



Citation: *Luckhart Transport Ltd. v Canadian Food Inspection Agency*, 2020 CART 23

Docket: CART – 1984

LUCKHART TRANSPORT LTD.

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Luc Bélanger, Chairperson

WITH: Ms. Angela Hurst representing the Applicant; and
Ms. Wendy Right representing the Respondent

**DECISION
DATE:** September 18, 2020

**PLACE OF
HEARING:** Waterloo, ON

1. OVERVIEW

[1] On April 27, 2018, the Canadian Food Inspection Agency (Agency) issued a Notice of Violation (NOV) with Penalty of \$7,800 to *Luckhart Transport Ltd.* (Luckhart) alleging it unloaded, or caused to be unloaded, a hog in a way **likely** to cause injury or undue suffering to it, contrary to subsection 139(2) of the [Health of Animals Regulation](#) (*HA Regulation*).

[2] The issue is whether the Agency has proven all the four essential elements of the violation to establish the hog suffered unduly during unloading.

[3] On March 13, 2017, a truck from Luckhart delivered 184 hogs to an Olymel slaughterhouse located in Saint-Esprit, Quebec. Dr. Daoust, Acting Veterinarian in Chief for the Agency, was present at the slaughterhouse. During the unloading she noticed an injured hog in the middle of the floor of the trailer's first compartment. Luckhart's driver used his legs to unload the injured hog by pushing it several times.

[4] The injured hog was euthanized by a slaughterhouse employee. A post-mortem examination of the hog, completed by Dr. Shirani, revealed that the hog had recent fractures on both hips. In Dr. Daoust's opinion, these injuries were consistent with her observation of the injured hog during her ante-mortem inspection. Accordingly, she completed an Inspector non-compliance report for a contravention of paragraph 139(2) of the [HA Regulations](#) for unloading, or causing to be unloaded, a hog in a way likely to cause injury or undue suffering. The investigation into the facts of the Inspector non-compliance report was assigned to Investigator Melchiorre.

[5] On April 27, 2018, Investigator Melchiorre's review resulted in the issuance of NOV #1718QC0013 with penalty in the amount of \$7,800 against Luckhart.

[6] For the following reasons, I find that the Agency met its burden of establishing the four essential elements of a violation under paragraph 139(2) of the [HA Regulations](#). As a result, I find Luckhart committed the violation and is liable for the \$7800 penalty.

2. BACKGROUND

I. a. General Facts

[7] On March 13, 2017, a truck from Luckhart delivered 184 hogs to an Olymel slaughterhouse located in Saint-Esprit Quebec. The estimated distance between the breeder's farm located in Clinton, Ontario and the abattoir is approximately 750 km.

[8] Dr. Daoust, observed the unloading. She alleges that upon noticing a wounded hog in the middle of the floor of the trailer's first compartment, she shouted at the driver to stop the unloading to no avail. Dr. Daoust claims the driver continued to unload the second-floor hogs over the injured hog. At that point, she left the loading dock to retrieve her camera. Upon her return, the wounded hog was on the dock in the doorway of the trailer. After shouting at the driver once more, he came over and discussed the situation.

[9] Dr. Daoust explained to Luckhart's driver that when there is an injured hog, the unloading must be stopped and an Agency veterinarian must be called. At that point she requested that the unloading be stopped to allow a slaughterhouse employee to stun the hog since it was now on the unloading dock.

[10] Dr. Shirani completed a postmortem examination of the hog. The examination revealed the hog had recent fractures on both hips.

[11] Dr. Daoust reviewed the slaughterhouse video surveillance. It showed the driver unloading the injured hog by pushing it several times with his legs until he was finally off the trailer.

[12] On April 20, 2017, Dr. Daoust sent Luckhart and their driver a *Notice of Potential Enforcement Action* for contravening to paragraph 139(2) of the [HA Regulations](#). It alleges that Luckhart unloaded, or causing to be unloaded, a hog in a way likely to cause injury or undue suffering. Dr. Daoust detailed her observation by completing an Inspector non-compliance report. Investigator Melchiorre investigated the facts of the inspector non-compliance report.

[13] On March 9, 2018, Investigator Melchiorre contacted Luckhart and sent them a copy of the pictures and the video taken in the course of the inspection in order to obtain their version of events.

