Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

CITATION: *Transport Eugène Nadeau Inc. v. Canada (Canadian Food Inspection Agency)*, 2017 CART 15

Date: 20170511
Docket: CART/CRAC-1858

BETWEEN:

Transport Eugène Nadeau Inc.,

APPLICANT

- and -

Canadian Food Inspection Agency

RESPONDENT

[Translation of the official version in French]

BEFORE: **Dr. Donald Buckingham, Chairperson**

With: **Clément Nadeau, representing the applicant; and**
Lisa Morency, 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 subsection 138(2)(*a*) 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, on the balance of probabilities, that the applicant, Transport Eugène Nadeau Inc., committed the violation set out in Notice of Violation 1415QC0068-2 dated August 28, 2015, relating to events that occurred on September 22, 2014, and is liable to pay the respondent, the Canadian Food Inspection Agency, a monetary penalty of $7,800 within thirty (30) days after the day on which this decision is served.

Hearing held in Québec, Quebec,
on Monday, April 10, 2017.

SUMMARY OF ORAL DECISION

[1] At the end of the hearing of this case, on April 10, 2017, I delivered my decision orally with reasons, below, to follow. In making this decision, my conclusions were as follows:

> i. The Canadian Food Inspection Agency (the Agency) established each element of the violation of paragraph 138(2)(*a*) of the *Health of Animals Regulations* (HA Regulations);
>
> ii. Transport Eugène Nadeau Inc. (TEN) did not establish an admissible defence that, under section 18 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act), could justify or excuse the acts it committed on September 22, 2014; and
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> iii. The $7,800 penalty imposed for this violation is justified in fact and in law.

[2] Consequently, I concluded, on the balance of probabilities, that TEN committed the violation described in Notice of Violation 1415QC0068-2, dated August 28, 2015, relating to events that occurred on September 22, 2014, and is liable to pay the Agency a monetary penalty of $7,800 within thirty (30) days after the day on which this decision is served.

ADDITIONAL COMMENTS FLOWING FROM THE HEARING

[3] The abovementioned decision was delivered orally in the absence of Clément Nadeau (Mr. Nadeau), TEN's duly authorized representative, who decided to leave in the morning, rather than continue participating in the hearing before the Canada Agricultural Review Tribunal (the Tribunal).

[4] The Tribunal has held that it does not have jurisdiction to order costs for or against either of the parties before it (*Favel Transportation Inc. v. Canada (CFIA)*, 2013 CART 17, issued May 22, 2013). Given Mr. Nadeau's conduct before the Tribunal, if I had the authority to award costs, it would probably have been appropriate to do so against TEN.

[5] Mr. Nadeau's contempt for the Agency, and his disrespect towards the Tribunal and its proceedings were thinly veiled. His inappropriate language before the Tribunal and his subsequent departure from the hearing, which was held at his company's request, were most regrettable. TEN's conduct leaves much to be desired. Using a hearing before the Tribunal as a forum for expressing one's dissatisfaction with the federal regulatory process is inefficient, inappropriate and wasteful.

[6] Moreover, it was Mr. Nadeau himself who asked the Tribunal to review the facts surrounding the issuance of the Notice of Violation. However, what he seems to be challenging is the fairness of the administrative monetary penalties regime (the AMP regime) as it applies to his company. To undertake such a challenge, it would have been preferable for him to do so through other means, such as, through a professional association or his political representatives.

WRITTEN REASONS

[7] Some of the facts of the case are not disputed. On the morning of September 22, 2014, TEN driver Steeve Nadeau transported 49 pigs from Ferme Aubis 1997 Inc. pig farm. Before 9:30 a.m., the pigs were unloaded at the Olymel S.E.C. slaughterhouse. At around 9:45 a.m., an Agency veterinarian, Dr. Therrien, performed an *ante mortem* inspection and noted that one of the pigs that had been part of the load and that was in the holding pen was unable to put weight on its left hind leg. Dr. Therrien also performed a *post mortem* examination of the pig. On the basis of her observations and her professional opinion, she concluded that the animal had been in this state before being loaded at the pig farm and that the pig had been unfit to travel and should never have been loaded.

[8] According to the written evidence of Steeve Nadeau, he loaded the pigs at the Aubis farm, and towards the end, the client had brought him a pig so that he could verify whether the animal was fit to travel. The pig had been walking on its own, and Steeve Nadeau had inspected it. It had been slightly lame, but supporting itself on all four legs. After consulting the industrial standards sheets, and based on his experience as a transporter and the training he has taken, he had concluded that the pig was fit for transportation if it was segregated, and the animal was therefore segregated for the journey.

