



Citation: *Jay Clare v. Canada (Canadian Food Inspection Agency)* 2014 CART 36

Date: 20141215

Docket: CART/CRAC-1644

**Between:**

**Jay Clare, Applicant**

**- and -**

**Canadian Food Inspection Agency, Respondent**

**Before: Chairperson Donald Buckingham**

**With: Mr. Ian Wallace, counsel for the applicant; and  
Ms. Jacqueline Wilson, counsel for the respondent.**

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 35 of the *Health of Animals Act*, alleged by the respondent.

## **DECISION**

**Following an oral hearing and review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that the applicant, Jay Clare, did not commit the violation set out in Notice of Violation #1112ON0018-03, dated May 29, 2012, concerning events that took place on April 21, 2011, and is not liable for payment of a penalty to the respondent, the Canadian Food Inspection Agency.**

The hearing was held in London, ON,  
Monday, August 18 to Wednesday, August 20, 2014.

## REASONS

### 1. Alleged Incidents and Issues

[1] Three matters between the parties were heard by the Tribunal in August of 2014. Each case is intertwined with the other. All three relate to the mysterious circumstances surrounding the deployment of one Canadian Cattle Identification Agency (CCIA)-approved Radio-frequency identification (RFID) cattle tag CAN-000-239-638-636. This tag was supposed to be applied to a cow owned by Mr. Ed Hasson (Hasson) before, or as left his farm for market, or in the next few hours thereafter, on March 23, 2011; it was not. Six days later, the tag was found on a cow owned by Richard Clare (R. Clare) at a feedlot operated by his son Jay Clare (J. Clare). The tag, and the identity of the cow bearing it, was verified by Canadian Food Inspection Agency (Agency) veterinarian Dr. Moussa Coulibaly (Dr. Coulibaly) on March 29, 2011. It was verified again by Dr. Coulibaly on April 21, 2011.

[2] The mystery is that Hasson's cow was 13 years old, red and white in colour, without horns and weighed over 1,500 pounds, while the cow that was at the Clare feedlot was three years old, red and white in colour, with horns, weighing around 1,300 pounds. Given this discrepancy, the Agency believes that the tag on the Clare cow was fraudulently applied and that R. Clare first misled, and that later, J. Clare, on two specific occasions, continued to mislead the Agency in this matter. As a result, the Agency, on May 29, 2012, issued one Notice of Violation to R. Clare and two Notices of Violation to J. Clare alleging that each had made false or misleading statements to an Agency inspector. The Notices of Violation allege that this was *[verbatim]* "contrary to section 35(1)(b) of the *Health of Animals Act*".

[3] A review of the *Health of Animals Act* (HA Act) reveals that the Act contains no "section 35(1)(b)". It does, however, contain section 35, which reads as follows:

*35. (1) No person shall obstruct or hinder or make any false or misleading statement either orally or in writing to an analyst, inspector or officer who is performing duties or functions under this Act or the regulations.*

*(2) The owner or the person in charge of a place entered by an inspector or officer under section 38 and every person found in the place shall*

*(a) give the inspector or officer all reasonable assistance in the owner's or person's power to enable the inspector or officer to perform duties and functions under this Act or the regulations; and*

*(b) furnish the inspector or officer with such information relevant to the administration of this Act or the regulations as the inspector or officer may reasonably require.*

*(3) A peace officer shall provide such assistance as an inspector or officer may request for the purpose of enforcing this Act or the regulations.*

[4] However, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), in section 3 states:

3. *The short-form descriptions that are set out in column 2 of Schedule 1 are established to be used in notices of violations in respect of violations of the corresponding provisions that are set out in column 1 of Schedule 1.*

[5] Therefore, it is reasonable for the Agency to use these short form descriptions in the issuance of Notices of Violations, as appears to be the case here in these present matters. Specifically, the violation in question forms part of subsection 35(1) of the HA Act, whereas in the AMP Regulations, it is enumerated as Item 20(b) of Division 1 of Part 1 of Schedule 1 of those Regulations. Item 20 is listed in two parts as: (a) "Hinder an inspector, an analyst or an officer" which carries the label of "serious", and (b) "Make a false or misleading statement to an inspector, analyst or officer" which carries the label of "very serious". On the day on which the false or misleading statements were alleged to have occurred, section 5 of the AMP Regulations stated that such act would constitute a very serious violation, with each instance carrying a penalty of \$10,000.

[6] The role of the Tribunal, then, is to determine whether the Agency has established all the elements required to support the impugned Notice of Violation. Furthermore, if the Tribunal finds that the Agency has established all of the elements required to support the impugned Notice of Violation, the Tribunal must determine whether the Agency has proved that the amount of the penalty is as authorized under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act) and the AMP Regulations.

## **2. Procedural History**

[7] The Tribunal heard three cases between the parties in August of 2014. While each case arose from its own request for review and will result in its own decision, the Tribunal ordered, with the parties' consent, that the cases be heard together. Moreover, there is only one fact situation and chain of events that give rise to all three cases. Below, the procedural history for each case is reproduced individually and also, where appropriate, collectively.

### **2.1 Case #1 - R. Clare Incident (CART/CRAC-1639)**

[8] This first case arises from Notice of Violation #1112ON0018-01, dated May 29, 2012, alleging on March 28, 2011, at Windsor, Ontario, R. Clare [*verbatim*] "committed a violation, namely: Make any false or misleading statement to an inspector To Wit: Dr. C. Small contrary to section 35(1)(b) of the *Health of Animals Act* which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*." This matter is referred to throughout these reasons as "the R. Clare Incident."

[9] The Notice of Violation naming R. Clare was served on him personally by the Agency on May 31, 2012. Pursuant to section 4 of the AMP Regulations, the alleged violation was classified as a “very serious violation” carrying an assessed penalty of \$10,000.

[10] By letter dated June 6, 2012, sent by courier to the Tribunal, R. Clare, via his lawyers, Emily Assini (Ms. Assini) and Ian Wallace (Mr. Wallace), requested a review by the Tribunal of the facts of the Notice of Violation issued to him in accordance with paragraph 9(2)(c) of the AMP Act.

[11] On June 22, 2012, the Agency sent a copy of the report (Agency Report) relating to the Notice of Violation issued to R. Clare to both R. Clare and to the Tribunal. The Tribunal received the Agency Report on June 26, 2012.

[12] In a letter dated June 26, 2012, the Tribunal invited R. Clare and the Agency to file any additional submissions relating to the Notice of Violation, naming R. Clare as the alleged violator, by July 26, 2012.

[13] On July 25, 2012, Ms. Assini filed additional submissions in support of R. Clare. (R. Clare Additional Submissions) as evidence to be considered for the R. Clare Incident. On August 24, 2012, Ms. Andrea Horton sent an email to the Tribunal and to Ms. Assini, replying to R. Clare’s Additional Submissions (Agency Additional Submissions).

## **2.2 Cases #2 and #3 - J. Clare March Incident (CART/CRAC-1643) and J. Clare April Incident (CART/CRAC-1644)**

[14] The second “sister” case arises from Notice of Violation #1112ON0018-02, dated May 29, 2012, alleging on March 29, 2011, at Burford, Ontario, J. Clare [*verbatim*] “committed a violation, namely: Make any false or misleading statement to an inspector To Wit: Dr. M. Coulibaly contrary to section 35(1)(b) of the *Health of Animals Act* which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.” This matter is referred to throughout these reasons as “the J. Clare March Incident”.

[15] The third “sister” case comes from Notice of Violation #1112ON0018-03, dated May 29, 2012, alleging on April 21, 2011, at Burford, Ontario, J. Clare [*verbatim*] “committed a violation, namely: Make any false or misleading statement to an inspector To Wit: Dr. M. Coulibaly contrary to section 35(1)(b) of the *Health of Animals Act* which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.” This matter is referred to throughout these reasons as “the J. Clare April Incident”.

[16] The two Notices of Violation arising from the J. Clare March Incident and the J. Clare April Incident, both dated May 29, 2012, were deemed to have been served on J. Clare by the Agency on July 9, 2012. Pursuant to section 4 of the AMP Regulations, these violations were both classified as a “very serious violation” carrying an assessed penalty of \$10,000 each.

[17] By letter dated June 29, 2012, sent by registered mail to the Tribunal, J. Clare, through his lawyers Ms. Assini and Mr. Wallace, requested a review by the Tribunal of the facts of the two Notices of Violation issued to him in accordance with paragraph 9(2)(c) of the AMP Act.

[18] On July 11, 2012, the Agency sent a copy of the Agency Report relating to each of the two Notices of Violation issued to J. Clare to both J. Clare and to the Tribunal.

[19] In letters dated July 16, 2012 (for J. Clare April Incident) and dated July 17, 2012 (for J. Clare March Incident), the Tribunal invited J. Clare and the Agency to file any additional submissions relating to the two Notices of Violation, naming J. Clare as the alleged violator.

[20] In a letter dated August 17, 2012, Ms. Assini filed additional submissions in support of J. Clare. (J. Clare Additional Submissions) as evidence to be considered in his case. No additional submissions were received from the Agency with respect to either of the two Notices of Violation issued to J. Clare.

