Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Yan v. Canada (Canada Border Services Agency),* 2013 CART 26

Date: 20130827
Docket: CART/CRAC-1603

Between:

Yongfeng (David) Yan, Applicant

- and -

Canada Border Services Agency, Respondent

Before: **Member Bruce La Rochelle**

With: **Yongfeng (David) Yan, self-represented; and**
Melanie A. Charbonneau, representative for the respondent

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 a violation of section 40 of the *Health of Animals Regulations* alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not commit the alleged violation and is not liable for payment of the penalty to the respondent.

Hearing held in Toronto, Ontario,
February 22, 2013.

REASONS

Alleged Incident and Legislative Authority

[2] The respondent, the Canada Border Services Agency (Agency), submits, by way of Notice of Violation amended at the hearing, that on December 11, 2011, at the Lester B. Pearson International Airport, the applicant, Yongfeng (David) Yan (Mr. Yan) did (*verbatim*) "import an animal product to wit: meat, without meeting the prescribed requirements", contrary to section 40 of the *Health of Animals Regulations*.

[3] A person is only permitted to import meat into Canada if he or she meets the requirements of "Part IV—Importation of Animal By-Products, Animal Pathogens and Other Things" of the *Health of Animals Regulations*, which includes section 40.

[4] The applicable provisions of Part IV of the *Health of Animals Regulations* are reproduced below:

> ***40.*** *No person shall import into Canada an animal by-product, manure or a thing containing an animal by-product or manure except in accordance with this Part.*
>
> ***41.*** *(1) A person may import into Canada an animal by-product, manure or a thing containing an animal by-product or manure…if*
>
> > *(a) the country of origin is the United States and the by-product, manure or thing is not derived from an animal of the subfamily* Bovinae *or* Caprinae*;*
> >
> > *(b) the country of origin, or the part of that country, is designated under section 7 as being free of, or as posing a negligible risk for, any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate of origin signed by an official of the government of that country attesting to that origin; or*
> >
> > *(c) the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in a manner that would prevent the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate signed by an official of the government of the country of origin that*

(i) attests that the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in that manner, and

(ii) shows the details of how it was collected, treated, prepared, processed, stored and handled...

...

41.1 *(1) Despite section 41, a person may import into Canada an animal by-product or a thing containing an animal by-product…if an inspector has reasonable grounds to believe that the importation of the by-product or thing, by its nature, end use or the manner in which it has been processed, would not, or would not be likely to, result in the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product was derived is susceptible and that can be transmitted by the by-product, and the by-product or thing is not intended for use as animal food or as an ingredient in animal food.*

(2) No person shall, in respect of any animal by-product or thing containing an animal by-product that has been imported in accordance with subsection (1), use or cause it to be used as animal food or as an ingredient in animal food.

...

43. *A person may import into Canada cooked, boneless beef from a country or a part of a country not referenced to in section 41 if*

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

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

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

...

52. *(1) Despite anything in this Part, a person may import into Canada an animal by-product if the person produces a document that shows the details of the treatment of the by-product and an inspector has reasonable grounds to believe—based on the source of the document, the information contained in the document and any other relevant information available to the inspector and, if*

necessary, on an inspection of the by-product—that the importation of the by-product would not, or would not be likely to, result in the introduction into Canada, or the spread within Canada, of a vector, disease or toxic substance.

(2) Notwithstanding anything in this Part, a person may import an animal by-product under and in accordance with a permit issued by the Minister under section 160.

[5] The basic regulatory regime, as particularized in the legislative extracts quoted, is that of prohibiting the importation of meat or meat by-products into Canada from countries other than the United States, unless an import permit has been obtained. In certain cases, a certificate or other document showing how the meat or meat by-product has been processed may be accepted in place of an import permit. In such cases, the products are permitted to be imported on the basis that the particulars disclosed result in a conclusion that the product would not or would not be likely to introduce particular diseases or contaminants into Canada, and therefore potentially into the Canadian food supply. In addition, an inspector is accorded a particularized discretion to permit the importation of animal by-products, based on reasonable grounds to believe that the importation of the product, "by its nature, end use or the manner in which it has been processed, would not, or would not be likely to, result in the introduction into Canada of any reportable disease" (section 41.1(1), *Health of Animals Regulations*).

[6] The roles of the various parties involved in the regulation of food importation are discussed in greater detail in the recent Tribunal case of *Gebru v. Canada (CBSA),* 2013 CART 2, particularly at paragraphs 10 to 16 of that decision.

[7] The Tribunal must determine whether the Agency has established all the elements required to support the Notice of Violation and, if Mr. Yan did import meat into Canada, whether he fails to meet the requirements that would have permitted such importation.

Procedural History

[8] In the original Notice of Violation YYZ4971-0345, dated December 11, 2011, the Agency alleges that, on that date at "4971", Mr. Yan "committed a violation, namely: import an animal product to wit: meat, without meeting the prescribed requirements" contrary to section 40 of the *Health of Animals Act*.

[9] Assuming for the moment that the Notice of Violation may be rectified, to correct both the location of the alleged violation (which should be Lester B. Pearson International Airport) and the regulatory reference (which should be to section 40 of the *Health of Animals Regulations*) such action, if proven on the balance of probabilities, is a violation under section 7(1)(*a*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*. The legislative and regulatory *schema* have been recently particularized in

Mak v. *Canada (CBSA)*, 2013 CART 11 and *Gebru*, previously cited. The specific item of concern was what was asserted by the Agency to be "duck tongues", imported from China.

[10] The Agency served the Notice of Violation with Penalty personally on Mr. Yan on December 11, 2011. In the Notice of Violation, Mr. Yan is advised that the alleged violation is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which the penalty assigned, is the amount of $800.00.

