Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Raynald Drouin v. Canada (PMRA), 2011 CART 20

Date: 20111017
Docket: CART/CRAC-1546

**Between:**

**Raynald Drouin, Applicant**

**- and -**

**Pest Management Regulatory 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 subsection 6(1) of the *Pest Control Products Act* [section 6 of the former Act], 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 committed the violation and is not liable for the payment of the penalty.**

Hearing held in Quebec City, QC,
April 20, 2011.

## REASONS

### Alleged incident and issues

[2] The Pest Management Regulatory Agency (Agency or PMRA), alleges that the applicant, Mr. Raynald Drouin (Drouin), on or about July 13, 2009, at Ste-Famille, Île d'Orléans, used the pesticide indoxacarb on his apple trees, a pesticide that has not been registered in Canada contrary to subsection 6(1) of the *Pest Control Products Act* (PCP Act).

[3] Subsection 6(1) of the PCP Act reads as follows:

> **6.** (1) *No person shall manufacture, possess, handle, store, transport, import, distribute or use a pest control product that is not registered under this Act, except as otherwise authorized under subsection 21(5) or 41(1), any of sections 53 to 59 or the regulations.*

[4] The Tribunal must decide whether the Agency has adduced sufficient evidence to support the impugned Notice of Violation, by proving in particular that:

- indoxacarb is an unregistered pesticide in Canada under the PCP Act;
- the pesticide indoxacarb was found in leaf samples analyzed in Agency laboratories in September 2009;
- the leaves samples analyzed by Agency laboratories in September 2009 were from Drouin's apple trees;
- if the leaves samples analyzed were from Drouin's apple trees, that Drouin "used" indoxacarb on his apple trees on or about July 13, 2009.

### Procedural history

[5] Notice of Violation #09QC-304AMP01P, dated May 4, 2010, alleges that, on or about July 13, 2009, at Ste-Famille, Île d'Orléans, Drouin [TRANSLATION] "used a pesticide product that was not registered in Canada, namely indoxacarb, in the orchards that he farms contrary to subsection 6(1) of the *Pest Control Products Act* [formerly section 6 of the PCP 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 (Pest Control Products Act and Regulations)*."

[6] Service by the Agency of the above Notice of Violation on Drouin was deemed to have occurred on May 16, 2010. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations (Pest Control Products Act and Regulations)*, this is a very serious violation for which the penalty is $4,000.

[7] In a letter dated June 3, 2010, Drouin requested a review by the Tribunal of the facts of the violation, in accordance with paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act (AMP Act)*. By way of a telephone conversation with Tribunal staff on June 9, 2010, Drouin requested that the review be by way of an oral hearing, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, respecting the *Pest Control Products Act and Regulations.*

[8] On June 23, 2010, the Agency sent its report (Agency Report) concerning the Notice of Violation to Drouin and to the Tribunal, the latter receiving it on June 24, 2010.

[9] In a letter dated June 24, 2010, the Tribunal invited Drouin to file with it any additional submissions in this matter, no later than July 26, 2010. However, no additional written submissions were received from the parties prior to the hearing of this case.

[10] The oral hearing requested by Drouin was held in Quebec City, Quebec on April 20, 2011, with Drouin self-representing. The Agency was represented by its counsel, Ms. Patricia Gravel.

## Evidence

[11] The evidence before the Tribunal in this case consists of written submissions from the Agency (the Notice of Violation and accompanying documents and the Agency Report) and from Drouin (his Request for Review and attached statement). As well, both parties presented witnesses who tendered evidence at the hearing on April 20, 2011. Jessica Hill (Hill), Pierre-Olivier Duval (Duval), and Isabel Beauchesne (Beauchesne) gave evidence on behalf of the Agency, while Drouin gave oral evidence on his own behalf. During the hearing, the parties also tendered 14 exhibits as evidence:

From the Agency:

1. Identity card of witness Jessica Hill;
2. Satellite photo of Drouin farm;
3. PMRA label from sample to be submitted to Laboratory;
4. PMRA: Regional Operations Manual – 2000 Edition;
5. Health Canada: Multiregional Program for the Use of Pesticides in Apple Production 2008 - 2446;
6. Signed Analysis Report – PMRA Laboratory Services (dated March 4, 2009);
7. Signed Analysis Report – PMRA Laboratory Services (dated September 11, 2009);

8. Dupont – Avaunt insecticide brochure;
9. Curriculum vitae of Isabel Beauchesne; and
10. Analysis of Potential Sources of Indoxacarb in an orchard on Ìle d'Orleans (Beauchesne report).

From Drouin:

1. Email from Luc Gagnon, MAPAQ, to Drouin dated July 19, 2010;
2. Email from Luc Gagnon, MAPAQ, to Drouin dated July 23, 2010;
3. Letter from Shawn Fancy, PMRA to David Rompre, M.P. dated November 23, 2010; and
4. Email from Stephanie Tellier, MAPAQ to Drouin dated July 13. 2010.

[12] The following facts are not in dispute:

- Drouin has been operating a farm near at Ste-Famille on Île d'Orléans since 1985. He operates the apple farm, which contains an apple orchard of some 1,200 trees, as a u-pick operation and has other farm sources of revenue not related to the apple orchard.

