



Citation: *L. Bilodeau et Fils Ltée and Patrice Guillemette v. Canada* (CFIA),
2015 CART 22

Date: 20151118
Dockets: CART/CRAC-1761 and 1763

BETWEEN:

L. Bilodeau et Fils Ltée, Applicant

- and -

Patrice Guillemette, Applicant

- and -

Canadian Food Inspection Agency, Respondent

[Translation from the official version in French]

BEFORE: Bruce La Rochelle, Member

**WITH: Jean-Claude Beauchamp, counsel for the applicants; and
Sarom Bahk and Pascale-Catherine Guay, counsel for the respondent**

In the matter of the applications made by the applicants, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the violations of subsection 138(4) of the *Health of Animals Regulations* alleged by the respondent.

DECISION

Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that the applicants did not commit the alleged violations.

Hearing held at Montreal, Quebec, on Thursday, June 11, 2015,
followed by the closing written submissions and replies
dated June 23, July 16 and July 24, 2015, respectively.

REASONS

Alleged Incident and Procedural History

[1] These proceedings concern two cases (CART/CRAC-1761 and CART/CRAC-1763) brought before the Canada Agricultural Review Tribunal (hereafter, “the Tribunal”) regarding a series of interrelated events concerning the health of a cow while it was being transported to an abattoir. In the first case, CART/CRAC-1761, the issue is whether the circumstances surrounding the transport required the applicant carrier L. Bilodeau et Fils Ltée (hereafter, “Bilodeau”) to interrupt transport to separate the cow from the others so that it could receive the health care it needed. In the second case, CART/CRAC-1763, the matter concerns the duty of a former driver for Bilodeau, Patrice Guillemette (hereafter, “Mr. Guillemette”), to interrupt the transport of that same cow. These cases are important, since in its entire history, the Tribunal has rendered only five decisions relating to subsection 138(4) of the *Health of Animals Regulations* (C.R.C., c. 296), the French version of which provides as follows:

138. (4) *Une compagnie de chemin de fer ou un transporteur routier cesse le transport d'un animal blessé, malade ou autrement inapte au transport en cours de voyage, au plus proche endroit où il peut recevoir des soins.*

When one reads the English version of this subsection, one could interpret it as meaning that a motor carrier *must interrupt* the journey and *must transport the animal* to the nearest place at which it can receive the necessary care if the animal becomes unfit for transport during the journey. The English version of subsection 138(4) provides as follows:

138. (4) *No railway company or motor carrier shall continue to transport an animal that is injured or becomes ill or otherwise unfit for transport during a journey beyond the nearest suitable place at which it can receive proper care and attention.*

[2] A joint oral hearing was held for the two cases, with the same evidence and the same testimony applying to both cases. The Tribunal therefore decided to deal with both cases in the same decision, to avoid duplication. Sarom Bahk (hereafter, “Ms. Bahk”) pleaded the cases of the Canadian Food Inspection Agency (hereafter, “the Agency”) before the Tribunal, along with Pascale-Catherine Guay (hereafter, “Ms. Guay”). Ms. Bahk was the solicitor of record in Bilodeau’s case (CART/CRAC-1761), and Ms. Guay was the solicitor of record in Mr. Guillemette’s case (CART/CRAC-1763). Jean-Claude Beauchamp (hereafter, “Mr. Beauchamp”) was the solicitor of record for the applicants in both cases and pleaded both cases before the Tribunal.

[3] Notice of Violation 1213QC0003 dated February 7, 2014, alleges that Bilodeau, on the 15th day of February 2012, at Saint-Cyrille-de-Wendover, Quebec, committed a violation, namely,

[TRANSLATION]

Continuing to transport an animal that is unfit for transport.

The Notice of Violation is a notice of violation with penalty, in the amount of \$7,800.

[4] The Notice of Violation was issued to Bilodeau by the Agency on February 7, 2014, by sending a copy by fax to Gaston Bilodeau, Vice-President.

[5] Notice of Violation 1213QC0003-2 contains the same facts as those set out in paragraph 3, except that these facts are alleged against Mr. Guillemette. The Notice of Violation is a Notice of Violation with Warning and was issued to Mr. Guillemette by the Agency on February 7, 2014, by email.

