

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Kropelnicki v. Canada (CFIA), 2010 CART 024

Date: 20101101
Docket: RTA-60387;
RT-1536

Between:

Gordon Kropelnicki, 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 188 of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable for payment of the penalty in the amount of \$500.00 to the respondent within 30 days after the day on which this decision is served.

Hearing held in Dauphin, MB,
August 10, 2010.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Gordon Kropelnicki (Kropelnicki), on May 6, 2009, at or near Sifton, Manitoba, failed to report the number of each of three exported animals' approved tags to the administrator under the approved Act within the prescribed time contrary to section 188 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 Kropelnicki exported the cattle in question, and
- that Kropelnicki or his agents, failed to report the numbers of any or all of three cows that were exported which bore Canadian Cattle Identification Agency approved identification tags.

Record and procedural history

[4] This case is one of four currently before the Tribunal between Kropelnicki and the Agency. The four cases are *Kropelnicki v. Canada (CFIA)* 2010 CART 022; RT-1534, *Kropelnicki v. Canada (CFIA)* 2010 CART 023; RT-1535, *Kropelnicki v. Canada (CFIA)* 2010 CART 024; RT-1536, and *Kropelnicki v. Canada (CFIA)* 2010 CART 025; RT-1537. Each case involves the Agency alleging a violation of the *Health of Animals Regulations* by Kropelnicki in failing to report exported animals' approved tag numbers to the Canadian Cattle Identification Agency within the prescribed time. The parties agreed at the August 10, 2010 hearing to have all four cases heard together with common evidence and arguments.

[5] This case involves the Notice of Violation #0910MBCA0006, dated December 8, 2009, which alleges that, on the 6th day of May 2009, at or near Sifton, in the province of Manitoba, Kropelnicki "committed a violation, namely: Fail to report the number of an exported animal's approved tag to the administrator in the prescribed time contrary to section 188 of the *Health of Animals Act* 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*." At the hearing of August 10, 2010 the parties agreed to amend Notice of Violation #0910MBCA0006 such that the violation would read "contrary to "section 188 of the *Health of Animals Regulations*" rather than "contrary to section 188 of the *Health of Animals Act*".

[6] Service by the Agency of the above Notice of Violation on Kropelnicki was deemed to have occurred on December 20, 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.

[7] Section 188 of the *Health of Animals Regulations* reads as follows:

188. Every person who exports a bison or a bovine shall ensure that the number of the animal's approved tag is reported to the administrator within 30 days after the exportation.

[8] In section 172 of *Health of Animals Regulations* "administrator" is defined as:

"administrator" means a person with whom the Minister has entered into an agreement, under section 34 of the Act, under which the person is to administer a national identification program for animals.

[9] The parties agreed that for the purposes of this case, the "administrator" that needed notification was the Canadian Cattle Identification Agency (CCIA).

[10] In a letter dated December 12, 2009, and received by the Tribunal on December 23, 2009, Kropelnicki 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 on December 24, 2009, Kropelnicki requested that the review be oral, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[11] The Agency sent its report (Report) concerning the Notice of Violation to Kropelnicki and to the Tribunal on January 6, 2010, with the Tribunal receiving it on January 7, 2010.

[12] In a letter dated January 7, 2010, the Tribunal invited Kropelnicki to file with it any additional submissions in this matter, no later than February 8, 2010.

[13] No further submissions were received from the parties other than a request for the rescheduling of the hearing dated May 7, 2010, from Kropelnicki and a request for the rescheduling of the hearing dated June 3, 2010, from the Agency, both of which were granted by the Tribunal.

[14] The oral hearing requested by Kropelnicki was held in Dauphin, Manitoba on August 10, 2010, with Kropelnicki self-represented and the Agency represented by its counsel, Ms. Shirley Novak.

Evidence

[15] The evidence before the Tribunal in this case consists of written submissions from both the Agency (the Notice of Violation and the Agency's Report) and from Kropelnicki (his request for review) and oral testimony given at the hearing held on August 10, 2010. At the hearing, Inspector Bruce Sabeski (Sabeski) gave evidence on behalf of the Agency while Kropelnicki gave evidence on his own behalf. During the hearing, the parties also tendered 4 exhibits as evidence.

