

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Ste. Rose Auction Mart Ltd. v. Canada (CFIA), 2011 CART 18

Date: 20111027
Docket: CART/CRAC-1544

Between:

Ste. Rose Auction Mart Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of a violation of subsection 183(2) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable for payment of the penalty in the amount of \$500.00 to the respondent within 30 days after the day on which notice of this decision is served.

Hearing held in Dauphin, MB,
on August 30, 2011.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Ste. Rose Auction Mart Ltd. (Ste. Rose), on October 15, 2009, at Ste. Rose du Lac, Manitoba, failed to tag one or more untagged cattle at its facility, and did not, therefore, satisfy the requirements of subsection 183(2) of the *Health of Animals Regulations*.

[3] Subsection 183(2) of the *Health of Animals Regulations* reads as follows:

183. (2) *The person who manages a tagging site shall tag all bison or bovines brought to the site that do not already bear an approved tag.*

[4] The Tribunal must decide whether the Agency has established all the elements required to support the impugned Notice of Violation in question, particularly:

- if Ste. Rose, as an auction market, was a tagging site and, therefore, fell under the ambit of the responsibilities set out in subsection 183(2) of the *Health of Animals Regulations*; and
- if Ste. Rose, an auction market, failed to tag one or more untagged cattle that were at its facility on October 15, 2009.

Procedural history

[5] Notice of Violation #0910MBCA0013, dated March 25, 2010, alleges that, on the 15th day of October 2009, at Ste. Rose du Lac, in the province of Manitoba, Ste. Rose “committed a violation, namely: failed to tag all bovines not already bearing an approved tag contrary to section 183(2) of the *Health of Animals Regulations* which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.”

[6] The Agency was deemed to have served the above Notice of Violation on Ste. Rose on April 10, 2010. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, this is a minor violation for which the penalty assessed was \$500.

[7] In a letter dated April 7, 2010, which was received by fax by the Tribunal on April 9, 2010, Ste. Rose, through its president Myles Masson (Masson), requested a review by the Tribunal of the facts of the violation, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. By way of a telephone conversation with Tribunal staff, Ste. Rose requested that the review be oral, in accordance

with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, and that the review hearing be conducted in English.

[8] By letter dated April 20, 2010, the Agency provided to Ste. Rose and to the Tribunal its Agency report (Report) concerning the Notice of Violation, with the Tribunal receiving its copy of the Report on April 21, 2010.

[9] In a letter dated April 21, 2010, the Tribunal invited Ste. Rose to file with it any additional submissions (Additional Submissions) in this matter, no later than May 21, 2010. No Additional Submissions were received from the parties by this date.

[10] Several interim motions were presented by the parties prior to the hearing. A request for an adjournment of the hearing submitted by the Agency in June 2010 was granted by the Tribunal. In August 2011, the Agency made a request for an extension to file documents and for the inclusion of those documents into the written record of documentary evidence relevant to this matter as an addendum to the original Agency Report (Tabs 6 to 10 to be added). The request was granted, subject only to any arguments that Ste. Rose might raise to such an extension for filing documents, or their relevance, at the beginning of the hearing, set for August 30, 2011. Ste. Rose raised no such arguments at the hearing. The Agency, also in August 2011, filed a more easily-referenced format of colour photocopies of previously submitted photos available in their Report (at Tab 3), which the Tribunal admitted into the written record. Finally, the Tribunal granted a request from the Agency for two of its witnesses to testify by teleconference.

[11] The oral hearing requested by Ste. Rose was held in Dauphin, Manitoba on August 30, 2011, with Ste. Rose represented by Masson, and the Agency represented by its legal counsel, Susan Eros.