[9] In reviewing the facts of a case, I must weigh the evidence before me and determine whether the Agency has established, on the balance of probabilities, each essential element to establish that TEN violated paragraph 138(2)(*a*) of the HA Regulations.

[10] If the Agency satisfies its burden of proof, TEN will be found liable for a violation under the AMP regime, unless it can establish a defence or an excuse authorized by the AMP Act, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations) or, in the case of the matter before me, the HA Regulations.

1. Issues

[11] This matter raises three issues:

i. Did the Agency prove each element of the violation of paragraph 138(2)(*a*) of the HA Regulations?

ii. Did TEN establish an admissible defence that, under section 18 of the AMP Act, could justify or excuse the acts it committed on September 22, 2014?

iii. Is the $7,800 penalty justified in fact and in law?

2. Analysis

2.1 Did the Agency prove each element of the violation of paragraph 138(2)(*a*) of the HA Regulations?

[12] The courts have closely examined paragraph 138(2)(*a*) of the HA Regulations and its application under the AMP regime, especially since the violation is one of absolute liability (*Doyon v. Canada (Attorney General)*, 2009 FCA 152 (*Doyon*), at paragraph 27).

[13] Paragraph 138(2)(*a*) of the HA Regulations provides as follows:

> *(2) Subject to subsection (3), no 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;*

[14] At paragraph 41 of *Doyon*, the Federal Court of Appeal has drawn seven essential elements to prove a violation of paragraph 138(2)(*a*) of the HA Regulations from this legislative provision:

> *[41] For there to be a violation of paragraph 138(2)(a), the prosecutor must establish*
>
> 1. *that the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);*
>
> 2. *that the animal in question was loaded onto or transported on a railway car, motor vehicle, aircraft or vessel;*
>
> 3. *that the cargo loaded or transported was an animal;*

4. *that the animal could not be transported without undue suffering;*

5. *that the animal suffered unduly during the expected journey ("voyage prévu" in French);*

6. *that the animal could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause; and*

7. *that there was a causal link between the transportation, the undue suffering and the animal's infirmity, illness, injury or fatigue, or any other cause.*

As noted in paragraph 27 of *Doyon*, the regime established by the AMP Act and Regulations is a strict one. It allows the Agency, the respondent, to prove the violation on the balance of probabilities rather than beyond a reasonable doubt. The AMP Act creates an absolute liability regime that explicitly excludes any defence of due diligence or mistake of fact.

2.1.1 Elements 1, 2 and 3

[15] Elements 1, 2 and 3 were proven and are undisputed. The compromised pig was transported by a TEN employee in a TEN trailer on September 22, 2014.

2.1.2 Elements 4, 5, 6 and 7

[16] Elements 4, 5, 6 and 7 require objective proof to establish that the animal in question "could not be transported without undue suffering", "suffered unduly during the expected journey", "could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause" or "that there was a causal link between the transportation, the undue suffering and the animal's infirmity, illness, injury or fatigue, or any other cause" (*Doyon*, at paragraph 41).

[17] The HA Regulations were conceived to apply to the entire Canadian agri-food chain, from production to the slaughterhouse. Now that the AMP Act applies to the *Meat Inspection Act* and its Regulations, the AMP regime is wider-ranging and also applies to the processing of slaughtered animals into meat products.

[18] A central element in establishing a violation of paragraph 138(2)(*a*) is the concept of "undue suffering", a concept to which elements 4, 5, 6 and 7 all refer. The Federal Court of Appeal has examined the interpretation of this concept in *Canada (Attorney General) v. Porcherie des Cèdres Inc.*, 2005 FCA 59 (*Porcherie des Cèdres*), at paragraph 26, and in

Canadian Food Inspection Agency v. Samson, 2005 FCA 235. It also explained this concept more thoroughly in *Doyon*, at paragraphs 30 to 36.

[19] In *Doyon*, Justice Létourneau states clearly that the purpose of paragraph 138(2)(*a*) is to prohibit any transportation in conditions that would cause undue suffering to an animal being transported with "undue suffering" being understood in the more all-encompassing sense of "unjustifiable", "unreasonable" and "inappropriate".

[20] These words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (*Canada (Attorney General) v. Stanford*, 2014 FCA 234 (*Stanford*), at paragraphs 41 to 44).

[21] While the scheme and object of the HA Act and HA Regulations are not explicitly stated in the legislation, the importance of regulating the humane transport of animals within the Canadian agri-food system is clear from paragraph 64(1)(*i*) of the HA Act, which provides for the making of regulations for the humane transport of animals.

[22] Part XII of the HA Regulations, on which the standard set out in paragraph 138(2)(*a*) is founded, is entitled "Transportation of Animals". The HA Act and the HA Regulations, in Part XII, must therefore be interpreted as establishing standards governing the protection of the health of animals being moved by a commercial transporter. This includes any travel between a producer's barn and a processor's slaughtering facilities.