- In August 2008 and again in July 2009, Hill, an inspector of the Agency, inspected Drouin's apple orchard and took samples of leaves from his apple trees and packaged the leaves in his presence for transporting. She also visited Drouin's farm in May 2009 to discuss the results of the analysis of the leaves she collected on her August 2008 visit to his farm.

[13] The Agency's witness, Hill, testified that she went to Drouin's farm in August 2008 without any advance notice to him as she was acting as an inspector of the Agency in its carrying out of a Canada-wide verification program of pesticide use on apple orchards (Exhibit 5 - Health Canada: Multiregional Program for the Use of Pesticides in Apple Production 2008 – 2446). Drouin's farm had been randomly selected for verification. Her job was to talk with the producer, inspect and take samples of his orchard, inspect pesticide storage facilities and the producer's record-keeping practices of pesticides used on the farm and to complete with the producer a questionnaire concerning pesticide handling and use. The aim of the program was to examine pesticide-use practices by producers and to detect the use of non-registered pesticides, if any was occurring. Drouin did not have advance

notice of the visit by Hill in 2008 and was one of two apple producers on the Île d'Orléans whom Hill visited as part of the 2008 program. Tab 9 of the Report contains the questionnaire that Hill compiled during her August 26, 2008 meeting with Drouin. It lists all of the pesticides that Drouin stated he had used on his apples and other crops in 2008 and what was still in his pesticide storage area. As well, Hill notes that she consulted Drouin's pesticide application registry at that time. Hill recorded on the questionnaire that:

1. Drouin or his father applied the pesticides on the farm,
2. they wore protective equipment during the mixing and application of the pesticides,
3. they followed label instructions and directions from the Quebec Ministry of Agriculture and Fisheries (MAPAQ) concerning the length of no-entry periods after the application of pesticides on their crops,
4. the producers has and maintains a written record of pesticide applications,
5. the objectives of the verification program were explained to Drouin,
6. the consequences of discovery of the use of non-registered pesticides,
7. under the final section of the questionnaire entitled "Comments and observations", Hill noted [TRANSLATION] "Producer is already very up-to-speed and has good answers."

[14] Hill told the Tribunal that, after she completed the questionnaire, her conclusion was that everything was in order at the Drouin farm and that his pesticide application registry was correct and current.

[15] Hill testified that, when she proceeded to take samples of Drouin's apple trees for analysis, she followed the procedure set out in the PMRA Regional Operations Manual – 2000 Edition (Exhibit 4). She prepared for the taking of the samples by putting on sterile boot covers and gloves, used disinfected scissors to cut off leaf samples, collected 500 grams of leaf samples from several trees, all of which were at least 10 metres from the orchard's edge to minimize the possibility of contamination of Drouin's trees from other producer's application of pesticides to their fields. She placed the leaf samples in aluminum sacks with labels (Exhibit 3) she had prepared to preserve the identity of the samples, then placed the aluminum package inside a disinfected container, closed it, tagged the container, placed it in her vehicle and, prior to shipping the sample off to the PMRA laboratory in Ottawa for analysis, stored the container in her office in Quebec. There is no record in the Agency's evidence of the information sheet that Hill used to accompany the sample to Ottawa but the lab analysis report (Tab 11) indicates that the sample was received on August 28, 2008, that the sample contained residues of indoxacarb in the amount of 0.020 ppm, and that the request for the analysis came from Duval (sent by Hill) from the Agency's Quebec office. The analysis was dated March 4, 2009, a period of more than six months from when the sample arrived at the Ottawa laboratory.

[16] Hill testified that she was requested by Duval to return to Drouin's farm in May 2009 to explain and explore with him the results of the laboratory analysis finding indoxacarb on the samples taken from Drouin's apple tree leaves in 2008. At Tab 12 of the Agency Report, an inspection report completed by Hill indicates that she attended Drouin's farm on May 14, 2009 as a follow-up to her visit with him in 2008. She told Drouin that the analysis revealed a non-registered pesticide indoxacarb. She notes in her report that Drouin told her that he did not know either the active ingredient "indoxacrab" or the product "Avaunt" and told her that he buys all of his pest control products from Synagri in Lévis from M. Alain Côté. Hill recorded that Drouin showed her his pesticide application record book (copies of which are contained at Tab 12). There is no record of any product by the name of Avaunt in that record book for the period 2006-2009. Hill recorded that Drouin told her he could not in the least understand where indoxacarb could have come from but that his neighbour is a market gardener who grew cabbages in 2008 in a field on the west side of his orchard. Hill asked Drouin if the neighbour was an organic producer and Drouin answered [TRANSLATION] "not at all". Hill and Drouin then did an inspection of Drouin's pesticide storage area and found only registered pesticides in the area. She concluded the meeting by re-explaining to Drouin the requirements of the PCP Act and the obligation on product users to use only registered products according to label directions or face the consequences of an administrative monetary penalty (AMP). In her testimony to the Tribunal she added that Drouin was surprised when she announced to him that the laboratory analysis came back positive.

