

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: L.B. Vaghela Ltd. o/a Tropical Impex v. Canada (CFIA), 2012 CART 16

Date: 20120920
Docket: CART/CRAC-1583

Between:

L.B. Vaghela Ltd. o/a Tropical Impex, Applicant

– and –

Canada (Canadian Food Inspection 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 subsection 34(1) of the *Plant Protection Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable to pay the respondent a monetary penalty of \$10,000 within thirty (30) days after the day on which this decision is served.

The hearing was held in Toronto, ON,
on June 12, 2012.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, L.B. Vaghela Ltd., operating as Tropical Impex (Impex), on February 9, 2011, at Mississauga, Ontario, committed a violation in failing to comply with its import permit by importing from India two boxes of kand vegetables (this rootcrop is also spelled kandh and kandha (species *Pachyrhizus*)) containing soil, contrary to section 34(1) of the *Plant Protection Regulations*.

[3] Subsection 34(1) of the *Plant Protection Regulations* reads as follows:

34. (1) *A person who imports a thing under a permit shall comply with all the conditions set out in the permit.*

[4] The Tribunal must decide whether the Agency has established all the elements required to support the impugned Notice of Violation in question, particularly that:

- Impex had an import permit for the importation of plant materials into Canada;
- Impex imported plant material under the import permit; and
- the plant material imported by Impex under the import permit failed to comply with one or more of the conditions set out in the permit.

Procedural History

[5] Notice of Violation 1112ON4106, dated May 16, 2011, alleges that on February 9, 2011, at Mississauga, Ontario, Impex “committed a violation, namely: Fail to comply with import the import [*sic*] permit conditions to wit: 2 boxes of Kand with soil, contrary to section 34(1) of the *Plant Protection Regulations*, which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.”

[6] Service by the Agency of the above Notice of Violation on Impex was deemed to have occurred on May 27, 2011. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (Regulations), Impex's alleged infraction is a very serious violation for which the penalty assessed is \$11,000.00.

[7] In a letter dated and faxed to the Tribunal on June 27, 2011, Impex requested a review by the Tribunal of the facts of the violation, in accordance with subsection 9(2)(c) of the *Agriculture*

and Agri-Food Administrative Monetary Penalties Act. In that fax, Impex requested that the review be by way of an oral hearing in English, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[8] On July 13, 2011, the Agency sent its report (Report) concerning the Notice of Violation to Impex and to the Tribunal, the latter receiving it the next day.

[9] In a letter dated July 14, 2011, the Tribunal invited Impex to file with it any additional submissions in this matter, no later than August 15, 2011. On August 16, 2011, the Tribunal received a fax from Impex, acting through its president Mr. Lalit Vaghela (Vaghela) dated August 15, 2011, informing the Tribunal that it would be making no additional written submissions “except to point [out] that L.B VAGHELA LTD is operating as TROPICAL IMPEX AND QUALITY FRESH PRODUCE and that I will afford my self The Assistance of a counsel to help thorough [*sic*] the review process”.

[10] After two postponements, the oral hearing requested by Impex was held in Toronto, Ontario, on June 12, 2012, with Impex represented by Mr. Ian Ball and the Agency represented by its counsel, Ms. Jacqueline Wilson.

Evidence

[11] The evidence before the Tribunal in this case consists of written submissions from the Agency (Notice of Violation and Report) and from Impex (Request for Review and fax of August 15, 2011). Written evidence from the Agency also consists of an affidavit of Ms. Sylvia Miller (Miller), the filing of which occurred on the day of hearing, but which had been consented to by Impex (see email of Impex’s representative Mr. Ball, dated April 26, 2012), as is required by Rule 17 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* SOR/99-451. Oral testimony at the hearing was provided by the Agency witness, Inspector Franklin Suh (Suh) and by Impex’s president Vaghela and forms part of the evidence in this case. Finally, the Agency tendered one exhibit at the hearing on June 12, 2012, entitled the “Inspector’s Report Plant Protection Program”, dated February 9, 2011. Impex tendered no exhibits at the hearing.

[12] Certain facts in this case are not in dispute:

- For the period including the relevant date of February 9, 2011, Impex was in possession of a valid Canadian import permit to import from various exporters in India “rootcrops for consumption except potatoes (*solanum tuberosum*)” (agreed fact of the parties; see also Import Permit P-2010-02565 issued to L..B. Vaghela Ltd., at Tab 2 of Report).

