

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: H.S. Knill Company Limited v. Canada (CFIA), 2011 CART 015

Date: 20110923
Docket: CART/CRAC-1539

Between:

H.S. Knill Company Limited, 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 the facts of a violation of section 177(1) 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 Kitchener, ON,
April 27, 2011.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, H.S. Knill Company Limited (Knill), on October 2, 2009, at Winnipeg, Manitoba moved sheep from Manitoba to Ontario, which did not bear an approved tag, contrary to section 177(1) of the *Health of Animals Regulations*.

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

- that Knill transported or caused the transport of the sheep in question, and
- when the sheep left Winnipeg on October 2, 2009, bound for Ontario that one or more of them did not bear a Canadian Sheep Identification Program (CSIP) approved tag.

Record and procedural history

[4] Notice of Violation #0910ON050202, dated December 11, 2009, alleges that, on October 2, 2009, at Winnipeg in the province of Manitoba, Knill “committed a violation, namely: Transport or cause the transportation of an animal or the carcass of an animal not bearing an approved tag contrary to section 177(1) 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*.”

[5] Service by the Agency of the above Notice of Violation on Knill was deemed to have occurred on December 21, 2009. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, this is a minor violation for which the penalty is \$500.

[6] Section 177(1) of the *Health of Animals Regulations* reads as follows:

177. (1) *Subject to section 183 and subsection 184(2), no person shall transport, or cause the transportation of, an animal or the carcass of an animal that does not bear an approved tag.*

[7] On January 26, 2010, the Agency sent its report (Report) concerning the Notice of Violation to Knill and to the Tribunal, the latter receiving it on January 27, 2010.

[8] In a letter dated January 27, 2010, the Tribunal invited Knill to file with it any additional submissions in this matter, no later than February 26, 2010. However, no further submissions were received from Knill or from the Agency.

[9] The oral hearing requested by Knill was held in Kitchener, Ontario on April 27, 2011, with Knill represented by its Vice-President, Mr. Bruce Poland (Poland) and the Agency represented by its counsel, Ms. Rina Li.

Evidence

[10] The evidence before the Tribunal in this case consists of written submissions from both the Agency (Notice of Violation and Report) and from Knill (its request for review and attached statement from Mr. James Fitzpatrick (Fitzpatrick), a driver of Knill). As well, both parties presented witnesses who tendered evidence at the hearing on April 27, 2011. Ashley Roberts née Lalonde (Roberts) gave evidence on behalf of the Agency, while Poland gave oral evidence and Fitzpatrick tendered written evidence on behalf of Knill. During the hearing, the Agency also tendered two exhibits as evidence: (1) enlarged colour photos of several of the photos found in black and white at Tab 2 of the Report; and (2) a copy of the bill of lading of Knill for the load in question dated October 2, 2009.

[11] Certain elements of the evidence are not in dispute:

- Knill is a commercial transporter of livestock. On October 2, 2009, a Knill truck driven by Fitzpatrick, loaded 178 sheep and goats for Mike Nernburg (Nernburg), a livestock dealer in Winnipeg, MB, and transported them to Cookstown, ON where they were off-loaded at the Ontario Stockyards Inc. (OSI) on October 4, 2009.
- On October 5, 2009 at OSI, Roberts, of the Agency, detected four sheep that did not bear CSIP-approved tags, as required for identification under Part XV of the *Health of Animals Regulations*.
- On October 5, 2009 at OSI, at the direction of Roberts, of the Agency, OSI staff detected two sheep that did not bear CSIP-approved tags, as required for identification under Part XV of the *Health of Animals Regulations*.

[12] The contested evidence in this matter relates to whether Knill or its employees transported sheep without approved tags from Winnipeg, MB to Cookstown, ON between October 2 and October 5, 2009.

[13] The Agency's witness Roberts has been an employee with the Agency since 2005, and is designated as an inspector under the *Health of Animals Act*. She told the Tribunal that she grew up in eastern Ontario and has personal experience tagging sheep. She has been an Agency inspector in the Barrie region since 2007 and has been inspecting OSI facilities

since 2007. She testified that she took personal notes of the October 5, 2009 inspection she completed with regards to this case, signed the Notice of Violation, wrote the Agency Report and completed the summary of the inspection found therein.

