

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Ontario Stockyards Inc. v. Canada (CFIA), 2011 CART 011

Date: 20110729
Docket: CART/CRAC-1511

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 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 this decision is served.

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), in the early afternoon of March 9, 2009, at Cookstown, Ontario, failed to tag one or more untagged sheep 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 “in transit” or 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 #0910ON340402, dated June 3, 2009, alleges that, on the 9th day of March 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 June 13, 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 June 15, 2009, which was received by fax by the Tribunal that same day, 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 June 29, 2009, the Agency provided to Ontario Stockyards and to the Tribunal its Agency report (Report) concerning the Notice of Violation, with the Tribunal receiving its copy of the Report on June 30, 2009.

[9] In a letter dated June 30, 2009, the Tribunal invited Ontario Stockyards to file with it any additional submissions (Additional Submissions) in this matter, no later than July 30, 2009. By letter dated July 20, 2009, which was received by the Tribunal on July 27, 2009, Ontario Stockyards provided to the Tribunal its Additional Submissions, which contained among other things a declaration dated July 16, 2009 from a Mr. Glen Paisley. With the permission of the Tribunal, the Agency filed a response to Ontario Stockyards Additional Submissions, including a document entitled "Ontario Stockyards Inc. In Transit Fees" (Agency Response), which was received by fax by the Tribunal on August 17, 2009.

[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, in the province of Ontario, on April 5, 2011, with Ontario Stockyards represented by its President, Wayne Small (Small), and the Agency represented by its legal counsel, Kathryn Lipic.

Evidence

[12] The evidence before the Tribunal in this case consists of written submissions from the Agency (specifically, the Notice of Violation, its Report and the Agency Response including the document entitled “Ontario Stockyards Inc. In Transit Fees”) and from Ontario Stockyards (specifically, its request for review and its Additional Submissions including the statement of Mr. Paisley). As well, both parties presented witnesses who tendered evidence at the hearing on April 5, 2011. The Agency presented Ashley Roberts (née) Lalonde (Roberts) while Ontario Stockyards called Wayne Small (Small) and Manuel Almeida (Almeida). During the hearing, the parties tendered three exhibits for consideration by the Tribunal: (1) an enlargement of the photograph at Tab 2.3 of the Report, showing the untagged sheep; (2) an enlargement of the photograph at Tab 2.8 of the Report, showing the pen card; and (3) two email communication strings from Wideman, Jim (OMAFRA) dated April 4, 2011 to info@ontariostockyards.on.ca.

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

- 17 sheep were sold by their owner Jamie Welch (Welch) to Lloyd Dickson (Dickson) in early March 2009 and were later resold by Dickson via Neil Woodrow (Woodrow) a few days later. The handling of these sheep from Welch to Dickson to Woodrow to third party buyers was somewhat convoluted but the parties agreed that it occurred as follows:
 - Dickson agreed to purchase sheep from Welch and for third parties to transport the sheep from the Welch farm.
 - Dickson’s brother picked up the sheep on Tuesday, March 3, 2009 from the Welch farm and delivered them to Hoard Station from where Glen Paisley then delivered the sheep to Ontario Stockyards, unloading them there either the same day or at the latest on the next day, March 4, 2009.
 - The sheep were held at Ontario Stockyards from that time until Monday, March 9, 2009 awaiting further directions from the owner as to what was to be done with the sheep.
 - On March 9, 2009, the 17 sheep were sold while they were at the Ontario Stockyards, apparently from Dickson to Woodrow to third parties (Tab 4 of the Report – Sales Invoice showing Woodrow as seller of 17 sheep; and Robert’s evidence, which was not challenged by Ontario Stockyards, that Woodrow completed the transaction for expediency purposes, acting as intermediary between Dickson and third parties, with Woodrow then providing a personal cheque to Dickson for the 17 sheep sold).

