

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Coleman v. Canada (CFIA), 2011 CART 006

Date: 20110321
Docket: RTA-60395;
RT-1545

Between:

Wayne Coleman, Applicant

- and -

Canadian Food Inspection Agency, Respondent

[Please note that an erratum released on March 31, 2011, is appended at the end of these reasons.]

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 Saskatoon, SK,
January 28, 2011.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Wayne Coleman (Coleman), on October 4, 2009, near Conquest, Saskatchewan, moved or caused to be moved bison which were not bearing approved tags, 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 Coleman moved or caused the movement of the bison in question, and
- when the bison left the Coleman farm on October 4, 2009, one or more of them failed to have in its ear/their ears a Radio Frequency Identification - Canadian Cattle Identification Agency (RFID-CCIA) approved identification tag.

Record and procedural history

[4] Notice of Violation #0910MBCA0012, dated March 1, 2010, alleges that, on the 4th day of October 2009, at Conquest, in the province of Saskatchewan, Coleman “committed a violation, namely: Did remove or cause the removal 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*.” At the hearing of January 28, 2011, the parties agreed to amend Notice of Violation #0910MBCA0012 such that the violation would read “Did move or cause the movement of” rather than “Did remove or cause the removal of”.

[5] Service by the Agency of the above Notice of Violation on Coleman occurred on May 11, 2010. 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 May 31, 2010 and received by the Tribunal on that same day, Coleman 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 June 1, 2010, Coleman informed the Tribunal that he wished to proceed with a review by way of written submissions alone.

[8] On June 8, 2010, the Agency sent its report (Report) concerning the Notice of Violation to Coleman and to the Tribunal, the latter receiving it on June 9, 2010.

[9] In a letter dated June 9, 2010, the Tribunal invited Coleman to file with it any additional submissions in this matter, no later than July 9, 2010.

[10] Pursuant to a further telephone conversation with Tribunal staff on June 16, 2010, Coleman informed the Tribunal that he wished to proceed with a review by way of oral hearing, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[11] No further substantive submissions were received from Coleman or from the Agency. However, several procedural issues were put to the Tribunal by the parties before the oral hearing of this matter.

[12] The first procedural request was from the Agency on September 28, 2010 for permission to call its oral evidence by way of conference telephone. Coleman opposed this request on October 1, 2010. As a result, on October 13, 2010, the Agency made a second procedural motion to the Tribunal requesting a change of venue of the oral hearing from Saskatoon to Winnipeg. In order to attempt to resolve these and other procedural motions, the Tribunal ordered a pre-hearing conference between the parties, which was convened by the Tribunal's Registrar on October 21, 2010. The summary of the pre-hearing conference prepared by the Registrar dated October 27, 2010 indicated that, while the parties were able to provide each other with the names of the witnesses that would be giving evidence in the upcoming hearing, they could not agree on the witnesses' use of conference telephone to give evidence.

[13] By Order dated October 28, 2010, the Tribunal ordered that the venue for the oral hearing of this matter remain in Saskatoon, SK and that the Agency be permitted to call its witnesses not residing in Saskatchewan to give oral evidence by way of conference telephone.

[14] On November 3, 2010, Coleman made a request to the Tribunal for a postponement of the oral hearing, which had been scheduled for Saskatoon on November 12, 2010. On November 8, 2010, the Tribunal granted Coleman's request and rescheduled the oral hearing of this matter to January 28, 2011 in Saskatoon, Saskatchewan.

[15] Finally, on January 24, 2011, the Tribunal granted Coleman's request for the issuance of a summons to require the attendance of a certain CFIA official at the oral hearing.

[16] The oral hearing was held in Saskatoon, SK on January 28, 2011 with Coleman representing himself and the Agency represented by its counsel, Ms. Shirley Novak. Just prior to the conclusion of the hearing, Coleman provided arguments to the Tribunal that a medical condition he suffers from may have bearing on the events that occurred at his farm on October 4, 2009. Given these arguments, the Tribunal ordered that the Coleman would be permitted to file with the Tribunal and the Agency any medical evidence and arguments to support his claim on or before February 4, 2011 and that the Agency would have until February 11, 2011 to provide the Tribunal with its arguments as to the relevance and impact of such evidence in this matter. Coleman supplied medical evidence and arguments, and counsel for the Agency provided her arguments, to the Tribunal on or before the above-noted deadlines.