- Impex's Import Permit P-2010-02565 had three conditions: "(1) It is prohibited to propagate any material imported under this permit; (2) The material must be free from all growing media, soil and/or related matter; (3) Material must be clean and free of pests and/or soil, and if packaged in containers, the containers must be new." (agreed fact of the parties; see also Import Permit, P-2010-02565 issued to L..B. Vaghela Ltd., at Tab 2 of Report).
- On February 9, 2011, at Mississauga, Ontario, Impex imported into Canada boxes of a rootcrop known as kand, a kind of purple sweet potato grown in India. At the time of the alleged incident, these vegetables were being stored at the holding facility ACI Warehouse (agreed fact of the parties).
- Also on February 9, 2011, Suh, a designated inspector under the *Plant Protection Act*, attended the holding facility where Impex's Kand were being stored (agreed fact of the parties).
- On February 14, 2011, Miller, a laboratory analyst of the Agency, examined two samples marked as lab submission 2011PHI-0000010290-4 that had been sent to her by Suh. Sample 0001 was a vial of the matter identified as soil and sample 0002 was the roots of the kand, a root vegetable, with soil. Miller's analysis revealed that the matter was soil and that the vegetable had soil on it and that the soil was infested with a pest (Miller affidavit).

[13] Additional facts were provided from Suh through the documents he prepared during, and after, his inspection which were included in the Report and through his oral testimony at the hearing. Suh testified that he attended at the ACI Warehouse with another Agency inspector on February 9, 2011, with the primary purpose of delivering Notices of Violation to parties other than Impex. However, once the inspectors arrived at the ACI Warehouse, they noticed two new shipments that had just arrived and so they proceeded to inspect the new shipments as well. Suh explained that the two shipments were located at loading doors 1 and 6, which were about 50 metres apart, with Suh's colleague inspecting the shipment at loading door 1 and he inspecting the shipment at loading door 6. Suh told the Tribunal that he approached loading door 6 and asked the person that was picking up the load who he was and what he was doing. The person identified himself as from Impex and that he was picking up a shipment of goods that his company owned. Suh testified that during this random inspection he asked the person picking up the load if he had any shipping documents for the goods and that the employee of Impex replied that he did not. Suh then proceeded to inspect some of the 100 or so containers of vegetables, fruits and rootcrops of the Impex shipment. Each of the boxes had an airway bill number. In particular, Suh inspected two boxes of kand. When he inspected them, he noticed that these rootcrops had soil attached to them, particularly in the crevices of the kand. Suh told the Tribunal that his four years of experience as an inspector of vegetables, fruits, nursery stock and lumber has provided him with the expertise to be able to determine that there was soil on the kand he inspected on February 9, 2011. Suh said that after he completed the inspection, he

confiscated the two boxes of kand and put them in the trunk of his vehicle. His colleague, who conducted a similar inspection to his, at door 1, also confiscated kand—four boxes of them—and those were also put into the trunk of his vehicle as well. Suh told the Tribunal that the two lots, however, had different stickers, which respected the two different airway bill numbers of the two shipments.

[14] Suh also testified that when he got back to the office, he placed the boxes in a cooler and placed identifier labels on the two Impex boxes. The other four boxes collected by his colleague were also put into the cooler, but had different owner and airway bill number identifiers. On February 10, 2011, Suh commenced the preparation of the paperwork for the lab submission of the samples from the two Impex boxes. At the same time, Suh took photos of the kand (Tab 3 of the Report). For the lab sample, Suh wrapped the kands in moist paper, then in plastic and then in a box. For the sample of soil, Suh took a kand, scrapped it and deposited the scrapings in a vial and placed the vial and the kand in a box and marked it as sample of soil. Suh then placed both samples in a large box, labelled it with the lab submission number and sent the box to the lab via Purolater courier. Suh testified that by processing only one set of samples at a time, the samples to be sent to the lab could not be mixed up.