[17] In a letter dated May 25, 2009 (Tab 13), Drouin received a formal letter from Duval of the Agency setting out the results of the 2008 laboratory tests and informing him that the use of indoxacarb in its American form of Avaunt, a non-registered pesticide under the PCP Act was in contravention of that Act's section 6(1) and could lead to measures being taken against products with such pesticide residues under the *Food and Drugs Act*. Duval notes [TRANSLATION]:

> *During your meeting with Inspector Jessica Hill (CFIA) on May 14, 2009, you stated to never having used an indoxacarb-based insecticide in your orchard during the 2008 growing season. It is therefore not been possible to determine the source of the residues of this active ingredient in the sample taken from your orchard in 2008 (page 2 in the letter).*

The letter ends with notice to Drouin that additional samples may be taken from his trees in the 2009 growing season and that if any infraction of the PCP Act for the use of non-registered products or for non-label use of registered products is detected, enforcement measures under the PCP may be taken.

[18] Hill testified that after Duval sent his letter to Drouin, she was instructed by Duval to complete a second inspection and sampling of Drouin's trees. She completed this task on July 13, 2009. Hill completed an inspection report documenting this visit (Tab 2 of the Agency Report). In her report, Hill notes that she compiled a list of the pesticides used on Drouin's

farm in 2009 by referring to his pesticide record book (Copies of the pages from that book are attached to the Hill's report at Tab 2). Her report notes that no adjacent fields or orchards were sampled that day but that [TRANSLATION] "Drouin wanted us to sample other producers on the Island, especially the small ones who didn't know what products they were applying." Finally, her report lists all the products found in Drouin's pesticide storage area, and all were found to be registered pesticides under the PCP Act.

[19] Hill told the Tribunal that she then went out into Drouin's orchard and took samples in the same manner and with the same precision that she had in August 2008. After she left the Drouin farm and returned to her office, she sent the sample to the PMRA laboratory in Ottawa for analysis with the "Sample Information" sheet found at Tab 6 of the Agency Report. On that form, Hill notes the date the sample was taken as July 13, 2009 and the inspection sample number as QC-2009-JH-0001, being apple tree leaves from the Paul-André Drouin et fils Inc. property. The analysis requested is for "as per Plan [and] according to the details under "Multi-résidus + Carbendazim". At the top right hand corner of the form there is a box labelled "sampling plan" with four choices—regular, investigation, follow-up, legal—where the follow-up box is checked off.

[20] Tab 7 of the Agency Report is an analysis report dated September 11, 2009, from the PMRA Laboratory Services in Ottawa states that it relates to Laboratory Sample 2009-QC-0049 and Inspection Number QC-2009-JH-0001 for apple tree leaves from the Paul-André Drouin et fils Inc. property taken July 13, 2009 and received by the laboratory on July 14, 2009. The Report notes that the analysis was requested by Duval (sent by Hill) and the results show a finding of indoxacarb in the amount of 0.028 ppm.

[21] By a letter dated May 6, 2010, (which appears in the Agency Report), Duval formally notifies Drouin that he is being served with a Notice of Violation under the AMP Act for a violation of the PCP Act and the options for payment of the financial penalty or review of the facts relating to the Notice of Violation. Attached to the Notice of Violation is a document entitled "Supporting Facts" which sets out the circumstances of the case including the accounts of Hill's visit and sampling of apple tree leaves in August 2008 and July 2009, instructions given to Drouin by Hill that he was not to use non-registered products and Drouin's comments to Hill that he only ever uses registered pest control products in his orchard.

[22] Agency's witness, Duval, testified that he is a PMRA regional agent for pesticides with his principal function being the surveillance of conformity with the PCP Act, in particular that pesticides are being used in accordance with the label directions and that products on the market are registered under the PCP Act. He testified that to determine if a pest control product is registered under the PCP Act, one must consult the Health Canada database. Duval confirmed to the court that he consulted that database in 2008-2009 and again just a few days before the hearing of this matter and that pesticide indoxacarb and the commercial formulations of it that are registered for use in the United States called "Avaunt" or "Steward",

are not registered for use under the PCP Act. He told the Tribunal that indoxacarb is an insecticide used for market garden vegetables, fruits, cotton and in homes for ants and other insects. Duval told the Tribunal he first became involved in the case PMRA 2008 apple verification program, and Hill visited Drouin's farm for a random sampling in August 2008. In March 2009, Duval received a notice that the analysis of Drouin's trees showed a positive result for indoxacarb, so he instructed Hill to return to Drouin's farm to talk to him and inform him of obligations under the PCP Act. Hill reported to Duval the results of her discussion, including the fact that Drouin maintained that he had never used indoxacarb and had no response for how it could have gotten into his field. Duval then sent a letter to Drouin (Tab 13) formally warning Drouin and indicating that a second sampling of his leaves was possible in the 2009 growing season. Duval told the Tribunal that he directed Hill to take another sample, which she did on July 13, 2009. With the results of that again being positive for indoxacarb, he reached the conclusion that Drouin had, for the second time in two years, applied indoxacarb to his apple trees.

