Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

CITATION: *Transport Eugène Nadeau inc. v. Canada (Canadian Food Inspection Agency),* 2017 CART 14

Date: 20170425
Docket: CART/CRAC-1856

BETWEEN:

Transport Eugène Nadeau inc.,

Applicant

- and -

Canadian Food Inspection Agency,

Respondent

[Translation of the official version in French]

BEFORE: **Chairperson Donald Buckingham**

With: **Clément Nadeau, representative of 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 paragraph 138(2)(*a*) of the *Health of Animals Regulations,* alleged by the respondent.

DECISION

Following a hearing and having reviewed all the oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that on a balance of probabilities the applicant, Transport Eugène Nadeau inc., committed the alleged violation, described in Notice of Violation 1314QC0090-1, dated August 28, 2015, regarding events occurring on October 9, 2013, and orders it to pay to the respondent, the Canadian Food Inspection Agency, a monetary penalty in the amount of $7,800 within 30 days of the date on which this decision is served.

The hearing was held in Quebec, PQ,
On Monday, April 10, 2017.

ORAL DECISION RECAPPED

[1] I delivered an oral decision in this matter at the conclusion of the oral hearing on April 10, 2017 with these written reasons to follow. My findings in issuing the oral decision were are follows :

> i. the Canadian Food Inspection Agency (Agency) had proved each of the elements of the violation of paragraph 138(2)(*a*) of the *Health of Animals Regulations*(HA Regulations);
>
> ii. Transport Eugène Nadeau inc. (TEN) had not established a permissible defence under section 18 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act) that could justify or excuse their actions of October 9, 2013;
>
> iii. the penalty of $7,800 for this violation was justified in fact and in law.

[2] As a result, on a balance of probabilities, I found that TEN did commit the violation set out in Notice of Violation 1314QC0090-1, dated August 28, 2015, concerning events that took place on October 9, 2013, and must pay to the Agency a monetary penalty in the amount of $7,800 within 30 days of the date on which these written reasons are served.

ADDITIONAL OBSERVATIONS ARISING FROM THE HEARING

[3] The above decision was delivered orally in the absence of Clément Nadeau (Mr. Nadeau), duly authorized representative of TEN, who chose to withdraw himself on the first morning of the hearing rather than continue with the hearing before the Tribunal.

[4] The Canada Agricultural Review Tribunal (Tribunal) has found that it does not have jurisdiction to award costs in favour of or against one of the parties appearing before it (*Favel Transportation Inc. v. Canada (CFIA),* 2013 CART 17, rendered May 22, 2013). Given the conduct of the Mr. Nadeau before the Tribunal in this matter, had I the power to award costs, this may well have been appropriate case to award them against TEN.

[5] Mr. Nadeau's contempt for the Agency and his disrespect for the Tribunal and its process was thinly veiled. His use of expletives while at the hearing and then his walking out of a hearing that had been convened at his company's request was beyond regrettable. This conduct attributable to TEN leaves much to be desired. The use of a hearing before the Tribunal to grand-stand one's displeasure at the operation of a federal regulatory process is ineffective and in poor form, not to mention a waste of resources.

[6] Furthermore, it was Mr. Nadeau himself who requested that the Tribunal review the facts surrounding the issuance of the Notice of Violation. What Mr. Nadeau appears to contest is the fairness of the administrative monetary penalty system (AMP system) as it

applies to his company. This would have been better accomplished in another forum, such as through a professional association or political representatives.

WRITTEN REASONS

[7] The facts of the case are not in dispute. TEN's driver, Clermont Nadeau transported 210 pigs coming from two different farms in the morning of October 9, 2013. Upon unloading the pigs at the Almont Asta abattoir later in the day, an Agency veterianian, Dr. Therrien, found two of the pigs from the load had large and significant ulcerated umbilical hernias which appeared to be very sensitive to the pig when touched. On the basis of her observations and professional opinion, she concluded that these two pigs had their infirmed condition before they were loaded at their farms of origin, and she informed Clermont Nadeau that these two pigs were not fit for travel and that they should never have been loaded.

