Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Nisreen Abdul-Aziz v. Canada (Minister of Agriculture and Agri-Food) 2012 CART 24

Date: 20121130
Docket: CART/CRAC-1622

Between:

Nisreen Abdul-Aziz, Applicant

- and -

Minister of Agriculture and Agri-Food, Respondent

Before: **Chairperson Donald Buckingham**

In the matter of an application made by the applicant, pursuant to paragraph 13(2)(*b*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review by the Tribunal of a Minister's decision dated March 12, 2012, holding that the applicant, by importing an animal by-product, violated the *Health of Animals Regulations*.

DECISION

[1] Following a review of the decision, and the reasons for that decision, purportedly made by, or on behalf of, the Minister of Agriculture and Agri-Food (Minister) on March 12, 2012, and following an oral hearing and a review of all oral and written submissions of the parties in this matter, the Canada Agricultural Review Tribunal (Tribunal), by order, sets aside the Minister's decision (Decision), finds the Notice of Violation issued to the applicant is null and void, and, as a result, holds that no monetary penalty is payable by the applicant to the respondent.

The hearing was held in Ottawa, ON,
on November 27, 2012.

REASONS

Alleged incident and issues

[2] On March 12, 2012, the Decision was allegedly issued by, or on behalf of, the Minister after the conclusion of a review pursuant to subsection 13(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* S.C. 1995, c. 40, of the facts pertaining to the issuance to the applicant, Nisreen Abdul-Aziz (Abdul-Aziz) of Notice of Violation 3961-11-M-0152. [The Tribunal notes that Abdul-Aziz is referred to as Nisreen Abdul-Azziz in the Notice of Violation but as Nisreen Abdul-Aziz on her Canadian passport and her Customs Declaration Card. She signs her name as Nisreen Abdul-Azeez when sending correspondence to the Canada Border Services Agency (Agency) and the Tribunal in this matter.]

[3] The Notice of Violation states that the events which gave rise to its issuance to Abdul-Aziz by the Agency occurred on May 9, 2011, at Pierre Elliot Trudeau International Airport in Montreal, Quebec, when Abdul-Aziz is alleged to have imported meat and milk without meeting the prescribed requirements contrary to section 40 of the *Health of Animals Regulations*.

[4] Section 40 of the *Health of Animals Regulations* makes importing meat into Canada unlawful unless an importer meets the requirements of Part IV "Importation of Animal By-Products, Animal Pathogens and Other Things" of the *Health of Animals Regulations*. Section 40 does not, however, prohibit or otherwise regulate the importation of milk or milk products although subsection 34(1) does. The propriety, and legal validity, of including both a charge under section 40 and section 34(1) in one Notice of Violation and then referring to only one of these two sections, though a questionable practice, has not been challenged or addressed by either party and will not be a matter that the Tribunal addresses in this decision.

[5] The primary issue which must be addressed in this case is whether the person who issued the purported Decision of the Minister was validly authorized to do so. This matter was at the heart of another recent Tribunal case in *Iliut Razvan Puia v. Canada (Minister of Agriculture and Agri-Food*) 2012 CART 20, issued October 26, 2012. In that case as in this case, the Minister's Decision was set out in a letter on Canada Border Services Agency letterhead, in this case dated March 12, 2012. The signature block of the letter was signed by a J. Laurin (Laurin) who indicates he or she is "A/Senior Program Advisor, Appeals Division, Recourse Directorate, ***For the Minister of Public Safety and Emergency Preparedness****"* [emphasis as found in letter]. There is, nowhere in this letter, any reference to the Minister of Agriculture and Agri-Food.

[6] That letter dated March 12, 2012 to Abdul-Aziz, confirms that the violation, as set out in Notice of Violation 3961-11-M-0152, "was committed and the Notice of Violation with Penalty issued pursuant to Section 7(1) of the Act is confirmed and

remains in effect. The amount of the penalty in the amount of $800 is now owing to the Receiver General for Canada".