[11] By letter dated December 20, 2011, and received by the Tribunal by fax on December 23, 2011, Mr. Yan requested a review by the Tribunal (Request for Review). The grounds specified were that "…the charge is unfair, excessive and incorrect…". The Tribunal confirmed with Mr. Yan that he wished to have an oral hearing in English. The Tribunal chose Toronto as the location of the oral hearing, based on convenience issues for all parties.

[12] Mr. Yan's request for review was forwarded by the Tribunal to the Agency on December 23, 2011, by fax and regular mail. Pursuant to Rule 36 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* (SOR 99/451) (Tribunal Rules), the Agency, acting on behalf of the minister of Agriculture and Agri-Food, was required to submit the minister's report (Report) by January 9, 2012.

[13] Under cover of a letter to the Tribunal dated January 6, 2012, and received on January 9, 2012, Ms. Melanie A. Charbonneau (Ms. Charbonneau), Acting Senior Program Advisor to the Agency, submitted the Agency's Report. In the Report, Mr. Yan was incorrectly identified in the style of cause, in which he is described as "Yongfeng Yan (David Yen)".

[14] In addition, by email to the Tribunal dated January 6, 2012, Ms. Charbonneau forwarded "…a copy of the photograph taken of the goods under appeal. It is better quality than the printouts in the report." The email and accompanying photograph were forwarded to Mr. Yan by the Tribunal, by email dated January 10, 2012.

[15] On January 9, 2012, by letter sent via email and regular mail to Mr. Yan and the Agency, the Tribunal acknowledged receipt of the Agency's Report, specifying that "…it would appear from the Agency's correspondence that the applicant has also received a copy…". In the Agency's cover letter of January 6, 2012, to the submission of its Report to the Tribunal, the Agency stated that "…Pursuant to the *Rules* of the Tribunal, we have also forwarded a copy of this report to the appellant (*sic*)...". In its letter of January 9, 2012, the Tribunal advised that parties that any additional representations that either party wished to make must be submitted to the Tribunal prior to February 8, 2012, after which time submissions will only be accepted with the Tribunal's consent. Neither party made additional submissions, prior to the hearing.

[16] The hearing was held on February 22, 2013. During the hearing, the presiding Tribunal member, Dr. Bruce La Rochelle, requested further information from the Agency and also made an Order in relation to evidence which Mr. Yan wished to introduce at the hearing. At the hearing, the Agency introduced four exhibits, to which Mr. Yan did not object. At the initiative of the Tribunal, Mr. Yan introduced one exhibit, being his business card. The exhibits are therefore as follows:

Exhibit 1	Copy of Nexus receipt in relation to Mr. Yan's declaration. Mr. Yan at the time was a Nexus cardholder, enabling him to self-process his declaration, in relation to primary inspection.
Exhibit 2	Revised copy of the Agency's Report.
Exhibit 3	Additional submissions of the Agency, described as "Respondent's Additional Submissions", with particular reference to arguments in support of correcting what are contended to be clerical errors in the Notice of Violation.
Exhibit 4	Instruction form to Agency officers in relation to Notice of Violation wording of particular violations.
Exhibit 5	Mr. Yan's business card.

[17] On February 28, 2013, via letter of that date sent by email scan to Mr. Yan and the Agency, the Tribunal particularized in writing its request for information made at the oral hearing. The Tribunal requested that the Agency provide a certified translation to English of the Chinese language on the packaging of the goods in question, with a suggested time for submission being March 15, 2013.

[18] On March 5, 2013, a translation of the package lettering from Chinese to English, certified by the Translation Bureau of Public Works and Government Services Canada, was received by the Tribunal from the Agency. In its cover letter accompanying the certified translation, the Agency, through Ms. Charbonneau, attempted to raise further arguments resulting from the translation.

[19] On March 7, 2013, via email scan, Mr. Yan sent a letter to the Tribunal, by which he purported to respond to further arguments raised by the Agency in its letter of March 5, 2013.

[20] On March 11, 2013, the Tribunal issued a written form of its Order originally made at the hearing of February 22, 2013. The Order was sent to Mr. Yan and the Agency by email and regular mail. In the Order, the Tribunal specified that: (a) no evidence introduced by the applicant of third party involvement with packing his luggage will be entertained; and (b) no evidence by the applicant in relation to the product being a non-meat product will be entertained. Both elements of the Order were based on the fact that neither argument had been raised by Mr. Yan at earlier stages, when he had adequate opportunity

to do so, and in circumstances where the Agency objected to such introduction of evidence at the hearing. Consistent with the reasoning underlying this Order, the Tribunal refused to entertain later arguments made by the Agency and Mr. Yan in their letters of March 5 and March 7, 2013, respectively.

Procedural Discussion

(a) Submission by Agency of Revised Report at Hearing

[21] As explained by Ms. Charbonneau at the hearing, the original Report filed by the Agency contained a factual error in relation to Mr. Yan's initial declaration. Such error was explained as being due to the fact that the investigating officer was out of the country at the time of the preparation of the report, and so the Agency attempted to meet filing deadlines by relying on documentation on the file at that time. It was assumed that Mr. Yan had made his initial declaration before an inspector. In fact, as the holder of a Nexus card, Mr. Yan had self-declared at a kiosk, and was then referred to secondary inspection. It was for this reason that the Nexus receipt was introduced as Exhibit 1 and the revised Report, revised only as to the description of the circumstances of initial self-declaration, rather than inspection, was introduced as Exhibit 2. Mr. Yan did not object to the introduction of the revised Report or the related Nexus receipt.

