

**AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE  
MONETARY PENALTIES ACT**

**DECISION**

In the matter of an application for a review of the facts of a violation of provision 69(1)(b) of the *Health of Animals Regulations* alleged by the Respondent, and requested by the Applicant pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

**Henry Tebrinke, Applicant**

**-and-**

**Canadian Food Inspection Agency, Respondent**

**CHAIRMAN BARTON**

**Decision**

**Following an oral hearing and a review of the written submissions of the parties, including the report of the Respondent, the Tribunal, by order, determines the Applicant did not commit the violation and is not liable for payment of the penalty.**

## REASONS

The Applicant requested an oral hearing pursuant to subsection 15(1) of the *Agriculture and Agri-food Administrative Monetary Penalties Regulations*.

The oral hearing was held in Vancouver on October 5, 2006.

The Applicant was represented by its solicitor, Mr. R.A. Wattie.

The Applicant gave evidence, and Dr. Ralph Estensen also gave evidence on behalf of the Applicant.

The Respondent was represented by its solicitor, Ms. Vickie McCaffrey.

Evidence for the Respondent was given by Dr. Robert Sturm, and by Ms. Pamela Davies, CFIA Investigator.

Prior to the hearing, I invited both counsel into my chambers to discuss whether there was any agreement on any of the issues.

Both counsel agreed to limit their witnesses to two, and agreed that I hear the preliminary motion (to allow further evidence) to be heard in chambers.

## ADDITIONAL EVIDENCE

Mr. Wattie then reviewed his preliminary motion to have introduced in evidence the affidavit of Dr. Ken Stepushyn, sworn June 19<sup>th</sup>, 2006, and the cross-examination of the Affidavit on July 27<sup>th</sup>, 2006. These documents were filed in the Federal Court in support of a judicial review application filed by the Applicant on April 27<sup>th</sup>, 2006.

He argued that the evidence was so intricately intertwined with these proceedings that it should be allowed. He also stated these documents were now part of the public record.

He primarily relied upon the case of *Eli Lilly and Co. et al. v Interpharm Inc., et al.* (1993) 50 C.P.R. (3d) 208, a decision of the Federal Court of Appeal on July 27, 1993, which quoted the reasons of *Reed J. in Canada v. ICHI Canada Ltd.* [1992] 1 F.C. 571. That decision held that the implied undertaking rule does not restrict the use of any information which is subsequently made part of the public record.

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Ms. McCaffrey firstly argued that affidavit evidence is not admissible without the

consent of the party against whom the affidavit evidence is tendered, pursuant to Rule 17 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)*.

She further relied on the case of *George Ernest Hunt v. Atlas Turner Inc. et al.* (1995), 4 B.C. L.R. (3<sup>d</sup>) 110, reversing the decision in the *Kyuquot Logging Ltd. v. B.C. Forest Products Limited* case and upholding the obligation upon a party obtaining discovery of documents to require such party to obtain the owner's permission or the Court's leave to use documents other than in the proceedings in which they are produced.

She also argued the common law (not the provincial law) should apply in this case.

I indicated I would allow the additional evidence for the purpose of the hearing, but rule on its admissibility in my decision.

As I indicated during the motion hearing, subsection 8(4) of the *Canada Agricultural Products Act* states that the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and shall deal with matters that come before it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.

I further indicated that Rule 17 would likely only apply with respect to affidavit evidence tendered as such in the oral hearing and not to affidavit evidence that had been tendered as evidence in another hearing. Even if it may not be admissible as evidence under oath, it may nonetheless be considered as a hearsay submission, as are many other documents submitted in this case.

As has been my practice in the past, it is my preference to allow all documentation and evidence tendered to be admissible and then to determine what weight, if any, to give to the evidence following the hearing.

Based on the fact this information is in the public domain and based on the past practice of this Tribunal, I will allow the additional evidence to stand but will give it the weight of hearsay evidence.

However, I do not consider this evidence to be all that relevant. The Respondent has already put the conclusions of the Review Committee in evidence in tab 4 of its report.

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The Applicant has tendered it primarily to show that the Review Committee, in hearings related to the accreditation of Dr. Estensen, did not find he had violated the *Health of*

*Animals Act* or Regulations. Hence his reasoning goes, that if Dr. Estensen did not violate the Regulations, how could the Applicant have violated section 69 of the Regulations?