[7] This same letter then goes on in a following section entitled "Reasons":

> *When you returned to Canada on May 15, 2011, you reported to the Canada Border Services Agency (CBSA) and you did not indicate on your declaration card that you were bringing food into Canada. You acknowledged being aware of the content of your baggage. Further inspection of your baggage revealed the presence of* '5 kilos of powdered milk and beef, chicken broth dehydrated cubes'*, for which you did not have the required permit/licence to bring such product into Canada.*
>
> *During the review process, you contented [sic] that* dehydrated *food was not listed on the Declaration Card – you further alleged that these products are sold in Canada assuming it was not illegal to import them into Canada. I would like to explain that If you had any questions about the declaration of Canadian regulations, you should have asked the first Border Services Officer about the reporting requirements for the dried food, keeping in mind that CBSA officers are there to help every passenger to facilitate their border clearance.*
>
> *As you failed to declare that you were importing animal by-products, I have decided to maintain the notice of violation, a serious violation under the* Health of Animals Regulations*. The demand for payment is upheld and the food products were destroyed accordingly.*
>
> *Payment should be made in the form of …*

Nowhere in the Decision does Laurin find it necessary to make reference to the section of the *Health of Animals Regulations* which Abdul-Aziz has been found to have violated.

[8] Abdul-Aziz, by way of a request for review to the Tribunal, has challenged the validity of the Minister's Decision. Accordingly, the record shows that Abdul-Aziz has not, to date, paid the penalty assessed to her under Notice of Violation 3961-11-M-0152. Abdul-Aziz requested that this review be conducted by way of oral hearing. That hearing was held in Ottawa, Ontario on November 27, 2012. It is clear from the record that it was the Agency that issued the Notice of Violation. However, from the record there is no indication that the Minister of Agriculture and Agri-Food, or his ministerial or his departmental staff were involved in the consideration of Abdul-Aziz's request for a ministerial review. Rather, from the record it appears that Agency staff, that is, employees of the Canada Border Services Agency, conducted the review of the facts of the Notice of Violation on behalf of a minister, but it is far from evident that it was on behalf of the Minister of Agriculture and Agri-Food. Furthermore, there is no indication on the record that the Agency

personnel who were engaged in conducting the review sought advice from legal counsel regarding the matter of their authority to issue the Decision.

[9] The issue raised in this case, therefore, is whether the Minister's decision should be confirmed, varied or set aside by the Tribunal, given the record now before it and the arguments made at the hearing, as well as the pertinent legislation and jurisprudence under which the Tribunal must carry out its mandate.

Procedural History and Record of Documents Filed in the Case

[10] Notice of Violation 3961-11-M-0152 dated the 9th day of May, 2011, was issued by the Agency alleging that Abdul-Aziz, on that day, at P.-E.-Trudeau International Airport in Montreal, Quebec, "committed a violation, namely, Import an animal By-product to wit: meat and milk without meeting the prescribed requirements Contrary to section 40 of the *Health of Animals Regulations*", which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[11] The Notice of Violations states that the Agency served the above Notice of Violation on Abdul-Aziz personally on May 9, 2011. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, Abdul-Aziz's alleged infraction is a serious violation for which the penalty assessed was $800.00.

[12] Having received the Notice of Violation, Abdul-Aziz chose to exercise her right to request a review of the facts of the violation before the Minister, an option which is clearly spelled out on page 2 of the Notice of Violation and which provides the following address for such a request: "Canada Border Services Agency; Recourse Directorate, 25 Nicholas Street, 20th Floor; Ottawa, Ontario K1A 0L8; Fax No. (613) 952-2432". Abdul-Aziz, in her letter dated May 13, 2011 sent to this address, requested such a review (Applicant Request for Review to Minister). The record shows that the Recourse Directorate of the Agency received the letter on May 20, 2011 (Tab 9 of Ministerial Report).

[13] On March 12, 2012, the Decision was issued under the signature of Laurin who indicated he or she is "A/Senior Program Advisor, Appeals Division, Recourse Directorate, ***For the Minister of Public Safety and Emergency Preparedness***" [emphasis as found in letter]. There is, nowhere in this decision, any reference to the Minister of Agriculture and Agri-Food. The record shows that the Decision was successfully delivered to Abdul-Aziz on March 13, 2012.

[14] Fifteen days later, on March 28, 2012, Abdul-Aziz faxed a copy of the Minister's Decision to the Tribunal. That same day, Tribunal personnel confirmed by telephone with Abdul-Aziz that she was seeking a review of the Minister's decision and that she wished to proceed by oral hearing in English. On March 30, 2012, Tribunal personnel sent a letter to Abdul-Aziz and to the Agency, setting out that the Agency, pursuant to

section 36 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* was obliged to forward to the Tribunal and to Abdul-Aziz a report relating to the violation (Ministerial Report) on or before April 16, 2012. On April 3, 2012, Abdul-Aziz faxed a signed hard copy of her request for review to the Tribunal. On April 11, 2012, the Agency requested an extension of time for the filing of its report, a request which was granted by the Tribunal, permitting the Agency until April 26, 2012, to file its report.