- Prior to their arrival at the Ontario Stockyards on March 3 or 4, 2009, none of the sheep bore Canadian Sheep Identification Program (CSIP) tags which are of the nature that meet the requirements of the *Health of Animals Regulations*.
- On March 9, 2009, CFIA Inspector Roberts discovered, during a routine inspection of animals at Ontario Stockyards, that the 17 sheep in question, then in holding pen D17, did not bear 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 inquired of Woodrow as to the ownership of the sheep and why they did not bear approved tags, then attended the offices of the Canadian Co-operative Wool Growers Limited (CCWG), which has an office on the premises of Ontario Stockyards, to secure 17 CSIP-approved tags. The purchase of these tags was charged to Dickson's account (Tab 3 of Report). Almeida then proceeded to tag all 17 of the untagged sheep in their holding pen.
- Soon thereafter, the 17 sheep were then permitted by Roberts to be sold and were subsequently released from Ontario Stockyards to their new owners.

[14] The contested evidence in this matter related to whether Ontario Stockyards had sufficient care and control of the 17 sheep during the period of March 3/4 to March 9, 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.

[15] 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 that she arrived at Ontario Stockyards on Monday, March 9 at 11:50 and at 12:57 she found 17 untagged sheep in Ontario Stockyards pen D17, which is a pen without watering facilities near the front of the auction market in fairly close proximity to the sales ring. She told the Tribunal that the pen card was white in colour, (and had no markings on it that the animals contained therein were "in transit" as usually this would have been conveyed by the pen card being blue), with the lot number and day of arrival of the animals (see Robert's photo of pen card D17 at Tab 2.8 of Report).

[16] Roberts further testified that as soon as she noticed the sheep were untagged she talked to Almeida. Almeida told her that he did not know the sheep were untagged but that he would talk to Woodrow. She told the Tribunal that once Almeida had talked to Woodrow, he went to tell Al DeGasparro of the CCWG about the sheep so he could get tags for them. Al DeGasparro got contact information from Ingrid Botting, an employee of Ontario Stockyards concerning ownership of the sheep. Almeida was given CSIP-approved tags and he then returned to the pen and tagged the animals with the tags (see Robert's notes at Tab 1 of Agency Report).

[17] During cross-examination, Roberts told the Tribunal that no one at Ontario Stockyards disagreed with her that the 17 sheep were untagged and that she was familiar with the Ontario Stockyards' grading and processing system for lambs. She also told the Tribunal, in response to Ontario Stockyard's question, that she was aware that the sheep had not yet made it through the Ontario Stockyards protocol system. She responded "yes" to Ontario Stockyards' suggestion that several parties had handled the lambs without approved tags but that it was Ontario Stockyards that tagged the animals before they were sold at the Ontario Stockyards premises on March 9, 2009.

[18] Ontario Stockyards' first witness was Small, the President of Ontario Stockyards. He told the Tribunal that Ontario Stockyards has developed a protocol for sheep held at their establishment (see Ontario Stockyards Additional Submission document entitled "Sheep & Lamb Ear Tag Protocol"). Once the establishment has been retained to sell an animal, Ontario Stockyards is of the view that that protocol comes into play as consideration has passed and the establishment is therefore in care and control of the animals. The protocol includes ensuring that CSIP-approved tags are in place. Small told the Tribunal that Ontario Stockyards, as a service to producers and shippers and for a fee (see Agency Response for Ontario Stockyards "in transit" fee schedule), allows sheep to be unloaded at the establishment as "in transit" animals. These animals will either be reloaded for direct shipment to a slaughter house or auction market or will be rerouted to another transportation company or producer. Small explained to the Tribunal that, in the case of "in transit" animals, Ontario Stockyards accepts no responsibility for the animals, has no authority over them and has no control over them other than to receive instructions as to their ultimate destination and to give them feed and water. In the case of "in transit" animals, the Ontario Stockyards "Sheep & Lamb Ear Tag Protocol" specifically states that "Ontario Stockyards Inc. accepts no responsibility for missing tags in in-transit stock." (see Ontario Stockyards Additional Submission document entitled "Sheep & Lamb Ear Tag Protocol"). Before reviewing Small's evidence on the issue of whether the sheep were "in transit", the Tribunal notes that when Ontario Stockyards provided to the Tribunal its Additional Submissions, which contained among other things a declaration dated July 16, 2009 from a Mr. Glen Paisley, Mr. Paisley explicitly stated that "On March 3rd, 2009 I delivered 17 sheep for Lloyd Dickson to the Ontario Stockyards inc. at Cookstown. I left instructions with O.S.I. staff to book the sheep in-transit to Neil Woodrow."

