

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140131**

**Docket: A-127-13**

**Citation: 2014 FCA 26**

**CORAM: PELLETIER J.A.  
GAUTHIER J.A.  
TRUDEL J.A.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**And**

**RITA SAVOIE-FORGEOT**

**Respondent**

Heard at Montréal, Quebec, on October 23, 2013.

Judgment delivered at Ottawa, Ontario, on January 31, 2014

**REASONS FOR JUDGMENT BY:**

**TRUDEL J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
GAUTHIER J.A.**

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**REASONS FOR JUDGMENT**

**TRUDEL J.A.**

**Introduction**

[1] This is an application for judicial review of a decision rendered by Mr. Donald Buckingham, the Chairperson of the Canada Agricultural Review Tribunal (the Tribunal), on March 7, 2013 (*Rita Savoie Forgeot v. Canada Border Services Agency*, 2013 CART 7) (Reasons). The Tribunal held that Ms. Savoie-Forgeot did not violate section 40 of the *Health of Animals Regulations*, C.R.C., c. 296 (Regulations), which prohibits the importation of animal by-products into Canada, except in accordance with Part IV of the Regulations.

[2] I propose to allow the application, quash the Tribunal's decision and refer the matter back to the Tribunal for redetermination. The Chairperson erred in his interpretation of section 40 of the Regulations, and in finding that the Canada Border Services Agency (CBSA) is required to provide individuals with a "reasonable opportunity" to justify the importation of animal by-products.

### **Facts**

[3] Ms. Savoie-Forgeot, a flight attendant, travels to Paris four to five times per month. On November 13, 2011, she traveled from France to Canada and arrived at Pierre Elliott Trudeau International Airport in Montréal. She was carrying several food products with her, including cheese and two cans that contained meat. She completed a Canada Border Services Agency E311(09) Declaration Card and marked "yes" next to the statement: "I am/we are bringing into Canada: Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects" (Reasons at paragraph 13). She valued the products being imported at 30 Canadian dollars.

[4] Upon presenting her declaration card at customs, the primary officer asked her what kind of food she was carrying. According to the CBSA she replied "only cheese". Ms. Savoie-Forgeot testified that she had declared cheese, salad, some canned foods, and bread and that she had presented her receipt to the officer and listed its items. The primary officer modified the declaration card to indicate that Ms. Savoie-Forgeot was not carrying any goods that required a customs examination.

[5] Upon a secondary inspection, a second officer asked her whether she had anything to declare. Ms. Savoie-Forgeot maintains that she described the same items as she had at primary inspection. The CBSA claims that she declared only the cheese. The officer verified the contents of her bags, found two cans and treated them as undeclared in light of the CBSA's version of the facts. An examination of their labels revealed that they contained beef, and that their importation into Canada is prohibited.

[6] Ms. Savoie-Forgeot was charged with violating section 40 of the Regulations which reads:

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.

40. Il est interdit d'importer un sous-produit animal, du fumier ou une chose contenant un sous-produit animal ou du fumier, sauf en conformité avec la présente partie.

Consequently, she was found to have violated section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 (*Penalties Act*) and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187 (*Penalties Regulations*) and was served with a notice of violation and received a fine of 800 dollars (Notice of Violation No. 3961-11-M-0378).

[7] Ms. Savoie-Forgeot requested that the Tribunal review the facts of the violation pursuant to paragraph 9(2)(c) of the *Penalties Act*.

### **The Tribunal's Decision**

[8] The Tribunal found that Ms. Savoie-Forgeot did not commit the alleged violation and is not liable to pay the fine. The Chairperson explained that in order to prove a violation under section 40 of the Regulations the Agency must prove, on a balance of probabilities, that:

- i. Forgeot is the person who committed the violation;
- ii. Forgeot brought an animal by-product, in this case two cans containing meat, into Canada; and
- iii. If Forgeot did import meat products into Canada, that Agency officials provided a reasonable opportunity for Forgeot to justify the importation in accordance with Part IV of the *Health of Animals Regulations* (Reasons at paragraph 25).