[15] With respect to the documentation he completed, Suh told the Tribunal that he prepared an “Inspector’s Report Plant Protection Program” (the two versions of this document are found at Tab 4 of the Agency Report and Exhibit 1 of the hearing) during his inspection of Impex’s kand shipment at the ACI Warehouse on February 9, 2011. In his report, as shown in Exhibit 1, Suh noted that: the client is “Tropical Impex 3800 Highgate Dr. Markham, ON”; that the grower/premises is “ACI @ Vista Cargo 6500 Silverdart Dr., Mississauga, ON”; that the commodities/articles inspected are “Kand (Rootcrops) Two(2) Boxes of Kand/* Amongst other goods Ex. India Airway Bill #: 098-90773034”; and, that the Inspectors Comments/Results section contains the following notes: “One (1) inspection of kand and suran/The kand are found to have presence of soil/The two (2) boxes of kand are confiscated; a Notice Pursuant to the Plant Protection Act (#047912) was issued./The remainder of the Cargo load was released.” Two other notations of relevance are noted on the report. On the top right side of the report there is a notation which reads “*Paperwork X No time to review at or during inspection receive and reviewed after”. Towards the bottom of the report just above Suh’s signature and inspector number and the date of the report (Feb 09, 2011), there appears a notation “Commodity/Articles Inspected... Released... Detained... Sample Taken... X Others... Confiscated two boxes of suran”.

[16] Suh also told the Tribunal that the other version of the “Inspector’s Report Plant Protection Program”(found at Tab 4 of the Report) contained additional notes made by him when he returned to his office later in the day on February 9, 2011. The additional notations include: (1) a correction of Tropical Impex’s address to “38 Highgate Dr. Markham, ON”; (2) an additional notation under the *Paperwork section which read “*No paperwork* -Import Permit Expired- No NISC pkg limited”; (3) an additional notation under the Commodity/Articles Inspected section which read “(each box = 22 lbs); (4) the addition of a red and white sticker

indicating an Air India Bill no. 098-90773034; and (5) the addition of a notation at the very bottom of the page stating “P-2010-02565 *New Imp. Permit*”. During his testimony, Suh also told the Tribunal that he was mistaken, in recording in both versions of his report, the observation that he confiscated suran as he had not—all he found and confiscated was kand.

[17] Suh also prepared the Notice Pursuant to the *Plant Protection Act* #047912 (Tab 5 of the Report) at the time of the inspection of the shipment at ACI Warehouse. The Notice sets out, among other things, that Impex is the owner or possessor of two boxes of “kand with soil Ex. India”, and that the boxes are being confiscated and will be destroyed under Agency supervision. A copy of this Notice was given by Suh, to the person who was picking up the Impex shipment.

[18] In cross-examination, Suh reiterated that the inspection of the goods at ACI Warehouse was a random inspection and that the inspectors had come to the warehouse for another primary purpose but that inspectors are permitted to undertake random inspections. In this case, Suh and his colleague were doing inspections as the commodities were being unloaded. Suh admitted that there were certain factual errors in both versions of his inspector’s report, including his references to suran rather than to kand, an omission in that he failed to check off the box indicating that a sample of the good had been taken, and an error as to who was the exporter of the kand in India.

[19] Vaghela was the only witness called to testify on behalf of Impex. He is the owner and president of Impex, a company which for 35 years has imported fruit and vegetables from the United States and abroad. Vaghela told the Tribunal that on February 9, 2011, he was in India, but soon thereafter, he heard from his employee that there had been an inspection and that there was an allegation that there was soil on Impex produce. The airway bill number 098-0-9077-3034 (Tab 1 of the Report) was the airway bill under which the products, including kand, were shipped from Mumbai on February 8, 2011, to Toronto on February 9, 2011. The goods were shipped by Bhagwandas Bherumel & Co. from India to Canada and were stored at ACI Warehouse. Vaghela told the Tribunal that when goods he owns arrive in Canada, prior to their release, an Agency approval is required. This can be done in advance with the Agency issuing such an approval or requiring an inspection. This is one of the documents that a driver will need to have the products released. Once the documentation is in order, the driver can then proceed to load the goods. Vaghela testified that Impex has been cited for plant protection violations before and that, as a result, the company immediately contacted its suppliers by telephone and explained to them the importance of cleaning the product before it is shipped to Canada, and the implications for Canadian importers and Canadian agriculture if the product was not properly cleaned. Vaghela also told his employees to check for soil on arriving shipments. Vaghela testified that his company has experienced situations where boxes destined for one company wind-up being channelled to another company by mistake. Vaghela also testified that he believes that in the present case, boxes imported and owned by another company were the ones in his company’s shipment that were inspected by the Agency.

[20] In cross-examination, Vaghela told the Tribunal that he stopped importing kand after the February 9, 2011 incident. He did however confirm that the company's shipment received that day did contain kand. Vaghela told the Tribunal that on February 8, 2011, Impex provided the Agency with the incoming shipment packet list and a request for release of the shipment. However, since that day, the Agency has not requested any further documentation regarding the shipment from Impex. While Vaghela acknowledged that he had not spoken specifically with the supplier around the time of the shipment, he had talked with him on another occasion about the need for and importance of cleaning products for exportation. Finally, Vaghela again stated he was convinced that the boxes were mixed-up and that they are those of another company, other than Impex.

