



Citation: *A. S. L'Heureux Inc. v. Canada* (Canadian Food Inspection Agency), 2018 CART 9

Date: 20181002

Docket: CART/CRAC-1953

**BETWEEN:**

**A. S. L'Heureux Inc.,**

**APPLICANT**

**- and -**

**Canadian Food Inspection Agency,**

**RESPONDENT**

[Translation of the official version in French]

**BEFORE: Geneviève Parent  
Member**

**WITH: Vincent Lamontagne; and  
Geneviève Ruel, representative for the respondent**

In the matter of an application made by the Applicant to the Canada Agricultural Review Tribunal pursuant to paragraph 9(2)(c) of the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#), for a review of the facts pertaining to a violation of paragraph 138(2)(a) of the [Health of Animals Act](#).

**DECISION**

**Having reviewed the evidence and the parties' written submissions, the Canada Agricultural Review Tribunal, by ORDER, determines that A.S. L'Heureux Inc. must pay an administrative monetary penalty of \$6,000 to the Canadian Food Inspection Agency for the violation set out in Notice of Violation 1516QC0030 1 within 30 days after the date on which this decision is notified.**

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## REASONS FOR DECISION

### I. Background

[1] This case concerns a review of the facts surrounding the issuance of Notice of Violation 1516QC0030-1, with monetary penalty of \$7,800, that the Canadian Food Inspection Agency (Agency) imposed on the Applicant on April 10, 2017, for an alleged violation of paragraph 138(2)(a) of the [Health of Animals Regulations](#).

[2] Paragraph 138(2)(a) of the [Health of Animals Regulations](#) provides that no person shall load or cause to be loaded, transport or cause to be transported an animal that, by reason of infirmity, illness, injury, fatigue or any other cause, cannot be transported without undue suffering during the expected journey.

[3] On April 20, 2017, the Applicant filed a request for review of Notice of Violation #1516QC0030-1 with the Canada Agricultural Review Tribunal (Tribunal), noting that it intended to mount a defence of due diligence and a constitutional challenge.

[4] Simultaneously, in other dockets, Mario Côté Inc. filed a series of applications before the Tribunal for review of the facts surrounding the issuance of various notices of violation, where the Tribunal considered the constitutionality of subsection 18(1) of the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#) (AAAMP Act), and thus the availability of a defence of due diligence against a violation under the agriculture and agri-food administrative monetary penalties regime (AAAMP regime).

[5] It should be noted that under subsection 18(1) of the [AAAMP Act](#), “A person named in a notice of violation does not have a defence by reason that the person (a) exercised due diligence to prevent the violation; or (b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.”

[6] On February 16, 2017, the Federal Court of Appeal dismissed an application for judicial review, finding, as had the Tribunal, that subsection 18(1) of the [AAAMP Act](#) did not infringe section 7 of the [Canadian Charter of Rights and Freedoms](#) ([Mario Côté Inc. v. Canada \(Attorney General\)](#), 2017 FCA 36 (Mario Côté FCA); [Mario Côté Inc. v. Canada \(Canadian Food Inspection Agency\)](#), 2015 CART 25 (Mario Côté CART)).

[7] This case is among those that were held in abeyance pending a ruling on the application for leave to appeal to the Supreme Court of Canada submitted by Mario Côté Inc.

[8] On November 9, 2017, the Supreme Court of Canada dismissed the application for leave to appeal of Mario Côté Inc. ([Mario Côté Inc. v. Attorney General of Canada](#), 2017 CanLII 75051 (SCC) (Mario Côté SCC)).

[9] In the wake of this outcome, which maintained that one cannot provide evidence of due diligence in order to be exonerated from a violation under the AAAMP regime, the parties agreed, as confirmed by order of the Tribunal dated March 7, 2018, that the Applicant no longer wished to challenge the merits of the violation, but only the amount of the monetary penalty and that the parties would do so by written submissions.

[10] It appears from the evidence on file and the written submissions of the two parties that they admit that the Applicant violated paragraph 138(2)(a) of the [Health of Animals Regulations](#) by transporting, on September 9, 2015, a compromised hog for which special measures were not taken, namely for the animal to be loaded last, unloaded first, and be isolated from the other livestock (Agency report, page 8; Agency’s written submissions, pages 5 and 6 ).