[15] On April 19, 2012, Abdul-Aziz sent a letter to the Tribunal (the Tribunal received the letter on April 20, 2012) with additional submissions to the attention of "Minister Sabourin and Ms. Charbonneau". The subject line of that letter reads: "**Re: Request for Review of Minister's Decision #3961-11-M-0152 Tribunal File: CART/CRAC-1622**" and the letter indicated that it was "in response to the letter advising of the Tribunal for the review of the Minister's Decision. I am requesting that the fine be withdrawn for the following reasons: …". The letter sets out four bulleted reasons why Abdul-Aziz was pursuing her request for review.

[16] The Ministerial Report dated April 24, 2012, was received by the Tribunal via email on April 26, 2012 (a hard copy was received at the Tribunal on April 27, 2012) with the Agency also indicating to the Tribunal that a copy of the report had been sent to Abdul-Aziz as well. The cover page of the Ministerial Report set out the case's style of cause as follows:

CART/CRAC 1622
NOV #3961-11-M-0152

CANADA AGRICULTURAL REVIEW TRIBUNAL

Between:

NISREEN ABDUL-ABDUL-AZIZ , Applicant

-and-

CANADA BORDER SERVICES AGENCY, Respondent
(on behalf of the Minister of Agriculture and Agri-Food)

This is the first time that the "Minister of Agriculture and Agri-Food" is referred to explicitly in these proceedings.

[17] By letter dated April 27, 2012, the Tribunal invited Abdul-Aziz and the Agency to make any additional submissions in response to the Ministerial Report, on or before May 28, 2012. On May 4, 2012, the Agency requested that this matter be heard by written submissions alone. This motion was refused by the Tribunal and reasons for the denial provided in its Order dated May 23, 2012. A second motion from the Agency was received by the Tribunal on May 28, 2012 (the letter was dated May 2, 2012) requesting that Tribunal "reject the content of the application for review by N.Abdul-Azeez (the Applicant) on the basis that the Applicant's submissions are

inadequate for the purposes of an application for review of a Minister's decision, and that they constitute new facts."

[18] To respond to this motion, the Tribunal ordered on June 4, 2012, that the parties by June 29, 2012, provide arguments as to why the request for review by Abdul-Aziz has, or has not, been validly commenced; and all documents dated prior to March 12, 2012, sent to, or received from, the other party concerning the alleged violation be forwarded to the Tribunal. In response to this order, the Agency informed the Tribunal in a letter dated June 12, 2012, that all the documents dated prior to March 12, 2012, sent to or received from Abdul-Aziz were contained in the Ministerial Report at Tab 10. With respect to the issue of whether Abdul-Aziz's request had been validly commenced, the Agency concluded in this same letter: "Consequently, the foregoing case law suggests to the Agency that Abdul-Aziz's request for review by the Tribunal has been validly commenced in the right court but not on the basis of the right reasons." No response to the Tribunal order was received from Abdul-Aziz.

[19] On the basis of the Agency's June 12, 2012 letter, and after reviewing applicable law, the Tribunal in its Order of October 9, 2012, ordered that Abdul-Aziz's request for review was admissible but held that any new evidence contained in her April 19, 2012 letter, was inadmissible and set down this case for an oral hearing in Ottawa on November 27, 2012.

[20] At the hearing, Ms. Abdul-Aziz appeared with her husband and son, with the latter representing her for the purposes of presenting arguments on her behalf. Ms. Melanie Charbonneau appeared for the respondent but there was some confusion as to whether she was before the Tribunal—given that she is currently an employee of the Agency—as the representative for the Agency, for the Minister of Public Safety and Emergency Preparedness, or for the Minister of Agriculture and Agri-Food. The Chairperson commenced the hearing asking the parties if they wished to bring forward any preliminary motions. Ms. Charbonneau indicated to the Tribunal that she wished to bring such a motion. She informed the Tribunal that the Agency was not in a position to make representations at this time and so asked to be excused from the case. When asked by the Chairperson the basis of this position, she replied that the Agency had not yet been able to address the matter of the *Puia* decision. When further asked by the Chairperson whether she had received instructions to represent the Minister of Agriculture and Agri-Food in this matter, Ms. Charbonneau indicated that she had. On that basis, Ms. Charbonneau, then informed the Tribunal that "we" are not contesting this request for review and that she would not be providing any representations at the oral hearing.