Analysis and Applicable Law

[21] 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.

[22] 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...

[23] 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...

[24] 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 34(1) of the *Plant Protection Regulations*.

[25] The Act's system of monetary penalties (AMP), including its severity, has been the subject of comment by the Federal Court of Appeal. In the case of *Michel Doyon v. Attorney General of Canada*, 2009 FCA 152, the court states 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.

[26] Moreover, in *Doyon*, the Federal Court of Appeal 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.

[27] The legislation is clear that the burden of proof for each element of the violation rests with the respondent, as set out in section 19 of the *Agriculture and Agri-Food Administrative Monetary Penalties 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.*

[28] Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities. For a violation of section 34(1) of the *Plant Protection Regulations*, the Agency must prove that

1. Impex had an import permit for the importation of plant materials into Canada;

2. Impex imported plant material under the import permit;
3. the plant material imported by Impex under the import permit failed to comply with one or more of the conditions set out in the permit by having soil attached to it.

[29] The Tribunal found both of the witnesses at the hearing to be very credible and that they presented their evidence in a straightforward and genuine manner and that there is no reason to doubt any of the testimony of Suh and Vaghela.

[30] The parties agree that elements 1 and 2 listed above, are met in this case. Where the parties disagree is with respect to element 3. The Agency alleges that its inspector, on February 9, 2011, found a product — kand — at the ACI Warehouse, linked ownership of it to Impex, inspected the product, and found soil on the product. The inspector then took samples of product, and the next day, sent those samples off for scientific testing to determine if the samples were soil and/or contained pathogens harmful to Canadian agriculture. Lab reports came back indicating that the samples were indeed soil and they did contain pathogens harmful to Canadian agriculture. Impex alleges that while it did import kand on February 9, 2011, the kand that was inspected that day, and then photographed and send to the lab for testing the next day were not their product. Instead the kand were those of another company which had imported kand that sample day into the same ACI Warehouse. As a result of a mixing-up of the samples, Impex has been wrongly accused of a violation under the *Plant Protection Regulations*.

[31] The only direct evidence before the Tribunal as to what happened at the ACI Warehouse on February 9, 2011, and at the Agency office on February 9 and 10, 2011, was given by the Agency witness Suh. The Tribunal found he was a credible witness. His testimony was clear. Suh determined that the person, who was picking up a product at door 6, was an employee of Impex and that the boxes Suh was inspecting were owned by Impex. Having satisfied himself of that, he inspected two of those boxes and stated both in his written reports and at the hearing that he found kand with soil. This observation by Suh will place Impex in violation of conditions 2 and 3 of its Import Permit P-2010-02565. Even in light of the factual errors that the inspector made, and which he admitted he made, in his written report, the Tribunal is convinced that on the balance of probabilities, the kand that the inspector examined at the ACI Warehouse on February 9, 2011, did belong to Impex and did contain soil. This finding is based primarily on the first hand, direct contact that the inspector had with the product before it was moved out of the ACI Warehouse. In light of this finding of fact by the Tribunal, it is not necessary to explore what may have happened to the product after the inspector loaded it into the trunk of his vehicle. It should be noted that the questioning of Suh by Impex's representative certainly did raise doubts as to whether the procedures Suh followed would have been sufficient to convince a trier of fact that he had taken the necessary steps to prevent the product in question from being co-mingled with other samples from companies other than Impex as the samples winded their way from ACI Warehouse to Agency lab.

[32] The 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.

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

[33] When an AMP provision has been enacted for a particular violation, as is the case for subsection 34(1) of the *Plant Protection Regulations*, Impex has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that the company might raise, including Impex's efforts to impress on its Indian suppliers the absolute need for the products they were sending to Canada to be completely free of soil. Given Parliament's clear statement on the issue, the Tribunal accepts that Impex's efforts will not amount to permitted defences under section 18.

Penalty, Quantum and Removal of All Record of the Penalty After Five Years

[34] Consequently, the Tribunal concludes that the Agency has, on a balance of probabilities, proven all the essential elements of the violation and, therefore, the Notice of Violation with Penalty is upheld. The only issue that remains to be determined by the Tribunal is whether the Agency has proven that a penalty of \$11,000 is justified under the Act and *Agriculture and Agri-Food Administrative Monetary Regulations*.