[11] As noted by the Federal Court of Appeal in *Doyon v. Canada (Attorney General)*, [2009 FCA 152](#), 395 N.R. 176 (*Doyon*) at paragraphs 36 et seq.: “the fact an animal is compromised and suffering does not necessarily mean that it cannot be transported, especially if it remains ambulatory.” The literature written for producers and transporters to help them comply with the regulations, such as the one produced by the Agency in this case (*Code of Practice for the Care and Handling of Farm Animals* which refers generally to the *Compromised Animals Policy*), states that compromised pigs can be transported to the abattoir if special measures are taken, in particular loading them last in the rear compartment of the truck and unloading them first upon arrival at the abattoir (*Code of Practice for the Care and Handling of Farm Animals*, Section 6, article 6.1.3).

## II. Jurisdiction and powers

[12] The Tribunal is an expert and independent body constituted by Parliament pursuant to subsection 4.1(1) of the [Canada Agricultural Products Act](#), and its jurisdiction consists of responding to requests for review of matters arising from the issuance of agriculture and agri-food administrative monetary penalties, such as those provided for in sections 9(2)(c) and 13(2) of the *AAAMP Act*.

[13] Subsection 14(1) of the *AAAMP Act* sets out the Tribunal’s powers as follows:

*14 (1) After concluding a review requested under this Act, the Tribunal shall, by order, as the case may be,*

*(a) confirm, vary or set aside any decision of the Minister under section 12 or 13, or*

*(b) determine whether or not the person requesting the review committed a violation and, where the Tribunal decides that the person committed a violation but considers that the amount of the penalty for the violation, if any, was not established in accordance with the regulations, the Tribunal shall correct the amount of the penalty,*

*and the Tribunal shall cause a notice of any order made under this subsection to be served on the person who requested the review, and on the Minister.*

*[Emphasis added]*

## III. The Agriculture and Agri-Food Administrative Monetary Penalties regime

[14] The AAAMP regime instituted under the *AAAMP Act* and the [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (*AAAMP Regulations*) is one of absolute liability. (*Doyon*, paragraph 11; [Mario Côté FCA](#), paragraph 40)

[15] As clearly established since [R. v. Sault Ste-Marie](#), [1978] [2 SCR 1299](#) (*Sault Ste-Marie*), at page 1326, “[o]ffences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act.”

[16] The AAAMP regime is a legal construct that underlies two major stages in which the Minister involved must demonstrate certain elements. The first is the demonstration that a violation has been committed, and the second is the determination of the associated administrative monetary penalty.

[17] Since the violation of paragraph 138(2)(a) of the [Health of Animals Regulations](#) has been admitted by the Applicant, this case falls solely within the second stage, namely the determination of the appropriate administrative monetary penalty.

[18] The [AAAMP Regulations](#) set the guidelines within which the Agency will determine the value of the administrative monetary penalty to be applied where there has been a violation of a provision of the statutes covered by the AAAMP regime. These guidelines are reviewed below.

[19] Schedule 1 of the [AAAMP Regulations](#) determines the gravity of the penalties according to the violation in question, which then allows the determination of the base amount of the penalty, as set out in section 5 of the [AAAMP Regulations](#).

[20] In this case, Schedule 1, Part 1, Division 2 indicates that a violation of paragraph 138(2)(a) of the [Health of Animals Regulations](#), namely, to *“load, transport, or cause to be loaded or transported an animal that cannot be transported without suffering”* constitutes a “serious” violation.

[21] Under section 5 of the [AAAMP Regulations](#), the penalty for a serious violation, when committed by a person in the course of a business or in order to obtain a financial benefit, as in the present case, is \$6,000. This amount can then be adjusted according to the calculation provided in Schedule 2 of the [AAAMP Regulations](#), with regard to the “total gravity value” to be calculated.

[22] As stated in section 6 of the [AAAMP Regulations](#), this “total gravity value” applies to all “serious” and “very serious” violations and is established using three criteria set out in Schedule 3 of the [AAAMP Regulations](#).

[23] The first criterion involves the history of the offender. The second involves the nature of the intent or the extent of negligence in committing the violation. The third requires an evaluation of the gravity of the harm that was caused or could be caused by the violation (subsection 4(3) of the [AAAMP Act](#) and Schedule 3 of the [AAAMP Regulations](#)).

[24] A gravity value is allocated to each criterion under Schedule 3 of the [AAAMP Regulations](#), and these values are added to represent the “total gravity value.”

[25] Once the “total gravity value” is determined in the case of a “serious” or “very serious” violation, Schedule 2 of the [AAAMP Regulations](#) provides that the administrative monetary penalty set out in section 5 of the [AAAMP Regulations](#) may be reduced, left as is or increased, with the percentages provided.