(b) Rectification Requested by Agency: Style of Cause and Notice of Violation

[22] At the oral hearing, the Agency raised certain points concerning revisions to the style of cause, initially referenced as Yongfeng Yan (David Yen), Applicant. The Agency acknowledged that there was a clerical error in Mr. Yan's surname. Mr. Yan also acknowledged that his legal surname was Yan, rather than Yen. The Agency expressed concern that there was another David Yan who was registered in the Nexus System as such, and that there was a greater need to distinguish Mr. Yan in the current case from another Nexus card holder with a similar name. The style of cause was amended to identify Mr. Yan as Yongfeng (David) Yan, to thus distinguish him from another David Yan in the Nexus system.

[23] There were two defects in the Notice of Violation. The first related to the place of the violation, which was specified to be "4971", taken from the Notice of Violation number, which was YYZ4971-0435. Had the inspector written "YYZ", such letters are generally associated with Pearson International Airport; "4971" is not. Hence, most technically, the place of the violation has not been specified.

[24] The second defect in the Notice of Violation relates to the erroneous citation of section 40 of the *Health of Animals Act*, as the legislative reference for the violation, in circumstances where the violation has actually occurred pursuant to section 40 of the *Health of Animals Regulations*. The error is an easy one to make, since the pre-formatted Notice of Violation form, "Notice of Violation at the Point of Entry" (CBSA134 [10]), contains four boxes, referencing the *Plant Protection Act,* the *Plant Protection Regulations,* the *Health of Animals Act* and the *Health of Animals Regulations*, and one box needs to be checked. The Tribunal appreciates that, in the exigencies of dealing with large numbers of people associated with multiple deplanings at an airport, Agency officers can end up checking the wrong box, through clerical oversight.

[25] In its supplementary arguments introduced at the hearing, entitled "Respondent's Additional Submissions" ("Additional Submissions"), the Agency advanced a number of arguments in favour of rectification.

[26] The Tribunal is particularly concerned with positions based on decisions rendered subsequent to the 2009 Federal Court of Appeal decision in *Doyon*. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal cautioned the Tribunal as follows (at paragraphs 27 and 28 of *Doyon*):

> *[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.*

[27] The Tribunal considers that the judicial caution expressed in the *Doyon* decision applies to circumstances of rectification in relation to a Notice of Violation. The Tribunal notes that in the *Kropelnicki v. Canada (CFIA)* series of decisions (2010 CART 22-25), involving reviews of Notices of Violation issued by the Canadian Food Inspection Agency, the Tribunal ordered rectification, based on the consent of the parties. The error in *Kropelnicki* was similar to the present case, in that a section of the *Health of Animals Act* was referenced as the offence in the Notice of Violation, rather than a numerically identical section of the *Health of Animals Regulations*. All cases were heard together and, at the hearing, the Agency and Mr. Kropelnicki, who was an experienced cattle farmer, agreed to the rectification of the respective Notices of Violation. The current case is similar in that the Agency requested rectification, supported by various arguments and decisions, and Mr. Yan, a sophisticated businessperson, did not object. While there was no formal consent by Mr. Yan to rectification, he may be viewed as having consented, given that he did not

raise any issues as to personal prejudice resulting from changing the Notice of Violation reference from *Health of Animals Act* to *Health of Animals Regulations*.

[28] The Tribunal therefore orders that the Notice of Violation be rectified, to reference the *Health of Animals Regulations,* rather than the *Health of Animals Act*, based on the consent, in substance, of the parties. The various arguments of the Agency need therefore not be addressed. The basis of the Tribunal's conclusion, in the current case and in *Kropelnicki*, is referenced to the level of business experience or sophistication of the applicant. In addition, there is no evidence that the applicant is not otherwise aware of the particulars of the violation alleged, or otherwise prejudiced in presenting his case for review.

(c) Non Compliance by Applicant with Filing Requirements for Request for Review

[29] Following his submission by fax of a Request for Review, Mr. Yan failed to send a copy to the Tribunal by registered mail, as required by subsection 14(3) of the *Agriculture and Agri-Food Administrative Monetary Penalty Regulations* (Regulations). Nor were any of the documents forwarded to the Tribunal sent in duplicate, as required by Rule 8 of the *Rules of The Tribunal (Agriculture and Agri-Food)* (Tribunal Rules). In its discretion, and further to Rule 4 of the Tribunal Rules, whereby a defect in form or a technical irregularity may be overlooked by the Tribunal, the Tribunal chooses to overlook these defects in Mr. Yan request for review.

[30] Rule 34 of the Tribunal Rules provides as follows:

> ***34.*** *An applicant who requests a review by the Tribunal must indicate the reasons for the request, the language of preference and, if the notice of violation sets out a penalty, whether or not a hearing is requested.*

[31] The Tribunal notes that, in a number of previous cases, an applicant has not provided reasons, at the time of submission of the Request for Review. In its discretion, in many such cases, the Tribunal has proceeded with the Request for Review, requiring the Agency to submit a report, to which an applicant is invited to respond, despite the absence of any reasons being initially provided by the applicant. The provisions of Tribunal Rule 34, referenced *ante*, must be considered by the Tribunal where it assesses the initial admissibility of a Request for Review. Where an applicant, in submitting a Request for Review, fails to provide reasons, as required by Rule 34, the applicant risks being subject to a finding by the Tribunal that the Request for Review is inadmissible. Reference is made to paragraph 3.3 of the Tribunal's Practice Note #11 - *Determining Admissibility of Requests for Review and Practices Regarding the Exchange of Documents Amongst Applicants, Respondents and the Tribunal*, issued on May 1, 2013, in which the requirement for the inclusion of reasons in the Request for Review is emphasized. In the current case, there could be an issue as to whether specified reasons that "the charge is unfair, excessive and incorrect" are adequately detailed, or of a level of generality as to be considered to be no

reasons at all. The Tribunal nonetheless chose to proceed with the Request for Review, which in any event, predates Practice Note #11.