[19] Small testified that the 17 sheep in question were “in transit”, and it was only at the moment that Ontario Stockyards was advised that the sheep were to be sold through the establishment, that Ontario Stockyards came into the care and control of the sheep. The sheep were discovered by Inspector Roberts before they completed the protocol process and so had not been examined for tags. Once they entered the sale process and were discovered to be without tags, they were tagged and never left the establishment without CSIP-approved tags (see Ontario Stockyards Additional Submission covering letter of July 20, 2009).

[20] During cross-examination, Small told the Tribunal that he has been the President of Ontario Stockyards for the past 17 years and that he was President when the animal identification part of the *Health of Animals Regulations* came into force. He told the Tribunal that Ontario Stockyards staff are present 24 hours a day, seven days a week and are present for the unloading of “in transit” as well as “sale” animals, that inside animal handlers are present at the establishment from 6:00 to 9:00 am every morning, that all animals are kept in pens, that some pens have watering facilities and other do not and that all of his staff are instructed to look for CSIP-approved tags. Small further testified that the pen card on the pen that held the 17 sheep on March 9, 2009 was white. However, he added that sometimes “in transit” animals are in pens that have white cards with manifest numbers rather than blue cards and that, at any rate, the sheep would have been in a different pen when they had arrived on Wednesday, March 4, 2009 and would have only been transferred to pen D17 once Ontario Stockyards had received instructions to sell the sheep, as pen D17 is a sorting pen near the start of the sorting process. Finally, Small told the Tribunal that, if animals are only “in transit”, then the establishment’s schedule of fees applies but that if, later, instructions are received for the sale of the “in transit” animals, the “in transit” fees are waived and a sales commission is charged instead. Small explained that during the sale of March 9, 2009, 1838 sheep and lambs were sold at Ontario Stockyards and only 19 of those were found not to have CSIP-approved tags, 17 by virtue of Robert’s inspection and 2 by virtue of Ontario Stockyards employees implementing the establishment’s protocol. In 2009, Ontario Stockyards sold 92,609 sheep and lambs and 403 missing tags were caught by virtue of Ontario Stockyards employees implementing the establishment’s protocol, with 128 delinquent producers responsible for the missing tags.

[21] Ontario Stockyards’ final witness was Almeida, a livestock receiver, sorter, handler and employee of Ontario Stockyards for the past 17 years. He explained to the Tribunal that sheep are collected in larger pens at the beginning, in pens like D3, and then moved up to smaller pens like D17. It becomes easier to find tags on sheep as they are moved closer to the sales ring as the sheep are in smaller groups. Almeida testified that he tags sheep when the CFIA inspector tells him to and when he finds one without a tag. If the lamb needs a tag, then they are put off to one side, tagged and then put into the ring for sale. In the case of animals moved into pen D17, he would check for tags and if they were untagged he would put the tags in just before they go into the sales ring.

[22] In cross-examination, Almeida explained that when animals are received it is difficult to check for tags. In the case of the particular 17 sheep in question, Almeida was not present when they were unloaded, nor for the feeding of these animals between March 4 and 9, 2009, as the first time he saw the 17 sheep was when Roberts told him to get tags for these untagged animals, which he did and which he applied to the 17 sheep before they were taken to the sales ring to be sold.

