explain to the inspector was a Chinese herbal remedy. At this point, there was confusion and so the inspector called for an interpreter. The interpreter came into the room and Dai explained that the product was a herbal remedy while the inspector was insisting that the meat products and tree product would both be required to be confiscated and two Notices of Violation issued, although he could not be sure about the tree product herbal remedy. Dai testified that the inspector then went away and prepared a Notice of Violation for the meat products and explained to her that if she paid it within 15 days there would be a reduced penalty. Dai stated to the Tribunal that she then explained to the inspector that she was going to appeal and that the inspector said arrogantly that he has not lost a case and it would be useless to go ahead with an appeal.

[24] For the cross-examination of Dai, the Tribunal asked the agent for the Agency if he would prefer to have Law provide the interpretation of his questions for Dai or whether Su should undertake that task. The agent for the Agency replied that Su should provide the interpretation, with the reservation that Law would continue to monitor the fidelity of his interpretation. In cross-examination, Dai confirmed that she signed her Declaration Card and that she was aware she was entering Canada with packages of meat in her baggage. In response to the question of whether she understood the statement on the Declaration Card

about meat and whether she left it blank, Dai replied that she asked the flight attendant if beef jerky was meat and the flight attendant said she didn't know and recommended to leave the boxes for that question blank. Dai then stated, in response to the question "what did you do at primary inspection?", that as she approached primary, she remembered "talking from the officer", but did not understand what was being said, that her card was examined and then she was sent through. Dai told the Tribunal that due to her lack of understanding and her dazed look, the officer waved her through. When she was intercepted by Inspector 15999, she showed him the meat products question and then he escorted her to then secondary examination area. Dai maintained under cross-examination that the interpreter did not arrive until after her bags had been searched and was called in only when the argument arose between Dai and the inspector concerning the nature of Chinese herbal remedy medicine.

[25] Law was the final witness and gave evidence as to the fidelity of Su's translation of his mother's evidence. Apart from occasional minor discrepancies in translation, Law pointed to very few differences of real significance in assessing the evidence given by Dai through Su's translation compared what Law would have translated.

Analysis and Applicable Law

[26] 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:

> **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.*

[27] 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;

[28] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health depending on the circumstances, may make regulations:

> **4.** (1) *The Minister 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...

[29] 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*.

[30] 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, 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.

[31] Moreover, the Federal Court of Appeal, in *Doyon*, points out that the Act imposes an important burden on the Agency. At 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.*

[32] 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.

[33] 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:

(1) Dai is the person who committed the violation;

(2) Dai imported an animal by-product, in this case beef jerky and packaged chicken meat, into Canada; and

(3) if Dai did import meat products into Canada, that Agency officials provided a reasonable opportunity to Dai for her to justify the importation in accordance with Part IV of the *Health of Animals Regulations*.

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

[35] With respect to element 1, Dai's identity as the alleged violator is not in dispute. Throughout the inspection process, from the time that Inspector 15999 randomly intercepted her at the baggage carousel and requested that she follow him to the secondary inspection area where he searched her luggage, the identity of Dai, the alleged violator, and the care, control and ownership of the luggage that was searched have not been disputed. Dai was the alleged violator identified by the Inspector 15999 and the bags he searched did belong to Dai.

[36] With respect to element 2, the Tribunal accepts that the Agency has established, and Dai does not deny the fact that her luggage contained around three kilograms of meat products. The Tribunal, therefore, finds as fact, that Dai did import an animal by-product into Canada in her luggage on July 31, 2011.

[37] Before moving on to determine whether the Agency has proved element 3, the Tribunal must address the issue with respect to whether the evidence submitted by the Agency, with respect to element 2, is admissible, as Dai has raised in her request for review and in her Additional Submissions that the search by Agency officials that yielded the meat products that are at the heart of this matter is one that is not reasonable under Canadian law. In this regard, the Tribunal must examine this argument in light of the law concerning unreasonable searches and seizures under section 8 of the *Canadian Charter of Rights and Freedoms* (Charter).