The Tribunal specified that the third prong of the test is necessary as subsections 41(1) and 41.1(1) of the Regulations allow alleged violators of section 40 to defend themselves by producing a certificate, document or permit justifying the meat's importation, or by declaring the meat they are carrying and allowing an inspector to determine if it may be imported into Canada (Reasons at paragraphs 31-32).

[9] Applying his three-part test to the facts at hand, he found that the CBSA did not give Ms. Savoie-Forgeot a "reasonable opportunity" to justify the importation and that the Agency had an obligation to question Ms. Savoie-Forgeot further and more carefully with regard to what she was bringing into Canada. The Tribunal therefore found that Ms. Savoie-Forgeot did not commit the violation as alleged and accordingly she was not liable to pay the penalty.

[10] Unhappy with this result, the CBSA brought this application for judicial review of the Tribunal's decision.

### **Parties' Positions**

[11] The CBSA argued before our Court that the Tribunal erred in law by mandating that the CBSA prove that its customs officers gave Ms. Savoie-Forgeot a reasonable opportunity to justify the importation of the meat she was carrying. Rather, according to the CBSA, Ms. Savoie-Forgeot had the burden of demonstrating that she had imported these products in conformity with the Regulations. The CBSA stressed that Canadian customs operates on the basis of a system of voluntary disclosure and that Ms. Savoie-Forgeot was bound by section 12 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), which mandates that all imported products must be reported at the nearest customs office. Thus she was responsible for declaring what she was carrying, and the CBSA was not required to ask her to provide further information. The CBSA also argued, in the alternative, that if the Tribunal did not err in law, it erred in finding that Ms. Savoie-Forgeot was not, in fact, given a reasonable opportunity to justify the importation of the animal by-products.

[12] Ms. Savoie-Forgeot argued that the Tribunal's conclusion – that she did not have the opportunity to demonstrate that she was abiding by the Regulations – is supported by the evidence which was before the Tribunal.

### **Analysis**

[13] This case calls upon our Court to clarify the proper legal test where an individual is alleged to have violated section 40 of the Regulations. In my respectful view, the Tribunal's interpretation cannot stand on a proper construction of the *Health of Animals Act* and its Regulations no matter which standard of review is applied to the Tribunal's decision.

[14] The purpose of the *Health of Animals Act*, S.C. 1990 c. 21 and its Regulations is to protect against the introduction of foreign animal diseases into Canada by controlling and restricting the importation of animal products and by-products from other countries (*Canada Border Services Agency v. Castillo*, 2013 FCA 271 at paragraph 12 [*Castillo*]). To this end, section 40 of the Regulations prohibits the importation of animal by-products into Canada. This prohibition, however, is not absolute. The importation of animal by-products may be permitted, for instance, where an individual produces a certificate attesting to the products' country of origin or safety (subsection 41(1) of the Regulations) or allows for their products to be inspected and the items are found not to pose a risk of spreading disease (subsection 41.1(1) of the Regulations). The *Health of Animals Act* and its Regulations defines "animal by-product" as including, *inter alia*, anything containing the flesh of a bird or mammal, with some specified exceptions (*Health of Animals Act*, subsection 2(1); Regulations, section 2).

[15] To assist with the enforcement of the *Health of Animals Act* and its Regulations, Parliament also enacted the *Penalties Act* which establishes an administrative penalty scheme and which provides the Minister of Agriculture and Agri-Food with the power to create regulations that enable this penalty scheme to be applied where individuals have contravened the *Health of Animals Act* (*Castillo* at paragraph 15; *Penalties Act*, sections 2, 4). Section 2 of the *Penalties Regulations* states that where an individual contravenes a provision of the *Health of Animals Act* or its Regulations this constitutes a violation subject to the *Penalties Act*, while section 7 of the *Penalties Act* states that an individual who commits such a violation is liable to receive a warning or a penalty. Where an individual contravenes section 40 of the Regulations this constitutes a serious violation under the

*Penalties Regulations*, subject to an \$800 fine (*Penalties Regulations*, Schedule 1, paragraph 5(1)(b)).

[16] Where the Tribunal is called upon to review the facts of a violation, the Minister must prove “on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice” (*Penalties Act*, section 19). In the case at hand, the CBSA thus needed to prove that Ms. Savoie-Forgeot “imported” into Canada an animal by-product that was not subject to one of the exceptions set out in Part IV of the Regulations.

