

Canada Agricultural  
Review Tribunal



Commission de révision  
agricole du Canada

Citation: Ontario Stockyards Inc. v. Canada (CFIA), 2011 CART 012

Date: 20110729  
Docket: CART/CRAC-1524

**Between:**

**Ontario Stockyards Inc., 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 184(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 did not commit the violation and is not liable for the payment of the penalty.**

Hearing held in Barrie, ON,  
April 5, 2011.

## REASONS

### **Alleged incident and issues**

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Ontario Stockyards Inc. (Ontario Stockyards), on or about 10:15 on October 19, 2009, at Cookstown, Ontario, failed to tag one or more untagged sheep that arrived at its facility, so as to satisfy the requirements of subsection 184(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:

- if Ontario Stockyards, as an auction market, exercised sufficient care and control over sheep that it has received for sale at its establishment, to fall under the ambit of the responsibilities set out in subsection 184(1) of the *Health of Animals Regulations*;
- if Ontario Stockyards, an auction market, failed to tag one or more untagged sheep that arrived at its facility; and
- given that the subsection 184(1) of *Health of Animals Regulations* uses the word “immediately” to describe the required time for retagging an untagged animal, and if Ontario Stockyards did tag the untagged animals, whether Ontario Stockyard’s tagging occurred within a period of time which could be considered “immediately” so as to meet this regulatory requirement.

### **Record and procedural history**

[4] Notice of Violation #0910ON050002, dated November 10, 2009, alleges that, on the 19<sup>th</sup> day of October 2009 at Cookstown, in the province of Ontario, Ontario Stockyards “committed a violation, namely: Fail to apply a new approved tag to an animal that has lost its approved tag or that does not bear an approved tag contrary to section 184.(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] The Agency was deemed to have served the above Notice of Violation on Ontario Stockyards on November 20, 2009. 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.

[6] Subsection 184(1) of the *Health of Animals Regulations* reads as follows:

**184.** (1) *Subject to subsections (2) and (3), if an animal does not bear an approved tag or loses its approved tag, the person who owns or has the possession, care or control of the animal shall immediately apply a new approved tag to it.*

[7] In a letter dated November 13, 2009, which was received by the Tribunal on November 17, 2009, Ontario Stockyards, through its President Wayne Small, 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, Ontario Stockyards 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 December 1, 2009, the Agency provided to Ontario Stockyards and to the Tribunal its Agency report (Report) concerning the Notice of Violation in question, with the Tribunal receiving its copy of the Report on December 3, 2009.

[9] In a letter dated December 3, 2009, the Tribunal invited Ontario Stockyards to file with it any additional submissions (Additional Submissions) in this matter, no later than January 4, 2010. By letter dated December 22, 2009, received by the Tribunal on December 29, 2009, Ontario Stockyards provided to the Tribunal its Additional Submissions.

[10] Other than a request for an adjournment of the hearing submitted by Ontario Stockyards, which was granted by the Tribunal, and a request by the Agency for the issuance of summonses, which was also granted by the Tribunal, no further written submissions were received from Ontario Stockyards or from the Agency in this matter.

[11] The oral hearing requested by Ontario Stockyards was held in Barrie, Ontario, on April 5, 2011, with Ontario Stockyards represented by its President, Wayne Small, and the Agency represented by its legal counsel, Kathryn Lipic.

### **Evidence**

[12] The parties agreed at the hearing that the Tribunal would hear this case and *Ontario Stockyards Inc. v. Canada (CFIA)*, 2011 CART 013 (Tribunal File: CART/CRAC-1533; NOV 910ON050103) together, as much of the evidence presented by the parties would be applicable and relevant to both cases.

[13] Evidence before the Tribunal in this case consists of written submissions from the Agency (specifically, the Notice of Violation and its Report) and from Ontario Stockyards (specifically, its request for review and its Additional Submissions). As well, both parties presented witnesses who tendered evidence at the hearing on April 5, 2011. The Agency presented Ashley Roberts (née) Lalonde (Roberts) and Allen Giesche (Giesche) while Ontario Stockyards called Wayne Small (Small), Tony Almeida (Almeida) and Ron Hadaway (Hadaway). During the hearing, the parties tendered four exhibits for consideration by the Tribunal for this case and for *Ontario Stockyards Inc. v. Canada (CFIA)*, 2011 CART 013 (Tribunal File: CART/CRAC-1533; NOV 0910ON050103): (1) colour copies of the photographs (11) at Tab 2 of the Agency Report in CART/CRAC-1524; (2) colour copies of the photographs (7) at Tab 2 of the Agency Report in CART/CRAC-1533; (3) manifest from Ontario Stockyards dated October 19, 2009; and (4) two email communication strings from Wideman, Jim (OMAFRA) dated April 4, 2011 to [info@ontariostockyards.on.ca](mailto:info@ontariostockyards.on.ca).