### **2.3 A Common Hearing for All Three Incidents**

[21] Tribunal staff confirmed with legal counsel for R. Clare and J. Clare that they wished the Tribunal to review their files in English, via an oral hearing, at a location at or near London, Ontario. The parties agreed that the three matters should be heard together. After several postponements, an oral hearing was held on August 18, 19 and 20, 2014, in London, Ontario.

## **3. Evidence**

[22] At the start of the hearing, the Tribunal ordered, with the consent of all parties, that the three cases be heard together with the common understanding that, where necessary, parties would indicate to which case (or combination of cases) evidence applied.

### **3.1 The Written Record**

[23] In each case, the Agency written record includes the relevant Notice of Violation and the relevant Agency Report. Specifically, in the case of the R. Clare Incident, the written record also includes the Additional Submissions of the Agency.

[24] In each case, the written record submitted by R. Clare and by J. Clare includes the relevant Request for Review. Specifically, in the case of the R. Clare Incident, the written record also includes the Additional Submissions of R. Clare, and in the cases of the J. Clare Incidents, the Additional Submissions of J. Clare.

### 3.2 The Witnesses

[25] The Tribunal heard *viva voce* evidence for all three Incidents from 12 witnesses, as summarized in Table 1:

<b>Table 1 WITNESSES</b>				
<b>WITNESS NAME</b>	<b>JOB TITLE</b>		<b>EVIDENCE APPLICABLE TO</b>	<b>PARTY CALLING WITNESS</b>
Mr. Edward Hasson	Cattle Producer		All Incidents	Agency
Mr. Alvin Boys	Trucker		All Incidents	Agency
Ms. Melanie Hackbart	OLEX Personnel		All Incidents	Agency
Dr. Charanjit Talwar	Doctor of Veterinary Medicine (D.V.M.)		All Incidents	Agency
Dr. Carolyn Small	D.V.M.		All Incidents	Agency
Dr. Sivaram Arumugam	D.V.M.		All Incidents	Agency
Dr. Moussa Coulibaly	D.V.M.		All Incidents	Agency
Mr. Roger Weber	Investigation Specialist		All Incidents	Agency
Mr. Gerry Wideman	Metzger Vet. Services Personnel		All Incidents	R. Clare and J. Clare
Mr. Richard Clare	Cattle Buyer		All Incidents	R. Clare and J. Clare
Mr. Brad Davis	Truck Driver		All Incidents	R. Clare and J. Clare
Mr. Jay Clare	Feedlot Operator		All Incidents	R. Clare and J. Clare

### 3.3 The Exhibits

[26] Exhibits, as set out below in Table 2, were tendered as evidence during the hearing:

<b>Table 2 EXHIBITS</b>			
<b>EXHIBIT NUMBER</b>	<b>EXHIBIT TITLE</b>	<b>EVIDENCE APPLICABLE TO</b>	<b>PARTY TENDERING EXHIBIT</b>
1	Cheque #189707, dated 24-Mar-11, payable to Hasson, Ed in amount of \$2,858.73	All Incidents	Agency
2	Purchase Invoice #200313, dated 03/24/11 on the name of 1553603 Ontario Inc., in amount of \$10,497.65	All Incidents	
3	Purchase Invoice #200313, dated 03/24/11 on the name of 1553603 Ontario Inc., in amount of \$19,300.93	All Incidents	
4	Ontario Livestock Exchange Inc. Manifest Report, trucker no. 1880, name A. Boys	All Incidents	
5	ID and Tag Report from OLEX	All Incidents	
6a	Fax from Ontario Livestock Exchange Inc. to Emily, RE: Age Verification Report for March 24, 2011 (17 pages)	All Incidents	
6b	Fax from Ontario Livestock Exchange Inc. to Emily, RE: Cows for March 24, 2011, from our Market Report 642 Head	All Incidents	
7	Veterinary Health Certificate Export of Cattle and Bison for Immediate Slaughter to the United States of America	All Incidents	
8	Handwritten Notes from Dr. Small	All Incidents	
9	SRM Receiver Record from Malden Valley Farms	All Incidents	
10a and b	NETS Citrix Presentation Server Client	All Incidents	
11a&b	Document 6 of Dr. Arumugam's Inspector Report, pages 1 and 2	All Incidents	
6c	Fax from 571245 Ontario Inc. (Butch Clare Livestock) to Ian Wallace and Emily Assini to Diana, dated August 18, 2014	All Incidents	Agency and R. Clare and J. Clare

### **3.4 An Overview of the Scenario Common to All Three Incidents**

[27] This case involves the identity and ownership of the cow (or cows) bearing the RFID tag number CAN-000-239-638-636 (RFID tag #636). According to the Canadian system of bovine animal identification system, overseen by the CCIA, this tag is to be applied to one cow, and one cow only, in order to preserve the identity of that cow, from its birth to its death, along the Canadian agri-food system.

[28] However, in the three matters before the Tribunal, a 13-year-old cow left the Hasson farm (the Hasson cow) for market on Wednesday, March 23, 2011 that was supposed to be bearing RFID tag #636. Six days later, on Tuesday, March 29, 2011, the RFID tag #636 was verified to be found in a three-year-old cow now owned by Clare (the Clare cow) on the Clare feedlot in Burford, Ontario. How that tag got in the Clare cow is the mystery to be unravelled in these cases.

[29] A general unfolding of events emerges as follows from the parties' submissions and testimony:

- a. The Hasson cow, with or without the RFID tag #636 secured in its ear, was sold in Kitchener at the Ontario Livestock Exchange (OLEX) on March 24, 2011.
- b. R. Clare bought the Hasson cow at OLEX.
- c. R. Clare bought many other cows on March 24, 2011, at OLEX as well.
- d. An Agency-approved Export Certificate was issued March 25, 2011, declaring that a load of 41 cows, including one three-year-old cow bearing the RFID tag #636, was certified for export to the U.S. by R. Clare.
- e. On Sunday, March 27, 2011, at OLEX, R. Clare loaded the cattle identified on the Export Certificate for export to the U.S. and the load departed for the U.S.
- f. In the afternoon of March 27, 2011, when the Clare load arrived at the U.S. border, the load was denied entry as an animal on board was down. The load was then directed back to Canada. The downer cow was off-loaded later that afternoon at an Agency-designated farm—the Unholzer farm—in southern Ontario.
- g. In the evening of March 27, 2011, the rest of the Clare load was admitted to the U.S. and completed its journey to a slaughter house in Michigan.
- h. On March 28, 2011, the downer cow was collected from the Unholzer farm by agents of R. Clare and taken to the Clare feedlot in Burford, Ontario.



- i. On March 29, 2011, an Agency veterinarian came to the Clare feedlot and was shown the Clare cow bearing the RFID tag #636 by J. Clare. The Agency veterinarian verified that the cow was a young cow and had RFID tag #636 in its ear.
- j. Again on April 21, 2011, an Agency veterinarian came to the Clare feedlot and was shown the Clare cow bearing the RFID tag #636 by J. Clare. Again, the Agency veterinarian verified that the cow was a young cow and had RFID tag #636. This time, however, the cow had a calf with her.

[30] Bookending this whole scenario, are two undisputed events substantiated by uncontradicted, direct evidence. First, there is the evidence from Hasson and Mr. Alvin Boys (Boys) that on March 23, 2011, Hasson decided to ship three cows from his farm to OLEX in Kitchener. He hired Boys to haul the three cows, along with cows from other farms, to OLEX in time for the next day's sale. Two of the three cows had CCIA-approved RFID tags in their ears upon loading, but one—a 13-year-old, polled (no horns), red and white cow, weighing 1,525 pounds—did not yet have a CCIA-approved RFID tag in her ear, as required by law, when the cow leaves its farm of origin. Hasson handed Boys RFID tag #636 to put, or to have put, in the cow's ear upon arrival at OLEX.

[31] Second, there is also uncontradicted direct evidence from Dr. Coulibaly and J. Clare that on March 29, 2011—just six days later—RFID tag #636 was found in the ear of a three-year-old, horned, red and white cow at the Clare feedlot. Again on April 21, 2011—almost a month after Hasson shipped his cows to OLEX—the three-year-old, horned, red and white cow, at the Clare feedlot is verified to have RFID tag #636 in its ear and now has a lively red and white calf beside it.

[32] What is disputed by the parties is what happened between March 23, 2011, when Hasson's untagged cow left his farm and March 29, 2011, when a cow at the Clare feedlot was verified by Dr. Coulibaly to have in its ear RFID tag #636.

### **3.5 The Disputed Facts**

[33] There are two vastly different theories of what happened during those intervening six days.

[34] The Agency presented evidence and argument to support its theory that all the Incidents relate to a cover-up perpetrated by R. Clare and J. Clare. The Agency alleges that during those days, R. Clare bought Hasson's cow at OLEX, and then, at some point prior to the verification by Dr. Coulibaly, switched the RFID tag #636 from Hasson's 13 year-old animal to the three-year-old animal that Dr. Coulibaly found on the Clare feedlot on March 29 and again on April 21, 2011.

