Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Winnipeg Livestock Sales Ltd. v. Canada (CFIA), 2012 CART 9

Date: 20120430
Docket: CART/CRAC-1568

Between:

Winnipeg Livestock Sales Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: **Chairperson Donald Buckingham**

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of section 174.1 of the *Health of Animals Regulations,* alleged by the respondent.

DECISION

[1] Following a review of all 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 $2,000.00 to the respondent within 30 days after the day on which notice of this decision is served.

By written submissions only.

REASONS

Alleged incident and basis of violation

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Winnipeg Livestock Sales Ltd. (WLS), on May 21, 2010, at Winnipeg, Manitoba did not report the issuance of approved tags within 24 hours of selling them, contrary to section 174.1 of the *Health of Animals Regulations* (Regulations).

[3] Section 174.1 of the Regulations read as follows:

> **174.1** *A distributor, or an organization that manages an animal identification system, that sells or distributes approved tags shall, within 24 hours after selling or distributing them, report the following information in respect of those approved tags to the administrator:*
>
> *(a) the name, address and telephone number of the person to whom they were sold or distributed;*
>
> *(b) the date they were sold or distributed;*
>
> *(c) their unique identification numbers; and*
>
> *(d) the total number that were sold or distributed.*

Record and procedural history

[4] Notice of Violation 1011MBCA0008, dated February 11, 2011, alleges that, on May 21, 2010, at Winnipeg in the province of Manitoba, WLS "committed a violation, namely: did not report the issuance of approved tags within 24 hours of selling them contrary to section 174.1 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 WLS was deemed to have occurred on February 24, 2011. Under section 4 of the Regulations, this is a serious violation for which the penalty assessed is $2,000.

[6] By letter dated March 7, 2011, WLS requested a review of the facts of the violation by the Tribunal, in accordance with paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. That request was received by the Tribunal that same day. Tribunal staff confirmed with WLS that it wished to proceed with a review by way of written submissions alone. The Tribunal has, therefore, conducted its review on the basis of all written submissions presented to the Tribunal by the parties.

[7] On March 21, 2011, the Agency sent its report (Report) concerning the Notice of Violation to WLS and to the Tribunal, the latter receiving it on March 23, 2011.

[8] In a letter dated March 23, 2011, the Tribunal invited WLS to file with it any additional submissions in this matter, no later than April 22, 2011. On April 22, 2011, the Tribunal did receive additional written submissions (Additional Submissions) from WLS, which the Tribunal provided to the Agency on April 26, 2011.

[9] The Tribunal invited the Agency to reply to the Additional Submissions on or before May 3, 2011. Following a request from the Agency for an extension to file a reply to the Additional Submissions (Reply), which WLS opposed, the Tribunal considered the parties' arguments and then issued an Order dated May 16, 2011, permitting the Agency until May 20, 2011 to file its Reply.

[10] On May 19, 2011, the Agency filed its Reply with the Tribunal and sent a copy to WLS. No further written submissions were received by the Tribunal from either party. The Tribunal must now decide whether the Agency has established all the elements required to support the impugned Notice of Violation in question.

Evidence

[11] The evidence before the Tribunal in this case consists of written submissions from the Agency (Notice of Violation, Report and Reply) and from WLS (request for review and Additional Submissions).

[12] The genesis of this case is somewhat curious. From the evidence, it appears that the present case came to the attention of the Agency due to the fact that Raymond and Michelle Le Heiget (the Le Heigets) sent eight cows for sale, through WLS, on May 20 and 21, 2010. While the parties do not necessarily agree on whether it was necessary to apply Canadian Cattle Identification Agency (CCIA) approved tags to four of these eight cows at WLS, it is not disputed that WLS's staff did, in fact, apply CCIA-approved tags to four of the Le Heigets cattle on May 20 or 21, 2010. That the four cows were tagged at that time and by WLS's staff is evidenced by the invoice from WLS to the Le Heigets wherein WLS seeks payment from the Le Heigets for four tags applied to their cattle (Invoice at Tab 2 of the Report). Both parties acknowledge, moreover, that Raymond Le Heiget is not only a cattle producer, but is also employed as a district veterinarian in Portage la Prairie for the Agency.

[13] The Le Heigets did not agree with the $40.00 charge that WLS assessed them because they maintain that they had verified all eight cattle just before shipping them to WLS and all had CCIA-approved tags when they left their farm. Thus, when faced with the $40.00 charge from WLS that they did not feel was justified, Raymond Le Heiget took it upon himself to look into the issue with WLS and made inquiries of their personnel. On the basis of those inquiries, it became apparent that other officials of the Agency became involved in the incident and those officials eventually commenced the compliance action against WLS, which resulted in the issuance of the Notice of Violation 1011MBCA0008, dated February 11, 2011, to WLS.