[14] Several elements of the evidence are not in dispute. The parties agreed at the hearing that:

- Seven sheep owned by Hasso Von Lippa (Von Lippa) were delivered to Ontario Stockyards sometime on Sunday, October 18, 2009 for their sale at Ontario Stockyards on Monday, October 19, 2009.
- On October 19, 2009 at 10:15, CFIA Inspector Roberts discovered, during a routine inspection of animals at Ontario Stockyards, that six (four ewes and two lambs) of the seven sheep in question, then in a holding pen, H5, at Ontario Stockyards, did not bear Canadian Sheep Identification Program (CSIP)-approved tags.
- When Roberts became aware of this situation, she directed that the sheep be detained in their holding pen and she alerted Almeida, an employee of Ontario Stockyards. He then attended the offices of the Canadian Co-operative Wool Growers Limited (CCWG) which had an office located on the premises of Ontario Stockyards, and secured six CSIP-approved tags sold to the owner Von Lippa's account from the CCWG (see Tab 3 of Agency Report and Ontario Stockyards' Additional Submissions). Almeida then proceeded to tag all six of the untagged sheep.
- The six previously untagged sheep were then permitted by Roberts to be sold and were subsequently released from Ontario Stockyards to their new owners (see Tab 4 of Agency Report and see Ontario Stockyards' Additional Submissions).

[15] The contested evidence in this matter related to whether Ontario Stockyards had sufficient care and control of the six untagged sheep during the period of October 18 and 19, 2009, such that the establishment would become subject to the requirements set out in subsection 184(1) of the *Health of Animals Regulations*, and if they did, whether Ontario Stockyards' tagging occurred within a period of time which could be considered "immediately" so as to meet these regulatory requirements.

[16] Roberts told the Tribunal that she is an inspector of the Agency who, since 2007, has inspected Ontario Stockyards for compliance with the *Health of Animals Regulations*. She gave evidence, based on the personal notes she recorded (see Tab 1 of the Agency Report), that she arrived at Ontario Stockyards on Monday, October 19 at 9:45 to complete an inspection in humane transport and livestock identification. At 10:15, she arrived at Ontario Stockyards holding pen H5 and noted that six of the seven sheep in pen H5 did not bear CSIP-approved tags. She testified that the pen card read "Hasso Von Lippa". She took photos of the untagged sheep and then spoke to Almeida. Roberts asked him when the sheep in pen H5 arrived and Almeida said "That's Jack's writing [an employee of Ontario Stockyards], came in yesterday". Then Roberts recorded that she went to speak with Jean Beck, another employee of Ontario Stockyards, to get Von Lippa's telephone number. Then Roberts spoke with Small to inform him that pen H5 needed to be checked for tags. Robert's notes indicate that Small replied "Who owns the sheep?" to which Roberts replied "Hasso Von Lippa" but that he should double-check the ownership. Roberts then continued her inspection. At 11:04, Roberts recorded that she met Small and Chris Small, another Ontario Stockyards employee who were going to tag Von Lippa's sheep. Small gave the approved tags to Hadaway who, with Chris Small, went to tag Von Lippa's sheep.

[17] At 12:02, Roberts recorded that she went to the CCWG-Cookstown and spoke with John Cuthbert and Al DeGasparro and asked for and received a copy of the Von Lippa invoice for the sale of the approved tags that had already been applied to Von Lippa's untagged sheep. At 12:05, Roberts recorded that she went to the front office of Ontario Stockyards and spoke to Ingrid Botting and Jean Beck and left a note requesting a copy of the sales invoice, manifest and trucking information for Von Lippa's sheep. Roberts then recorded that she left Ontario Stockyards. At 13:09, Roberts recorded that she called the CCWG-Cookstown and asked for and received from Al DeGasparro the tag numbers sold to Von Lippa for the tagging of his untagged sheep. Roberts also told the Tribunal that when she inspects sheep for CSIP-approved tags she looks at the sheep from many angles and she does not find it difficult to see tags.