[8] Clermont Nadeau's written evidence was that he arrived at the pick-up barn at 05:00 and there was a lot of steam in the barn and it was still dark outside. He counted and tattoed the pigs being loaded and trusted the employees who were loading to make sure all the pigs were okay for transport. He was very surprised to find out that two of them had got by him that were not okay for transport and that if he had seen them while loading, he would have never loaded them into the trailer.

[9] In reviewing the facts of a case, my role is to weigh the evidence before me and to determine whether the Agency has proven, on a balance of probabilities, each of the essential elements that must be proved to conclude that TEN committed a violation contrary to paragraph 138(2)(*a*) of the HA Regulations.

[10] Where the Agency meets its burden of proof, TEN will be held liable for a violation under the AMP system, unless it can establish a defence or excuse permitted under the AMP Act, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), or as it pertains to this case, the HA Regulations.

1. Issues

[11] There are three issues raised by this case:

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

ii. has TEN established a permissible defence under section 18 of the AMP Act that could justify or excuse its actions of October 9, 2013; and

iii. is the penalty of $7,800 assessed, justified in fact and in law?

2. Analysis

2.1 Has the Agency proved each of the elements necessary for the violation of paragraph 138(2)(a) of the HA Regulations?

[12] The courts have examined subsection 138(2)(*a*) of the HA Regulations and its application under the AMP system in some detail, particularly given that this violation is one of absolute liability (*Doyon v. Canada (Attorney General)*, 2009 FCA 152 (*Doyon*), at paragraph 27).

[13] Subsection 138(2)(*a*) of the HA Regulations reads 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] From this legislative provision, the Federal Court of Appeal has, at paragraph 41 of *Doyon*, parsed out seven essential elements for establishing a violation of paragraph 138(2)(*a*) of the HA Regulations:

> *[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 *Doyon* at paragraph 27, the regime established by the AMP Act and AMP Regulations is harsh. It grants to the respondent agency the ability to prove the violation using a burden of proof, on a balance of probabilities, rather than beyond a reasonable doubt. The AMP Act creates an absolute liability regime whereby it specifically disallows any defence of due diligence and mistake of fact.

2.1.1 Elements 1, 2, and 3

[15] Elements 1, 2, and 3 have been proven and are not contested. The two pigs with ulcerated umbilical hernias were transported by TEN employees in a TEN trailer on October 9, 2013.

2.1.2 Elements 4, 5, 6, and 7

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

[17] The HA Regulations are meant to operate within the whole spectrum of the Canadian agri-food chain from production to slaughter. Now with the AMP Act applying to the *Meat Inspection Act* and Regulations, the AMP system extends further to the transformation of slaughtered animals into meat products.

[18] Central to finding of a violation of subsection 138(2)(*a*) is the concept of "undue suffering". Elements 4, 5, 6 and 7 each refer to the concept. The Federal Court of Appeal has considered the interpretation of "undue suffering" in *Attorney General of Canada v. Porcherie des Cèdres Inc*., 2005 FCA 59 (*Porcherie des Cèdres*), at paragraph 26 and *Samson v. Canada (Canadian Food Inspection Agency),* 2005 FCA 235. It also provides a more robust elucidation of the concept in *Doyon*, at paragraphs 30 to 36.

[19] In *Doyon*, Létourneau J.A. clearly states that subsection 138(2)(*a*) is intended to prohibit transportation in conditions that cause undue suffering to an animal transported where "undue suffering" is given an all-encompassing meaning of "unjustifiable", "unreasonable" and "inappropriate".

[20] These words must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the

intention of Parliament (*Canada (AGC) v. Stanford*, 2014 FCA 234 (*Stanford*), at paragraphs 41 to 44).

[21] While the scheme and object of the HA Act and HA Regulations is not explicitly stated in the legislation, the importance of regulating the humane transport of animals within the Canadian agriculture and food system is evident from section 64(1)(i) of the HA Act, which provides for making regulations with respect to the humane treatment of animals.