[21] Abdul-Aziz, through her representative, on the other hand, made oral arguments at the hearing as to why the Ministerial decision should be set aside. Abdul-Aziz argued that (1) she was unaware of the restrictions on foods that could be brought into Canada; (2) the foods she brought into Canada had been examined and tested in the Middle East and so the food was not dangerous, could not have bad effects and was only for personal use; (3) the foods she brought into Canada were

foods regularly available in Canada and should not have been the subject of a fine; (4) she did not know that Maggi cubes would be classified as meat; (5) the Minister's Decision simply agreed with the Agency's unfair action to issue a fine for common food products which pose no danger; and (6) she came into Canada from Jordon on the day that she received the Notice of Violation at the Montreal airport in May of 2011.

[22] As well as oral arguments, the Tribunal also has considered the written record before it in this case, which consists of the following documents:

From the Minister and the Agency:

(i) the Notice of Violation dated May 9, 2011;
(ii) the Minister's Decision (including the Reasons for Decision) dated March 12, 2012; and
(iii) the Ministerial Report dated April 24, 2012.

From Abdul-Aziz:

(i) her Request for Review to the Minister dated May 13, 2011;
(ii) her Request for Review to the Minister received by the Tribunal on March 28, 2012, with additional submissions received at the Tribunal on April 3, 2012; and
(iii) her additional submissions to the Tribunal and Agency ("Minister Sabourin and Ms. Charbonneau") in her letter dated April 19, 2012, except for the new evidence contained therein which was ordered inadmissible by the Tribunal in its Order dated October 9, 2012.

From the Tribunal:

(i) Tribunal Order dated May 23, 2012;
(ii) Tribunal Order dated June 4, 2012; and
(iii) Tribunal Order dated October 9, 2012.

Analysis and Applicable Law

[23] The *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act) establishes a possibly unique, if not somewhat perplexing, procedure (particularly for self-represented applicants) for challenging a Notice of Violation issued pursuant to it. Under the Act, a person served with a Notice of Violation, should he or she wish to contest its validity, may choose one of two preliminary routes—a request for review to the Minister of Agriculture and Agri-Food, or the Minister of Health, as the case may be (subsection 8(1) and paragraph 9(2)(b) of the Act) or a request for review to this Tribunal (subsection 8(1) and paragraph 9(2)(c) of the Act.) In both cases, the review which takes place is an administrative review of the executive act that has led to the

issuance of a notice of violation. This review is in the nature of a review of first instance where the reviewer—either the Minister or the Tribunal—receives evidence from the parties, considers applicable law, applies the facts of the case to the applicable law and then the decision-maker determines whether or not the person requesting the review committed the violation. This exercise, in either case, leads to the issuance of an administrative adjudicative decision.

[24] Most frequently under Canadian administrative procedure, the next juridical step in the process for a party that is dissatisfied with the result from the first instance decision would be to seek judicial review of it before a court of law. This is the case under the Act for decisions in the first instance rendered by the Tribunal, with judicial review carried out by the Federal Court of Appeal. However, this is not the case for decisions in the first instance rendered by the Minister. Here, the Act stipulates that a review of ministerial decisions will be carried out by the Tribunal (subsection 12(2) and paragraph 13(2)(b) of the Act). This case, of course, is one such request for review of a decision of the Minister.

[25] In reviewing a Minister's decision, the Tribunal may confirm it, vary it or set it aside (paragraph 14(1)(*a*) of the (Act)) and as such, performs a function not as a decision-maker of first instance but rather as a body reviewing a decision of first instance, making the Tribunal in this case, function more like an court exercising a judicial review function. The Tribunal is subject to, and guided by, Canadian administrative law and procedure in carrying out its function to complete a review of a Minister's decision. Of course, parties who are in turn dissatisfied with the Tribunal's decision on a review of a Minister's decisions, have yet again, the opportunity to seek judicial review of those decisions before the Federal Court of Appeal. Recent cases where parties have exercised their right for judicial review of Tribunal decisions include *Attorney General of Canada v. Rosemont Livestock,* 2011 FCA 25; *Attorney General of Canada v. Steve Ouellet*, 2010 FCA 268; *Attorney General of Canada v. Denfield Livestock Sales Limited*, 2010 FCA 36; and *Michel Doyon v. Attorney General of Canada,* 2009 FCA 152.