The Review Committee hearings were for a distinctly separate purpose related to Dr. Estensen's standing under his accreditation agreement with the Respondent.

Section 69 is a violation against an exporter, and Dr. Estensen was not the exporter in this case. Accordingly, since Dr. Estensen could not have violated section 69 as he was not the exporter, this evidence is of little relevance. As an aside, I did find some of the other information contained in the exhibits of the affidavit of Dr. Ken Stepushyn, such as exhibits D and G, to be useful background information.

I will also allow in evidence the set of pictures and handwritten notes of Ms. Davies, as tendered by Ms. McCaffrey just prior to the hearing.

#### NOTICE OF VIOLATION

The Notice of Violation dated February 15, 2006, alleges that the Applicant, on or about the 8<sup>th</sup> day of December, 2005, at Abbotsford, in the province of British Columbia, committed a violation, namely: "export out of Canada livestock which did not comply with the importation requirements of the country to which the livestock were exported", contrary to provision 69(1)(b) of the *Health of Animals Regulations*. Subsection 69(1) states as follows:

69.(1) Subject to this Part, no person shall export out of Canada livestock, poultry, animal embryos or animal semen unless

(a) the person has obtained a certificate of a veterinary inspector or a certificate of an accredited veterinarian endorsed by a veterinary inspector issued before shipment that clearly identifies the livestock, poultry, animal embryos or animal semen and shows

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(i) that a veterinary inspector or an accredited veterinarian has inspected the livestock, poultry, animal embryos or animal semen and found it to be free from any communicable diseases,

(ii) the date and place of inspection, and

(iii) where tests have been performed, the nature of each test and that the livestock, poultry, animal embryos or animal semen proved negative to such tests; and

(b) the importation requirements of the country to which the livestock, poultry, animal embryos or animal semen are exported have been complied with.

Paragraph “(b)” is a separate violation pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

Prior to the *viva voce* evidence I ascertained whether each party had copies of the following additional pertinent documents in this file:

- Notice of Violation dated February 15<sup>th</sup>, 2006.
- Letter dated March 21, 2006, from the solicitor for the Applicant requesting a review.
- Letter dated April 6<sup>th</sup>, 2006, from the Respondent submitting its report (white binder).
- Letter dated May 23<sup>rd</sup>, 2006, from the solicitor for the Applicant attaching a list of documents.
- Letter dated May 30<sup>th</sup>, 2006, from the solicitor for the Applicant containing its argument, and an index for the document binder (binder received by the Tribunal on June 7<sup>th</sup>, 2006).

Having confirmed both parties had copies, these documents as well where entered on the record as evidence for the purpose of the hearing.

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The solicitor for the Applicant acknowledged that it was an import requirement of the United States that cattle exported to the United States for slaughter be less than 30 months of age.

The issue, then, is whether the Respondent has established, on a balance of probabilities, that the Applicant failed to meet this requirement.

Can the head and two carcasses presented to Dr. Robert Sturm and Ms. Davies a few days after processing of the Applicant's lot can be traced to the Applicant's load?

Several days after the Applicant exported the 36 animals in question, Dr. Sturm and Ms. Pamela Davies attended the Tyson Food processing plant where these animals were slaughtered. They were sent to inspect the plant and to have interviews with officials, including Jose Gabiola, the United States Department of Agriculture (USDA) inspector who was alleged to have discovered the skinned head of a holstein over 30 months of age (OTM) among cattle exported by the Applicant.

Their investigation is set out in tab 2 of the Respondent's report and referred to in the hearing as the Sturm and Davies Report (Report). The "photo" #'s, the "photo TD" #'s, and the "photo TD attachment" #'s, described in the Report are confusing. The pages in Tab 2 following the Report are neither identified nor are they numbered. I have numbered these pages consecutively and will refer to them as numbered annexes of the Report.

It is undisputed that the Applicant exported a load of 36 cattle to Tyson Foods for processing and that the cattle bore the tags set out in the Veterinary Health Certificate in annexes # 13, 14 and 15 of the Report.

Annex # 43 of the Report taken by Ms. Davies is a picture of the alleged head in question, and there was no dispute in any of the evidence that the dentition clearly shows its age to be OTM.

