Federal Court  Cour fédérale

Date: 20090811

Docket: T-1520-08

Citation: 2009 FC 818

Ottawa, Ontario, August 11, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HILBERT HONEY CO. LTD.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal brought by the Applicant under section 18(1) of the *Federal Courts Act*, R.S., 1985, c. F-7 (Act) of the decision of the Canadian Food Inspection Agency (Respondent or CFIA), dated September 24, 2008 (Decision), denying return to Canada of the Applicant's agricultural product, which consisted of 62 drums of raw honey (Product) that were evidently destroyed in the United States (US) by order of the United States Food and Drug Administration (US FDA).

BACKGROUND

[2] The Applicant is a beekeeping operation and honey farm located in Humboldt, Saskatchewan.

[3] In August 2007, the Applicant exported 62 drums of raw honey with an approximate value of $56,000 to the United States for further processing and packaging.

[4] On September 21, 2007, upon entry to the United States at Sweetgrass, Montana, the US FDA sampled the honey and found it contained unacceptable quantities of filth and debris, including paint chips. The US FDA took additional random samples when the Product reached its destination at Anaheim, California and found high concentrations of lead in the paint chips that were in the honey.

[5] On November 1, 2007, the US FDA detained the Product and indicated that, in addition to the filth and debris, the paint chips were leaching lead. The CFIA was contacted on November 21, 2007 with respect to the circumstances of the testing and detention. The CFIA made inquiries about the possible sources of lead through correspondence to Mark Mammen, Vice President of the Sioux Honey Association, but received no response.

[6] The US FDA provided additional information to the Applicant concerning its refusal to accept the Product, noting the risk of solubilization in acidic food products such as honey following lead exposure. The US FDA advised the Applicant that while re-conditioning could remove solid extraneous matter from the honey, it will not remove lead that had migrated into the honey and is present as a dissolved salt.

[7] The Applicant arranged for independent testing of the Product, which revealed that it contained levels of lead well below what the Applicant alleges is the "commonly accepted industry cut-off of 0.02ppm."

[8] On May 15, 2008 and May 20, 2008, the US FDA reproduced its decision in two Notices of FDA Action.

[9] On June 2, 2008 and July 16, 2008, the Applicant requested the return of the 62 drums of honey to Canada alleging that the Product was in compliance with Canada's food laws. On July 3, 2008 and July 22, 2008 the CFIA denied the requests and cited contravention of subsections 4.1(1) and 16(f) of the Honey Regulations, C.R.C., c. 287 (Regulations) and section 17 of the *Canada Agricultural Products Act*, 1985, c. 20 (4th Supp.) (Products Act). The Product could only be returned as bee feed or be destroyed. The Applicant supplied the CFIA with copies of its independent test results.

[10] On September 9, 2008, the Applicant requested that the Product be returned to Canada to be used as bee feed without irradiation. The Applicant could not find any irradiation facilities in the US or Canada willing to irradiate drums of honey. On September 18, 2008, the CFIA denied the request to import the honey as bee feed unless the honey was irradiated. On September 23, 2008, the Applicant informed the CFIA that the irradiation process was unmanageable. On September 24, 2008, the CFIA re-affirmed its decision to refuse the return of the Applicant's honey to be used for bee feed without irradiation.

[11] The Applicant alleges that at no time in the proceedings did it intend to market the Product. It says it wanted "simply to have the product returned to Canada to be inspected under the supervision and direction of the CFIA."

[12] The Applicant brought an interim application to have the Product returned to Canada pending the outcome of this judicial review. The interim application was dismissed by Justice Beaudry of this Court by an Order dated October 15, 2008.

[13] As a result of the failed interim application, the Applicant was forced to have the Product destroyed in the United States at its own cost. The destruction was carried out in late 2008.

[14] The Applicant did not attempt to pursue any legal proceedings to challenge the US FDA decisions in that jurisdiction.

[15] The Applicant brought this judicial review application on October 2, 2008.

DECISION UNDER REVIEW

[16] The Respondent denied the Applicant's request to have the Product re-admitted to Canada. The Respondent said that it could not be sure of the authenticity of the Applicant's independent test results, as it had not been provided with any information as to the methods used in the testing process.

[17] The Applicant asked the Respondent to reconsider its decision, and provided further information regarding the independent test results, including information about the methods used in collecting, transporting and testing the samples.

[18] The Respondent once again denied the Applicant's request to have the Product returned to Canada. The Respondent's decision stated that the Product could be admitted to Canada either to be used as bee feed or to be destroyed.

[19] The Respondent was of the opinion that the Product was in contravention of section 17(a) of the Products Act and sections 4.1(1) and 16(f) of the Regulations.

ISSUES

[20] The Applicant originally submitted the following issues on this application:

a. Is this application barred by the 30-day limitation found in section 18 of the Act?

b. Is this application moot and, if so, should it be heard nonetheless by this Court pursuant to the doctrine of mootness?

c. What is the correct standard of review applicable to the Respondent's Decision?

d. Was the Respondent's Decision incorrect or unreasonable because:

i. The Respondent did not have the legal authority within the framework of its enabling legislation to make the Decision;

ii. The Decision was not reasonable;

iii. The Decision was procedurally unfair.

STATUTORY PROVISIONS

[21] The following provision of the *Canadian Food Inspection Agency Act*, 1997, c. 6 (Food Inspection Act) is applicable to this application:

Legal proceedings	Action en justice
15. Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Agency, whether in its own name or in the name of Her Majesty in right of Canada, may be brought or taken by or against the Agency in the name of the Agency in any court that would have jurisdiction if the Agency were not	**15.** À l'égard des droits et obligations qu'elle assume sous le nom de Sa Majesté du chef du Canada ou sous le sien, l'Agence peut ester en justice sous son propre nom devant tout tribunal qui serait compétent si elle n'avait pas la qualité de mandataire de Sa Majesté.

an agent of Her Majesty.