[35] The Clares presented evidence and argument to support their theory that the RFID tag #636 that was designated for Hasson's cow, was never actually applied to that cow's

ear. Rather, the tag was applied mistakenly to another cow at OLEX. Unknowingly, R. Clare then purchased the cow that did actually receive the RFID tag #636, had that cow verified for age-eligibility for export to the U.S., and then shipped this approved cow to the U.S. for slaughter. However, because the cow with RFID tag #636 went down in the trailer en route to the U.S., the trailer was returned, the cow with RFID tag #636 offloaded, and she was then returned to the Clare feedlot.

[36] The three cases before the Tribunal, turn, therefore, on a careful examination of the evidence to determine whether or not, the cow that R. Clare bought at OLEX and shipped to the U.S. was in fact the same cow as the “downer” cow found at the U.S. border, then offloaded at the Unholzer farm, then retransported to the Clare feedlot, and then verified and photographed by Dr. Coulibaly (his photos are found at Tab 8 in each of the Agency Reports). If it is the same cow, then there will be scant, if any evidence, that R. Clare, in his representations to Dr. Small on March 28, 2011, and J. Clare, in his representations to Dr. Coulibaly on March 29, 2011, and April 21, 2011, uttered false or misleading statements. If it is not the same cow, then the representations by the Clares may indeed constitute false or misleading statements made by the Clares to Agency officials in the official conduct of their duties.

[37] Below, is a summary of the pertinent (and voluminous) evidence provided by the parties to prove their respective theories.

### **3.5.1 Written and Oral Evidence of Hasson**

[38] Hasson gave evidence as to what happened between his farm and the OLEX auction mart. His written statement is at Tab 12 of the Agency Reports. He also gave oral testimony. On Wednesday, March 23, 2011, Hasson contracted with Boys to ship three cows to the OLEX auction mart. Two of the three cows had CCIA-approved RFID tags in their ears when they were loaded by Hasson. The third one did not. Hasson told the Tribunal that this cow was about 13 years old, an excitable cow of the Simmental breed, red and white in colour, had no horns and weighed about 1,500 pounds. He told the Tribunal that after the three cows were loaded, he handed RFID tag #636 in a ziplock bag to Boys, requesting that he tag, or have the 13-year-old cow tagged, when he arrived at the OLEX auction mart. Hasson testified that when Weber showed him the photo taken by Dr. Coulibaly of the Clare cow (Tab 8 of the Agency Reports), he confirmed to Weber that this was not the cow that he sent to market with Boys on March 23, 2011.

### **3.5.2 Written and Oral Evidence of Boys**

[39] Boys gave evidence as to what happened between Hasson’s farm and the OLEX auction mart. His written statement is at Tab 13 of the Agency Reports. He also gave oral testimony. Boys testified that he loaded Hasson’s three cows and, along with several others from other farms, he delivered them all to the OLEX auction mart in the evening of March 23, 2011. He did not tag the Hasson cow, but handed the tag to staff of OLEX and

requested that they apply the RFID tag #636. Boys told the Tribunal that he asked the OLEX staff to put the tag in immediately but they said “no”, they would get it done the next morning. Upon receipt at OLEX, Boys testified that the Hasson cow was given a temporary hip tag sale number 1022. This is confirmed by the OLEX document presented as Exhibit 4 that Boys completed when he dropped off the Hasson cows. Boys testified that when Weber showed him the photo at Tab 13 (same as colour photo at Tab 8) of the Agency Reports, he could confirmed to Weber that this was not a cow that he transported to market from Hasson’s farm on March 23, 2011.

### **3.5.3 Written Evidence of OLEX and Oral Evidence of OLEX Employee Hackbart**

[40] The Agency collected and presented several business documents from OLEX in its Agency Reports and in the documents presented as exhibits at the hearing. OLEX documents in the Agency Reports are found at Tab 1, pages 7, 8, 9, 10, 13, 14; and at Tab 13, page 4. OLEX documents presented at the hearing are Exhibits 1, 2, 3, 4, 5, 6a, 6b and 6c.

[41] The document at Tab 1, page 8 of the Agency Reports, shows the hip tag # 1022 was attributed to seller Hasson, buyer 33 (which was agreed by the parties to be R. Clare) for one crossbred cow that weighed 1,535 pounds.

[42] The document at Tab 1, page 9 of the Agency Reports, is the same document as at Tab 1, page 8 of the Agency Reports, except that it has additional handwritten notations, which during the hearing, Hackbart acknowledged that she added to the original copy of this document on July 8, 2011, when she was visited by two Agency investigators (Armstrong and Kozak). The notations she added indicated the buyer’s lot number (11) and a cross-referenced RFID tag number (239 638 636). Exhibit 1 contains a further change to the original and subsequent copy of this document, where Hackbart changes one of her handwritten notations to indicate that the cow with hip tag #1022 was actually sold to buyer’s lot number 300 rather than lot 11. Exhibits 2 and 3 appear to confirm this, as they are OLEX records for R. Clare’s lot 11 purchases on March 24, 2011, which includes 12 cows but does not include the cow with hip tag #1022 and for R. Clare’s lot 300 purchases on March 24, 2011, which does the cow with the hip tag #1022 among the 24 cows listed. The invoice records cow with hip tag #1022 as being a crossbred cow, weighing 1,535 pounds and selling for a total price of \$1,105.20.

[43] The documents at Tab 1, pages 10 and 14 of the Agency Reports (the complete 17 pages of this document was submitted as Exhibit 6a), show that the animal with hip tags 1023 and 1024 were age-verified as being U.S. export-eligible, but there is no record of the animal with hip tag #1022 in this report, the implication being that that animal was not U.S. export-eligible.

[44] The document at Tab 1, page 13 of the Agency Report, written by Hackbart on July 15, 2011, almost four months after the incident, confirms that *[verbatim]* “Hip/Sale

Tag #1022 sold by Ed Hasson on March 24/11, was bearing RFID tag #239 638 636". The confirmation, however, does not include any description of the cow sold or the name of the purchaser.

[45] Exhibit 4, another OLEX document, confirms as Boys testified, that the Hasson cow was given a temporary hip tag sale number 1022.

[46] Exhibit 5 is the OLEX identification and tag report for all cattle sold on March 24, 2011, and confirms that the cow identified with hip tag #1022 was sold to R. Clare (buyer number 133, lot 300) for \$1,105.20. Hackbart testified that it was created on March 25 or 26, 2011.

[47] Exhibit 6b is an OLEX document stating that 642 cows were sold at OLEX on March 24, 2011.

[48] Exhibit 6c is an OLEX record for R. Clare's (buyer 133) lot 51 purchase of 35 cows on March 24, 2011.

[49] Witness Hackbart gave evidence that she had been at OLEX for 28 years and is the office manager there. As such, she issues cheques to customers and invoices to buyers, as well as overseeing part-time employees and sales management. Hackbart told the Tribunal that R. Clare is a buyer with buyer number 133 and 33 at OLEX at every Thursday sale and buys slaughter cattle, slaughter steers and slaughter heifers. J. Clare is a buyer at OLEX every Tuesday sale. OLEX auction mart holds cull cow sales on Tuesdays and Thursdays. On Thursday, March 24, 2011, OLEX had a sale of about 500 or more cows. Hackbart told the Tribunal that OLEX tracks cattle coming through the auction ring with a temporary four-digit hip tag, which is glued to the animal upon its arrival. The animals then make their way through the OLEX process: from sellers' unloading area, to sales holding pens, to aging station, to sales ring, to buyers' pen, and finally to the buyers' loading area.

[50] Hackbart confirmed that the hip tags can fall off during the time that an animal is at OLEX, and if they do, an employee might reattach the hip tag if he knows for sure which tag belongs to which cow, or he can issue a new one, which is in the 9000s, if the tag has fallen off before the aging station, or in the 6000s, if the tag has fallen off after the aging station but before the sales ring. Hackbart confirmed that animals going through OLEX are also tracked by their RFID tag numbers as well. Hackbart testified that there are instances when RFID do fall out however. When RFID tags fall out or are absent in an animal, OLEX can, because it is an official tagging site, apply a new one either at the unloading chute or at the aging station but she was unsure as to exactly where and when the recording of number and identity of the cow with the new tag would be done.

[51] Hackbart told Tribunal that looking at the documentation in the case Hasson's cows were given hip tags 1022, 1023 and 1024. These cattle were then passed through the aging station. The cow bearing the RFID tag #636 was not included in the list of those animals to be U.S. export-eligible as being under three years old. On July 15, 2011, Hackbart made a

declaration “to confirm that Hip/Sale tag #1022 sold by Ed Hasson on March 24/11, was bearing RFID tag #239 638 636” (Tab 1, page 13 of Agency Reports).