[23] All the documents produced by the Agency for this case, Duval told the Tribunal, were under the direction of his office. The Drouin case was the only sample among the 2008 samplings of apple trees in Quebec came back positive and was then re-verified and came back positive again. Duval told the Tribunal that he made three additional verifications to confirm his conclusion: (1) the Agency prepared an expert report on the nature and possible sources of indoxacarb residues found on the Drouin farm (Beauchesne report). The conclusion of that report were that the levels of indoxacarb found could not have resulted from drift from an off-site location and could be those found by an application of the product at approved American application rates for the commercial product Avaunt; (2) the Agency's laboratory analyst, Neil Synder was easily able to identify the indoxacarb molecule because it is unique and does not arise from the degradation of other molecules. Duval told the Tribunal that the analyst would be 100% certain in this assessment because it is a routine test; (3) there was no possibility of cross-contamination of Dupont products by Dupont such that a registered product in Canada might have been contaminated at a Dupont plant abroad because Drouin's pesticide application record book showed him using only one Dupont product—Mazate—a product which is produced by Dupont uniquely in Colombia while their Avaunt is produced in several countries by specifically not in Colombia. Duval told the Tribunal that on the basis of these additional verifications and after discussion with his supervisor, a Notice of Violation was issued to Drouin. When asked by Agency counsel how one gets a product like Avaunt that is not registered into Canada, Duval replied that it can be ordered online over the internet, even by Ebay with delivery included, or the producer could go to the United States and buy the product there and bring it back to Canada.

[24] In cross-examination, Duval told the Tribunal that the Agency was not able to trace internet purchases of pest control products as it is difficult to establish the point of their sale. Duval also told the Tribunal that indoxacarbe can only be found in insecticide products and not in herbicide products, unless farmers themselves mix the two together, and that the American trade name preparations are "Avaunt" for use on vegetables and fruits and "Steward" for use on nuts and cotton.

[25] The Agency's witness, Beauchesne, testified as an expert. Although she is a duly qualified expert capable of testifying as an expert before the Tribunal (see Exhibit 9 for c.v. of Beauchesne), she is an employee of the Agency who was asked to complete a report on the presence of indoxacarb on the Drouin farm. She presented her report at the hearing (Exhibit 10). She prepared the report in the fall of 2009, and presented her findings to Duval in November 2009, with the full final report not being available in English until 2010 and in French until 2011. Beauchesne told the Tribunal that her conclusions in her report were that (1) carry-over from year to year of indoxacarb residues on apple leaves is extremely unlikely; (2) based on operational applications with an airblast sprayer as the source, the measured concentrations of indoxacarb on Drouin's leaves could result from a direct application of the product on site; (3) based on the expected concentration on apples after the 14-day waiting period, the measured concentrations of indoxacarb on Drouin's leaves could result from a direct application of the product on site; (4) it is extremely unlikely that the measured concentration resulted from drift; (5) contamination of ground water would not lead to concentrations of indoxacarb observed in the sampled orchard; and (6) as indoxacarb is not widely used in Canada, contamination of surface water from drift is unlikely. In oral testimony, Beauchesne told the Tribunal that it was very possible that the source of the indoxacarb was the direct application of it on the apple trees in 2009, and that, in her view, it was the only probable source. There was no other source, as drift from other fields was not realistic as they are too far away from Drouin's orchard and most drift, if any, would be caught in the first 10 metres into the orchard. Water contamination, such as might occur if Drouin mixed his registered products with water contaminated with indoxacarb, is extremely improbable as indoxacarb is not widely enough used to contaminate ground or surface water in Canada.

[26] In his own defence, Drouin presented evidence via the written statement accompanying his request for review and by oral testimony before the Tribunal. In his written statement dated June 3, 2010, he states that he uses only registered pesticides for his orchard and respects all waiting periods before harvest for each product. He has kept a pesticide application record book of all applications since 1996. In his communications with Duval in 2008, 2009, and 2010, Drouin states that he told Duval [TRANSLATION] "that I haven't even heard of the insecticide "Avaunt" and I have never used it." Drouin continued [TRANSLATION]:

> *I have all of the purchase invoices for the insecticides that I have used and applied on my orchard. Why would I use 2 similar insecticides in the same period and thereby increase my costs. That's just not logical. You can check everything in my application record books.*
>
> *As I have already mentioned, I am prepared to go all the way because I am not guilty, and I will even take a lie detector test if that is required.*

[27] Drouin stated in oral testimony to the Tribunal that he has never used indoxacarb and he has always maintained to Agency officials from the beginning that he never, ever has

used non-registered pest control products. He has taken courses on how to use registered products and since 2006 has meticulously completed a pesticide record book of all the pesticides he applies to his farm. He has an interest in doing so –for his health and the health and safety of his family and for the safety and commercial relations he has with his clients who come and pick his apples and pay him for them. Drouin told the Tribunal that prior to being informed by the Agency about the existence of the product indoxacarb, he had never heard of it. When he did hear about it from the Agency, he called Duval and asked him more about it and Duval told him that it was an insecticide for cabbages and apples. Drouin told the Tribunal that after he received Duval's letter in May 2009, telling him he was going to be inspected again in the 2009 growing season, it would be illogical for him to apply a non-registered product knowing that the Agency would be coming later to take samples. Drouin told the Tribunal that he did apply registered pesticides—such Imidane, Manzate, and Calypso—to control apple pests in 2008 and 2009. In tha case, why would he need to or want to apply another pesticide that would do the same thing? Drouin stated that even getting Avaunt would take time and effort that he didn't have.