Evidence

[12] The evidence before the Tribunal in this case consists of written submissions from the Agency (the Notice of Violation, its Report and supplementary materials appended to the Report in August 2011) and from Ste. Rose (its request for review). As well, both parties called witnesses who tendered evidence at the hearing on August 30, 2011. The Agency presented Dr. Raymond Le Heiget (Le Heiget), Inspector Dennis Riehl (Riehl), and Inspector Larry Hominuk (Hominuk), while Ste. Rose presented Masson. During the hearing, Ste. Rose tendered three exhibits for consideration by the Tribunal: (1) Ste. Rose Auction Mart Ltd. - Step by Step Selling Process and Tag Inspection; (2) Canadian Cattle Identification Agency (CCIA) – National Applied Research Project: Study of radio frequency identification systems at livestock auction markets across Canada (CCIA Phase One report); and (3) CCIA – Phase Two: National Applied Research Project: Study of radio frequency

identification systems at livestock auction markets and buying stations in Canada (CCIA Phase Two report). The latter two exhibits were tendered by Ste. Rose at the very end of the hearing and as a result, the Tribunal granted the Agency the right to make written legal arguments as to the relevancy and weight of these documents before the Tribunal would rule on their admissibility. By letter dated September 12, 2011, counsel for the Agency indicated that she had no concerns with the Tribunal's receiving into evidence the CCIA Phase One report, except to note that its relevance was to the general context of tagging in Canada and not to the specific events that occurred on October 15, 2009. The Agency objected to the Tribunal receiving as evidence the CCIA Phase Two report, as that report chronicles events and information that occurred after the alleged violation and is argued by the Agency, therefore, not to be relevant. The Tribunal has now considered these arguments of the Agency and will admit the CCIA Phase One report but will not admit the CCIA Phase Two report because the latter's contents relate to a period well after the alleged violation occurred.

[13] Several elements of the evidence are beyond dispute:

- On October 15, 2009, four Agency officials attended Ste. Rose to conduct an enhanced auction mart CCIA tag inspection.
- Those four Agency officials (Le Heiget, Kristjansson, Riehl and Hominuk) are duly authorized to act as inspectors for the Agency to carry out inspections for compliance with the *Health of Animals Act* and *Health of Animals Regulations*.
- During their inspection, the four Agency officials (Le Heiget, Kristjansson, Riehl and Hominuk) found several cattle at the auction mart that did not bear CCIA-approved tags.
- Ste. Rose is a corporation in the province of Manitoba.
- Ste. Rose is recognized as a tagging facility by the CCIA.

[14] The contested evidence in this matter relates to whether Ste. Rose failed to tag one or more of the several untagged animals while they were at the facility on October 15, 2009, which would constitute a violation under subsection 183(2) of the *Health of Animals Regulations*, as Ste. Rose is registered as a recognized tagging site.

[15] Le Heiget gave his testimony by way of teleconference from Portage La Prairie, Manitoba. He told the Tribunal that he was the acting animal health district veterinarian responsible for animal identification compliance in 2009 at the time of the CCIA-approved tag inspection program was undertaken at Ste. Rose on October 15, 2009. The procedure that the Agency had put into place for compliance inspections was for the district veterinarian

and the Agency inspector for the local district to attend an auction mart and complete the enhanced inspection. These two, or sometimes more inspectors, would then walk through the auction mart pens and do visual and electronic wand reader inspections of animals in the pens to determine if they had CCIA-approved tags. The visual inspection would include viewing, as much as possible, the front and the back of the cattle's ears and verifying the presence of the back button of the approved tag.

[16] Le Heiget told the Tribunal that on October 15, 2009, four Agency inspectors (himself, Kristjansson, Riehl and Hominuk) attended Ste. Rose to conduct the inspection. Le Heiget stated that Ste. Rose was a well-maintained facility. Le Heiget testified that he was there for most of the day and, it being a sale day, there were many animals at Ste. Rose. Le Heiget watched many animals in the pre-sale, sale and post-sale areas of the facility. He noted two animals lacking CCIA-approved tags in post-sale pens (one in Pen 55 and one in Pen 19). He noted five more untagged animals in pre-sale pens (two in Pen 30A, one in Pen 41A, one in Pen 45A, and one in Pen 46A). Le Heiget told the Tribunal he followed one particular animal – a steer with a dangle tag (Y144) – from the pre-sale area, to the auction ring, to the post-sale area of the Ste. Rose facility. Towards the end of the inspection, Le Heiget spoke with Masson in the general area of the sales ring to discuss their findings. During this conversation, Le Heiget noticed a red steer come into and exit from the sales ring all the time without a CCIA-approved tag and, when he probed Masson as to what he was going to do with this animal, Le Heiget reported to the Tribunal that Masson responded to him with the question “What do you want me to do with that?”