[18] During cross-examination, Roberts told the Tribunal that her notes recorded that Almeida told her that the animals had been delivered the day before the sale, that is, on Sunday, October 18, 2009. In response to the question from Ontario Stockyards as to where pen H5 is located, Roberts testified that pen H5 is a long way away from the sales ring.

[19] The Agency's second witness, Giesche, provided evidence as to the origin, content and ambit of two email communication strings from Wideman, Jim (OMAFRA) dated April 4, 2011 to [info@ontariostockyards.on.ca](mailto:info@ontariostockyards.on.ca) (Exhibit 4). The subject line of each email reads "FW: Tagging of Sheep at Auction Markets". Each email consists of three pages, and each has as its last page the following unsigned, undated document which reads as follows:

Auction Mart tagging of non-tagged sheep

Decision

We have decided to allow auction marts to tag sheep which arrive untagged in order for them to comply with s184(1) of the Health of Animals Regulations. This also improves traceability. Following discussions with the Canadian Wool Growers Association (national distributor of approved sheep tags), they have agreed to sell tags to auction marts. In order to comply with s178(1), the auction mart must purchase tags on their own account and report (to the database) the issuance of the tags to the owner of the sheep after they tag them (within 24 hours). Some auction marts are purchasing tags under the animal owner's account and tagging the sheep. This practice is in violation with s178(1). This is a serious offence under the AAMPS Regulations. We will consider auction marts to be in compliance with s184 provided they have the animals tagged before ownership changes (normally at the sale ring).

The string of communications for each email dates from March 24, 2011 to April 4, 2011 and includes the following persons: Jim Wideman (Wideman) of the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA); Robert Vanderwoude (Vanderwoude), OMAFRA; Anco Farenhorst (Farenhorst), (CFIA, as indicated by his email address of [@inspection.gc.ca](mailto:@inspection.gc.ca)); Andrew Armstrong (affiliation unknown) and Ontario Stockyards. The March 28, 2011 email from Wideman to Vanderwoude contains the following: "Hi Robert—Will you be notifying the Auction Markets of this or do you want me to or is CFIA going to notify—Jim." The March 24, 2011 email from Farenhorst to Vanderwoude reads as follows: "Hi Robert, Here is the policy decision regarding the tagging of sheep which arrive untagged at auction markets. You are welcome to share this as seems appropriate to you. Anco"

[20] Giesche is the Manager of Enforcement and Investigation Services for the Agency in Ontario. He has been an employee of the Agency since 2004. Giesche told the Tribunal that he had seen the last page "Auction Mart tagging of non-tagged sheep – Decision" (Decision) attached to each of the emails but he had never seen the other pages of each of the emails. Giesche testified that he received the Decision on March 24, 2011 when it was hand-delivered to him by one of his staff members, Mike Kozak. Giesche said the Decision had

been “cut and pasted” from another person and then sent from Farenhorst who worked at Agency Headquarters in Ottawa. Giesche said that when he received the Decision it was a complete surprise to him and so he contacted Farenhorst to determine its origin and contents. Farenhorst then told Giesche that he, Farenhorst would send out a clarification of the policy in late March 2011. Giesche concluded his direct testimony by saying that to his knowledge there was no enforcement policy by the Agency concerning animal identification in 2009.

[21] In cross-examination, Giesche was asked if it was accurate to say that there was a fair amount of confusion “at the top” about where tagging should be done and when it should be done at auction marts. Giesche said that he would agree but that the emails in question originated from the Guelph office and that, as his job was investigation of criminal prosecutions and AMPs violations, he was confused, so he went to the person from whom the Decision came for clarification.

[22] Ontario Stockyards’ first witness was Small, the President of Ontario Stockyards. He told the Tribunal that in his Additional Submissions to the Tribunal he stated as follows:

“Ontario Stockyards Inc. has a protocol in place with respect to the animals that we are in possession of, have care and control of. Please see attached protocol.

The facts are the sheep and lambs, in the case before us, were in the early steps of our protocol.

The facts are we were in possession and control of the animals, whereby we were following all steps of protocol.

Ontario Stockyards Inc. is not a tagging station for negligent producers and we do not have the financial resources to retain an employee to check only for tags.

