

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Coward v. Canada (CFIA), 2010 CART 18

Date: 20100927
Docket: RTA-60381;
RT-1528

Between:

Cecil Coward, 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 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 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 Swift Current, SK,
June 23, 2010.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Cecil Coward (Coward), on May 19, 2009, near Hodgeville, Saskatchewan, moved 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 Coward moved or caused the movement of the cattle in question, and
- when the 50 cow/calf pairs left Coward's farm on the morning of May 19, 2009, bound for the Shamrock Community Pasture, that any of the 10 cows failed to have in its ear a Radio Frequency Identification - Canadian Cattle Identification Agency (RFID-CCIA) approved identification tag.

Record and procedural history

[4] Notice of Violation #0910SKCA0002, dated August 12, 2009, alleges that, on the 19th day of May 2009, at or near Hodgeville, in the province of Saskatchewan, Coward "committed a violation, namely: Move or cause the movement of an animal not bearing an approved 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 under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*."

[5] Service by the Agency of the above Notice of Violation on Coward was deemed to have occurred on October 2, 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 15, 2009 and received by the Tribunal on October 20, 2009, Coward 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 October 21, 2009, Coward 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 27, 2009 (and received by the Tribunal on October 28, 2009), the Agency sent its report (Report) concerning the Notice of Violation to Coward and to the Tribunal.

[9] In a letter dated October 28, 2009, the Tribunal invited Coward to file with it any additional submissions in this matter, no later than November 27, 2009. No further submissions were received from Coward other than a request for a rescheduling of the hearing dated April 26, 2010 which was granted by the Tribunal.

[10] The oral hearing requested by Coward was held in Swift Current, Saskatchewan on June 23, 2010, with Coward represented by his agent, Mr. Scott Campbell and the Agency represented by its counsel, Ms. Shirley Novak.

Evidence

[11] 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 Coward (his request for review). As well, both parties presented two witnesses who tendered evidence at the hearing on June 23, 2010. Lawrence Getzlaf and Darlene Tingtved gave evidence on behalf of the Agency while Coward, himself, and his wife Jacqueline Coward gave evidence on behalf of Coward. During the hearing, the parties also tendered 4 exhibits as evidence.

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

- Coward operates a large cow/calf operation near Hodgeville, Saskatchewan.
- Each year Coward moves his cattle from his farm to pasture, some of which are private pastures and some of which are 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.
- 175 pairs of cows and calves were collected by the Coward family into their farm corrals where cow/calf pairs were branded and tagged, which included RFID-CCIA approved tags, on May 1, 2009 in anticipation of the Coward cattle moving to their summer pastures.
- On May 19, 2009 Coward and his wife moved 50 cow/calf pairs from their farm to the Shamrock Community Pasture located some 40 miles (64 kilometres) from the farm.
- The 50 cow/calf pairs were transported in two loads and unloaded into the Shamrock Community Pasture in the morning of May 19, 2009, and were collected into a holding corral.
- After inspecting the holding corral that housed the Coward cattle, Agency officials found 10 cows that did not bear RFID-CCIA approved tags.

[13] The contested evidence in this matter related to whether the Coward cows that were found untagged by Agency officials on May 19, 2009, at the Shamrock Community Pasture had RFID-CCIA tags when they left the Coward farm earlier that morning.

[14] Agency's witnesses were Inspectors Lawrence Getzlaf (Getzlaf) and Darlene Tingtved (Tingtved), both employees of the Agency. The pertinent evidence of these two Agency employees is summarized below.

[15] Getzlaf testified that he is employed by the Agency 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 19, 2009 at the Shamrock Community Pasture. Arriving at the pasture around 10:30 a.m., he asked the Pasture Manager if he could check the pasture. When he did, he found one lot of cattle consisting of 50 cow/calf pairs, which the Pasture Manager told Getzlaf belonged to Coward. Among these 100 animals, Getzlaf initially found nine cows without RFID-CCIA approved tags. Furthermore, some of these cows had holes in their ears which would indicate that at some time they had tags that had since fallen out. He then informed the Pasture Manager of this situation and it was Getzlaf's understanding that the Pasture Manager called Coward to come and tag his untagged animals before their release into the pasture. Getzlaf called a co-worker Tingtved to come and assist him and she arrived at the pasture in the early afternoon. Getzlaf told the Tribunal that he never actually met Coward on that day as he left before Coward arrived later that afternoon.