[14] Other elements of the evidence are not in dispute. Tab 11 (page 13) of the Agency Report contains the WLS registration under the CCIA Canadian Livestock Tracking System. That registration lists WLS under "operation type" as "Auction; Livestock Sales Facilities; Tag Dealer; Tagging Facility". The date of the print-out of the registration is October 13, 2010. There is no evidence to suggest that this registration was otherwise at the pertinent time of May 21, 2010. As a commercial enterprise in Winnipeg, Manitoba, WLS operates as an auction mart, and thus, assists buyers and sellers of livestock exchange animals destined for the Canadian food system.

[15] The Agency also presented evidence in its Report from the CCIA database to show that WLS received almost 200 CCIA-approved tags between November 10, 2009 and June 24, 2010, for its use, and in particular, the series of tags numbered 124000248409936-124000248410004 (Tabs 4 and 5 of the Report). The Agency also presented evidence that certain tags issued to WLS during this period were ones that turned up on animals that were killed at a slaughterhouse in Calgary, after they had been shipped from the WLS's facility in May 2010. In particular, two cows identified with the CCIA numbers 124000248409955 and 124000248409973 were slaughtered by XL Foods in Calgary on May 26, 2010 (Tab 8 of the Report).

[16] The Agency presented evidence that the CCIA's database records established that no entries were ever made, and certainly not within 24 hours of May 21, 2010, in the CCIA's database, with respect to tag numbers 124000248409955 and 124000248409973 that had been issued to WLS many months earlier (Tab 8 of the Report).

[17] In response, WLS gave evidence in its Additional Submissions letter dated April 21, 2011, to the effect that "As part of the ongoing movement towards full traceability in the movement of cattle in Canada, Winnipeg Livestock Sales has made every effort to make sure that every animal that goes through our facility is properly tagged" (Additional Submissions at page 1). The Additional Submissions also state that "In many cases employees [of WLS] find cattle during the course of a sale that do not have tags, or that may have lost them. These cattle are then tagged before being sold. Sometimes these cattle are sold long after the rest of the consignment has already gone through the sales ring because of delays in getting tags, and getting the animal to the squeeze chute to be tagged. All of these are inconveniences that slow down the speed of the commerce at an auction mart." (Additional Submissions at pages 1 and 2).

[18] WLS also gave evidence that while it is a licensed CCIA tag dealer, it does not sell tags. Instead, it uses "their own tags in cattle that needed to be tagged and every effort was made to transfer ownership of the tags from us to the producer. It is evident from the Winnipeg Livestock Sales tagging records (see attached #5) that it is very difficult to monitor these tags when there are several employees that all take part in the receiving and tagging of cattle. It is virtually impossible for employees to work all day and all night receiving cattle for a sale and then be expected to transfer ALL of the tags from Winnipeg Livestock Sales to the correct producer within the 24-hour deadline." (Additional Submissions at page 4).

[19] WLS testified that “In the spring of 2010, around the time when the Le Heiget’s cattle were sold, things were very busy around Winnipeg Livestock Sales because grass cattle were in high demand and we were preparing to hold the National Livestock Auctioneering Competition. One of the auctioneers that sells at the Winnipeg Livestock Sales cleaned up the auctioneer booth and threw out all records that held the tag numbers and producer names. Every effort was made to back track and match tag numbers with producer names but after conferring with CCIA staff it was decided that an error in matching names to tags was worse than not matching names at all. We continue to try and distribute tags, as per the regulations set out by the CFIA but by the end of 2010 decided that it was impossible to operate with the 24 hour time frame of transferring tag ownership. Winnipeg Livestock Sales is no longer a tag dealer or distributor. We have gone back to buying tags directly from the dealers on our premises and registering then to producers that are using them.” (Additional Submissions at pages 4 and 5).

Analysis and Applicable Law

[20] 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.*

[21] 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…

[22] 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...*

[23] 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 section 174.1 of the *Health of Animals Regulations* (Regulations).

[24] Part XV of the 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.

[25] 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.

[26] 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 animal's birth and the slaughterhouse floor. Sometimes there might be confusion as to whether an animal has an approved tag and another approved tag will be applied to the animal at some point in its journey through the system.

[27] At any rate, 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, and when such tagging occurs to take responsibility for recording and reporting data to the CCIA, as required by the Regulations. 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*.

[28] Therefore, while the backdrop of this case may have arisen because of interactions between WLS and the Le Heigets, and four cows delivered by the Le Heights to WLS on May 20-21, 2010, the evidence to consider is whether WLS's personnel applied

CCIA-approved tags at their facility to any cattle at that time, and if they did, whether WLS personnel registered the information as required by the Regulations within 24 hours.

[29] A violation of section 174.1 of the Regulations will validly arise where:

1. the alleged violator is either a distributor or an organization that manages an animal identification system,

2. the alleged violator sold or distributed CCIA-approved tags for an animal falling within the definition of “animal” under Part XV,

3. the alleged violator applied a CCIA-approved tag to an animal on its premise; and

4. the alleged violator, after selling or distributing the tag by applying it to an animal, failed to report to the CCIA the required information, as set out in subsections (*a*) through (*d*).