[6] By letter dated February 17, 2014, received by the Tribunal on March 3, 2014, and signed by Isabelle Bilodeau, President, Bilodeau filed a request for review (hereafter, "Request for Review") and stated that it wanted to proceed by oral hearing, in French. By letter dated February 17, 2014, received by the Tribunal on March 3, 2014, and signed by Mr. Guillemette, Mr. Guillemette filed his Request for Review and stated that he wanted to proceed by oral hearing, in French. Both letters used the same wording. Neither Bilodeau nor Mr. Guillemette provided any reasons in support of their Requests for Review, which is contrary to the provisions of Rule 22 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)*, SOR/99-451, in force at that time. Rule 22 reads as follows:

22. An application to the Tribunal for a review of a decision of the Board must be filed with the Registrar of the Tribunal and must set out the reasons for the application.

[7] As the Tribunal noted in *Practice Note #11 – Determining Admissibility of Requests for Review and Practices Regarding the Exchange of Documents Amongst Applicants, Respondents and the Tribunal*, issued on May 1, 2013, an applicant must give reasons supporting the Request for Review; otherwise, the Request for Review can be declared inadmissible. In practice, the determination of whether a Request for Review is admissible is made exclusively by the Chairperson of the Tribunal, Dr. Donald Buckingham (hereafter, "Dr. Buckingham").

[8] On March 7, 2014, the Tribunal sent a letter to Bilodeau and Mr. Guillemette, asking them to expand on the reasons surrounding the notices of violation in question, more specifically, [TRANSLATION] "enough information ... regarding the circumstances [of the] activities of February 15, 2012, and ... to support and expand on [the reasons for the requests]".

[9] By letter dated March 12, 2014, Mr. Beauchamp notified the Tribunal that he had been retained by Bilodeau and Mr. Guillemette. By letter dated March 19, Mr. Beauchamp submitted the reasons for Bilodeau. The reasons submitted by Mr. Beauchamp on behalf of Bilodeau were related to the case before the Tribunal (CART/CRAC-1761) and to another case whose review by the Tribunal is still pending (CART/CRAC-1762). In case CART/CRAC-1761, Mr. Beauchamp argued as follows:

[TRANSLATION]

1. *L. Bilodeau & Fils was not notified of any violation at the time of the events;*
2. *L. Bilodeau & Fils has no knowledge of whether one of the cows transported by its business on February 16, 2012, from Mathew Elsses, in Nova Scotia, to the Levinoff-Colbex slaughter facility in St-Cyrille-de-Wendover, became unfit for transport during the journey;*
3. *L. Bilodeau & Fils denies having continued to transport a cow that allegedly became unfit for transport during a journey beyond the nearest suitable place at which it could receive proper care and attention;*

NOW THEREFORE, L. Bilodeau & Fils contests the facts on which this claim is based, particularly the elements set out in paragraphs 3 and 4 of page 6 of the summary of the violation issued on February 6, 2014.

The Tribunal had not received the document entitled [TRANSLATION] "Summary of the Violation", issued on February 6, 2014, and mentioned above.

[10] By letter dated March 19, Mr. Beauchamp submitted reasons on behalf of Mr. Guillemette, claiming as follows:

[TRANSLATION]

Patrice Guillemette denies having continued to transport a cow that allegedly became unfit for transport during a journey beyond the nearest suitable place at which it could receive proper care and attention.

In addition, Mr. Beauchamp asked that Mr. Guillemette's Request for Review be dealt with at the same time as Bilodeau's case (CART/CRAC-1761), by oral hearing, in French.

[11] By decisions dated March 25 and 26, 2014, the Chairperson of the Tribunal, Dr. Buckingham, determined that the Requests for Review were admissible in both cases. The Chairperson's reasons were as follows:

Bilodeau (CART/CRAC-1761 [and CART/CRAC-1762])

[TRANSLATION]

There are issues regarding the physical condition of the above-referenced animals that warrant hearing the parties.

Mr. Guillemette (CART/CRAC-1763)

[TRANSLATION]

There are issues in the evidence regarding the condition of the cow that was allegedly unfit for transport on February 15, 2012.

