Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: **CITATION**:*Transport Eugène Nadeau inc. v. Canada (Canadian Food Inspection Agency),* 2017 CART 16

Date: 20170606
Docket: CART/CRAC-1857

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 subsection 140(2) 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 1415QC0039-2, dated August 28, 2015, regarding events occurring on May 15, 2014, 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.

OBSERVATIONS ARISING FROM THE ORAL HEARING

[1] The oral hearing of this matter commenced with both parties present. However, the latter part of the hearing was conducted in the absence of Clément Nadeau (Mr. Nadeau), duly authorized representative of Transport Eugène Nadeau inc. (TEN), who chose to withdraw himself mid-morning on the first day of the hearing rather than continue with the hearing before the Canada Agricultural Review Tribunal (Tribunal). In spite of the departure of Mr. Nadeau, I proceeded with the hearing of the three cases (CART/CRAC-1856, CART/CRAC-1857, and CART/CRAC-1858) that had been scheduled for Apri 10 to 13, 2017. Counsel for the Canadian Food Inspection Agency (Agency), although ready to proceed with her presentation of evidence and argument, submitted that she was prepared to have me decide the cases on the written record before the Tribunal.

[2] The 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.

[3] Mr. Nadeau's contempt for the Canadian Food Inspection Agency (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.

[4] 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. He may be right that the AMP system is not fair. The Federal Court of Appeal in *Doyon v. Canada (Attorney General)*, 2009 FCA 152 (*Doyon*) refers to the AMP system as "draconian". However, it would have been more appropriate for him to express his grievances in another forum, such as through a professional association or political representatives.

[5] I delivered oral decisions at the end of the hearings (with written reasons which followed later) in the two other cases (CARTCRAC-1856 and CART/CRAC-1858) heard at the same time as the present case (CART/CRAC-1857) on Monday, April 10, 2017. I reserved my decision in this matter pending my full review and consideration of the written evidence currently in the file and of further written arguments from the Agency, which were sent to the Tribunal on April 28 and May 4, 2017.

OVERVIEW

[6] Most of the facts of the case are not in dispute. TEN's driver, Steeve Nadeau transported 180 pigs coming from two barns to the Olymel S.E.C. abattoir on May 15, 2014. The loading of the pigs started at 07:00 a.m., and the pigs were finally unloaded at the abattoir at 16:00 p.m. At unloading some of the pigs appeared to be in distress and so an Agency veterinarian was called.

[7] At 16:30 p.m., the Agency veterinarian, Dr. Therrien, arrived at the unloading area of the abattoir to inspect the pigs in distress and along with those pigs also found 10 dead pigs on the top deck of the trailer. Dr. Therrien found that all pigs on the load, other than the dead and distressed ones, were normal.

[8] Because Dr. Therrien suspected that the deaths had been caused by overcrowding of the transport trailer on this very hot day, she took measurements of the TEN trailer to determine the loading density of the load to see if it fell within industry standards. She determined that it did not and that in her opinion, therefore, the actions of TEN constituted a violation of subsection 140(2) of the *Health of Animals Regulations* (HA Regulations). She completed an Inspector Non-Compliance Report to that effect that same day. She put TEN on notice by sending a letter to TEN that day informing the company of a potential enforcement action that may be taken by the Agency against it for this occurrence.

[9] On the basis of these observations and further investigation of the incident, the Agency issued a Notice of Violation with Penalty on August 28, 2015, to TEN in the amount of $7,800 for transporting or having had transported an animal in an overloaded vehicle contrary to subsection 140(2) of the HA Regulations.

[10] TEN requested that the Tribunal review the facts surrounding the issuance of the Notice of Violation.

[11] 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 subsection 140(2) of the HA Regulations.

[12] 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 *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act), the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), or as it pertains to this case, the HA Regulations.

REASONS

1. Issues

[13] At the heart of this case is a dispute as to whether the load in question was overloaded, overcrowded, or as subsection 140(2) of the HA Regulations puts it, "… crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein".

[14] Below this dispute, lie three issues raised by this case:

i. has the Agency proven each of the elements of the violation of subsection 140(2) of the HA Regulations;

ii. has TEN established a permissible defence under section 18 of the AMP Act that could justify or excuse their actions of May 15, 2014; and

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

2. Analysis

2.1 Has the Agency proved each of the elements necessary for the violation of subsection 140(2) of the HA Regulations?

[15] May 15, 2014, was an unsually hot day. The driver of the TEN trailer indicated in his evidence that the weather announced for the day was that it would reach 24 degrees Celcius by 14:00 p.m., but that he thought he would have his load delivered to the abattoir by noon.

