

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140224**

**Docket: A-215-13**

**Citation: 2014 FCA 52**

**CORAM: SHARLOW J.A.  
WEBB J.A.  
NEAR J.A.**

**BETWEEN:**

**CANADA BORDER SERVICES AGENCY**

**Applicant**

**and**

**XIAOJUN TAO**

**Respondent**

Heard at Toronto, Ontario, on January 21, 2014.

Judgment delivered at Ottawa, Ontario, on February 24, 2014.

**REASONS FOR JUDGMENT BY:**

**NEAR J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
WEBB J.A.**

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**REASONS FOR JUDGMENT**

**NEAR J.A.**

**I. Introduction**

[1] The Canada Border Services Agency (CBSA) seeks judicial review in respect of the May 21, 2013 decision of the Canada Agricultural Review Tribunal (2013 CART 16) in which member Dr. Bruce La Rochelle determined that Xiaojun Tao did not commit a violation of section 40 of the *Health of Animals Regulations*, C.R.C. c. 296.

## II. Facts

[2] On July 10, 2012, Mr. Tao arrived at Pearson International Airport in Toronto on a flight from China. Before entering Canada, he completed a CBSA Declaration Card. Among other questions, the Declaration Card requires entrants to Canada to answer “yes” or “no” to:

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.

[3] Mr. Tao ticked the “no” box for this question, indicating that he was not importing any of those products into Canada. Mr. Tao declared that he had purchased or received goods abroad valued at \$1000, which is over the personal exemption limit of \$800. Mr. Tao was then referred to secondary inspection and his luggage was examined.

[4] Based on the evidence provided by the CBSA before the Tribunal, the secondary inspector determined Mr. Tao’s ownership of the luggage and examined its contents. When the secondary inspector found several packages containing what he believed was meat and which were decorated with cows, he asked Mr. Tao what the packages contained. According to the inspector, Mr. Tao replied “beef.” The inspector then asked Mr. Tao “is beef meat?” to which Mr. Tao was said to have answered “yes.” Asked by the inspector to spell meat, Mr. Tao spelled “M-E-A-T.” The inspector then asked Mr. Tao why he did not declare that he was importing the product, to which Mr. Tao is alleged to have responded to the effect that “in China this is candy; it is meat but it is candy.” The CBSA also introduced photographs of the product in its evidence to the tribunal.

[5] Mr. Tao’s version of events which he put in evidence before the Tribunal differs. Mr. Tao disagreed that the product was beef since it was neither examined nor eaten, and it could have

contained pork instead of beef. When the inspector asked him if the product was beef, Mr. Tao said that he responded with the question “beef?” He also disputed the photographic evidence from the CBSA saying that it did not show the products found in his luggage.

[6] The CBSA inspector issued Mr. Tao with a Notice of Violation of section 40 of the *Health of Animals Regulations*, under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 subsection 7(2). Mr. Tao received an \$800 penalty with the option of reducing it to \$400 by paying the penalty within 15 days.

### **III. Decision of the Tribunal**

[7] Mr. Tao requested a review of the violation, which was received by the Tribunal on August 7, 2012 and was treated by the Tribunal as a request for a review by written submissions only. The evidence before the Tribunal consisted of written submissions from the CBSA and from Mr. Tao, received between July 28, 2012 and October 30, 2012.

[8] The Tribunal released its decision on May 21, 2013, wherein it determined that Mr. Tao did not commit the violation and was not liable for payment of the penalty amount. Ultimately, the Tribunal was not convinced that the product imported by Mr. Tao was meat, specifically that it was beef.

[9] The Tribunal determined that Mr. Tao was not required to say anything when he was questioned by the inspector and that he had satisfied his declaratory obligations by filling out the

Declaration Card as required by subsection 5(3) of the *Reporting of Imported Goods Regulations*,

S.O.R.86-873:

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. In its Report, at Tab 12, the Agency submitted copies of Tribunal decisions in support of various arguments advanced. Some aspects of those decisions will now be discussed.

(Paragraph 32)

[10] As the CBSA had not cautioned Mr. Tao that any statement he made could be contrary to his interest, the Tribunal was reluctant to grant weight to his alleged admission that it was beef. The

Tribunal made the following comments:

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.

(Paragraph 31)

In the Tribunal's view, the Agency will rarely be able to prove its case solely based on the admissions of an alleged violator, particularly in circumstances where the alleged violator has not been cautioned beforehand as to how any such admissions might be used. In the

absence of such caution, the Tribunal will generally be reluctant to accord significant weight to such admissions, assuming such evidence is accepted in any event.