Evidence

[17] The evidence before the Tribunal in this case consists of written submissions from both the Agency (the Notice of Violation, the Agency's Report and additional written submissions that were contained in its requests or responses to procedural matters) and from Coleman (his request for review and additional written submissions that were contained in his requests or responses to procedural matters). As well, both parties presented witnesses who tendered evidence at the hearing on January 28, 2011. Dr. Sherry Thompson, Perry Mikita and Dennis Riehl gave evidence on behalf of the Agency while Kevin McCutcheon, Ken Habermehl and Coleman himself, gave evidence on behalf of Coleman. During the hearing, the parties also tendered 11 exhibits as evidence. Subsequent to the hearing, Coleman submitted three medical reports as evidence, as well as arguments as to the relevance and impact of such evidence on the outcome of the case. Counsel for the Agency submitted arguments as to the relevance and impact of the medical evidence on the validity of the Notice of Violation at issue in this matter.

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

- Coleman owns and sells bison as part of his overall business activities in Saskatchewan.
- On October 4, 2009, Coleman loaded 30 bison onto a truck/trailer operated by Rhodes Trucking, which he contracted to hauled the animals to Winkler Meats slaughterhouse, also known as Establishment #58 (Winkler Meats), in Winkler, Manitoba for slaughter.

- The bison arrived in Winkler on October 5, 2009, were unloaded from the truck/trailer into Winkler Meats, and were slaughtered that day at the slaughterhouse.
- After inspecting the heads of the slaughtered bison originating from the Coleman load, Agency officials at Winkler Meats found 17 of the 30 bison did not bear an RFID-CCIA approved tag.

[19] The contested evidence in this matter relates only to the element of the offence with respect to whether Coleman moved or caused the movement of bison from his farm in October 4, 2009 when one or more of them did not have an RFID-CCIA approved tag in its/their ear.

[20] Agency's witnesses were Agency Veterinarian, Dr. Sherry Thompson (Thompson), and Agency Inspectors Perry Mikita (Mikita) and Dennis Riehl (Riehl). The pertinent evidence of these Agency employees is summarized below.

[21] Thompson has been an employee of the Agency for the past 10 years. She was the Acting Veterinarian-in-Charge at Winkler Meats on October 5, 2009. Mikita, already at Winkler Meats, requested Thompson come to Winkler Meats because several bison had been found to be without RFID-CCIA approved tags. She brought a camera with her and photographed some of the bison missing tags (Agency Report, Tab 2) and told the Tribunal that none of those bison had holes in their ears, indicating that the tags had either never been applied or that they had been missing for some time and the hole where the tag had been had healed over completely. She told the Tribunal that she was informed by Mikita and Winkler Meats staff that the bison were owned by Coleman.

[22] In cross-examination, Thompson informed the Tribunal that bison are hard to examine because of their nature and, as a result, while they are still alive, "you can't get real close to them to examine them". When asked when the missing tags were first noticed, Thompson told the Tribunal that it was on the killing floor that the missing tags were first noticed, as going on the truck to do such an inspection would not be a safe practice. Thompson stated that while she was not present at the unloading of the bison, she did see some of the bison while they were still alive and the rest she observed only on the kill floor.

[23] Mikita has been a meat hygiene inspector of the Agency and its predecessor for the past nineteen years. He attended at Winkler Meats in that capacity on October 5, 2009. Mikita told the Tribunal that he was not present for the unloading of the 30 bison at Winkler Meats, but when he arrived, the plant foreman told him that some of the bison were not tagged and had no holes in their ears. Mikita said that they would save the heads after the kill

for verification by the Agency veterinarian who would be coming later. Mikita told the Tribunal that it is very difficult to verify whether a bison has its RFID-CCIA approved tag while it is still alive because the tag is very small—about one inch in diameter—, the ear of the bison is very hairy and the temperament of the bison is difficult. As a result, Mikita examined the heads of the bison after they were killed and confirmed by physical examination that in those animals without a tag he found no holes in them whatsoever. While at the plant, Mikita confirmed that the bison were owned by Coleman by examining the documentation accompanying the shipment and through discussions with Winkler Meats staff.