Dr. Sturm and Ms. Davies toured the processing facility and reviewed relevant documentation, floor plans, procedures and plant security. They did not observe any deviation from the written procedures set out in annexes # 3 and # 4 of the Report.

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By chance, inspector Gabiola is alleged to have seen two skinned heads of OTM cattle among the Applicant's animals on the kill line. One bore Sticky tag # 384 and a second one bore Sticky tag # 386. It was apparently too late to recover and identify the second head but Dr. Sturm later viewed the alleged carcasses of both animals and noted ossification of their spines, indicating both animals were OTM. The head and carcasses

were represented to Dr. Sturm and Ms. Davies as being from the Applicant's lot slaughtered on December 9, 2005.

I am not going to repeat the evidence given at the hearing or in the written material, but will confine my remarks to my perceived shortcomings in the Respondent's evidence.

Since the Respondent's case hinges on being able to trace the Applicant's cattle from start to finish, so to speak, for ease of reference I will review the various types of tags used on the Applicant's animals from the time the cattle were inspected prior to being exported until the end of their processing.

#### CCIA TAGS

The CCIA tag is the officially sanctioned Canadian Food Inspection Agency tag which is a heavy plastic tag affixed to the left ear of each animal. The animal whose alleged head is shown in the picture at annex # 43 of the Report bore CCIA tag # 271 629 357 when inspected by Dr. Estensen. There are reportedly 43 different types of CCIA tags, making it difficult for border inspection.

#### ESTENSEN TAGS

When Dr. Estensen inspected the cattle on December 7<sup>th</sup>, 2005, he testified he stapled a metal identifying tag to the left ear of each of the cattle he inspected. These metal tags bore consecutive numbers and are listed on his Veterinary Health Certificate # VABD-2005-774. He testified he stapled tag # 8Z07478 to the ear of the Hereford cow also bearing CCIA tag # 271 629 357.

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#### UNIDENTIFIED TAGS

The blue tag in pictures shown in annexes # 38, 40, 42 and 43 of the Report showing "SEP 9" and the tag "117" shown in the picture submitted by Ms. McCaffrey just prior to the hearing, were not identified. There was no concrete evidence as to what these tags represented or where they came from. There was only a suggestion that they may have

been Tyson's feedlot tags.

#### USDA REJECT TAGS

USDA reject tags are the USDA tags rejecting an animal or part of an animal. They appear to be made of heavy paper or cardboard. The Report alleges a U.S. inspector tagged the head in the picture in annex # 43 of the Report with a USDA reject tag (form # 6502-1), and the picture shows the USDA reject tag as bearing # B34887314.

#### STICKY TAGS

Once a carcass has been skinned and the other tags removed, a two-part numbered identity sticker is affixed to the outside rib cage of the carcass. There was no evidence as to how this tag was affixed. When the head of the animal is removed, one part of the sticker is detached and placed on the head hook. The carcass and head in question were each allegedly tagged with Sticky tag # 384.

On average, 2,036 animals are processed at the Tyson plant every day, about 300 per hour. The sticky tags are numbered 1 to 999. Since over 1,000 animals had been processed before the Applicant's lot on that day, Sticky tag # 384 actually meant it was the 1,384<sup>th</sup> animal to be processed that day. Sticky tag # 386 was purportedly on the other OTM whose head was not recovered. None of the pictures in the file shows a head or a carcass bearing these tags, and accordingly, I do not know what they look like.

#### EVIDENTIARY SHORTCOMINGS

The evidence relating to the different tags leaves a number of unanswered questions.

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- The Estensen tags were never mentioned in the Report. And they were not used to identify the carcasses or heads of any of the 36 animals in the Applicant's lot. Where did these tags go? And where did the ears of the cattle bearing these tags go after they were removed?

Presumably after the animals were killed and hung by the back legs on the kill chain, and after the ears were removed, the Estensen tags were discarded with the ears. However,



the CCIA tags were apparently cut out of the ears and placed in a clear bag and pinned to the carcass. When skinned and beheaded, these CCIA tags were then replaced by the Sticky tags and apparently put in a box with all the other CCIA tags in the lot.