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

- Kropelnicki has a feeder cattle operation in Manitoba.
- Kropelnicki exported 34 cattle to the USA via Pembina, North Dakota on April 5, 2009.
- On August 26, 2009, Kropelnicki received a letter of warning sent from the Agency on August 25, 2009, which stated that three of the cattle he transported to the USA on April 5, 2009, had not had their Radio Frequency Identification - Canadian Cattle Identification Agency (RFID-CCIA) approved identification tag retired within 30 days of their export to the USA and that he must bring himself into compliance with section 188 of the *Health of Animals Regulations* no later than September 15, 2009.
- Kropelnicki took no steps himself to retire the tags in questions prior to August 25, 2010.
- Kropelnicki now uses a veterinary clinic in Roblin, Manitoba (Roblin clinic) to certify his animals for export and, once exported, to retire the tag numbers of those animals by notifying the CCIA.

[17] The Agency's witness Sabeski testified that he is employed by the Agency and is currently an animal program inspector. Since 2006, he is also an audit inspector for exports in the Brandon office. In completing such an audit, Sabeski told the Tribunal that he receives exports certificates for recent cattle exports to the USA and compares the entries on these certificates with the CCIA database to determine if the exported animals' tags have been retired from the database. In the summer of 2009, he was asked to complete an exporter audit wherein 10 exporters had been determined to be in non-compliance with the provisions requiring retirement of exporter cattle tag numbers. Sabeski indicated that one of these 10 exporters was Kropelnicki and that he, along with the other nine exporters, was sent a letter requesting compliance with the provisions of section 188 of the *Health of Animals Regulations*, on or before September 15, 2009.

[18] Sabeski testified that on September 16, 2010, he reviewed the export certificate for Kropelnicki's 34 cattle shipped to the USA on April 5, 2009, and compared these entries with notations for each recorded on the CCIA database to determine if the exported animals' tags had been retired from the database. He noted that three exported cattle from this shipment had not had their tag numbers retired. As a result, he recommended enforcement action which resulted in the issuance of the Notice of Violation in question.

[19] Sabeski testified that he received a telephone call from Kropelnicki on September 17, 2009. During that phone call, Kropelnicki told Sabeski that he had called the veterinarian clinic in Glenboro (Glenboro clinic) on August 29 or 30, 2010 to have them retire the tags and that they said they would do so. However, they did not and so Kropelnicki said that the Roblin clinic was going to retire the tag numbers.

[20] Sabeski also told the Tribunal that he did make a call to "Rachel" at the Roblin clinic on September 17, 2009. She had no information of the status of the retirement of tag numbers of Kropelnicki's cattle that had been exported to the USA on April 5, 2009, and as of that date, the clinic had not retired any such numbers from the CCIA database.

[21] Kropelnicki presented the following evidence. On August 26, he received a registered letter from the Agency advising him that certain cattle exported by him had not had their tag numbers retired from the CCIA database. Kropelnicki then phoned the Glenboro clinic in Manitoba which had assisted him in the pre-clearance medical formalities for the export of his cattle. Kropelnicki told the Tribunal that staff at the Glenboro clinic said they would fax him the CCIA tag numbers of cattle that he had shipped to the USA.

[22] In cross-examination, Kropelnicki acknowledged that he, not the Glenboro clinic was the exporter of the cattle and that prior to August 30, 2009, he had never had any problems with the clinic. Kropelnicki stated that he relied on the Glenboro clinic to retire the tag numbers but they never did. All that happened, according to Kropelnicki, was that Glenboro clinic staff gave him "the run-around".

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 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 188 of the *Health of Animals Regulations*.

[27] 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 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 allow the animal’s movement to be traced back from the place where the problem is found, such as at an international border, at an auction market or at an abattoir, to the farm where the animals originated.