[26] This second stage of the AAAMP regime is intended to ensure that the administrative monetary penalty imposed takes into account the specific facts of each case. In an absolute liability regime like that of the AAAMP, this stage is of particular importance for the offender and for the effectiveness of the regime.

#### IV. Issues

[27] In this case, the Agency assessed a gravity value of 5 for the first criterion on the Applicant's history.

[28] The Agency also considered that the violation was committed due to the Applicant's negligence and assessed a gravity value of 3 under the second criterion.

[29] Lastly, it considered that the violation caused serious harm to the health of the animal transported without special conditions and assessed a gravity value of 5.

[30] Therefore, the Agency assessed a "total gravity value" of 13. As provided in Schedule 2 of the [AAAMP Regulations](#), a "total gravity value" of 13 leads to a 30% increase in the \$6,000 base penalty, for a total of \$7,800.

[31] The Applicant is contesting the "total gravity value" assessed by the Agency for the violation committed and requests that the Tribunal revise this value.

[32] Based on the written submissions, it appears that the Applicant is not challenging the assessment of the first criterion, as the Agency had provided evidence of the Applicant's history corresponding to the gravity value of 5.

[33] The Applicant is however challenging the assessment for the two other criteria, suggesting that a gravity value of 0 should be assessed for the second criterion (intent or negligence) and a gravity value of 1 should be assessed for the third criterion (harm). This would amount to a total gravity value of 6, which would not require an increase of the penalty as set out under Schedule 2. This would leave the Applicant with the base penalty of \$6,000.

[34] In this case, therefore, the Tribunal must determine whether the "total gravity value" assessed was established by the Agency in accordance with the relevant regulations, namely Schedule 3 of the [AAAMP Regulations](#).

[35] Since the parties agreed on a gravity value of 5 for the first criterion involving the Applicant's history, the Tribunal will successively analyse the gravity values attributed by the Agency to the two other criteria in Schedule 3 of the [AAAMP Regulations](#), namely the nature of the intent or negligence and the gravity of the harm, having regard to the written submissions of the parties and the evidence on the record.

[36] In accordance with subsection 14(1) of the [AAAMP Act](#), if the Tribunal finds that the administrative monetary penalty in this case was not established based on the relevant regulations, it has to substitute the amount it deems compliant.

[37] This case therefore raises three questions:

- i. What is the appropriate gravity value for the criterion of intent or negligence set out in Schedule 3, Part 2 of the [AAAMP Regulations](#)?
- ii. What is the appropriate gravity value for the criterion of harm caused by the violation set out in Schedule 3, Part 3 of the [AAAMP Regulations](#)?
- iii. If the Tribunal finds that the administrative monetary penalty was not established in accordance with the relevant regulations, what should the amount of the penalty be?

## V. Analysis

### Question 1: Nature of the Applicant's intent or negligence

#### *Parties' arguments with regard to negligence*

[38] The Agency considers that the violation was committed by the Applicant by negligence. Therefore, the Agency assigns a gravity value of 3, pursuant to Schedule 3, Part 2, section 3 of the [AAAMP Regulations](#).

[39] The reasoning of the Agency reads as follows:

*[TRANSLATION]*

*In this case, the CFIA considers that A.S. L'Heureux Inc. was negligent because it knew or should have known that the hog was lame and thereby realize that it was transportable with special arrangements because of its condition. The animal's condition was visible to the naked eye and A.S. L'Heureux Inc. had the duty to ensure that each of the animals that boarded its vehicle was fit for transport without undue suffering. (Agency's Report, page 12, tab 6)*

[40] In its written submissions, the Agency adds the following:

*[TRANSLATION]*

*... the conclusion is therefore that a reasonable person would have identified the hog in question as compromised and transportable only with special arrangements. As such, the deficiency in the pre-loading inspection conducted by A.S. L'Heureux Inc., which led to the commission of the violation, represents a breach of a legal duty of care.*

*[emphasis added]*



[41] To support this argument, the Agency relies on the decision in *A.S. L'Heureux Inc. v. Canada (Canadian Food Inspection Agency)*, [2014 CART 17](#), which states at paragraph 28:

*The Tribunal agrees with the Agency's assessment. A.S. L'Heureux, which is liable for acts of negligence committed by an employee, did not present any evidence to the contrary. The Tribunal is of the opinion that, in this case, A.S. L'Heureux breached its statutory duty of care as a result of conduct that differs from how a reasonable person would have behaved in similar circumstances.*

*[emphasis added]*

[42] The Agency adds the following:

*[TRANSLATION]*

*Thus, even if the evidence supported the suggestion that A.S. L'Heureux was diligent, which is not the case here, it would have nonetheless been liable for the negligence of its employee. The reasonable person test also applies to the employee for which A.S. L'Heureux is responsible under the current regime. To adopt a contrary reasoning would be tantamount to saying that when a company is accused of a violation, such violation can never have been committed with intent or negligence because the company is always acting through its employees: this cannot be the intention of the current regime.* (Agency's written submissions, page 5)

*[emphasis added]*

[43] For its part, the Applicant submits to the Tribunal that the Agency's reasoning is "circular" and rules out the possibility that a violation could be committed without negligence or intent on the part of the offender.

[44] On this, the Applicant submits that it is possible for a violation to be committed without negligence on the part of the offender and that [TRANSLATION] "*even if a defence of due diligence is not admissible... the Tribunal should consider it when assessing whether or not there was negligence to determine the penalty.*" (Applicant's written submissions, dated April 6, 2018, page 2)

[45] The Applicant relies on the criteria of a defence of due diligence stated in *Procureur général du Québec c. Dépan-Escompte Couche-Tard inc.*, [2003 CanLII 9343](#) (QC CQ) (*Dépan-Escompte Couche-Tard inc.*) to show that it was not negligent in this case.

[46] It also submits that the balance of probabilities weighs in its favour because, if two employees did not notice the condition of the hog prior to and during loading, this must mean that its condition deteriorated during transport, that its condition was difficult to detect to the naked eye, and [TRANSLATION] "*the employees did the best they could.*" (Applicant's written submissions, dated April 6, 2018, pages 4 and 5)



## **The law**

[47] This case allows us to continue the analysis initiated in the Mario Côté decisions cited above regarding the defence of due diligence being raised by an offender under the AAAMP regime.

[48] The regime established by the [AAAMP Act](#) is one of absolute liability, where guilt follows on the mere proof of the proscribed act. ([Sault Ste-Marie](#), page 1301, [Doyon](#), paragraph 25 and [Mario Côté FCA](#) at paragraph 40)

[49] Parliament's clear intention to establish an absolute liability regime is set out, notably, in subsection 18(1) of the [AAAMP Act](#) where it is stated: "[a] person named in a notice of violation does not have a defence by reason that the person (a) exercised due diligence to prevent the violation; or (b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person."

[50] As noted above, the unconstitutionality of subsection 18(1) of the [AAAMP Act](#) with regard to section 7 of the [Canadian Charter of Rights and Freedoms](#) was argued unsuccessfully in the Mario Côté cases (see [Mario Côté CART](#), [Mario Côté FCA](#) and [Mario Côté SCC](#)).

[51] It is therefore clear with regard to the law in force that an offender cannot rely on a defence of due diligence to be exonerated from a violation under the AAAMP regime. A defence of due diligence is not admissible at the first stage of the AAAMP regime, where the Agency must show that a violation has in fact been committed.

[52] However, the Tribunal is of the opinion that the same does not apply in the second stage of the AAAMP regime. Schedule 3, Part 2 of the [AAAMP Regulations](#), which requires the Agency to show whether the violation was committed with intent or by negligence and, in that case, to demonstrate the nature of the negligence in question, amounts to an analysis of the diligence that the offender demonstrated, or failed to demonstrate, in each case.

[53] In *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, [2017 FCA 45](#) (*Maple Lodge Farms FCA*), at paragraph 78, the Federal Court of Appeal states that evidence of positive conduct may mitigate the administrative penalty in the following terms: "Positive conduct during the violation may go to mitigate the party's penalty, but it cannot exonerate it from its absolute liability."

[54] Indeed, the gradations in Schedule 3, Part 2 of the [AAAMP Regulations](#) are eloquent. Item 1 of that table provides for a gravity value of 0 when the violation is committed without intent or negligence. The value is also 0 if the offender voluntarily discloses the violation and takes the necessary steps to prevent its re-occurrence (item 2). Item 3 provides a gravity value of 3 for a violation committed by a negligent act and item 4 provides a value of 5 if the violation is committed through an intentional act.

[55] Together with paragraph 4(3)(a) of the [AAAMP Act](#), it is clear that, in accordance with the table, an analysis must be made of the nature of the intent or negligence of the offender and that it is possible, further to this analysis, to find that a violation was committed without negligence on the part of the offender. Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects (section 12 of the [Interpretation Act](#), R.S.C. (1985), c. I-21).