[24] When asked in cross-examination, Mikita informed the Tribunal that his role in issuing the Notice of Violation in this case was to let the veterinarian-in-charge know that there was a problem and then assist in the preservation of the evidence in the case.

[25] Riehl has been an animal programs inspector and humane transport inspector of the Agency and its predecessor for the past seventeen years. He attended at Winkler Meats in that capacity on October 5, 2009 to assist Thompson and Mikita with a case of untagged bison. He told the Tribunal that when he arrived not all the bison were killed and that he helped with the inspection, but not the actual taking of photos or in the handling of the heads of the untagged bison. The next day, October 6, 2009, he returned to Winkler Meats with Thompson and Mikita to meet with Winkler Meats personnel to continue the investigation. Riehl established from documents he received from Winkler Meats (see Tabs 3, 4, and 5 of the Report) that the owner of the bison was Coleman, a producer who was making his first delivery of bison to Winkler Meats. Winkler Meats staff told Riehl that they had informed Coleman by fax (see Tab 7 of the Report) prior to his shipment of bison of the requirement that all bison being transported to the plant required RFID-CCIA approved tags. On October 7, 2009, Riehl called Coleman and Coleman confirmed that he had sent a load of 30 cow and bull bison to Winkler Meats. Riehl then asked Coleman if the animals had been tagged with RFID-CCIA approved tags and he replied that the cows had been tagged six years ago and the bulls three years ago. He also told Riehl during the phone call that he had noticed tags in the pasture. Asked whether he had retagged the animals without tags, Coleman replied to Riehl that he did not need to look for tags on loading them for market. Riehl asked Coleman if he had a tagging facility at home and Coleman said he did and that he had thought about unloading untagged animals but he was alone so he did not.

[26] In cross-examination, Riehl informed the Tribunal that his role in issuing the Notice of Violation in this case was to gather information and then report it to his supervisors. Riehl stated he was the person who wrote the case summary of the Report.

[27] Coleman's witnesses were farmer/rancher, Kevin McCutcheon (McCutcheon), veterinarian, Dr. Ken Habermehl (Habermehl), and Coleman himself. The pertinent evidence of these witnesses is summarized below.

[28] McCutcheon told the Tribunal that he is a farmer/rancher with a cow/calf operation. He also trains horses and has experience with bison, as he often uses them to assist him with his horse training. While McCutcheon did not witness any of the events of October 4-5, 2009, that are the subject of this case, the Tribunal agreed to hear his evidence as evidence in support of Coleman as to the general nature and behaviour of bison. Bison are difficult to domesticate and are closer to working with a wild animal, McCutcheon told the Tribunal. When tagging bison, it is hard to get them to run down the chute at the first tagging, and, if ever they need retagging, it is five times harder the second time and 10-20 times harder to retag the same bison a third time. McCutcheon told the Tribunal he has retagged bison that have lost their tags. He estimated that two to three bison in a hundred probably lose their RFID-CCIA tags, particularly due to cold weather and being around round bales and twine. McCutcheon told the Tribunal that due to the wild nature of bison, retagging a bison requires state-of-the-art equipment; otherwise, not only is retagging a nuisance and an expense to the producer but also a health and safety hazard.

[29] Habermehl is a veterinarian and farmer/rancher in Saskatchewan. He has personal and professional experience with tagging cattle over many years. While Habermehl did not witness any of the events of October 4-5, 2009, that are the subject of this case, the Tribunal agreed to hear his evidence as evidence in support of Coleman as to the general nature and performance of RFID-CCIA approved tags for use in cattle, bison and sheep. Habermehl presented evidence (see Exhibits 6 and 7) that there is a significant failure rate in the retention and permanency of a certain type of RFID-CCIA approved tag that, according to him, currently has 90% of the market share of animal identification in Canada, including for bison identification. One major reason for poor retention is Canada's cold weather. Habermehl stated to the Tribunal that at a recent conference of continuing professional education for veterinarians, he raised the issue of retagging bison with RFID-CCIA tags and the answer from experts was that retagging of bison was especially difficult.