[14] On March 22, 2018, Luckhart responded by stating the driver used his legs in a pushing motion to assist the pig in maintaining its momentum to get off the truck where it could be euthanized. It further stated that the two options established by Agency's *Compromised Animals Policy (Policy)* to deal with non-ambulatory animals, namely euthanize on the truck are not available at that particular Olymel plant. Lastly, Luckhart explained it is against their company policy for drivers to carry weapons inside their trucks and requiring them to euthanize an animal without proper training would go against the legislation.

[15] On April 27, 2018, Mr. Melchiorre's issued Notice of Violation #1718QC0013 with a \$7,800 penalty against Luckhart.

II. b. Procedural History and Orders

[16] On May 30, 2018, the Canada Agricultural Review Tribunal (Tribunal) received the Applicant's request for review of the Notice of Violation (NOV) # 1718QC0013.

[17] On July 12, 2018, the Tribunal found Luckhart's request for review admissible.

[18] On November 14, 2019, the Tribunal held a mandatory Case Management Conference Call (CMCC) to discuss the hearing process, the role of the Tribunal and encouraged the parties to submit an *Agreed Statement of Facts*, an *Agreed List of Documents*, a *Witness List* and a *Joint Hearing and Witness Plan*. The parties were also invited to submit any preliminary matters.

[19] On November 29, 2019, Luckhart requested that the NOV be dismissed because their right to be tried within a reasonable time, pursuant to section 11(b) of the [Canadian Charter of Rights and Freedom](#) (*Charter*) was violated. Luckhart relied most notably on the [Jordan](#)¹ decision from the Supreme Court of Canada (SCC) to request that the matter be dismissed because of the 35 months it took between the events which led to the issuance of the NOV and setting the matter for a hearing was unreasonable.

[20] By order dated December 12, 2019, I gave the parties until January 24, 2020, to provide an agreed *Joint Hearing and Witness Plan*. I also gave the Respondent until January 24, 2020, to provide their response to Luckhart's request to have the NOV dismissed.

[21] On January 24, 2020, the Tribunal received the required documents, including the Respondent's response to the Luckhart's [Charter](#) argument.

[22] In an **ORDER** dated February 21, 2020, after carefully reviewing the parties' submissions, I dismissed Luckhart's request to have the matter dismissed on the basis that their [Charter](#) rights under section 11(b) were breached. The **ORDER** further confirmed that the hearing would proceed on March 10-12, 2020.

III. c. Legal Framework

[23] The request for review in this matter was made under paragraph 9(2)(c) the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#) (*AAAMP Act*). The Tribunal must undertake an examination of the facts to determine whether an applicant committed the violation. If a violation is found to have occurred, pursuant to subsection paragraph 14(1)(b) of the [AAAMP Act](#), the Tribunal must examine whether the penalty was established in accordance with the regulations and, if not, set the correct amount.

[24] In [Doyon](#)², the Federal Court of Appeal held that violations under the administrative monetary penalty system should be analyzed in accordance with their essential elements. Each of these elements must be proven on a balance of probabilities before an applicant can be found liable.³ The Agency bears this burden pursuant to section 19 of the [AAAMP Act](#).

¹ *R v Jordan*, [2016] 1 SCR 631.

² *Doyon v. Canada (Attorney General)*, 2009 FCA 152 [*Doyon*].

³ *Ibid* at paras 28, 42.

[25] The first step of the analysis consists of outlining the essential elements of a violation of subsection 139(2) of the [HA Regulations](#), which reads as follows: “No person shall load or unload, or cause to be loaded or unloaded, an animal in a way likely to cause injury or undue suffering to it.”

[26] The Tribunal has previously determined in [Transport Robert Laplante et Fils Inc.](#)⁴, that in order for an applicant to be held responsible for a violation of subsection 139(2) of the [HA Regulations](#), the Agency must establish on the balance of probabilities that:

- Element 1 – that cargo was loaded or unloaded;
- Element 2 – that the cargo loaded or transported was an animal;
- Element 3 – that the loading or unloading of the animal caused the animal’s injury or caused it to suffer unduly; and
- Element 4 – that there was a causal link between the loading or unloading, the animal’s injury or undue suffering, and the applicant.