[23] In re-examination, Almeida told the Tribunal that the vast majority of missing CSIP-approved tags that are applied by Ontario Stockyards are ones that are discovered by virtue of the use and implementation of the Ontario Stockyards protocol rather than ones discovered by CFIA inspectors.

Analysis and Applicable Law

[24] 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.

[25] 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;

[26] 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,

[27] 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*.

[28] 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.

[29] 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.

[30] 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.*

[31] Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities. If one looks at Notice of Violation #0910ON340402, dated June 3, 2009 that is the basis of this case, it alleges that, on the 9th day of March 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*.”

[32] 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 17 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 for animals once they had entered the “sales” stream of Ontario Stockyards activities. The evidence shows that 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.

[33] In this case, counsel for the Agency suggests that Ontario Stockyards’ tagging of the 17 sheep, sheep which had been at Ontario Stockyards for a number of days and then tagged just prior to their sale and at the behest of the Agency’s Roberts, is not enough to exonerate Ontario Stockyards 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.

[34] Concerning element 1 above, the parties are in agreement that before Inspector Roberts found the 17 sheep in question in Ontario Stockyards' pen D17 on March 9, 2009 at 12:57, 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 17 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 17 sheep in question did not bear CSIP-approved tags.

[35] The Tribunal also finds that the Agency has proved, on the balance of probabilities, element 2 — that Ontario Stockyards had care and control of the 17 sheep which Roberts discovered did not bear CSIP-approved tags. The Tribunal is guided in this determination by the Federal Court of Appeal decision of *Canada (Attorney General) v. Denfield Livestock Sales Limited* 2010 FCA 36 and three of its 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.

[36] The Court in *Denfield* held that an auction mart exercised sufficient power and control over the movement of an animal so as to cause the movement of an animal for the purposes of section 176 of the *Health of Animals Regulations* (paragraphs 18, 29, and 31). In that case, the Court held that, even though the auction mart did not own the animals, it had control of them during their time at the auction mart, such that the auction mart would become one of the responsible parties for ensuring compliance with Part XV – Animal Identification of the *Health of Animals Regulations*.

[37] The Tribunal, in several cases, has had to consider whether players further down the agri-food chain are able to exercise care and control of animals when they are neither the owners nor truckers of those animals. In *Volailles*, the Tribunal found that the slaughter house in that case “had no control or influence over the manner in which the birds were caged, loaded into the truck or transported. The Applicant had no control over the actions of the transporter” (paragraph 19). As a result, the Tribunal dismissed the Notice of Violation against the slaughter house.

[38] However, in *Sure Fresh*, the Tribunal's finding on this point is set out at paragraph 34:

[34] The Tribunal finds that there is sufficient evidence to determine that Sure Fresh did have sufficient control and influence to "transport or cause to be transported" the chickens on load C150, even though it did so only at the end of the voyage of the chickens. The Health of Animals Act and Regulations provide rules for the humane transport of animals. To this end, the rules that provide for the safe "transport" of an animal must encompass the activities involving the movement of animals which will, unless special circumstances exist, include the loading, moving in the transporting vehicle, and unloading of an animal. With such an expansive definition of "transport or cause to be transported" a number of parties -- producers, transporters and even auction marts and slaughter houses -- can conceivably "transport or cause the transport of an animal".

[39] In 9020-2516 *Québec inc.*, the Tribunal found, as it did in *Sure Fresh*, that there was sufficient evidence to determine that the slaughter house did have control and influence to "transport or cause to be transported" of Cornish hens, even though it did so only at the end of the voyage of the chickens by actively choosing to slaughter the fragile Cornish hens at the end of the day rather than checking them when they came into the slaughter house, assessing their condition and then, because of their fragile state, move them up in the slaughtering sequence of that day to prevent any further suffering of the birds.

[40] Counsel for the Agency urged the Tribunal to find that Ontario Stockyards owned, possessed, or had care and control of the 17 sheep in question while they were on the premises of Ontario Stockyards.

