

Citation: Ontario Livestock Exchange Inc. v. Canada (CFIA), 2011 CART 24

Date: 20111215  
Docket: CART/CRAC-1564

**Between:**

**Ontario Livestock Exchange 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 \$1,300.00 to the respondent within 30 days after the day on which this decision is served.**

Hearing held in Kitchener, ON,  
September 16, 2011.

## REASONS

### Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Ontario Livestock Exchange Inc. (OLEX), on October 12, 2010, at Waterloo, 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] 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.*

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

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

### Procedural History

[5] Notice of Violation 1011ON052002, dated January 13, 2011, alleges that, on the 12<sup>th</sup> day of October, 2010, at Waterloo, in the province of Ontario, OLEX “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*.”

[6] The Agency was deemed to have served the above Notice of Violation on OLEX on January 23, 2011. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, this is a minor violation for which the penalty assessed was \$1,300.

[7] In a letter dated February 4, 2011, received by fax by the Tribunal that same day, OLEX, through its President Larry Witzel (Witzel), 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, OLEX 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 February 21, 2011, the Agency provided to OLEX and to the Tribunal its Agency report (Report) concerning the Notice of Violation, with the Tribunal receiving its copy of the Report on February 23, 2011. As the Report was received after the time limit established by the Tribunal, arguments were received from the parties as to why the Agency should or should not be granted an extension for the filing of the Report. After reviewing arguments from the parties, the Tribunal issued an Order dated March 1, 2011, granting an extension to the Agency for the filing of the Report. The Report was, therefore, received and becomes part of the Agency's evidence in this case.

[9] The Tribunal's Order dated March 1, 2011, also informed the parties that they had until March 31, 2011, to file with the Tribunal any additional submissions in this matter. No materials were filed by the parties before this date. However, with the permission of the Tribunal and after having received arguments from OLEX, the Tribunal, on September 2, 2011, permitted the Agency to file additional documents in the case on the condition that OLEX be permitted to object "to the relevance of such documents, at the beginning of the hearing set for Friday, September 16, 2011". Other than a request by the Agency for the issuance of a summons, which was also granted by the Tribunal, and a letter from the Agency setting out its list of witnesses to be called at the hearing, no further written submissions were received from OLEX or from the Agency in this matter.

[10] The oral hearing requested by OLEX was held in Kitchener, Ontario, on September 16, 2011, with OLEX represented by Mr. Witzel, and the Agency represented by its legal counsel, Ms. Jacqueline Wilson.

## **Evidence**

[11] The evidence before the Tribunal in this case consists of written submissions from the Agency (the Notice of Violation, the Report and the Agency's September 2 Additional Documents) and from OLEX (its request for review and its responses to procedural matters raised by the Agency). As well, both parties presented witnesses who tendered evidence at the hearing on September 16, 2011. The Agency presented Ashley Roberts (Roberts), Mark Thompson (Thompson), and Terry Lauri (Lauri) while OLEX called Witzel as its witness.

During the hearing, the Agency tendered the September 2 Additional Documents as exhibits for consideration by the Tribunal. After argument from the parties as to their relevance and weight, the documents were received as part of the record and were identified as follows: (1) a purchase invoice: OLEX to L+M Meat Distributing Inc. (marked as pages 1.1 to 1.4); and (2) colour copies of photos found at Tab 4 of the Agency Report, which had been received on August 11, 2011, as part of the Agency's Additional Documents (marked as photos 2.1 to 2.28).

[12] The following facts are not in dispute in this case:

- On October 12, 2010, 11 animals owned by Alberto Rebelo (Rebelo) were delivered to OLEX to be sold. After their sale, they remained at OLEX until transported out of the facility to their new owner on the morning of October 13, 2010.
- The 11 animals were purchased at the OLEX sale of October 12, 2010 by Lauri, acting for L+M Meat Distributing (L+M Meats), a slaughter house specializing in the preparation and marketing of sheep and goat meat, located in Guilford, Ontario.
- On the morning of October 13, 2010, the 11 animals were loaded and transported from OLEX to L+M Meats by a trucker named Jim McArthur (McArthur).
- Later in the morning of October 13, Agency Inspectors Roberts and Thompson discovered, during a routine inspection of animals at L+M Meats, that the 11 animals in question did not bear Canadian Sheep Identification Program (CSIP) approved tags, which are of the nature that meet the requirements of the *Health of Animals Regulations*.