[38] The law in this regard is quite settled and, given the facts of this case, of little assistance to Dai. Given current Canadian case law, the search conducted by

Inspector 15999 that permitted the discovery of the meat products imported by Dai would be held to reasonable search under the Charter. A brief review of this law is set out below.

[39] A traveller arriving at the Canadian border has a reduced expectation of privacy. The traveller can expect to be scrutinized and have his or her luggage examined. This is settled law since *R. v. Simmons* [1988] 2 S.C.R. 495. Such routine checks do not raise constitutional issues about the legality of the search or the admissibility of the evidence. Dickson C.J.C. stated on this point at paragraph 27:

> *27. It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means. (emphasis added)*

[40] Justice Dawson reiterates this statement of law in *R. v Smith* [2004] O.J. No 4979 (Ont S.C. J) at paragraphs 28 and 29:

> *28. In* Simmons*, Dickson C.J.C. concluded (at p. 313) that in relation to routine questioning and a search of luggage: "No stigma is attached ... and no constitutional issues are raised." In* Kwok*, Finlayson J.A. held there is no detention in a constitutional sense during routine procedures to gain entry to Canada, despite the fact that a traveller's movements are subject to direction and control during the process. These cases establish, in my view, that no issue arises as to the reasonableness of a search under s. 8 of the Charter, nor in relation to the arbitrariness of detention under s. 9 of the Charter, at these early stages of the customs and immigration process. This flows from the fact that there is no reasonable expectation of privacy and no constitutional detention involved in undergoing such routine inspection.*
>
> *29. These cases establish that it is not until more intrusive and non-routine measures are taken during the customs and immigration process that a traveller will be considered detained, or that s. 8 of the Charter will become applicable.However, this does not mean that a Charter remedy is not available when racial profiling occurs in a border crossing context.*

[41] In *R. v. Corbyn* [2005] O.J. No. 55 (Ont. S.C.J.), a traveller returning from Jamaica was sent by an inspector in the gauntlet area in Terminal 1 at Pearson for secondary inspection, even though she was coded free to leave at primary inspection. The search of her luggage at secondary inspection disclosed cannabis. The Court, in *Corbyn,* found that the roving inspector has the authority to send a traveller for secondary inspection no matter how the E311 card is coded at primary inspection. The Court also re-affirms that under s. 99(1)(*a*) of the *Customs Act*, an inspector has the authority to open and inspect goods imported into Canada at any time, up to the time of release without threshold grounds. Section 2 of the *Customs Act* provides that "release" means authorized removal of the goods from a customs office. Section 5 of the *Customs Act* provides that the Minister may designate customs offices for specified purposes. Revenue Canada memorandum D111 designates the customs area in all three terminals at Pearson as customs offices. Therefore, the random selection of a traveller for a luggage search at the secondary point of entry is prior to release and falls within the scope of inspection under s. 99(1)(*a*).

[42] In *R. v Jones* [2006] O.J. No 3315 (Ont C.A.), at paragraph 30, the Court of Appeal reiterates that travellers reasonably expect that customs authorities will routinely and randomly search their luggage. This expectation and attendant submission to search is the *quid pro quo* for entry into Canada. Effective control over borders is a societal interest of sufficient importance to be characterized as a principle of fundamental justice:

> *30. Like the trial judge, I think the fact that the impugned statements were made at the border in the course of routine questioning by Customs authorities is central to the analysis of the appellant's self-incrimination claim. No one entering Canada reasonably expects to be left alone by the state, or to have the right to choose whether to answer questions routinely asked of persons seeking entry to Canada. As the appellant himself testified, travellers reasonably expect that they will be questioned at the border and will be expected to answer those questions truthfully. Travellers also reasonably expect that Customs authorities will routinely and randomly search their luggage. Put simply, the premise underlying the principle against self-incrimination, that is, that individuals are entitled to be left alone by the state absent cause being shown by the state, does not operate at the border. The opposite is true. The state is expected and required to interfere with the personal autonomy and privacy of persons seeking entry to Canada. Persons seeking entry are expected to submit to and co-operate with that state intrusion in exchange for entry into Canada.*