[12] The Chairperson's reasons for the decision were not sent out, but they are still available in both public records. Instead, The Tribunal sent letters dated March 31, 2014, to Bilodeau and Mr. Guillemette, as well as to the Agency, asking that the Agency submit the reports (hereafter, "Agency Reports") regarding the violations, in accordance with paragraph 36(1)(a) of the *Rules of the Tribunal*, which states as follows:

36. (1) Within 15 days from the day on which the Minister receives the copy of the request for a review, the Minister must prepare a report that includes

(a) any information relating to the violation

In practice, the 15 days are counted from the date of the Tribunal's letter.

[13] On April 15, 2014, the Agency Reports were submitted, and copies were sent to Bilodeau and Mr. Guillemette. By a letter from the Tribunal, dated April 17, 2014, and sent to Mr. Beauchamp and Louise Panet-Raymond, legal counsel for the Agency, both lawyers were invited to submit additional information and representations, in accordance with section 37 of the *Rules of the Tribunal*, which states as follows:

37. Within two days after receiving the report, the Tribunal must send an acknowledgement letter to each party indicating that the report has been received and that the parties have 30 days after the date of the letter to submit any additional information or representations including any documents or other evidence.

No additional information was submitted by the parties. By letter dated August 10, 2014, the Tribunal was notified by Ms. Bahk and Ms. Guay that they had been given a mandate to represent the Agency in both cases in question.

[14] After some delays caused by various circumstances, the hearing of both cases took place on June 11, 2015, in Montreal. As was mentioned above, the entire hearing applied to both cases. Counsel for the Agency were assisted by François Paul, one of the Agency's investigators. Mr. Beauchamp was assisted by Gaston Bilodeau, Bilodeau's Vice-President.

[15] At the end of the hearing, counsel did not have time to present their closing submissions. The Tribunal asked them whether they wanted to continue the next day or submit their representations in writing. After some discussion, counsel said that they would prefer to proceed by written submissions. Counsel suggested a timetable and an order of submission, as well as a limit of 20 pages per memorandum. All of this was approved by the Tribunal. On June 23, 2015, the Agency, through Ms. Bahk, filed its closing submissions. On July 16, 2015, the closing submissions of Bilodeau and Mr. Guillemette were filed by Mr. Beauchamp. On July 24, 2015, the Agency filed its reply.

Evidence and Submissions Before the Tribunal

[16] The following evidence and submissions were presented to the Tribunal:

- (i) The Agency Reports dated April 15, 2014, and the additional documents filed by the Agency at the hearing (Exhibits 2 and 3);
- (ii) The testimony at the hearing on June 11, 2015, specifically, from the following persons:
 - Dr. Geneviève Comeau, the Agency's chief veterinarian at the abattoir;
 - Dr. Marie-Claude Simard, a manager and veterinarian at the Agency (details of her experience are set out in the résumé filed by the Agency [Exhibit 1]);
 - Mélanie Carbonneau, an Agency investigator;
 - Patrice Guillemette, formerly employed by Bilodeau as a truck driver;
- (iii) Submissions by the Agency, dated June 23, 2015;
- (iv) Submissions by Bilodeau and Mr. Guillemette, dated July 16, 2015; and
- (v) The Agency's reply, dated July 24, 2015.

Uncontested Facts

[17] By the submissions of the parties and the testimony given at the hearing, the uncontested facts are as follows:

- (i) On February 15, 2012, 20 dairy cows and about 60 dairy calves from the farm of Mathew Eisses in Masstown, Nova Scotia, were transported by two drivers, both of them employees of Bilodeau, to the Levinoff-Colbex abattoir, located in St-Cyrille-de-Wendover, Quebec.
- (ii) There was a transfer of responsibility between the two Bilodeau employees, with Mr. Dubé handing responsibility for the transport over to Patrice Guillemette (one of the applicants in this case) at St-Jean-Port-Joli. When Mr. Guillemette took charge of the trailer, he noticed two downed cows in the trailer: one in the rear compartment and another in the lower belly compartment. Mr. Guillemette tried to make them stand up but was unsuccessful.
- (iii) After the shipment arrived at the abattoir, Dr. Geneviève Comeau (hereafter, "Dr. Comeau"), an Agency veterinarian whose responsibilities included inspecting shipments, observed that in the shipment, there were two cows in a decubitus (recumbent) position. The cow in the rear compartment was in a

sternal decubitus position. The cow located in the lower belly compartment was in a lateral decubitus position.