[13] The contested evidence in this matter relates to two points: (1) whether the 11 animals in question were sheep or goats; and (2) whether OLEX had sufficient care and control of the 11 animals during the period while they were at the OLEX facility, such that the establishment would become subject to the requirements set out in subsection 184(1) of the *Health of Animals Regulations*.

[14] The Agency's first witness, Roberts, told the Tribunal that since 2005 she has worked with the Agency inspecting establishments for compliance with the *Health of Animals Regulations*. Other relevant experience to this case, she told the Tribunal, was that prior to her work with the Agency, she raised purebred Suffolk sheep. Roberts gave evidence that she and Inspector Thompson arrived at L+M Meats at around 8:30 a.m. to complete animal identification and animal welfare during transportation inspections. The 11 animals in question were part of a load of 72 animals unloaded into the facility from the truck driven by McArthur at around 9:55 a.m. Roberts entered into the area where the animals were and found 11 untagged animals. None of the 11, which consisted of one ram and 10 ewes, had rips or tears or holes in their ears. Some of the 11 had producer tags, but none had CSIP-approved tags, tags which bear the maple leaf symbol and a long series of ID numbers. Roberts

testified that photos showing the lack of CSIP-approved tags on the animals were taken by Inspector Thompson (Exhibit 2 and Agency Report Tab 4). Roberts spoke with the driver McArthur and he told her that he had picked up the animals at OLEX in Kitchener that morning at 8:20 a.m.. Roberts also spoke with Lauri on the morning of October 13, 2010 and he told Roberts that he had purchased the animals in the name of L+M Meats from the OLEX sale in Kitchener the day before. The Agency has also presented evidence to this effect via sales invoices (Exhibit 1).

[15] Concerning the species of the animals in question, Roberts gave evidence to the Tribunal that the 11 animals were sheep. Roberts described the animals as sheep in her notes and in her evidence. Roberts received invoices from Lauri, which referred to the animals as sheep or ewes or rams (Exhibit 1), the latter two names, being reserved for female and male adult sheep respectively. She told the Tribunal that, after she and Thompson completed their inspection at L+M Meats, she spoke with OLEX staff, including Witzel, concerning who owned the animals prior to their sale to L+M Meats. Roberts said that OLEX staff, and the documents they produced for the transactions, referred to the animals as sheep. She also spoke with the former owner of the animals, Rebelo, and he told her that he took his 11 sheep to sell at OLEX and that they had producer tags but not CSIP-approved tags, as he was unaware of any such tagging regulations.

[16] In cross-examination, Roberts told the Tribunal that while hair sheep can more closely resemble goats than wool sheep, given her observations and experience, she was sure the untagged animals were hair sheep and not goats. Roberts agreed that the invoices in Exhibit 1 show that the sales that occurred at OLEX were mixed lots of sheep and goats, that the photos in Exhibit 2 and at Tab 4 of the Report contain both sheep and goats and that a normal person would have a hard time identifying the goats from the sheep in those photos. Roberts also agreed that the trucking bill of lading (Tab 3 of Report) for "72 wool" referred to the load that was delivered to L+M Meats, but which was not exclusively wool sheep, but rather a mixture of hair sheep, wool sheep and goats. Roberts told the Tribunal that goats are not required to have CSIP-approved tags, but all sheep must bear such tags. Those delivered to auction marts lacking CSIP-approved tags must be tagged by the organization that has care and control of the sheep, which in this case was OLEX.

[17] The Agency's second witness, Lauri, testified that, although he has been in the business for 25 years, he has been the owner and operator of L+M Meats for the just past eight years. L+M Meats purchases and slaughters goats and lambs and sells the meat. Lauri told the Tribunal that the 11 animals in question were purchased by him at the OLEX sale of October 12, 2010 and that he was assigned buyer number 288 for the purposes of that sale. The sheep he purchased were from sale lot 107 and they were shipped to his facility on October 13, 2010, as set out in the trucker's bill of lading (Tab 3 of Report). Lauri stated that when the sheep arrived, his plant foreman unloaded the sheep and then Roberts informed him that the sheep had no approved tags. He was surprised that the sheep were untagged but they were already unloaded. Lauri confirmed to the Tribunal that the sheep in question were hair sheep.