[22] Part XII of the HA Regulations, in which the standard set out in paragraph 138(2)(*a*) is found, is entitled "Transportation of Animals". Thus the HA Act and the HA Regulations in Part XII are to be interpreted as establishing standards for the protection of animal health while those animals are in commercial transport. This would include any part of travel from a producer's barn to a processor's slaughter facilities.

[23] While Parliament has enacted a specific provision to protect animal health for animals during transport from undue suffering, the 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. The deliberate intention of Parliament to use the phrase "undue suffering" must therefore be read in the context of this balancing in mind, given the scheme and object of the HA Act and HA Regulations.

[24] "Undue" under this legislative scheme means "undeserved", "unwarranted", "unjustified", or "unmerited" (*Porcherie des Cèdres*, at paragraph 26) and "unjustified", "unmerited" or "unwarranted" (*Doyon*, at paragraph 30). As such, liability will generally attach to an actor in the Canadian agri-food system only where animals in the care and control of that actor are exposed to "undeserved", "unwarranted", "unjustified" or "unmerited" suffering.

[25] The Agency must prove on a balance of probabilities each of elements 4, 5, 6, and 7 to sustain an alleged violation. However, in this case where the alleged violation may relate to either or both of two pigs, the Agency need prove each of these elements for only one or the other in question. While the alleged violation may have occurred for actions by TEN relating to either pig, I find, for the reasons set out below, that there is ample evidence provided by the Agency that the transportation of both or either of the pigs by TEN constituted a violation of paragraph 138(2)(*a*) of the HA Regulations.

<u>Element 4 -"the pig or pigs could not be transported without undue suffering"</u>

[26] The evidence from the *ante mortem* and *post mortem* examinations conducted by Dr. Therrien, as well as the photos and video taken by her, show that at least one of the pigs had a large, open, and infected hernia which she stated, and no one contested, clearly predated the loading of it onto the TEN trailer on October 9, 2013.

[27] Dr. Therrien concludes in her Report that the transportation of the compromised animals, which suffered from an ulcerated hernia, had a condition that rendered them unsuitable for transport and that they could not be transported without undue suffering. Based on the evidence presented, I agree.

Element 5 - "the pig or pigs suffered unduly during the expected journey"

[28] The transport of the TEN load covered more than 200 kilometres and took several hours. Given the respective pre-existing condition of the pigs, they did suffer unduly during the long journey from the pig barn to the slaughter house. This suffering, which would have arisen due to the movement of the animal in the trailer in highway traffic, the painful brushing of an infected hernia on the trailer bedding, and the tussling of pigs against other animals in the load, was undeserved and unwarranted.

[29] The Agency's "Transportation of Animals Program - Compromised Animals Policy" (Tab 21 of the Agency Report), a guiding document for the animal transportation industry and the Agency, clearly states that animals with an open, ulcerated, or infected wounds are unfit for transport. The written evidence of Dr. Therrien was that this animal should not have been loaded.

Element 6 - "the pig or pigs could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause"

[30] The evidence shows that the pig or pigs could not be transported without undue suffering by reason of its pre-existing condition of its open, ulcerated, or infected hernia. Dr. Therrien's written report and photos support this finding.

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

[31] Causation is clear in this case. The pigs were transported by TEN employees. The pigs suffered unduly during their voyage on the TEN trailer. TEN's position is that it does not deny that there was a causal link between the transportation, the undue suffering and the pigs' infirmities, but rather that it did not know about the pigs' condition given the circumstances under which the loading of the 210 pigs took place.

[32] This position of TEN is not, however, of any relevance to the proving of Element 7 or any of the other elements to be proved by the Agency, on the balance of probabilities.

[33] I find, then, on the balance of probabilities, that the Agency has established Elements 4, 5, 6 and 7 in accordance with *Doyon*. With large open wounds on large hernias, there is no doubt that any movement would have caused the pigs suffering. Extra movement that comes with transportation would, on a balance of probabilities, push this matter into the realm of "undue suffering".

