

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

K1A 0B7

Citation: *Waito Bros Inc. v Canada (Canadian Food Inspection Agency)*, 2020 CART 24

Docket: CART-2154

BETWEEN:

WAITO BROS INC.

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Marthanne Robson, Member

**WITH: Mr. Richard Waito, representing the Applicant; and
Mrs. Melissa Gratta, representing the Respondent**

**DECISION September 29, 2020
DATE:**

WRITTEN SUBMISSIONS ONLY

1. OVERVIEW

[1] This is an application under subsection 8 (1) of the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#) (AAAMP Act) to review Notice Of Violation (NOV) #19200N3217 issued to Mr. Richard Waito for transporting an animal and causing it undue suffering contrary to section 138 (2) a) of the [Health of Animals Regulations](#) (HA Regulations).

[2] At issue is whether the animal in question, that had a very large umbilical hernia, was fit for transport and whether it suffered unduly during the journey.

[3] The Canada Food Inspection Agency (Agency) issued a NOV with a \$800 penalty. Mr. Waito requested that the Canada Agricultural Review Tribunal (Tribunal) review the facts of the violation.

[4] The NOV is valid, and Mr. Waito must pay the penalty assessed.

2. LEGAL FRAMEWORK

[5] One of the purposes of the [Health of Animals Act](#) (HA act) and the [HA Regulations](#) is to ensure the humane treatment of animals during transportation. The legislation sets out requirements for transporters to ensure the protection of animals from death, injury or undue suffering due to such factors as poor or inadequate equipment, overcrowding, inadequate ventilation, or undue exposure to weather conditions. It has additional provisions to ensure that compromised animals receive the extra care necessary to avoid undue stress and injury during transportation. In some cases, animals may be too compromised to transport without undue suffering.

[6] The Tribunal has the power to review the facts of a violation upon request.¹

[7] The [AAAMP Regulations](#)² set out administrative monetary penalties for the violation of the [HA Act](#) and [HA Regulations](#). Paragraph 138 (2) a) of the [HA Regulations](#) is a serious violation. The Agency issued the NOV to Mr. Waito as an individual, rather than a business, so the penalty is set at \$800.³

[8] Paragraph 138(2)(a) of the [HA Regulations](#) reads:

¹ [Agriculture and Agri-Food Administrative Monetary Penalties Act, SC, c 40, s 8\(1\) \(1995\)](#) [AAAMP Act].

² [Agriculture and Agri-Food Administrative Monetary Penalties Regulations, SOR 2000-187](#) [AAAMP Regulations].

³ [Ibid](#) at s 5(1).

Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal

(a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey;

[9] In [Doyon](#)⁴, the Federal Court of Appeal (FCA) held that violations under the administrative monetary penalty system should be analysed according to their essential elements, each of which must be proven on a balance of probabilities before an applicant can be found liable⁵. Proving on the balance of probabilities means that it is more likely than not that all the elements of the violation occurred.

[10] The [Doyon](#)⁶ decision established seven essential elements the Agency must prove in order for a person to be found liable for a violation of paragraph 138(2)(a) of the [HA Regulations](#):

1. the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);
2. the animal in question was loaded onto or transported on a railway car, motor vehicle, aircraft or vessel;
3. the cargo loaded or transported was an animal;
4. the animal could not be transported without undue suffering;
5. the animal suffered unduly during the expected journey (“voyage prévu” in French);
6. the animal could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause; and
7. there was a causal link between the transportation, the undue suffering and the animal’s infirmity, illness, injury or fatigue, or any other cause.⁷

[11] The first three elements are not in dispute. Mr. Waito loaded and transported the hog in question (element 1) on a motor vehicle (element 2) and the cargo was an animal (element 3). At issue are the last four elements.

3. BACKGROUND

⁴ [Doyon v. Canada \(Attorney General\)](#), 2009 FCA 152 [*Doyon*].

⁵ [Ibid](#) at paras 20, 28, 42.

⁶ [Supra](#) note 4.

⁷ [Ibid](#) at para 41.