[56] With regard to the opposite opinion issued in *A.S. L'Heureux Inc. v. Canada (Canadian Food Inspection Agency)*, [2014 CART 17](#) at paragraph 28, the Tribunal is of the view there is no “legal duty of care” at the stage of determining the administrative monetary penalty, or at the stage of proving that the violation was committed. (Agency’s written submissions, page 5).

[57] A careful reading of the applicable legislative provisions indicates that in this case, the legal duty of care is that set out in paragraph 138(2)(a) of the [Health of Animals Regulations](#), namely not to “load or cause to be loaded... transport or cause to be transported an animal... that cannot be transported without undue suffering...”

[58] Of course, compliance with this duty implies that companies wishing not to commit such a violation must adopt responsible and diligent practices in line with the purpose of the regulations, which is to protect animals and their health. It is indeed one of the purposes sought by the AAAMP absolute liability regime. (*Canada (Attorney General) v. Stanford*, [2014 FCA 234](#), paragraph 59).

[59] It follows from the foregoing that, at the stage of determining the administrative monetary penalty, the Agency must conduct an assessment of the offender’s behaviour so as to show the nature of the offender’s negligence or intent, where applicable. The onus lies with the Agency. It cannot simply assume negligence once a violation has been committed

[60] Proving the violation and determining the resultant administrative monetary penalty are two different stages within a single legal structure. Once proof of the violation has been made out, the offender should not be put back into a situation that it cannot overcome.

[61] The aim of this second stage of the AAAMP regime is precisely to ensure that the administrative monetary penalty imposed takes into account the specific facts of each case. The offender may, as in this case, contest the penalty imposed if it feels it was not negligent and that the Agency did not properly assess its conduct in the circumstances.

[62] The Tribunal is therefore of the opinion that, as the Applicant argues, in the assessment provided under Schedule 3, Part 2 of the [AAAMP Regulations](#) which addresses the analysis of negligence or intent, it may be useful to rely on the guidelines set out by the courts in matters of defences of due diligence to qualify the behaviour of the offender.

[63] Numerous decisions have clarified these guidelines since [Sault Ste-Marie](#). It is not relevant here to provide an exhaustive list since the reasoning underpinning those decisions is not entirely applicable in the context of the AAAMP regime. However, these guidelines can help us in assessing the nature of the offender's negligence as provided for in Schedule 3, Part 2 of the [AAAMP Regulations](#).

[64] In terms of the case law on defences of due diligence, it is now recognized that a company that has taken all the measures a responsible company would have taken in the same circumstances to avoid the violation and has done everything needed to "*ensure the effective operation of the system*" to prevent commission of the offence could be deemed not to have been negligent. ([Sault Ste-Marie](#), page 1331)

[65] The case law establishes that due diligence does not imply a superhuman or perfect behaviour. It means taking the steps and precautions necessary to avoid the alleged damage. (*R. v. Maple Lodge Farms*, [2013 ONCJ 535](#) (*Maple Lodge Farms ON*), paragraphs 363 and 364)

[66] It is not sufficient to act reasonably in the abstract or to exercise due diligence in a general sense. The diligence must relate to the violation in question, not to some broader concept of reasonable behaviour. (*R. v. Rideout*, [2014 NLCA 29 \(CanLII\)](#), paragraphs 12 and 13)

[67] The analysis of the offender's behaviour must therefore be adapted depending on the regulated activity in question and according to the specific circumstances of each case. ([Maple Lodge Farms ON](#), paragraphs 361 and 362).

[68] As well, in the AAAMP regime, evidence of diligent conduct that might allow the offender to avoid a violation being characterized as negligent will be assessed according to the specific circumstances of each case, the type of violation in question, and the agricultural or agri-food sector of activity involved.

[69] The offender's compliance with the applicable standards of the industry in question may be a significant indicator in terms of determining whether it was negligent or not, but the case law provides that it is not necessarily determinative in and of itself. (*E. Grof Livestock Ltd. v. Canada*, [2014 CART 11](#), paragraph 91)

[70] The Applicant submits to the attention of the Tribunal certain criteria that may prove useful in the analysis of whether or not there has been negligence in the transport of animals ([Dépan-Escompte Couche-Tard inc.](#); *Agence du revenu du Québec c. 9141-5315 Québec inc.*, [2017 QCCQ 12233](#)). These criteria are as follows:

1. the presence of clear and appropriate directives communicated to employees through an effective channel of communication;
2. the implementation of systems for enforcing, controlling and monitoring directives and employees;
3. the existence of a specialized training program for staff;
4. the use and maintenance of appropriate equipment;
5. the establishment of an emergency program, if appropriate; and
6. the possibility of graduated administrative penalties to encourage employees to comply with the legislation and directives.