[52] Hackbart testified that R. Clare is also known as Butch Clare and that he buys cattle under the OLEX buyer numbers 33 and 133 and that OLEX records indicate that the cow bearing hip tag 1022 on March 23 and 24, 2011, was sold to OLEX buyer number 33. Hackbart testified that she cross-referenced hip tag 1022 and found it to be on a cow bearing RFID tag #636, which she wrote in on the documents found at Tab 1, page 9 of Agency Reports and at Exhibit 1. She told the Tribunal that she wrote this RFID tag number beside the hip tag number after she consulted OLEX’s computer record of sales completed on March 24, 2011, but she didn’t remember the exact date she did this. Hackbart testified that she does not know how the aging process for determining U.S. export-eligibility is done but that OLEX has no responsibility for that process. OLEX has a practice, however, that it will verify that a CCIA-approved RFID tag is in every animal’s ear before it is released from its premises.

[53] Under cross-examination, Hackbart testified that she does not know if, or when, the cow with hip tag 1022 received a RFID tag, given that the evidence is that when it arrived at OLEX, it did not have such a tag. She told the Tribunal that Gerry Wideman (Wideman) works for Metzger Veterinary Services (Metzger) and does age verification at OLEX. She also testified that she did not know the age of the cow with the hip tag 1022. Hackbart testified that it was her mistake that she entered a handwritten notation of R. Clare purchasing the cow with hip tag #1022 in his lot 11 purchases when in reality the cow formed part of his lot 300 purchases on March 24, 2011. When questioned, Hackbart told that Tribunal that she wrote the letter found at Tab 1, page 13, based on pre-sale information she was able to retrieve from OLEX computers. She added that the OLEX recordkeeping system does not provide for a reading of an RFID tag after the age-verification stage. She agreed that if a hip tag fell off, she would never know about this occurrence and that she would never see an export health certificate, if one was generated.

#### **3.5.4 Written Evidence of Dr. Chahal and Dr. Longfield and Oral Evidence of Dr. Talwar**

[54] A document entitled Veterinary Health Certificate Export of Cattle or Bison for Immediate Slaughter to the United States of America Reference Number TWOK-2011-03144 (Export Certificate) at Tab 2 of the Agency Reports, verifies that 41 cows are eligibility for export to the U.S. This document ostensibly was completed by Dr. Chahal, an accredited veterinarian under contract to the Agency, on March 24, 2011, and approved by Dr. Longfield of the Agency on March 25, 2011. It lists the exporter of the cattle as Butch Clare Livestock and the importer as West Michigan Beef and the port of entry for the export to be Detroit, Michigan. The document attests, among other things that *[verbatim]* “The animals have been individually identified with an official Canadian ear-tag, applied prior to each animal’s entry into the United States”. At line 37 of the Export Certificate, the entry records a cow with the RFID tag #636, as being a three-year-old Simmental female, red and white in colour, bearing an additional “g1” tag.

[55] Agency witness, Dr. Talwar, testified that he acts as an Agency District Veterinarian and, as such, is responsible for accrediting private veterinarians who provide services to the Agency, including services such as institutional inspections and accreditations for export. The role of an accrediting veterinarian with respect to exports to the U.S. is to verify the age of cattle, inspect their health status and to determine their eligibility for export to the U.S. Dr. Talwar testified that the Export Certificate was endorsed by Dr. Chahal, an accredited veterinarian under contract to the Agency, on March 24, 2011. The signature from Dr. Longfield of the Agency on March 25, 2011, would have been an attestation that the accredited veterinarian had complete his designated task, although Dr. Longfield would not have seen any of the animals that were the subject of the Export Certificate.

[56] Dr. Talwar testified that Dr. Chahal became the subject of an audit and investigation by the Agency. Dr. Talwar specifically undertook the audit of the Export Certificate at issue in this case. His findings were that Dr. Chahal could not explain the age verification on all animals included in it and could not find the records for all the animals that he certified on this load. Dr. Talwar was told by Dr. Chahal that he was relying on his technicians, particularly Wideman working at OLEX, for verification. With respect to the animal at line 37 of the Export Certificate (RFID tag #636), Dr. Talwar told the Tribunal that Dr. Chahal told him that he could not verify that particular age verification. Exhibit 7 was presented to the Tribunal as proof that no verification existed for the animal listed at line 37 of the Export Certificate.

[57] In cross-examination, Dr. Talwar testified that, while Dr. Chahal was not able to prove that he was in control of a process or of knowledge to determine the ages of some animals listed on the certificate, it was possible that the ages on the certificate were correct. Dr. Talwar confirmed that age verification of the animal at line 37 of the certificate could have been done visually or by means of reference to purebred association records, but there is no record that it was done by either of these means. Dr. Talwar also confirmed that Dr. Chahal, after a suspension and retraining, is again working as an accrediting veterinarian with the Agency.

### **3.5.5 Written and Oral Evidence of Dr. Small**

[58] Dr. Small testified, by referring to the report she completed at Tab 4 of the Agency Reports (the Agency acknowledged that the report by Dr. Small for the R. Clare Incident should have included the same material as was included at that tab for the other two Incidents and the Tribunal agreed to this amendment of the R. Clare Agency Report). She told the Tribunal that she retrieved a message on her cell phone left at 16:22 on March 27, 2011, from Dr. Mike Caston (Dr. Caston), USDA port veterinarian, Detroit, saying that he was refusing entry to a load of cattle with a downer cow and that he did not know who to call. Dr. Small explained that the Agency port veterinarian on standby on March 27, 2011, was Dr. Arumugam but that he did not receive a call from Dr. Caston. Dr. Small called Dr. Caston at 08:25 on March 28, 2011, to confirm whether he had called anyone else on March 27, 2011. He confirmed that he had not.

[59] Dr. Small said she next phoned Unholzer at 08:40, who told her that a cow had been unloaded at his farm the night before and that they had dragged her to the back of the truck and unloaded her with a bobcat. Dr. Small told the Tribunal that Unholzer then told her that they had given the cow water and that she got up. He told Dr. Small that he wasn't able to read the ear tag due to "her nature". Dr. Small told Unholzer that Agency personnel would be coming out to his farm to speak with him that day. Dr. Small then called Dr. Arumugam to visit the Unholzer farm to inspect the downer cow there. Dr. Small also called R. Clare to inquire about the circumstances surrounding the downer cow.

[60] Dr. Small told the Tribunal that she recorded in her notes that, at 11:40 that day, she received a phone call from Dr. Caston stating that he had received the RFID tag number of the downer, which was RFID #636, animal #37 on the Export Certificate. She told the Tribunal that Dr. Caston said that he had received this information from Nancy at Butch Clare's office.

[61] At 15:10, Dr. Small recorded that she received a call from R. Clare, saying that the downer cow had gotten up and that he had had her collected from the Unholzer farm and returned to the Clare feedlot in Burford, Ontario. Dr. Small told the Tribunal that R. Clare then told her that Agency personnel could come and have a look at her if they wished.

[62] In cross-examination, Dr. Small told the Tribunal that the process at the U.S. border involving the downer cow did not unfold as it normally should have as no Agency inspectors accessed the situation found by the U.S. officials. As a result, Dr. Small told the Tribunal she became suspicious because normal procedures for these types of situations had not been followed.

[63] Dr. Small also relayed to the Tribunal the hearsay evidence she received from Unholzer as to what he told her happened at his farm on the March 27, 2011. As well, one of the documents Dr. Small and Dr. Arumugam received from Unholzer was Exhibit 9, the SRM Receiver Record from Unholzer's Malden Valley Farms, which records as its final entry the receipt of one animal with RFID tag number CAN000239638636, and with the notation of "1300#" on March 27, 2011, from a truck of Oxford Transport, driven by "Brad".

### **3.5.6 Written and Oral Evidence of Dr. Arumugam**

[64] Dr. Arumugam provided a written report of his involvement in the Incidents which is included at Tab 6 of the Agency Reports. Most of what he records, and provided by way of *vive voce* evidence, is in the nature of hearsay evidence from Unholzer.

[65] Dr. Arumugam told the Tribunal that Unholzer told him that he, Unholzer, had received a call at 16:30 on March 27, 2011, that a load had been refused at the U.S. border and that Oxford Transport was bringing a downer cow to his farm to unload it there so that the rest of the load would be allowed entry into the U.S. for slaughter. Unholzer told Dr. Arumugam a series of contradictory stories as to what happened next. The truck

arrived at his farm at 18:15. The downer animal either walked off, was dragged off, or was lowered by a bobcat off the trailer. Unholzer further relayed the driver's name to Dr. Arumugam as "Kaisey". He also said that the cow in question was marked with an "X" to indicate obnoxious behaviour and had no horns.

[66] Dr. Arumugam testified that he called Unholzer at around 09:40 on Monday, March 28, 2011, to arrange a visit to his farm to inspect the downer cow. Unholzer told him then that the downer cow had gotten up. The two men agreed that Dr. Arumugam would visit the Unholzer farm at around 14:00 that day. When Dr. Arumugam arrived, Unholzer told him that R. Clare had arranged for the cow to be picked up and that a driver and trailer had come at around 11:00 to take her back to the Clare feedlot in Burford and so, the cow was no longer at the Unholzer farm. Dr. Arumugam told the Tribunal that during their visit, Unholzer informed him that when the cow was loaded for the Clare feedlot, the cow was assisted by a forklift pulling on the animal's neck so that it could get in the walk-in trailer that had been arranged for its transportation.