[17] During cross-examination, Le Heiget told the Tribunal that his method of determining whether an animal has an approved tag or not is to conduct both a basic visual examination and to use a radio-frequency scanner to verify the presence of CCIA-approved tags. Le Heiget also testified that he was not present to determine if the animals that he observed as untagged remained so when they left the Ste. Rose facility.

[18] The Agency's second witness, Riehl, testified by teleconference from Carman, Manitoba. Riehl told the Tribunal he has been with the Agency and its predecessor agencies for 18 years doing animal identification and animal welfare inspections and is authorized as an inspector under the *Health of Animals Act*. Riehl told the Tribunal that on October 15, 2009, he was part of the team that was dispatched to complete an inspection at Ste. Rose. It was the first time that he had ever attended the facility. Riehl described the physical layout of the facility as consisting of a receiving or unloading area, which led to an area where a CCIA-approved tag scanner/reader and tagging chute had been installed, which in turn led to pre-sale holding pens, the sales ring and finally the post-sale holding pens. Riehl told the Tribunal that the four Agency inspectors broke up into two teams to complete the inspection of the Ste. Rose facility, with himself and Hominuk forming one team. In their inspection of the post-sale pens, the two teams spilt the pens to be examined, with each team examining roughly half of the pens. The post-sale pens that his team

examined revealed no animals missing CCIA-approved tags. However, Reihl told the Tribunal that in the pre-sale pens, he observed untagged animals, although he did not take notes or record the details or descriptions of those animals. Reihl added that he did not see any cattle around the CCIA tagging installation and when he asked a Ste. Rose employee what happened when cattle were run through the CCIA installation and were found to be untagged, he was told that the information gathered was not passed on to Ste. Rose but was used by the CCIA as part of its tag retention survey. Reihl testified that he was not one of the inspectors from the team that spoke with the management of Ste. Rose to discuss the findings of the team from their day-long inspection of cattle at the Ste. Rose facility.

[19] The Agency's third and final witness, Hominuk, testified that he has been employed by the Agency since 2004 and is involved with animal identification compliance programs at the Agency. Within his region, he is responsible for the inspection of two auction marts, one of which is Ste. Rose. He has visited Ste. Rose both on sale days and on pre-sale days and was involved with the animal identification compliance inspection at Ste. Rose held on its sale day of October 15, 2009. Hominuk's general procedure for conducting an inspection for CCIA-approved tags is to arrive an hour or two after the sale starts, then tour post-sale pens to visually inspect for missing tags. If, visually, he detects a missing tag, he enters the pen for further verification. He then repeats the procedure in the pre-sale pens and again as animals go through the sales ring. Concerning the physical layout of Ste. Rose, Hominuk told the Tribunal that cattle entered the facility in the pre-sale portion of the facility, then moved past the tagging chute, to the sales ring and then again past the tagging chute to the post-sale pens to be ready to be reloaded by the purchasers. The animals, therefore, could be tagged at several points from unloading by the seller to reloading by the purchaser. Hominuk testified that the tagging station was a relatively new pilot-project installed at Ste. Rose, probably in July 2009.