[30] In cross-examination, Habermehl informed the Tribunal that he had never personally tagged any bison with RFID-CCIA tags. He also agreed that the written evidence that he presented to the Tribunal relating to failure rates of RFID-CCIA approved tags was not from his own personal or professional research and observation but was from other sources that he had collected. As well, the Tribunal acknowledged that the evidence given by Habermehl from professional conferences he attended was in the nature of hearsay evidence.

[31] Coleman testified that he is a farmer/rancher and runs a part-time accounting service from his farm located near Conquest, Saskatchewan. Coleman told the Tribunal that when he was arranging shipment of the bison to Winkler Meats in the week prior to their shipment, he had told staff there that he was shipping bison that were tagged with RFID-CCIA approved tags. On October 3, 2009, Coleman moved the bison that he was preparing to have shipped

to market from one part of his farm to another part of his farm which was near his corral/handling area. Then, on the morning of October 4, 2009, he moved the 30 bison into the corral/handling area so that they could be loaded on the truck/trailer for shipment to Winkler Meats. Coleman moved the bison through the loading area and up into the truck/trailer while the trucker closed compartment doors in his truck/trailer as each of the compartments filled with the appropriate number of bison. Coleman told the Tribunal that he was surprised when he was informed by Winkler Meats of the number of his bison they had found to be without RFID-CCIA tags.

[32] Furthermore, Coleman presented evidence during the hearing that a medical condition that he was suffering from may have prevented him from being able to verify whether the bison that were being loaded into the truck/trailer sported RFID-CCIA approved tags. The Tribunal agreed to receive this evidence (Exhibit 8 – Letter from Saskatchewan Government Insurance Company), as well as medical reports that Coleman agreed to file with the Tribunal and the Agency within seven days of the hearing, to substantiate the medical condition that Coleman may have been suffering from and its impact on this case.

[33] In cross-examination, Coleman told the Tribunal that he did arrange to have the 30 bison moved from his farm to Winkler Meats with the move date of October 4, 2009. In response to the Agency counsel's question, Coleman told the Tribunal that he had loaded the animals without the assistance of anyone else other than that of the driver of the truck/trailer, and that he did not verify each one of the animals for an RFID-CCIA tag as it was loaded on October 4, 2009 but rather focussed on ensuring his safety while loading the bison.

Analysis and Applicable Law

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

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

[35] 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;

[36] 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,*

[37] 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*.

[38] Part XV of the *Health of Animals Regulations* (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.

[39] Part XV of the Regulations envisages a closed system for identifying production animals, such that their movements from birth to death can be monitored by a unique identification tag, which, for designated animals, is placed in one of their ears, ideally at birth. When the tagged animal dies, either on the farm, in transit or when slaughtered, the tag is recorded and that animal is withdrawn from the animal identification registry.

[40] Practical difficulties arise in attempting to have 100% of Canadian cattle, bison and sheep tagged with approved tags. Some animals, requiring identification pursuant to Part XV of the Regulations, may never be tagged, through neglect or opposition to the present regulatory scheme. Bison appear to pose even more difficulties to tag than the other species and, from the evidence of Coleman’s witness, an even greater challenge to retag should the initial RFID-CCIA approved tags fail and fall out.

[41] The present legal requirements for tagging are “a one-size-fits-all” system for all species, even though tagging and retagging bison appears to be quite a different and more dangerous exercise than tagging or retagging cattle or sheep. The law is clear, however, that in order to minimize “slippage” and to maximize the number of animals that are tagged with approved tags for the full duration of the animal’s life, the Regulations require several actors in the production chain to tag animals—bison, cattle or sheep—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 Regulations, they too face liability when tags are missing. Owner and transporters of regulated animals are among those identified under the 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*.

[42] 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 when the animal dies or is slaughtered. Almost every system of mandatory identification is, however, subject to mechanical failure or human error.