[28] Drouin told the Tribunal that he asked Duval to take additional samples from his farm and from nearby orchards and fields but Duval refused. Then Drouin received the Notice of Violation and he again called Duval and asked why additional samples from his and other farms had not been taken. Duval told him that it was expensive--$500 to do a sample and so no more samples were done. Drouin reported to the Tribunal that Duval told Drouin that they would only do samples for cases under investigation and those had been done. Drouin proposed to Duval that he, Drouin, would get another sampling done at his own expense or that he would have an independent lab do an analysis of the leaves that the Agency had from his farm in 2009. Drouin said he asked Duval if he still had the samples and he said that he did and so Drouin contacted Luc Gagnon from MAPAQ to carry out the independent analysis. However, after initially agreeing to do the analysis (Exhibit 11), Gagnon contacted Drouin telling him that his supervisor had overruled him and that they would not be able to help him, as this would be interfering with a PMRA file (Exhibit 12). After contacting his Member of Parliament, M. David Rompre, to assist him, Drouin told the Tribunal that he received a copy of letter from Shawn Fauley of the PMRA to M. Rompre (Exhibit 13) wherein the PMRA refused to provide Drouin or another laboratory with a sample of the leaves collected for independent verification of the results, citing loss of integrity of the sample as the reason. Finally, Drouin presented the Tribunal with a document from Ms. Stephanie Tellier of MAPAQ (Exhibit 14) which presents opinion evidence that drift could have been a cause of the presence of indoxacarb in Drouin's orchard. While Ms. Tellier was not called as a witness, her statement was received by the Tribunal, although the weight to attribute to the document must not be great.

[29] After the Agency told him a second time in 2009 that there was a positive test for indoxacarb, Drouin told the Tribunal knew that there was a problem and that something was not right. He told the Tribunal that, since he continued to use the same pest control products on his apples orchards and do the same thing year after year, he needs find out what is causing this lab results. He wondered-did the lab made a mistake with the samples, was there a contamination of his ground or surface water?

[30] In cross-examination, Drouin told the Tribunal that again that he has never purchased the product “Avaunt” and has never had or applied “Avaunt” to his orchard. He explained to the Tribunal that he himself applies all the insecticides to the trees and has one designated sprayer for his orchard.

## Applicable Law

[31] This Tribunal’s mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the AMP Act. The purpose of the AMP 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.*

[32] Section 2 of the Act defines “agri-food Act”:

> ***2.*** *“*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*.*

[33] 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…*

[34] The Minister of Health has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations (Pest Control Products Act and Regulations)* (SOR/2001-132) which designates as a violation a contravention of several specific provisions of the PCP Act and *Pest Control Products Regulations* (*PCP Regulations*). These violations are listed in Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations Respecting the Pest Control Products Act and Regulations* and include a reference to subsection 6(1) of the PCP Act.

[35] Subsection 6(1) of the PCP Act sets a clear and unequivocal burden of responsibility on all Canadians not to manufacture, possess, handle, store, transport, import, distribute or use a pest control product that is not registered under the PCP Act.

[36] To determine the outcome of this case, given the opposing evidence, the Tribunal is guided by The Federal Court of Appeal, in *Doyon v. Attorney General of Canada*, 2009 FCA 152 which cautions this Tribunal to be *"circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link"* At paragraphs 27 and 28 of that decision, the Court stated:

> *[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.*

[37] In paragraphs 20, 42, 54 and 72 of *Doyon*, the Federal Court of Appeal set out certain considerations the Tribunal must be mindful of in coming to its decisions:

> *[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.*
>
> …
>
> *[42] Each of these essential elements of the violation must be proven to make it possible to conclude that the accused has committed a violation.*
>
> …
>
> *[54] The main function of a tribunal of first instance is to receive and analyse the evidence. In carrying out this important function, it may reject relevant evidence, but it cannot disregard it, especially if it contradicts other evidence of an essential element of the case: see* Oberde Bellefleur OP Clinique dentaire O. Bellefleur( Employer) v. Canada (Attorney General)*, 2008 FCA 13;* Parks v. Canada (Attorney General), *[1998] F.C.J. No. 770 (QL)*; Canada (Attorney General) v. Renaud, *2007 FCA 328; and* Maher v. Canada (Attorney General), *2006 FCA 223. If it decides to reject the evidence, it must explain why:* ibidem.
>
> …

> *[72] In conclusion, the Tribunal's error concerning the scope of the* Samson *decision, above, the errors made in managing and analysing the evidence and the failure to recognize and gauge the weakness of the prosecution's evidence led the Tribunal to render a verdict that, in my view, was unreasonable and that should be set aside.*

[38] It is the task of the Tribunal to sift through the evidence in this case so as to come to its conclusion as to whether the alleged violation was committed by the alleged violator, as set out in section 19 of the AMP Act:

> **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.*

## Assessment of the Evidence and Application of the Law

[39] As stated in *Doyon* above, the Tribunal must assess, based on the evidence, on the balance of probabilities, whether the Agency has proved "*each of these essential elements of the violation … to make it possible to conclude that the accused has committed a violation."* (paragraph 42 of *Doyon*).