[20] On the specific day of October 15, 2009, Hominuk was part of the team of four inspectors at Ste. Rose and was responsible for taking notes of events as they occurred, for taking photos and for preparing the report of the team's findings at Ste. Rose. Hominuk told the Tribunal that October 15, 2009 was a very large sale day at Ste. Rose with around 2000 cattle going through the facility. The team arrived at the facility around 10:00 a.m., and with Le Heiget, Hominuk talked to Don Masson, the former owner of Ste. Rose, informing him of the nature of the inspection team visit. Hominuk testified that Don Masson told them that they would not find any missing tags, as Ste. Rose was participating in a scanning program to catch all untagged animals as they came in on the day prior to the sale. After this meeting, the team split into two groups, with each group examining about one half of the pre-sale and post-sale pens. Hominuk told the Tribunal that he and Reihl examined their half of the post-sale pens, then the pre-sale pens and then returned to the post-sale pens later in the day to re-inspect for untagged animals. Hominuk recorded zero untagged animals when they first inspected the post-sale pens. He recorded that they found six untagged animals in their

pre-sale pens, including one with a producer tag #190 in Pen 94, one with a producer tag "Sassy" in Pen 101-102, one with a producer tag #177 in Pen 100, two with no producer tags in Pen 30A, and one with no producer tag in Pen 41A. Upon their return to the post-sale pens around lunch time, Hominuk recorded one more cow without a CCIA-approved tag in Pen 5S.

[21] After lunch, he and Le Heiget discussed the results of their inspection with Masson in the bleachers of the sales ring. During the discussion, Hominuk pointed out another animal going through the ring without a CCIA-approved tag -- a red white face with a producer tag #Y144 without a CCIA-approved tag which was sent to post-sale Pen 67 -- and Masson commented "What do you want me to do with that?". Hominuk reported that Masson said he was doing his best but does not have the manpower to check each and every animal. Prior to leaving the facility sometime before 5:00 p.m., on October 15, 2009, Hominuk met with Ste. Rose staff to review the facility's CCIA-approved tag record book (see Tab 10). Hominuk told the Tribunal that the record book shows that the last entry when he inspected the book was for five cows that were tagged by Ste. Rose on October 14, 2009, the day prior to the sale day on which the Agency team conducted its inspection. Hominuk told the Tribunal that, while he was at Ste. Rose on October 15, he observed no tagging of cattle with CCIA-approved tags anywhere at the facility, including in the CCIA-project tagging chute.

[22] Ste. Rose's only witness was its president Masson. He told the Tribunal initially the Agency was supposed to do all of the inspections, including finding any missing tags, but then, at a certain point, the Agency stopped doing this and put the emphasis on auction marts to do both. This burden, Masson testified, is an unrealistic task, given that, for example, on October 15, 2009, Ste. Rose had 12 hours to sort and sell 2000 head of cattle. Masson told the Tribunal that it is very difficult to tag cattle on a sale day and that such tagging needs to be done the day before the sale. October 15, 2009 was an extremely busy day at Ste. Rose, and, what is more, it is very difficult to get up close to cattle under such conditions. Masson testified that the Ste. Rose staff did their best to look for approved tags in the cattle and for such tags that had fallen out and could be found on the facility floor or in its feeder bowls, but Ste. Rose cannot guarantee 100% tagging of the animals that come through the facility, as it sells around 50,000 animals a year.

[23] Masson told the Tribunal that Ste. Rose has always cooperated with the Agency and the CCIA, so much so, that it participated in Phase 1 and Phase 2 of the CCIA pilot-project for animal identification (Project) (see Exhibit 2 "CCIA Phase One report"). Phase 1 of the Project sought volunteers from the auction mart community from across Canada to assist the CCIA in completing a study of the efficiency and accuracy of radio frequency identification systems at livestock auction markets across Canada. Ste. Rose was one of only nine auction markets to cooperate in this study. Between October 5 and December 20, 2009, when the research study collected data, Ste. Rose was a willing participant incurring costs and inconvenience to engage in the Project. The results of Phase 1 of the Project for