[67] In cross-examination, Dr. Arumugam agreed that his concern in visiting Unholzer was the treatment of the downer cow in getting her off the trailer on March 27, 2011. He agreed that Unholzer changed his story often as to how the animal was treated, how she reacted and how she was removed from the trailer. Dr. Arumugam also told the Tribunal that Unholzer told him at times one thing and then at other times something completely at odds with the first story. Dr. Arumugam agreed that in respect of a notation on Exhibit 9, the SRM Receiver Record from Unholzer's farm, the reference "1300#" may have meant "1,300 pounds" for the animal that Unholzer received at his farm with RFID tag #636.

### **3.5.7 Written and Oral Evidence of Dr. Coulibaly**

[68] Dr. Small and Dr. Arumugam testified that they arranged to have an inspection of the Clare feedlot to verify the downer cow bearing RFID tag #636. Dr. Coulibaly testified that he was one selected to carry out this task. Dr. Coulibaly was instructed by Dr. Dewit, the Agency's District Veterinarian for the Guelph region, to carry out an inspection at the Clare feedlot on Tuesday, March 29, 2011. Dr. Coulibaly testified that he asked J. Clare to show him the cow in question. J. Clare then presented him with the animal bearing the RFID tag #636. Dr. Coulibaly testified that he completed a health status check of the animal, detected no lameness in the animal, determined the animal to be in good health and that it indeed bore the RFID #636. Tab 8 of the Agency Reports is a photo taken by Dr. Coulibaly while conducting his inspection of the animal, which was a Simmental cow, red and white, with horns. Dr. Coulibaly verified the tag number by a visual inspection and by an electronic tag reader. He testified that he did not notice anything unusual or abnormal about the tag or the ear of the animal.

[69] Again on Thursday, April 21, 2011, Dr. Coulibaly attended the Clare feedlot, asked J. Clare to show him the cow in question and J. Clare did so. This time, J. Clare indicated that the cow had calved and he showed Dr. Coulibaly the cow and the calf. Dr. Coulibaly testified



that he was presented with the same animal as he had been shown on March 29, 2011. Dr. Coulibaly verified the RFID tag number manually after the animal had been restrained to permit such an inspection. The animal appeared in good health and that it had a calf following her. When the calf was separated from the cow, the cow showed anxiety and while he could not say if they were definitely a mother and calf, it would be likely they were. Dr Coulibaly indicated that he took the photos of the cow and calf, found at Tab 9 of the Agency Reports.

[70] In cross-examination, Dr. Coulibaly indicated that he did not conduct any pregnancy test of the cow in question on his first visit and that he would have had to have done so to confirm at that time whether she was pregnant. Dr. Coulibaly confirmed that he did not specifically check to see if the cow's RFID tag had been recently removed. He also stated that he had never seen a tag removed or replaced in the same or a different cow in his experience.

### **3.5.8 Written Evidence of other Agency Personnel and Oral Evidence of Weber**

[71] Other Agency personnel collected evidence and submitted reports as set out in the Agency Reports. These include handwritten notes from Andrew Armstong and Mike Kozak at Tab 1 of the Agency Reports (regarding information collected from OLEX personnel, particularly Hackbart), inspector reports from Dylan Ryan and Jeffrey Medel at Tab 6 of the Agency Reports (regarding information collected from Unholzer), handwritten notes from Weber at Tabs 10, 11, 12 and 13 of the Agency Reports (regarding information collected from Hasson, Unholzer and Boys). Except for the meddled recollections of Unholzer, the hearsay evidence collected in these documents reflects other similar evidence offered by the Agency through witnesses called at the hearing.

[72] At the hearing, however, Weber offered testimony in addition to his handwritten notes in the Agency Reports. He testified that he was the investigator of the Incidents, interviewed people involved in the Incidents, made the decision to issue the Notices of Violation and completed the Agency Reports. Weber told the Tribunal that he had completed the trace-back of the RFID tag #636, of its issuance to Hasson and had completed interviews with Unholzer regarding his involvement with the Incidents.

[73] As well, Weber gave evidence that he had conducted, of his own volition, several tests to see how CCIA-approved RFID tags could be tampered with, so as to permit their switching from one animal to another. The Agency never sought to have Weber qualified as an expert in these matters and consequently, the findings of his research were objected to by counsel for R. Clare and J. Clare. Weber admitted, in cross-examination, that the Agency never has conducted any official tests concerning whether CCIA-approved RFID tags can be tampered with. Weber also told the Tribunal that during his investigation that he never asked any of the potential witnesses if the RFID tags were or could be tampered with.

### **3.5.9 Oral Evidence of Wideman**

[74] Wideman testified that he is employed by Metzger and works as a veterinary technician. He told the Tribunal that he has no specific recollection of the sale day of March 24, 2011, but if it was a Thursday, he would have been doing age-verifying of cattle for sale at OLEX, under the direction of Dr. Chahal. The process that he follows is the cow goes through the head gate, has its RFID tag scanned and this creates a record in a computer database.

[75] Wideman testified that according to the results from computer that were transcribed on the Export Certificate, signed by Dr. Chahal on March 24, 2011, the cow bearing the RFID tag #636 was verified to be three years old at the age-verifying chute. Wideman told the Tribunal that it was unlikely that the age of three for the cow was incorrect. Wideman testified that he supposed that OLEX does have issues matching sellers and buyers. He also stated that he is responsible for installing CCIA-approved RFID tags and does so frequently. He had never seen them removed or reinstalled in another cow.

[76] In cross-examination, Wideman told the Tribunal that when he is doing the pre-sale aging verification, he does check for a CCIA-approved RFID tag and if one is missing, he will put a new one in. If a tag is missing in a cow with a hip tag or if directed by a specific trucker or farmer, he will apply a non OLEX-issued tag but if there is no hip tag, he will put in an OLEX-issued tag. He then will scan the new tag and enter in the age-verification data. Wideman agreed that the cow with hip tag 1022 would have been ineligible for export, according to the OLEX sales records. However, he stated that when the "charting" (that is the preparation of an Export Certificate) is done for export to the U.S., the exporter tells the verifier which lots he wishes to have certified and then the cows that are eligible from those lots will appear on an Export Certificate. Wideman's employer, Metzger, has to verify each animal again at charting for export and must matched up the export data with OLEX pre-sale age-verification.

### **3.5.10 Oral Evidence of Davis**

[77] Davis testified that he remembers taking a load of Clare cattle on Sunday morning, March 27, 2011 from OLEX, destined for a slaughter house in Michigan. He told the Tribunal that he does not load the cattle but rather that R. Clare or J. Clare would load them at OLEX. When he got to the U.S. border in the afternoon on Sunday, March 27, 2011, he was denied entry. When he got out of his truck to complete inspection formalities there, he noticed one cow down in the load. He got the cow up but when he returned, the cow was down again. A U.S. Customs officer noticed the cow lying down in the trailer. Because of this "downer" cow, Davis was not allowed to enter the U.S. but was told by the U.S. Customs officer that the downer cow would have to be removed and then the load could cross. Davis told the Tribunal that the downer cow was never identified by RFID tag number at the U.S border.

[78] Davis told the Tribunal that he then returned to Canada and took steps to remove the downer cow from the trailer. He identified the farm of Unholzer as an approved location for injured or diseased cattle and proceeded to unload the downer cow there. Davis told the Tribunal that after the cows that were around the downer cow were unloaded, the downer cow got up to her feet and walked out of the trailer but she was angry. Davis testified that he called R. Clare at this point and R. Clare told him to reload the trailer but leave the problem cow behind at Unholzer's farm. Davis stated that the cow that was unloaded was young with small horns, a red and white face and very agitated and angry. Davis testified that this was the last he saw of that cow and he then proceeded to take the remaining animals to the border and across to the slaughter house in Michigan.

[79] In cross-examination, Davis stated that in the three to four years that he hauled cattle, this incident was the only time that he had ever been turned back at the U.S. border. While hauling loads of cattle, most of his loads were for R. Clare. With respect to this load, the U.S. Customs officer, Dr. Caston, told him to go back to Canada and deal with the downer cow, so Davis returned to the Canadian side telling Canadian officials that his paperwork was not in order because that is what Dr. Caston told him to say to get back into Canada. Davis repeated, when questioned, that when he got to the Unholzer farm, the downer animal was able to get off the truck by walking and that it was a lie if Unholzer told the Agency investigators that the cow had to be dragged off the trailer.