[16] The evidence shows however that the day was actually hotter, sunnier and more humid that was predicted. At 07:00 a.m., it was already 14.4 degrees Celcius, by 10:00 a.m., it was 24.5 degrees Celcius by 14:00 p.m., it was 27.7 degrees Celcius and by 16:00 p.m., it was 27.4 degrees Celcius.

[17] The drive between the farm sites and the abattoir was less than 70 km and the transport time should have been around an hour.

[18] Why the 180 pigs took around 9 hours to be loaded, transported and unloaded is not totally clear from the evidence. TEN's evidence suggests several reasons such as the pigs took a long time to load, the truck transporting the pigs broke down, and there was a long wait to unload once the load arrived at the abattoir. Whatever the reason, when the pigs were unloaded at the abattoir, several were dead and others were in distress.

[19] The courts have examined violations arising from the HA Regulations and their enforcement under the AMP system in some detail, particularly given that these violations are of absolute liability (*Doyon*, at paragraph 27).

[20] The Federal Court of Appeal, at paragraphs 41 and 42 of *Doyon*, indicated a violation of a provision of the HA Regulations can be parsed into its essential elements, each of which the Agency must prove in order to establish a violation.

[21] This Tribunal has applied the *Doyon* approach of parsing out the required elements of HA Regulation violations. The Tribunal has parsed out four elements for the Agency to prove to uphold an alleged violation under section 140. For violations under subsection 140(1), see *Western Commercial Carriers Ltd.* v. *Canada (Canadian Food Inspection Agency)* 2014 CART 33 and for violations under subsection 140(2), see *0830079 B.C. Ltd. v. Canada (CFIA)*, 2013 CART 34.

[22] For the Agency to sustain as valid an AMP violation under subsection 140(2) of the HA Regulations, it must prove four essential elements, on a balance of probabilities:

- Element 1 - an animal was transported in a truck, trailer or compartment on the trailer;

- Element 2 - the truck, trailer or compartment on the trailer was crowded;

- Element 3 - the crowding in the trailer was to such an extent as to be likely to cause injury or undue suffering to any animal contained therein; and

- Element 4 - there was a causal link between the loading, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and TEN.

[23] In *Canada (ACG) v. Stanford*, 2014 FCA 234, at paragraphs 41 to 44, the Court held statutory interpretation involves reading the words of an Act 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.

[24] While the scheme and object of the *Health of Animals Act* (HA Act) and HA Regulations is not explicitly stated in the legislation, references to the importance of regulating the humane transport of animals within the Canadian agriculture and food system surfaces at paragraph 64(1)(*i*) of the HA Act. Again, Part XII of the HA Regulations, in which the standard set out in subsection 140(2) is found, is entitled "Transportation of Animals". Given their content, the HA Regulations, in this Part, must also be interpreted as establishing standards for the protection of animal health while those animals are in commercial transport from a producer's barn to a processor's slaughter facilities.

[25] The animal health protection provisions of the HA Act and HA Regulations do not, therefore, exist in a vacuum. The context of this legislation includes that animal health is to be protected within the agricultural and agri-food production systems currently existing in Canada.

[26] Parliament has enacted a specific provision to protect animal health during loading so that they may be protected from the likelihood of or actual injury or 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.

[27] Thus, the actual words used in subsection 140(2) in defining a violation must be read with this balancing in mind, given the scheme and object of the HA Act and HA Regulations. The words used in subsection 140(2)—"crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein"—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.

[28] To be transported, animals must necessarily be forced or constrained into a confined space. Recommended codes of practice have been developed which set out general recommended loading densities and how they will vary, depending on the size of animals transported and ambient weather conditions. Proper loading densities contribute to maintaining the welfare of the animals transported and to the agriculture and agri-food industries' ability to operate in a variety of weather conditions on a year-round basis. When loading densities are exceeded, this puts the animals loaded and transported at risk. Where such a risk leads or is likely to lead to injury or undue suffering of the animals, the operator will be exposed to liability under the HA Regulations.

2.1.1 Finding concerning Element 1

[29] Element 1—that an animal was transported on a truck, trailer or compartment on the trailer—is not in dispute. TEN, through its employee, Steeve Nadeau, transported 180 hogs from St-Charles-de-Bellechasse, Quebec to Vallée-Jonction, Quebec, for slaughter on May 15, 2014.