Ste. Rose are set out at pages 14, 15, 16 and 63 of the CCIA Phase One report. These results indicate that, even using sophisticated technology to read CCIA-RFID tags, on average over the study period only 96.5% of the tags are read, meaning that if 2000 cattle were run through the CCIA scanner on any given day, the tags of 70 cattle would be unread. Participation in this project was in addition to measures that Ste. Rose had taken with its staff to lay out its “Step by Step Selling Process and Tag Inspection Procedure” (Exhibit 1). This procedure sets out several steps and identifies opportunities for staff to verify tags and to replace them if they are missing. In trying to meet its objectives of replacing missing tags, Ste. Rose has taken concrete steps, both internally and in cooperation with the CCIA to improve its procedures Masson told the Tribunal. Ste. Rose even restructured certain physical aspects of its facility to assist the CCIA in measuring the efficiency of scanning cattle tags and the retention rate of approved tags in cattle. When discussing the actual tagging of cattle at Ste. Rose on the day in question (October 15, 2009), Masson stated that:

“We did tag a few cattle that day, but we probably missed some and I don’t know if we did that intentionally, but the cattle we were supposed to tag after the sale – we did tag them. It is very difficult to tag cattle during a sale. We do do it, but it is very difficult and if we can’t tag them as soon as the sale is done, the cattle don’t leave the premises until the cattle are tagged.

Now, if we do have to tag the cattle during the sale, it stops the whole process and it is very difficult to get the process going again, so it is very important to do all, quote, “your homework” the day before.”

[24] During cross-examination, Masson told the Tribunal that any cattle tagged with approved tags issued to Ste. Rose would be recorded in the facility’s CCIA-approved tag record book (see Tab 10). In response to the question of whether any cattle were tagged with CCIA-approved tags by Ste. Rose staff on October 15, 2009, Masson told the Tribunal that Ste. Rose employees informed him that there were cattle that needed tagging and that the Agency gave him a list of the specific cattle that needed to be tagged. Masson then gave that list to Ste. Rose employees with instructions to tag those animals. Masson told the Tribunal that he was not present when Ste. Rose staff carried out his instructions and tagged the specified animals. When asked if he remembered the conversation with Agency inspectors in the sales ring where he remarked, “What do you want me to do with that?”, Masson told the Tribunal that he recalled the conversation but his understanding was that he did not see the untagged cattle go through the sales ring.

Analysis and Applicable Law

[25] This Tribunal’s mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (the Act). The purpose of the Act is set out in section 3:

3. *The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.*

[26] Section 2 of the Act defines “agri-food Act”:

2. *“agri-food Act” means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act...*

[27] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations:

4. (1) *The Minister may make regulations*

(a) designating as a violation that may be proceeded with in accordance with this Act

(i) the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act...

[28] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187, which designates as a violation several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and include a reference to subsection 183(2) of the *Health of Animals Regulations*.

[29] The Act’s system of monetary penalties (AMP), as set out by Parliament is very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes the AMP system as follows, at paragraphs 27 and 28:

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor’s burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him – or herself.

[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

[30] However, the Federal Court of Appeal in *Doyon*, also points out that the Act imposes an important burden on the Agency. At paragraph 20, the Court states:

[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation, and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.

[31] Section 19 of the Act reads as follows:

19. *In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.*

[32] Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities. Section 183(2) of the *Health of Animals Regulations* requires that the Agency prove four separate elements in order to uphold the validity of the violation:

1. that the violator is Ste. Rose;
2. that Ste. Rose manages an approved tagging site;
3. that it received cattle into its facility; and
4. that on October 15, 2009, Ste. Rose did not tag all cattle brought to its facilities that did not already bear an approved tag.