[14] Roberts testified that on October 5, 2009, she arrived at the OSI facilities at around 10:00 a.m. At 11:00 a.m., she went to pen K2 and with Art Irving (Irving), an employee of OSI, entered the pen to perform an inspection of the sheep contained therein to determine if they all bore approved tags. Roberts found that four animals did not. Nor did any of the four bear evidence that such tags had been recently ripped out or lost. She took photos of these animals as supporting evidence (Report – Tab 2 and Exhibit 1). Roberts also told the Tribunal that Irving also found two more sheep in the pen that did not bear approved tags and that when she asked him, he told her that he did not know the animals were untagged but agreed with her observations and assessment that the animals did not bear approved tags.

[15] In order to determine the handlers and owners of the six sheep in question, Roberts testified that she examined the pen card on October 5, 2009 and took a photo of it (see photo at Report – Tab 2 and Exhibit 1). It was marked with the following: “1074, Knill, Nuremberg (sic), 126, L + Goats”. Roberts explained to the Tribunal that the pen card is filled out by OSI staff with “1074” representing the manifest number of the animals in the pen, the names “Knill, Nuremberg (sic)” representing the transporter and shipper, with the “126, L+Goats” representing the number and type of animals in the pen. Exhibit 2 presented by the Agency, Roberts explained, is the Bill of Lading for the load in question, including 178 sheep and goats shipped from Winnipeg to Cookstown on October 2, 2009 showing the shipper as Nernberg and the transporter of the animals as Knill. Roberts testified that the Sales Invoice issued to Nernburg (Report – Tab 4) shows 91 head of sheep under manifest #1074 with the trucker of those animals as Knill and a tagging fee of \$24.00 for application of approved tags levied with respect to animals in that group. Roberts told the Tribunal that the Invoice at the Report’s Tab 3 from the Canadian Cooperative Woolgrowers Limited shows that on October 6, 2009, it billed Nernburg for six approved tags for sheep, the six sheep that Roberts and Irving found that were missing approved tags in pen K2 on October 5, 2009.

[16] In cross-examination, Roberts told the Tribunal that she was not present at OSI when the sheep were off-loaded from the Knill truck and that she never communicated with the Knill driver, Fitzpatrick. Roberts also told the Tribunal that she did not know how long the sheep had been in pen K2 since their unloading at OSI, and that, while she did not count all the sheep in pen K2, she did inspect them all and did find four that did not bear approved tags. She told the Tribunal that Irving told her that the sheep in pen K2 had been hauled by Knill. Roberts testified that when the six sheep without tags were identified, they were pulled aside and tagged by OSI staff with approved tags and then inspected by her.

[17] Knill's witness, Poland, stated to the Tribunal that he and Douglas Knill are co-owners of Knill, an animal transport company founded in 1933 operating across North America to serve the livestock industry. Poland testified that the personnel of Knill are very familiar with legal requirements for hauling animals and their drivers attend courses on safe handling, care and transportation of animals. With respect to the load in question, Fitzpatrick was the driver and he was to pick up and load animals in three Manitoba locations, finishing up with the loading of 178 sheep and goats from Nernburg in Winnipeg. Poland told the Tribunal that the driver has no authority or responsibility for tagging untagged animals as that falls on the shipper, although the driver has been trained to question the shipper to determine that the animals are tagged prior to loading them. The 178 sheep and goats were loaded in Winnipeg at night and, as such, it was physically impossible for the driver to visualize all the sheep as they were being loaded. Moreover, the driver will at times during loading be on his hands and knees in the trailer closing gates and then the backdoor, all the while trying to count the sheep and goats that have been loaded. The driver's job is to load, count and get the weight of animals with tag verification difficult unless the animals are run through a bright area. Poland told the Tribunal that, in his opinion, the driver did his job as set down by Knill's company rules on the night of October 2, 2009, as he loaded the sheep and goats in Winnipeg. There was no issue with missing tags at Winnipeg, as the driver asked the shipper and there was no evidence of any problem. When the driver off-loaded the sheep in Cookstown at OSI, he did not look at the sheep as they came off. Once the sheep were unloaded the driver proceeded to his next unloading destination. Poland explained that the driver of the load, Fitzpatrick, had attended the Knill in-house training course and the Ontario Farm Animal Council course on legal requirements for the handling and hauling of animals. As Knill is not a registered tagging facility, it and its drivers do not have authority to tag animals missing approved tags and Knill drivers have been instructed never to load an animal without an approved tag. Poland testified that drivers have been instructed that if such a situation presents itself, they must contact the office for further instructions.