[18] During cross-examination, Lauri, told the Tribunal that he buys both sheep and goats and that a hair sheep could be mistaken for a goat, as there is a general assumption that sheep have wool and goats have hair. Lauri said that he would know with his experience that of the animals in Exhibit 2.28, the animal at the top of the photo is a sheep while a person off the street might think it was a goat and that both he and the person off the street would recognize the animal in the bottom of the photo as being a sheep. Lauri agreed that the bill of lading description of “72 wool” was inaccurate, as the load was a mixture of wool sheep, hair sheep and goats. Lauri told the Tribunal, that when he bought the sheep at the OLEX sale on October 12, 2010, he did not see or notice that the animals were missing CSIP-approved tags.

[19] The Agency’s final witness, Thompson, testified that he has been an inspector with the Agency for the past two and one half years. Thompson gave evidence that he and Inspector Roberts arrived at L+M Meats at around 8:30 a.m. to complete animal identification and animal welfare during transportation inspections. The 11 animals in question were unloaded into the facility from the truck driven by McArthur and he noticed sheep that did not bear CSIP-approved tags, but did have producer tags. Those animals did not have any rips, holes or tears in their ears. In his conversation with the driver, McArthur told him that the animals came from OLEX. Likewise, when Thompson talked with Lauri, the latter told him that the animals had been purchased from the OLEX sale, as per the bill of sale Lauri had given to Roberts (Exhibit 1).

[20] During cross-examination, Thompson told the Tribunal that he was raised on a farm and has experience in dealing with sheep and lambs and goats and still has sheep on his property. When asked why the Agency inspectors did not separate the sheep and the goats when they arrived at L+M Meats for better identification, Thompson told the Tribunal that there were insufficient pens at the facility to do so. Finally, Thompson testified that while he was there when the animals were unloaded at L+M Meats, he was not sure exactly how many animals were on the load, but he thought it was between 75 and 100, with a mixture of wool sheep, hair sheep and goats.

[21] The only witness for OLEX was Witzel, president of OLEX. He testified that OLEX markets between 70,000 – 80,000 sheep and goats and 150,000 cattle per year. Witzel told the Tribunal that he and his operation are strong promoters of traceability and have worked diligently with Agriculture and Agri-Food Canada and the Agency to promote good business practices, going so far as to provide opportunities for training of Agency inspectors. Witzel feels that he acts as an intermediary between government and industry to ensure full cooperation with the regulations, but the onus is on producers to apply approved tags. Witzel testified that even so, the facility takes its tagging responsibilities seriously and has two different systems—one for cattle and one for sheep to try to make sure they all have tags. His understanding is that, while OLEX is an approved tagging site for cattle and that OLEX can and does apply to approved tags to cattle missing theirs, for sheep it is another story. For sheep, OLEX is not an approved tagging site and OLEX is not permitted to put a tag in the

ear of an untagged sheep, but rather OLEX is supposed to send them back home to their producer. The practicality of this is complicated by the fact that, on any given day, up to 1,800 animals are coming into the facility and goats and sheep are all mixed together. Witzel told the Tribunal that he never spoke with Rebelo or with McArthur and, to his knowledge, what could have happened on October 12, 2010, was that there was confusion by his staff between the hair sheep that required tags and the goats that did not. Witzel said he was amazed when Roberts told him that there were 11 untagged sheep from the October 12, 2010 OLEX sale.

[22] In cross-examination, Witzel explained that the documents listing the animals in pen 107 at Tab 2 of the Report were generated at OLEX, but OLEX was not the purchaser of these animals, only the selling agent for the producer, working for a commission when the animals were sold to the buyer 288, which was for this sale, L+M Meats. Even the notation of “ram” that is on the invoice as being in pen 107A could have been entered either by the person who trucked the animal to OLEX or by one of the OLEX staff. Witzel states that, as there was no inbound trucker manifest, it is hard to know who classified and recorded the animals when they arrived. He did confirm, however, that the four animals in pen 107E were bought by buyer 288, that is L+M Meats, and that the various documents describing to the animals produced on October 12 and 13 all referred to them as ovines, that is sheep.

### **Analysis and Applicable Law**

[23] 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.*

[24] 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;*

[25] 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...*

[26] 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*.

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

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

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

[28] 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.*

[29] 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.*

[30] Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities. For the Notice of Violation in question, the Agency must establish each of the following elements, on the balance of probabilities, to prove that OLEX violated subsection 184(1):

1. That the animals 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 animals;
3. that the person failed to immediately apply a new approved tag to the animals that did not bear an approved tag; and
4. the animals in question were sheep.