[22] The following provisions of the Regulations are applicable to this application:

4.1 (1) Subject to subsections (2) and (3), no person shall market honey in import, export or interprovincial trade as food unless the honey	**4.1** (1) Sous réserve des paragraphes (2) et (3), est interdite la commercialisation — soit interprovinciale, soit liée à l'importation ou l'exportation — du miel en tant qu'aliment, sauf si le miel :
(*a*) is not adulterated; (*b*) is not contaminated; (*c*) is edible; (*d*) is prepared in a sanitary manner; and (*e*) meets all other requirements of the *Food and Drugs Act* and the *Food and Drug Regulations*.	*a*) n'est pas falsifié; *b*) n'est pas contaminé; *c*) est comestible; *d*) est conditionné hygiéniquement; *e*) satisfait à toutes les autres exigences de la *Loi sur les aliments et drogues* et du *Règlement sur les aliments et drogues*.
…	…
16. A registered establishment shall be operated in such a manner that	**16.** Un établissement agréé doit être exploité de façon que
…	…
(*f*) honey does not come into contact with any substance that may have a deleterious effect on the quality of the honey.	*f*) le miel ne vienne pas en contact avec une substance qui puisse avoir un effet délétère sur la qualité du miel.
…	…
INSPECTION AND CERTIFICATION	INSPECTION ET CERTIFICATION
38. (1) A person who wishes to have honey inspected or graded shall	**38.** (1) Quiconque souhaite faire inspecter ou classer du miel doit :

(*a*) make a request to an inspector at least 48 hours before the service is required or, if there is no inspector in the area, at the nearest inspection office at least 72 hours before the service is required;

a) en faire la demande à l’inspecteur au moins 48 heures à l’avance ou, à défaut d’inspecteur dans la région, au bureau d’inspection le plus proche au moins 72 heures à l’avance;

(*b*) present the honey at a place and time designated by an inspector;

b) présenter le miel aux date, heure et lieu précisés par l’inspecteur;

(*c*) make all honey from which samples will be drawn by the inspector readily accessible and ensure that it is in a condition suitable for inspection or grading;

c) rendre facilement accessible tout le miel duquel l’inspecteur prélèvera des échantillons et veiller à ce qu’il soit dans un état qui se prête à l’inspection ou au classement;

(*d*) be available to assist the inspector, or designate an employee on the premises who will be available to assist the inspector, to open and close the containers and provide such other assistance as the inspector may request in order to provide the service;

d) se mettre à la disposition de l’inspecteur, ou désigner un employé sur place qui soit à la disposition de celui-ci, pour l’aider à ouvrir et fermer les contenants et lui prêter toute autre aide qu’il peut demander pour la prestation du service;

(*e*) indicate the grade names and colour class, if any, proposed to be placed on the containers, where the honey is unlabelled at the time it is presented;

e) si le miel n’est pas étiqueté au moment de sa présentation, indiquer les noms de catégorie et la classe de couleur qu’il est proposé d’inscrire sur les contenants, le cas échéant;

(*f*) provide a room where the inspection can be performed in which

f) fournir une pièce pour l’inspection dans laquelle :

(i) the temperature is at least 10°C, and

(i) la température est d’au moins 10 °C,

(ii) there is adequate lighting for a proper inspection; and	(ii) l’éclairage est suffisant pour permettre une inspection convenable;
(*g*) pay the applicable fee prescribed by the *Canadian Food Inspection Agency Fees Notice*, in accordance with the conditions of payment set out in that Notice.	*g*) payer le prix applicable prévu dans l'*Avis sur les prix de l’Agence canadienne d’inspection des aliments*, selon les modalités qui y sont prévues.
(2) A person who has a financial interest in honey that was inspected and certified under these Regulations may, on written request to an inspector, obtain a copy of the certificate of inspection.	(2) Quiconque a des intérêts pécuniaires dans du miel ayant été inspecté et pour lequel un certificat a été délivré aux termes du présent règlement peut demander par écrit à l’inspecteur une copie du certificat d’inspection.

[23] The following provisions of the Products Act are applicable to this application:

Prohibition	Interdiction
17. No person shall, except in accordance with this Act or the regulations, (*a*) market an agricultural product in import, export or interprovincial trade; (*b*) possess an agricultural product for the purpose of marketing it in import, export or interprovincial trade; or (*c*) possess an agricultural product that has been marketed in contravention of this Act or the regulations. …	**17.** Sont interdites, relativement à un produit agricole, toute commercialisation — soit interprovinciale, soit liée à l’importation ou l’exportation — effectuée en contravention avec la présente loi ou ses règlements de même que la possession à ces fins ou la possession résultant d’une telle commercialisation. …

Seizure	Saisie
23. Where an inspector believes on reasonable grounds that this Act or the regulations have been contravened, the inspector may seize and detain any agricultural product or other thing (*a*) by means of or in relation to which the inspector believes on reasonable grounds the contravention occurred; or (*b*) that the inspector believes on reasonable grounds will afford evidence in respect of a contravention of this Act or the regulations.	**23.** L'inspecteur peut saisir et retenir tout produit agricole ou tout autre objet, s'il a des motifs raisonnables de croire qu'ils ont servi ou donné lieu à une contravention à la présente loi ou à ses règlements, soit tout produit agricole, ou tous autres éléments, dont il a des motifs raisonnables de croire qu'ils peuvent servir à prouver la contravention.
…	…
30. (1) Where an inspector believes on reasonable grounds that an agricultural product is being or has been imported into Canada in contravention of this Act or the regulations, the inspector may, whether or not the product is seized, require the importer to remove it from Canada by delivering personally to the importer a notice for its removal or by sending the notice by registered mail to the importer's business address in Canada.	**30.** (1) S'il a des motifs raisonnables de croire qu'un produit agricole est ou a été importé en contravention avec la présente loi ou ses règlements, l'inspecteur peut, qu'il y ait ou non saisie, en exiger le retrait par l'importateur en envoyant à celui-ci, à son adresse commerciale au Canada, un avis à remettre à personne ou sous pli recommandé.

STANDARD OF REVIEW

[24] The Applicant submits that if the Court finds that the facts of the case are sufficiently close to those in *Miel Labonté Inc. v. Canada (Attorney General)*, [2006] F.C.J. No. 247 (F.C.) (*Miel Labonté*); *BC Landscape & Nursery Assn. v. Canada (Attorney General)*, [2000] F.C.J. No. 1148 (F.C.T.D.) (*BC Landscape*) and *Friends of Point Pleasant Park v. Canada (Attorney General)*, [2000] F.C.J. No. 2012 (F.C.T.D.) (*Friends of Point Pleasant*) and the question is not one of jurisdiction within the meaning of *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*), then this Court must find that the standard of review is one of reasonableness.

[25] The Respondent states that the CFIA is specially trained in the field of honey products within the scheme of the National Honey Program. This includes elements of international trade and the regulation of both foreign and domestic products. The CFIA has access to international standards, product quality and food contamination literature and consultations in toxicology. A high degree of deference should be recognized where the quality of honey products is in issue.

[26] The Respondent cites sections 23 and 30 of the Products Act and states that the permissive language throughout the legislation is indicative of the high degree of discretion intended by the legislator. The “broad spectrum of quality control legislation” in the Regulations also reflects the discretion afforded to CFIA inspectors specifically trained in the area.