### **3.5.11 Oral Evidence of J. Clare**

[80] J. Clare testified that he first heard about the downer cow from his father R. Clare. He came into work about 06:30 on March 28, 2011, and later that morning, he was chatting with his father who told him about the downer cow. His father also told him that Agency veterinarians would be coming from Woodstock to see the cow that was now at the Clare feedlot and that the cow was in a pen all by herself. This was the first time J. Clare had seen the cow. J. Clare told the Tribunal that then Dr. Coulibaly came from the Agency on March 29, 2011, and he showed her the cow. He does not remember the conversation that the two of them had but Dr. Coulibaly took photos of the cow. J. Clare remembers the cow being in good shape, a Simmental, with horns and a RFID tag. J. Clare testified that the cow later calved and so instead of shipping her before she calved, they kept the cow on the farm. After she had calved, the Clares called the Agency again and invited them to come see the cow again. J. Clare told the Tribunal that he couldn't tell the cow was pregnant in March, as it is harder to tell when with younger cows. In April, Dr. Coulibaly came back to the farm to look at the cow and calf and take more photos.

[81] In cross-examination, J. Clare told the Tribunal that the cow and calf were eventually sold to "Carsons" after April 21, 2011, but that the RFID tag was never retired, probably because it was sold as a cow-calf pair. J. Clare testified that the cow, on March 29, 2011, was a bit skittish when Dr. Coulibaly came to verify its health and tag number.

### 3.5.12 Oral Evidence of R. Clare

[82] R. Clare gave evidence that he feeds about 30,000 cattle per year and ships about 60,000 cattle to the U.S for slaughter annually. He attends OLEX every Thursday to buy cattle for both operations. On an average Thursday, R. Clare purchases between 370 and 650 cows with approximately 85% purchased for export, and the rest destined for the Canadian market. R. Clare is the biggest cattle buyer at OLEX and buys cattle under at least eight lot numbers, which allow OLEX to collect the cattle he buys for sorting for different purposes, such as for export to the U.S. or for finishing in his feedlot. If there are insufficient numbers to complete a load for export from one lot, R. Clare will take enough cows from another lot to complete the load.

[83] R. Clare stated that the usual process he encounters at OLEX is the following: (a) several sellers bring in cattle on Wednesday night or early Thursday morning that are unloaded into OLEX pens; (b) the cattle are then arranged into holding pens by seller or groups of sellers, and are identified by hip sale tags and CCIA-approved RFID tags; (c) holding pen lots are pre-sale aged usually by Wideman of Metzger who will apply a red, blue or green tag to show that a cow has been age-verified and is eligible for export to the U.S.; (d) lots of cattle enter the ring and are auctioned off to the highest bidder; (e) cattle bought by a particular purchaser will be put into a pen or pens designated for that purchaser; (f) the purchaser loads or arranges for the loading of his cattle into a trailer for delivery to a Canadian feedlot, a Canadian processor or a U.S. processor; and (h) if the load is going to the U.S., then the cattle will be reverified for export-eligibility and an Export Certificate issued by a third-party verifier, here Metzger, and the Export Certificate is then approved by an Agency veterinarian before the cattle can be loaded from OLEX pens into a purchaser's trailer.

[84] R. Clare testified that he bought many cows at OLEX sale of March 24, 2011, but has no specific memory of the cow bearing the RFID tag #636 coming through the ring, although he agrees that he did purchase that cow on that day. He explained to the Tribunal that the cows he bought on that day were likely gathered into several pens according to whether they were U.S. export-eligible to make up a load for delivery to a U.S. slaughter house, or were otherwise destined for Canadian slaughter or for further fattening on the Clare feedlot. R. Clare told the Tribunal that there was little real incentive for shipping cows to the U.S. as the difference in selling price was only one to two cents per pound either way.

[85] R. Clare told the Tribunal that the cows that he purchased on Thursday, March 24, 2011, that were U.S. export-eligible were officially verified as being so, and that these cattle were penned together at the OLEX facility awaiting transport by agents of R. Clare on Sunday, March 27, 2011. R. Clare attended OLEX on Sunday, March 27, 2011, in the morning to load the U.S.-destined load, as the U.S. slaughter house wanted to have the cattle in their facility by Sunday night. R. Clare testified that he remembers loading the load and the cow in question, as he put five cows in the "nose" of the trailer and the cow in question was *[verbatim]* "a goofy bitch, dark red and orange with a red "X" on her head as she was a difficult cow to handle". R. Clare said that he loaded her in the nose so that "she would not gore any other cows". R. Clare also pointed out that the red "X" that was painted

on the cow's head might remain there for four or five days or perhaps less if it was humid, before it wore off.

[86] R. Clare testified that Davis was the driver of the trailer onto which he loaded the U.S.-bound cattle on March 27, 2011. Davis then departed with the load. The next interaction R. Clare had with the load was when Davis or the U.S. border official, Dr. Caston, called him to say there was a downer cow on the load. R. Clare told the Tribunal that he instructed Davis to go to Unholzer's farm to remove the downer cow. R. Clare stated that he later received a call from Davis saying that the cow was up and wanted to know if he should try to cross into the U.S. again. R. Clare told him to leave the cow at Unholzer's and then proceed to cross the border. R. Clare testified that Davis told him the cow walked off the trailer and that neither Davis, nor Unholzer, said anything to him about using a bobcat to get the cow off the trailer at the Unholzer farm.

[87] R. Clare testified that he sent a trailer to pick up the animal on Monday morning, March 28, 2011, and remembers telling his son, J. Clare, that an animal was coming to the feedlot. R. Clare recalls talking to Dr. Small that day and saying to her that she could come and take a look at the cow. R. Clare recalls talking with Dr. De Wit of the Woodstock office of the Agency who said that an Agency veterinarian was going to come and see the cow.

[88] R. Clare told the Tribunal that the cow arrived by 15:00, at the Burford feedlot. R. Clare testified that this cow was the same cow that he had loaded at OLEX and that when she arrived at the farm, he had the tips of her horns cut off because she was still "goofy" and that cutting off the tips of her horns would settle her down. He testified that he believes that the cow weighed about 1,200-1,300 pounds, not over 1,500 pounds. He did not notice that she was pregnant, as one can be sure of a visual confirmation of that only in the very last stages of pregnancy. He added that he would not ship a pregnant cow, if he knew that it was pregnant, for safety and for financial reasons—a cow with calf is worth \$300 more than a slaughter heifer.

[89] R. Clare testified that there is no doubt in his mind that the cow he loaded in Kitchener at OLEX was the cow he got back at the Burford feedlot. He told his son J. Clare to show that cow to the Agency personnel, and eventually that cow had a calf and the cow-calf pair was sent to "Carsons" to be sold on consignment. R. Clare stated that he understands that RFID tags should be in all cows' ears well before the age-verification stage at OLEX, but if they have not yet made it into the cow, they will be applied there, and that there may be 70-80 tags on a given sale day that need to be installed at OLEX. The persons doing age-verification, will then record this information into the computer database. Finally, R. Clare stated to the Tribunal that he has never removed a CCIA-approved RFID tag, or instructed an employee to remove one. R. Clare believes that the CCIA-approved RFID tags are not supposed to be capable of being removed.

[90] In cross-examination, R. Clare testified that he never knows in advance of a sale how many cattle he will be buying on any given day. Once he has purchased the cattle though, it is he who builds the loads by instructing OLEX staff to put different cattle into different pens. If a lot for export to the U.S. is short a few animals, he will take some other animals

from a different lot. For the load going to the U.S. on March 27, 2011, R. Clare admitted that 35 animals came from lot 51 and the other six were added to fill out the load of 41 animals, as indicated on the Export Certificate.

[91] In cross-examination, R. Clare also testified that he has had downer cows on other loads and that the Agency will come and inspect them when this occurs. R. Clare testified that he knew the Agency wanted to see the cow after he had talked with Dr. Small but stated that Dr. Small never told him that he couldn't get the cow from Unholzer's farm. He had agreed that the Agency could come and see the cow. R. Clare testified that he didn't recall if he called Dr. Small or she called him in the afternoon of Monday, March 28, 2011. R. Clare told the Tribunal that while he knows that the cow with the hip tag #1022, weighed 1,525 pounds, he knows that the cow he got back to the Clare farm didn't weigh that much and so he doesn't believe that the cow with the hip tag #1022 was the cow that bore the RFID tag #636.

[92] In re-examination, R. Clare testified that Unholzer probably told him that the Agency personnel were coming to Unholzer's to inspect the downer cow, but that in the meantime he contacted a driver who was in the area of Unholzer's farm on the morning of March 28, 2011, to pick up the downer cow so as to have it transported to the Clare feedlot in Burford. It was after this that R. Clare invited Dr. Small, or other Agency personnel, to come and look at the cow at the Clare feedlot.

#### **4. Factual Determinations and Legal Analysis**

[93] The Agency, through its witnesses, has presented evidence to prove a case of cover-up and deceit by the Clares. The Agency theory is that the Clares tried to ship the 13-year old Hasson cow to the U.S. for slaughter, it went down at the border, was returned to Canada, forcibly removed from the trailer, and then its tag was removed and placed by the Clares into a three-year-old cow that was found by Dr. Coulibaly at the Clare feedlot.

