

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

K1A 0B7

Citation: *Way-Alta Livestock Ltd. v Canadian Food Inspection Agency*, 2019 CART 16

Docket: CART – 1988

BETWEEN:

WAY-ALTA LIVESTOCK LTD.

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Patricia Farnese, Member

**WITH: Ms. Lacey Barkley, representing the Applicant; and
Ms. Jennifer Lee, representing the Respondent**

DECISION DATE: October 15, 2019

1. INTRODUCTION

[1] Way-Alta received a Notice of Violation (NOV) of subsection 138(2)a) of the [Health of Animals Regulations](#) (HAR) and assessed a \$6,000 penalty for causing cattle to unduly suffering during transport. They appealed the NOV and amount of the penalty to the Minister of Agriculture. The Minister declined to withdraw the NOV or adjust the penalty. Way-Alta has now asked that the Tribunal review the Minister's decisions. I have concluded that by failing to take sufficient provisions when transporting compromised animals and by transporting an unfit animal, Way-Alta caused undue suffering.

[2] In deciding that the violation occurred, I find that the animals that are the subject of the NOV are sufficiently identifiable even though the CFIA submissions to the Tribunal have not precisely identified all the animals "in question" as required by subsection 138(2)a) of the [HAR](#). In addition, I find that animals with a body condition score of 2 are compromised and will unduly suffer if transported without sufficient provisions to minimize suffering. Likewise, cattle with a body condition score of 1 are unfit for transport. Any transport of cattle with a body condition score of 1 is a violation of subsection 138(2)a) of the [HAR](#).

[3] I do not agree with the Minister's decision that the undue suffering was the result of Way-Alta's negligence. The CFIA failed to demonstrate that Way-Alta's misunderstanding of best practices in animal transport met the burden required to establish negligence. Therefore, a penalty of \$5,400 is assessed.

2. LEGAL FRAMEWORK

[4] The [Agriculture and Agri-food Administrative Monetary Penalties Act](#) (AAAMP Act) and [Regulations](#) set out a uniform process to enforce and address violations of many laws in the agriculture and agri-food sector. A violation of subsection 138(2)a) of the [HAR](#) is subject to the AAAMP regime. The AAAMP regime contains two steps: (1) a determination that the violation was committed and (2) an assessment of the appropriate penalty. The government must prove both steps on a balance of probabilities.

[5] The AAAMP regime creates absolute liability offences which means that there only a few defences that can be relied upon to avoid the NOV once step one has been proven. Way-Alta did not raise one of the acceptable defences, therefore, the NOV will stand if the Canadian Food Inspection Agency (CFIA) proves that the following seven elements ([Doyon v. AGC¹](#)):

¹ [Doyon v. Canada \(Attorney General\)](#), 2009 FCA 152.

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 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, and any other cause.

[6] If the CFIA proves the 7 elements, the Tribunal must decide the appropriate penalty amount. Where an absolute liability offence is alleged, this second step is important because it allows for the specific facts of the case to be considered. Step two asks whether the accused has any prior violations or convictions, acted with intent or negligence, and contemplates the harm done or could have been done.

3. ISSUES

1. Has the CFIA sufficiently identified the animals alleged to have unduly suffered during transport?
2. Did undue suffer occur during transport?
 - i. How were compromised animals transported?
 - ii. Were unfit animals transported?

4. ANALYSIS

[7] The first three elements of the violation are not in dispute because the parties agree that driver loaded forty-six dairy and beef cows onto a trailer at Way-Alta's request and transported the cattle to Brooks, Alberta. The driver unloaded the cattle at JBS Foods, a slaughtering facility.

1. Has the CFIA sufficiently identified the animals alleged to have unduly suffered during transport?

[8] Yes. The animals that are the subject of the NOV are sufficiently identifiable even though the CFIA submissions to the Tribunal have not precisely identified all the animals “in question”. I was unable to determine the precise number of animals alleged to have unduly suffered because the CFIA staff at JBS Foods did not identify animals by their tag number on either the photos or in their notes submitted into evidence, despite each of these animals bearing a Canadian Cattle Identification Agency (CCIA) RFID tag.

[9] The reference to “animal in question” in elements 1 and 2 raises two issues. First, the reference ensures that a person who receives a NOV is treated fairly. An accused is entitled to know the case they must defend themselves against. Depending on the circumstances, confusion as to which animal is alleged to have suffered can raise procedural fairness questions if this confusion prevents the accused from preparing a defence to the NOV.