[12] In August 2018, Mr. Waito loaded 29 hogs onto his trailer at his property and transported them to a provincially registered facility, Batchert Meats Inc. (BMI). Mr. Waito unloaded 18 of the hogs. He delivered the remainder to another facility. An Agency Inspector, who had just arrived at BMI, observed the unloading of the last few animals off the trailer. After speaking briefly with the Inspector, Mr. Waito left. The Inspector went into the barn to look at the animals unloaded prior to her arrival. She noted that one hog had a very large umbilical hernia that was about the size of a basketball. The hernia was touching the ground, impeding movement, and had ulcerations on the bottom.

[13] Following a phone call to the office, another inspector and a veterinarian arrived to assist in the assessment of the animal with the hernia. The veterinarian conducted both ante-and post- mortem examinations of the hog. The veterinarian noted there was a large pendulous umbilical hernia about 10 inches in diameter, which rubbed against the hind legs, impeding movement, when the hog was walking. The veterinarian also observed that there were lesions on the underside of the hernia sack caused by the hernia sack touching the floor while the animal walked.

[14] The Agency officials consulted the on-site Ontario Ministry of Agriculture Food and Rural Affairs Meat Hygiene Officer, who ordered the pig euthanized by a BMI employee. According to the Inspector's notes, the Agency does not have the authority to order an animal euthanized.

[15] Industry guidelines⁸ define an animal as unfit for transport when it has a hernia that impedes movement, touches the ground when the animal is standing and/or includes an open skin wound or ulceration. In the opinion of the Agency veterinarian, the animal in question met these criteria. He concluded the hog was unfit for transport and should not have been transported. In his opinion, the hernia caused pain during transportation. As a result, the animal suffered unduly during transportation.

[16] Mr. Waito admitted he was aware one of the hogs had a "rupture" but in his opinion, it in no way inhibited movement. He was aware that if a hernia was touching the ground, the hog was unfit for transport. However, he felt there was nothing wrong with the animals.

[17] The Tribunal recently reviewed facts of an alleged violation of paragraph 138(2)(a) of the *HA Regulations* in *Les Fermes C. Hamelin et Fils Inc.*⁹ In that case the Agency proved that a hog suffered unduly and should not have been transported because it had a hernia which impeded movement.

[18] The Tribunal must also consider whether Mr. Waito has raised any allowable defence.

⁸ *Transportation of Animals Program Compromised Animals Policy*, (5 November 2013), online, : Government of Canada <<https://www.inspection.gc.ca/animal-health/humane-transport/compromised-animals-policy/eng/1360016317589/1360016435110>> [*Policy*].

⁹ *Les Fermes C. Hamelin et Fils Inc. v. Canada (Canadian Food Inspection Agency)*, 2019 CART 4 [*Hamelin*].

4. ISSUES

[19] The issues in this case are:

1. Was the hog fit for transport? (Elements 4 and 6)
2. Did the hog suffer unduly during transportation? (Elements 5 and 7)
3. Did Mr. Waito raise an allowable defence?

5. ANALYSIS

Issue 1: Was the hog fit for transport? (Elements 4 and 6)

[20] The [*Compromised Animals Policy*](#) (*Policy*) published by the Agency provides industry guidance for the humane transport of animals. The *Policy* states:

*An unfit animal is an animal with reduced capacity to withstand transportation and where there is a high risk that transportation will lead to undue suffering. Unfit animals if transported would endure unjustified and unreasonable suffering. Unfit animals may only be transported for veterinary treatment or diagnosis.¹⁰ (*emphasis added*)*

[21] The *Policy* states an animal is unfit for transport if it has a hernia that meets one or more of the following criteria:

- impedes movement (includes conditions in which the hind legs of the animal touches the hernia when the animal is walking);
- is painful on palpation;
- touches the ground when the animal is standing in its natural position, and/or;
- includes an open skin wound, ulceration, or obvious infection.