[16] Tingtved is an employee of the Agency and currently acts as an inspector. She testified that she came to the Shamrock Community Pasture on May 19, 2009, in the early afternoon after having received a phone call from Getzlaf. Tingtved told the Tribunal that she then accompanied Getzlaf to inspect the Coward cattle and they found a number of cows without RFID-CCIA approved tags. She brought a camera with her and photographed some of the cows missing tags (Agency Report, Tab 5) and told the Tribunal that some of those cows had holes in their ears, but none of the holes were fresh, indicating that the tags had been missing for some time. Tingtved told the Tribunal that Getzlaf then left the pasture around 3:00 p.m..

[17] Tingtved testified that later in the day around 3:30 p.m., Coward and his wife came back to the pasture. A discussion ensued between Tingtved and Coward wherein she asked Coward: if he had checked his cattle for RFID-CCIA approved tags before loading that morning and he replied that he had not; if he was aware that the cattle needed to be tagged and he replied that he was; and, who had transported the cattle to the pasture and he replied that he had done so. At the end of the discussion, Tingtved left the pasture. Tingtved told the Tribunal that the next day she called the Pasture Manager and he told her that Coward and he had tagged 10 of the Coward cows with RFID-CCIA approved tags in the late afternoon of May 19, 2009 before the entire Coward herd was released into the pasture.

[18] In cross-examination, Tingtved informed the Tribunal that Coward at no time refused to retag the cattle that were found to be missing their RFID-CCIA approved tags.

[19] Coward's witnesses included himself, and his wife (Mrs. Coward). Coward testified that he is a farmer/rancher in southwestern Saskatchewan and, with his wife, have 175 cow/calf pairs. In 2009, he transported 125 pairs to his own pastures and 50 pairs to the Shamrock Community Pasture. He transported the 50 pairs on May 19 in two loads. After he was home again that morning, he received a call around 11:30 a.m. from the Pasture Manager telling him that some of his cows were missing their RFID-CCIA approved tags.

[20] Coward testified he does his best to tag all his cattle, that the RFID-CCIA approved tags often fall out and that he finds cows without tags. He often must retag them, sometimes by putting the tag into the same hole that the old tag made prior to its falling out. He explained therefore that even if a newly retagged animal lost its tag, it would not cause a new or fresh scar, as a healed hole from the old tag already existed.

[21] With respect to written submissions, Coward in his request for review dated October 15, 2009 stated as follows: "Our cows had all been tagged previously and in the time of sorting + loading for two different pastures I am sorry to say that I did not take the time to check for tags in the cows. As soon as possible after we got to the Pasture we retagged the cows missing their tags. ... I am aware that there was an oversight on my part about not checking again to see that the cattle still had their tags".

[22] Mrs. Coward testified that she and her husband had branded and tagged with RFID-CCIA approved tags the entire herd of 175 cow/calf pairs on May 1, 2009. On May 19, the day of transport, Mrs. Coward testified that her main concern in the loading process was with "mothering-up", that is, ensuring that the correct calf was with its mother as the pair went up the chute onto the truck.

[23] In cross-examination, Mrs. Coward told the Tribunal that she didn't verify each one of the animals for a RFID-CCIA tag as it was loaded on May 19 but rather that her focus was on the "mothering-up" of the cow/calf pairs.

Analysis and Applicable Law

[24] This Tribunal's mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (the Act). The purpose of the Act is set out in section 3:

3. *The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.*

[25] Section 2 of the Act defines "agri-food Act":

2. "agri-food Act" means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act;

[26] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations:

4. (1) *The Minister may make regulations*

(a) *designating as a violation that may be proceeded with in accordance with this Act*

(i) *the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act,*

[27] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187, which designates as 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*.

[28] 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 auction market or an abattoir, to the farm where the animals originated.

[29] 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.

[30] 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*.

[31] For the purposes of this case, such approved tags are RFID-CCIA approved 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.

[32] 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 Coward that on May 1, 2009, he tagged all of his cattle with RFID-CCIA approved identification tags. If there was human error in the application of the RFID tags on May 1, 2009, there was no evidence of it presented at the hearing. The Agency and its officials were never at the Coward farm and there is no evidence which contradicts the testimony of Coward and his wife on this point.

[33] However, the undeniable fact remains that the evidence of Agency witnesses, which was admitted by Coward, was that 10 of Coward's cows were found in the Shamrock Community Pasture on May 19, 2009, without RFID-CCIA approved tags.

[34] Two conclusions are available given the evidence. Either the 10 cows were tagged when they left the Coward farm on the morning of May 19, 2009, and lost their tags en route or while being unloaded or held at the Shamrock Community Pasture, or that some or all of them did not have their tags before they were loaded at the Coward farm on the morning of May 19. The former would exonerate Coward while the latter would impute liability to him.

