

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Habermehl v. Canada (CFIA), 2010 CART 17

Date: 20100903
Docket: RTA-60380;
RT-1525

Between:

Ken Habermehl, 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 section 176 of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not committed the violation and is not liable for the payment of the penalty.

Hearing held in Saskatoon, SK,
June 15, 2010.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Dr. Ken Habermehl (Habermehl), on May 26, 2009, near Macrorie, Saskatchewan, moved or caused the movement of seven cattle not bearing approved tags from their farm of origin, contrary to section 176 of the *Health of Animals Regulations*.

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

- that Habermehl moved or caused the movement of the cattle in question, and
- when the 29 cow/calf pairs left Habermehl's farm on the morning of May 26, 2009, bound for the Elbow Community Pasture, that any of seven cows failed to have in its ear a Radio Frequency Identification (RFID) Canadian Cattle Identification Agency (CCIA) approved identification tag.

Record and procedural history

[4] Notice of Violation #0910SKCA0005, dated September 1, 2009, alleges that, on the 26th day of May 2009, at or near Macrorie, in the province of Saskatchewan, Habermehl "committed a violation, namely: Move or cause the movement of an animal not bearing an approved (sic) tag from its farm of origin or from a farm or ranch other than its farm of origin contrary to section 176 of the *Health of Animals Regulations*, which is a violation of 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 Habermehl was deemed to have occurred on September 14, 2009. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, this is a minor violation for which the penalty is \$500.

[6] Section 176 of the *Health of Animals Regulations* reads as follows:

176. *Subject to section 183, no person shall move, or cause the movement of, an animal or the carcass of an animal from its farm of origin or from any other farm or ranch unless it bears an approved tag issued under subsection 174(1) to the operator of the farm or ranch where the approved tag was applied to it.*

[7] In a letter dated October 6, 2009 and received by the Tribunal that same day by facsimile, Habermehl 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*. At that same time, Habermehl requested that the review be oral, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[8] On October 7, 2009, the Agency sent its report (Report) concerning the Notice of Violation to Habermehl and to the Tribunal.

[9] In a letter dated October 8, 2009, the Tribunal invited Habermehl to file with it any additional submissions in this matter, no later than November 9, 2009. Habermehl requested an extension for his submissions and was granted one until November 17, 2009.

[10] Habermehl filed a package of additional submissions which was received by the Tribunal on November 13, 2009. The Agency responded to Habermehl's filing with a reply received by the Tribunal on November 25, 2009. Additional filings were received by the Tribunal from Habermehl and from the Agency between November 25, 2009 and June 14, 2010. All of these filings have been shared between the parties and have been reviewed by the Tribunal in consideration of issuing a decision in this case.

[11] The oral hearing requested by Habermehl was held in Saskatoon, Saskatchewan on June 15, 2010 with Habermehl represented by himself and an agent, Mr. Jim Ness and the Agency represented by its counsel, Ms. Shirley Novak.

Evidence

[12] The evidence before the Tribunal in this case consists of written submissions from both the Agency (specifically, the Notice of Violation, and Agency's Report, its response to Habermehl's reply and additional materials, as noted above) and from Habermehl (specifically, his request for review and his reply to the Agency's Report and additional materials, as noted above). As well, both parties presented witnesses who tendered evidence at the hearing on June 15, 2010. The Agency presented one witness: Lawrence Getzlaf while Habermehl called seven witnesses: himself, Ross Sigfusson, Craig Habermehl, Randy Ames, Darlene Tingtved, Allison Danyluk, and Roy Rutledge. During the hearing, the parties also tendered 11 exhibits as evidence.