(Paragraph 33)

[11] The Tribunal held that the decision of this Court in *Doyon v. Attorney General of Canada*, 2009 FCA 152 required it to conduct a “rigorous” evidentiary review and on the basis of the evidence other than Mr. Tao’s alleged admission, the Tribunal was not convinced that the Agency had met its burden of proving, on the balance of probabilities, that the product contained meat:

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. Having so found, the Tribunal does not consider it necessary to address the other arguments advanced by the Agency or Mr. Tao.

(Paragraph 42)

[12] On June 19, 2013, the CBSA filed a notice of application for judicial review in this Court.

#### **IV. Standard of Review**

[13] In *Canada Border Services Agency v. Castillo*, 2013 FCA 271 at paragraph 11, this Court has previously determined that a correctness standard should be applied to decisions involving pure questions of law and statutory interpretation made by the Tribunal.

#### **V. Legislative Framework**

##### The *Health of Animals Act* and its Regulations

[14] The *Health of Animals Act*, S.C. 1990, c. 21, operates to protect Canada from the introduction of foreign animal diseases by regulating whether and how animal products and by-products may be brought into Canada. Section 40 of the *Health of Animals Regulations*, the

provision which Mr. Tao allegedly violated, prohibits the importation into Canada of animal by-products, except in accordance with Part IV of the *Health of Animals Regulations*:

<p>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.</p>	<p>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.</p>
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[15] Animal by-product" is a defined term in the *Health of Animals Regulations*:

<p>“animal by-product” means an animal by-product that originated from a bird or from any mammal except a member of the orders <i>Rodentia</i>, <i>Cetacea</i>, <i>Pinnipedia</i> and <i>Sirenia</i>;</p>	<p>« sous-produit animal » Sous-produit animal provenant d'un oiseau ou d'un mammifère, à l'exception des rongeurs, des cétacés, des pinnipèdes et des siréniens.</p>
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[16] Part IV of the *Health of Animals Regulations* imposes restrictions on the importation of animal by-products including those from China.

[17] Where a person imports, inter alia, animal by-products into Canada, the *Health of Animals Act* requires him or her to present the product for inspection either before or at the time of importation:

<p>16. (1) Where a person imports into Canada any animal, animal product, animal byproduct, animal food or veterinary biologic, or any other thing used in respect of animals or contaminated by a disease or toxic substance, the person shall, either before or at the time of importation, present the animal, animal product, animal by-product, animal food, veterinary biologic or other thing to an inspector, officer or customs officer who may inspect it or detain it until it</p>	<p>16. (1) L'importateur d'animaux, de produits ou sous-produits de ceux-ci, d'aliments pour animaux ou de produits vétérinaires biologiques, ainsi que de toute autre chose soit se rapportant aux animaux, soit contaminée par une maladie ou une substance toxique, les présente, au plus tard à l'importation, à un inspecteur, à un agent d'exécution ou à un agent des douanes qui peut les examiner lui-même ou les retenir jusqu'à ce que l'inspecteur ou l'agent d'exécution s'en charge.</p>
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has been inspected or otherwise dealt with by an inspector or officer.

### Customs Act

[18] The *Customs Act*, R.S.C. 1985, c. 1 (2nd supp.) also places certain declaration obligations on persons entering Canada. Subsection 12(1) mandates that all goods imported into Canada must be reported at a customs office and subsection 12(3) provides that the person in actual possession of the goods must make the report:

12. (1) Subject to this section, all goods that are imported shall, except in such circumstances and subject to such conditions as may be prescribed, be reported at the nearest customs office designated for that purpose that is open for business.

12. (3) Goods shall be reported under subsection (1)

(a) in the case of goods in the actual possession of a person arriving in Canada, or that form part of the person's baggage where the person and the person's baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;

...

12. (1) Sous réserve des autres dispositions du présent article, ainsi que des circonstances et des conditions prévues par règlement, toutes les marchandises importées doivent être déclarées au bureau de douane le plus proche, doté des attributions prévues à cet effet, qui soit ouvert.

(3) Le déclarant visé au paragraphe (1) est, selon le cas :

a) la personne ayant en sa possession effective ou parmi ses bagages des marchandises se trouvant à bord du moyen de transport par lequel elle est arrivée au Canada ou, dans les circonstances réglementaires, le responsable du moyen de transport;

[...]

[19] Persons reporting goods under section 12 are under a statutory obligation set out in section 13 to answer truthfully any questions about the imported products

13. Every person who reports goods under section 12 inside or outside Canada or is stopped by an officer in

13. La personne qui déclare, dans le cadre de l'article 12, des marchandises



accordance with section 99.1 shall

(a) answer truthfully any question asked by an officer with respect to the goods; and

(b) if an officer so requests, present the goods to the officer, remove any covering from the goods, unload any conveyance or open any part of the conveyance, or open or unpack any

package or container that the officer wishes to examine

à l'intérieur ou à l'extérieur du Canada, ou qu'un agent intercepte en vertu de l'article 99.1 doit :

a) répondre véridiquement aux questions que lui pose l'agent sur les marchandises;

b) à la demande de l'agent, lui présenter les marchandises et les déballer, ainsi que décharger les moyens de transport et en ouvrir les parties, ouvrir ou

défaire les colis et autres contenants que l'agent veut examiner.