2.1.2 Finding concerning Element 2

[30] Element 2—that the truck, trailer or compartment on the trailer was crowded—is potentially in dispute. In light of the evidence before me in the case, I find that the TEN trailer on May 15, 2014, was crowded.

[31] The parties agree that the TEN load contained 180 pigs. The Agency presented various codes of practice for calculating appropriate hauling densities for pigs (*Code de pratiques recommandées pour le soin et la manipulation des animaux de ferme-Transport* de l'Agence; *Guide référence sur la manipulation et le bien-être des porcs durant le transport* de l'Association québecoise des transporteurs d'animaux vivants; *Densité de chargement* de la Fédération des producteurs de porcs du Québec). Calculations from these guides, given the

weight of the pigs and the size of the TEN trailer and the weather conditions on May 15, 2014, indicated that there were, depending on the guide, between 2 and 47 pigs too many on the trailer. Using the calculations of the Agency, the load was not within acceptable limits of any of the guides under regular weather conditions, let alone under the unusually hot, sunny and humid conditions of May 15, 2014. TEN did not provide evidence that seriously challenged the veracity of the Agency calculations or provide any of its own calculations as to what an appropriate loading density would have been on the day in question.

[32] Given the totality of the evidence, I find that pigs in the TEN load were crowded within the meaning of subsection 140(2) of the HA Regulations during their journey on May 15, 2014.

2.1.3 Finding concerning Element 3

[33] Element 3—that the crowding was to such an extent as to be likely to cause injury or undue suffering to any animal contained therein—is also potentially in dispute.

[34] This Tribunal has commented elsewhere that recommended densities, as set out in codes of practice, are merely guidelines and not, in themselves, definitively determinative as to whether a violation has been committed (*F. Ménard Inc. v. Canada (CFIA),* (RTA #60126) at page 4; and *Finley Transport Ltd v. Canada (CFIA)*, 2013 CART 42 (*Finley Transport*)). At paragraph 50 of *Finley Transport*, the Tribunal held "Overcrowding remains a question of fact, to which various codes or standards may be referred to in support, but which ultimately becomes a determination based on the particular circumstances". Recently, in *Canada (Procureur général) c. L. Bilodeau et Fils Ltée,* 2017 CAF 5 (*Bilodeau*), the Federal Court of Appeal endorsed the view that codes of conduct do not have legal force and do not bind the Tribunal (*Bilodeau* at paragraph 10). The Tribunal continues to adopt this position.

[35] At paragraph 26 of *Canada (Attorney General) v. Porcherie des Cèdre*s, 2005 FCA 59, (albeit in the context of paragraph 138(2)(*a*) of the HA Regulations violations), the Federal Court of Appeal has considered the meaning of the word "undue" in relation to "undue suffering". There the Court held "undue" meant "undeserved", "unwarranted", "unjustified" or "unmerited" suffering. Moreover, the Federal Court of Appeal later cited this interpretation with approval in *Doyon*, at paragraph 30.

[36] Given the context of the HA Regulations, as regulations to protect animal health within existing agricultural production systems, the Tribunal finds that the evidence tendered in this case proves, on the balance of probabilities, that the crowding of the pigs on the TEN load likely caused and, indeed, actually caused injury and undue suffering to one or many of the pigs.

[37] Dr. Therrien provided credible and convincing written evidence that was recorded on the day of the events in question. She found 10 dead pigs from the top deck of the load and other pigs in distress and panting. She observed no other pigs with health problems on the load. Dr. Therrien took detailed measurements of the TEN trailer, made credible assumptions about the average live pigs on the load and on this basis the Agency then calculated the loading density on the load and it was found to be in excess of industry standards for ordinary weather days, and far in excess for hot and humid weather conditions. TEN did not provide evidence that seriously challenged any of Dr. Therrien's calculations or conclusions.

[38] In sum, the evidence of Dr. Therrien demonstrates that the probable cause of the death and distress of the pigs was insufficient space in the trailer, particularly given the hot and humid conditions of the day and the length of time the animals were in the transport trailer and the fact that no industry standards would have considered the loading density to be acceptable in the conditions of May 15, 2014. This leads me to find that the Agency has proven, on a balance of probabilities, that the pigs were overcrowded in the trailer and that this overcrowding caused injuries and undue suffering to the pigs transported on the load.