[27] Accordingly, the Tribunal must act with the greatest prudence in its analyzing the evidence and applying the essential elements of the violation to the evidence. My role as a decision maker is to be circumspect in managing and analyzing the evidence in relation to the four essential elements for a violation of subsection 139(2) of the [HA Regulations](#).

3. ISSUE

[28] Has the Agency proven the four essential elements of the violation to establish the hog suffered unduly during unloading?

[29] In the Affirmative, was the penalty established in accordance with the regulations?

4. ANALYSIS

I. a) Has the Agency proven all the essential elements of the violation under subsection 139(2) of the [HA Regulations](#)?

Elements 1 & 2 – An animal was unloaded

[30] Element 1 and 2 of the violation are not in dispute I rely on the *Agreed Statement of Facts* submitted by the parties which establishes that the hog was transported by Luckhart from the breeder’s farm located in Clinton, Ontario and unloaded at Olymel’s slaughterhouse. Accordingly, the Agency has established these elements of the violation.

⁴ [Transport Robert Laplante et Fils Inc. v. Canada \(CFIA\), 2010 CART 5](#) at para 13.

Element 3 – the loading or unloading of the animal caused the animal’s injury or caused it to suffer unduly

[31] The meaning of “undue” suffering for the purposes of subsection 138(2)a) was defined in [Porcherie des Cèdres Inc](#), as “unjustifiable, unreasonable and inappropriate suffering.”⁵ Accordingly, the Agency must prove on the balance of probabilities that the hog suffered unreasonably and/or without justification or was injured while being unloaded.

[32] In this case both parties relied on the Agency’s *Policy* in establishing their respective position. It is important to know that the Tribunal has already stated it is not bound by the Agency’s *Policy*, nonetheless it can be used to help guide the analysis.⁶

Agency’s position

[33] The Agency argued the *Policy* provides it is forbidden to move animals from other compartments into the compartment of a downer animal unless no alternative exists and the animal is adequately protected under the supervision of an Agency inspector. It contends Luckhart’s driver breached these requirements when hogs were unloaded over the injured hog and when it was pushed off the trailer without being euthanized.

[34] The Agency also argued the Tribunal held in [Eric Desjardins](#)⁷ that moving a non-ambulatory animal causes undue suffering as set down by the FCA in [Porcherie des Cèdres Inc](#)⁸. It claims the evidence demonstrated the hog had hip fractures and the manner in which the driver unloaded the hog caused it pain and suffering.

[35] At the hearing Dr. Daoust confirmed she shouted at the driver three times to stop the hogs from being unloaded over the injured hog in the trailer’s first compartment to no avail. She stated that when she came back from her office after retrieving her camera, the injured hog was on the dock. She reiterated that the post-mortem examination’s finding that the hog hips were fractured was consistent of her observation during the unloading. Dr. Daoust clearly explained that in this situation, the unloading should have been stopped and the driver should have used the stun gun available at the Olymel slaughterhouse instead of pushing the hog off the trailer. In her opinion, pushing the hog off the trailer in the manner Luckhart’s driver did caused the hog pain and suffering.

[36] Dr. Daoust’s testimony was complete and precise. She observed the hog downed in the trailer while Luckhart’s driver unloaded other hogs over it. I give her testimony high probative value.

⁵ [Canada \(Attorney General\) v Porcherie des Cèdres Inc, 2005 FCA 59](#) at para 26.

⁶ [L. Bilodeau et Fils Ltd. and Patrice Guillemette v. Canada \(Canadian Food Inspection Agency\), 2015 CART 22](#). (confirmed by the FCA in [Canada \(Attorney General\) v. L. Bilodeau et Fils Ltée, 2017 FCA 5](#)).

⁷ [Eric Desjardins v. Canada \(CFIA\), 2009 CART 60337](#).

⁸ [Supra](#) note 5.

Luckhart's position

[37] Luckhart explained that it is against their company policy for drivers to carry weapons inside their trucks and requiring them to euthanize an animal without proper training would go against the legislation. They argued that given their policy and the fact that Olymel employees would not enter the trailer to euthanize the hog, the driver had no choice but to unload the injured hog.