[26] A body conducting a review of a first instance decision, such as is the case here with the Tribunal's review of a Minister's decision, must apply the proper standard of review applicable to that decision. In *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (*Dunsmuir*) at paragraph 34, the Supreme Court of Canada reduced the historical three standards of reviews to two — correctness and reasonableness:

> *[34] The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness* simpliciter *lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We*

conclude that there ought to be two standards of review - correctness and reasonableness.

[27] The Supreme Court continues in *Dunsmuir*, at paragraphs 46-47, to set out the reasonableness standard and its application, and, in paragraph 50, the correctness standard and its application:

> *[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?*
>
> *[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*
>
> *...*
>
> *[50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.*

[28] Learned authors have commented, more specifically, as to when one or the other of the two standards of review will apply as follows:

> "Thus correctness will normally be the standard of substantive judicial review on: constitutional questions, 'true questions of jurisdiction or *vires*', questions concerning the division of jurisdiction between competing administrative regimes, and 'a question ... of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's special expertise''. Conversely, unreasonableness will normally be the standard of review of a tribunal's finding of fact, making or applying policy, and exercising discretion and the application of the law to the facts when a legal question cannot readily be extricated from the facts". (Brown and Evans, *Judicial Review of Administrative Action in Canada*, Toronto: Canvasback Publishing, 2011 at pages 14-9 to 14-10).

[29] It is a fundamental principle of public law that all governmental action must be supported by a grant of legal authority. As well, any administrative action that contravenes a grant of legal authority conferred by statute will be invalid. Although not explicitly listed in the above list cited by Brown and Evans, the question of the validity of the exercise of authority by the decision-maker in question will be a question of law and therefore be subject to the correctness standard of review as set out in *Dunsmuir*. Such a question is without doubt akin to true questions of jurisdiction or *vires*, questions concerning the division of jurisdiction between competing administrative regimes, and questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator's special expertise.

[30] An important element then in conducting a review of a decision of first instance and the decision-making process is to ensure that the person making the decision is the one who has been so designated by statute (see *Secord v. Saint John (City) Board of Police Commissioners* (2006), 43 Admin. L.R. (4th) 218 (NBQB)). In addition, even where statutorily-authorized persons have formally made decisions, a reviewing body will have to ensure that they have, in fact, applied their minds to the representations of the parties and to the matters that the statute directs them to decide (see *Khan v. University of Toronto* (1995), 130 D.L.R. (4th) 570 (Ont. Div. Ct.)).

[31] In the present case, it is not at all clear to the Tribunal that the person who made the decision is the person so designated by statute to make it. As such this question of the validity of the exercise of authority by the decision-maker in question will be a question of law and therefore be subject to the correctness standard of review as set out in *Dunsmuir.* A review of the Act and of the *Interpretation Act* R.S.C. 1985 c. I-21, is necessary to explore if the correctness standard has been met in this case.

[32] Section 2 of the Act defines "Minister" as follows:

> *"Minister" means the Minister of Agriculture and Agri-Food, except that, in relation to a violation involving a contravention of the* Pest Control Products Act *, it means the Minister of Health;*

[33] Anyone who reads this definition in conjunction with the mention of the "Minister" in sections 8, 9, 12 and 13 of the Act would have a reasonable expectation that their request for review would, in fact, be considered by the Minister of Agriculture and Agri-Food or the Minister of Health, as the case may be. Nowhere in the Act is the "Minister of Public Safety and Emergency Preparedness" mentioned. So it might come as a surprise to an applicant to see that such a review was being performed by, or for, this latter Minister. Here in this case, it is clear that the author of the Minister's Decision of March 12, 2012, associates himself or herself with this latter mentioned Minister. At no point has Laurin provided any indication or authentication of his or her authority, delegated, sub-delegated or otherwise, which would give him or her, the right to hear and decide this case on behalf of the Minister of Agriculture and Agri-Food.