[43] The evidence in this case, sparse as it may be, is that the system that the Regulations rely upon, or perhaps more accurately the equipment and technology to support that system, did not establish a permanent and infallible means to track the movements of Coleman’s bison. The Tribunal accepts the evidence of Coleman that he tagged his bison with RFID-CCIA approved identification tags at some time in, or prior to, 2006. If there was human error in the application of the RFID-CCIA approved tag in 2006, there was no evidence of it presented at the hearing. However, there is little, if any, evidence from Coleman that he verified the continuing presence of an approved tag in each of the bison’s ears at loading. In fact, the evidence before the Tribunal is that he did not, because he was alone and was very occupied with the loading of the bison, and because seeing an RFID-CCIA approved tag in a bison’s hairy ear is difficult even under optimal conditions.

[44] Section 176 of the 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. A violation of section 176 of the Regulations arises 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.

[45] It is the Agency which bears the burden of proof, for proving all the elements of the alleged violation. With respect to elements 2, 3 and 4, the Agency has presented convincing evidence to prove each of these elements on the balance of probabilities. As to element 2, bison are animals falling under the definition of “animal” under Part XV of the Regulations. Without a doubt as to element 3, Coleman’s bison were moved from their farm of origin to Winkler Meats. Finally, as to element 4, the Agency’s officials found, on October 5, 2009 at Winkler Meats, 17 of 30 of Coleman’s bison without RFID-CCIA approved tags. Furthermore, these officials found no holes in these bison’s ears that might lend credence to the possibility that such tags had been recently lost. Moreover, there was no evidence of any tags being found in the truck/trailer that carried them to Winkler Meats. Finally, Coleman himself was not able to satisfy the Tribunal that he verified that each of his bison had an approved tag on the morning they were loaded. There is some evidence—his telephone call with Riehl on October 7, 2009—that even Coleman may have had some doubts as to whether all his bison had approved tag. On this basis the Tribunal makes as a finding of fact, and on the balance of probabilities, that Coleman’s 17 bison found at Winkler Meats to be without RFID-CCIA tags were without such tags when they were loaded onto the truck/trailer at Coleman’s farm on October 4, 2009.

[46] With respect to element 1, the Act, as well as the case law from this Tribunal and from the Federal Court of Appeal, is quite clear that liability under this element is ascribed to the owner of the animals when he himself or his agents move the animals. In this situation, the parties agree that Coleman brought his bison into his corrals and then proceeded to load his bison, with the assistance of the driver, onto a truck/trailer that he had contracted to take the animals to Winkler Meats. Section 20(2) of the Act states:

(2) A person is liable for a violation that is committed by any employee or agent of the person acting in the course of the employee’s employment or the scope of the agent’s authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.

[47] Final arguments from Coleman indicated that he thought he had hired professionals to haul his animals and that, if the driver had noticed missing tags he could have told Coleman that he could not haul them. Coleman told the Tribunal that he had trouble with the current tagging system and that somebody, when trying to follow it, was going to end up getting hurt. That the current tagging system is letting producers down and exposing them to risks and unfair legal liability has become a not uncommon refrain from applicants appearing before the Tribunal (see *Habermehl v. Canada (CFIA)* 2010 CART 017; *Coward v. Canada (CFIA)* 2010 CART 018; and *Reynolds v. Canada (CFIA)* 2011 CART 005). The applicants in these cases argue, as did Coleman in this case, that there is a significant problem with RFID-CCIA approved tags' permanency and, as such, producers of beef, bison and sheep are unfairly exposed to liability for violations of Part XV of the Regulations. While Coleman expressed his clear dislike for the system and his thoughts of the need for reforming it, he acknowledged that neither was a defence to the current violation he faces.

[48] Considering that a producer has to purchase, apply and verify the continuing and constant presence of an 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 Coleman, and the Tribunal must interpret and apply the law to the facts of this case.

Defences Available Under the Law

[49] The Act's system of monetary penalties (AMP), as set out by Parliament, creates a liability regime that allows few defences. It prohibits the defence of due diligence or mistake of fact. Subsection 18(1) 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.

[50] When an AMP provision has been enacted for a particular violation, as is the case for section 176 of the Regulations, Coleman has no room to mount a defence of due diligence. The Tribunal notes that even an honest plea from an applicant, such as "I last saw the animal a while ago and it was tagged so I thought it would be tagged when it was transported because the tags are supposed to be permanent", would not be a permitted defence under the Act.