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

- Habermehl is a trained veterinarian who operates, with his wife and son, a large cow/calf operation near Macrorie, Saskatchewan.
- Each year Habermehl moves many of his cattle from his farm to community pastures, with movement from the farm occurring in late spring and movement from the community pastures back to his farm occurring in the fall.
- In anticipation of the Habermehl cattle moving to their summer pastures, over 100 pairs of cows and calves were collected by the Habermehl family into their farm corrals where cow/calf pairs were examined and prepared for their imminent trip to summer pasture.
- On May 26, 2009 Habermehl moved 29 cow/calf pairs from his farm to the Elbow Community Pasture located some 42 miles (67 kilometres) from his farm.
- The 29 cow/calf pairs were transported in three loads, one of which was driven by Habermehl and the other two by third parties with all three loads leaving the Habermehl farm with a few minutes of each other early on the morning of May 26, 2009.
- The three loads of Habermehl cow/calf pairs were unloaded at the Elbow Community Pasture mid-morning on May 26, 2009 and were collected into a holding corral that was used to temporarily house only the Habermehl cattle.

- After inspecting the holding corral that housed the Habermehl cattle, Agency officials found seven cows that did not bear CCIA approved tags.

[14] The contested evidence in this matter related to whether the Habermehl cows that were found untagged by Agency officials on May 26, 2009 at the Community Pasture had CCIA tags when they left the Habermehl farm earlier that morning.

[15] The Agency's sole witness was Inspector Lawrence Getzlaf (Getzlaf), an employee of the Agency, although two of Habermehl's witnesses, namely Inspector Darlene Tingtved (Tingtved) and Dr. Allision Danyluk (Danyluk), whom Habermehl had summoned to appear at the hearing to give evidence on his behalf, are also employees of the Agency. The pertinent evidence of these three Agency employees is summarized below.

[16] Getzlaf testified that he has been employed by the Agency and its predecessor government department for 20 years and is currently an inspector who, among other things, verifies compliance under the *Health of Animals Act* and *Regulations*, including Part XV of the Regulations – Animal Identification. Getzlaf was completing inspections and verifications of animal identification on May 26, 2009 at the Elbow Community Pasture. Several producers had delivered their cattle to the holding corrals of the Community Pasture for release into the pasture that was scheduled for around noon. At approximately 9:30 a.m., the three loads of Habermehl cow/calf pairs were unloaded into the holding corrals. Getzlaf testified that he introduced himself to Habermehl but, even before he began to verify that all the Habermehl cow/calf pairs were tagged with approved CCIA tags, Habermehl spoke to him saying "I have two cows that are untagged – what are you going to do about it?" Getzlaf told the Tribunal that he then proceeded to check for RFID tags in the ears of the Habermehl cow/calf pairs in the holding corral. He observed seven cows that were not tagged and told Habermehl that these cows could not go out into the pasture until they were tagged.

[17] As Habermehl did not have any tags with him, about two hours later in the morning Habermehl returned to the Community Pasture with some approved tags and Getzlaf testified that he then watched Habermehl tag the animals which were missing tags. Getzlaf had a brief conversation with Habermehl after the tagging but then had no further face-to-face contact with Habermehl after May 26, 2009.

[18] In cross-examination, Getzlaf told the Tribunal that he did not look for tags or their retaining buttons in any of the trailers that had transported the Habermehl cow/calf pairs to the Elbow Community Pasture on the morning of May 26, 2009. Getzlaf also stated in cross-examination that he did not inspect the ears of the cows that Habermehl later tagged but did note that each was without an approved tag.

[19] Tingtved has been an employee of the Agency and its predecessor for 23 years and currently acts as an inspector. She testified that she was not at the Elbow Community Pasture on May 26, 2009. Tingtved told the Tribunal that she accompanied Getzlaf to the Elbow Community Pasture on June 11, 2009 to take statements from the pasture staff and riders concerning the events that occurred on May 26, 2009. Those statements are located at Tabs 7 to 11 of the Report. In response to Habermehl's question in direction examination, Tingtved said she did not ask Getzlaf if he looked for tags in the Habermehl trailers on May 26, 2009.