...

The objective of this whole program is to have all animals tagged and registered to the proper owners before being sold.

In this case, the animals were never sold without a tag and, whether or not the missing tags were discovered through our protocol, or by an inspector, should not be an excuse for a fine. The animals were tagged, the tags were registered to the proper owner, and this is the assurance that our system worked well in this case and many others that have been tagged and registered to the proper owner through our protocol.”

[23] Small told the Tribunal that there was no reason to think that Ontario Stockyards' protocol would not have picked up the animals with missing tags as they moved through the system for sale on Monday, October 19, 2009. The protocol ensures that sheep coming through the establishment are checked for CSIP-approved tags by employees and, as Von Lipa's sheep were at the start of the protocol system, the protocol system in place at Ontario Stockyards would have picked up these untagged animals.

[24] Small testified that the Von Lipa sheep arrived at Ontario Stockyards in the evening of Sunday, October 18, 2009 during the night shift of Ontario Stockyards employee Jack Collins. Small told the Tribunal that Ontario Stockyards sold 1390 head of sheep at the sale on Monday, October 19, 2009. Of those sheep, 17 head were found to be untagged prior to sale and then, once tagged, were sold. Those 17 untagged sheep originated from five delinquent producers. Of the 17 untagged lambs found, 11 were found by the Agency and six were found through the action of the Ontario Stockyards' protocol. Six of the 17 were the sheep in question in this case, owned by Von Lipa. Small also provided data from Ontario Stockyards reporting system to show that since December 5, 2008, the facility has kept detailed records to show how their protocol pick-up sheep missing tags, the number of tags installed and the number of delinquent producers (see Ontario Stockyards Additional Submissions for CART/CRAC-1533, pages 6 and 7). In all, between December 5, 2008 and December 4, 2009, Ontario Stockyards was able to identify and tag 403 untagged sheep belonging to 128 delinquent producers.

[25] Small explained to the Tribunal that the Ontario Stockyards protocol provides several points at which auction market personnel take steps to verify the presence of CSIP-approved tags in animals delivered for sale to the auction market. Reference to the protocol itself (see Ontario Stockyards Additional Submissions) indicates that there are six such points: (1) when the sheep are unloaded from their delivery truck onto Ontario Stockyards docks and through the gate leaving the unloading dock to large holding pens; (2) when large lots of sheep are let out into the alley to sort; (3) during grading, as the sheep move up the line in their order of arrival; (4) after the final sort, as alley staff move the stock along to the sales ring; (5) as the sheep enter the auction ring; and (6) after being sold, when the sheep are yarded in the buyer's pen. If, at any point throughout the process, a sheep is found without a tag, the animal is held until the owner is identified, a tag purchased from the CCWG, the CSIP-approved tag number recorded in the CCIA database, the tag installed and the animal then sold. The producer is charged for the tag and is also charged a tagging fee.



[26] Small testified, however, that verifying the presence of CSIP-approved tags is not easy. Coming off the trucks, sheep come out quickly and this location is probably the most difficult to check for tags, as the gate people are completing a head count as well as compiling a record of the lot, including name of owner and manifest number, and entering this information into a computer. As the sheep are moved through the facility in large lots, and sometimes one of these lots can have as many as 400 sheep, it is impossible to check for tags until the lots are broken down into smaller lots and that is where Ontario Stockyards' emphasis for verifying tags occurs. Small also testified that there are 10 to 15 different kinds of tags in the industry and only one metal tag is an approved tag. Moreover, as an approved tag gets older it loses its distinctive colour. The job of verifying the existence of an approved tag becomes one of looking for one tag among many possible tags that sheep may bear and doing this while many other things are being accomplished. Small concluded by saying that, only when the animals are in smaller lots, when staff are in the pens with the animals, can the protocol really kick in, but the protocol works, because all tagging is getting done before the sheep enter the sales ring and change ownership.

[27] During cross-examination, Small told the Tribunal that it even if there had been a discovery of missing CSIP-approved tags at unloading at Ontario Stockyards, it would have been impractical to send the sheep back to Von Lippa's farm as it was about 60 miles away. When asked if the Von Lippa load was dropped off with other animals, Small answered that he doubted that they would have been, but he reiterated that when animals are dropped off, the most important thing is to count the animals.