(d) Denial of Submission of Further Evidence by Applicant and Agency

[32] At the hearing, Mr. Yan wished to introduce evidence: (a) of third-party intervention and (b) that the product was not meat. With respect to third-party intervention, Mr. Yan wished to introduce evidence, solely by way of uncorroborated assertions from Mr. Yan, that his sister had packed his luggage and must have included the packages without his knowledge. The Agency objected to the introduction of such evidence at such a late stage in the proceedings. The Tribunal sustained the Agency's objection and declined to hear such evidence, due to considerations of procedural unfairness. Depending on the circumstances and the credibility of the evidence, the Tribunal has accepted third-party intervention as breaking the causal link necessary for the Agency to establish the essential elements of a violation. See, for example, *El Kouchi v. Canada (CBSA)*, 2013 CART 12, at paragraph 36.

[33] At the hearing, Mr. Yan wished to introduce evidence that the product in question — described by all parties as "duck tongues", was in fact not meat, but rather was made of tofu. To what extent such differentiation would have improved Mr. Yan's case was not determined, since the Tribunal refused to entertain any such evidence, sustaining the Agency's objection. As the Agency pointed out, the product in question had been long since destroyed, and to introduce at the hearing completely new evidence as to its composition was unfair to the Agency. The Tribunal agreed.

[34] Mr. Yan's attempt to introduce evidence of third-party intervention, as well as his attempt to introduce evidence of a completely different composition of the goods, were not permitted by the Tribunal, based on considerations of relative fairness. Mr. Yan had submitted no documentation whatsoever, in the fourteen months between the time he was served with the Notice of Violation and the time of the hearing, which itself had been subject to adjournments, thus facilitating more time for Mr. Yan to both marshal and disclose his evidence. The only document from Mr. Yan on file, prior to the hearing, was his Notice of Objection, where he specified no particulars other than "the charge is unfair, excessive and incorrect".

[35] Both parties—Mr. Yan, as well as the Agency—have a right to receive particulars in advance of a hearing, as to the nature of the case to be argued. Considerations of fairness are not well served, through elements of surprise. It is for this reason that both parties were invited by the Tribunal to make additional submissions, following receipt of the Agency Report, or to request additional time by which to make such submissions. The invitation to Mr. Yan to make additional submissions was clear, and was not responded to. Therefore, the Tribunal's position, particularly in the face of Agency objections, was that Mr. Yan's evidence at the hearing could not be entertained.

[36] Concurrently with submitting a certified Chinese to English of the wording of the package containing the goods in question, Ms. Charbonneau, on behalf of the Agency and

without first seeking permission of the Tribunal, attempted to raise further arguments, emanating from the translation. After the translation and Ms. Charbonneau's comments were forwarded by the Tribunal to Mr. Yan, he responded by letter, with supplementary submissions. For similar reasons to those causing the Tribunal to decline to hear further from Mr. Yan at the hearing, the Tribunal declines to hear further from both Mr. Yan and the Agency, in relation to their purported later written submissions.

(e) Supplementary Submission by the Agency of Jurisprudential Argument, Jurisprudence and Related Decisions

[37] At the hearing, the Agency sought permission to introduce into evidence a document titled "Respondent's Additional Submissions", which involved a review of the jurisprudence and Tribunal decisions, in support of the Agency's argument that rectification of the Notice of Violation should be permitted. Upon inquiry of the Tribunal, the Agency admitted that Mr. Yan had not seen this document before. An issue therefore arose as to whether the Tribunal hearing should proceed, since Mr. Yan had not been previously served with this document. Given the fourteen month time period that had passed since the initial Request for Review, plus earlier adjournments of the hearing date (at the initiative of the Agency and the Tribunal, but none at the initiative of Mr. Yan), there appeared to be a collective desire that the hearing continue, if possible, during the scheduled hearing day. An adjournment was called by the Tribunal, to enable Mr. Yan to review the material. At the conclusion of the adjournment, Mr. Yan advised that he was prepared to continue the hearing.

[38] While the Agency is not required to make reference to jurisprudence or tribunal decisions in terms of arguing its case, when it does so, the applicant should have advance notice of such particulars. One reason for this is because an applicant may decide, based on the quality and detail of the Agency's legal arguments, that retention of counsel is advised. The vast majority of applicants before the Tribunal are self-represented, with no evident training in law. It is not appropriate for an applicant, and in particular a self-represented applicant, to be surprised by legal arguments to which he or she does not have a fair opportunity to respond. In the current case, Mr. Yan consented to proceed, despite the element of surprise. The Tribunal considered Mr. Yan's consent to be an informed one, given the nature and extent of his business experience. Had the applicant been significantly less sophisticated, the Tribunal might well have insisted that the matterbe adjourned, in order to provide the applicant with more time to review, with or without the benefit of legal counsel, the Agency's legal arguments.

Evidence Before the Tribunal

[39] The evidence before the Tribunal therefore consists of the oral representations of the parties made at the hearing, in addition to evidence in the following documents:

(a) The Agency Report (The Report), titled "Respondent's Report", submitted January 9, 2012, and also entered into evidence at the hearing of February 22, 2013;

(b) Additional Submissions by the Agency (Additional Submissions), titled "Respondent's Additional Submissions", entered into evidence at the hearing of February 22, 2013;

(c) A translation from Chinese to English, certified by the Translation Bureau of Public Works and Government Services Canada, of the package lettering on the goods in question, submitted by the Agency on March 5, 2013, in response to a request from the Tribunal, made at the hearing of February 22, 2013;

(d) Copy of Nexus receipt in the name of Yongfeng Yan, entered into evidence at the hearing of February 22, 2013; and

(e) Copy of Notice of Violation Wording instruction form to Agency personnel, entered into evidence at the hearing of February 22, 2013.