- (iv) The cow in a sternal decubitus position was able to stand up, but only after being prompted to do so with an electric prod. After standing up, this cow exited the truck without further assistance.
- (v) The cow in a lateral decubitus position stood up and exited the truck without assistance. It is this cow that is the subject of the Notice of Violation. After exiting the truck, or being unloaded, this cow remained in an enclosure at the abattoir, and after some time, it walked over to another enclosure, where it remained with several other cows and then walked, without assistance, to the kill site.

Contested facts and submissions

[18] The contested facts relate to the physical condition of the cow. In addition, the Tribunal must determine the relationship between the cow's physical condition and its unfitness for transport, and at what moment this unfitness arose.

[19] Supported by the sworn testimony of Dr. Comeau, the Agency argues that the cow's unfitness for transport has been proven. Dr. Comeau testified that she observed visible trample marks on the cow's thorax and left flank. She took photographs and made video recordings of the cow (Exhibits 5 and 8, Agency Report), which she presented in support of her observations. After the cow stood up, Dr. Comeau observed that the cow remained standing without moving and was experiencing frequent muscle tremors, particularly in the front legs. According to Dr. Comeau, by looking at the cow's shaking, it could reasonably be assumed that the cow had been in this recumbent position, in the trailer, for a long period. To substantiate her opinion, Dr. Comeau took photographs of the trailer's floor (Exhibit 6, Agency Report). Dr. Comeau stated that the photographs showed that the cow had remained in a lateral decubitus position in the trailer for a long time.

[20] Bilodeau and Mr. Guillemette deny that the cow was unfit for transport at any point during the journey. Mr. Guillemette testified under oath that in St-Jean-Port-Joli, he found the cow in a sternal decubitus position, slightly on its side, but not in a lateral decubitus position. According to Mr. Guillemette, the cow was not injured, in distress or suffering. He also testified that the cow had clear eyes, that its tongue was not hanging from its mouth and that it seemed to be in good condition.

[21] Mr. Guillemette's testimony regarding the cow's health must be assessed on its own. The Tribunal notes that no Agency representatives were present when the trailer load was transferred at St-Jean-Port-Joli. Moreover, the Agency did not apply to the Tribunal for a summons requiring the other driver, Mr. Dubé, to appear and testify, in accordance with the Tribunal's powers under paragraph 8(2)(a) of the *Canada Agricultural Products Act*, R.S.C., 1985, c. 20 (4th Supp.).

[22] Mr. Guillemette testified that the distance between the trailer and the first enclosure was 70 to 80 feet. The distance between the first enclosure and the second was, according to Mr. Guillemette, from 60 to 80 feet. He also testified that the distance between the second enclosure and the kill floor was about 100 feet. The total distance covered by the cow, without assistance, was approximately 250 feet. The Agency did not dispute this part of Mr. Guillemette's testimony. Dr. Comeau, who had worked at the abattoir for several years, was unable to estimate how far the cow had walked.

Analysis of the submissions

[23] The Agency argues that the veterinary testimony should be accepted as discharging the burden of proof on a balance of probabilities. However, there are concerns regarding the evidence presented by the Agency. The veterinary evidence is weaker than Dr. Comeau's photographic and video evidence. Moreover, such testimony is contradicted by the photographic and video evidence. Two of the three video recordings made by Dr. Comeau were viewed by the Agency at the hearing. They showed that the cow remained standing, without assistance, and that no serious injuries could be seen. The cow could be perceived as a sad or fearful animal, but proof that it was suffering or in a state of undue suffering was not there. Similarly, when one examines the photographs of the cow, submitted by the Agency, there do not appear to be any serious injuries on the cow's side, as was alleged. Therefore, the evidence submitted by the Agency through videos and photographs contradicts the veterinary testimony.