[30] 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, all of the elements above. With respect to the first element, the WLS registration under the CCIA Canadian Livestock Tracking System lists WLS as “Auction; Livestock Sales Facilities; Tag Dealer; Tagging Facility” and, as such, the Tribunal finds that WLS is either a distributor or an organization that manages an animal identification system. With respect to element 3, the evidence bears out that several cattle belonging to the Le Heigets were tagged by WLS personnel on May 20-21, 2010.

[31] With respect to elements 2 and 4, WLS presented evidence that it does not sell CCIA tags. However, the Agency provided evidence that WLS was issued almost 200 CCIA tags in the period between November 10, 2009 and June 24, 2010. As well, the Agency produced evidence that WLS applied some of those tags to the Le Heigets’ cattle on May 20-21, 2010, cattle which were purchased by and shipped to XL Foods, where they were killed. While WLS may maintain that it was not in the business of selling CCIA tags, there is concrete proof that it invoiced the Le Heigets for such tags at a cost of $10.00 per tag. The Tribunal finds that WLS did, therefore, sell tags, as well as distribute them and, as such, is subject to the requirements of section 174.1 of the Regulations. Finally, the Agency provided evidence, which the Tribunal accepts on the balance of probabilities, that WLS staff failed to provide to the CCIA, the program administrator under the Regulations, the required information under section 174.1 of the Regulations within 24 hours of the tagging of the animals in question. In fact, there is no evidence to suggest that any information for these animals was ever recorded, as evidence from WLS suggests that the necessary information was destroyed, albeit by accident, by WLS staff or agents within the confines of the WLS’s facility.

[32] Moreover, with respect to elements 2, 3 and 4, the Act, as well as the case law from this Tribunal and from the Federal Court of Appeal, is quite clear that an alleged violator, under the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, is responsible for

the acts of his employees or agents. 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.*

[33] WLS raised one final issue concerning the manner in which the case came to the attention of the Agency. In its Additional Submissions, WLS stated that "Raymond Le Heiget does not police CFIA rules at Winnipeg Livestock Sales. This is done by inspectors working out of the CFIA office on Main Street in Winnipeg. This investigation by Raymond Le Heiget working out of his jurisdiction against Winnipeg Livestock Sales appears as an ACT OF REVENGE AND A COMPLETE CONFLICT OF INTEREST." (Additional Submissions at page 3). The Tribunal makes the following observations regarding these comments from WLS. First, it is important to note that the initial action of tagging was carried out by WLS without any direction from the Le Heigets and it is the action of tagging by an "distributor or an organization that manages an animal identification system" that engages liability. Clearly, the motivation of WLS or the Le Heigets bears little relevance to the fact that WLS chose to tag the Le Heiget animals on May 20-21, 2010. Once WLS started the action of tagging the animals, section 174.1 required further action by WLS which it failed to complete. Second, whether Raymond Le Heiget's actions to investigate the situation he found himself in were motivated by zeal, revenge or duty, there is no evidence that the decision to take enforcement against WLS was exercised by Raymond Le Heiget. While evidence he collected was used by the Agency, the Agency deployed other employees to further the investigation and then to issued and serve the Notice of Violation to WLS. As such, the Tribunal finds that no conflict of interest arises in this case.

[34] The Tribunal acknowledges that, given the evidence, WLS likely engaged in the tagging exercise, as it did on May 20-21, 2010, with the best of intentions of complying with the law and of furthering traceability of food animals in Canada. However, without providing the details of the animals to which the tags were applied to the CCIA, those goals could not be achieved. Considering that auction marts are often working under sub-optimal conditions for upholding tagging obligations—high volumes of animals, difficulty in verifying missing tags, and the multiplicity of tags present in animals ears—the Regulations do impose a heavy, and at times, superhuman burden on players in the agri-food continuum. However, if auction marts do apply CCIA-approved tags, they are obliged to report the information to the CCIA, as required under section 174.1 of the Regulations. WLS, in this case, failed to complete this task. Part XV of the Regulations may 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 WLS, and the Tribunal must interpret and apply the law to the facts of this case.

[35] 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.*

[36] When an AMP provision has been enacted for a particular violation, as is the case for section 174.1 of the Regulations, WLS has little room to mount a defence. Arguments from WLS, that is almost impossible for WLS staff to comply with the obligations of section 174.1 of the Regulations or that the records necessary to report the information required by section 174.1 were destroyed by WLS's personnel, 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 WLS might raise. Given Parliament's clear statement on the issue, the Tribunal accepts that such statements by WLS are not permitted defences under section 18.

[37] Overall, the evidence supports the Agency's position that it has rightly issued a Notice of Violation to WLS, as the Agency has made out all the required elements for a violation under section 174.1 of the Regulations. 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 WLS committed the violation and is liable for payment of the penalty in the amount of $2,000.00 to the Agency within 30 days after the day on which notice of this decision is served.

[38] The Tribunal wishes to inform WLS 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 30th day of April, 2012.

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Dr. Donald Buckingham, Chairperson