[27] The Respondent cites *Miel Labonté* for the proposition that when faced with a CFIA decision on the quality standard of a honey product, “reasonable grounds” for the purposes of recall orders under section 19 of the Food Inspection Act means that “some evidence must exist to support

the decision." The Respondent also cites *Friends of Point Pleasant* which states at paragraph 49 that the legislator's use of "reasonable grounds" means "more than a flimsy suspicion, but less than the civil test of balance of probabilities."

[28] The Respondent states that reasonableness, with a high degree of deference, is the standard when reviewing decisions of the CFIA based on questions of fact.

[29] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[30] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[31] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the merits of the Decision to

be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[32] The issue raised concerning procedural fairness and natural justice is reviewable on a standard of correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

[33] The Applicant dropped the jurisdiction issue at the hearing and the Respondent has not raised limitations or mootness. Consequently, I have not considered these issues.

ARGUMENTS

The Applicant

[34] The Applicant submits that when the CFIA considered the Applicant's request to have the Product returned to Canada, it accepted the findings, opinions and assumptions of the US FDA over the contrary evidence provided by the Applicant. This means that a farmer's product can be denied entry into Canada without ever having been inspected in accordance with Canadian standards, or dealt with under Canadian legal rules of procedural fairness. Therefore, a producer's economic

rights can be affected by decisions of foreign bodies, even if those decisions are not just or procedurally fair.

[35] The Applicant says that, since Canada's economy has always been heavily dependent upon the marketing of domestic goods across the world, the rights of exporters are naturally deserving of a high degree of procedural and administrative protection. Therefore, the Applicant submits that the Court should find the Respondent's Decision to be invalid and set it aside.

Decision Not Reasonable

[36] The Applicant points out that the CFIA decided that it would be a contravention of the Products Act and the Regulations to have the Product readmitted to Canada for testing, but that it would not be a violation to have it brought in for use as bee feed or for destruction. The Applicant views this decision as unreasonable and as based upon a fundamental misunderstanding of the legislation and administrative law.

[37] The Applicant submits that the Respondent has contended throughout this matter that this is an issue of public safety and that the Applicant's Product was in violation of Canada's requirements regarding food safety and, therefore, in contravention of trade requirements. The Applicant alleges, however, that this is misleading and that the Applicant at no time stated that it sought to market or sell its Product as food in the Canadian market. Rather, the Applicant's aim was to have its Product returned to Canada and retested to allay any concerns about safety.

[38] While the Applicant did state in a June 2, 2008 letter its belief that it was in compliance with all Canadian laws and regulations, it also stated that it was willing to have the Product re-tested if required by the CFIA. The Applicant states that its assertion that the Product conformed to Canadian law can be read as a response to the Respondent's position that the Product would have to be reconditioned in the US prior to admittance. As the Applicant considered reconditioning unnecessary, it follows that it requested readmission without it.

[39] The Applicant contends that the Respondent's position was that it would not be a safety hazard to bring the product into Canada either for irradiation or for destruction, but it would be a safety hazard to bring it in for testing. But testing involves no more risk of distribution on the open market than does irradiation or destruction. The Applicant alleges that the Respondent has provided no defensible reason why one scenario is different from the other two.

[40] The Applicant says that the Respondent provided voluminous evidence of the risks of lead infiltration into food products, especially products of an acidic nature; however, there is no evidence of the extent of exposure the Applicant's Product had to any lead that may have existed in the drums. Also, there is no evidence before the Court of the number of drums which were affected by the alleged lead exposure. Such exposure may have been limited to one or two drums out of the whole shipment of 62.

[41] The reason why this Court does not have this information is that the drums were first sealed by the US FDA and then destroyed in the United States. If the Respondent had permitted the drums to be examined upon their return to Canada, it may have been found that lead exposure was limited to only one or two drums. Then, rigorous and thorough sampling of the remaining drums could have helped determine whether the exposure came from the drums themselves or from somewhere in the production or bottling facility of the Applicant or elsewhere. Such testing could have revealed whether up to 90%-95% of the shipment could have been saved from destruction; a significant portion of the Applicant's business for the year 2008 could have been saved from loss.

[42] The Applicant says that the Respondent has not provided the Court with any evidence that performing tests upon returned products would impose an unduly onerous burden. Even if the Respondent were to contend that it would be an impossible burden to retest every shipment of food product that has been found unsafe in a foreign jurisdiction, this position would be contradicted by the fact that the CFIA was willing to have the Product readmitted to Canada for use as bee feed. Such a step would have been far more labor-intensive for the CFIA and would have necessitated a CFIA inspector being present at the irradiation facility to supervise the treatment of the Product and to ensure that it was only used for animal feed.

Application of Legislation

[43] The Applicant points out that "marketing" is defined in the Food Inspection Act as follows:

> …the preparation and advertisement of agricultural products and includes the conveyance, purchase and sale of agricultural products

> and any other acts necessary to make agricultural products available for consumption or use…

[44] The Applicant notes that the Respondent's position is that, by requesting that its Product be admitted into Canada for further and proper testing, the Applicant was seeking to market the Product, which the Applicant alleges is not correct. The Applicant suggests that this Court should interpret "marketing" to mean something distinct from verifying that a product is suitable for sale as food. The Applicant's position is simply that the US FDA's findings regarding contamination were not determinative, and that if there was a problem with the Product it could have been dealt with by further testing and possible reconditioning in Canada. The Applicant submits that the re-conditioning of contaminated product is provided for in the Regulations.

[45] The Applicant alleges that if the Respondent's current position is correct, then it would be an offence under the Act and the Regulations to undertake any improvement of any contaminated product, as this would be in contravention of the marketing provisions. It is apparently acceptable to the Respondent to irradiate the product for bee feed, but unacceptable to first test it to determine if this is the appropriate action.

Decision was not Procedurally Fair

[46] The Applicant also submits that the Decision was not procedurally fair and relies upon *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 for the five factors which should be assessed to determine the degree of procedural fairness owed in any given

situation. The Applicant says that, in this case, there was no immediate public health issue that posed any risk. If the Applicant had requested that the Product be made available for marketing, then the Respondent's reliance upon public health concerns would have been justified. However, the facts of this case do not give rise to health issues; rather, the question at issue is one of economic and administrative law rights.