[28] Ontario Stockyards' second witness was Hadaway, an employee of Ontario Stockyards. Hadaway told the Tribunal that it was not really possible to check tags at unloading and complete the manifest as required to record the intake of animals as they come off the truck at Ontario Stockyards. Furthermore, Hadaway testified that, if they find a sheep or lamb without an approved tag, Ontario Stockyards personnel can only tag it "immediately" if the place they get the tags from is open. The CCWG is open only during regular business hours, [the implication being that CCWG is not open on weekends or in the early morning which is when the Von Lippa sheep arrived at the facility].

[29] In cross-examination, Hadaway testified that his role at Ontario Stockyards was yard man, head of maintenance, shipping and receiving, inspector for the welfare of animals, humane transport and handling. He told the Tribunal that every load is received into a 12 foot by 40 foot chute where finding time to check for tags is difficult. After the first unloading, Ontario Stockyards personnel assign a manifest number and move the animals into the next pen. Sheep are often marked with paint by truckers to keep a record of animal ownership, but the process from unloading to penning is a constant non-stop flow with no time to inspect for tags. Hadaway told the Tribunal that on the sale day of Monday, October 19, 2009, he was working as a handler and arrived at Ontario Stockyards at 7:30. Hadaway testified that between 7:30 and 11:00, he did not feed the Von Lippa sheep, but that he might have walked up the H alley for some other purpose that morning. He also said that if any untagged sheep have been identified by the trucker or Ontario Stockyards personnel, there is the notation NET [needs ear tag] put on the pen card, but at the point when the animals were being held in H5, no one had noticed any missing tags. In response to the question from Agency counsel as to when the CCWG opened in the morning for business, Hadaway answered "about 9:30".

[30] On re-direct examination, Hadaway told the Tribunal that you cannot really check for tags while walking down an alley but rather you really have to be in the pen and have to grab the ear of the sheep and physically look at the ear. As the lots of sheep get smaller during sorting, that is when you are up close and physical enough to see the tags. Hadaway testified this is the process that happens at Ontario Stockyards as the sheep get closer to the sales ring and when the untagged sheep are found they are set aside and immediately tagged, after tags have been obtained and registered to the proper owner and only then are the animals allowed to go into the auction ring to be sold.

[31] Ontario Stockyards' final witness was Almeida, an employee of Ontario Stockyards for the past 17 years. He explained to the Tribunal that he must check five unloading chutes as animals come into Ontario Stockyards and that it is hard to check for tags at unloading, even for lots of two animals, as you might be too busy. Almeida testified that the ear tags are not easy to see, and in order to check he would have to grab an ear and check for the maple leaf, as a government tag (CSIP-approved tag) could be confused with an industry tag. It is easier to check for tags in the pens, rather than in the alleys as you pretty well have to walk among the animals to check them for tags and this can only really happen in the pens. Almeida testified that when he finds untagged animals, he then tags them, or if the owner is around, the owner retags the animal.

[32] In cross-examination, Almeida explained that he was on duty at unloading on Monday, October 19, 2009, but not on Sunday, October 18, 2009. He told the Tribunal that the Von Lippa animals were dropped off sometime during the night shift between 18:00 Sunday and 6:00 Monday and that many lots of sheep come in during this Sunday night shift for the sale on Monday morning. When asked what time the CCWG opened for business, Almeida said that he didn't really know but figured they were open after 9:00 on business days.

### **Analysis and Applicable Law**

[33] 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.*

[34] 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;*

[35] 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,*

[36] 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 184(1) of the *Health of Animals Regulations*.

[37] The Act's system of monetary penalties (AMP), as set out by Parliament is, however, 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.*

[38] 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.*

[39] 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.*

[40] Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities. If one looks at Notice of Violation #0910ON050002, dated November 10, 2009 that is the basis of this case, it alleges that, on the 19<sup>th</sup> day of October 2009 at Cookstown, in the province of Ontario, Ontario Stockyards

“committed a violation, namely: Fail to apply a new approved tag to an animal that has lost its approved tag or that does not bear an approved tag contrary to section 184.(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*.”