[43] Finally, in the most recent case on point*, R. v Sahota* 2009 OJ NO 3519 OSCJ, the Court relies on the statements in *Simmons* and *Corbyn,* and once again holds that there are no threshold grounds required to search a person's luggage up to the point of release from the customs office. At paragraph 35, the Court states as follows:

> *35. The authorities are clear that in general no constitutional issues are raised in relation to routine questioning and a search of luggage at the border (See* R. v. Simmons*, [1988] S.C.J. No. 86(S.C.C.) at para. 36;* R. v. Jones*, [2006] O.J. No. 3315 (Ont. C.A.) at paras. 30-32;* R. v. Smith*, [2004] O.J. No. 4979 (Ont. S.C.J.)*

at paras. 27-29 and R. v. Corbyn*, [2005] O.J. No. 5578 (Ont. S.C.J.) at paras. 27-29).*

[44] The evidence presented by both parties reveals that the search conducted by Inspector 15999 resulted from his roving function that day at Vancouver International Airport, his random selection of Dai as a person to be searched at the secondary inspection point, which is before the point of release from the customs area, and his subsequent discovery of the meat products during his search of her bags. The Tribunal, therefore, rejects Dai's contention that the search conducted by Inspector 15999 infringed her Charter rights under section 8, and there is consequently no basis for the exclusion of any evidence obtained by the Agency as a result of that search under section of the Charter.

[45] There remains for analysis, then, only the evidence pertaining to element 3 of the alleged violation. This third element is essential to proving a violation of section 40 of the *Health of Animals Regulations*. That section, as noted above, states as follows: "*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 1, 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.

[46] The severity and draconian nature of the AMPs regime noted by the Federal Court of Appeal in *Doyon*, noted above in paragraph 30, 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—are necessary elements of the proof of a violation. 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 wording in the listing of the violation under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* – "without meeting the prescribed requirements".

[47] 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 a person has met the prescribed requirements of Part IV falls on the alleged violator and he or she must take all necessary and reasonable steps to make such a justification known to the Agency. Normally, this justification will take one of two forms, either by

a. the traveller declaring any animal by-products to the Agency either in writing on that person's Declaration Card or in person to an Agency official once that person

had deplaned and entered Canada on 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 producing 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.

[48] The third element of the violation – if Dai did import meat products into Canada, that Agency officials provided a reasonable opportunity to Dai for her to justify the importation in accordance with Part IV of the *Health of Animals Regulations* – in the grand majority of cases would be an element of the violation that 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 that the traveller's Declaration Card was falsely marked with a "No" beside the question of whether the traveller was bringing meat products into Canada; or that the person understood and answered "No" to the primary inspector's question about whether the traveller was bringing meat products into; and that the traveller was asked and understood the Agency's request to produce a certificate, document or permit which would permit importation of a meat product. In the case of a person who understands either of Canada's official languages, the Agency's burden to prove that they had afforded a traveller a reasonable opportunity to justify any importation of meat products in accordance with Part IV of the *Health of Animals Regulations* would be quickly and easily met.

[49] However, in the present case, the evidence provided both from the Agency and from Dai has been insufficient to convince the Tribunal that Agency officials provided any reasonable opportunity for Dai to justify her importation of meat products in accordance with Part IV of the *Health of Animals Regulations.* Dai was a credible witness. Her evidence was consistent, clear and precise, particularly on the point of whether her Declaration Card was fully completed. Her evidence on this point is to be preferred over vaguer recollections on the issue from Inspector 15999. Her evidence was that she was unsure how to answer the question on her Declaration Card with respect to meat products and so she left it blank. The Agency produced as evidence in the case, Dai's Declaration Card as part of its Report at Tab 2 but due to poor photocopying of the document it is not possible to establish that the question on Dai's Declaration Card with respect to meat products has been completed. The Agency in its letter of August 29, 2011 promised to produce the original of this document, which would have definitely established the markings on the card, but it failed to do so before, or at, the hearing. The Agency failed to produce the primary inspector who could have again shown that a reasonable opportunity had been afforded to Dai to declare her meat products or to ask questions about what a meat product entailed so as to be able to mark her card properly. Finally, the Agency Inspector 15999 could not confirm that he remembered or noted that the box was unmarked only that it was normal practice not to let anyone through primary inspection without all questions being answered. As a result, the Tribunal concludes, as a matter of fact, that Dai's Declaration Card did not have any markings beside the space to answer the question as to whether Dai had or did not have meat products that she was bringing into Canada, and that she was desirous of seeking

advice from Canadian officials as to how she should make her declaration on the card concerning the products she was bringing into Canada.