[31] Concerning element 1 above, the Agency presented convincing evidence from two inspectors that the animals discovered at L+M Meats on October 13, 2010, did not bear CSIP-approved tags. Moreover, the two inspectors and Lauri, the operator of the abattoir, presented evidence that the animals were the same animals that were sold, purchased and transported from OLEX on October 12 and 13, 2010. This evidence was not contradicted by OLEX, except to say that Witzel gave evidence that he was amazed to find out that the animals were missing CSIP-approved tags. On the basis of the evidence presented, the Tribunal finds that the 11 animals found to be without CSIP-approved tags did not have such tags on October 13 when they were examined at L+M Meats, and that they had never had such tags when they were delivered to OLEX on October 12, 2010, or at any time while they were at the OLEX facility on October 12 and 13. Moreover, evidence from Witzel showed that, even if OLEX personnel had found the untagged sheep, the practice of OLEX would not have been to tag them.

[32] The Tribunal also finds that the Agency has proved, on the balance of probabilities, element 2 — that OLEX had care and control of the 11 sheep lacking CSIP-approved tags while they were at the OLEX facility on October 12 and 13, 2010. 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 recent decisions, *Ontario Stockyards Inc. v. Canada (CFIA)*, 2011 CART 011, *Ontario Stockyards Inc. v. Canada (CFIA)*, 2011 CART 012, and *Ontario Stockyards Inc. v. Canada (CFIA)*, 2011 CART 013. In each of these cases, the Court or this Tribunal has held that, even though the auction mart does not own the animals, it has 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*.

[33] The Tribunal finds that the Agency has met the burden of proving, on the balance of probabilities, that OLEX 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”, in the case of an animal, would include feeding and watering that animal. The evidence is clear that OLEX received the 11 animals in question on October 12, 2010. They were unloaded into its facilities, moved around its pens to the sale ring, then into buyer pens after the sale and then loaded for transport to L+M Meats the next morning. These actions of OLEX towards the 11 animals indicates to the satisfaction of the Tribunal that the auction market had care and control, if not possession, of them during at least part of October 12 and 13, 2010. Element 2 has been, therefore, established by the Agency on the balance of probabilities.

[34] The Tribunal finds that the Agency has met the burden of proving, on the balance of probabilities, that OLEX did not apply CSIP-approved tags to the 11 animals while they were in its possession or under its control, immediately or otherwise. While this inaction may have arisen from a misunderstanding as to OLEX’s role or its responsibility to apply CSIP-approved tags, or confusion by OLEX staff as to what kind of animals they were dealing with, it does not detract from the Tribunal’s finding of fact that OLEX did not tag the 11 animals with CSIP-approved tags while they were at the OLEX facility.

[35] What subsection 184(1) of the *Health of Animals Regulations* seems designed to do is to encourage producers and all other intermediaries to take steps to tag or retag animals coming into their possession, care and control so that they act quickly to preserve animal identity. 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. In this case, OLEX did not so act. As a result, the Agency has proved on the balance of probabilities, the third element necessary to support the violation alleged in the Notice of Violation.

[36] This leaves the fourth and final element necessary to prove the violation—whether the animals in question were sheep or goats—which to the casual, outside observer might seem a relatively straightforward issue for determination by the Tribunal. From a legal perspective, if the animals were goats, OLEX was under no obligation to tag them, as goats are not included under Part XV of the *Health of Animals Regulations*. If, on the other hand, the animals were sheep, then OLEX is subject to responsibilities set out in Part XV. The photos provided by the Agency show that the animals in question were not conventional and easily

identifiable “woolly sheep.” They were then either “hair sheep” or “goats”, which even Lauri of L+M Meats, a slaughterer of both, told the Tribunal are often confused. However, in this case the Tribunal finds that the 11 animals in question were sheep and not goats. The evidence of Inspectors Roberts and Thompson and of Lauri, was that the 11 animals were unequivocally “hair sheep”. OLEX’s evidence raised questions as to whether the animals were sheep or goats, but Witzel’s evidence revealed that it is unlikely that he actually identified the animals in question while they were at the OLEX facility. Therefore, the Tribunal finds the eye-witness evidence of Roberts, Thompson and Lauri the better evidence on which to make its finding of fact that the animals in question were actually sheep. Given that the evidence also confirms that the 11 sheep identified by Roberts, Thompson and Lauri on October 13 were the same animals as were found at the OLEX facility on October 12, the Tribunal is convinced that OLEX had possession and/or care and control of sheep and not goats in this case. Moreover, several pieces of documentation generated by OLEX staff regarding these animals refer to them by their ovine names of sheep; ewes and rams.