[33] In this case, counsel for the Agency urged the Tribunal to add a fifth element to the list, that Ste. Rose did not “immediately” tag all cattle brought to the site that did not already bear an approved tag. The Tribunal rejects this suggestion for three reasons. First, the *Health of Animals Regulations* already contains in certain of its provisions the word “immediately” (see subsections 183(1)(d), 184(1), and 184(2) for example). Legislators who

drafted the Regulations have then, in certain circumstances, deliberately added the word “immediately” where they thought that such qualification was necessary. They did not do so in subsection 183(2). Second, to read the word “immediately” into this section when it is explicitly absent would only make the responsibility, under this section, more onerous on persons who manage tagging sites. The Federal Court of Appeal in *Doyon* has already indicated to the Tribunal that the AMPs system “*leaves the person who commits a violation very few means of exculpating him – or herself*”. This Tribunal sees no reason to increase this burden by reading in the word “immediately”. Finally, given the objective of Part XV of the *Health of Animals Regulations* to establish and preserve the identify of animals destined for the Canadian agri-food system, there is no apparent need to require the tagging site operator to ignore all commercial requirements and business necessities of running a sales auction mart and “drop everything” to tag untagged animals, particularly during extremely busy conditions such as fall sales, when huge numbers of cattle are coming through the facility, as long as the facility diligently, and in a manner that it can show to the satisfaction of inspectors, carries out the tagging of any and all cattle brought to the site that do not already bear an approved tag.

[34] Concerning elements 1, 2, and 3 above, the parties are in agreement that Ste. Rose was an approved tagging site that received cattle into its facility on October 14 for a sale on October 15, 2009. By all accounts, it was a very big and busy sale with over 2,000 head of cattle coming into and going out of the facility over that 48-hour period. The Tribunal finds that the Agency has proved, on the balance of probabilities, each of these elements.

[35] What is at issue is element 4, whether Ste. Rose failed to tag all cattle brought to its facilities that did not already bear an approved tag. On this point, the parties differ on their evidence, argument and interpretation of the law, and, consequently, on the appropriate outcome of this case. The Tribunal concludes however, from the evidence presented, that Ste. Rose did fail to tag all cattle brought to its facilities that did not already bear an approved tag.

[36] Evidence adduced by the Agency, and not denied by Ste. Rose, is clear that the Agency team conducting the CCIA-approved tag compliance inspection on October 15, 2009 at Ste. Rose found several animals in pre-sale and post-sale pens without approved tags. Masson told the Tribunal that the Agency inspectors gave him a list of the untagged animals that they found while they were discussing the results of their inspection with him in the sales ring bleachers. The parties do appear to disagree whether an animal, without an approved tag was also spotted, as it made its way through the sales ring while the three were discussing the inspection results, with the Agency’s Le Heiget and Hominuk identifying one such animal and Masson stating that he did not see untagged cattle go through the sales ring. The Agency has adduced evidence to say that their inspectors did visual (walking around the facilities), electronic (using the detector wand) and data (inspection of the Ste. Rose tagging record book) inspections to establish that cattle at Ste. Rose on October 15, 2009 were missing tags. Up until the time of their departure around 5:00 p.m. on October 15, 2009, there was no indication that any steps had been taken to tag those cattle

identified by the Agency inspectors as lacking CCIA-approved tags. Masson offered testimony to the Tribunal that Ste. Rose did tag the untagged cattle after the sale, that he took the Agency inspectors' list of untagged cattle, gave it to Ste. Rose employees and instructed them to tag the untagged cattle. Masson told the Tribunal, however, that he was not there when Ste. Rose tagged those specific cattle. Masson also presented to the Tribunal the Ste. Rose "Step by Step Selling Process and Tag Inspection" procedure (Exhibit 1), but offered little in the way of evidence that the procedure had actually been followed on October 14 and 15, 2009, and had resulted in the tagging of untagged animals on those days.