[71] The Tribunal is of the view that these criteria may indeed be useful in qualifying the conduct of an offender, especially since the discussions generally held by Agency representatives with offenders and the content of the questionnaires presented to them, such as those reproduced in Tabs 11 to 14 of the Agency report, echo most of those criteria.

### ***Application of the law to the facts***

[72] In the case before us, the conduct to be assessed is that of the Applicant, identified in Notice of Violation 1516QC0030-1 as the offender, namely a company that has been in the animal transport business for 30 years.

[73] Contrary to the Agency's written submission on page 5, analysing the conduct of the offender does not amount to ruling out the possibility that a company may have committed a violation intentionally or negligently. It is still relevant to analyse the conduct of the employees in question.

[74] For example, gross negligence or wilful misconduct on the part of employees could be considered equivalent to intent on the company's part to commit the violation. (*Finley Transport Limited v. Canada*, [2013 CART 42](#), paragraph 93; *E. Grof Livestock Ltd. v. Canada*, [2014 CART 11](#), paragraph 93)

[75] In this case, the Agency submits that the violation was committed negligently. Now, as explained extensively above, negligence refers to a situation where the Agency can demonstrate that the offender failed to take all of the measures that a responsible company would have taken in the same circumstances to avoid the violation and did not take all reasonable steps to ensure "*the proper operation of the system.*" ([Sault Ste-Marie](#), page 1331)

[76] In the current case, the Agency's demonstration of the Applicant's negligence is based, first, on its evidence regarding the condition of the compromised hog, which was [translation] "*visible to the naked eye*" and could be identified by a reasonable person, and second, on its inference from the facts that there was a [TRANSLATION] "*deficiency in the pre-loading inspection performed by the Applicant.*" (Agency's written submissions, pages 4 and 5)

#### Condition of the hog

[77] Regarding the condition of the hog at the loading stage, the Agency relies essentially on the opinion of Dr. Pelletier, who states that, in light of the hog's condition when it was unloaded and the *ante-mortem* and *post-mortem* examinations she conducted, notably noting the presence of subacute arthritis, [translation] "*it is therefore evident that the animal was limping markedly at the farm... .*" (Animal Transport Inspection Report by Dr. Pelletier, Tab 6, page 2)

[78] No other evidence in the Agency record relates to the hog's condition at the time of loading.

[79] Mr. Olivier Bilodeau of B.O. Élevages (at whose farm the loading in question was carried out) and Mr. L'Heureux, director of the Applicant, were not present at the time of the loading, but indicated that they gave clear instructions to their employees to the effect that the [TRANSLATION] "*lame hogs*" should not be loaded and to contact them in such circumstances. (Tabs 11, 12, 13 and 14)

[80] During their interviews with Agency representatives, Mr. Olivier Bilodeau and Mr. L'Heureux state that they were not informed by their employees of a compromised hog being part of the lot to be loaded at the time of the events. (Tabs 11, 12, 13 and 14)

[81] Mr. Bilodeau indicated to the Agency that he went back to the employee who was present at the time of loading. The employee told him that he had noticed nothing. (Tab 12)

[82] The employees present were not interviewed by the Agency, and the Applicant did not produce affidavits or other evidence pertaining to their version of the facts relating to the condition of the hog at the time of loading.

[83] The Applicant did not produce any additional evidence about the hog's condition being visible to naked eye. It relies on the Agency's file and submits to the Tribunal that the balance of probabilities weighs in favour of the fact that, at the time of loading, the hog [TRANSLATION] "*was moving very well and that its condition deteriorated significantly during the transport*" and that "*it was difficult to detect its condition to the naked eye.*"

[84] Let us remember that what we are dealing with a compromised hog that could be transported provided that special arrangements were made for it. (Agency report, page 8; Agency's written submissions, pages 5 and 6)

[85] In this context, and having analysed the evidence on the record, notably Dr. Pelletier's report, the photos, including the one of the contact wound three centimetres in diameter on the left hind leg, as well as the videos demonstrating the condition of the hog in question at the time of unloading, the Tribunal can only conclude, on a balance of probabilities, that the condition of the hog was [TRANSLATION] "*visible to the naked eye*" at the time of loading, such that it could not have gone unnoticed by the Applicant's employee.