[18] In cross-examination, Poland told the Tribunal that he was not present when the load in question was loaded in Winnipeg or unloaded in Cookstown. In response to the question of whose responsibility it is to tag untagged animals, Poland told the Tribunal that the transporter is definitely not responsible for tagging but rather that the shipper is responsible.

[19] Knill also presented evidence via the written statement of Fitzpatrick, the driver of the load in question. In that statement dated January 6, 2010 and attached to Knill's request for review, Fitzpatrick states that he is a driver for Knill and that on October 2, 2009 he loaded livestock for Nernburg, including 178 sheep and goats in Winnipeg going to Cookstown. Fitzpatrick states "I was told by all the stock yards where I loaded, that the livestock were tagged and ready to load. I have been trained by H.S. Knill Company to make sure all C.F.I.A. tags are on livestock, as this is the responsibility of all parties".

[20] Fitzpatrick continues his statement, saying “I was told by the stock yard staff that they [the animals] were all tagged. I could visually see the tags, but how can I, the driver, know for sure when loading sheep which aren’t sheared, that each one is present. This is almost impossible for me to see as the Winnipeg yard loaders send 20-30 sheep at a time up the chute for me to put in each section of the trailer. I did the best to my ability to conform to the law. I did not have anything to do with tagging of the animals and was told that they were all done and ready to load. I proceeded on my route to Cookstown, Hanover, and then to Paris, Ontario to deliver all the animals. No one told me at any delivery point that there was any problem with tags”.

[21] During the hearing, Poland told the Tribunal that Fitzpatrick worked for Knill for six years, but is currently laid-off from the company. His statement was typed up by the Knill office secretary. It was based on his notes and signed by him. Poland told the Tribunal during his cross-examination, that if Fitzpatrick had noticed untagged animals he would have contacted the office as he has done so in the past.

Analysis and Applicable Law

[22] 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* (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.

[23] 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...

[24] 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...

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[25] 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 violations 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 paragraph 177(1) of the *Health of Animals Regulations*.

[26] Part XV of the *Health of Animals Regulations* (Regulations) is entitled “Animal Identification”. The animal identification provisions of Part XV enable the Agency to trace the origin and movements of individual farm animals which are destined for human consumption. As such, when serious animal disease or food safety issues arise, urgent corrective action, follow-up and trace back of infected animals can be undertaken. Application of approved tags greatly enhances the ability of the Agency to rapidly respond to, and deal with, serious animal diseases and food safety issues identified in animals that have moved, or are moving, through the marketing system. Approved tags, in principle, allow the animal’s movement to be traced back from the place where the problem is found, such as at an auction market or an abattoir, to the farm where the animals originated.

[27] Part XV of the Regulations envisages a closed system for identifying production animals, such that their movements from birth to death can be monitored by a unique identification tag, which, for designated animals, is placed in one of their ears, ideally at birth. When the tagged animal dies, either on the farm, in transit or when slaughtered, the Regulations require a record to be kept of the death of the animal and the number of its tag.

[28] Practical difficulties arise in attempting to have 100% of Canadian cattle, bison and sheep tagged with approved tags. Some animals, requiring identification pursuant to Part XV of the Regulations, may never be tagged, through neglect or opposition to the present regulatory scheme. Most animals, however, will be tagged, but, even among these, some will lose their tags somewhere between the birthing pen and the slaughter house floor. To minimize “slippage” and to maximize the number of animals that are tagged with approved tags for the full duration of the animal’s life, the Regulations require several actors in the production chain to tag animals which are either not yet tagged or which have lost their tags.