There was no written evidence presented by Mr. Yan. His evidence was presented entirely orally, at the hearing.

Facts Supported by Evidence

[40] The facts asserted by the Agency, which are not disputed by Mr. Yan, are as follows:

(a) On December 11, 2011, Mr. Yan entered Canada at Lester B. Pearson International Airport, on an Air Canada flight from China (Report, "Statement of Facts"; Tab 1 - Copy of Declaration Card E311, dated December 11, 2011, and specifying Air Canada flight No. AC 088-CN).

(b) Mr. Yan answered "No" to all questions on the Declaration Card, including "No" to the question "I am bringing into Canada…meat/meat products…" (Report, "Statement of Facts"; Tab 1 - Copy of Declaration Card E311, dated December 11, 2011).

(c) Mr. Yan was referred to secondary inspection, where he presented his Declaration Card, plus his Nexus card (Report, "Statement of Facts"; Tab 2 - Copy of Secondary Inspector's notes).

(d) Mr. Yan's luggage included a box that he had already self-declared. Upon opening the box, the secondary inspector found what she described as "duck tongues". In particular (quoted *verbatim* from Inspector's Non Compliance Report), "Examination of bag found assortment of teas, as well as other dried food products and one bag of duck tongue" (Report, "Statement of Facts";

Tab 2 - Copy of Secondary Inspector's notes; Tab 4 - Inspector's Non Compliance Report).

(e) Duck tongues are prohibited from entry into Canada, according to the Canadian Food Inspection Agency's Automated Import Reference System (AIRS), being a form of duck "offal" (Report; "Summary of Facts"; Tab 3 - AIRS Extract).

(f) When Mr. Yan was asked by the secondary inspector why he didn't declare the item, he said it was (quoting *verbatim* from the Secondary Inspector's notes) "a snack and it's poultry and that poultry isn't meat" (Report, "Summary of Facts"; Tab 2 - Copy of Secondary Inspector's report).

(g) Mr. Yan refused to sign the Notice of Violation, by which signature he would have acknowledged that he had committed the violation alleged, and which would have resulted in a 50% reduction of penalty (Report, "Summary of Facts; Tab 4 - Copy of Notice of Violation; Tab 2 - Secondary Inspector's notes).

Facts Supported by Evidence, Not Referred to by Agency

[41] Facts supported by evidence, which were not referred to by the Agency, are as follows:

(a) When Mr. Yan presented himself at secondary inspection, he presented both his Declaration Card and his Nexus card (Report, Tab 2 - Copy of Secondary Inspector's notes). The Tribunal notes that the holder of a Nexus card, which is issued upon application by frequent travellers who are considered to be low risk, is able to self-declare at self-service kiosks at major airports. The secondary inspection was, therefore, to verify Mr. Yan's self-declaration.

(b) After the alleged prohibited product was discovered, Mr. Yan's Nexus card was seized (Report, Tab 2 - Copy of Secondary Inspector's notes; Tab 4, Alternate Inspection Program Violation Card).

Asserted Facts, Not Supported by Evidence

[42] The Agency asserts that Mr. Yan did not possess the prescribed certificates or permits to import the product (Report, p. 11, "Statement of Facts"). Reliance is placed by the Agency on the inspector's notes, contained in Tab 2 of the Report. Certificates or permits are not mentioned in the photocopy of the inspector's notes included in Tab 2.

[43] The Agency asserts that the inspector took pictures of the seized products and then send them for destruction, to be disposed of as international waste (Report, p. 12 - "Statement of Facts"). In support of these assertions, reliance is solely placed by the Agency at Tab 5 of the Report, which is a photograph of the items alleged to have been intercepted. The connection between the photograph and the inspector is not established, nor is the destruction of the items supported by the photograph alone. With respect to whether there is evidence supporting the destruction of the items, the Tribunal will not comment further, as the matter was addressed by the Agency's representative at the hearing, who asserted that the items had been destroyed.

Arguments of the Agency

[44] The Agency asserts (quoting *verbatim* from "Respondent's Arguments") that "Mr. Yan does not contest the nature of the product nor his connection to the violation. Mr. Yan admitted to the Inspector that the duck tongues found in his luggage belonged to him..." (Report, "Respondent's Arguments", paragraph 4).

[45] Poultry is also meat, the importation from China of which is prohibited, in the absence of permits or certificates (Report, "Respondent's Arguments", paragraphs 5 and 6, referencing AIRS report).

[46] All of the elements of the violation are not in dispute and, in addition, have been established by the Agency: Mr. Yan is the person named in the violation and he did in fact commit the violation identified in the notice. In particular, he imported a prohibited animal by-product without proper documentation (Report, "Respondent's Arguments", paragraph 7).

Arguments of the Applicant

[47] Mr. Yan did not dispute any of the facts alleged by the Agency. His only comments, prior to the oral hearing, were contained in his Request for Review, wherein he states that (quoting *verbatim* from his Request for Review) "…I believe the charge is unfair, excessive and incorrect.

[48] The primary argument advanced by Mr. Yan at the hearing was that he was a longstanding businessperson, who had never committed an offence in Canada, and would not knowingly have committed the violation as alleged.

[49] At the hearing, Mr. Yan also attempted to introduce evidence of alleged third-party intervention and the alleged tofu composition of the "duck tongues". For the reasons specified in paragraphs 32 to 34, *ante*, the Tribunal sustained the Agency's objections to the introduction of such evidence, without prior notice and at such a late stage in the proceedings.