[20] Danyluk graduated with a degree in veterinary medicine in 1999 and is now an employee of the Agency. She testified that she was not at the Elbow Community Pasture on May 26, 2009. Danyluk told the Tribunal that, in her professional opinion, it is possible to have CCIA approved tags fall or be ripped out of cattle's ears during transport, falling either into the trailer or outside of it through a side panel, but that it is not likely to have seven drop out during the transportation that took place in this case.

[21] Habermehl's non-Agency witnesses included: himself, his son Craig Habermehl (Craig), Randy Ames (Ames), Ross Siggfusson (Siggfusson), and Roy Rutledge (Rutledge).

[22] Habermehl testified that he is a farmer/rancher in west central Saskatchewan. He graduated with a degree in Veterinary Medicine from the University of Saskatchewan in 1976 and, after operating a veterinary practice for many years in Alberta, returned to undertake the farming/ranching operation. Each year, as part of his seasonal activities, he prepares his cow/calf pairs (presently more than 100 pairs) for summer pasturing off his farm at local community pastures. In 2009, these activities took place in May 2009. May 2009, Habermehl testified was the "worst month ever" due to the loss of his mother, and a wet spring on top of all the regular busyness of spring activities around his agricultural operation. The Habermehl family completed their annual spring cattle preparations starting on Friday, May 22 and finishing on Sunday, May 24, putting the whole herd of more than 200 head through the chutes. At this time, Habermehl or family members applied new, or verified that there were existing, CCIA approved tags in all cows and calves, gave the cattle the required vaccinations and checked the overall health of each animal. Habermehl stated that in 2006, the whole herd had been given CCIA approved tags. Because of his "quality first" motto, Habermehl stated that he put "everything" through again on the weekend of May 22-24, so that all cows and calves would be ready to be moved to community pastures.

[23] Habermehl's evidence was that he was able to transport some of his cow/calf pairs to his own private pasture on May 22 and 23, some pairs to Community Pastures, other than Elbow on Monday, May 25, but due to a delay in the availability of transport, was not able to load his 29 cow/calf pairs destined for the Elbow Community Pasture until Tuesday morning, May 26, 2009.

[24] On the morning of May 26, 2009, three trailers were used by Habermehl to transport the 29 cow/calf pairs: the first trailer, driven by a third party, contained 14 cows; the second, also driven by a third party, contained 13 cows; and the third, driven by Habermehl, contained 2 cows and 29 calves. The trip to the Elbow Community Pasture was about 40 miles.

[25] With Habermehl's arrival at the Community Pasture, the cattle from all three trailers were unloaded into the holding corrals. Habermehl noticed that at least one of his cows no longer had a CCIA approved tag. He also noticed that a CFIA inspector was on-site because a CFIA vehicle was at the Community Pasture. Habermehl walked into the receiving shack, talked with the Pasture Manager, Siggfusson, and then addressed the CFIA inspector (who would later be identified as Getzlaf), saying "I think I know what you are looking for" meaning missing tags. At this point, Habermehl explained that he knew at least one of his cattle did not have an approved tag. He asked the inspector if he could take untagged cattle back home but the inspector said "no". He asked the inspector if he could telephone someone to get a ruling on these matters but the inspector said "no". After this discussion, not having any CCIA tags with him, Habermehl drove back to his home to retrieve the required tags. Upon his return later in the morning, the cattle without tags were retagged, and soon thereafter, the entire lot of 29 Habermehl cow/calf pairs was released from the holding corrals into the Community Pasture.

[26] Towards the end of his interaction with the inspector, after a total of seven cattle had been retagged, Habermehl said to the inspector "I learned something today. I will carry tags and [tagging] pliers. I want your name and the name of your supervisor." Inspector Getzlaf told Habermehl his name and that his supervisor was Dr. Danyluk. Habermehl concluded the conversation by telling Getzlaf that he hoped he would be seeing Danyluk at an upcoming veterinarian conference.

[27] Habermehl testified that no one, not he or the inspector, or the third party transporters looked into the third party trailers for lost tags. Habermehl, but not the inspector, looked into his own trailer and found two tag retainer buttons and one ripped CCIA tag, which indicated to Habermehl that at least two or possibly three cattle transported in his trailer over the prior few days had lost their tags while in the trailer.