[17] The term “import” is undefined in the *Health of Animals Act* and its Regulations. However, a purposive and contextual reading of section 40 of the Regulations suggests that while the process of importing an animal by-product may begin when an item is brought onto Canadian soil, it is not complete at that point. Upon arrival in Canada, individuals have the obligation to declare the items they are carrying in accordance with section 12 of the *Customs Act*. They also have the obligation, either before or at the time of importation, to present any animal by-products to an inspector, officer or customs officer for inspection in accordance with section 16 of the *Health of Animals Act*. If an inspector or officer finds that the by-product does not pose a risk of spreading disease or the individual presents a certificate attesting to its country of origin and safety, then the importation will be allowed in accordance with subsections 41(1) and 41.1(1) of the Regulations. The process of importing the by-product will be complete at this point, as individuals will be free to leave the inspection area with these items. However, if the by-product poses a risk of spreading disease or is otherwise ineligible for importation, the inspector or officer will require that it be forfeited or be removed from Canada in accordance with sections 17 or 18 of the *Health of Animals Act*. The



importation of these products would then be stopped at this point, as these items would not be permitted further entry into Canada.

[18] It follows that where individuals declare that they are carrying animal by-products and thus voluntarily make them available for inspection, they ought not to be found to have violated section 40 of the Regulations. Even if upon inspection they are found to have in their possession animal by-products that do not fall within the exceptions enumerated in Part IV of the Regulations, they have not yet completed the process of importing these by-products into Canada.

[19] Conversely, individuals who fail to declare the animal by-products they are carrying and thus do not make them available for inspection are in violation of section 40 of the Regulations. In their case, the failure to declare signals the end of the importation process as they have, through their failure, removed the possibility for the officer to inspect the items and also the officer's discretion under subsection 41.1(1) of the Regulations to allow the individual to retain them. As a result, even if the items are later located, forfeited or removed, individuals in this instance will have already contravened section 40 of the Regulations.

[20] The prospective and conditional language used in subsection 41.1(1) supports this interpretation of section 40 of the Regulations. Subsection 41.1(1) states:

Despite section 41, a person may import into Canada an animal by-product or a thing containing an animal by-product, other than one described in section 45, 46, 47, 47.1, 49, 50, 51, 51.2 or 53, if an inspector has

Malgré l'article 41, il est permis d'importer un sous-produit animal ou une chose contenant un sous-produit animal, autres que ceux visés aux articles 45, 46, 47, 47.1, 49, 50, 51, 51.2 et 53, si l'inspecteur a des motifs

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 (SOR/2009-18).

[Emphasis added.]

raisonnables de croire que l'importation du sous-produit ou de la chose, par sa nature, sa destination ou sa transformation, n'entraînera pas — ou qu'il est peu probable qu'elle entraîne — l'introduction de toute maladie déclarable, de toute maladie mentionnée à l'annexe VII et de toute épizootie grave que l'espèce de laquelle il provient est susceptible de contracter et qui peut être transmise par lui, pourvu que le sous-produit ou la chose ne soit pas destiné à servir d'aliments pour animaux ou d'ingrédient pour de tels aliments (DORS/2009-18).

[Non souligné dans l'original.]

The words “may import” indicate that the importation may be permitted following the inspection, not that it has already occurred. In turn, the use of the conditional language “would” further suggests that the process of importing the products has not yet been completed. If the importation process had been finalized at the time of inspection, then this provision would have used either the present or past tense. For instance, it would have stated that the importation “does not” create or “has not” created a risk of spreading disease

[21] This interpretation based on the scheme set out in the *Health of Animals Act* and the Regulations, does not necessarily apply to other types of importation, for example the importation of illegal drugs. In a case where there is a complete prohibition on importation, the act of importation is complete as soon as the thing or substance arrives on Canadian territory, since there is no possibility of justifying its importation. In each case, the statutory scheme governing the importation of a good or a product must be examined to determine whether or not the simple presence of the good on Canadian territory is a violation of the scheme.