Respondent

[47] The Respondent submits that the overall scheme of the Products Act and the Regulations is not only intended to regulate the quality of products that are marketed to consumers, but also to regulate the way in which those products are safely processed, supplied, stored and conveyed in import, export and interprovincial trade. Parliament has provided CFIA inspectors with the authority to administer and enforce import and export requirements of agricultural and food products as per section 11 of the Food Inspection Act which reads as follows:

11. (1) The Agency is responsible for the administration and enforcement of the *Agriculture and Agri-Food Administrative Monetary Penalties Act, Canada Agricultural Products Act, Feeds Act, Fertilizers Act, Fish Inspection Act, Health of Animals Act, Meat Inspection Act, Plant Breeders' Rights Act, Plant Protection Act and Seeds Act*.	**11.** (1) L'Agence est chargée d'assurer et de contrôler l'application des lois suivantes : la *Loi sur les sanctions administratives pécuniaires en matière d'agriculture et d'agroalimentaire*, la *Loi sur les produits agricoles au Canada*, la *Loi relative aux aliments du bétail*, la *Loi sur les engrais*, la *Loi sur l'inspection du poisson*, la *Loi sur la santé des animaux*, la *Loi sur l'inspection des viandes*, la *Loi sur la protection des obtentions végétales*, la *Loi sur la*

protection des végétaux et la
Loi sur les semences.

Applicant's Repatriation and Re-importation Argument

[48] The Respondent submits that the Applicant makes reference to "re-importation," which is not a defined term in any legislation or regulation. A product is either imported or exported. The legislation and the regulations apply to domestic as well as foreign products. The Respondent notes that the CFIA had no control over the Product while it was in transit from Montana to California, and the Applicant did not provide compelling evidence to show the origin of the paint chips. If the definition of "import" in a regulatory context were to be restricted to only foreign foods, animals, plants and other products, the purpose and intent of regulating safety for Canadian citizens would be jeopardized in a free trade environment. Therefore, the re-importation argument of the Applicant would impose an unnecessary burden on CFIA inspectors and an element of uncertainty over regulatory compliance, particularly when the Applicant made no request for certification of the Product prior to export.

[49] According to the Applicant's submission, a Canadian citizen could take his domestic cow to a United States auction and, in the event it contracts a fatal, highly contagious disease, avoid regulatory scrutiny upon "repatriation," thereby jeopardizing domestic herds upon its return. The Respondent states that this interpretation is "ludicrous" and that goods must be reported upon entry to Canada even if they are domestically produced. Once reported, the goods are subject to appropriate regulatory scrutiny.

US FDA Jurisdiction

[50] The US FDA made decisions on quality and safety in relation to the Applicant's Product. It rejected the Applicant's reconditioning proposals and the Applicant never challenged the US FDA's decision in that jurisdiction. The Applicant invoked the involvement of the CFIA by requesting a decision on the return of the Product to Canada and that it be re-inspected by Canadian authorities. The Applicant raises section 38 of the Regulations as a ground for that request.

[51] The Respondent points out that Ms. Connie Zagrosh deposed in response #8 to her cross-examination that section 38 of the Regulations is intended to provide a service to producers to verify grade and colour declarations for marketing purposes. It is not intended for target testing for compliance or enforcement relating to adulterated substances.

[52] The Respondent notes that the United States is a significant trading partner that has credible regulatory regimes which are subject to the same international quality and safety standards as those of Canada. The Applicant's proposed scheme of re-testing product that has already been determined by a competent regulator to be unfit for consumption is not grounded in any legislative authority. There is an abundance of jurisprudence on the point that a party cannot collaterally attack orders of a body with competent jurisdiction through another proceeding: *Toronto (City) v. Canadian Union*

of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77 and *Canada (Minister of Human Resources Development) v. Hogervorst*, [2007] F.C.J. No. 37 (F.C.A.).

[53] The substandard quality of the Applicant's Product was discovered in the United States and the Applicant's request for the re-inspection of the Product by Canadian authorities through a judicial review process is a collateral attack on the inspection techniques and decisions reached by the US FDA, which is a body with competent regulatory jurisdiction over the Product.

Reasonable Grounds

[54] The credible and compelling evidence of the US FDA regarding the adulteration and contamination of the Product established a *bona fide* belief in a serious possibility that the Product was in contravention of Canada's quality and safety standards. The evidence leaves little doubt of the contamination but, of course, the standard is that of mere "reasonable possibility."

[55] There is no legislative definition or authority that requires a chemical reaction to take place for a product to be "contaminated," "inedible" or "unsanitary" for the purposes of section 4.1 of the Regulations. Lead was in the paint chips, the paint chips were in the honey, and there was no evidence that the Applicant would have been able to remove micro-particles of lead.

[56] The Respondent submits that the Applicant's evidence of its own private sampling and testing does not refute the evidence of Ms. Connie Zagrosh and there was no evidence before the

CFIA as to which drums were tested, the manner in which they were sampled and tested, or the probability that the sampling was a homogenous representative sample of the Product. The honey had been exposed to lead and there was no reversal for that. In Canada, there is no regulated acceptable level of lead in a product such as honey. See: subsections 16(f) and 4.1(1) of the Regulations.

[57] It was reasonable for the CFIA to rely upon the US FDA's evidence in the absence of evidence to the contrary to make the Decision it did. Countries that are signatories to the same international standards for food safety have reciprocal regulatory obligations. There is no prescribed limitation to the extent of evidence that CFIA inspectors can consider when determining quality and food safety.

[58] In *Miel Labonté*, Justice Noël at paragraph 31 states that the underlying point in the jurisprudence is that the CFIA makes its decisions in the public interest; those decisions by which the CFIA chooses what action is necessary are discretionary and call for a high degree of judicial restraint. Therefore, the CFIA was not obligated to absolutely determine whether or not the lead had dissolved as salt into the honey for the purposes of regulatory scrutiny. The regulatory environment tasks CFIA with a high discretion to determine whether a food product meets the quality and safety standards imposed by the various statutes and regulations.

[59] It is obvious from the record that the Applicant intended to market its Product for the purposes of human food consumption. There are references to this made at paragraph 22 of the

Affidavit of Mr. John Hilbert and through a conversation with John Hilbert described in paragraph 9 of the Affidavit of Connie Zagrosh. The Applicant is a registered honey establishment and the intent for the end product is to market the honey for human food consumption. The allegation that the Applicant's Product was only to be returned for inspection purposes is an inaccurate portrayal of the evidence that was before CFIA at the time it made its Decision.