[28] In cross-examination, Habermehl told the Tribunal that he had never encountered this type of problem—lost tags upon arrival at a community pasture—before. When questioned exactly when the cow/calf pairs destined for the Elbow Community Pasture were processed on his farm, Habermehl replied that it was on Sunday, May 24 and that they were moved to the pasture on Tuesday, May 26. Habermehl told the Tribunal, on cross-examination, that he also found two CCIA approved tags at home in front of the processing chute just prior to his departure from his corrals, but after the other two trailers had departed.

[29] When asked in cross-examination, if he intended to unload the cattle on his trailer at the Community Pasture, Habermehl stated "Well, not after I knew there were two with tags missing".

[30] In response to questions from the Chairperson, Habermehl stated that, before loading the cattle for the Elbow Community Pasture, he again inspected all the animals in the holding pen. While on this inspection he found some retaining buttons in his corral. This was the reason for his concern about tag failure and whether some of his cattle might be somehow without tags. He included in his final testimony the following statement "I love my cattle."

[31] Witness Craig Habermehl (Craig), Habermehl's son, testified that he helped his father with the tagging and other preparations of the Habermehl's cattle on the weekend of May 22-24, 2009, in anticipation of the cattle moving to their summer home at various community pastures. The procedure used in processing the cattle was for Craig to move the cattle up from the holding pens into the headgate where Habermehl would examine and treat the cattle while in the headgate. Craig remembers certain of the cattle coming through to the headgate and his father replacing those tags during the preparations that went on at the Habermehl farm from May 22-24. Craig was not present at the loading and transport of any of the Habermehl's cattle on the morning of May 26, 2009.

[32] Ames has been the Pasture Manager at Coteau Community Pasture for the past eight years. He testified that each and every time Habermehl brought his cattle to this pasture "everything was done". The Habermehl cow/calf pairs that Habermehl delivered to the Coteau Community Pasture on May 25, 2009, all had brands, farm identification tags, RFID (CCIA approved) identification tags, and fly tags.

[33] Sigfusson has been the Pasture Manager at Elbow Community Pasture since 1998. He testified that on the morning of May 26, 2009, Habermehl delivered cow/calf pairs to the community pasture. Sigfusson was in the receiving shack when Habermehl unloaded his cattle. Once Habermehl entered the shack, Sigfusson heard Habermehl tell Getzlaf that he, Habermehl, would do whatever was necessary to get his cattle compliant. In an earlier statement (Tab 7 of the Agency Report) Sigfusson stated that Habermehl seemed to be aware that he had tags missing from some of his cattle. Sigfusson also told the Tribunal that Habermehl has been on the committee of direction of the Elbow Community Pasture since 2006.

[34] Rutledge is a cattleman and now the owner of a large stockyard and auction mart in Western Canada, and has been around farm animals for more than 40 years. Rutledge was qualified as an expert in matters relating to the handling cattle. He testified that in his market, he and his staff find RFID (CCIA approved) identification tags in the sorting alleys and holding pens. In his opinion the tags fall out 10% to 30% of the time and those lost tags turn up in transport trucks, auction marts and elsewhere. Rutledge stated that “lots of cows” that he sees have had to have RFID (CCIA approved) identification tags put in more than once, as evidenced by ears that are split or have old tagging holes. In his experience, the current animal identification process has unrealistic expectations. Rutledge likened the process to “enforcing speed limits with speedometers that didn’t register properly”.

[35] Rutledge opined that there currently exist other technologies which provide more secure systems of animal identification, like the Australian bolus system, electronic chips, and metal tags. Rutledge’s conclusion was that using the current technology of plastic RFID (CCIA approved) identification tags results in unavoidable tag loss in cattle that are moved farm to other destinations.