[34] I acknowledge that meat industry companies and their employees work long hours in often difficult conditions. Transporting pigs to market is part of the meat industry. All the individuals and companies in the chain of events, from production, to transportation, to the sales ring, to transportation again, and finally the slaughterhouse, must strive to take care of animals intended for human consumption. In the vast majority of cases, food industry companies and their employees succeed in taking care of animals without incurring their liability under the HA Regulations. Unfortunately, this did not occur in this case.

2.2 Defences available under the law

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

[36] Where there is a provision in the AMP Act related to a specific violation, as is the case of paragraph 138(2)(*a*) of the HA Regulations, TEN has very few means of defence. In this case, section 18 excludes almost any excuse that TEN might give, including: 1) the loading conditions at the pig barn were such that it was difficult to see the condition of the pigs being loaded; 2) TEN employees did not actually observe any unfit animals being loaded onto the trailer; and 3) TEN employees relied on the loaders to spot and exclude unfit animals for transport. These excuses or explanations do not constitute admissible grounds of defence under the AMP Act.

2.3 The validity of the penalty amount

[37] The only issue that remains to be determined by me is whether the Agency has proven that the penalty of $7,800 is justified under the AMP Act and the AMP Regulations. The Tribunal finds that this amount is justified for the following reasons.

[38] Calculation of the appropriate penalty begins with a determination of the status of the violation being minor, serious or very serious, as per Schedule 1 to the AMP Regulations. A violation of paragraph 138(2)(*a*) of the HA Regulations belongs to the category of serious violations under the AMP Regulations. On the day on which the violation was committed, section 5 of the AMP Regulations stated that a serious violation carried a penalty of $6,000. In this case, the basic 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 amount of the penalty. If the total is between 6 and 10, the base penalty amount is not adjusted. If the total is below 6, the base penalty amount is decreased; if the total is above 10, the amount is increased.

2.3.1 The number of previous violations

[39] According to Part 1 of Schedule 3 to the AMP Regulations, if the perpetrator of the alleged violation committed more than one minor or serious violation in the five years prior to the day on which the violation was committed, a gravity value of 3 is assessed. Since TEN has committed more than one previous violation, as evidenced in the Agency's Report, I agree with the Agency, which attributed a value of 5 to this factor.

2.3.2 Intent or negligence

[40] 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 is assessed where "[t]he violation subject to the assessment is committed through an intentional act" (Item 4).

[41] The Agency found that the violation was committed negligently because TEN as the transporter, failed to verify that each and every one of the pigs that were loaded onto the TEN trailer was fit for transport without causing undue suffering. The Agency maintains that in failing to do this, TEN was negligent in loading the two pigs in question, thereby committing it to unduly suffer during transport. I agree with the Agency, which attributed a value of 3 to this factor.

2.3.3 Harm

[42] For the third factor, the Agency assessed a gravity value of 5, because of serious harm to animal health. It is difficult to disagree with the conclusion that the seriousness of harm in the circumstances falls within the gravity value 5 when"*[t]he violation subject to the assessment causes … serious or widespread harm to human, animal or plant health or the environment*." The evidence clearly demonstrates that the pigs suffered and this constitutes serious harm to animal health. I agree with the Agency, which attributed a value of 5 to this factor because the violation caused serious harm to animal health on October 9, 2013.

[43] The Tribunal, therefore, on the basis of the evidence presented, finds that a fair total gravity value for the penalty adjustment in this case is 13, as proposed by the Agency. For an overall rating of 13, Schedule 2 of the AMP Regulations provides that the basic amount of the penalty of $6,000 must be increased by 30%. The amount of the penalty to be imposed in this case is therefore correctly assessed at $7,800.

3. Disposition

[44] I find, for the reasons set out above, that:

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

ii. TEN has not established a permissible defence under section 18 of the AMP Act that could justify or excuse their actions of October 9, 2013;

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

[45] As a result, on a balance of probabilities, I find that TEN did commit the violation set out in Notice of Violation 1314QC0090-1, dated August 28, 2015, concerning events that took place on October 9, 2013, and must pay to the Agency a monetary penalty in the amount of $7,800 within 30 days of the date on which this decision is served.

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

Dated at Ottawa, Ontario, on this 25th day of April 2017.

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Dr. Donald Buckingham, Chairperson