[60] The Respondent alleges that the Applicant is attempting to limit the scope of the CFIA's inquiry by restricting the definition of "marketing" to something distinct from verifying whether a food is suitable for sale as food. However, the definition is broader than this. The definition of "marketing" includes "any other act necessary to make agricultural products available for consumption or use." The Applicant's allegation that the CFIA would be in violation of its own definition of "marketing" by allowing the products into Canada for bee feed is, the Respondent alleges, "absurd." The Product did not meet the standards/requirements for human consumption or for animal feed.

[61] The Respondent concludes that the decisions of the CFIA were reasonable.

Procedural Fairness

[62] The Respondent submits that the correspondence between all of the parties involved shows a clear intent by the CFIA to provide an opportunity for the Applicant to submit evidence of compliance with the Canadian standards of food safety. There is no evidence to suggest that the

CFIA dismissed the Applicant's requests or did not consider the Applicant's correspondence or documentation. The CFIA reviewed the Applicant's sampling results and reconditioning proposals with consideration for all relevant evidence and reached a reasonable decision.

[63] The Respondent notes that, as the court's determination in *Miel Labonté* shows, the legislative scheme in the present case is intended ultimately to protect the public interest, and the Applicant always intended its honey to be used for human consumption. The Applicant's economic interests, although a factor to be considered, cannot outweigh the public interest in having safe, edible food products. Therefore, even at an elevated standard as proposed by the Applicant, the CFIA has met its duty to be fair in this case.

Conclusion

[64] The Respondent concludes that the CFIA had the authority to make the Decision to refuse entry of the Applicant's Product which was adulterated, contaminated and otherwise in contravention of the applicable legislation and regulations. There was ample credible evidence upon which the CFIA could make its Decision in the interests of the public regarding the end use of the Product. The Product did not meet the quality standards of the US FDA and it did not meet the quality and safety standards of the CFIA. Therefore, the CFIA's Decision was reasonable.

ANALYSIS

The Decision

[65] The Decision is embodied in four letters from CFIA to legal counsel for the Applicant.

[66] The first letter of July 3, 2008 refuses to allow the Applicant to bring the Product back into Canada "as human food." The determination that the Product contravenes section 17(a) of the Product Act and section 4.1(1) and 16(f) of the Honey Regulations is based upon two notices issued by the US FDA.

[67] The first US FDA notice is dated November 1, 2007 and says that the Product was detained because it "appears to contain a poisonous or deleterious substance which may render it injurious to health. Paint chips are leaching lead" and it "appears to consist in whole or in part of a filthy, putrid, or decomposed substance or is otherwise unfit for food in that it appears to contain foreign objects. Contains excessive wood and paint chips."

[68] The US FDA denied the Applicant's proposals for corrective action and, in a notice dated May 15, 2008, said that "Leaded paint chips have disintegrated into small pieces increasing surface area available for extraction. Honey [is] an acidic food, providing a media that will solubitize (*sic*) lead in the paint. Some lead has become honey this (*sic*) use of lead paint in wood associated with hives. Proposal would remove extraneous matter, won't remove lead that has migrated into honey and is present in honey as a dissolved salt … ."

[69] So the US FDA decided that the Product contained "a poisonous and deleterious substance which may render it injurious to health" and that "some lead had become a component of the honey thru use of lead paint on wood associated with hives."

[70] The CFIA could not accept the Midwest Laboratories Inc. sampling for reasons given and decided "there is no cause to disagree with the US FDA findings in the Notices of FDA Action."

[71] In the CFIA's second letter of July 22, 2008, the CFIA refused the Applicant's request "to have the product reconditioned and returned to Canada as human food" for the reasons already given in the letter of July 3, 2008, but also pointed out that the Product could be "imported into Canada as bee feed" subject to compliance with the relevant requirements (i.e. the Product would have to be irradiated in Canada or the U.S. before it could be used as bee feed), or the "product may also be returned to Canada for destruction and moved under seal to an approved landfill site."

[72] As regards the importation of the Product for human food, the letter of July 22, 2008 simply confirms the decision already made and communicated to the Applicant in the letter of July 3, 2008.

[73] The letter of September 18, 2008 merely refused the Applicant's request to return the Product to Canada for use as bee feed without irradiation because this would be "a violation under section 57 of the *Health of Animals Regulations*."

[74] The letter of September 18, 2008 then summarizes the options available to the Applicant:

> The detained honey can only be returned to Canada if:
>
> i. the honey is irradiated outside of Canada and returned for bee feed;
>
> ii. the honey enters Canada under detention, goes to a Canadian irradiation facility and is then used as bee feed; or
>
> iii. the honey enters Canada under detention and must go to an international Waste Approval Disposal Site for deep burial.

[75] Nothing is said in the letter of September 18, 2008 about importing the Product into Canada for use as human food because that decision had already been made in the letter of July 3, 2008 and confirmed in the letter of July 22, 2008.

[76] The final letter is dated September 24, 2008 and merely denies the Applicant's request that CFIA reconsider its decision not to allow the Product back into Canada for use as bee feed unless it is first irradiated. The CFIA repeats the position and the options already set out in its letter of September 18, 2008.

[77] So it is clear that the CFIA made a decision not to allow the Product back into Canada for use as human food on July 3, 2008 and reconfirmed this decision on July 22, 2008. This decision was based upon the US FDA's findings as set out in its Notices of November 1, 2007 and May 15, 2008 that the Product was unfit for food and that the Applicant's proposals to remedy the problem would not remove the lead "that has migrated into honey and is present in honey as a dissolved salt."

[78] In any event, nothing was done with the Product so that the US FDA's initial findings that "it appears to consist in whole or in part of a filthy, putrid, or decomposed substance or is otherwise unfit for food in that it appears to contain foreign objects. Contains excessive wood and paint chips" and its conclusions about the leaching problem still stand. The Applicant chose not to challenge these findings of the US FDA. Instead, it decided to try and bring the Product into Canada and entered into communications with the CFIA that led to the results already outlined above.

[79] The Applicant took the position with CFIA that the Product should be brought into Canada for further testing to determine whether all, or part, of the Product was suitable for further processing and sale as food for human consumption. This is the basis of the judicial review application before me. The Applicant says that the CFIA's refusal to allow the Product into Canada for further testing was unreasonable and procedurally unfair.

Basis For Decision

[80] The stated basis for the Respondent's Decision was that the Product cannot return to Canada as human food "for it is believed to be in contravention of section 17(a) of the Products Act and sections 4.1(1) and 16(f) of the Honey Regulations." Those provisions read as follows:

17. No person shall, except in accordance with this Act or the regulations, (*a*) market an agricultural product in import, export or interprovincial trade	17. Sont interdites, relativement à un produit agricole, toute commercialisation — soit interprovinciale, soit liée à l'importation ou l'exportation — effectuée en contravention avec la présente loi ou ses

règlements de même que la possession à ces fins ou la possession résultant d'une telle commercialisation.