[35] The Tribunal finds that a penalty of \$10,000 can be justified and is appropriate under the Act and *Agriculture and Agri-Food Administrative Monetary Regulations*, but one for \$11,000 cannot, for the following reasons. Calculation of the appropriate penalty begins with a determination of the status of the violation being minor, serious or very serious as per Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Regulations*. A violation of subsection 34(1) of the *Plant Protection Regulations* carries with it the classification of being a very serious violation. At the time of the violation, section 5 of the *Agriculture and Agri-Food Administrative Monetary Regulations*, states that a very serious violation carries with it a penalty of \$10,000. From the base amount of, in this case \$10,000, the penalty can either be increased or decreased based on three factors: (1) prior violations; (2) degree of intentionality; and (3) harm done. Values between 0 and 5 are assessed by the Agency for each of the three factors and then

totalled to determine the total gravity factor which will then determine the final adjusted penalty amount. If the total gravity factor is between 6 and 10, the base penalty amount is not adjusted. If the total is below 6, the penalty is reduced and if it is above 10, the penalty is increased.

[36] In the present case, the Agency has assessed Impex with a total of 11 and, therefore, increased the penalty by 10%, as per Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations*. The Agency has arrived at the total of 11 by assessing: (1) 5 points for prior violations, alleging that Impex has had prior violations within the previous five years; (2) 3 for degree of intentionality, alleging that Impex committed the present violation through its own negligence; and (3) 3 for harm done, alleging Impex's violation could have caused serious or widespread harm to human, animal or plant health or the environment.

[37] On the first and third factor, the Tribunal agrees with the Agency's gravity assessment as 5 and 3 respectively. However, the Tribunal does not find that the Agency has adduced sufficient evidence, on the balance of probabilities, to support its penalty adjustment calculation for the second factor. With respect to this assessment of intentionality, Schedule 3, Part 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations* outlines four options: (1) 0 points for "the violation subject to the assessment is committed without intention or negligence"; (2) 0 points for "the person who commits the violation subject to the assessment makes a voluntary disclosure of the violation and takes necessary steps to prevent its re-occurrence"; (3) 3 points for "the violation subject to the assessment is committed through a negligent act"; (4) or 5 points for "the violation subject to the assessment is committed through an intentional act". The evidence submitted by the parties clearly does not support a finding by the Tribunal that "the violation subject to the assessment is committed through an intentional act". On the other hand, the Agency alleges that the violation was committed through a negligent act. However, the only statement to substantiate its position is as follows: "This issue has been brought to their attention on three previous occasions" (see Report at page 10). Evidence from Vaghela was to the effect that he had talked to his Indian suppliers and impressed upon them the importance of providing his company with clean rootcrops, free of soil. He took prudent steps to try to import soil-free rootcrops. With violations under the *Agriculture and Agri-Food Administrative Monetary Act* already absolute liability offences, the gravity value for intent requires the party alleging negligence to provide it beyond a mere statement that prior warnings had been issued to Impex. Here, the Agency provided no such evidence while Impex did provide evidence as to the steps it had taken to prevent exporters from shipping rootcrops with soil. Therefore, the Tribunal finds that the assessment for degree of intentionality should be 0 points for "The violation subject to the assessment is committed without intent or negligence."

[38] The Tribunal, therefore, on the basis of the evidence presented, finds that total gravity value for the penalty adjustment in this case is not 11, as alleged by the Agency, but rather equals as follows: (1) 5 for prior violations; (2) 0 for degree of intentionality, because the Agency failed to prove negligence, on the balance of probabilities; and (3) 3 for degree of harm done. As the

Tribunal assesses the total gravity value for the present violation at 8, Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations*, directs that the original penalty amount is not subject to adjustment and should remain at the amount of \$10,000, as set out in the *Agriculture and Agri-Food Administrative Monetary Regulations* for very serious violations.

[39] Consequently, the Tribunal, by order, determines that Impex committed the violation and orders it to pay the Agency a monetary penalty of \$10,000 within 30 days after this decision is served.

[40] The Tribunal wishes to inform Impex that this violation is not a criminal offence. After five years, it will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*:

23. (1) Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from

(a) where the notice of violation contained a warning, the date the notice was served, or

(b) in any other case, the payment of any debt referred to in subsection 15(1),

unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection

Dated at Ottawa, this 20th day of September, 2012.

Dr. Donald Buckingham, Chairperson