[40] As the exceptions set out in subsection 21(5) or 41(1) of the PCP Act and any of sections 53 to 59 of the PCP Regulations do not apply in this case, a violation of subsection 6 (1) of the PCP Act will validly arise in this case where the following four elements are proved:

1. A person
2. manufactured, possessed, handled, stored, transported, imported, distributed, or used
3. a pest control product,
4. that was not registered under the PCP Act.

[41] Specifically in this case, the Agency alleges, for each of the elements, that it has proved that:

1. Drouin
2. in July 2009, used on his apple trees

3. indoxacarb in some commercial formulation; and

4. that indoxacarb is not registered under the PCP Act.

[42] Examining the evidence, it is only with respect to element 4 that the parties are not in dispute. While the evidence offered by affidavit by the Agency at Tab 1 of its Report to support this finding cannot be received because of the Tribunal's Rule 17, the uncontradicted evidence of Duval was to the effect that indoxacarb was on July 13, 2009 and still remains an unregistered pesticide under the PCP Act. The Tribunal, therefore, finds as a fact that indoxacarb is not registered under the PCP Act in Canada, but that it may be available in the United States or other countries under the trade names of "Steward" and "Avaunt". The Tribunal is satisfied, on the balance of probabilities, that the Agency has proved element 4 of the alleged violation.

[43] With respect to other three elements, the parties are diametrically opposed as to the conclusion the Tribunal should draw from the evidence presented.

[44] The Agency has presented evidence to convince this Tribunal that on the balance of probabilities it was (1) Drouin who (2) used on his apple trees in 2009 (3) indoxacarb. The evidentiary basis for this position is that Hill, an Agency official collected leaves from Drouin's orchard, those leaves were analyzed in an Agency lab, where they were found to contain indoxacarb residues, and then an Agency expert later provided expert opinion evidence that the only probable explanation of the presence of residues of this type and concentration would be the deliberate application of indoxacarb according to American application guidelines to his apple trees. The next step in the argument which was not substantiated in any way but by inference was that the only person that could have carried out the deliberate application of the indoxacarb was Drouin. This position is presented to the Tribunal as the most logical and probable explanation, even though circumstantial, to prove that Drouin used on his apple trees in 2009 the unregistered pesticide indoxacarb.

[45] Drouin, on the other hand, has presented evidence to this Tribunal as to why the Agency position is neither logical, nor probable but is totally unfounded as it fails to prove that he used indoxacarb at all. First, Drouin has consistently and repeatedly stated that he did not know about a product known as indoxacarb before Agency officials brought the product to his attention in May 2009. Second, he emphatically and consistently stated he has never bought the product, stored the product or used the product "Avaunt". Third, in openly cooperating with Agency officials in the investigation, he repeatedly presented to Agency officials on no less than three separate occasions his pesticide application record book showing all pesticides that he or his father had applied to the farm since 1996, and indoxacarb or "Avaunt" never appeared in that record book. His cooperative tone and continuing disbelief that any pesticide that contained indoxacarb could have been found on his property fit with his cooperative behaviour and disbelief expressed to the Agency throughout the investigation.

[46] The Tribunal found witnesses for both parties very credible. However, under the circumstances, the burden of proving a violation and the legal burden of persuasion falling on the Agency, the Tribunal finds that the Agency has failed to prove, on the balance of probablilities, that Drouin used indoxacarb.

[47] The Tribunal accepts the evidence of Drouin that he has never purchased or used indoxacarbe on his farm and therefore could not have used indoxacarbe on his apple trees in July 2009. Drouin was very genuine, credible and consistent on this point—from his first meeting with Hill, to his calls to Duval, to his submissions in his request for review, to his oral evidence at the hearing, he maintained never, ever to have used the product Avaunt. The Tribunal finds Drouin's evidence on this point is supported by the evidence presented by the Agency concerning the inspection of Drouin's pesticide application record book and inspection of his pesticide storage area. On three occasions—August 26, 2008, May 14, 2009 and July 13, 2009, the Agency's Hill inspected Drouin's pesticide application record book and his pesticide storage area and found no record of "Avaunt" or any other pesticide or mixture that contained indoxacarb recorded or in storage. Moreover, at no time did the Agency note any suspicious entries in the record keeping book or suspicious containers that might have contained a product with indoxacarb. Without such evidence as part of the Agency's case, the Tribunal would have to not only reject the truthfulness and integrity of Drouin as a person but would also have to subscribe to the innuendo that Drouin was the kind of person who would lie to Agency officials, hide pesticides, falsify records and make clandestine visits to the United States or purchases over the internet to obtain an illegal product that would offer him no particular commercial advantage compared to what he would be able to acquire from his local pesticide supplier.