[24] The testimonies of Dr. Comeau and Mr. Guillemette establish that the cow was able to walk, without assistance, from the trailer to the kill site—a distance of approximately 250 feet in total, according to Mr. Guillemette. The Tribunal did not have the advantage of seeing a video of the cow walking from the second enclosure to the kill site. In response to a question from the Tribunal, Dr. Comeau could not explain why she had not made such a video recording.

[25] Furthermore, even if the Agency could establish, on a balance of probabilities, the circumstances of the cow's health problems, the facts must be such that it can be deduced that the health problems existed before or arose during the journey. According to subsection 138(4) of the *Health of Animals Regulations*, one of the elements of the violation is that the cow became unfit for transport *during* a journey.

[26] Mr. Guillemette testified that when he took charge of the shipment, he discussed the cow's condition with his co-worker, Mr. Dubé. Mr. Guillemette observed the cow, and according to him, it was not in a state of distress. Mr. Guillemette's submissions are supported by the Agency's photographs and videos, and by the evidence related to the cow's behaviour at the abattoir. In analyzing the evidence, the Tribunal relies heavily on the Federal Court of Appeal's decision in *Doyon v. Canada (Attorney General)*, 2009 FCA 152 (*per* Létourneau J.A., Blais and Trudel JJ.A. concurring), in which the following is stated at paragraph 28:

[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.

In the present case, the required level of circumspection does not admit the conclusion that the cow was in such a physical condition as was alleged by the Agency. The facts suggest that the cow in question was fit for transport during the journey.

[27] The policy on the health of animals during transport was described in the testimony of Dr. Marie-Claude Simard as being as supportive of the Agency's position. This policy is not relevant if the Agency has not proven, through evidence of the physical condition of the animal in question, that the animal became unfit for transport during the journey. It is the Tribunal's view that the Agency has not discharged the burden of proof with regard to the physical condition of the cow and the connection between that physical condition and an unfitness for transport. Therefore, there is no need to discuss the policy on the health of animals if the Agency has not established that the cow in question had any health challenges.

[28] In the Regulations (section 2), there is a definition of "non-ambulatory animal", which reads as follows:

"non-ambulatory animal" means an animal of the bovine, caprine, cervid, camelid, equine, ovine, porcine or ratite species that is unable to stand without assistance or to move without being dragged or carried.

There is a connection between the definition and section 138, but not a direct connection with subsection 138(4). The connection is with paragraph 138(2)(a), and subsections 138(2.1) and 138(2.2), which together provide as follows:

138. (2) . . . [N]o person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal

(a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey. . . .

(2.1) For the purpose of paragraph (2)(a), a non-ambulatory animal is an animal that cannot be transported without undue suffering during the expected journey.

(2.2) Despite paragraph (2)(a), a non-ambulatory animal may be transported for veterinary treatment or diagnosis on the advice of a veterinarian.

Keeping in mind the instructions of the Federal Court of Appeal in *Canada (Attorney General) v. Stanford*, 2014 FCA 234, regarding statutory interpretation, it is possible that the interplay of subsections 138(2), 138(2.1) and 138(2.2) can be applied to subsection 138(4). If so, it could be concluded that an animal that becomes non-ambulatory during a journey is, from that moment, unfit for transport. However, in the Tribunal's opinion, the non-ambulatory state must be more than temporary for subsection 138(2.1) to apply to subsection 138(4), assuming that such an application or interpretation would be reasonable. In this case, the Tribunal finds that the Agency has not proven the non-ambulatory state of the cow and that, in any event, even if this state had been proven, it was temporary.

[29] It is helpful to review the past decisions of the Tribunal that apply to subsection 138(4) of the Regulations. As was mentioned above, there are five such decisions:

David Mytz v. Canada (CFIA), RTA# 60084 (2003), (hereafter, "*Mytz*");
Gordon Sharpe v. Canada (CFIA), RTA# 60251 (2006), (hereafter, "*Gordon Sharpe*");
Allen Sharpe v. Canada (CFIA), RTA# 60252 (2006), (hereafter, "*Allen Sharpe*");
Stuart v. Canada (CFIA), 2011 CART 2, (hereafter, "*Stuart*"); and
Peachey v. Canada (Minister of Agriculture and Agri-food), 2011 CART 8, (hereafter, "*Peachey*").