Analysis and Applicable Law

[36] 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.*

[37] 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;

[38] 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,*

[39] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187, which designates as violations several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and include a reference to paragraph 176 of the *Health of Animals Regulations*.

[40] Part XV of the *Health of Animals 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 the human food chain. 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 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.

[41] Part XV of the *Health of Animals 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 tag is recorded and that animal is withdrawn from the animal identification registry.

[42] 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 *Health of Animals Regulations*, may never be tagged, through neglect or opposition to the present regulatory scheme. Most animals, however, will be tagged, but, even among these, some will lose their tags somewhere between the birthing pen and the slaughter house floor. To minimize “slippage” and to maximize the number of animals that are tagged with approved tags for the full duration of the animal’s life, the *Health of Animals Regulations* require several actors in the production chain to tag animals which are either not yet tagged or which have lost their tags. If actors inside or beyond the farm gate do not tag, as required by the *Health of Animals Regulations*, they too face liability when tags are missing. Owner and transporters of sheep are among those identified under the *Health of Animals Regulations* with such responsibilities. The Agency has the responsibility of ensuring compliance with these provisions either through criminal prosecutions or through the levying of administrative monetary penalties for violations identified in the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[43] For the purposes of this case, such approved tags are RFID (CCIA approved) identification tags made of plastic bearing a front piece printed with a bar code and a back button which, when applied to an animal's ear, is meant to lock the tag into place permanently. Such a permanent locking device would permit farm-to-processor tracking and thus meet the objectives of the Regulations to establish a permanent and reliable system to track the movements of all bison, cattle and sheep in Canada from the birth of such animals on their "farm of origin" to their removal from the production system, either through export or domestic slaughter. Almost every system of mandatory identification is, however, subject to mechanical failure or human error.

[44] The evidence in this case is that the system that the Regulations rely upon, or perhaps more accurately the equipment and technology to support that system, does not establish a permanent and infallible system to track the movements of all bison, cattle and sheep in Canada. The Tribunal accepts the evidence of Habermehl that he tagged all of his cattle in 2006 with RFID (CCIA approved) identification tags and that again on the weekend of May 22-24, 2009 he did the same, even though some cattle tagged in 2006 had to be retagged because they had lost their 2006 tag. If there was human error in the application of the RFID tags during the weekend of May 22-24, 2009, there was no evidence of it presented at the hearing and it is not unimportant to note that Habermehl was a trained professional practitioner of veterinary medicine as well as being an experienced cattleman. On transport day, Habermehl again verified that all cows and calves were ready to leave his farm on May 25-26, 2009 for community pastures. The Agency and its officials were never at the Habermehl farm and there is no evidence which contradicts the testimony of Habermehl and his son on this point.

[45] However, the undeniable fact remains that the evidence of Getzlaf, which was admitted by Habermehl, was that seven Habermehl cows were found in the Elbow Community Pasture holding corrals on the morning of May 26, 2009, once they had been unloaded from their transport trailers, without RFID (CCIA approved) identification tags.

[46] Two conclusions are available given the evidence. Either the seven cattle were tagged when they left the Habermehl farm on the morning of May 26, 2009 and lost their tags in the trailers en route or while being unloaded or held in holding pens at the Elbow Community Pasture, or that they did not have their tags before they were loaded at the Habermehl farm on the morning of May 26. The former would exonerate Habermehl while the latter would impute liability to him.

[47] Section 176 of the *Health of Animals Regulations* draws a strict line "in the sand" such that there will be no violation of the section if, at moment when an animal is moved from the farm of origin it bears an approved tag. If the tag is lost in transport, section 184 permits the owner or transporter to retag the animals before they are co-mingled with other animals, which was clearly done in the present case at the Elbow Community Pasture by Habermehl. A violation of section 176 arises only where:

1. the alleged violator moved (or caused the movement of);
2. an animal falling within the definition of "animal" under Part XV;
3. from that animal's farm of origin or any other farm or ranch; and
4. the animal did not bear an approved tag at the time of movement from the farm.