[34] The *Interpretation Act*'s subsection 24(2) might be instructive as to whether the Minister of Agriculture and Agri-Food can delegate his review powers under the Act to another person:

> *(2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include*
>
> > *(a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;*
> >
> > *(b) the successors of that minister in the office;*
> >
> > *(c) his or their deputy; and*
> >
> > *(d) notwithstanding paragraph (*c*), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.*

[35] There is no indication that Minister of Agriculture and Agri-Food personally made the decision in the letter dated March 12, 2012, issued to Abdul-Aziz. However, paragraph 24(2)(a) of the *Interpretation Act* would still permit that decision to be validly made if it was made by another "*minister acting for that minister*". There is no indication that Minister of Public Safety and Emergency Preparedness personally made the decision either. As well, paragraph 24(2)(d) of the *Interpretation Act* would appear to also permit that decision to be validly made if it was made by another "*a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing*". Pursuant to this provision, staff of the Ministry of Agriculture and Agri-Food, as opposed to staff

from the Ministry of Public Safety and Emergency Preparedness, could have assisted the Minister of Agriculture and Agri-Food in carrying out decision-making functions under the Act. There is no indication that the Minister's staff made the decision either.

[36] It is important to recall that the Act gives an applicant a right to seek a review of an administrative decision, in this case the issuing of a Notice of Violation from an enforcement agency, to the Minister of Agriculture and Agri-Food, or the Minister of Health, as the case may be. Sections 12 and 13 of the Act are explicit:

> **12.** *(1) After concluding a review requested under section 8, the Minister shall determine whether or not the person committed the violation, and the Minister shall cause a notice of any decision under this subsection to be served on the person who requested the review.*
>
> *(2) Where the Minister decides under subsection (1) that a person has committed a violation, the person may, in the prescribed time and manner, request a review of the Minister's decision by the Tribunal.*
>
> ***13.*** *(1) After concluding a review requested under paragraph 9(2)(b), the Minister shall determine whether or not the person requesting the review committed a violation and, where the Minister decides that the person committed a violation but considers that the amount of the penalty for the violation was not established in accordance with the regulations, the Minister shall correct the amount of the penalty for the violation, and the Minister shall cause a notice of any decision under this subsection to be served on the person who requested the review.*
>
> *(2) Where the Minister decides under subsection (1) that a person has committed a violation, the person may, in the prescribed time and manner,*
>
> *(a) pay the amount of the penalty set out in the notice referred to in subsection (1), in which case*
>
> *(i) the Minister shall accept the amount as and in complete satisfaction of the penalty, and*
>
> *(ii) the proceedings commenced in respect of the violation under section 7 are ended; or*
>
> *(b) request a review of the Minister's decision by the Tribunal.*

[37] No doubt, where a Minister of the Crown is explicitly empowered to do something, others in the department or ministry over which the minister presides may exercise that power. The delegation of authority by subsection 24(2) is not, however, unlimited. Subsection 24(2) limits the sub-delegation of an administrative, legislative or quasi-judicial decision-making action on behalf of the Minister to: (a) persons within

the Minister's Department, and persons within the ministry of state over which the minister presides, or (b) another minister acting for that minister. It would be a strained reading of the subsection that would permit both at the same time, that is as might be argued to have occurred in this case, a delegation from the Minister of Agriculture and Agri-Food to the Minister of Public Safety and Emergency Preparedness, and then a sub-delegation by the Minister of Public Safety and Emergency Preparedness to persons within his ministry. The Latin phrase *delegates non potest delegare* is applicable.

[38] Even employing the expanded authority granted to officials under the *Interpretation Act*, there are at least three reasons why that expanded authority does not reach to the Agency official who reviewed the evidence for, and then wrote and issued, the Ministerial decision in the present case. First, the exercise of the Minister's powers under the *Interpretation Act*, as set out in paragraph 24(2)(d), is limited to those in his "department or ministry" over which the Minister of Agriculture and Agri-Food presides. Canada Border Services Agency officials are not within this purview. Second, the Agency officials have offered the Tribunal no evidentiary or legal basis that they have been delegated or empowered to exercise the Minister of Agriculture and Agri-Food's authority to review Notice of Violation. In fact, to the contrary, the decision in this case has all the indicia to the outside world and to Abdul-Aziz , the applicant, that it is a decision of the Minister of Public Safety and Emergency Preparedness. Third and finally, from a procedural fairness perspective, it makes little sense for the exact same body—the Canada Border Services Agency—to review a decision under the guise of it being conducted by, or for, the Minister of Agriculture and Agri-Food, when in fact, the review is being conducted by an official in the same Agency, if not the same division, as the one who issued the Notice of Violation in the first place, on May 9, 2011. Even without the issue of invalid sub-delegation of Ministerial authority, the Tribunal questions if an Agency that both issues the Notice of Violation and then reviews the facts of the case when so requested by the applicant, has sufficient safeguards in place to satisfy the requirements for procedural fairness in such a review process.