[22] The Agency's *Policy*, while not binding on the Tribunal, can provide guidance to assess the fitness of an animal for transport.¹¹

[23] The Agency's veterinarian, Dr. Mohan, conducted both ante- and post-mortem examinations of the hog. In his opinion, the hog met at least three of the four policy criteria: the hernia impeded movement, touched the ground and had skin ulcerations. Some lesions had scabs indicating they had occurred prior to loading and transportation a few hours earlier. The Agency's report includes photographs which support Dr. Mohan's assessment. Two Agency inspectors confirmed his observations that one hog had a very large hernia which impeded movement and had lacerations on the bottom.

¹⁰ *Policy*, [*supra*](#) note 8.

¹¹ *Hamelin*, [*supra*](#) note 9 at para 23.

[24] Unfit animals may only be transported for veterinary treatment or diagnosis. In this case, the hogs were transported for processing.

[25] Mr. Waito admitted in an interview with the Agency Inspector that the hog had a belly rupture but that it did not in any way impede movement. Whether or not the hernia impeded the hog's movements, there is evidence that the hernia touched the ground and had ulcerations.

[26] Mr. Waito said he was aware that if a hernia was touching the ground, the hog was unfit for transport. He told the Agency's Inspector that the hog had been on his property for a week prior to transportation. The existence of the scabs on the underside of the hernia indicated that it had been touching the ground prior to transporting the hog. Mr. Waito should have observed this.

[27] I accept the Agency's evidence that the hog had a large belly hernia which touched the ground and that there were ulcerations on the hernia. The condition of the hog met two of the *Policy* criteria for an animal unfit for transport. The Agency proved on a balance of probabilities that on August 27, 2018, the hog was unfit for transport and could not be transported without suffering unduly due to a hernia, proving Elements 4 and 6.

Issue 2: Did the hog suffer unduly during transportation? (Elements 5 and 7)

[28] Even though the Agency proved the hog was unfit for transport, following the [Doyon](#)¹² decision, it must still prove that the animal actually suffered unduly during the expected journey.

[29] In [Porcherie des Cèdres Inc.](#)¹³ the FCA determined that "undue suffering" means unjustified or unreasonable suffering. The Agency must prove on the balance of probabilities that the hog suffered unreasonably and/or without justification when transported.

[30] In Dr. Mohan's opinion, the swinging of the herniated mass during the movements of the hog in transportation result in downward tension on the herniated intestines causing pain. The touching and rubbing of the hernia against the floor while walking on uneven surfaces, on ramps and lying down, caused pain from the rubbing of the existing skin ulcers.

[31] Mr. Waito did not submit any evidence or observations regarding the pain or undue suffering of the hog, or lack thereof, during transportation.

¹² [Supra](#) note 4.

¹³ [Canada \(Attorney General\) v. Porcherie des Cèdres Inc., 2005 FCA 59.](#)

[32] I accept the Agency's evidence that the condition of the hog caused pain during transportation. I conclude that as the hog was unfit for transport, the pain it suffered during the journey was undue in the sense of being unjustified and unreasonable. The undue suffering was as a result of the transportation. The Agency demonstrated a causal link between the transportation, the undue suffering and the animal's infirmity.

[33] The Agency proved on a balance of probabilities Element 5 (the animal suffered unduly during the expected journey) and Element 7 (there was a causal link).

Issue 3: Did Mr. Waito raise an allowable defence?

[34] There are very few allowable defences for causing undue suffering to an animal by transporting it contrary to paragraph 138 (2) (a) of the [HA Regulations](#).¹⁴

[35] In his submissions, Mr. Waito indicated he was concerned about the hot temperature that day. He noted the hogs were not crowded. He was also concerned that a BMI employee euthanized the hog in question. None of those issues are allowable defences.

6. ORDER

[36] I find that Mr. Waito committed the violation in NOV #19200N3217 dated August 27, 2019, contrary to paragraph 138 (2) (a) of the [HA Regulations](#). Mr. Waito must pay the penalty of \$800 to the Agency within forty-five (45) days after the day on which Mr. Waito receives notice of this decision.

[37] I wish to inform Mr. Waito that this violation is not a criminal offence. Five years after the date of service of the NOV, he has the right 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 Ottawa, Ontario on this 29th day of September 2020

(Original signed)

Marthanne Robson
Member

¹⁴ *AAAMP Act*, [supra](#) note 1, *S 18(1), 18 (2)*.

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