…

…

4.1 (1) Subject to subsections (2) and (3), no person shall market honey in import, export or interprovincial trade as food unless the honey

4.1 (1) Sous réserve des paragraphes (2) et (3), est interdite la commercialisation — soit interprovinciale, soit liée à l'importation ou l'exportation — du miel en tant qu'aliment, sauf si le miel :

(*a*) is not adulterated;
(*b*) is not contaminated;
(*c*) is edible;
(*d*) is prepared in a sanitary manner; and
(*e*) meets all other requirements of the *Food and Drugs Act* and the *Food and Drug Regulations*.

a) n'est pas falsifié;
b) n'est pas contaminé;
c) est comestible;
d) est conditionné hygiéniquement;
e) satisfait à toutes les autres exigences de la *Loi sur les aliments et drogues* et du *Règlement sur les aliments et drogues*.

…

…

16. A registered establishment shall be operated in such a manner that

16. Un établissement agréé doit être exploité de façon que

…

…

(*f*) honey does not come into contact with any substance that may have a deleterious effect on the quality of the honey.

f) le miel ne vienne pas en contact avec une substance qui puisse avoir un effet délétère sur la qualité du miel.

[81] The Applicant says that at no time relevant to these proceedings did it intend to market the Product. The Applicant says that its intention was simply to have the Product returned to Canada to be inspected under the supervision and direction of the CFIA.

[82] I take this to mean that the Applicant wanted to import the Product into Canada for the purpose of inspection and possible release should further testing reveal that it could be used for human food. At paragraph 7 of its Memorandum of Fact and Law, the Applicant provides the following background information:

> 7. After several months of fruitless negotiation with the US FDA, the Applicant directed its solicitors to contact the Respondent to request that the product be readmitted to Canada for further and proper testing to determine whether all of part of the product was, in fact, suitable for further processing and sale as food for human consumption.

[83] So, I take it from this that the Applicant did wish to bring the Product into Canada to be sold as food for human consumption provided further testing revealed that it was "suitable for further processing and sale as food for human consumption."

[84] The Applicant no longer takes issue with the jurisdiction of the CFIA to make the Decision in question. What the Applicant now says is that the Decision not to allow the Product into Canada on terms and conditions was unreasonable. In other words, the Applicant says that CFIA's refusal to permit the Product into Canada was unreasonable: CFIA should have permitted the Product into Canada and placed it in detentions until it met the requirements of the Regulations. This would have involved further testing at the Applicant's expense to determine the nature and extent of the

contamination and/or adulteration and then a determination as to what should happen to the Product based on the results.

[85] Another way of putting this is that the Applicant says it was unreasonable for the CFIA to simply rely upon the US FDA findings as set out in the Notices of the US FDA Action to deny entry of the Product into Canada.

[86] One of the problems with this assertion, it seems to me, is that the Applicant did not challenge the US FDA findings and decisions made in relation to the Product in the U.S.. There is really nothing before me to suggest that the US FDA findings were unreasonable or inaccurate. The Applicant has produced its own test results from the analysis done by Midwest Laboratories Inc. on samples submitted by Sioux Honey Assoc.. But this report was rejected by CFIA for reasons given in its letter of July 3, 2008: “This report is not accompanied by any information establishing how the sampling was done. As a result, the CFIA is not able to determine that the product subjected to this analysis is in fact the product which was detained.” I can find nothing in the record to establish that CFIA acted unreasonably in its rejection of the Applicant’s test results or that the CFIA did not give the Applicant an opportunity to demonstrate that the US FDA conclusions were not an accurate reflection of the state of the Product.

[87] There is nothing before me to suggest that this aspect of the Decision was unreasonable or incorrect. The Applicant’s position is that, notwithstanding the findings and conclusion of the US FDA concerning the Product, the CFIA should have allowed it into Canada for testing and, depending upon the results, possible further processing and sale for human consumption.

[88] It has to be born in mind that the US FDA had found that the Product "appears to consist in whole or in part of a filthy, putrid, or decomposed substance or is otherwise unfit for food in that it appears to contain foreign objects" and that the lead problem could not be solved because "some lead has become a component of the honey … and is present in honey as a dissolved salt … ."

[89] At the time of the Applicant's request that the Product be allowed into Canada for testing and possible processing and sale for human consumption, the full extent of the problem was not known. All of the Product may have been contaminated or only a percentage of it may have been.

[90] The Applicant appears to feel that, because the Product was exported from Canada, it should have been allowed back into Canada for further testing. However, for reasons given by the Respondent, it is difficult to see how or why Product that had been found to be contaminated in the U.S. should have been afforded any regulatory concessions by the CFIA.

Basis of Applicant's Argument

[91] The Applicant's argument for unreasonableness is based upon its interpretation of section 50 of the Honey Regulations (which are passed under the authority of the Products Act and the system set up under the Products Act and the Regulations to ensure conformity with the regulatory scheme.

[92] Section 50 of the Regulations reads as follows:

50. Honey that does not meet the requirements of these Regulations	**50.** Le miel qui ne répond pas aux exigences du présent règlement
(*a*) shall be refused entry into Canada; or	*a*) ne doit pas être admis au Canada; ou
(*b*) where entry is permitted, that honey shall be placed under detention until it meets the requirements of these Regulations.	*b*) s'il est admis, doit être placé sous retenue jusqu'à ce qu'il réponde aux exigences du présent règlement.

[93] Notwithstanding what appears to be a mandatory requirement in subsection 50(a) ("shall be refused entry into Canada") the alternative provided for in subsection 50(b) appears to suggest that honey which does not meet the requirements of the Regulation can be allowed entry into Canada and placed in detention until it does meet the requirements.

[94] The prohibition contained in section 4.1(1) of the Regulations and relied upon by CFIA to refuse the Applicant's request says that "no person shall market honey in import, export or interprovincial trade as food unless the honey … ." The Applicant says it was not asking that the Product be imported to market as food, but was requesting that it be allowed into Canada for testing.

[95] I cannot accept this assertion. I think it would be more accurate to say that the Applicant did wish to import the Product to market as food but, before it was submitted for further processing or sale as food for human consumption, the Applicant requested that further testing be done to ensure compliance with the Regulations.