[22] The interpretation which I propose of section 40 is consistent with the duty to declare items set out under section 12 of the *Customs Act*, as well as the overall purpose of the *Health of Animals Act* to protect against the introduction of animal diseases into Canada. If individuals who declare the items they are carrying could be found to have violated section 40 of the Regulations, this could discourage prospective importers from making a declaration. Individuals who have animal by-products in their possession upon arrival in Canada might either try to discard them prior to reaching a customs officer, or elect not to report them, as they would be subject to the same penalty under section 40 of the Regulations regardless of whether or not they made a declaration. In turn, by not declaring these items, individuals would not voluntarily allow for them to be inspected in accordance with section 16 of the *Health of Animals Act*, and enable inspectors to determine whether these animal by-products pose a risk of spreading disease and thus ought to be seized and destroyed.

[23] Finally, this interpretation also mirrors the CBSA's stated practice on the ground. In their testimony before the Tribunal, the officers explained that had Ms. Savoie-Forgeot declared the items she was carrying, they would have simply confiscated them and she would not have been issued a notice of violation (Reasons at paragraph 36).

[24] I am aware that this interpretation of section 40 deviates slightly from our Court's prior jurisprudence. In *Canadian Food Inspection Agency v. Westphal-Larsen*, 2003 FCA 383 [*Westphal-Larsen*] our Court held, with considerable misgivings, that where an individual has presented an item for inspection in accordance with section 16 of the *Health of Animals Act*, he or she may nonetheless be found to have violated section 40 of the Regulations. It reasoned that "[i]f an object

is produced at the time of importation, it must have been imported. If it has been imported, then section 40 of the Regulations applies” (*Westphal-Larsen* at paragraph 12). *Westphal-Larsen* did not, however, consider whether declaring an item and thus *voluntarily* making it available for inspection would preclude an individual from being found to have violated section 40 of the Regulations. Mr. *Westphal-Larsen* had failed to declare that he was carrying meat on his declaration card, which he submitted to a representative of the Canada Customs and Revenue Agency upon his arrival in Canada. He only verbally declared that he had salami in his suitcase and allowed for it to be inspected once he discovered that all luggage arriving from Holland would be subject to an x-ray on account of an outbreak of foot and mouth disease. The interpretation of section 40 which I have proposed would have therefore resulted in the same outcome in that case. Mr. *Westphal-Larsen* neglected to declare the item he was carrying and to voluntarily make it available for inspection, such that it might be confiscated if it posed a risk of spreading disease. Thus he was correctly found to have violated section 40 of the Regulations.

[25] It should be noted that disclosure of goods and making them available for inspection should occur at the first contact with customs officials and not later, when a search is imminent or under way. A traveller is not allowed to gamble that he or she will not be directed to the secondary search area, and to declare the goods only if it appears they will be discovered as a result of a search. Mr. *Westphal-Larsen* gambled and lost.

### **Conclusion**

[26] I find therefore that the Tribunal erred in its interpretation of section 40 of the Regulations. This provision does not impose an obligation on the CBSA to demonstrate that its officers gave Ms.

Savoie-Forgeot a “reasonable opportunity [...] to justify the importation” (Reasons at paragraph 25). The duty falls on the individual transporting animal by-products into Canada to declare fully what they are bringing into the country. The question the Tribunal ought to have asked is simply whether, on the facts of this case, Ms. Savoie-Forgeot declared the items she was carrying and made them available for inspection. If so, she would not have violated section 40 of the Regulations, as she would have allowed for the items to be inspected and confiscated if they posed a risk of spreading disease. If she had not declared these items, however, she would have violated section 40, as she was found to have prohibited items in her possession which she did not voluntarily make available for inspection.

[27] For these reasons, I would allow the application for judicial review without costs; I would set aside the Tribunal’s decision and I would refer the matter back to it for determination on the basis of the test set out above.

"Johanne Trudel"

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J.A.

“I agree  
J.D. Denis Pelletier J.A.”

“I agree  
Johanne Gauthier J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

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**STYLE OF CAUSE:**

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TRUDEL J.A.

**CONCURRED IN BY:**

PELLETIER J.A.  
GAUTHIER J.A.

**DATED:** JANUARY 31, 2014

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