[38] Luckhart also explained their driver was compromised both physically and mentally by a prior experience at the same Olymel slaughterhouse. During that incident, he was instructed to euthanize a non-ambulatory hog on his trailer with a gun which took three tries. Therefore, when the situation presented itself again on March 13, 2017, the driver decided to help the hog get off the trailer in order to minimize its suffering as he felt that euthanizing animals with a gun was not humane.

[39] Luckhart stated they take pride in using measures to ensure the well-being of the animals under their care. Amongst other things, Luckhart ordered new trailers to ensure more humane transportation for animals. In addition, Luckhart's representative runs an animal shelter and sits on various boards to provide advice on improving the industries' guidelines for the humane transport of animals. Lastly, Luckhart explained that in order to respect their company's policy, they no longer bring animals to this particular Olymel slaughterhouse.

[40] I do not doubt Luckhart takes the necessary measures and prides itself in ensuring the well-being of the animals. Similarly, I accept that Luckhart's driver believed that unloading the hog would minimize its suffering. However, the question is not subjective – it's whether the evidence demonstrates the unloading of the hog caused it to suffer unduly. In this instance, the Agency's evidence establishes the hog, which had fractures on both hips, suffered unduly by being pushed off the trailer by the driver.

Element 4 – There was a causal link between the unloading, the hog's injury or undue suffering, and the applicant.

[41] In this case, the link is quite evident. The hog was lying on the trailer floor with two fractured hips. Nevertheless Luckhart's driver decided to push the hog off the trailer with his legs in order for it to be euthanized by a slaughterhouse employee. It is the driver's decision to unload the hog in such a manner that caused the hog to suffer unduly while being unloaded.

II. b) Did Luckhart raise a permissible defence?

[42] Violations issued pursuant to the [AAAMP Act](#) are absolute liability in nature, meaning that due diligence and mistake of fact defences are not available to applicants.⁹ As for the permissible defenses, subsection 18(2) of the [AAAMP Act](#) states the following: *“Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.”*

[43] In practice, very few common law defenses will be applicable. However, those which have been explicitly recognized by the Tribunal are necessity¹⁰, automatism¹¹ and officially induced error of law.¹²

[44] Luckhart argued the defense of necessity applied because the driver had no choice but to push the hog of the trailer because (i) their company policy does not allow drivers to carry weapons and (ii) the Olymel slaughterhouse does not allow their employees to go on trailers to euthanize or stun compromised animals.

[45] The Supreme Court of Canada specified in *Perka* there are three requirements to the defence of necessity: “First, there is the requirement of imminent peril or danger. Second, the Applicant must have no reasonable legal alternative to the course of action that was undertaken. Third, there must be proportionality between the harm inflicted and the harm avoided.”¹³

[46] In this case, none of those requirements are met; there was no imminent danger, Luckhart’s driver could have used one of the guns available at the Olymel slaughterhouse and there is no evidence to show harm was avoided.

[47] Luckhart has failed to raise a permissible defence or overcome the Agency’s evidence. As a result, the Agency has proven on a balance of probabilities, all the elements of a violation of subsection 139(2) of the [HA Regulations](#).

⁹ *Ibid* at para 11; see also [AAAMP Act](#), SC 1995 c40, subsection 18(1).

¹⁰ See [Maple Lodge Farms Ltd v Canada \(CFIA\)](#), RTA n° 60291, RTA n° 60295, RTA n° 60296, and RTA n° 60297.

¹¹ See [Klevtsov v Canada \(MPSEP\)](#), 2017 CART 10 [Klevtsov].

¹² See [Shar Kare Feeds Limited v Canada \(CFIA\)](#), 2013 CART 15, at paras 38-39; [Guy D’Anjou inc v Canada \(CFIA\)](#), 2015 CART 2 at para 28.

¹³ [Perka v. The Queen](#), [1984] 2 SCR 232, 1984.

III. c) Was the penalty established in accordance with the regulations?

[48] Section 5 of the [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (AAAMP Regulations) classifies subsection 139(2) of the [HA Regulations](#) 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 Agency 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 Inc.](#)).¹⁴ A numerical score is associated with each of the three criteria. Those scores are totaled to determine whether the penalty should be increased or decreased based on the total gravity value.