[41] The Tribunal is not convinced, based on the evidence presented, that Ontario Stockyards ever owned the sheep. However, the Tribunal finds that the Agency has met the burden of proving, on the balance of probabilities, that Ontario Stockyards either possessed or had care and control of the sheep. “Possession” does not require ownership of a good but rather some degree of control over the item and it being in close proximity to the possessor. Nor does “control” of an item require ownership of it, but only the ability to monitor its location and direct its movement. “Care”, particularly for an animal, would include feeding and watering that animal. The evidence is clear that Ontario Stockyards received the 17 sheep that are the subject of this case at the latest on Wednesday, March 4, 2009. There is conflicting evidence as to whether these animals were received as “in transit” animals or as “sale” animals, but it is clear that at some point before their sale on Monday, March 9, 2009 at Ontario Stockyards, they became “sale” animals. By Ontario Stockyards’ own protocol, the animals, once they become “sale” animals, are possessed by, and are under the care and control of, Ontario Stockyards. As such, Ontario Stockyards, even by its own admission, was at some point between March 3/4 and 9, 2009 subject to the requirements of subsection 184(1) of the *Health of Animals Regulations*. Counsel for the Agency has argued that Ontario Stockyards exercised care and control over the animals long before their sale on March 9, 2009. The animals were delivered to Ontario Stockyards at least by March 4, 2009 and between then and March 9, 2009, they were cared for with food and water, they were moved from the receiving dock to various holding pens, and, whether or not the sheep were “in transit” or “sale” animals, the actions of the Ontario Stockyards towards the 17 sheep indicates to the satisfaction of the Tribunal that the auction market had care and control of the animals, if not possession of them, during this five day period. Element 2 has been therefore established by the Agency on the balance of probabilities.

[42] 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. From the evidence, it is clear that Ontario Stockyards received the 17 sheep onto their premises at least on Wednesday, March 4, 2009. These animals were sold at Ontario Stockyards five days later. During those five days Ontario Stockyards personnel fed and watered the animals and moved them around the facility. Small’s evidence was that Ontario Stockyards practice and protocol was not to take responsibility for “in transit” animals and he clearly considered these animals “in transit” until the moment the order came to sell them on sale day, Monday, March 9, 2009. Then around 12:57 on the sale day, Roberts found the 17 sheep without CSIP-approved tags and they were held back for tagging by employees of Ontario Stockyards and then the sheep were sold. 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”.

[43] 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* (2nd 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*).”

[44] 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*?

[45] 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 and instead requiring that they act quickly to preserve animal identity – cannot become so onerous and “instantaneous” that it displaces every and all other priorities and commercial 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, 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 184(1) makes intermediaries responsible to act expeditiously to preserve the identity of the animals without proper identification.

[46] In this case, the responsibility of Ontario Stockyards to “immediately” tag untagged animals must be seen not as an abstract definition but as a functional one in the operational context of a working auction market. It would be naive and unreasonable in such a context to expect the word “immediately” to mean that Ontario Stockyards had to act instantly, and without any other focus, to attend to the requirement of verifying if all animals entering their premises from several trucks through several chutes, often in large groups of fast-moving animals bearing a variety of ear tags, each individually bore an approved tag. Of course, it would be equally naive and unreasonable in such a context to expect the word “immediately” to be given a drawn out temporal meaning, so as to permit Ontario Stockyards as long as five days to verify that sheep being fed and watered daily and moved around, often by different employees in the facility, did or did not bear approved tags. Moreover, whether Ontario Stockyards believed it was under no obligation to check for tags because it believed the sheep were “in transit” is immaterial to the meaning to be attributed to the word “immediately” and, as set out below, is also not a defence. After five days in the facility, any tagging of untagged sheep by Ontario Stockyards employees cannot fall within the meaning of “immediately”. The Tribunal finds that Ontario Stockyards’ failure to discover the missing CSIP-approved tags, especially in a group of sheep where none of them had such approved tags, over a space of five days, leads to the conclusion that the retagging of those sheep by Ontario Stockyards did not occur “immediately”. As a result, the Agency has proved on the balance of probabilities, each of the elements necessary to support the violation alleged in the Notice of Violation.