[30] In *Mytz* (a decision rendered by former Chairperson Barton), the Tribunal agreed that it was reasonable for a motor carrier to conclude that a cow was lying down because it was sluggish. If there are other causes, it is up to the Agency to establish the facts on a balance of probabilities. In *Mytz*, it was concluded on the basis of a *post mortem* examination that the cow in question was suffering from mastitis and that one of the symptoms of mastitis is sluggishness. In addition, the Tribunal referred to the Agency's admission that only a veterinarian would be able to diagnose that disease. The Tribunal therefore concluded as follows (at page 3 of the decision):

. . . [T]he Tribunal finds the Applicant could not have known the cow was injured, became ill or otherwise unfit for transport until he discovered the cow was dead.

[31] Accordingly, the Tribunal found that, absent evidence contradicting the carrier's testimony, the Agency had not proven that the cow had become unfit for transport. The Tribunal made this determination despite the fact that the carrier had checked the shipment four times. The cow was found dead on the fourth check. During the first and second checks, the carrier found the cow lying down and helped it to stand up. On the third check, the carrier decided to let the cow remain lying down. The Tribunal also referred to three other cows that were "exhausted and breathing heavily" at the end of the journey but were unloaded without incident after a "rest" (decision, page 3).

[32] In *Gordon Sharpe*, a decision by former Chairperson Barton, the relevant facts and the Tribunal's findings are as follows (pages 3 and 4 of the decision):

The uncontradicted evidence of the Respondent is that the Applicant transported 35 holstein cows from Chilliwack, British Columbia, to XL Beef in Calgary, arriving there at 11 a.m. on Saturday, October 15th, 2005.

En route the Applicant noticed a downed cow on the top deck of the trailer at Golden, British Columbia. He tried to get her up for a half hour but she would not rise. He continued on to Calgary and there is no evidence to indicate he made an effort to offload the downer.

On inspection by the Respondent at XL Beef in Calgary, the downer was lying in 1.5 inches of runny manure, was shaking and had hoof marks on its exposed side.

The Respondent's evidence is that the downed animal could have been unloaded at Golden at the Rodeo Grounds or other places, and if the Applicant did not know where to unload the animal he could have acquired this information from the RCMP or from the Provincial Scale operations.

I am satisfied the Applicant should not have continued to transport the animal to Calgary in this condition, and accordingly the Respondent has established, on a balance of probabilities, that the violation was committed.

[33] In *Gordon Sharpe*, the cow's severe injuries were noticed at the end of the journey. Furthermore, there were other circumstances that suggested that the cow was unable to stand up and was not just being sluggish—the large quantity of runny manure, for example. Therefore, it was open to the Tribunal to conclude in *Gordon Sharpe* that the cow remained lying down for part of the journey and in doing so risked injury and other health problems. This is in fact what happened, rendering the cow unfit for transport.

[34] In *Allen Sharpe*, another decision by former Chairperson Barton, the relevant facts and the Tribunal's findings are as follows (pages 3 and 4 of the decision):

. . . [T]he Applicant loaded 49 cows on a semi-trailer in Clyde, Alberta and transported the cattle to XL Beef in Calgary, Alberta, arriving at about 1:30 in the afternoon on August 31st, 2005.

The belly of the trailer was overloaded by seven cows in accordance with the recommended loading density formula for cattle, and another compartment was overloaded by one cow.

On checking the cattle at Nisku, Alberta, the Applicant found one cow down in the belly of the trailer which would not get up.

The Applicant further checked the animal at Lacombe, Alberta, and found it still down but appearing to be comfortable. The animal could have been off-loaded at Ponoka, Red Deer, Innisfail, or Olds Auction Markets.

On arrival at XL Beef, the downed animal had no bedding and was covered in soupy urine and feces and other animals were stepping on it. The downer showed nicks and excoriations on its exposed and trampled skin and had hoof marks on its chest, abdomen and udder. The cow was euthanized on the trailer.

I am satisfied that the downed cow was unfit for transport during its journey to Calgary and should have been unloaded at the nearest suitable place at which it could have received proper care and attention. Accordingly, the Respondent has established, on a balance of probabilities, that the Applicant committed the violation.