[35] 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 the 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 Shamrock Community Pasture by Coward. 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.

[36] 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. The evidence bears out that Coward moved the 10 cows that were without RFID-CCIA approved tags as part of the group of 50 cow/calf pairs he hauled to the Shamrock Community Pasture on May 19, 2009.

[37] With respect to element 4, the parties argue that the evidence leads to different and opposing conclusions. There is no clear evidence as to exactly when each of the 10 cows lost its RFID-CCIA approved tags. The evidence of Coward is that he tagged all of his cattle going to pastures on May 1, 2009. There is also evidence and an admission that neither he, nor Mrs. Coward verified the cattle for RFID-CCIA tags on the morning they were loaded for transport on May 19. There is no evidence that Coward or the Agency inspectors looked for or found tags, or buttons at the Coward farm, in the Coward transport vehicles or at the Shamrock Community Pasture on May 19. Agency witnesses provided evidence that the holes in the ears of the cows that were missing tags did not display any evidence of recent scars, tears or blood.

[38] Arguments from Coward 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*.

[39] Considering that a producer has to purchase, apply and verify the continuing and constant presence of a RFID-CCIA 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 Coward, and the Tribunal must interpret and apply the law to the facts of this case.

[40] 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.*

[41] When an AMP provision has been enacted for a particular violation, as is the case for section 176 of the *Health of Animals Regulations*, Coward 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 and I just tagged them a couple of weeks ago” — would not, in and of themselves, be permitted defences under section 18, and would not have the effect of exonerating an applicant. In the present case, section 18 of the Act will exclude practically any excuse that Coward might raise. Given Parliament’s clear statement on the issue, the Tribunal accepts that such statements by Coward would not be permitted defences under section 18.

[42] 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.

[43] 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.

[44] 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.

[45] The Tribunal found all of the 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 Coward's evidence, though credible, was self-serving and not consistent with the probabilities of the case if he was arguing that it is likely on the balance of probabilities that the tags missing from the 10 cows were in place when they left the farm on the morning of May 19, and that they were lost while in transit or at the community pasture prior to the Agency's official inspecting the cattle at the Shamrock Community Pasture just a few hours later.

[46] Counsel for the Agency also argued that the case of *Canada (CFIA) v. Magnowski* 2003 FCA 492 supported her arguments that Coward cannot rely on the fact that he had tagged all of his cattle some time prior to their transport to the Shamrock Community Pasture to uphold his claim that it is more likely than not that each of his 10 cows had tags when they were loaded on May 19, 2009. Of course the *Magnowski* case was more clear cut—there the producer testified he had tagged his cattle on Mother's Day 2002, and that they were found to be missing tags on February 5, 2003, almost 11 months later as opposed to this case where Coward testified that he had tagged all his cattle just 18 days before they were found to be without RFID-CCIA approved tags.

[47] The Tribunal finds that the Agency has met the evidentiary burden of proving, on the balance of probabilities, that at least one and up to 10 of Coward's cows were loaded at the Coward farm on the morning of May 19, 2009, without having a RFID-CCIA approved tag. Much can happen in 18 days. Unlike another case that has recently come before the Tribunal (*Habermehl*), in this case there was an admission by Coward that he did not verify each cow as it was loaded for travel to the Shamrock Community Pasture. Moreover, there was no evidence that Coward looked for or found any lost tags or buttons in his loading corrals at his farm or in his transport vehicle. Together, these facts point to a more reasonable likelihood that one or more, or even all 10 cows, lost their tags between May 1 and the time they were loaded for transport to the community pasture on May 19. Of course there are other possibilities as to how the cattle lost their tags. The tags could have been lost in the transport trailers or in the holding corrals at the Shamrock Community Pasture but these remain possibilities rather than likelihoods or probabilities given the evidence in this case.

[48] The Tribunal finds that the Agency has, therefore, made out all of the essential elements of this case. The Tribunal has no reason to doubt Mr. and Mrs. Coward's assertions that "due to drought + the price of cattle it is hard enough to make a profit" (statement by Coward in his request for review) and that they are good cattle producers who agree with the tagging program for Canadian cattle. However, in light of the evidence and the applicable law, the Tribunal must conclude that the Agency has established, on a balance of probabilities, that Coward 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.

[49] The Tribunal wishes to inform Mr. Coward 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 27th day of September, 2010.

Dr. Donald Buckingham, Chairperson