[29] When actors inside or beyond the farm gate do not tag, as required by the Regulations, they too face liability when tags are missing. Owner and transporters of animals are among those identified under the Regulations with such responsibilities. The Agency has the responsibility of ensuring compliance with these provisions either through criminal prosecutions or through the levying of administrative monetary penalties for violations identified in the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[30] For sheep, such approved tags are coloured metal or plastic tags with a unique number and common maple leaf emblem on each. The tags referred to by witnesses in this case were pink metal Kurlock tags, which are constructed such that when applied to a sheep's ear, the applicator is meant to lock the tag into place permanently. Such a permanent locking device would permit farm-to-processor tracking and thus, meet the objectives of the Regulations to establish a permanent and reliable system to track the movements of all sheep in Canada, from the birth of such animals on their "farm of origin" to their removal from the production system, either through export or domestic slaughter. Almost every system of mandatory identification is, however, subject to mechanical failure or human error.

[31] While Agency officials admittedly never saw the six animals in question before October 5, 2009, the Tribunal is convinced from the evidence of Roberts, which was not disputed by Knill, that the six sheep found by her and OSI staff on that day in Cookstown did not bear approved tags. The one question that remains is whether these same animals failed to bear an approved tag when they were loaded and while they were being transported by Knill's driver Fitzpatrick from Winnipeg to their unloading at OSI in Cookstown.

[32] There are three possibilities as to what happened in this case: (1) any or all of the six sheep did not bear an approved tag before loading onto Knill's truck in Winnipeg; (2) each of the six sheep did bear an approved tag when it was loaded onto the Knill truck in Winnipeg on October 2, 2009, but all lost their tags en route or while being unloaded at OSI; or (3) all six of the sheep lost their approved tags only after they were unloaded while they were being held at OSI prior to their sale and prior to Robert's inspection of pen K2 on October 5, 2009. Only the last two possibilities might exonerate Knill while the first necessarily entails liability on it.

[33] Section 177(1) of the Regulations sets a clear, heavy and unequivocal burden of responsibility on transporters with respect to animal identification. It requires that "subject to section 183 and subsection 184(2), no person shall transport, or cause the transportation of, an animal or the carcass of an animal that does not bear an approved tag". It draws a strict line "in the sand" such that there will be a violation if, from the moment that transport of an animal begins until it is unloaded, the animal does not bear an approved tag. If the tag is lost in transport, section 184 permits the owner or transporter to retag the animal "immediately after it is received" at the next place where it is to be unloaded. While the evidence in this case does not suggest that the tags were lost in transit, it is clear that Knill did not tag the untagged animals immediately—they were retagged only after Roberts and OSI staff identified that they were missing their approved tags just prior to sale.

[34] As the exceptions set out in section 183 or subsection 184(2) do not apply in this case, a violation of section 177(1) of the Regulations will validly arise where:

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1. the alleged violator transported (or caused the transportation of),
2. an animal falling within the definition of “animal” under Part XV, and
3. the animal did not bear an approved tag at the time of transportation.

[35] It is the Agency which bears the burden of proof for proving all the elements of the alleged violation. Based on the evidence presented, it is clear and not in dispute that the Agency has proved, on the balance of probabilities, elements 1 and 2 above. The evidence bears out that the sheep transported are defined animals under Part XV and that they were loaded in Winnipeg onto a Knill truck which travelled to Ontario where they were off-loaded at OSI.

[36] Moreover, with respect to element 1, the Act, as well as the case law from this Tribunal and from the Federal Court of Appeal, is quite clear that a transporter of animals is responsible for the acts of his employees or agents and will, by their actions, transport animals. Section 20(2) of the Act states:

(2) A person is liable for a violation that is committed by any employee or agent of the person acting in the course of the employee's employment or the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.