2.1.4 Finding concerning Element 4

[39] I find that Element 4—that there was a causal link between the transport, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and TEN—also has been proven by the Agency, on a balance of probabilities. The evidence in this case showed a causal link between the transport, the crowding (which exceeded all the limits recommended by industry), the actual injury and undue suffering of ten dead pigs and others that were in distress at the time of unloading, all of which occurred while the load was under the control of TEN and its employee.

[40] Causation is clear in this case. Furthermore, I am convinced by the arguments of counsel for the Agency, that the element of "expected journey" that was examined by the Court in *Doyon* as it related to an alleged violation of paragraph 138(2)(*a*), is not and should not be implicitly included as an element in an alleged violation of subsection 140(2). As such, the fact that the TEN trailer may have broken down on its way to the abattoir on May 15, 2014, is of no consequence and does not break the chain of causation as concerns an alleged violation of subsection 140(2) of the HA Regulations.

[41] Therefore arguments from TEN regarding the reasons why it took so long to get the pigs from the barns to the abattoir are not relevant to a determination of whether Element 4 (or any of the other elements) have been proven by the Agency, on a balance of probabilities.

2.2 Defences available under the law

[42] The system of administrative monetary penalties, as set out by Parliament, is strict in its application. The AMP Act creates an absolute liability regime allowing no defence of due diligence or mistake of fact.

[43] When an administrative monetary penalty provision has been enacted for a particular violation, as is the case for subsection 140(2) of the HA Regulations, TEN has little room to mount a defence. In this case, section 18 excludes practically any excuse that TEN may raise, including: (1) its driver, Steeve Nadeau, may have had difficulty loading the pigs; (2) its driver, Steeve Nadeau believed that the loading density for the load was okay; (3) its driver, Steeve Nadeau believed he would not be required to load the pigs at a density appropriate for hot and humid weather conditions because he thought he would get to the abattoir before it got too hot; (4) its driver, Steeve Nadeau had a mechanical breakdown with the TEN truck which caused the pigs to be exposed to direct sun and hot weather for far longer than expected; and (5) the TEN load would have to wait additional time at the abattoir before it was unloaded thus exposing the pigs to further exposure to the hot weather. Given Parliament's clear statement on the issue, these justifications and excuses by TEN are not valid defences under section 18 of the AMP Act.

[44] Consequently, I conclude that the Agency has, on a balance of probabilities, proven all the essential elements of the violation and, therefore, the Notice of Violation with Penalty is upheld.

2.3 The validity of the penalty amount

[45] The Agency provides evidence and argument why the penalty of $7,800 is justified in fact and under law of the AMP Act and the AMP Regulations. I agree that this amount is justified.

[46] 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 subsection 140(2) 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 Previous violations

[47] According to Part 1 of Schedule 3 to the AMP Regulations, if the perpetrator of the alleged violation has committed only 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, the Tribunal agrees with the Agency, which attributed a value of 5 to this factor.

2.3.2 Intent or negligence

[48] 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).

[49] The Agency found that the violation was committed negligently (Agency Report, on page 15) because TEN as the transporter, failed in its obligation to assure the welfare of the pigs it was transporting. Even under normal weather condition, its employee loaded more pigs than recommended by industry guidelines and with the hotter and more humid weather conditions to which the load was eventually subjected, this was even moreso the case. For these reasons the Agency argues that TEN was negligent. I agree with this assessment and with the Agency's attribution of a value of 3 to this factor.

2.3.3 Harm

[50] 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 ten pigs were found dead on the load and others were in respiratory distress. These conditions indeed constitute serious harm to animal health. I agree with the Agency in its assessment of a value of 5 to this factor because the violation did cause serious harm to animal health on May 15, 2014.

[51] Therefore, on the basis of the evidence presented, I find 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 should be increased by 30%. The amount of the penalty to be imposed in this case is properly assessed at $7,800.

3. Disposition

[52] The Tribunal finds, for the reasons set out above, that:

i. the Agency has proved each of the elements of the violation of subsection 140(2) of the HA Regulations;

ii. TEN has not established a permissible defence under section 18 of the AMP Act that could justify or excuse its actions of May 15, 2014;

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

[53] As a result, on a balance of probabilities, the Tribunal finds that TEN did commit the violation set out in Notice of Violation 1415QC0039-2, dated August 28, 2015, concerning events that took place on May 15, 2014, 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.

[54] 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 6th day of June, 2017.

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Dr. Donald Buckingham, Chairperson