[28] 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 is exported, or while in Canada dies on the farm, in transit or when slaughtered, the tag is recorded and that animal with its unique tag number is withdrawn from the animal identification registry.

[29] The evidence in this case is that the system that the *Regulations* rely upon functioned properly but Kropelnicki failed to complete the last step of the traceability process, that of retiring CCIA tag numbers when he shipped his cattle out of Canada. If this step is not completed, the identification system will become unreliable as it will fail to present an accurate picture of the real number of cattle currently in the system and their approximate location in Canada.

[30] The undeniable facts in this case are that Kropelnicki shipped his cattle to the USA and their tag numbers were not retired on or before September 15, 2009. The Tribunal has no reason to doubt that Kropelnicki fully relied on the Glenboro clinic to carry out his wishes and to protect his interests by retiring the tag numbers of the cattle exported to the USA. It is clear that Kropelnicki took some preliminary steps to have the tags retired to meet his obligations and the Agency's August request. Unfortunately for whatever reason, the retirement of the tags did not occur prior to September 15, 2009.

[31] It is the Agency which bears the burden of proof for proving all the elements of the alleged violation. Based on the evidence presented, the Agency has proved, on the balance of probabilities, each of the elements that is required for the violation to be sustained. Kropelnicki exported three cows to the USA on April 5, 2009. He did not within 30 days retire their tag numbers from the CCIA database. Nor did he, or his agents, retire these tag numbers from the CCIA database during the additional grace period up to and including September 15, 2009, offered to Kropelnicki by the Agency.

[32] Arguments from Kropelnicki indicated that the current tagging system using RFID-CCIA tags has real retention problems and that all costs of the system are borne by producers, including exposure to liability if the tags fall out. Another recent case before this Tribunal has suggested similar problems exist with the current tagging system (*Habermehl v. Canada (CFIA)* 2010 CART 017). The applicants in both of these cases argue that there is a significant problem with RFID-CCIA approved tags failing and as such, producers of beef, bison and sheep are unfairly exposed to liability for violations of Part XV of the *Health of Animals Regulations*. But these issues, although raised by Kropelnicki during the hearing, are not relevant to the case before the Tribunal.

[33] Part XV does appear to impose a heavy responsibility on the agricultural 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 the regulatory burden that Parliament and the Governor in Council have placed on, in this case, the applicant Kropelnicki, and the Tribunal must interpret and apply the law to the facts of this case.

[34] 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.

[35] When an AMP provision has been enacted for a particular violation, as is the case for section 188 of the *Health of Animals Regulations*, Kropelnicki has little room to mount a defence. The Tribunal finds that Kropelnicki's statements such as "I am 100% for traceability" or "I believed the Glenboro clinic was going to retire the numbers", will 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 Kropelnicki might raise. Given Parliament's clear statement on the issue, the Tribunal accepts that such statements by Kropelnicki are not permitted defences under section 18.

[36] Moreover, reliance by Kropelnicki on individuals who were acting as his agents in the export transaction to the USA, is not a defence to the violation alleged in this case either. Subsection 20(2) of the Act reads as follows:

20. (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.

[37] The Tribunal finds that the Agency has met the evidentiary burden of proving, on the balance of probabilities, that Kropelnicki's cows exported to the USA did not have their tag numbers retired from the CCIA database within 30 days of their exportation. Kropelnicki was given adequate notice of the pending enforcement action against him by a registered letter that he received on August 26, 2009. Although he appears to have put his reliance in a vet clinic that let him down, he unfortunately must carry the liability that attaches to the failure to ensure that tag numbers of exported cattle be retired from the CCIA database within the specified time limit for doing so.

[38] In light of the evidence and the applicable law, the Tribunal must conclude that the Agency has established, on a balance of probabilities, that Kropelnicki committed the violation and is liable for payment of the penalty in the amount of \$500.00 to the Agency within 30 days after the day on which this decision is served.

[39] The Tribunal wishes to inform Mr. Kropelnicki that this violation is not a criminal offence. After five years, he 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 1st day of November, 2010.

Dr. Donald Buckingham, Chairperson