[50] As well, it is clear from the evidence and from the hearing that Dai does not speak or understand English. She made no mention of understanding English while aboard the plane on July 31, 2011. She gave her evidence to the Tribunal through an interpreter and was not heard to speak any English during the hearing. Agency witnesses testified that Dai did not understand English and that an interpreter had to be called in when it became clear that Dai could not understand any English. At the very least, given the specific facts of this case, the Agency has not been able to demonstrate to the Tribunal that it afforded Dai any reasonable opportunity to avail herself of section 40 justifications in a manner that she understood before officials decided to issue her a Notice of Violation. The Tribunal finds, given that Dai presented a Declaration Card that was incomplete because she had questions about how to accurately complete it, and that Dai was unable to understand or speak English or French, that there was a duty on the Agency to take some steps, before serving her with a Notice of Violation, to ensure that she understood so she could have a reasonable opportunity to exercise her Part IV justifications, including declaring to an inspector that she had products that she was uncertain as to whether they could be brought into Canada. At the very least, until Dai was provided with an opportunity to understand the Declaration Card question and to understand that she was required to choose to declare or not declare any products that might be caught by that question, it seems that, if the current Notice of Violation were allowed to stand, the present system, designed as “alternative to the existing penal system and a complement to existing measures for the enforcement of agri-food Acts” (paragraph 8 in *Doyon*) would be an even more “draconian administrative monetary penalty system” (heading between paragraphs 20 and 21 in *Doyon*), than was referred to by Mr. Justice Létourneau in that case.

[51] Given the evidence, the Tribunal finds, as fact, that in this specific case, Dai was never given a reasonable opportunity to make a declaration to the Agency inspectors that she was bringing meat products into Canada and to request whether such meat products were allowed entry into Canada. Through a series of unfortunate events, Dai was never able to express to Canadian authorities, before the decision was taken to issue her a Notice of Violation, the nature of the contents of her luggage. The Tribunal finds, as fact, that Dai was uncertain as to how to complete her Declaration Card and so left the box relating to whether she was bringing meat products into Canada blank. The Tribunal also finds, as fact, that Dai did not understand any of the English spoken to her by Inspector 15999 (prior to her being spoken to in Mandarin) and that the services of a Mandarin interpreter were not engaged until after Inspector 15999 he had commenced his search of her bags at secondary inspection and had decided to issue Dai a Notice of Violation. As a result, the Tribunal finds that the Agency has failed to prove element 3 of the alleged violation in that it failed to provide sufficient evidence to the Tribunal that it has met the very low threshold of proving that the Agency or its officials in this case provided a reasonable opportunity to Dai for her to justify the importation of meat products in accordance with Part IV of the *Health of Animals Regulations.*

[52] 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. Section 18 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.*

[53] The finding by the Tribunal, in paragraph 51, however, does not relate a defence of due diligence or mistake of fact by Dai. Clearly, had Dai raised such defences, Parliament's unequivocal statement on the issue in section 18 would have disallowed them.

[54] 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 the present case, it is clear from the evidence that any potential threat from the importation of meat products by Dai 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.

[55] 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, as a result of not providing Dai with a reasonable opportunity for her to justify the importation in accordance with Part IV of the *Health of Animals Regulations*, the Agency has failed to prove, on the balance of probabilities, one of the required elements of a violation under section 40 of the *Health of Animals Regulations.* The Tribunal, therefore, holds the applicant did not commit the violation and is not liable for payment of the penalty.

Dated at Ottawa this 30th day of March, 2012.

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Dr. Donald Buckingham, Chairperson