[94] The Clares, on the other hand, through their witnesses have presented evidence that points to a different set of events influenced by inadvertence and errors but no cover-up. Their central point is that the RFID tag #636 never made it into the Hasson Cow. Rather at OLEX on March 24, 2011, the RFID tag #636 inadvertently made its way in a three-year-old cow, which was purchased by R. Clare, officially age-verified as certified for export to the U.S., then loaded at OLEX on Sunday morning for export to the U.S. This Clare cow, officially documented as having the RFID tag #636, then went down in the trailer on its way to the U.S., was returned to and unloaded at the Unholzer farm, and eventually came back to the Clare feedlot by Monday afternoon, March 28, 2011.

[95] A finding by the Tribunal that R. Clare and J. Clare made false or misleading statements to Agency officials, therefore depends on proof, on the balance of probabilities, that:

- a. Hasson's 13-year-old cow, in fact, did receive the RFID tag #636 and that tag was applied to its ear; and
- b. the Clares, or persons under their control, switched the RFID tag #636 out of the 13-year-old Hasson cow and into the three-year-old Clare cow.

[96] If these facts are not proven, then statements made by R. Clare, inviting Agency officials to come and see "the cow", or by J. Clare, stating to Agency officials that this is "the cow", will not have been false or misleading as the evidence is clear that the cow that Dr. Coulibaly saw was a cow with the RFID #636. Only if the Hasson cow actually received the tag and then the Clares switched that tag out of the Hasson cow into the Clare cow will there be the basis for a finding that the R. Clare invitation to visit the cow, or the J. Clare showings of a cow, with the RFID #636 were false or misleading.

[97] These alleged contraventions of the HA Act by the Clares are classified as "very serious violations" under the AMPS Act. Moreover, a fine of \$10,000 is no small matter and demonstrates the gravity of this kind of violation. The AMP Act and AMP Regulations make it clear that it is no small matter to make false or misleading statements to government officials. On the other hand, being accused of making such statements is no small matter either. If unproven, such accusations alone can undeservedly attack one's reputation in the community and one's own sense of honour and integrity.

[98] Courts have examined the AMP regime with a certain degree of scrutiny, especially given that violations entail absolute liability. In *Doyon v. Attorney General of Canada*, 2009 FCA 152 (*Doyon*), Létourneau JA, writing on behalf of the Federal Court of Appeal, describes the regime as follows:

*[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.*

[99] Moreover, the Federal Court of Appeal, in *Doyon*, points out that the AMP Act imposes a heavy burden on the Agency:

*[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.*

[100] Section 19 of the AMP 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.*

[101] In analyzing and attributing the appropriate weight to the evidence presented by the Agency, the Tribunal is guided by the *dicta* of the Federal Court of Appeal in *Doyon*, which when judicially reviewing the Tribunal's finding, regarding an alleged violation falling under a different, but related, section of the HA Regulations, stated the following:

*[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.*

...

*b) Analysis and management of the evidence*

*[54] The main function of a tribunal of first instance is to receive and analyse the evidence. In carrying out this important function, it may reject relevant evidence, but it cannot disregard it, especially if it contradicts other evidence of an essential element of the case: see Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General), 2008 FCA 13; Parks v. Canada (Attorney General), [1998] F.C.J. No. 770 (QL); Canada (Attorney General) v. Renaud, 2007 FCA 328; and Maher v. Canada (Attorney General), 2006 FCA 223. If it decides to reject the evidence, it must explain why: ibidem.*

**4.1 Factual Determination #1 - Was the RFID Tag #636 Applied to the Ear of Hasson's 13-Year-Old Cow?**

[102] No direct evidence was presented to the Tribunal that RFID tag #636 was ever placed in the ear of Hasson's 13-year-old cow. No doubt, if it had been placed there while the cow was on Hasson's farm, these cases would never have arisen. Alas, it was not. Although it appears that the tag and the cow travelled in the same vehicle to OLEX on the night of Wednesday, March 23, 2011, neither the owner, the driver, or any employee of OLEX could provide evidence that the tag was ever placed in this cow's ear. Instead, the best oral evidence that was offered was the hearsay reported by Boys, that the OLEX employee to whom he gave the RFID tag #636 would take care of it, likely the next morning. After this moment, determining which cow received the tag is an exercise in examining circumstantial evidence, in reconstructing what might have happened by reference to generated records, handwritten notations, cross-referencing of documents and *vive voce* opinion and speculation. A review of that evidence is in order.



[103] The document at Tab 1, page 8 of the Agency Reports, shows a record that the hip tag number 1022 was attributed to seller Hasson and that this crossbred cow weighing 1,535 pounds was purchased by buyer 33 (which was agreed by the parties to be R. Clare). The document at Tab 1, page 9 of the Agency Reports, shows additional handwritten notations added by Hackbart on July 8, 2011, when she was visited by two Agency investigators, indicating the buyer's lot number (11) and a cross-referenced RFID tag number (239 638 636). The document, at Tab 1, page 10 of the Agency Reports, shows that the animal with hip tags 1023 and 1024 were age-verified as being U.S. export-eligible, but that there is no record of the animal with hip tag 1022, the implication being that the animal was not U.S. export-eligible. The document, at Tab 1, page 13 of the Agency Report, written by Hackbart on July 15, 2011, almost four months after the incident, confirms that *[verbatim]* "Hip/Sale Tag #1022 sold by Ed Hasson on March 24/11, was bearing RFID tag #239 638 636". The confirmation, however, does not include any description of the cow sold or the name of the purchaser.

[104] Neither party could produce a computer-generated, or manually-generated business record of OLEX that was recorded at the time of the sale that definitively linked the hip tag #1022 and the RFID tag #636 to the one cow.

[105] From Hasson and Boys, the evidence was clear that the Hasson cow was unloaded into OLEX untagged. After that, the meandering of the RFID tag becomes murky. While the business records of OLEX for the sale results of March 24, 2011, appear to substantiate that both tags may have been in a 13-year-old cow, the Export Certificate compiled by a third-party verifier on contract to the Agency on March 24, 2011 (and approved by an Agency veterinarian on March 25, 2011) records the animal bearing RFID tag #636 as being a female, three years old, red and white in colour, and approved for export to the U.S.

[106] R. Clare does not remember buying either cow—he buys many cows every Thursday at OLEX. He testified that he did remember loading a young cow on Sunday, March 27, 2011, that was the same cow that eventually came back to his farm a day later and was verified by Dr. Coulibaly as wearing the RFID tag #636.

[107] Wideman and R. Clare testified that RFID tags are applied at OLEX as cattle can lose their tags or come into OLEX without tags, as happened in this case. With several hundreds of cattle going through OLEX every sale day, tagging mistakes arising from these circumstances can happen. While this evidence might be seen as self-serving, the Tribunal found both Wideman and R. Clare to be credible witnesses.

[108] Further substantiation that the animal in question on the load to the U.S. was a young animal is found in the document at Tab 3, page 1 of the Agency Report, compiled by U.S. border officer, Dr. Caston, which refuses entry of the load, and declares that the animals coming into the U.S. on the load are females between the ages of two and seven years old. Dr. Small's notes at Tab 4, page 2, record that *[verbatim]*: "At 11:40 am Dr. Caston called and gave me the tag number from the downer which Nancy from Butch Clare's office provided him – CAN 000239 638 636 - one female red and white Simmental. This was animal #37 listed on HA2183 #TWOK-2011-03144 faxed by Dr. Caston. At 3:10 pm,

Butch Clare called and told me the cow did get up and that he had collected her and returned her to his farm in Burford. He said we could come have a look at her if we wished....”

[109] Exhibit 9, the SRM Receiver Record from Malden Valley Farms reputedly compiled by Unholzer, records in its final entry the receipt on March 27, 2011, from Oxford Transport, driven by Brad, one animal with RFID tag number CAN000239638636 with a final notation of “1300#”. While it is not clear from the evidence that this notation meant 1300 pounds, if it did this would be in line with the weight of the three-year-old cow.

[110] Finally the written and oral evidence of Dr. Coulibaly is solidly to the effect that he visually and electronically verified that a three-year-old 1,300 pound, red and white, horned heifer, that he was shown by J. Clare on March 29, 2011, and April 21, 2011, did have in it ear the RFID tag #636.

[111] The Tribunal has also considered the hearsay evidence related to what Unholzer may have said about the Incidents as recorded by several Agency officials concerning the identity of the cow he observed and the manner in which it was unloaded at his farm. Unholzer’s evidence unfortunately is very jumbled and self-contradictory. As it is all hearsay and because of its inherent inconsistencies, the Tribunal disregards it as being of any probative value and attributes little weight to the reputed evidence provided by Unholzer. Moreover, as the parties informed the Tribunal that Unholzer has since passed away, it was impossible for either party to call him as a witness at the hearing of these matters.