[51] Moreover, the Tribunal is guided by prior cases from the Federal Court of Appeal, such as the case of *Canada (CFIA) v. Magnowski* 2003 FCA 492, where the producer tagged his cattle on Mother's Day, 2002, and they were found 11 months later to be missing their approved tags and by recent Tribunal cases of *Coward v. Canada (CFIA)* 2010 CART 018 and *Reynolds v. Canada (CFIA)* 2011 CART 005, where the producer had tagged all his cattle less than a month before they were found to be without RFID-CCIA approved tags. In all three cases, as in this one, the Agency has met the burden of proving that when the animals left their farm of origin or any other farm or ranch, they did not, on the balance of probabilities, bear approved tags, as is required by the Regulations. If the Tribunal did not have to consider any other matters or defences, the evidence adduced by the Agency supports the Agency's position that it has rightly issued a Notice of Violation to Coleman under section 176 of the Regulations.

[52] However, the Act does recognize the possibility of applicants being able to avoid liability under the Act, if they can make a case for the existence of a defence, other than one of due diligence or mistake of fact to the alleged violation. Subsection 18(2) of the Act reads as follows:

(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.

[53] Coleman presented evidence, at the very end of the hearing, of a medical condition that he suffered from on October 4, 2009 that could give rise to a finding by this Tribunal of a "circumstance" that could be relied upon by Coleman as a "justification or excuse in relation to" the violation he is alleged to have committed.

[54] The Tribunal has considered Coleman's oral evidence, his exhibits and reports from third party medical caregivers and a licensing agency. The medical condition alleged appears to have arisen in late 2009 and, without a doubt, has affected Coleman and continues to cause impairment even today to his quality of life. Unfortunately, the medical condition as the "circumstance" contemplated under subsection 18(2) has two impediments to being a circumstance that would justify or excuse the violation that the Agency has otherwise proved, on the balance of probabilities, that Coleman committed. First, the Tribunal is not convinced, on the balance of probabilities, that Coleman's evidence of his medical incident or "circumstance" actually occurred on or before October 4, 2009. Second, the Tribunal is not convinced, on the balance of probabilities, that Coleman's evidence even if it were accepted that it occurred exactly at the time of the loading of his bison on October 4, 2009, proves that such a medical incident could support a known justification or excuse (such as automatism or insanity or necessity) to exonerate him from the violation that he is alleged to have committed. The Tribunal therefore finds that the facts presented are not sufficient for Coleman to exonerate himself on the basis of a defence recognized under subsection 18(2) of the Act.

[55] As is clear from the evidence presented, the handling and loading of bison can be a dangerous and exhausting activity. Preparation for it is a necessity. Having the proper equipment and personnel at hand for its execution is essential. And, in light of the requirements of Canadian law, having someone available to verify the presence of approved tags is also advisable. At some considerable cost to his health and financial situation, Coleman attempted to complete these tasks on his own, with the driver of the truck/trailer on October 4, 2009. Whether he neglected to, or simply being overwhelmed by all the other activities that were going on around him that day was unable to, verify the existence of RFID-CCIA approved tags in ears of his bison that he handled and loaded for transport, the Tribunal must conclude that the Agency has established, on a balance of probabilities, that Coleman committed the violation. His defences, based on medical conditions that are alleged to have been in play on October 4, 2009 have not been made out, on the balance of probabilities. As a result, Coleman 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.

[56] The Tribunal wishes to inform Mr. Coleman 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 21st day of March, 2011.

Dr. Donald Buckingham, Chairperson

March 31, 2011

ERRATUM

Please note that paragraphs 28, 29 and 45 of the English version of the decision *Coleman v. Canada (CFIA)*, 2011 CART 006; Docket RTA-60395; RT-1545 issued March 21, 2011, located at pages 7, 7 and 11 respectively, contain the word “April”. That word is in error and is hereby deleted in those paragraphs and replaced with the word “October” in each instance.

The decision is hereby amended as set out above and the corrected version of pages 7 and 11 of the decision are attached.