[48] 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 beyond doubt and not in dispute that the Agency has proved on the balance of probabilities each of elements 1, 2, and 3 above. In the recent Federal Court of Appeal case of *Canada (Attorney General) v. Denfield Livestock Sales Limited* 2010 FCA 36, the Court examined in detail the context and meaning of section 176 of the *Health of Animals Regulations*. In that case, the Court 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 (paras. 18, 29, and 31).

[49] In this case, it is clear that Habermehl had three loads of cattle to get to the Elbow Community Pasture. On May 26, 2009, he hauled one himself with the other two hauled by third parties at Habermehl's direction. Clearly, Habermehl exercised sufficient power and control over each of the three loads, such that he moved or caused the movement of all 29 cow/calf pairs that arrived at the Elbow Community Pasture on May 26, 2009. Moreover, he and his family had, during the same late May period, prepared and hauled around 150 of their cattle to other summer pastures.

[50] With respect to element 4, the evidence presented by the parties leads to different and opposing conclusions. There is no clear evidence as to exactly when each of the seven cattle lost their RFID (CCIA approved) identification tags. The evidence of Habermehl is that he tagged all of his cattle going to community pastures between May 22 and 24, 2009. With respect to the 29 cow/calf pairs destined for the Elbow Community Pasture, he again verified the cattle on the morning they were loaded for transport on May 26. There is also evidence that Habermehl found tags, or buttons or both in his corrals and in his trailer which suggested that there was RFID tag failure and that some of his cattle going to this, or one of the other, community pastures might be without tags. Those tags might have been lost before loading, during transport, during unloading or while in holding pens at a community pasture. The Tribunal finds as fact that Habermehl completed a detailed, systematic and individual examination of each of the 29 cow/calf pairs that were destined to be transported to the Elbow Community Pasture and all were tagged with a RFID (CCIA approved) identification tags on May 24. He then reverified the animals' readiness and compliance for travel off his farm on the morning of the departure of the animals for the Elbow Community Pasture.

[51] The Tribunal also finds as fact, that Habermehl, once he had arrived at the Elbow Community Pasture, told Getzlaf that he had two cows that were untagged. Whether these two cows were the ones that he himself had transported in his load of two cows and 29 calves or if they were ones that Habermehl found in the holding corrals from the other two loads of cows hauled by third parties is not clear. Opportunities to gather more evidence were missed by the Agency on this point. No attempt was made by Agency officials to determine in which load the seven cows were located. Moreover, there is clear evidence offered by Getzlaf, and substantiated by Habermehl, that Getzlaf never looked or attempted to search for any tags or buttons in any of trailers that hauled the cows. Evidence from Habermehl was that he examined his own trailer when he cleaned it out and found two more ear tag buttons. Moreover, Getzlaf did not examine the ears of the seven retagged cattle prior to their retagging to determine whether they had rips or holes that might indicate if a tag had recently fallen out.

[52] Evidence from Habermehl and Rutledge indicated that there is a problem with the current tagging system of RFID (CCIA approved) identification tags. Whether the Tribunal accepts the opinion evidence of witness Rutledge, or the actual case of the seven cows in this case, a not insubstantial problem of RFID (CCIA approved) identification tag failure exposes players in the beef, bison and sheep industry to liability for violations of Part XV of the *Health of Animals Regulations*.

[53] Considering that a producer has to purchase, apply and verify the continuing and constant presence of a RFID (CCIA approved) identification tag in the ear of each of his animals whenever they are moved off his farm or face liability for regulatory non-compliance, Part XV does appear to impose a heavy responsibility on one sector for the benefit of all consumers and producers in Canada to assure traceability and food safety in the food system. Fair or not, this is, however, the regulatory burden that Parliament and the Governor in Council have placed on, in this case, the applicant Habermehl, and the Tribunal must interpret and apply the law to the facts of this case.