[10] In addition, the Tribunal requires enough specificity to be able to assess whether the CFIA has met the burden of proof that a violation has occurred. The [*Doyon*](#) test requires that a causal link be proven between the accused’s transport and undue suffering of an animal. Based on how an animal is alleged to have suffered, the identity of a specific animal may be required to prove the causal link.

[11] In this case, there is no dispute that while waiting to be unloaded at JBS Foods, at least three cattle went down and one cow remained a downer and was euthanized on the truck after the driver was unsuccessful in getting that cow to rise. All first-hand accounts of the cattle’s condition when they arrived at JBS Foods concur that the animals transported by Way-Alta had body condition scores of 2 or 3 and that the body condition scores of the dairy cattle were generally worse than the beef cattle.

[12] In addition, the photos, inspector notes, and witness testimonies provide sufficient evidence for me to conclude that:

- One animal was not loaded and transported because it was deemed unfit.
- At least one cow with a body condition score of 2 was down upon arrival but was able to rise and walk off the trailer.
- One cow was euthanized on the trailer because it was down upon arrival and would not rise after allowed to rest and electrically prodded twice.
- A number of cows sustained minor abrasions during transport from either contact with the floor or walls of the trailer, or from contact with other animals.
- Cattle with body condition scores of 2 were located throughout the trailer.
- At least one cow with a body condition score of 2 displayed evidence of fatigue and pain in the form of an arched back, slow movement and shaking.

- An animal with a body condition score of 2 that was subjected to further inspection after slaughter passed the inspection by the CFIA veterinarian present during unloading.
- One cow was found to be emaciated after slaughter and the carcass condemned.

[13] In this case, the specific identity of the animals is not necessary because the CFIA alleges that the animals transported by Way-Alta were too fatigued due to their poor body condition to either be transported at all or transported without special provisions. Way-Alta did not dispute that some of the animals had a body condition score of 2. They argued that the body condition of these animals was typical of cull cattle and that they moved the animals to the appropriate slaughter facility as quickly and humanely as necessary in the circumstances. Any suffering was not undue as all cattle, and especially old, weak dairies will get fatigued during transport on a hot day.

2. Did undue suffer occur during transport?

[14] The remaining elements require me to decide whether Way-Alta transported either unfit or compromised animals. CFIA policy and industry guidelines outline that an animal's status as unfit or compromised is a key consideration in assessing when an animal has unduly suffered as a result of "infirmity, illness, injury or fatigue, and any other cause."

What is undue suffering?

[15] [Doyon](#) clarifies that a violation will not automatically occur if an animal that is suffering is transported. Suffering animals can be transported provided that the transport does not lead to "undue" suffering. "Undue suffering" is not defined in the legislation. The meaning of "undue" for the purposes of subsection 138(2)a) was defined in [Attorney General of Canada v Porcherie des Cèdres Inc.²](#), as "unjustifiable, unreasonable and inappropriate suffering."

[16] Although not binding, CFIA policy and industry guidelines can help assess whether the cattle unduly suffered during transport. The CFIA has published "Transportation of Animals Program Compromised Animals Policy" to guide decision-making related to animal transport. This policy has informed the Humane Handling Guidelines for Dairy Cattle and the Humane Handling Guidelines for Beef Cattle. These guidelines were developed by the beef and dairy industries and contain best practices in animal transport. Therefore, the policy and guidelines can assist with identifying factors that increase the likelihood that undue suffering will occur and provisions that can be taken to minimize suffering in response.

² [Canada \(Attorney General\) v. Porcherie des Cèdres Inc.](#), 2005 FCA 59

[17] Any transport of unfit animals or transporting compromised animals in manner inconsistent with the policy by Way-Alta likely establishes elements 4 and 5 of the [Doyon](#) test. The policy defines a compromised animal as “an animal with reduced capacity to withstand transportation but where transportation with special provisions will not lead to undue suffering”. Compromised animals can be transported to the “nearest suitable place” for slaughter if special provisions that prevent undue suffering during transport are used. Unfit animals cannot be transported to slaughter because transportation will cause undue suffering even if special provisions are used.