#### Deficiency in the pre-loading inspection

[86] To demonstrate that the Applicant was negligent, the Agency also argues that there was a "*deficiency in the pre-loading inspection performed by the Applicant.*" (Agency's written submissions, pages 4 and 5)

[87] To demonstrate that deficiency, the Agency points only to the fact that Mr. André L'Heureux, director and shareholder of the Applicant, [TRANSLATION] "*confirmed that he did not follow up with his employee after being informed of the facts of this case or even after observing on the receiving slip or the bill of lading that some of his hogs had been held back...*". (Agency's written submissions, pages 4 and 5; Agency report, Tabs 11 and 13)

[88] For its part, the Applicant identifies certain pieces of evidence in the record potentially attesting to diligent conduct on the part of the Applicant: Mr. L'Heureux asserts that he gives clear information to his employees never to load [TRANSLATION] "*lame*" hogs; the Applicant's employees all take the specialized Transport Quality Assurance training as well as training given by Mr. L'Heureux himself; all employees are instructed that they must inform Mr. L'Heureux by telephone if they identify a lame hog, etc. (Agency report, Tabs 11 and 13)

[89] It is true that follow-up with employees after a violation has been committed is one element available to the Agency to demonstrate negligence on the part of the Applicant, but it is not the only one and it cannot, on its own, lead the Tribunal to a finding of negligence.

[90] The quality of the directives given to employees and the means by which they are communicated, the manner in which the company carries out loading at the time of the events, the training given to employees, and the incentives in place to induce employees to comply with the directives are just as important in terms of assessing the quality and seriousness of the mechanism that a company puts in place to prevent violations.

[91] The Agency does not discuss these other elements.

#### ***Conclusion regarding the Applicant's negligence***

[92] The Tribunal notes that the Agency appears to be confusing the constitutive elements of the violation under paragraph 138(2)(a) of the [Health of Animals Regulations](#) with the elements that can demonstrate negligence on the part of the Applicant within the context of such violation, both in its report and in its written submissions.

[93] Commission of the violation does not necessarily entail negligent commission. It is up to the Agency to demonstrate, with specific evidence, that the violation was committed negligently.

[94] It should be remembered that, in an absolute liability regime, *“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.”* ([Doyon](#), paragraph 28)

[95] This circumspection is just as necessary when it comes to assessing the amount of the administrative monetary penalty to be attributed to the violation committed.

[96] Accordingly, after analysing all of the evidence in the record and the arguments of the parties, the Tribunal is of the opinion that the Agency has not met its burden of proof in that it has not demonstrated that the Applicant showed negligence by failing to take all of the measures that a responsible company would have taken in the same circumstances to avoid the violation. A gravity value of 0 must therefore be assessed for the negligence or intent element under Schedule 3, Part 2 of the [AAAMP Regulations](#).

## Question 2: Harm

[97] Part 3 of Schedule 3 of the [AAAMP Regulations](#) identifies three levels of harm arising from a violation and attributes a gravity value to each of them.

[98] If the violation causes or could cause minor harm, the gravity value will be 1. If the violation could cause serious or widespread harm, the gravity value will be 3. Finally, if the violation causes serious or widespread harm, the gravity value will be 5.

[99] In the case before us, the Agency is attributing a gravity value of 5, contending as follows at page 13 of its report:

*[TRANSLATION]*

*In this case, A.S. L’Heureux loaded and transported a hog that was limping and suffering from subacute arthritis in its left hind leg. By such actions, A.S. L’Heureux transported a hog causing undue suffering to the animal because it was transported without special arrangements over a distance of 251 km and approximate travel time of 2 hours and 41 minutes to the slaughterhouse. Based on its condition, the hog was transportable with special arrangements, but none were taken: the hog was not transported locally and directly to the nearest suitable place, it was not loaded last and unloaded first, and finally, it was not segregated from the other hogs. In so doing, A.S. L’Heureux caused serious harm to the animal’s health.*



[100] In its written submissions, the Agency submits to the Tribunal that a situation relating to undue suffering can hardly be associated with minor harm, citing *E. Grof Livestock Ltd. v. Canada*, [2014 CART 11](#) at paragraphs 98 and 99. (Agency's written submissions, pages 5 and 6)

[101] It then continues, noting that:

*[TRANSLATION]*

*... the undue suffering endured by the animal during transport is an essential element of the violation. By deciding not to challenge the substance of the violation, A.S. L'Heureux Inc. has admitted that it inflicted undue suffering on the hog in question by loading it and transporting it on a motor vehicle.*  
(Agency's written submissions, page 6)

[102] Once again, the Tribunal notes some confusion on the part of the Agency between the demonstration that the violation under paragraph 138(2)(a) of the [Health of Animals Regulations](#) has been committed and the assessment of the administrative monetary penalty to be attributed having regard to the specific facts of each case. These are two distinct stages within a single legal structure.