[49] During its investigation, the Agency assessed a “total gravity value” of 13, which, in accordance with Schedule 2, section 7 of the [AAAMP Regulations](#), adds 30% to the minimum fine of \$6,000. With regards to the assessment of the total gravity value the Agency submitted the following:

- History: Luckhart had 3 prior violation of paragraph 139(2) of the [HA Regulations](#), as such a gravity level of 5 was assessed by the Agency;
- Intent or Negligence: The Agency submits that the violation was committed through a negligent act. It asserts that the driver’s action of pushing the non-ambulatory hog off the trailer disregarded the fact that unloading a hog in this state posed a risk it would suffer unduly. The Agency further argues that Luckhart failed in its obligation to provide its drivers with proper tools or training to deal with non-ambulatory animals in accordance with the *Policy*. Accordingly, a gravity level of 3 was assessed by the Agency; and
- Harm: The Agency submits the hog, because of its fractures and his level of pain, was in no state to move on its own, yet alone be pushed and trampled. Hence a gravity level of 5 was assessed by the Agency.

The first criterion involves the history of the offender

[50] Based on the fact Luckhart had 3 prior violations in the previous 5 years, the Agency assessed a gravity value of 5 based on the first criteria. Under Schedule 3, Part 1, section 2 of the [AAAMP Regulations](#), more than one previous violation within the past five years results in a gravity value of 5.

[51] In the circumstances, I find that the Agency properly assessed this gravity value.

¹⁴ [A. S. L'Heureux Inc. v Canada \(Canadian Food Inspection Agency\), 2018 CART 9.](#)

The second criterion involves the nature of the intent or the extent of negligence in committing the violation

[52] In assessing a gravity value of 3 for the second criterion, the Agency was required to show that the violation had been committed intentionally or by negligence as established in [A. S. L'Heureux Inc.](#)¹⁵ I must therefore conduct an analysis of whether the Agency proved there was intent on Luckhart's part or that it failed to demonstrate diligence in the particular circumstance which led to the insulation of the violation.

[53] The evidence on file reveals the following;

- Luckhart is aware of the requirement of the legislation and the Agency's *Compromised Animal Policy* in dealing with a non-ambulatory animal on their trailer;
- Luckhart has a company policy which prevents its drivers from carrying any weapons;
- Luckhart understood that Olymel employees are not allowed to enter the trailers in order to stun non-ambulatory animals; and
- Luckhart's driver was well aware that unloading non-ambulatory hog on the plant's dock would result in the animal being stunned by an Olymel employee

[54] Luckhart is entitled to create its own internal policies. However in making so, it must be diligent in ensuring their policies do not result in putting their drivers in situations where an animal may unduly suffer. I find that Luckhart was not diligent by having a driver who is not equipped or trained to euthanize an animal on the trailer to a slaughterhouse whose employees are not allowed to do so either.

[55] Accordingly, in these particular circumstances, I find that the Agency has properly assessed the gravity value for this criterion.

The third criterion requires an evaluation of the gravity of the harm that was caused or could be caused by the violation

[56] Given the Agency assessed a value of 5 for this criterion, I must determine whether it established the violation cause: a) serious or widespread harm to human, animal or plant health or the environment; b) serious or widespread harm to any person as a result of false, misleading or deceptive practices; or c) serious monetary losses to any person.¹⁶

[57] Again Dr. Daoust's compelling testimony and the post-mortem examination of the hog leaves no doubt in my mind that the violation caused it serious harm. I find that the Agency properly assessed the gravity value for this criterion.

[58] In these circumstances, I find the Agency established the penalty of \$7,800 in accordance with the regulations.

¹⁵ *Ibid* at paras 52, 55 and 59.

¹⁶ *AAAMP Regulations*, Schedule 3, Part 3, section 3.

5. ORDER

[59] I find that Luckhart committed the violation in # 1718QC0013, dated April 27, 2018, and must pay the penalty of \$7,800 to the Canadian Food Inspection Agency within thirty (30) days after the day on which it receives this decision.

[60] I wish to inform Luckhart that this violation is not a criminal offence. Five years after the date on which the penalty is paid, it is entitled to apply to the Minister to have the violation removed from the records, in accordance with section 23 of the [AAAMP Act](#).

Dated at Ottawa, Ontario, on this 18th day of September 2020.

(Original signed)

Luc Bélanger
Chairperson
Canada Agricultural Review Tribunal