[96] In my view, this is just another way of saying that the Applicant did wish to import the Product to market as food provided the Product could be marketed as food under Canadian law. So, in my view, section 4.1(1) of the Regulations was applicable to the facts of this situation. The Applicant did not wish to import the Product just so that it could be tested. Testing is not an end in itself. The Applicant wished to import the Product to market as food provided it could somehow convince CFIA to allow this following further testing in Canada.

[97] In my view, then, the mandatory prohibition contained in 4.1(1) of the Regulations does not say that honey which might not be contaminated, adulterated etc. can be imported to market as food subject to testing once the honey arrives in Canada. The prohibition is against importation *per se* and the only issue is whether the honey falls within the stipulated grounds of prohibition found in sub-paragraphs (a) to (e) of section 4.1(1).

[98] Whatever discretions are allowed by subsection 50(b) of the Regulations, the overall scheme of the Regulations suggests to me that contaminated or adulterated honey should not be allowed into Canada for marketing. Nor do I see a statutory or regulatory obligation in CFIA to allow honey into Canada so that it can be tested for contaminants and adulteration.

[99] If I am wrong in this interpretation and section 50 of the Regulations does permit a discretion, then it seems to me that the prohibition contained in section 4.1(1) must still be taken into account in deciding whether the discretion was exercised reasonably.

[100] As the affidavit of Ms. Connie Zagrosh, Western Area Specialist, Honey Products for the Canadian Food Inspection Agency makes clear, the Applicant did not provide CFIA with any proposal as to how the probable chemical effects of contamination from lead leaching into honey could be reversed; nor did the Applicant provide any evidence to question the test results and the findings of the US FDA. In my view, then, the issue before the Court is whether the CFIA exercised its jurisdictional powers reasonably under section 17(a) of the Products Act and section 4.1(1) and 16(f) of the Honey Regulations when it relied upon the US FDA findings and Notices to disallow the Applicant's request to import the Product into Canada to market as food, subject to further testing.

[101] The Applicant has put forward various arguments as to why it might have been reasonable for CFIA to allow the Product to be brought into Canada for testing. However, that is not the issue before the Court. As *Dunsmuir* makes clear at paragraph 47, the question for the Court is whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." Also, *Dunsmuir* tells us that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." In the present case, although the Applicant disagrees with the Decision, and so argues that it lacks justification and intelligibility, the record reveals transparently and intelligibly how and why the Decision was made to deny the Applicant's request to bring the Product into Canada. Also, great care was taken to listen to and assess the Applicant's proposals and arguments, and intelligible reasons were provided for everything the CFIA did in relation to this Product. The Applicant is merely saying that a way should have been found to save the Product and bring it back into Canada.

In particular, the Applicant is saying that it would have been reasonable to allow the Product back into Canada for testing because this would have involved no cost and no risk to the Canadian public. If the Product was tested and did not meet the requirements in the Regulation, then CFIA has sufficient powers to ensure that it be detained and destroyed.

[102] Even if I were to accept that such a course of conduct by CFIA would have been reasonable and in accordance with Products Act and the Honey Regulations, this does not mean that CFIA's denial of the request was unreasonable and does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."

[103] By exporting its Product to the U.S. the Applicant must be taken to have accepted the standards and compliance regime in place in that country. The US FDA assessed the Applicant's Product and found it to be in breach of U.S. regulations and standards. In particular, the US FDA found that the Product appeared to be unfit for food and to be contaminated with lead. The Applicant did not challenge these findings. The Applicant is now saying that it was unreasonable for the CFIA to accept the US FDA findings when making its Decision on importation of the same Product. And these were findings that the Applicant did not challenge. Not only is the Applicant saying that it was unreasonable for the CFIA to rely upon US FDA findings that the Applicant did not challenge, it is also saying that the CFIA was unreasonable not to allow import of the Product into Canada even though the Applicant produced no acceptable evidence to question the US FDA findings or to prove that any percentage of the Product met the requirements for human consumption in Canada. Nor did the Applicant produce any evidence that, if the Product was

allowed into Canada, there was any way of dealing with the lead contamination identified by the US FDA.

[104] The Applicant is understandably aggrieved at the loss of its Product, and it understandably attempted to convince CFIA to allow the Product into Canada, but I do not think it can be said that there was no reasonable basis for CFIA's Decision or that it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[105] In my view, it was reasonable for the CFIA to rely upon the US FDA's evidence in the absence of acceptable evidence to the contrary to make the decision it did. As the Respondent points out, countries that are signatories to the same international standards for food safety have reciprocal regulatory obligations and there is no prescribed limitation on the evidence that CFIA inspectors can consider when determining the quality and safety of food.

[106] The importation of honey is permitted by the Honey Regulations if it meets the standards and requirements for either human consumption or use as animal feed. It is clear that section 50 of the Honey Regulations directs that honey that does not meet the requirements of the Regulations can be refused entry into Canada, even if subsection 50(b) appears to permit entry under certain conditions. I can find nothing in the Products Act or the Honey Regulations to suggest that honey should be allowed into Canada for testing where it has been found to be in breach of US FDA standards and requirements. As the Respondent points out, there is no legislative authority that supports, even by implication, the Applicant's proposed scheme for re-testing product that has already been determined by a competent regulator to be unfit for consumption. It appears significant

to me that the prohibition in section 4.1(1) of Honey Regulations that forbids the marketing of honey "in import, export or interprovincial trade as food" is not alleviated in 4.1(2) in so far as "import" is concerned:

(2) Honey that has been adulterated or contaminated may be marketed in export or interprovincial trade as food where the honey, before being marketed, is prepared in such a manner that it meets the requirements of paragraphs (1)(*a*) to (*e*).	(2) Le miel falsifié ou contaminé peut faire l'objet d'une commercialisation — soit interprovinciale, soit liée à l'exportation — en tant qu'aliment si, avant sa commercialisation, il est conditionné de manière à satisfaire aux exigences des alinéas (1)*a*) à *e*).

In other words, there is no curative exception to 4.1(1) where honey is marketed "in import," which suggests to me that the legislation and the Regulations anticipate that contaminated honey that does not meet the requirements of the Regulations will be refused entry into Canada.

[107] I agree with the Respondent that the credible and compelling evidence of the US FDA regarding the adulteration and contamination of the Product was sufficient to ground a *bona fide* belief in a serious possibility that the Product was in contravention of Canada's quality and safety standards and to deny it entry to Canada, except on the grounds stipulated by CFIA in its letters to the Applicant. In addition to the filth and contamination reported by the US FDA, the CFIA also considered international standards and domestic literature about exposure to lead. The Applicant's own sampling was not sufficient to overcome the CFIA's concerns because there was no evidence as to which drums had been tested, the manner in which they were sampled and tested, and whether the samples tested were an homogenous representation of the Product.