[23] While Parliament has enacted a specific provision to protect the health of animals during transport from undue suffering, that provision must be interpreted so as to maintain a balance between the regular commercial activities of actors in agricultural and agri-food production systems and the protection of the animals in those systems. Parliament's deliberate intention to use the words "undue suffering" must be interpreted in the context of this balancing exercise, while considering the scheme and purpose of the HA Act and its Regulations.

[24] Under this statutory scheme, the word "undue" means "undeserved", "unwarranted", "unjustified" or "unmerited" (*Porcherie des Cèdres*, at paragraph 26), and "unjustifiable", "unreasonable" and "inappropriate" (*Doyon*, at paragraph 30). In this context, an actor in the Canadian agri-food system becomes liable only when an animal in the actor's care or control is exposed to "undeserved", "unwarranted", "unjustified" or "unmerited" suffering.

[25] The Agency must prove, on the balance of probabilities, elements 4, 5, 6 and 7 to justify the alleged violation. The alleged violation may have been caused by acts TEN committed with respect to the pig in question, and I conclude, for the reasons set out

below, that the Agency produced considerable evidence establishing that TEN's transportation of the pig violated paragraph 138(2)(*a*) of the HA Regulations.

Element 4 - the pig could not be transported without undue suffering

[26] The evidence drawn from the *ante* and *post mortem* examinations Dr. Therrien performed, the photographs she took and the video images she filmed show that the pig was indisputably compromised and that it was clearly compromised before it was loaded on the TEN trailer on September 22, 2014.

[27] Dr. Therrien concludes in her report that the compromised animal, which was unable to put any weight on its left hind leg, was suffering from front leg lameness and had a round back, was in a condition that made it unfit for transport and that it was impossible to transport it without causing undue suffering.

[28] In contrast, Steeve Nadeau suggests in his written account that the pig was only slightly lame and was able to stand on all four legs. He made a judgment call and determined that the pig could be segregated during transport, and segregated it in his truck.

[29] At least part of Steeve Nadeau's version is contradicted by the producer, Mr. Audet. Mr. Audet stated that the pig was not segregated in the truck that day.

[30] In light of the evidence presented, I find the technical evidence from the *ante mortem* and *post mortem* examinations to be more reliable and compelling. I therefore find that the pig's condition made it unfit for transport and that it was impossible to transport it without causing undue suffering.

Element 5 - the pig suffered unduly during the expected journey

[31] TEN's load was transported over a short distance, 30 kilometres, with the journey taking less than an hour. However, given its pre-existing condition, the pig did indeed suffer unduly during the journey from the pig farm to the slaughterhouse. This suffering, which would have been caused by the animal being moved about inside the trailer in traffic and the pigs being jostled inside the load, was unwarranted and unjustified.

[32] Dr. Therrien concluded in her report that the pig's undue suffering would have been increased by its injured limb coming into contact with the walls of the truck or with other pigs while being jostled about.

Element 6 - the pig could not be transported by reason of infirmity, illness, injury, fatigue or any other cause

[33] It appears from the evidence that the pig could not be transported without undue suffering by reason of its pre-existing condition, namely, the fact that it was unable to put any weight on its left hind leg. Dr. Therrien's written report and her photographs support this conclusion.

Element 7 - there was a causal link between the transportation, the undue suffering and the pig's infirmity, illness, injury or fatigue, or any other cause

[34] The causal link is obvious in this matter. The pig was transported by a TEN employee. It suffered unduly during its trip in the TEN trailer. TEN has the following position: it does not deny the existence of a causal link between the transportation, the undue suffering and the pig's infirmity, but it submits that its employee deemed the pig to be fit for transport to the slaughterhouse. In light of the evidence before me, I find that TEN's employee was wrong and that the pig was not fit for transport.

[35] I therefore conclude, on the balance of probabilities, that the Agency has established elements 4, 5, 6 and 7, in accordance with *Doyon*.

[36] I am aware that meat industry companies and their employees work long hours in often difficult conditions. The transportation of pigs to market is one part of the meat industry. All the people and companies that are part of the chain of activities from production and transportation to and from the auction ring and finally to transportation again, this time to the slaughterhouse, have to take care of the animals destined for human consumption. In most cases, food industry companies and their employees succeed in taking care of animals without liability under the scheme of the HA Regulations. Regrettably, this was not the case here.

2.2 Defences Available Under the Law

[37] The system of administrative monetary penalties set up by Parliament is very strict in its application. The AMP Act creates an absolute liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact.