Dr. Donald Buckingham, Chairperson

[28] McCutcheon told the Tribunal that he is a farmer/rancher with a cow/calf operation. He also trains horses and has experience with bison, as he often uses them to assist him with his horse training. While McCutcheon did not witness any of the events of October 4-5, 2009, that are the subject of this case, the Tribunal agreed to hear his evidence as evidence in support of Coleman as to the general nature and behaviour of bison. Bison are difficult to domesticate and are closer to working with a wild animal, McCutcheon told the Tribunal. When tagging bison, it is hard to get them to run down the chute at the first tagging, and, if ever they need retagging, it is five times harder the second time and 10-20 times harder to retag the same bison a third time. McCutcheon told the Tribunal he has retagged bison that have lost their tags. He estimated that two to three bison in a hundred probably lose their RFID-CCIA tags, particularly due to cold weather and being around round bales and twine. McCutcheon told the Tribunal that due to the wild nature of bison, retagging a bison requires state-of-the-art equipment; otherwise, not only is retagging a nuisance and an expense to the producer but also a health and safety hazard.

[29] Habermehl is a veterinarian and farmer/rancher in Saskatchewan. He has personal and professional experience with tagging cattle over many years. While Habermehl did not witness any of the events of October 4-5, 2009, that are the subject of this case, the Tribunal agreed to hear his evidence as evidence in support of Coleman as to the general nature and performance of RFID-CCIA approved tags for use in cattle, bison and sheep. Habermehl presented evidence (see Exhibits 6 and 7) that there is a significant failure rate in the retention and permanency of a certain type of RFID-CCIA approved tag that, according to him, currently has 90% of the market share of animal identification in Canada, including for bison identification. One major reason for poor retention is Canada's cold weather. Habermehl stated to the Tribunal that at a recent conference of continuing professional education for veterinarians, he raised the issue of retagging bison with RFID-CCIA tags and the answer from experts was that retagging of bison was especially difficult.

[30] In cross-examination, Habermehl informed the Tribunal that he had never personally tagged any bison with RFID-CCIA tags. He also agreed that the written evidence that he presented to the Tribunal relating to failure rates of RFID-CCIA approved tags was not from his own personal or professional research and observation but was from other sources that he had collected. As well, the Tribunal acknowledged that the evidence given by Habermehl from professional conferences he attended was in the nature of hearsay evidence.

[31] Coleman testified that he is a farmer/rancher and runs a part-time accounting service from his farm located near Conquest, Saskatchewan. Coleman told the Tribunal that when he was arranging shipment of the bison to Winkler Meats in the week prior to their shipment, he had told staff there that he was shipping bison that were tagged with RFID-CCIA approved tags. On October 3, 2009, Coleman moved the bison that he was preparing to have shipped

to market from one part of his farm to another part of his farm which was near his corral/handling area. Then, on the morning of October 4, 2009, he moved the 30 bison into the corral/handling area so that they could be loaded on the truck/trailer for shipment to Winkler Meats. Coleman moved the bison through the loading area and up into the truck/trailer while the trucker closed compartment doors in his truck/trailer as each of the compartments filled with the appropriate number of bison. Coleman told the Tribunal that he was surprised when he was informed by Winkler Meats of the number of his bison they had found to be without RFID-CCIA tags.

[32] Furthermore, Coleman presented evidence during the hearing that a medical condition that he was suffering from may have prevented him from being able to verify whether the bison that were being loaded into the truck/trailer sported RFID-CCIA approved tags. The Tribunal agreed to receive this evidence (Exhibit 8 – Letter from Saskatchewan Government Insurance Company), as well as medical reports that Coleman agreed to file with the Tribunal and the Agency within seven days of the hearing, to substantiate the medical condition that Coleman may have been suffering from and its impact on this case.

[33] In cross-examination, Coleman told the Tribunal that he did arrange to have the 30 bison moved from his farm to Winkler Meats with the move date of October 4, 2009. In response to the Agency counsel's question, Coleman told the Tribunal that he had loaded the animals without the assistance of anyone else other than that of the driver of the truck/trailer, and that he did not verify each one of the animals for an RFID-CCIA tag as it was loaded on October 4, 2009 but rather focussed on ensuring his safety while loading the bison.

Analysis and Applicable Law

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

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

[35] 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;

[36] 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,*

[37] 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*.

[38] Part XV of the *Health of Animals Regulations* (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.