[112] The Tribunal has also considered the evidence the Agency presented challenging the validity of the Export Certificate in an effort to prove that perhaps the 13-year-old Hasson was wrongly certified as U.S. export-eligible. The evidence in the Export Certificate states that the animal bearing the RFID tag #636 was three years old. The Export Certificate was verified by an agent of the Agency and then approved by an official of the Agency. The Agency however, presented evidence to support an argument that this certification was wrongly made. To substantiate this, it presented a witness, Dr. Talwar, to discredit the evidence of another veterinarian, Dr. Chahal, who was under contract to the Agency during the material time. This evidence may prove that Dr. Chahal could not produce a record of how he arrived at his conclusion that the animal in question was three years old but it does not prove that the animal was 13 years old. In cross-examination, Dr. Talwar agreed that the animal might have actually been three years old but that there is no record of that.

[113] Therefore, on the basis of all the evidence presented the Tribunal is not convinced, on the balance of probabilities, that the RFID tag #636 actually was attached to the ear of Hasson’s 1,500 pound, polled, red and white, 13-year-old cow, on March 24, 2011, as opposed to the tag finding its way into some other cow’s ear which was without an RFID tag at OLEX on that day.

[114] In light of the evidence, it would only be by “*mere conjecture ... speculation, hunches, impressions or hearsay*” to conclude, on a balance of probabilities, that the RFID #636 tag

did indeed end up in the Hasson 13-year-old cow rather than some other cow, including for instance, in the Clare three-year-old cow.

#### **4.2 Factual Determination #2 - Did the Clares Switch the RFID Tag #636?**

[115] The Agency offered no direct evidence that the Clares switched the RFID tag #636 from a 1,500 pound, hornless, 13-year-old cow, to a 1,300 pound, horned, three-year-old cow. Without a doubt, such evidence might be difficult to obtain, but Dr. Coulibaly did inspect, on two occasions, visually and from very close range, the 1,300 pound, horned, three-year-old cow, that bore the RFID tag #636. He did not note any concerns, or even suspicions, arising from his examination of the cow in question that the RFID tag #636 had been switched.

[116] As well, in the many Agency-written reports tendered as evidence, completed between March and July 2011, there is no mention of a concern of the switching of tags by the Clares.

[117] It is only the Agency witness, Weber, who completed the Agency Reports for all three Incidents, who gave evidence that he had conducted, of his own volition, several tests in August of 2014, to see how CCIA-approved RFID tags could be tampered with, so as to permit their switching from one animal to another. Weber was never qualified as an expert in matters of the testing CCIA-approved RFID tags. His evidence on this point, while proving the possibility of tampering to effectuate an illegal transfer of a tag between animals, flies in the face of industry and government objectives of such tags being specifically designed to be permanent and non-transferable, thereby preserving the identity of all tagged animals in the Canadian agri-food system.

[118] Weber also told the Tribunal that, during his investigation, he never asked any of the potential witnesses if the RFID tags were, or could be, tampered with and none supplied him with any such information.

[119] Finally, there was not one shred of evidence led by the Agency that showed that the Clares did, in fact, engage in tag-switching. If the tags were switched, evidence might have been led that showed the tag in the new cow showed signs of tampering or that the hole in the new cow's ear showed signs of tampering. No such evidence was offered by the Agency. There is as well, if this theory is to prevail, the problem of the tagless "old" cow that a switching would create. To switch the tags would mean that a cow that had the RFID tag would no longer have that tag. If so, then the original cow would then be without a tag. If such a cow were found—dead or alive—this might indeed be convincing evidence that a switch had occurred. The Agency has not led any evidence that would suggest that any such skullduggery occurred here.

[120] Therefore, the Tribunal concludes, on the balance of probabilities, that the Agency has not proved that the Clares, or persons under their contract or control, switched any

RFID tags. To conclude that they did the Tribunal would, in light of the evidence, again have to engage in “*mere conjecture ... speculation, hunches, impressions or hearsay*”.

[121] No doubt, the R. Clare and the J. Clare March and April Incidents did expose some strange and questionable practices occurring on the days between March 23 to 29, 2011—such as Hasson’s failure to secure the RFID tag on his cow before it left his farm; the lack of any record of who and how the RFID tag actually got on a cow at OLEX; the failure of any verification of downer animal’s identity by any U.S. or Canadian border official; the almost complete breakdown of communication sharing between U.S. and Canadian animal health officials on the night the load was turned back; the completely muddled and almost unintelligible stories attributed to Unholzer as to what happened to the downer cow while it was at his farm; and finally, the questionable decision by R. Clare to make a hasty arrangement of the transfer of the animal from Unholzer’s farm to the Clare feedlot on the morning of March 28, 2011, before Agency officials could conduct an inspection of the animal at the Unholzer farm. Even in light of these strange events, a serious allegation that the Clares engaged in deliberate tampering with CCIA-approved tags requires more proof and less speculation from the Agency.

#### **4.3 Legal Analysis Given the Factual Determinations**

[122] Applying the *Doyon* approach of parsing out the elements of a subsection 35(1) violation, the Tribunal acknowledges that there are four elements that the Agency must establish to sustain as valid a violation of that subsection of the HA Act that:

1. a person;
2. either obstructs or hinders, or, makes a false or misleading statement;
3. orally or in writing; and
4. to an inspector performing his duties.

##### **4.3.1 Elements 1, 3 and 4 Not In Dispute**

[123] Elements 1, 3 and 4 are not in dispute. The Tribunal finds that R. Clare and J. Clare made oral declarations to Agency veterinarians who were performing their duties.

[124] With respect to Element 3, R. Clare’s oral statement in question was made on March 28, 2011, to Dr. Small and was to the effect that the Agency could come and visit the downer cow (with the RFID tag #636 and that it was the same cow that he had loaded at OLEX with that tag on March 27, 2011) at the Clare feedlot.

[125] With respect to Element 3, J. Clare’s oral statement in question in the March Incident was made on March 29, 2011, to Dr. Coulibaly and was to the effect that the veterinarian

could inspect an animal on the Clare feedlot, which Clare held out to be the downer cow (with the RFID tag #636 and that it was the same cow that R. Clare had loaded at OLEX with that tag on March 27, 2011).

[126] With respect to Element 3, J. Clare's oral statement in question in the April Incident was made on April 21, 2011, to Dr. Coulibaly, and was to the effect that the veterinarian could again inspect an animal on the Clare feedlot, which Clare held out to be the downer cow (with the RFID tag #636 and that it was the same cow that R. Clare had loaded at OLEX with that tag on March 27, 2011).

#### **4.3.2 Element 2 – Making a False or Misleading Statement**

[127] Given the Tribunal's factual determinations that:

- a. an Agency official found a three-year-old Clare cow at the Clare feedlot that was verified to have the RFID tag #636 in her ear on March 29, 2011;
- b. the three-year-old Clare cow at the Clare feedlot was the cow that R. Clare invited Dr. Small to come and see on March 28, 2011;
- c. the three-year-old Clare cow at the Clare feedlot was the cow that J. Clare showed to Dr. Coulibaly on March 29, 2011 and April 21, 2011;
- d. the Agency has not proven, on the balance of probabilities, that the Hasson cow received the RFID tag #636, rather than a three-year-old cow owned by Clare which was verified for export to the U.S, loaded for export to the U.S. on March 27, 2011, then returned to the Unholzer farm that same day and then to the Clare feedlot in Burford on March 28, 2011; and
- e. the Agency has not proven, on the balance of probabilities, that the Clares switched, tampered with, or otherwise illicitly installed the RFID tag #636 from another cow to the three-year old Clare cow;

the Tribunal concludes that none of the three statements uttered by R. Clare, or by J. Clare was false or misleading.

[128] One would expect that the Clares, moreover, as respected cattle dealers in Canada to be ever mindful of any departure from the utmost integrity in their dealings with customers, industry colleagues and government officials, as to do otherwise would risk their reputation in the Canadian cattle industry, incite ridicule from their peers, and expose them to serious enforcement actions by Canadian authorities.

[129] The Tribunal is alert to conflicting evidence in this case concerning when and how RFID tag #636 actually was applied and to which cow. The fact remains, however, that there is simply not enough evidence to conclude, on a balance of probabilities, that the

Clare made false or misleading statements to Agency officials on March 28, March 29 or April 21, 2011.

## **5. Defences Available Under the Law**

[130] The Tribunal is also aware that the AMP Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Subsection 18(1) of the Act reads as follows:

**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.*

[131] The findings by the Tribunal above, however, do not relate to a defence of due diligence or mistake of fact by R. Clare or J. Clare. Clearly, had R. Clare or J. Clare raised such arguments, Parliament's unequivocal statement on the issue in subsection 18(1) of the AMP Act would have disallowed them.

## **6. Conclusion**

[132] Accordingly, the Tribunal concludes that, on a balance of probabilities, the Agency has failed to prove all of the essential elements of the violation, and that R. Clare and J. Clare, therefore, did not commit the alleged violations. Consequently, R. Clare and J. Clare are not liable for payment of any monetary penalty in these cases. Because of this finding, it is not necessary for the Tribunal to consider whether the Agency has proven that the amount of the penalty is justified under the AMP Act and the AMP Regulations.

Dated at Ottawa, Ontario, this 15th day of December, 2014.

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Dr. Don Buckingham, Chairperson