[48] The Agency argued that Drouin's evidence should be seen as self-interested and so must be discounted. The Tribunal found Drouin to be a thoroughly credible witness. The Agency argued as well that, given dicta in the case of *Faryna v. Chorny* [1951] B.C.J. No. 152, Drouin's evidence must be discounted because it is not "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time" (paragraph 9 of *Faryna*). The probabilities in this case, however are difficulty to ascertain. While the evidence presented by the Agency was detailed, very scientific, and very carefully documented, it remains circumstantial that Drouin used indoxacarb, in the face of Drouin's oral evidence and written evidence in the form of his pesticide application record, that he did not use indoxacarb, and never had, in any of its commercial formulations on his apple trees in July 2009.

[49] The Tribunal recognizes that its factual determination, based on Drouins's direct evidence, that Drouin never purchased or used indoxacarbe, in essence, rejects the circumstantial evidence of Agency that he did. The Agency's evidence of the three elements of the violation, which it has not proved on the balance of probabilities, did have certain deficiencies. First, with respect to elements 1 and 2--the identity of the alleged violator and

the use of the prohibited product--the Agency never presented any evidence that it was Drouin that used or applied the prohibited production. The Tribunal was asked by the Agency to make the leap that because the apple leaves at the Ottawa PMRA lab were found to have indoxacarb residues, then it must have been Drouin who put those residues there because he owned and operated the farm where the apple trees were located. By itself, this might have been a question of probability that the Tribunal was prepared to resolve in favour of the Agency, particularly in a situation where there was no, or no credible, direct evidence from Drouin to the contrary or where there was evidence of the product "Avaunt" entered in Drouin's pesticide application record book, or where there was evidence adduced by the Agency that cast doubt on the truthfulness of the record book or where there were mysterious entries in the record book or mysterious containers in the pesticides storage areas on his farm. None of these were present in the case. Nor did the Agency ever feel that it was necessary or prudent for them to take samples of any of Drouin's pesticides for analysis to prove their case that Drouin might have had indoxacarb on his property.

[50] With respect to element 3—indoxacarb, the unregistered product—the Agency evidence was very strong and scientifically rigorous but presented some difficulties in terms of maintaining the legal integrity of the sample obtained so as to guarantee that the sample analyzed was the sample that came from Drouin's farm. Given that the case to prove circumstantially that Drouin used indoxacarb was based on the important direct evidence that leaves from his farm contained indoxacarb, the Agency needed to be very vigilant in the collection and analysis of that evidence. They failed in this regard.

[51] The Tribunal accepts that Hill carried out with care and precision the collection and marking of samples from Drouin's apple orchard. On two occasions, she collected leaves randomly from the orchard, marked them, stored them, and sent them off to a federal government laboratory in Ottawa. The Tribunal also accepts the government laboratory in both cases detected the presence of indoxacarb on the leaves. However, the evidence that the Agency tendered in Exhibit 4, page 26, contains a section entitled "Legal Samples", which does not appear to have been compiled with and may have compromised, or at least calls into question the evidence tendered by the Agency regarding the laboratory analysis.

[52] While Hill maintained that in the collection of both the August 2008 and July 2009 samples from Drouin's apple trees she followed the procedure set out in the PMRA Regional Operations Manual – 2000 Edition (Exhibit 4), the Tribunal notes that Hill appears to have neglected to follow for each sample, the procedure set out at page 24 of the Manual entitled "LEGAL SAMPLES – To be taken ONLY if prosecution is in mind or is highly possible". Likely this section of the manual would not have been seen to be applicable with respect to the collection of the August 2008 sample. Testimony from Hill and Drouin regarding the August 2008 sampling indicates that neither of the parties thought that there would be a problem—in fact Hill's questionnaire seems to indicate that everything looked like it was in order at the Drouin farm. However, by the time Hill came to complete the second sample in

July 2009 and after her visit to Drouin in May 2009 explaining the results of the analysis of the August 2008, clearly legal action for non-compliance was already in the contemplation of the Agency and in fact such legal action did ensue on the basis of the lab results from the July 2009 sampling. The Tribunal finds as fact that there is evidence on the record that the Agency failed to followed the specific steps set out in the Manual under the section "Legal Samples" at page 26, so as to ensure the integrity of the process that it might later rely upon to take legal action against Drouin. The Manual requires that for legal samples the following steps be followed:

1. Regional Manager or Officer to notify Residue lab to expect sample and to identity designated analyst;

2. Maintain sample integrity (keep sample locked up or in sight at all times);

3. Specify analysis requested on Sample Submission form;

4. Seal sample and initial inspection stickers. Use seal tape;

5. Address box to specific analyst at the lab. Notify the analyst to expect sample;

6. Mark box LEGAL SAMPLE and ATTENTION: (analyst's name)

7. Seal the box with official adhesive tape and initial box at seal (tape) joint.

[53] At Tab 6 of the Report, is the "Sample Information" sheet that Hill completed and sent along with the July 2009 sample to the Ottawa lab. This form fails to meet the Legal Samples criteria in the Manual in the following ways: Hill did not indicate that this sample was under the "Legal" sampling plan even though the Agency by this time clearly was aware that the sample would be or might be used as the basis for legal enforcement action against Drouin. There is no evidence that Hill or Duval notified the lab to expect the residue sample and to identify a designed analyst. There is no evidence that the maintenance of the sample's integrity was a priority or concern or that it was locked up or kept in sight at all times. There is no evidence that the sample was sealed with seal tape. There is no evidence that the sample was addressed to the specific analyst at the Ottawa lab or that he or she had been notified of the sample's imminent arrival. There is no evidence that the box containing the sample was marked LEGAL SAMPLE and ATTENTION: (analyst's name). Finally there is no evidence that the box was sealed and the initialled. This is not to say that some or all of these steps were not taken by the Agency but no evidence to that effect was before the Tribunal, which again affects the reliability and weight to be attributed to the lab analysis that is key to proving the Agency's case.