[37] While it is the Agency that bears the burden of proving all the elements of the alleged violation, the alleged violator is not without any responsibility to displace logical inferences that can be drawn from the evidence in deciding whether certain events did or did not occur. In this case, there is clear, uncontroverted evidence that by 5:00 p.m. there were still untagged cattle at the Ste. Rose facility. What happened after that is only a matter of speculation, given the generality of Masson's testimony. Had Masson been able to produce for the Tribunal a tagging record book that showed all the untagged cattle identified by the Agency inspectors as tagged on October 15, 2009, or had Masson actually stayed and overseen the tagging of these animals after he had been handed this list by Agency inspectors on October 15, 2009, he would have been able to present very strong evidence to counterbalance any logical inference that one or more of the untagged cattle left Ste. Rose without a CCIA-approved tag. The simple assurance that Masson told Ste. Rose staff to tag the animals leaves the Tribunal unconvinced. Given Masson's vagueness on these and other matters to which he testified, such as whether an animal passed through the sales ring without an approved tag while he and Agency inspectors discussed the findings of the inspection, the Tribunal finds as fact that the better evidence and logical inference with respect to element 4, is that, on the balance of probabilities, one or several of the animals that were identified as lacking CCIA-approved tags during the day of October 15, 2009 actually left Ste. Rose without such approved tags.

[38] Such a factual finding by this Tribunal, in the face of a lack of specific, direct and convincing evidence from Masson to the contrary, preserves the objective of subsection 183(2) of the *Health of Animals Regulations* – to provide for responsibility to fall on intermediaries to take steps to tag or retag animals coming into their possession at an approved tagging site, so as to preserve those animals' identity. No doubt, an auction mart, as a commercial entity, is responsible to accurately track ownership, numbers, kinds, sexes and condition of animals received, handled, sold and shipped. As well, it is required to monitor the health and treatment of animals coming into and going out of its facility. It must accommodate producers and their truckers, buyers and their truckers as well as manage its own human resources, protocols and processes. However, subsection 183(2) imposes an important responsibility on the auction mart -- to preserve the identity of the animals when

they lack proper identification. Even if this responsibility does not have to be carried out immediately, there does have to be some proof, beyond mere words of direction by a senior manager to his staff, to ensure that the responsibility for animal identity preservation has been carried out. Otherwise, the traceability envisaged by the system would be compromised.

Defences Available Under the Law

[39] The Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the Act states:

18. (1) A person named in a notice of violation does not have a defence by reason that the person

(a) exercised due diligence to prevent the violation; or

(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

[40] When an AMP provision has been enacted for a particular violation, as is the case for subsection 183(2) *Health of Animals Regulations*, Ste. Rose has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that the company might raise, including Ste. Rose's assertions that it is doing the best it can. It is unfortunate, of course, that a company which has so clearly been a cooperative volunteer and team player in establishing and perfecting the traceability regime envisaged by the *Health of Animals Regulations* through its participation with the CCIA pilot-projects, its cooperation with the Agency and its other related endeavours, now faces the prospect of a violation under the very regulations it was working with others to perfect from an implementation and compliance perspective. There is no doubt, moreover, from the evidence, that Ste. Rose was aware of its obligations and generally was taking its role with respect to animal identification seriously. Why, in this case, a simple Notice of Violation with Warning rather than a Notice of Violation with Penalty from the Agency to Ste. Rose was not sufficient, given Ste. Rose's obvious cooperation in animal identification research and development, is a question that only the Agency can answer. Unfortunately, given Parliament's clear statement on the issue and the facts as found by the Tribunal in this case, the Tribunal finds that none of Ste. Rose's actions or statements from its witness raise a defence that is not excluded by Parliament's intention in section 18 of the Act.

[41] In conclusion, the Tribunal finds that the Agency has, on a balance of probabilities, proven all the essential elements of the violation and the notice of violation with penalty is upheld. The Tribunal, by order, determines that Ste. Rose committed the violation and orders it to pay the Agency a monetary penalty of \$500 within 30 days after the date that notice of this decision is served on it.

Removal of Any Record of the Penalty After Five Years

[42] The Tribunal wishes to inform Ste. Rose that this violation is not a criminal offence. After five years, it will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*:

23. (1) Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from

(a) where the notice of violation contained a warning, the date the notice was served, or

(b) in any other case, the payment of any debt referred to in subsection 15(1),

unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.

Dated at Ottawa, this 27th day of October, 2011.

Dr. Donald Buckingham, Chairperson