Analysis of the Arguments and Evidence

Alleged Admissions of Applicant

[50] Similar to the case of *Tao v. Canada (CBSA)*, 2013 CART 16, the Agency places significant reliance on Mr. Yan's admissions in relation to proving the Agency's case. The evidence is that Agency inspectors were uncertain as to the composition of the product, despite opening it and handling it, and relied on the admissions of Mr. Yan to establish the nature of the product. The specifics of such reliance will be discussed, *post*.

[51] The Tribunal disagrees with the Agency's assessment of the probity of evidence resulting from an uncautioned admission by the applicant. In the *Tao* case, the Tribunal expressed its views as follows, at paragraphs 31 and 32, in relation to uncautioned admissions contrary to an applicant's interest:

> *[31] In the Tribunal's view, this case turns on whether the Agency has established, on the balance of probabilities, that the product in question is in fact meat; specifically, beef. The Agency asserts that Mr. Tao acknowledged that the product was beef; Mr. Tao denies having done so. In the Tribunal's view, even if it were to be accepted that Mr. Tao acknowledged that the product was beef, that acknowledgement would not, by itself, establish proof of that element of the Agency's case. This is because Mr. Tao would be making assertions that are contrary to his interest, in circumstances where he is not obliged to say anything, and has not been so cautioned. It is the Tribunal's view that a warning by the Agency to Mr. Tao that any statements made by an alleged violator may be used against him, is very important to the acceptance or the weight accorded by the Tribunal to such evidence.*
>
> *[32] The Tribunal makes reference to subsection 5(3) of the* Reporting of Imported Goods Regulations *(SOR/86-873), which reads as follows:*
>
> > **5**.(3) Goods that are imported by a person arriving in Canada on board a commercial passenger conveyance other than a bus shall be reported in writing.

The Supreme Court of Canada has held that regulatory requirement to produce records that may be self-incriminating does not offend the principle against self-incrimination: Fitzpatrick v. The Queen [1995], *4 SCR 154. In the current case, Mr. Tao's regulatory compulsion relates only to the declarations made on the declaration card. He has no obligation to say anything further.*

[52] The Tribunal noted in the *Tao* decision that the Agency has significant time available to it to test an item, where it is uncertain as to its nature, prior to issuing a Notice of Violation. The Agency's seizure and disposal authority under the *Health of Animals Act* is particularized in sections 42 and 43, as follows:

> **42.** *An inspector or officer who seizes and detains an animal or thing under this Act shall, as soon as is practicable, advise its owner or the person having the possession, care or control of it at the time of its seizure of the reason for the seizure.*
>
> **43.** *(1) An inspector or officer who seizes and detains an animal or thing under this Act, or any person designated by the inspector or officer, may*
>
> *(a) store it at the place where it was seized or remove it to any other place for storage.*
>
> *…*
>
> *(3) An inspector or officer who seizes and detains an animal or a perishable thing under this Act may dispose of it and any proceeds realized from its disposition shall be paid to the Receiver General.*

[53] As the Tribunal observed, in paragraph 44 of the *Tao* decision:

> *[44] The Agency is reminded that it has the right to seize and test items that it believes are prohibited from importation without a certificate, whereafter a Notice of Violation can be issued, depending on the test results. As is provided in subsection 26(1)(b) of the* Agriculture and Agri-Food Administrative Monetary Penalties Act, *for a serious violation, such as the violation so categorized in the current case, the Agency has two years to issue the Notice of Violation, from the time that the Agency, on behalf of the Minister of Agriculture and Agri-Food, became aware of the alleged violation. In the case of a minor violation, the Agency has six months to issue a Notice of Violation. Therefore, in all cases involving an alleged violation, there is significant time available to the Agency to marshal and submit its evidence. The Agency is encouraged to take advantage of this right, in circumstances where the nature of the item is not otherwise readily determinable.*

[54] Further to the Tribunal's reasoning in *Tao*, the Tribunal considers that Mr. Yan's admissions that the product contains meat—in particular, poultry—is not to be accorded significant weight, in the absence of persuasive evidence otherwise introduced by the Agency.

No Evidence Supporting Lack of Permits or Certificates

[55] The Tribunal has noted earlier that the Agency's assertion, as to Mr. Yan not having any import permits or certificates, remains unsupported by the evidence. This is not referenced in the inspector's notes included as part of Tab 2 of the Report. This point could have been confirmed in a signed Inspector's Non Compliance Report, which the Agency frequently submits, as part of its Report, in support of assertions made. No such document was included in the Agency Report in the current case.

[56] The Tribunal is therefore faced with a question as to whether the Agency has established, on the balance of probabilities, an essential element of its case, in relation to whether Mr. Yan had any permit or certificate that would have justified the importation of the product. In this regard, a recent Tribunal case, *Krasnobryzhyy v. Canada (CBSA)*, 2012 CART 11, would appear to be relevant in providing guidance.