[35] The Tribunal's decision in *Allen Sharpe* was based in part on the fact that there were too many cows in the trailer compartment. If a cow remains lying down in such a compartment, even if the cow seems comfortable, the risk of injury increases, as does the risk that the cow will become unfit for transport. There is a relationship between unfitness for transport and an increased risk of injury and actual injury. If a downed cow arrives with serious, visible injuries (as in *Allen Sharpe*: "nicks and excoriations on its exposed and trampled skin and . . . hoof marks on its chest, abdomen and udder"), the Tribunal will be inclined to conclude that the animal became unfit for transport at an earlier point in the journey. Moreover, in *Allen Sharpe*, and similarly in *Gordon Sharpe*, there were other circumstances that suggested that the cow had been unable to stand for quite some time: the cow was covered in soupy mix of urine and feces.

[36] In *Stuart*, a carrier noticed while inspecting a shipment that there were two downed cows in a rear compartment. He determined that the two cows were not in distress. He decided to continue the journey. Later, a gate that separated the upper belly compartment from the lower belly compartment opened, causing four animals in the upper compartment to fall into the trailer's rear compartment. When the animals were unloaded, one of the downed cows was found dead, and the other cow which had been lying down died shortly thereafter. Therefore, even though at the end of the journey the cows had visible injuries, it was not possible to conclude, on a balance of probabilities, that the two cows became unfit for transport simply because they were found lying down at an earlier point in the journey. The Tribunal explained (*per* the decision of Chairperson Buckingham) as follows, at paragraph 44:

44. . . . *The Tribunal accepts that the mere fact that animals are lying down in the rear compartment is not sufficient for a finding that those animals are in distress, are injured or otherwise unfit for transportation*

Regarding the quality of the evidence, Chairperson Buckingham explained as follows, at paragraph 42:

42. ... Stuart [gave] direct evidence that none of the animals was in distress at Red Deer and the Agency [adduced] indirect and hearsay evidence that there were problems with the animals that were detectable during the driver's stop at Red Deer

In the case at hand, Mr. Guillemette gave similar testimony.

[37] The Tribunal's decision (rendered by Chairperson Buckingham) in *Peachey* was not a decision on the merits in a Request for Review. It was, rather, a decision by which the Minister's decision was set aside by Chairperson Buckingham because of an error in the date in the Notice of Violation that was not corrected by the Tribunal on its own initiative or upon a request by the Agency.

[38] It can therefore be concluded that, in the absence of directions from the Federal Court of Appeal, the Agency must prove on a balance of probabilities that an animal's severe injuries or the other circumstances relating to the health problems or welfare of an animal found lying down at the end of a journey are connected with an unfitness for transport earlier during the journey. Moreover, it should be noted that the Tribunal did not refer to the definition of a "non-ambulatory animal" when arriving at its previous conclusions. A downed cow could be unfit for transport (as was established in *Gordon Sharpe* and *Allen Sharpe*), but such unfitness has not been proven in the present case.

[39] At the hearing and in counsel's written submissions, arguments were presented with regard to whether it is appropriate to take statements from drivers as part of the Agency's investigations without warning the drivers of how these statements could be used. Although it is true that this practice raises, or could raise, serious concerns, this is not a case where the Tribunal must decide this issue. Here, there is proof on a balance of probabilities that the cow in question was fit for transport, regardless of the statements made by the drivers during the investigation.

Conclusion

[40] In light of the foregoing, the Tribunal is of the opinion that the Agency has not proven, on a balance of probabilities, that the cow in question was unfit for transport during the journey.

[41] Therefore, in the first case, CART/CRAC-1761, the Tribunal concludes that the circumstances of the transport did not require the applicant Bilodeau to interrupt the journey to separate the cow from the others and obtain the necessary health care. Furthermore, in the second case, CART/CRAC-1763, the Tribunal concludes that Mr. Guillemette did not have a duty to interrupt transport of that same cow.

[42] Accordingly, the Tribunal, by order, determines that Bilodeau and its former employee, Mr. Guillemette, did not commit the alleged violations.

Dated at Ottawa, Ontario, on this 18th day of November 2015.

Bruce La Rochelle, Member