Defences Available Under the Law

[47] 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.

[48] When an AMP provision has been enacted for a particular violation, as is the case for subsection 184(1) *Health of Animals Regulations*, Ontario Stockyards 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 Ontario Stockyards' belief that in establishing its protocol for animal identification, it excluded any responsibility on itself for "in transit" animals. There is no doubt, however, from the evidence, that Ontario Stockyards was taking its role with respect to animal identification seriously and that once animals were identified as missing tags, they were tagged, such that animals were not sold without CSIP-approved tags. This is admirable, as are the statistics presented to the Tribunal of the success rate of Ontario Stockyards in finding missing tags and replacing them. Unfortunately, given Parliament's clear statement on the issue, the Tribunal finds that Ontario Stockyards' mistaken belief that it was not subject to the responsibilities under subsection 184(1) *Health of Animals Regulations* for "in transit" animals is not a permitted defence to the current alleged violation.

[49] At the hearing, as part of the closing argument made by Small on behalf of Ontario Stockyards, Small sought to introduce an exhibit noted by the Tribunal as Exhibit 3 "two email communication strings from Wideman, Jim (OMAFRA) dated April 4, 2011 to info@ontariostockyards.on.ca". Counsel for the Agency objected to its introduction, but the Tribunal ruled that the document would be admitted and that parties could file written arguments with the Tribunal by April 12, 2011, as to the relevance and weight that should be accorded to the document for the purposes of this case. Counsel for the Agency provided the Tribunal with its written submission on April 12, 2011. Ontario Stockyards presented no written submission but provided its oral argument as to the document's relevance and weight as part of its closing argument. Ontario Stockyards argued that the Agency's current position, as set out in the email -- that the Agency now "will consider auction marts to be in compliance with section 184 provided they have the animals tagged before ownership changes (normally at the sale ring)" -- should be applied as a defence for Ontario Stockyards to raise in this case to the violation currently alleged.

[50] The Tribunal holds that Ontario Stockyards' reliance on the April 4, 2011 document as a defence to the current alleged violation cannot stand. First, the origin of the document and its status are contested by the Agency and the Tribunal accepts the arguments that the document suffers as to its reliability, given its unclear authorship and authority as it was presented at the hearing. Second, the document appears to have been drafted, at the earliest, in March 2011, more than two years after the alleged violation and does not appear to contemplate a retroactive application. Third, it would appear unlikely that a policy change by the Agency, if that is indeed what has occurred, could affect the legal interpretation of a statute or regulation that requires a certain action by a certain actor, in this case that Ontario Stockyards, to immediately apply an approved tag to untagged sheep, rather than simply "before ownership changes (normally at the sale ring)".

[51] One might argue, however, that after March 2011, this new Agency position may be raised by an auction mart potentially facing liability under subsection 184(1) to convince the Agency that issuing a Notice of Violation in circumstances similar to the ones found in the present case would be contrary to Agency policy and would reflect poorly on the Agency's discretion and intent to bring an enforcement action in such circumstances. The Tribunal accepts, however, that this document illustrates a very real confusion which continues to exist in the area of the responsibilities of auction marts in their good faith initiatives to meet their obligations under subsection 184(1) of the *Health of Animals Regulations*.

[52] 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 Ontario Stockyards committed the violation and orders it to pay the Agency a monetary penalty of \$500 within 30 days after this decision is served on it.

Removal of Any Record of the Penalty After Five Years

[53] The Tribunal wishes to inform Ontario Stockyards 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 29th day of July, 2011.

Dr. Donald Buckingham, Chairperson