[38] When a provision of the AMP Act concerns a specific violation, as is the case with paragraph 138(2)(*a*) of the HA Regulations, there are very few defences available to TEN. In the matter before me, section 18 of the Act excludes practically any excuse that TEN could raise, including that TEN's employee deemed the pig fit for transport and decided to load it in the trailer. This explanation is not an admissible defence under the scheme of the AMP Act.

2.3 Validity of the Amount of the Penalty

[39] The only remaining issue before me is whether the Agency has established that the $7,800 penalty is justified under the AMP Act and the AMP Regulations. The Tribunal finds that this amount is justified, for the following reasons.

[40] To calculate the penalty, it must first be determined whether the violation is minor, serious or very serious under Schedule 1 to the AMP Regulations. A violation of paragraph 138(2)(*a*) of the HA Regulations falls in the category of serious violations under the AMP Regulations. On the day on which the violation was committed, section 5 of the AMP Regulations provided that a serious violation called for a penalty of $6,000. In the matter before us, the base amount of $6,000 can be either increased or decreased on the basis of three factors: number of prior violations, degree of intentionality of the violator, and harm done. Values between 0 and 5 are assessed by the Agency for each of the three factors and then totalled to determine the final penalty amount. If the total is between 6 and 10, the base penalty amount is not adjusted. If the total is below 6, the base penalty is reduced; if it is above 10, the penalty is increased.

2.3.1 Number of Prior Violations

[41] In accordance with Part 1 of Schedule 3 to the AMP Regulations, if the person who committed the alleged violation committed only one minor or serious violation in the five years before the day on which the violation subject to the assessment was committed, a value of 3 is assessed. Given that TEN committed more than one previous violation, as indicated in the Agency's report, I agree with the Agency, which assessed a value of 5 for this factor.

2.3.2 Intent or Negligence

[42] According to Part 2 of Schedule 3 to the AMP Regulations, the Agency must assess whether the violation was committed with intent or negligence. The Agency may assess a value of 0, which corresponds to a situation where "[t]he violation subject to the assessment is committed without intent or negligence" (Item 1). A value of 0 may also be assessed where "[t]he person who commits the violation subject to the assessment makes a voluntary disclosure of the violation and takes necessary steps to prevent its re-occurrence" (Item 2). A value of 3 is assessed where "[t]he violation subject to the assessment is committed through a negligent act" (Item 3), and a value of 5, where "[t]he violation subject to the assessment is committed through an intentional act" (Item 4).

[43] The Agency determined that the violation subject to the assessment was committed through a negligent act because TEN, in its capacity as a transporter, had breached its duty to ensure animal welfare. The Agency submits that in failing to do so, TEN was negligent in transporting the pig in question, forcing it to suffer unduly while being transported. I agree with the Agency, which assessed a value of 3 for this factor.

2.3.3 Harm

[44] Regarding the third factor, the Agency assessed a gravity value of 5 because of the serious harm to animal health caused. It is difficult not to agree with the conclusion that the harm caused in the circumstances deserved a gravity value of 5 since "*[t]he violation subject to the assessment causes … serious or widespread harm to human, animal or plant health or the environment*". It appears from the evidence that the pig suffered and that this constitutes serious harm to animal health. I agree with the Agency, which assessed a value of 5 for this factor because the violation caused serious harm to animal health on September 22, 2014.

[45] The Tribunal, therefore, on the basis of the evidence presented, finds that a fair total gravity value for the adjusted penalty in this case is 13, as proposed by the Agency. For a total value of 13, the base penalty of $6,000 must be increased by 30% under Schedule 2 to the AMP Regulations. The amount of the penalty imposed in this case is therefore established at $7,800.

3. Decision

[46] For the reasons given above, I conclude that

i. the Agency has established each element of the violation of paragraph 138(2)(*a*) of the HA Regulations;

ii. TEN did not establish an admissible defence that, under section 18 of the AMP Act, could justify or excuse the acts it committed on September 22, 2014; and

iii. The $7,800 penalty imposed for this violation is justified in fact and in law.

[47] I therefore conclude, on the balance of probabilities, that TEN committed the violation set out in the Notice of Violation 1415QC0068-2, dated August 28, 2015, relating to events that occurred on September 22, 2014, and is liable to pay the Agency a monetary penalty of $7,800 within thirty (30) days after the day on which this decision is served.

[48] The Tribunal wishes to inform TEN that this violation is not a criminal offence, as this is a purely administrative matter. After five years, TEN will be entitled to apply to the Minister of Agriculture and Agri-Food to remove the violation from its record, in accordance with subsection 23(1) of the AMP Act.

Dated at Ottawa, Ontario, on this 11th day of May, 2017.

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Dr. Donald Buckingham, Chairperson