[54] These measures in the Manual regarding samples that might be used in legal cases are in place, no doubt, to preserve the identity of the product analyzed and the integrity of the

system in maintaining a clear line of control over the product at all times that will be necessary in any legal action where unaccounted-for periods of maintaining sample integrity can jeopardize a finding of legal liability. Sample integrity is unfortunately missing in this case and it would have been an essential piece of the puzzle to solidify the Agency's case against the direct evidence of the alleged violator who has testified under oath he never ever used on his farm the product found by the lab analysis on leaves purported to be from his farm. Where the Agency has not followed its own procedure as set out in its Regional Operations Manual – 2000 Edition (Exhibit 4), the claim of the infallibility of the results of the analysis, as set out in the Agency's letter to the David Rompre, M.P. (Exhibit 13) is diminished. The questioning of the infallibility of the results of the analysis is further justified in the Agency's clear choice to inform Drouin, a federal Member of Parliament, provincial agencies that they were not prepared to share their samples with anyone for a verification of their results.

[55] The Agency also urged the Tribunal to accept that it was not the Tribunal's responsibility, if there was indoxacarb in Drouin's apple trees leaf samples, to determine how the pesticide got there. Equally true, the Tribunal finds is that it is not its responsibility to assume that Agency's causal link required to get leaves from Drouin's orchard to an Ottawa laboratory and the results of that analysis back to the Agency's Quebec official is necessarily without the possibility of interruption or mistake.

[56] The Tribunal is then left hanging on the point of a balance. As the legal standard applicable to the finding of a violation under the AMPS system is the balance of probabilities, the decision-maker is required to be more certain that the events or elements to be proved did occur than they did not. The Tribunal finds that it cannot make such a finding in this case and therefore concludes as a finding of fact in this case, that Drouin did not use indoxacarb in some commercial formulation on his apple trees in July 2010.

[57] The Tribunal is reminded of the words of the Federal Court of Appeal *Doyon*, in paragraph 32, that is the responsibility of the Tribunal to make such determinations on the evidence, even where it is difficult to weigh the evidence from each party:

> *[32] It cannot be reasonably argued that there is a total lack of evidence of a violation in this case. The exercise undertaken by the Tribunal involved applying the law to the facts of the case. Its decision therefore involves a question of mixed fact and law reviewable on a standard of reasonableness: see* Dunsmuir v. New Brunswick*, 2008 SCC 9. It goes without saying, however, that errors of law as to the definition of the essential elements of a violation and the management of the evidence can render a decision unreasonable.*

[58] Moreover, the Federal Court of Appeal in *Doyon*, para. 49, has alluded to the draconian nature of the AMPs system and the need to be cautious in impeding liability to an alleged violator too liberally:

> *[49] As this provision triggers a substantial monetary penalty, we must guard against a liberal interpretation that extends the scope of the essential elements, which are already quite broad, given the fact that the person who has committed the violation has absolute liability, that the prosecutor has a considerably reduced burden of proof and that the person who has committed a violation risks higher penalties in the event of a subsequent violation (see sections 5 and 6 and Schedule 3 of the AMPs Regulations).*

[59] The Tribunal's concludes as fact that there is insufficient evidence to support a finding that the Agency has proved elements 1, 2 and 3 of the violation, on the balance of probabilities. The direct evidence of Drouin, in this case his pesticide application record book and his pesticide storage area, outweigh the circumstantial evidence adduced by the Agency that he was the one who used indoxacarb, if indeed that was the substance that was found on his apple tree leaves. In choosing not to follow the method outlined by its own procedure manual for the taking and maintaining the integrity of samples required for legal cases, the Agency, in the opinion of the Tribunal, brought into question the validity of its lab analysis findings. The Agency may have tried its best to ensure that the causal link from field to lab to the receipt of the lab analysis in Quebec was unbroken, but to say that the causal link was broken requires something more than the simple assertions presented in evidence at the hearing. Such would require the Tribunal to delve into conjecture, speculation, hunches, impressions (Doyon, para. 28). This, coupled with the Tribunal's acceptance of Drouin's evidence that he never used the pesticide in question, tips the balance in favour of this Tribunal finding that the Agency has not therefore proved all the essential elements of the alleged offence set out in the Notice of Violation against the alleged violator Drouin and, therefore, determines that the applicant did not committed the violation and is not liable for the payment of the penalty.

Dated at Ottawa, this 17th day of October, 2011.

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Dr. Donald Buckingham, Chairperson