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

[55] When an AMP provision has been enacted for a particular violation, as is the case for section 176 *Health of Animals Regulations*, Habermehl has little room to mount a defence. The Tribunal accepts that any honest plea from an applicant alone — statements such as “I always try my best to tag all my animals” or “I thought they were all tagged because the tags are supposed to be permanent”— would not 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 Habermehl might raise, including the fact that he “loves his cattle”. Given Parliament's clear statement on the issue, the Tribunal accepts that such statements by Habermehl would not be permitted defences under section 18.

[56] However, the Federal Court of Appeal, in *Doyon v. Attorney General of Canada*, 2009 FCA 152, 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.

[57] 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.

[58] Moreover, in *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal cautions this Tribunal and advises it to be “circumspect in managing and analysing the evidence and in analysing the essential elements of the violation” in an alleged AMP violation 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.

[59] Therefore, the strictness of the AMP regime reasonably must apply to both Habermehl and the Agency. Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities. It is with respect to the fourth element – the animal did not bear an approved tag at the time of movement from the farm – the Tribunal finds that the Agency has failed to prove its case on the balance of probabilities.

[60] The Tribunal found all of the eight witnesses in this matter were very credible. Agency counsel urged the Tribunal that the case of *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.) is relevant in this case as it stands for the proposition that the credibility of an interested witness must be weighed against whether that witness’s evidence is consistent with the probabilities affecting the case as a whole (para. 9). She urged that in this case Habermehl’s evidence, though credible, was self-serving and not consistent with the probabilities of the case. The Tribunal sees the evidence of Habermehl in another light. The Tribunal found Habermehl to be a professional, experienced, systematic and compassionate handler of his animals. As such, the Tribunal accepts that the Habermehl animals, going to the Elbow Community Pasture, were all tagged or retagged with approved tags on May 24, 2009. He has in place systems to prepare, tag, retag and verify animal health of all his animals just before they leave his farm every year. He is proactive and attends to every animal health and regulatory detail. Even when such details might be to his detriment, he has revealed it to the Tribunal, such as when he found the tags in the chute at his farm after the first two trailers departed on the morning of May 26, 2009.

[61] The Tribunal finds that Habermehl sought to comply at every juncture of his operations with Part XV of the *Health of Animals Regulations*. He tagged and retagged his cattle with RFID tags; he verified his cattle when they were being loaded and then when he became aware of a problem at the Elbow Community Pasture on Monday morning, May 26, 2009, he drove more than 100 km round-trip to secure approved tags so that his animals would be compliant before they were released into the community pasture.

[62] What is lacking from an evidentiary perspective by the Agency in this case is proof that the seven cattle did not have RFID tags when they left the Habermehl farm. Over 200 cattle had been prepared, verified and shipped from the farm between May 22 and May 26. They had all been tagged with RFID tags and then shipped in several trailers to several different pastures. Tags and buttons were found in the chute and in the trailers, but to which cattle did they belong? Agency officials failed to look for any evidence of lost tags in the trailers, or of ripped ears (or lack thereof) in the retagged cattle that would have provided the Tribunal with perhaps enough evidence to determine whether the cattle lost their tags on the Habermehl farm or on their way to, or in the holding pens of, the Elbow Community Pasture.

[63] Given the lack of sufficient evidence on the matter, it would be “mere conjecture ... speculation, hunches, impressions or hearsay” to conclude that, on the balance of probabilities, any of the seven cows were without tags on the morning of May 26, before they were loaded into transport trailers. These tags are, after all, supposed to be permanent identification tags. The fact that any or all of these permanent tags would be lost within less than 48 hours is not proved from the evidence presented to the Tribunal.

[64] The Tribunal has considered two cases in which courts have wrestled with the difference between speculation and legal inference: *Canada v. Satiacum* [1989] F.C.J. No. 505 and *Xiu Jie Zhang v. Minister of Citizenship and Immigration* (2008 FC 533). At page 13 of *Satiacum*, the Federal Court of Appeal writes:

The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in Jones v. Great Western Railway Co. (1930), 47 T.L.R. 39 at 45, 144 L.T. 194 at 202 (H.L.):

The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.