[39] The Tribunal, therefore, finds that the person who completed the review of the facts of the Notice of Violation issued to Abdul-Aziz, and who then issued a decision purported on behalf of the Minister of Agriculture and Agri-Food, acted without statutory authority. As a result, the purported Minister's Decision of March 12, 2012, is invalid and must be set aside.

[40] Legislative and/or regulatory amendments would be required to legitimize the action taken in the present case. Such amendments might include: (a) an explicit power of the Minister under section 4 of the Act to make regulations permitting him to delegate his power to officials of the Agency, not only to issue Notices of Violation under the Act, but also to conduct ministerial reviews on his behalf; (b) an explicit power of the Minister under section 6 of the Act, to designate officials of the Agency, who can not only issue Notices of Violation under the Act, but who can also conduct

ministerial reviews on his behalf; and (c) the creation and bringing into force of such regulations and designations.

[41] The finding set out in paragraph [39] above, leaves the Tribunal with the challenge of determining the consequences of such a finding on the validity of the underlying Notice of Violation that was originally issued to Abdul-Aziz on May 9, 2011.

[42] The general rule is that as a creature of statute, a tribunal cannot make orders that affect individuals' rights or obligations, without authority from its enabling statute. Orders outside the scope of the enabling statute would be void for exceeding jurisdiction. However, if the statute is silent on remedies, as a practical necessity, the Tribunal must have the remedial power to do the things its statute requires it to do. Accordingly, the range of remedies is narrow, but can be broadened if it is determined certain remedial power is needed to achieve a result provided for by statute.

[43] The *Rules of the Review Tribunal (Agriculture and Agri-Food)*, SOR/99-451 and *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187 are silent as to remedial powers.

[44] The Act specifically sets out the Tribunal's powers in section 14.

> ***14.*** *(1) After concluding a review requested under this Act, the Tribunal shall, by order, as the case may be,*
>
> > *(a) confirm, vary or set aside any decision of the Minister under section 12 or 13, or*
> >
> > *(b) determine whether or not the person requesting the review committed a violation and, where the Tribunal decides that the person committed a violation but considers that the amount of the penalty for the violation, if any, was not established in accordance with the regulations, the Tribunal shall correct the amount of the penalty,*
>
> *and the Tribunal shall cause a notice of any order made under this subsection to be served on the person who requested the review, and on the Minister.*
>
> *(2) Where the Tribunal decides under subsection (1) that a person has committed a violation, the person is liable for the amount of the penalty as set out in the order of the Tribunal and, on the payment of that amount in the time and manner specified in the order,*
>
> > *(a) the Minister shall accept the amount as and in complete satisfaction of the penalty; and*

(b) the proceedings commenced in respect of the violation under section 7 are ended.

[45] The *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp) also provides some broadly worded powers to the Tribunal.

> ***8.*** *(1) The Board and the Tribunal are courts of record and each shall have an official seal that shall be judicially noticed.*
>
> *(2) In addition to the powers conferred by subsection (1), the Board and the Tribunal each have, with respect to the appearance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of their orders and other matters necessary or proper for the due exercise of their jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, the Board and the Tribunal may each*
>
> *(a) issue a summons requiring a person*
>
> *(i) to appear at the time and place stated in the summons to testify to all matters within the person's knowledge relative to any subject-matter before the Board or the Tribunal, as the case may be, and*
>
> *(ii) to bring and produce any document, book or paper in the person's possession or under the person's control relative to that subject-matter;*
>
> *(b) administer oaths and examine any person on oath; and*
>
> *(c) during a hearing, receive such evidence as they consider relevant and trustworthy.*

[46] What is meant by "court of record" is unclear. It is a term that has more than one sense depending on the context. For example, in a family law context, a court stated the following with respect to the Unified Family Court in *Manley v. Manley and Armor Moving and Storage Ltd.*, 1988 CanLII 3596 (ON CJ):

> *This phrase, "court of record", is not an empty title. It carries within it a legacy of jurisprudence that affirms the existence of "inherent" powers in the court for the control of its own process. Being a "court of record" means that the court is immediately blessed with an array of procedural powers, one of which is the power to set aside its own judgments.*

[47] The powers of a "court of record" are often discussed, as was the case in *Pacific Press Ltd. v. Campbell*, 1997 CanLII 3543 (BC SC), in the context of the ability of a body to exercise powers of contempt and to make witnesses compellable, a

power which is given to the Tribunal in subsection 8(2) of the *Canada Agricultural Products Act*, as noted above.