### **Defences Available Under the Law**

[37] 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.*

[38] When an AMP provision has been enacted for a particular violation, as is the case for subsection 184(1) *Health of Animals Regulations*, OLEX 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, whether based in due diligence or in mistake of fact.

[39] With respect to a defence of due diligence, paragraph 18(1)(a) will prevent justifications from OLEX, including a plea that it did everything it could to prevent a violation of subsection 184(1) of the *Health of Animals Regulations*. Its precaution to put in place a procedure to enable its staff to identify and deal appropriately with animals lacking approved tags was commendable. There is no doubt, from the evidence, that OLEX was taking its role with respect to animal identification seriously and that it had separate protocols in place for dealing with untagged cattle and untagged sheep. Unfortunately, given Parliament’s clear

statement on the issue, the Tribunal finds that OLEX's best efforts to deal with untagged animals is not a permitted defence to the current alleged violation.

[40] With respect to a defence of mistake of fact, paragraph 18(1)(b) will prevent justifications from OLEX, including a plea that its staff thought the animals in question were goats and, thus, were under no obligation pursuant Part XV of the *Health of Animals Regulations* to tag the animals. Given the Tribunal's finding that the animals in question were in fact sheep, paragraph 18(1)(b) prevents OLEX from raising this defence. In view of Parliament's clear statement on the issue, the Tribunal finds that the mistaken belief of OLEX that the animals were goats rather than sheep is not a permitted defence to the current alleged violation.

[41] Finally Witzel, in his closing argument for OLEX, passionately outlined his concern that different and confused standards of inspection and conduct were being applied by the Agency to different auction marts dealing with sheep in Ontario. In other cases that have come before the Tribunal, the Tribunal has noted that there is very real confusion in the area of the responsibilities of auction marts in carrying out their good faith initiatives to meet obligations under subsection 184(1) of the *Health of Animals Regulations* (see paragraphs 49-51 of *Ontario Stockyards Inc. v. Canada (CFIA)*, 2011 CART 011, paragraph 52 of *Ontario Stockyards Inc. v. Canada (CFIA)*, 2011 CART 012, and paragraph 51 of *Ontario Stockyards Inc. v. Canada (CFIA)*, 2011 CART 013). This case seems to demonstrate a continuing confusion existing among industry and government players implementing compliance with the identification of sheep in the Canadian agri-food chain. Witzel was a very credible witness and advocate for OLEX. In Witzel's opinion, OLEX was receiving mixed messages from the Agency regarding the process to be adopted when untagged sheep came into the OLEX facility. He told the Tribunal, that on the one hand, he had been warned by Agency inspectors "on numerous occasions" that if OLEX tagged a sheep missing its CSIP-approved tag, then it would be in violation of the *Health of Animals Regulations* (presumably s. 178(1)), and yet, in this case, where OLEX failed to apply CSIP-approved tags to sheep missing theirs while at the OLEX facility, OLEX has been served with a notice of violation under subsection 184(1) of the *Health of Animals Regulations*. Witzel argued that exposure to this kind of liability is not only disappointing and unfair, but he believed has not been consistently applied to other auction marts in Ontario. Witzel told the Tribunal "At the end of the day, I get a \$1,300 fine when I have been told that we're not allowed to tag. Here I am left holding the bag. I don't want this job anymore. ... Nothing demoralizes more than when you are trying to help and you get slapped. The system should be for people who don't cooperate. ... I need a clarification for what is permitted and what is not." There is, no doubt, genuine exasperation in Witzel's plea. Moreover, he is not the first to appear before this Tribunal pleading for the Agency to clarify its implementation and compliance policy for auction marts handling sheep so that auction marts can meet their obligations under subsection 184(1) of the *Health of Animals Regulations*.

[42] However, whether or not the Agency has a more fulsome role to play than is currently the case for the implementation of best practices for auction marts that handle sheep in Ontario, is not a decision for this Tribunal to make. Under its enabling statutes, this Tribunal does not have the jurisdiction to consider such a matter, but rather must make a determination of whether this particular Notice of Violation is valid or not. In this regard, given its factual determinations, 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 OLEX committed the violation and orders it to pay the Agency a monetary penalty of \$1,300 within 30 days after this decision is served on it.

### **Removal of Any Record of the Penalty After Five Years**

[43] The Tribunal wishes to inform OLEX 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 15<sup>th</sup> day of December, 2011.

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Dr. Donald Buckingham, Chairperson