## VI. Issue

[20] Did the Tribunal err in excluding evidence from the CBSA that Mr. Tao had admitted that the product he was importing contained beef?

## VII. Analysis

[21] The CBSA submits that, contrary to the Tribunal's statement that Mr. Tao was under no obligation to say anything when he was questioned by the inspector, people who are importing products into Canada are in fact subject to continuing statutory obligations to declare and present animal by-products they are importing and to truthfully answer any questions asked by customs officials. By requiring CBSA inspectors to caution importers, the CBSA argues that the Tribunal created "novel regulatory and evidentiary rules that are not grounded in law." Furthermore, the CBSA submits that the substantive decision made by the Tribunal is unreasonable as a result of the failure of the Tribunal to examine all of the evidence before it. The outcome reached by the Tribunal falls outside of the range of reasonable outcomes and should be overturned.

[22] While Mr. Tao did not file a memorandum of fact and law, he did submit a Notice of Appearance where he briefly sets out his opposition to the application. He argues that the CBSA lacks evidence to support the violation. In his oral submissions made before this Court Mr. Tao asked that the Tribunal's decision be upheld and questioned the authenticity of the photographic evidence put forward by CBSA.

[23] The Tribunal excluded the evidence tendered by the CBSA to the effect that Mr. Tao had admitted to the CBSA officer that the product found in his luggage contained meat. It did so on the basis that Mr. Tao made the alleged statement "in circumstances where he is not obliged to say anything, and has not been so cautioned" (at paragraph 31). This is an error in law which warrants this Court's intervention.

[24] The first part of the Tribunal's error stems from the mistaken belief that Mr. Tao had fulfilled his statutory requirement to declare his luggage contents by filling out his Declaration Card. Mr. Tao, in fact, was under a continuing statutory obligation to declare the products he was importing, and this obligation did not end with his completion of the Declaration Card.

[25] Section 16 of the *Health of Animals Act* requires a person importing animal by-products to present those by-products either before or at the time of importation. If animal by-products were in Mr. Tao's luggage, he was under a duty to declare them and to present them for inspection. Furthermore, sections 12 and 13 of the *Customs Act* obliged him to report all the goods that he was bringing into Canada and to answer truthfully any question asked by a CBSA officer about the goods. Mr. Tao did not have an option to remain silent about anything found in his luggage.

[26] The second part of the Tribunal's error stems from the Tribunal's mistaken belief that Mr. Tao deserved protection against self-incrimination in his conversation with the CBSA officer in the form of a caution from the officer. There is no basis in law for the Tribunal to exclude evidence of Mr. Tao's statements to the CBSA officer due to a lack of a caution from the officer.

[27] I conclude that the Tribunal erred in excluding the evidence tendered by the CBSA to the effect that Mr. Tao acknowledged that the items in his luggage were beef and that beef was meat. That evidence should have been admitted.

[28] Individuals receiving a Notice of Violation have very few avenues with which to exculpate themselves. The circumstances of his importation of the product in question do not protect Mr. Tao from answering questions about the product found in his luggage even where those statements may be contrary to his interests. The Tribunal erred in law in affording Mr. Tao protections to which he was not entitled. There was no reason defensible in law why the evidence of the inspector as to Mr. Tao's alleged admissions was excluded.

### **VIII. Conclusion**

[29] I would allow the application for judicial review, quash the decision of the Tribunal, and remit the matter back to it for a fresh determination in accordance with these reasons.

[30] As the Crown has not requested costs, I would decline to award any.

"David G. Near"

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J.A.

"I agree  
K. Sharlow J.A."

"I agree  
Wyman W. Webb J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-215-13

**APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE TRIBUNAL MEMBER OF THE CANADA AGRICULTURAL REVIEW TRIBUNAL DATED MAY 21, 2013**

**STYLE OF CAUSE:** CANADA BORDER SERVICES  
AGENCY v. XIAOJUN TAO

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 21, 2014

**REASONS FOR JUDGMENT BY:** NEAR J.A.

**CONCURRED IN BY:** SHARLOW J.A.  
WEBB J.A.

**DATED:** FEBRUARY 24, 2014

**APPEARANCES:**

Andrew Law FOR THE APPLICANT

Xiaojun Tao ON HIS OWN BEHALF

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