[48] In setting out the powers of the Tribunal, section 14 of the Act does not go into detail as to what additional powers are available when setting aside a decision of the Minister. It is possible that remedies would include powers relating generally to monetary penalties. Other available remedies would have to be evaluated on a case-by-case basis.

[49] In the present case, what is an appropriate remedy for an applicant like Abdul-Aziz? She has exercised her rights to have the validity of an executive act taken against her reviewed, and that review has been found to have been undertaken and completed by a person other than one authorized to do so. The whole process has exposed Abdul-Aziz already to a great deal of concern, trouble and even expense. In this case then, it would appear that the most appropriate remedy from this Tribunal would include an order that the Ministerial Decision be set aside, and also an order from the Tribunal that the Notice of Violation 3961-11-M-0152, issued to Abdul-Aziz, pursuant to the Act and *Agriculture and Agri-Food Administrative Monetary Penalties Regulations,* on May 9, 2011, is null and void. The Tribunal therefore so orders and as a result, no monetary penalty is payable by the applicant to the respondent.

[50] The finding of the Tribunal in this case as set out above in paragraphs 26-49 follows the finding in the Tribunal's recent case of *Puia*. However, even if the Tribunal had not found that it is obliged to set aside the Minister's Decision for the reasons set out in those paragraphs, it would have been obliged to do so, on other grounds as follows.

[51] The Tribunal is convinced that the Minister's Decision must be set aside on the basis that it was unreasonable as there is not a single element of evidence to support the Minister's decision that "the facts as presented confirm that the violation was committed and the Notice of Violation with Penalty issued pursuant to section 7(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*" (paragraph 3 of decision letter of March 12, 2012), when his factual finding is that Abdul-Aziz "returned to Canada on May 15, 2011" (paragraph 4 of decision letter of March 12, 2012). The Notice of Violation, of course, is dated May 9, 2011. The Notice states that it was served on personally on Abdul-Aziz on this date and Abdul-Aziz told the Tribunal that she received the Notice in May on that day that she returned from Jordon. The documents prepared by the Agency to support the Notice contained in the Minister's Report are stamped May 9, 2011. Therefore, the Minister's assessment in his decision that Abdul-Aziz 's return to Canada was on May 15, 2011, is totally unsupported by the evidence. All the evidence provided by the Agency, and accepted by the Minister as the basis for his decision, points to events and activities that happened on May 9, 2011. There is no element of the evidence to support a finding by the Minister that any violation by Abdul-Aziz , under the *Agriculture and Agri-Food Administrative Monetary Penalties Act,* occurred on May 15, 2011, the only date to which the Minister refers in his Decision.

[52] The whole AMPs system, 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 cautions the finder of facts under the system to be "circumspect in managing and analysing the evidence and in analysing the essential elements of the violation" in any alleged AMP violation. At paragraphs 27 and 28, the Court states:

> *[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.*

[53] In order to avoid an error of law in the upholding of any Notice of Violation, the Minister must be convinced, on the balance of probabilities, that each of the elements of the alleged violation has been proved by the Agency. Moreover, 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.*

[54] Again quoting from *Doyon*, at paragraph 20:

> *[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.*

[55] One of the key elements of any proceeding where a violation is alleged is proof, on the balance of probabilities, that the person named in the Notice of Violation was the person who committed the alleged violation and that the time and place of the violation were, in fact, the time and place when and where the person named in the

notice of violation committed it. In the present case, the Minister's decision must be set aside, as there is no evidence on which he could base a decision that Abdul-Aziz committed a violation of section 40 of the *Health of Animals Regulations* on May 15, 2011. Whether Abdul-Aziz might have committed any violation of these Regulations at some other time is not a relevant consideration to these proceedings.

[56] Therefore, by reason that the record reveals no evidence upon which the Minister could have based his finding in his decision of March 12, 2012, that the alleged violation by Abdul-Aziz occurred on May 15, 2011, the Minister's decision must be set aside as being unreasonable. As a consequence, the Tribunal would have, if it had not already made a similar finding in paragraphs 26-49, ordered that the Minister's decision of March 12, 2012, be set aside, that the Notice of Violation issued to the applicant be dismissed, and, that as a result, no monetary penalty is payable by the applicant to the respondent.

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

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Dr. Donald Buckingham, Chairperson