[18] Body condition can be “any other cause” that may cause undue suffering as required in element 6 of the [Doyon](#) test. The policy contains exhaustive lists of conditions that deem animals unfit or compromised. Body condition or fatigue are not included on those lists. The guidelines, however, expressly outline that body condition is a relevant factor for assessing fitness for travel. Emaciated cattle have a body condition score of 1 and are unfit for transport. Cattle with a body condition score of 2 are identified as compromised animals and should be transported directly to the nearest suitable place with special provisions that prevent undue suffering.

[19] Therefore, to answer the question of whether the animals suffered unduly during transport in this case requires that I first decide if any animal was unfit or compromised.

i. Were compromised animals transported?

[20] Yes. The guidelines clearly establish that both dairy and beef cattle with a body condition of 2 are compromised. As explained, elements 4 to 6 of the [Doyon](#) test are established if sufficient provisions were not in place to prevent undue suffering. The guidelines outline that suitable provisions may include loading the animals last and unloading them first, providing segregation from other animals, providing bedding in the trailer, not crowding the animals, and moving animals quickly to humane slaughter. The specific provisions to be used whenever animals with a body condition score of 2 are transported, however, are not explicitly mandated. Rather, transporters are expected to use their judgment to determine what provisions are necessary to prevent undue suffering. Way-Alta asserts that the animals were transported in a suitable trailer by an experienced handler as a quickly as possible to slaughter thereby preventing undue suffering. That one cow was not loaded after it was deemed unfit is evidence that suitability for transport was considered.

[21] I accept the CFIA’s evidence that the Alberta Livestock Permits and the driver’s logbook establish that the cattle were loaded at Tongue Creek Feeders, therefore, JBS Foods was not the nearest place as required for compromised animals. But, that does not end the matter. General interpretive principles outline that each word in the phrase “nearest suitable place” is significant.

[22] The CFIA did not prove that either Cargill or Family Meats was the most suitable place to transport the animals. Way-Alta explained, and the CFIA did not provide any evidence to suggest otherwise, that Cargill does not accept cull cattle. Likewise, no evidence was presented to establish that Family Meats had the capacity to handle the amount of compromised cattle needing slaughter. The overall purpose of requiring animals to be transported to the nearest suitable place is to ensure that any suffering does not become undue as a result of transport being prolonged. The CFIA has the burden of establishing that the Family Meats would have slaughtered the animals more quickly than JBS Foods. They have not met this burden.

[23] Similarly, the CFIA has not established that the cattle unduly suffered as a result of injuries sustained during transport. The CFIA does not dispute that the animals had sufficient space on the trailer and that the trailer was in good condition. I find that any abrasions received by the animals during transport were minor and did not cause the animals to suffer unduly.

[24] With no evidence that sufficient provisions were taken to minimize suffering, however, I find that the cattle with a body condition of 2 unduly suffered during transport as a consequence of their body condition. Witnesses for the CFIA testified that the compromised animals should also have been segregated and loaded last with bedding provided. While the CFIA did not adequately explain how the use of any of these provisions would minimize suffering, they have established on a balance of probabilities that no further provisions were taken to prevent undue suffering. Providing adequate space, a trailer in good condition, an experienced handler, and a quick transport on a hot day are minimum requirements for the transportation of all animals. The policy and guidelines clearly require that additional provisions be taken for compromised animals to prevent undue suffering. That the animals were assessed and loaded as fit for transport by Way-Alta, but when unloaded demonstrated signs of pain, fatigue, and weakness, proving a causal link between their undue suffering and transport as required by element 7 of the [Doyon](#) test.

[25] Therefore, I find that elements 4 to 7 of the [Doyon](#) test have been established. As explained, the policy and guidelines have outlined that cattle with a body condition score of 2 are compromised and that compromised animals will unduly suffer if sufficient provisions to minimize suffering are not taken during transport. When Way-Alta transported compromised animals without taking the additional provisions beyond what is required for the safe transport of all animals, they caused these animals to unduly suffer.

ii. Were unfit animals transported?

[26] Yes. The guidelines provide that emaciated animals have a body condition score of 1 and are unfit for transport. Because emaciation does not appear suddenly, I find that the animal that was condemned for emaciation was unfit for transport.