[103] Had Parliament intended for a violation under paragraph 138(2)(a) of the [Health of Animals Regulations](#) to result automatically in the application of Item 2 or 3 of Part 3, Schedule 3 of the [AAAMP Regulations](#), it would have said so clearly.

[104] Instead, Parliament provided for this second stage in the process of determining the penalty, within which the Agency must assess and demonstrate the harm caused or that could have been caused by the violation in question, having regard to the facts and findings specific to each case.

[105] As part of the harm assessment, there are three options available to the Agency to represent the gravity of the harm caused or that could have potentially been caused, including the possibility that the violation caused or could cause minor harm.

[106] Minor harm may have been caused by undue suffering, which means "inappropriate," "unjustifiable" or "unreasonable" suffering ([Doyon](#), paragraph 30). The Tribunal interprets paragraphs 95 to 101 of *E. Grof Livestock Ltd. v. Canada*, [2014 CART 11](#), cited by the Agency, as leaving the door open to that possibility, notably at paragraph 100.

[107] Paragraph 138(2)(a) of the [Health of Animals Regulations](#) covers a range of different situations. It is possible to consider that loading an animal unfit for transport could cause greater harm than the transport of a compromised animal without the necessary precautions having been taken. It is also possible to imagine that transporting a compromised animal without taking the necessary precautions may cause a different level of harm depending on the facts of the case. For example, the death of the hog at the unloading stage would necessarily entail more significant harm than the harm suffered in this case. The same could be true if, for example, this compromised hog had been transported, without special arrangements having been made for it, in conditions of extreme heat or extreme cold.

[108] This is not a matter of downplaying animal suffering—on the contrary. However, the role of the Agency is to assess objectively and demonstrate the harm caused or potentially caused to ensure that the administrative monetary penalty associated with the violation is in line with the facts of the case.

[109] The AAAMP regime is one of absolute liability, which, by definition, operates in draconian ways ([Maple Lodge Farms FCA](#), paragraph 18). This is where the second stage in the legal structure of the AAAMP regime—determining the administrative monetary penalty to be imposed—takes on great importance. The Agency must pay just as much attention to this stage as it does to demonstrating that the violation was committed.

[110] In the present case, as evidence of the harm caused, the Agency revisits the elements of the violation under paragraph 138(2)(a) of the [Health of Animals Regulations](#). It does not demonstrate how the specific conditions of the transport of September 9, 2015, caused serious harm to the hog in question, in comparison to other similar situations. (*0830079 B.C. Ltd. v. Canada (Canadian Food Inspection Agency)*, [2013 CART 34](#), paragraph 56)

[111] As well, having analysed all of the evidence in the file, particularly Dr. Pelletier's report, the photographs and videos of the hog in question after unloading, and in light of the duration of the transport and the fact that we are in the presence of a hog that was in a condition to be transported provided that special measures were taken, the Tribunal finds, on a balance of probabilities, that it is more appropriate to attribute a gravity value of 1 under Schedule 3, Part 3 of the [AAAMP Regulations](#).

### **Question 3: Appropriate penalty amount**

[112] In light of the foregoing, the Tribunal concludes that the administrative monetary penalty in this case was not assessed in accordance with the relevant regulations.

[113] Having analysed the parties' submissions and the evidence on the record, the Tribunal considers that a total gravity value of 6 must be applied, which, under Item 6 of Schedule 2 of the [AAAMP Regulations](#), requires no adjustment to the base administrative monetary penalty of \$6,000 imposed on the Applicant.

## **VI. Order**

[114] Following a review of the parties' written submissions and the evidence on the record, the Tribunal, BY ORDER, determines that the amount of the administrative monetary penalty that the Applicant must pay is \$6,000.

[115] As provided in subsection 15(3) of the [AAAMP Regulations](#), the Applicant shall pay this amount within 30 days after the day on which this decision is notified.

[116] The Tribunal wishes to inform the Applicant that this violation is not a criminal offence. After five years, the Applicant is entitled to apply to the Minister of Agriculture and Agri-Food to have the violation removed from the records, in accordance with section 23 of the [AAAMP Act](#).

Dated at Quebec, Quebec, this 2<sup>nd</sup> day of October, 2018.

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Geneviève Parent  
Member  
Canadian Agricultural Review Tribunal