[37] With respect to element 3, the parties argue that the evidence leads to different and opposing conclusions. Knill maintains that its driver, Fitzpatrick, relied on his training—not letting animals that he could see without tags be loaded onto a Knill truck and the assurance he had from stockyard personnel loading the sheep that night that they were all tagged—in concluding that all the sheep were tagged. The Agency has presented evidence that its inspector found six untagged sheep that can be directly traced to the Fitzpatrick load. None of these sheep had any of the hallmarks—blood, holes, recently ripped ears—of tags that had recently been lost. A reasonable conclusion from the evidence, which the Tribunal accepts, on the balance of probabilities, as its finding of fact, is that no approved tag was in the ear of any of the six sheep at the time the six were loaded in Winnipeg and during their transport to Cookstown.

[38] Final arguments from Poland, on behalf of Knill, were that Knill did not knowingly transport untagged animals and that Knill systematically gave instructions to its drivers not to

load animals failing to bear approved tags. Fitzpatrick, the driver in this case, was no doubt a very busy man on the night of October 2, 2009, as he loaded sheep in dimly lit conditions in Winnipeg. He indicated in his statement that while it was impossible for him that night to see all the sheep and their tags, he put his faith in stockyard personnel that all the sheep had been tagged. The Tribunal accepts that had he seen any untagged animals he would have responded by implementing the Knill procedure to call the office for further instructions and to

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stop the loading awaiting those instructions. Unfortunately, that did not happen. That the current identification system is unfairly exposing players in the agri-food continuum to liability for violations of Part XV of the Regulations because of a significant problem with the permanency of approved tags, has become a not uncommon refrain from applicants appearing before the Tribunal (see *Habermehl v. Canada (CFIA)* 2010 CART 017; *Coward v. Canada (CFIA)* 2010 CART 018; *Ontario Stockyard Inc. v. Canada (CFIA)* 2011 CART 012; and *Schaus Land and Cattle Co. Limited v. Canada (CFIA)* 2011 CART 014).

[39] Considering that a transporter is often working under sub-optimal conditions for tag verification—limited lighting, the high speed of animals going into the truck, the hairiness of animals' ears which often hides tags, and the multiplicity of tags present in animals ears—the Regulations do impose a heavy, and at times, superhuman burden on a transporter to verify the continuing and constant presence of an approved tag in the ear of each of the animals being transported, failing which, the transporter faces liability for regulatory non-compliance. Part XV does appear to impose a heavy responsibility on one sector for the benefit of all consumers and producers in Canada to assure traceability and food safety in the food system. Fair or not, this is, however, the regulatory burden that Parliament and the Governor in Council have placed on, in this case, the applicant Knill, and the Tribunal must interpret and apply the law to the facts of this case.

[40] The Act's system of monetary penalties (AMP), as set out by Parliament is very strict in its application. 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.

[41] When an AMP provision has been enacted for a particular violation, as is the case for section 177(1) of the Regulations, Knill has little room to mount a defence. The Tribunal accepts that any honest plea from an applicant alone—such as the position of Poland that Knill did the best it could to train its drivers to know and follow the rules for transporting animals and should not now be held responsible for a situation that was impossible for it to conform to, or Fitzpatrick’s statement “I was told by all the stockyards where I loaded, that

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the livestock were tagged and ready to load”—would not, in and of themselves, be permitted defences under section 18, and would not have the effect of exonerating an applicant. In the present case, section 18 of the Act will exclude practically any excuse that Knill might raise. Given Parliament’s clear statement on the issue, the Tribunal accepts that such statements by Knill are not permitted defences under section 18.

[42] Overall, the evidence supports the Agency’s position that it has rightly issued a Notice of Violation to Knill, as the Agency has made out all the required elements for a violation under section 177(1) of the Regulations. The testimony of all witnesses in this case was professional and credible. In light of all the evidence and the applicable law, the Tribunal must conclude that the Agency has established, on a balance of probabilities, that Knill committed the violation and is liable for payment of the penalty in the amount of \$500.00 to the Agency within 30 days after the day on which notice of this decision is served.

[43] The Tribunal wishes to inform Knill 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 23rd day of September, 2011.

Dr. Donald Buckingham, Chairperson