[41] On a first reading of this allegation, it would appear from the evidence presented, and which is not in dispute, that Ontario Stockyards did apply an approved tag to each of the six Von Lipa sheep that were found prior to their sale at Ontario Stockyards to be without a CSIP-approved tag. The evidence given by witnesses for Ontario Stockyards consistently bore out the fact that the facility took its responsibility of tagging untagged animals very seriously, so much so that it had set up a detailed "Sheep and Lamb Ear Tag Protocol" which was being applied by Ontario Stockyards personnel. However, as the evidence bore out, Ontario Stockyards personnel are moving thousands of animals through their facility each year with each sale day often requiring the moving of over a thousand animals in from producers and out to new purchasers or slaughter houses. At any point of the process, Ontario Stockyards personnel appear to be doing many things at the same time to meet business, regulatory and safety requirements, including verifying that animals bear approved tags.

[42] In this case, counsel for the Agency suggests that Ontario Stockyards' tagging of the six Von Lipa sheep that were found prior to their sale at Ontario Stockyards without a CSIP-approved tag is not enough to exonerate them from a violation of subsection 184(1) of the *Health of Animals Regulations*. Counsel suggested that the legislation requires that the Agency must establish the following elements to prove that Ontario Stockyards violated subsection 184(1):

1. that the animal in question did not bear an approved tag;
2. that the person alleged to have committed the violation, owns or has the possession, care or control of the animal; and
3. that the person failed to immediately apply a new approved tag to the animal that did not bear an approved tag.

[43] Concerning element 1 above, the parties are in agreement that before Roberts found the six sheep owned by Von Lipa in Ontario Stockyards' pen H5 on October 19, 2009 at 10:15, they did not bear CSIP-approved tags. To say, however, that the animals in question were never tagged, or never would have been tagged, by Ontario Stockyards with CSIP-approved tags is not accurate. Evidence showed that, as part of their normal operations, Ontario Stockyards had tagged animals not bearing CSIP-approved tags whenever their employees or CFIA inspectors discovered such animals. In fact, the six sheep in this case were tagged by Ontario Stockyards staff, after Roberts pointed out that they were missing such tags and after Ontario Stockyards staff completed the necessary steps to determine who owned the sheep, secured CSIP-approved tags on the owner's account and then tagged the animals prior to their entry into Ontario Stockyards' sale ring to be sold to new owners. However as to the issue of whether the animals were at some point in time in Ontario Stockyards facilities without CSIP-approved tags, it is not contested, and the Tribunal finds as a fact, that prior to Robert's investigation, the six sheep in question did not bear CSIP-approved tags.

[44] The parties are in agreement that element 2 above – that the six sheep in question were in the possession of or care and control of Ontario Stockyards – has been proved on the balance of probabilities.

[45] Moreover, the agreement between the parties with respect to the proving of element 2 above is in keeping with the determination by the Federal Court of Appeal decision of *Canada (Attorney General) v. Denfield Livestock Sales Limited* 2010 FCA 36 and three of the Tribunal's own decisions, *Volailles Grenville Inc. v. Canadian Food Inspection Agency* RTA 60277 (2007), *Sure Fresh Foods Inc. v. Canada (CFIA)*, 2010 CART 016 and *9020-2516 Québec inc. v. Canada (CFIA)*, 2011 CART 007.

[46] It is with respect to the proving of element 3 – that the person failed to immediately apply a new approved tag to the animal that did not bear an approved tag – that the parties differ on their evidence, argument and interpretation of the law, and consequently, on the appropriate outcome of this case. Uncontested evidence from employees of the Ontario Stockyards establishes the arrival of the Von Lippa sheep (consisting of six untagged and one tagged sheep) at Ontario Stockyards at the earliest at 18:00 on Sunday, October 18 and at the latest at 6:00 on Monday, October 19. It is also not in debate that Roberts of the Agency found these six sheep lacking CSIP-approved tags amongst the group of seven in pen H5 at 10:15, which was about a half an hour after she started her inspection of animals at Ontario Stockyards. From the evidence, the parties agree that the sheep were located in a pen that was still far away from the sales ring. Small's evidence was that the sheep were therefore just at the beginning of the protocol process that was successfully being used by Ontario Stockyards for approved tag verification and, where necessary, approved tag replacement. The parties agree that when the untagged sheep were discovered Almeida of Ontario Stockyards attended the offices of the CCWG, which were by then open for business after having been closed on the weekend, to secure six CSIP-approved tags which were sold and registered to the owner Von Lippa. By around 11:00 on Monday, October 19, 2009, Ontario Stockyards personnel had tagged the six sheep held in pen H5. Finally, evidence shows that the lot of six sheep that were held back for tagging were then sold. At 15:54, Roberts recorded that she received a copy of the sales invoice for these animals from employees of Ontario Stockyards. The question that remains for the Tribunal to determine, in sifting through the evidence presented, is whether the evidence supports a finding that Ontario Stockyards "failed to immediately apply a new approved tag to an animal that did not bear an approved tag".