[39] Part XV of the Regulations envisages a closed system for identifying production animals, such that their movements from birth to death can be monitored by a unique identification tag, which, for designated animals, is placed in one of their ears, ideally at birth. When the tagged animal dies, either on the farm, in transit or when slaughtered, the tag is recorded and that animal is withdrawn from the animal identification registry.

[40] Practical difficulties arise in attempting to have 100% of Canadian cattle, bison and sheep tagged with approved tags. Some animals, requiring identification pursuant to Part XV of the Regulations, may never be tagged, through neglect or opposition to the present regulatory scheme. Bison appear to pose even more difficulties to tag than the other species and, from the evidence of Coleman’s witness, an even greater challenge to retag should the initial RFID-CCIA approved tags fail and fall out.

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[41] The present legal requirements for tagging are “a one-size-fits-all” system for all species, even though tagging and retagging bison appears to be quite a different and more

dangerous exercise than tagging or retagging cattle or sheep. The law is clear, however, that in order to minimize “slippage” and to maximize the number of animals that are tagged with approved tags for the full duration of the animal’s life, the Regulations require several actors in the production chain to tag animals—bison, cattle or sheep—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 Regulations, they too face liability when tags are missing. Owner and transporters of regulated animals are among those identified under the 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*.

[42] 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 when the animal dies or is slaughtered. Almost every system of mandatory identification is, however, subject to mechanical failure or human error.

[43] The evidence in this case, sparse as it may be, is that the system that the Regulations rely upon, or perhaps more accurately the equipment and technology to support that system, did not establish a permanent and infallible means to track the movements of Coleman’s bison. The Tribunal accepts the evidence of Coleman that he tagged his bison with RFID-CCIA approved identification tags at some time in, or prior to, 2006. If there was human error in the application of the RFID-CCIA approved tag in 2006, there was no evidence of it presented at the hearing. However, there is little, if any, evidence from Coleman that he verified the continuing presence of an approved tag in each of the bison’s ears at loading. In fact, the evidence before the Tribunal is that he did not, because he was alone and was very occupied with the loading of the bison, and because seeing an RFID-CCIA approved tag in a bison’s hairy ear is difficult even under optimal conditions.

[44] Section 176 of the 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. A violation of section 176 of the Regulations arises where:

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5.the alleged violator moved (or caused the movement of),

6.an animal falling within the definition of “animal” under Part XV,

7.from that animal's farm of origin or any other farm or ranch, and

8.the animal did not bear an approved tag at the time of movement from the farm.

[45] It is the Agency which bears the burden of proof, for proving all the elements of the alleged violation. With respect to elements 2, 3 and 4, the Agency has presented convincing evidence to prove each of these elements on the balance of probabilities. As to element 2, bison are animals falling under the definition of "animal" under Part XV of the Regulations. Without a doubt as to element 3, Coleman's bison were moved from their farm of origin to Winkler Meats. Finally, as to element 4, the Agency's officials found, on October 5, 2009 at Winkler Meats, 17 of 30 of Coleman's bison without RFID-CCIA approved tags. Furthermore, these officials found no holes in these bison's ears that might lend credence to the possibility that such tags had been recently lost. Moreover, there was no evidence of any tags being found in the truck/trailer that carried them to Winkler Meats. Finally, Coleman himself was not able to satisfy the Tribunal that he verified that each of his bison had an approved tag on the morning they were loaded. There is some evidence—his telephone call with Riehl on October 7, 2009—that even Coleman may have had some doubts as to whether all his bison had approved tag. On this basis the Tribunal makes as a finding of fact, and on the balance of probabilities, that Coleman's 17 bison found at Winkler Meats to be without RFID-CCIA tags were without such tags when they were loaded onto the truck/trailer at Coleman's farm on October 4, 2009.

[46] With respect to element 1, the Act, as well as the case law from this Tribunal and from the Federal Court of Appeal, is quite clear that liability under this element is ascribed to the owner of the animals when he himself or his agents move the animals. In this situation, the parties agree that Coleman brought his bison into his corrals and then proceeded to load his bison, with the assistance of the driver, onto a truck/trailer that he had contracted to take the animals to Winkler Meats. Section 20(2) of the Act states:

(2) A person is liable for a violation that is committed by any employee or agent of the person acting in the course of the employee's employment or the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.