- After this process, how could the CCIA tags be traced to the skinned head and carcasses shown to Dr. Sturm and Ms. Davies?
- The tag marked "SEP 9" appearing in several pictures has not been satisfactorily identified. How can it be traced to the Applicant's animal?
- The three tags shown in the picture in annex # 43 of the Report are not affixed to the head alleged to be from the Applicant's animal. Once again, how could they be traced back to the Applicant's animal?
- There was no evidence to indicate where the Sticky tags went after inspection. Why were the Sticky tags not kept to identify the head and the two carcasses?
- There is no evidence to match the CCIA tag # 271 629 357 shown in the picture in annexe # 43 of the Report to the Sticky tag or to the head alleged to have been seen by inspector Gabiola. If the CCIA tags were all put in a box when replaced by the Sticky tags, how could CCIA tag # 271 629 357 have been later traced to that head?
- There was no evidence to show where Unidentified tag # 117 came from or what it means. Unidentified tag # 117 is shown in the picture submitted by Ms. McCaffrey just prior to the hearing. This picture also shows CCIA tag # 271 684 572 along with a notation of white CCIA tag # 271 629 357 and blue unidentified tag SEP 9. How can it be used to identify one of the Applicant's animals?

In addition to the unanswered questions related to the various tags, other puzzling questions arise from the evidence.

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## OTHER QUESTIONS

The dentition on the animal in the picture in annex # 43 of the Report was, by all accounts, well over the OTM limit. According to Dr. Sturm, the animal was between 40 to 48 months of age or older. Dr. Brown's evidence in the Report is that the cow was a "slam dunk, over 40 months". Dr. Estensen testified that an animal will not qualify for export to the United States if it has its second set of incisors showing.

Dr. Ward, the Applicant's local veterinarian examined the animals prior to being examined by Dr. Estensen. Although Dr. Ward, according to the Applicant, was not an expert on pregnancy testing, I would have assumed that among both doctors and the Applicant, an animal with its fourth incisors erupting (as shown in the picture in annex # 43 of the Report) would readily stick out and be an obvious reject. It would not have been a discretionary or close call.

- I was impressed with the evidence of Dr. Estensen insofar as he explained the meticulous nature of his examination of the cattle, and of his use of the Estensen tags. Having inspected thousands of cattle since the border was re-opened in July of 2005, and bearing in mind the drastic consequences should an incident occur and the border be again closed, how could an obvious grave error of that nature have been made by both veterinarians and by the Applicant as well?

The ante-mortem card located at tab # 4B of the Applicant's Case File shows inspector Gabiola inspected the cattle on December 10<sup>th</sup> at 8:15 am.

However, the USDA form located at tab # 4G and signed by Tyson Fresh Meats and by Dr. Brown seems to indicate the slaughter date was December 9<sup>th</sup>, 2005.

- With such strict measures in place, how could this discrepancy have arisen?

The Respondent's evidence is that lot # 20 and lot # 22 (on either side of the Applicant's lot on the kill line at the Tyson plant) were both lots of Canadian cattle, while the line up kill-card does not indicate lot # 22 is a Canadian lot.

- How accurate is the other documentation?

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- At the kill line where inspector Gabiola reportedly saw the OTMs, five animals were being killed per minute where a lot of other activity was simultaneously taking place. There was no indication the kill line was stopped at this time. Could this have explained why the second alleged head was not set aside?
- In all these circumstances is it not difficult to see how an error in identification may have taken place?

HEARSAY EVIDENCE

In this case, the Respondent relies entirely upon hearsay evidence and in particular the hearsay evidence of inspector Jose Gabiola, who was the only eye witness at the Tyson plant to have allegedly identified the Applicant's OTM animals.

Although I understand there are costs and other implications in bringing witnesses to a hearing, it is unfortunate that the key witness was not at the hearing to assess his evidence and be challenged or have his credentials or credibility judged.

As in the case of *James Gray v. Pest Management Regulatory Agency* RTA # 60247, I find it very difficult following an oral hearing to find that a violation has been committed based solely on hearsay evidence where there is considerable direct evidence to the contrary.

Weighing all the evidence in this case, and taking into consideration the unanswered questions, other evidentiary shortcomings and lack of direct evidence from the Respondent, I find the Respondent has not established, on a balance of probabilities, that the Applicant committed the violation.

Dated at Ottawa this 2<sup>nd</sup> day of November 2006.

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Thomas S. Barton, Q.C., Chairman