[47] What does the word "immediately" mean in the context of the present case? Counsel for the Agency has urged the Tribunal to consider and adopt, for the interpretation of subsection 184(1) of the *Health of Animals Regulations*, the meaning of "immediately" found in the *Canadian Oxford Dictionary* (2<sup>nd</sup> edition): "(1) instantly, without pause or delay (*answered the phone immediately*). (2) without intermediary; in direct connection or relation (*who is immediately responsible?*). (3) with no object, distance, time, etc. intervening (*the door immediately in front of you; the years immediately following the war*)."

[48] The third meaning above and the example phrases offered to illustrate that meaning – “with no object, distance, time, etc. intervening (*the door immediately in front of you; the years immediately following the war*).” – indicates that “immediately” may be properly used to describe situations and events separated by seconds – “*the door immediately in front of you*” and by those separated by several years – “*the years immediately following the war*”. Assuredly, “immediately” might be meant to describe situations and events separated by a time frame between seconds and years, as required by the context of those situations or events. What did the legislators intend the word “immediately” to mean in the context of subsection 184(1) of the *Health of Animals Regulations*?

[49] The mischief that subsection 184(1) of the *Health of Animals Regulations* seems designed to prevent – allowing for no responsibility to fall on intermediaries to take steps to tag or retag animals coming into their possession, care and control that do not have tags rather than requiring that they act quickly to preserve animal identity – cannot become so onerous and “instantaneous” that it displaces every and all other priorities and operational realities of the businesses that it is designed to regulate. 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 both producers and their truckers, and buyers and their truckers as well as manage its own human resources, protocols and processes. However among these tasks, subsection 184(1) also imposes a clear responsibility on intermediaries to act expeditiously to preserve the identity of the animals not bearing approved identification.

[50] At the very least and given the evidence, to attribute the meaning of “instantly” to a person’s failure “to immediately apply a new approved tag to the animal that did not bear an approved tag” would place Ontario Stockyards in the impossible position of not being able to comply with the legislative requirement of subsection 184(1) because the untagged sheep arrived at the facility while the only approved tagging sales site – the CCWG – was closed and would not reopen until around 9:00 the next day. To attribute a meaning to the word “immediately” which would put the alleged violator in a position where he or she could not comply could not have been the intention of the legislator. Therefore, to require that Ontario Stockyards tag untagged animals before the required tags could be retrieved would be an absurd meaning of “immediately”.

[51] The evidence of Ontario Stockyards, both in written and oral form, was consistent in setting out how Ontario Stockyards had set up a detailed system, its “Sheep & Lamb Ear Tag Protocol”, which was designed to identify and provide for the tagging of any untagged sheep and lambs coming through their facility. The written and oral evidence from Small, Hadaway and Almeida did not show that the protocol was ignored, or that it failed to pick-up missing tags. Quite the contrary, the system worked (see evidence of annual record of untagged sheep found due to use of protocol at pages 6 and 7 of Ontario Stockyards Additional Submissions to CART/CRAC-1533) and it worked progressively as well as quickly, particularly on sale days, as the sheep got closer and closer to the auction ring where they could be seen more closely, as Ontario Stockyards personnel was walking and working among the animals in very close proximity to them. In the present case, there is no evidence that the protocol was not in force, was not working and would not have worked, except that at 10:15 there was an event – the inspection by Roberts of pen H5 – that was superimposed on the normal working of the Ontario Stockyards protocol.

[52] The protocol was the instrument that Ontario Stockyards developed in good faith to comply with its responsibility under subsection 184(1) of the *Health of Animals Regulations*. While there is much debate as to the relevance and weight to be accorded to the Decision circulated by Farenhorst in March 2011 to this case, that Decision is at least evidence that confusion existed as to the meaning and application of subsection 184(1) of the *Health of Animals Regulations* by the Agency and that auction markets were in a dialogue with government agencies as to how they could comply. The evidence in this case was that Ontario Stockyards was diligently attempting to understand and meet its obligations proactively, even before the March 2011 decision.