[108] CFIA's decision was made in part with references to subsections 16(f) and 4.1(1) of the Honey Regulations. Subsection 16(f) states as follows:

16. A registered establishment shall be operated in such a manner that	**16.** Un établissement agréé doit être exploité de façon que
…	…
(*f*) honey does not come into contact with any substance that may have a deleterious effect on the quality of the honey.	*f*) le miel ne vienne pas en contact avec une substance qui puisse avoir un effet délétère sur la qualité du miel.

[109] For the purposes of subsection 4.1(1)(*d*) of the Honey Regulations, "unsanitary conditions" is defined under section 2 of the *Food and Drugs Act*, R.S.C. 1985, c. F-27:

"unsanitary conditions" means such conditions or circumstances as might contaminate with dirt or filth, or render injurious to health, a food, drug or cosmetic.	« conditions non hygiéniques » Conditions ou circonstances de nature à contaminer des aliments, drogues ou cosmétiques par le contact de choses malpropres, ou à les rendre nuisibles à la santé.

[110] For the purposes of subsection 4.1(1)(*b*) of the Honey Regulations, "contaminated" is defined as follows:

"contaminated", in respect of honey, means containing a chemical, drug, food additive, heavy metal, industrial pollutant, ingredient, medicament, microbe, pesticide, poison, toxin or any other substance not permitted by, or in an amount in excess of limits prescribed under, the *Canadian Environmental Protection Act*, the *Food and Drugs Act* and the *Pest Control*	« contaminé » Qualifie le miel qui contient un produit chimique, une drogue, un additif alimentaire, un métal lourd, un polluant industriel, un ingrédient, un médicament, un microbe, un pesticide, un poison, une toxine ou toute autre substance qui est interdite sous le régime de la *Loi canadienne sur la protection de l'environnement*, de la *Loi sur les aliments et drogues* et de la

Products Act;	*Loi sur les produits antiparasitaires*, ou dont la quantité excède les limites de tolérance prescrites sous le régime de ces lois.

[111] "Adulterated" is also defined in the Honey Regulations as:

"adulterated", in respect of honey, means adulterated within the meaning of sections B.01.046 and B.01.047 and Division 15 of Part B of the *Food and Drug Regulations*;	« falsifié » S'entend au sens des articles B.01.046 et B.01.047 et du titre 15 de la partie B du *Règlement sur les aliments et drogues*.

[112] The term "adulterated" for the purposes of the *Food and Drugs Act* has been the subject of judicial commentary by Justice Heald in *Berryland Canning Co. v.Canada*, [1974] 1 F.C. 91 (F.C.) at page 101:

> With deference, I am not able to agree with this submission. Cockburn C.J. decided in the case of *Francis v. Maas* (1877-78) 3 Q.B.D. 341 that "adulteration" means the infusion of some foreign substance. It seems to me that a 'foreign substance' would be wide enough to include any substance that one would not normally expect to be present in a food.

[113] The honey drums cannot be a source of contamination as noted in Division 23 of the *Food and Drug Regulations*, C.R.C., c. 870 at section B.23.001 for the purposes of subsection 4.1(1)(*e*) of the Honey Regulations:

No person shall sell any food in a package that may yield to its contents any substance that may be injurious to the health of a consumer of the food.	Est interdite la vente d'un aliment dont l'emballage peut transmettre à son contenu une substance pouvant être nuisible à la santé d'un consommateur de l'aliment.

[114] The Applicant has attempted to limit the scope of CFIA's inquiry and discretion by restricting the definition of "marketing" to something distinct from verifying whether a food is suitable for sale as food. However, the definition of "marketing" includes "any other act necessary to make agricultural products available for consumption or use."

[115] After considering all of the evidence, the CFIA decided that the honey could only be used as bee feed (section 4.2 of the Honey Regulations) or it had to be destroyed (section 4.3 of the Honey Regulations).

[116] Justice MacKay, in *Friends of Point Pleasant Park*, concluded at paragraph 54 that there was evidence and not "a mere flimsy suspicion," to support the belief of the CFIA inspector that there was a serious possibility of infection. The CFIA inspector's decision in that case was therefore reasonable.

[117] Similarly, in *Miel Labonté*, the evidence before the court included several public health risk notices which had been broadcast on the internet regarding the risk to food safety with the presence of nitrofuran. Justice Noël concluded that the honey product in question posed a public health risk contrary to section 19.1 of the *Canadian Food Inspection Agency Act*.

[118] Justice Noël also noted at paragraph 31 of *Miel Labonté* that the underlying point in the jurisprudence is that discretionary decisions made by the CFIA in a matter of the public interest calls for a high degree of judicial restraint.

[119] Applying these principles to the case at bar, it seems to me that the CFIA was not obligated to absolutely determine whether or not the lead had dissolved as a salt into the Product for the purposes of regulatory scrutiny. CFIA has considerable discretion to determine whether food products meet the quality and safety standards imposed by the various acts and regulations. In the absence of acceptable evidence to the contrary, I cannot say that the CFIA acted unreasonably when it relied upon the finding of the US FDA to deny entry of the Product into Canada, except on the conditions stipulated in its correspondence with the Applicant.

Fairness

[120] I have reviewed the record and the correspondence between the CFIA and the Applicant as well as other parties involved. It is my view that the Applicant was provided with a full opportunity to submit evidence of compliance and to make its case before the CFIA.

[121] There is no evidence to suggest that the CFIA did not give full consideration to the Applicant’s request and consider the points and procedures that were raised for dealing with the problem. In the end, the CFIA simply could not accede to the Applicant’s requests and it gave full reasons for the positions taken. The Applicant obviously disagrees with the Decision and feels that

more could have been done to try and save its shipment of honey and allow it into Canada. However, disagreement with the Decision and the process does not render them unreasonable or unfair.

[122] There was ample credible evidence for the CFIA to make its Decision in the interests of the public. The Product did not meet the quality standards of the US FDA and it was not unreasonable for the CFIA to take the position that it did not meet the quality and safety standards of Canadian law.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application be dismissed.

2. The Respondent shall have its costs of the application.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	T-1520-08
STYLE OF CAUSE:	***HILBERT HONEY CO. LTD.***
	v.
	CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	Saskatoon, SK
DATE OF HEARING:	July 16, 2009
REASONS FOR JUDGMENT And JUDGMENT:	RUSSELL J.
DATED:	August 11, 2009

WRITTEN REPRESENTATIONS BY:

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