[57] In *Krasnobryzhyy*, the applicant asserted that he had never been asked, at either the primary or secondary inspection, as to whether he had any permits or certificates. There was direct evidence from the inspector at secondary inspection that she might not have asked the question of the applicant, but that she did not find any such permit or certificate when she searched the applicant's luggage. The Tribunal concluded that there was no evidence that the applicant had any such permit or certificate in his possession. The Tribunal held that it could still assess whether, on the evidence, it was reasonable to conclude that such a permit or certificate existed, despite the applicant not having been asked to produce same. As discussed by Tribunal Chairperson Buckingham, in paragraphs [34] and [35] of *Krasnobryzhyy*:

> *[34] The third element of the violation - if Krasnobryzhyy did import meat products into Canada, that Agency officials provided a reasonable opportunity to Krasnobryzhyy for him to justify the importation in accordance with Part IV of the* Health of Animals Regulations *- in the grand majority of cases would be an element of the violation that will be very easily met by the Agency as the threshold for adducing sufficient evidence is extremely low. Normally, the Agency would have only to prove to the Tribunal that the traveller's Declaration Card was falsely marked with a "No" beside the question of whether the traveller was bringing meat products into Canada; or that the person understood and answered "No" to the primary inspector's question about whether the traveller was bringing meat products into; and that the traveller was given an opportunity to produce a certificate, document or permit, which would permit importation of a meat product. In the case of a person who understands either of Canada's official languages, the Agency's*

> *burden to prove that they had afforded a traveller a reasonable opportunity to justify any importation of meat products in accordance with Part IV of the* Health of Animals Regulations *would normally be quickly and easily met.*
>
> *[35] The Tribunal finds, in this case, that the Agency has met this burden. Krasnobryzhyy's conduct by marking "Non" on his E311 Declaration Card and by failing to declare the dry sausage to the Agency at any time before Inspector 17739 found it in his luggage during secondary inspection, is sufficient to prove that he was given a reasonable opportunity to declare the product or to produce a certificate, document or permit, which would permit importation of a meat product, even if as Krasnobryzhyy testified, no Agency officer actually directly asked him for certificates or permits that would have allowed entry of the meat product into Canada. The evidence presented by both parties does not support any finding by the Tribunal that Krasnobryzhyy actually had such a permit or certificate in his possession on May 2, 2011.*

[58] Similarly, in the circumstances of the current case, the Tribunal finds that a lack of evidence that Mr. Yan was asked about permits or certificates does not mean that this element of the violation has not been otherwise established.

Photographic Evidence

[59] The Tribunal has noted that, in the current case, the nexus between the photograph in the Agency Report and the facts of the current case has not been established, at least at first instance. The assertion that the photograph in the Report was in fact taken by the secondary inspector is not supported by evidence. In this regard, the case facts are quite similar to those found in *Mak*, previously cited. In both *Mak* and in the current case, a second and asserted improved copy of the photograph in question was separately forwarded to the Tribunal by Agency personnel. In *Mak*, such association of the photograph with Agency personnel was considered to be sufficient to accept the photograph as being evidence of the goods that were in fact seized. As the Tribunal noted, in paragraph 45 of *Mak*:

> *[45] …there is no evidence that the photographs submitted in evidence were in fact taken by the inspector. After reviewing the photographs, the Tribunal considers that, on the balance of probabilities, the product contained meat. In addition, the nexus of connection between the photographs and the case at hand is considered to have been established by the early and independent electronic submission to the Tribunal of such photographs by [Agency personnel]…The Tribunal considers it to be highly unlikely that Agency personnel, with such a degree of responsibility, would end up submitting, through oversight, photographs relating to an entirely different case.*

Given the additional and independent submission of the photograph by Agency personnel in the current case, the Tribunal adopts the reasoning in *Mak*, and holds that the nexus of connection of the photograph to the facts of the current case is thereby established.

[60] The current case is the third in a trio of recent cases where photographic evidence becomes pivotal to the proof of the Agency's case. The two prior decisions were *Mak* and *Tao*, both previously cited. In the *Mak* case, the Tribunal determined that the photographic evidence supported the contention by the Agency that the product imported contained meat. As the Tribunal noted in *Mak* at paragraph 57, in part:

> *[57] Photographs of the buns, with the nexus of association to the case established by way of the independent and separate submission of same by Agency personnel with oversight responsibilities…become pivotal to meeting the burden of proof in this case. The burden of proof that the product contained meat would likely not otherwise have been met by the Agency…*

[61] In the *Tao* case, the Tribunal came to the opposite conclusion. As the Tribunal noted in *Tao,* at paragraph 44:

> *[44] With respect to the use of photographic evidence, the Tribunal draws a distinction between the current case and the recent Tribunal decision in* Mak v. Canada (CBSA)*, 2013 CART 11. In the* Mak *case, there was photographic evidence of buns which were asserted to contain meat (*Mak*, paragraphs 27 and 45). The Tribunal accepted that the photographs, as presented, depicted meat. While not particularized by the Tribunal in* Mak*, a review of the Report of the Agency in* Mak*, which is a matter of public record, discloses that one of the photographs depicted a bun that had been opened, and where the bun filling shown is supportive of the Tribunal's conclusion in* Mak *that the bun contained meat. In the present case, the photographic evidence is quite different. It is not possible to conclude from the photographs submitted by the Agency in the present case that the product in question contains meat. Furthermore…translated content details of apparently identical products, as found on the internet, are not at all determinative in the present case, particularly in the absence of further information verifying the integrity and association of the translations.*

[62] In *Tao*, the product asserted to be the subject of the Notice of Violation was known as "meat candy". Each of the products was individually wrapped and enclosed in a larger bag. It was not possible, from the photographic evidence presented, to arrive at a conclusion as to the nature of the product. The Agency did not examine any of the product scientifically.

[63] The Tribunal considers that, from an evidentiary perspective, the current case is similar to *Tao.* The Agency presented photographic evidence of the seized goods (Report, Tab 5). The photograph, as in *Tao*, shows clear packaging, containing individually wrapped items. Only one side of the container packaging is photographed. The container package aide photographed contains both Chinese lettering and what appears to be the related

Chinese words, phonetically written, using the English alphabet. One of the package items has been broken open, in circumstances where it is unclear as to what the contents are, let alone what the contents are made of. The Tribunal acknowledges that the Agency separately forwarded what was represented to be a superior quality version of the photograph, though the Tribunal does not consider that such higher quality photograph sheds any greater light on the package contents.