[27] I do not accept the explanation from the CFIA veterinarian on-site when the load of cattle arrived that he and the other CFIA staff did not see the animal that was subsequently condemned for emaciation during their inspection of the unloading process because of the number of animals being unloaded. It is more likely that a quick visual inspection of the emaciated cow did not distinguish it from the animals with a body condition score of 2. Three CFIA staff inspected these cattle, including one inspector who testified that concerns she has had with previous loads from Way-Alta heightened her scrutiny of this load. Numerous photographs were taken by CFIA staff, the CFIA veterinarian subjected one cow he suspected was unfit for human consumption to further inspection upon slaughter, and each of the CFIA staff prepared notes in anticipation of a potential notice of violation. I am confident that the emaciated animal would have been identified by CFIA staff if possible.

[28] The CFIA's failure to precisely identify the animals they alleged unduly suffered during transport may have been relevant if I had found that the only animal to have unduly suffered was the one condemned after slaughter. Tracking the precise identity of the cattle may have allowed for a closer inspection of the emaciated animal's body condition in the photographs submitted into evidence.

5. TOTAL GRAVITY VALUE ASSESSMENT

[29] Section 5 of the [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (AAAMP Regulations) classifies subsection 138(2)a) of the [HAR](#) as a serious violation that warrants a penalty of \$6,000. The [AAAMP Regulations](#), however, contain a process to adjust the penalty in some cases. The CFIA has the burden of proving that an adjustment to the penalty is justified based on three criteria: prior violations or convictions, intent or negligence, and the harm done or could have been done ([A.S. L'Heureux](#)³). Schedule 3 of the [AAAMP Regulations](#) attaches a numerical score to each of the three criteria. Those scores are totalled to determine the "total gravity value". If an adjustment is required, Schedule 2 the [AAAMP Regulations](#) outlines the percentage the penalty should be increased or decreased based on the total gravity value.

[30] Because Way-Alta has no previous violations or convictions, no adjustment to the penalty is required.

³ [A. S. L'Heureux Inc. v. Canada \(Canadian Food Inspection Agency\)](#), 2018 CART 9

[31] I disagree with the Minister's conclusion that Way-Alta was negligent and find that no adjustment to the penalty is required. Previous violations of this subsection have typically fallen into two categories. The first category involves animals that have perished as a consequence of prolonged exposure to unreasonable temperatures or overcrowding during transport. The second category involves the transport of non-ambulatory or ambulatory animals with injuries that are readily apparent such as open wounds and fractures. Thus, it is not surprising that Way- Alta only consider whether an animal is able to load without assistance or has any observable injuries when determining if cattle are fit for transport.

[32] Moreover, that one animal was deemed unfit and not transported indicates that fitness for transport was considered by Way-Alta. A misunderstanding of best practices in animal transport, especially where poor body condition does not fall within established categories of previous violations, is not negligence. The CFIA has not met the burden required to conclude that Way-Alta was negligent. Thus, no adjustment of the penalty is required.

[33] Finally, the Minister assessed a gravity value of 5 because the actions of Way-Alta caused serious harm to animals. Specifically, the Minister relied on evidence that two cows were euthanized and three to five animals were deemed "downed cows". In fact, only one cow was euthanized and that was the only animal that could accurately be described as a "downed cow" or, more commonly, a downer. A downer is an animal that fails to rise. Witnesses for the Applicant and the Respondent testified that it is not uncommon for even healthy animals to lay down on the trailer when the truck stops during transport, especially on hot days. Therefore, that an animal was down at some point is not sufficient to prove harm. Likewise, the Tribunal has previously held that something more than the fact that an animal cannot rise must be relied upon to prove harm ([Guy D'Anjou v. CFIA](#)⁴).

[34] Nonetheless, I have concluded that Way-Alta's failure to make provisions when transporting animals with a body condition score of 2 caused undue suffering to those animals. Undue suffering, by definition, is serious because it causes unnecessary and unjustified pain to animals. Consequently, a gravity of value of 5 is warranted.

[35] With a total gravity value of 5, the penalty is reduced by 10% resulting in a penalty of \$5,400.

6. ORDER

[36] I find that Way-Alta has committed the violation in Notice 1718WA0181 and must pay the penalty of \$5,400 to the agency within thirty days of being notified of this decision as required by paragraph 15(3) of the [AAAMP Act](#).

⁴ [Guy D'Anjou Inc. v. Canada \(Canadian Food Inspection Agency\)](#), 2015 CART 2

[37] I wish to inform Way-Alta 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 Saskatoon, Saskatchewan, on this 15th day of October 2019.

(Original signed)

Patricia Farnese
Member
Canada Agricultural Review Tribunal