In R. v. Fuller (1971), 1 N.R. 112 at 114, Hall J.A. held for the Manitoba Court of Appeal that “[t]he tribunal of fact cannot resort to speculative and conjectural conclusions.” Subsequently a unanimous Supreme Court of Canada expressed itself as in complete agreement with his reasons: [1975] 2 S.C.R. 121 at 123, 1 N.R. 110 at 112.

[65] In *Zhang*, at paragraphs 2 and 3, the Federal Court, on similar note, writes:

[2] *Drawing an inference is a matter of logic. As stated by the Newfoundland Supreme Court (Court of Appeal) in Osmond v. Newfoundland (Workers' Compensation Commission) (2001), 200 Nfld. & P.E.I.R. 203 at paragraph 134:*

Drawing an inference amounts to a process of reasoning by which a factual conclusion is deduced as a logical consequence from other facts established by the evidence. Speculation on the other hand is merely a guess or conjecture; there is a gap in the reasoning process that is necessary, as a matter of logic, to get from one fact to the conclusions sought to be established. Speculation, unlike an inference, requires a leap of faith.

[3] *The same court explained the difference between inference and speculation in another way:*

An inference is different from speculation. It must be grounded in some proven fact and established to be probable in the circumstances.

See: Newfoundland (Workers' Compensation Commission) v. Miller (2001), 199 Nfld. & P.E.I.R. 186 at paragraph 11 (Nfld. C.A.).

[66] The Tribunal echoes the words, as quoted above in the *Satiacum* case, that “the dividing line between conjecture and inference is often a very difficult one to draw.” However, in this case, concluding that the tags were ripped out or dropped from the seven cattle’s ears before their loading into the transport trailers does require a leap of faith. The chain of causation, between Sunday, May 24 and Tuesday, May 26, 2009 has missing or weak links.

[67] Habermehl’s cattle destined for the Elbow Community Pasture were systematically tagged with approved tags on Sunday, May 24. Then he verified the cow/calf pairs just before loading to the community pasture on May 26. Chances of human error are low as well because Habermehl is an experienced rancher, a professional veterinarian, a director of the Elbow Community Pasture and clearly knew that he was under an obligation to tag each and every cow and calf that left his farm.

[68] Are there other possibilities for how the cattle lost their tags? Clearly yes, in the transport trailers or in the holding corrals at the Elbow Community Pasture. Moreover, the Tribunal was presented with conflicting evidence of two professional veterinarians on the whether it was likely or possible that the tags of the seven cows were lost during their transport to the community pasture. The Agency veterinarian, who was not present on May 26, 2009, said it was possible but not likely. Habermehl, who was the owner of the cattle, and who, of course, has a partisan interest in the outcome of this case, intimated that it was possible, even likely, that all the tags could have been pulled out during transport. He, Habermehl, did check his trailer on May 26 and found tag buttons which had fallen out during the transport. The Agency inspector, Getzlaf, on the other hand did not check any of the three trailers to see if there were any lost or ripped tags on the floor of the trailers, nor is there evidence that he checked to see if there were any tags in the holding corrals at the community pasture where they were placed before their release into the pasture itself. The Tribunal concludes that it would require speculation, rather than legal inference, to determine that any of the seven cows that had no tag at the Elbow Community Pasture, on the balance of probabilities, had no tag prior to its loading at the Habermehl farm on the morning of May 26, 2009.

[69] The *Doyon* decision requires the Tribunal to “*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.*” Too much speculation and impression must be entertained to uphold a finding that the cattle that left Habermehl’s farm on the morning of May 26, 2009, on the balance of probabilities, did not bear an approved RFID tag.

[70] The Tribunal finds that the respondent has not made all of the essential elements of the case, and as a result that the applicant did not commit the alleged violation and is not liable for payment of the monetary penalty.

Dated at Ottawa, this 3rd day of September, 2010.

Dr. Donald Buckingham, Chairperson