[53] The facts in this case point to an auction market which had a process in place with no less than six verification points to find missing tags. By all accounts, Ontario Stockyards was a busy place on Sunday, October 18 and Monday, October 19, 2009. Over 1300 sheep came into and left the premises over those 24 to 48 hours. A very small number of those animals were found to be untagged, with some of them found by Ontario Stockyards personnel and others by the Agency’s Roberts. However, the identity of each one of these animals was re-established and preserved by Ontario Stockyards, meeting the objective of Part XV of the *Health of Animals Regulations*, as they were all tagged before being sold on Monday, October 19, 2009.



[54] It is important to keep in focus the objective of Part XV of the *Health of Animals Regulations*. The Agency, in its Report, at page 5, states as follows:

*This Statute and Regulations, among other things, regulates the identification of “animals” in Canada. “Animals” as defined by the Regulations means a bison, a bovine and an ovine. Part XV, Animal Identification, of the Regulations requires that all “animals” in Canada bear a unique approved identification tag upon leaving their farm of origin. The animal identification provisions of Part XV enable the CFIA to trace the origin and movements of individual animals when serious animal disease or food safety issues are discovered and require urgent corrective action, follow-up and trace back. Application of approved tags greatly enhances the ability of the CFIA to rapidly respond to and deal with serious animal disease and food safety issues identified in “animals” that have been moved through the marketing system. Approved identification tags allow trace back of the animals [sic] movements from both the place where the problem is found, such as at an abattoir, as well as from the farm where the animal originated. This greatly improves the likelihood that an identified problem can be dealt with effectively and rapidly.*

[55] Ontario Stockyards actions and procedures allowed it to meet the objectives of the *Health of Animals Regulations*, as each of the untagged animals discovered there that day, entered the sales ring of Ontario Stockyards with its identity recorded in the CCIA approved database for animal traceability, as established by Part XV of the *Health of Animals Regulations*. In a period of less than 24 hours from their delivery, and within approximately two hours of the opening of the CCWG, which was the entity that controlled the issuance of CSIP-approved tags to producers, or as was required in this case, to the auction mart on the producer's behalf, the untagged Von Lippa sheep were tagged, sold and thereafter traceable as to their origin. The evidence in this case points to a cooperative entity which is mindful of the required system of compliance under the *Health of Animals Regulations* and, despite its sometimes onerous responsibilities, takes those responsibilities in stride with its commercial imperatives to “immediately” apply approved tags when it discovers that they are missing. The fact that an Agency inspector found the untagged sheep first should not be determinative in concluding that the protocol in place at the facility would not have yielded the same result. The evidence shows, in fact, that some untagged sheep were found that same day by Ontario Stockyards that were not found by the Agency inspector. “Immediately” in the present case must be understood to mean the series of events that transpired over the relatively short period of time from when animals were delivered to when they were sold. This short period of “immediacy” was governed by a written protocol, developed in good faith and carried out systematically with tangible positive results, which would, less than two years later, be reflected in what appears to be an Agency policy decision that was introduced as evidence in this case.

[56] Therefore, it is important once again to reflect on the application of the words of the Federal Court of Appeal in *Doyon* at paragraphs 27 and 28 to the present case as cited above at paragraph 37 above. While the defences available to an alleged violator are very limited under the AMPs regime and none appear to apply in this case, the Tribunal as decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation, including the reasonable meaning, the intention of the legislator and the mischief to be prevented in determining if this alleged violator failed to “immediately” apply the tag to the untagged animals that had been identified. The Tribunal finds that in the operational context of an auction market, the actions of Ontario Stockyard in applying CSIP-approved tags to the six untagged Von Lippa sheep meet the statutory requirement of “immediately” under subsection 184(1) of the *Health of Animals Regulations*.

[57] In conclusion, the Tribunal finds that, given the evidence presented by the Agency and by Ontario Stockyards, the Agency has failed, on a balance of probabilities, to prove element 3 of the alleged violation and has not therefore made all of the essential elements of the case. In conclusion, the Tribunal finds that Ontario Stockyards did not commit the alleged violation and is not liable for payment of the monetary penalty.

Dated at Ottawa, this 29<sup>th</sup> day of July, 2011.

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Dr. Donald Buckingham, Chairperson