[64] Following a request made by the Tribunal at the hearing and later confirmed in writing by the Tribunal, the Agency submitted a certified English translation of the container packaging lettering. Unlike in *Tao*, where the translations presented were, for the most part, via a Google translation function and where no translations presented were in fact certified, the translation presented in the present case was certified via the Translation Bureau of Public Works and Government Services Canada. The translations, while particularly credible, provide no further insight as to the package contents. The container package is simply described as "A fine gift for giving" and "Specialty of Wenzhou".

Evidence of Inspector and Other Evidence in Relation to Whether the Seized Product Was Meat

[65] The inspector who had seized the product gave evidence at the hearing. The Agency advised the Tribunal that reliance on the inspector's experience with meat products, and duck products in particular, was a component of the Agency's proof, on the balance of probabilities, that the product was of the nature alleged by the Agency. The inspector advised the Tribunal that she was familiar with duck products, but not specifically with the duck tongue product in question. She testified that she opened one of the packages and felt the package contents, noting in so doing, that the product was tongue-shaped. She was not entirely certain as to the nature of the product, and so consulted with her supervisor. She testified that her supervisor advised her that her supervisor didn't know what it was. The inspector advised her supervisor that "The traveller [Mr. Yan] says it's duck tongue," to which her supervisor replied "If that what he said, then you go with that." She also consulted with a fellow inspector, who advised her that "to me, that looks like duck tongue". However, the inspector was not able to particularize her fellow inspector's expertise as being any greater than her own.

Conclusions on the Evidence

[66] The Agency's arguments, as advanced by Ms. Charbonneau, involved reliance on three primary evidentiary components, in order to establish, on the balance of probabilities, that the product contained meat: (i) the uncautioned admission by Mr. Yan that the product contained meat; (ii) photographic evidence of the product, supplemented by translation of the package lettering; and (iii) direct testimony from the inspector who seized the goods. In the Tribunal's view, the Agency has not succeeded in establishing, on the balance of probabilities, that the product contained meat. As noted earlier, the Tribunal does not place significant weight on the uncautioned admission of Mr. Yan. In addition, the

photographic evidence does not clearly establish the product components, and is not assisted through the translation of the package lettering. Finally, while the inspector involved with the seizure of the product is acknowledged to be experienced and knowledgeable, she was not knowledgeable in relation to this particular product. Neither were her fellow inspector and her supervisor, both with whom she consulted. A statement to the effect that "if Mr. Yan says it's duck tongue, then you go with that" is, in the Tribunal's view, of negligible evidentiary value.

[67] In the Tribunal's view, this case is an example of where the Agency might have considered using its seizure and examination powers, as discussed in paragraph 53, ante, referencing similar comments in the Tao decision.

[68] The Tribunal is obliged to be mindful of the direction provided to the Tribunal by the Federal Court of Appeal in the case in *Doyon,* discussed earlier. Based on the rigorous nature of evidentiary review required by *Doyon*, the Tribunal holds that the Agency has failed to establish, on the balance of probabilities, that the product in question contained meat, based on deficiencies in proof of identification of the product contents. The Notice of Violation, as a consequence, cannot be upheld.

Status of Nexus Card

[69] The Tribunal notes that Mr. Yan's Nexus card was seized, concurrently with the goods in question. The seizure of such card, prior to any violation being conclusively determined on review, means that Mr. Yan appears to have been without such a card since the time that the Notice of Violation was issued, in December of 2011. At the oral hearing, Mr. Yan disclosed that he was a Toronto business owner. Possession of a Nexus card is generally associated with frequent travellers. The Tribunal is unclear as to the Agency's authority to seize a Nexus card, in circumstances where the traveller disputes the Notice of Violation from the outset and where, as in the current case, the Agency's success in proving its case is far from certain. As noted on the Agency's website in relation to Nexus (http://www.cbsa-asfc.gc.ca/prog/nexus/term-eng.html), accessed August 27, 2013:

> *If you violate any terms or conditions of the NEXUS program, or if you violate any laws or regulations of Canada or the United States, your NEXUS privileges may be cancelled.*
>
> *If the CBSA has cancelled your NEXUS membership, you may write to one of the Canadian Processing Centres, to request a review of the decision within 30 days of the date shown on the NEXUS letter.*
>
> ***Note:** If your NEXUS membership is cancelled as a result of a CBSA seizure action, you must also request a Ministerial review of the seizure action within 90 days of the date of the seizure as instructed on your seizure receipt. Information on the seizure appeal process is provided to you at the time of the violation.*

> *If your seizure is overturned through an appeal, you should contact a Canadian Processing Centre in writing to request that the CBSA reconsider your participation in the NEXUS program*.

[70] The Tribunal notes that, notwithstanding that an Applicant's request for review may be successful; the Agency appears to arrogate to itself a discretion, as to whether the Nexus card will be reissued. While it is beyond the authority of the Tribunal to further explore this matter, the legislative authority for the Agency to so act appears to the Tribunal to be unclear.

Conclusion

[71] The Tribunal therefore finds, following a review of all of the oral and written submissions of the parties, that the Agency has not proved, on a balance of probabilities, all the elements of the violation. As a result, the Tribunal finds that Mr. Yan did not commit the violation and is not liable for payment of any penalty amount. While the Tribunal has no power to order the return of Mr. Yan's Nexus card, the Tribunal urges the Agency to return such card to Mr. Yan forthwith.

Dated at Ottawa, Ontario, this 27th day of August, 2013.

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Dr. Bruce La Rochelle, Member