



Citation: *C.I. Hishon Transport Inc. v Canadian Food Inspection Agency, 2021 CART 16*

DOCKET: CART-1963

BETWEEN:

C.I. HISHON TRANSPORT INC.

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Luc Bélanger, Chairperson

**WITH: Mr. William James Weir, representing the Applicant; and
Ms. Haniya B. Sheikh, representing the Respondent**

DECISION DATE: June 16, 2021

**PLACE OF
HEARING: Guelph, ON and via virtual hearing**

1. OVERVIEW

[1] This is an application pursuant to subsection 9(2)c) of the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#) (AAAMP Act) for a review of a Notice of Violation (Notice) issued against C.I. Hishon Transport Inc. (Hishon Transport) for transporting or causing to be transported hogs in an overcrowded conveyance contrary to subsection 140(2) of the [Health of Animals Regulations](#) (HA Regulations).

[2] The issue is whether Hishon Transport transported or caused the transportation of hogs in an overcrowded conveyance.

[3] For the following reasons, I find that Hishon Transport violated subsection 140(2) of the [HA Regulations](#). The Canadian Food Inspection Agency (Agency) has demonstrated a causal link between Hishon Transport and the transport, the crowding, the actual injury and undue suffering of at least seven hogs. A permissible defence under the [AAAMP Act](#) was not raised in this case. As a result, the Agency established on the balance of probabilities that Hishon Transport committed the violation.

2. LEGAL FRAMEWORK

[4] The agency issuing the Notice must prove on the balance of probabilities all the essential elements of the violation. If all the elements are proven, the Canada Agricultural Review Tribunal (Tribunal) considers whether the applicant has raised a permissible defence. Violations under this system are absolute liability offences, meaning there are very few allowable defences. The Federal Court of Appeal in the [Doyon](#)¹ decision described this system of violations and penalties as draconian and highly punitive. Due diligence, I did my best, mistake of fact and I did not know, are not permissible defences. If the applicant does not establish a permissible defence, the Tribunal considers whether the penalty was imposed in accordance with the law.²

[5] The first step of the analysis is to outline the essential elements of a violation under subsection 140(2) of the [HA Regulations](#) which reads as follows:

No person shall transport or cause to be transported any animal in any railway car, motor vehicle, aircraft, vessel, crate or container that is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.

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

² [Agriculture and Agri-Food Administrative Monetary Penalties Act, SC 1995 c40](#), s 18(1) [AAAMP Act].

[6] The Tribunal has previously determined in [*Transport Eugène Nadeau Inc.*³](#), that in order for an applicant to be held responsible for a violation of subsection 140(2) of the [*HA Regulations*](#), the Agency must establish on the balance of probabilities that :

1. an animal was transported in a truck, trailer or compartment on the trailer;
2. the truck, trailer or compartment on the trailer was crowded;
3. the crowding in the trailer was to such an extent as to be likely to cause injury or undue suffering to any animal contained herein; and
4. there was a causal link between the loading, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and the Applicant.⁴

[7] Accordingly, my role as a decision maker is to be circumspect in managing and analyzing the evidence in relation to the essential elements for a violation of subsection 140(2) of the [*HA Regulations*](#).

3. ISSUES

[8] The Tribunal must address the following issues:

- a. Has the Agency proven all the essential elements of the violation under subsection 140(2) of the [*HA Regulations*](#)?
- b. Did Hishon Transport raise a permissible defence?
- c. If the essential elements were proven and no permissible defence was raised, the Tribunal must determine whether the penalty was established in accordance with the regulations.

4. ANALYSIS

I. General Facts

[9] On July 13, 2015, 211 hogs were loaded into a trailer owned and operated by Hishon Transport from three different farms located in relative proximity to each other in western Ontario. The load then made its 13-hour journey of about 725 km to the Olymel Slaughterhouse facility in Saint-Esprit, Quebec.

³ [*Transport Eugène Nadeau inc. v. Canada \(Canadian Food Inspection Agency\)*, 2017 CART 16](#) at para 22 [*Transport Eugène Nadeau*].

⁴ [*Transport Robert Laplante & Fils Inc. v. Canada \(Canadian Food Inspection Agency\)*, 2016 CART 27](#) [Transport Robert Laplante] at para 12 and [*Transport Eugène Nadeau*](#) at para 22.

[10] Upon the arrival of the load, the veterinarian in charge, Dr. Perreault, informed veterinary inspector, Dr. Branislav, and Inspector Lemay of the presence of several deaths in the trailer, as well as two hogs in respiratory distress. The rear compartment, which held those hogs, was already unloaded when Dr. Branislav made his observations and report. At that point, one hog had to be euthanized for humanitarian reasons. There were no dead hogs or hogs in respiratory distress in the other compartments of the trailer.

[11] Dr. Branislav examined the load density and trailer capacity, taking the weather conditions into account. He concluded the compartment was substantially overloaded. The normal load capacity for the rear compartment is 26.1 kg per square foot or 29.5 hogs with live weight of 125 kg. Dr. Branislav assessed that the compartment held 35 hogs of an average of 125 kg each or 31 kg per square foot.

[12] Upon examination of the dead hogs, Dr. Branislav found that they showed signs of asphyxiation and suffocation, as well as of cyanosis (discolouration caused by deoxygenation). Dr. Branislav concluded that the combination of the lack of adequate ventilation caused by overcrowding, the summer temperature (19-24°C), and the length of the journey (13 hours) caused the deaths of the animals. Additionally, the inspection and post-mortem examination showed no disease to explain the 3.31% mortality rate.

[13] Dr. Branislav prepared an Inspector's Non-Compliance Report which was forwarded to the Enforcement and Investigation Services to review the alleged violation under section 140 of the [HA Regulations](#). The investigation into the facts of the Inspector non-compliance report was assigned to Investigator Charbonneau.

[14] On April 27, 2018, Investigator Charbonneau's review resulted in the issuance of Notice #1516QC0041 with a penalty in the amount of \$7,800 against Hishon Transport.

II. Has the Agency proven all the essential elements of the violation under subsection 140(2) of the [HA Regulations](#)?

[15] According to the *Agreed Statement of Facts* jointly submitted by the parties, element 1 and element 3 are uncontested. The parties submitted that the animals were transported in a truck, trailer or compartment on the trailer owned by Hishon Transport. Furthermore, it is agreed by the parties that the crowding in the trailer was to such an extent as to be likely to cause injury or undue suffering to any animal contained herein. Therefore, the questions we must answer are whether the Agency established that the hog trailer or one of its compartments was crowded, which is element 2, and for element 4, whether there was a causal link between the crowding, the injuries or undue suffering sustained by hogs and Hishon Transport.

Element 2 – the truck, trailer or compartment on the trailer was crowded

[16] The first issue is to determine whether compartment “J”, which contained 35 hogs, amongst which seven were found dead and two were in respiratory distress, was crowded. As explained and recently reiterated by the Tribunal in [*Transport Robert Laplante & Fils Inc.*](#) “[o]vercrowding remains a question of fact, to which various codes or standards may be referred to in support, but which ultimately becomes a determination based on the particular circumstances”.⁵

[17] Hishon Transport claims the hogs were properly distributed across the compartments during loading. It argues that the hogs may have moved from one compartment to another during the trip by falling or because of the doors between compartments accidentally opened. On that point, CFIA Investigator Charbonneau testified that Mr. Laverty, Hishon Transport’s driver, stated that hogs in compartment “G” (the adjacent compartment) may have “jumped” to compartment “J”. Similarly, when questioned by Investigator Charbonneau, Mr. Ossendryver, president of Hishon Transport, claimed that hogs could have fallen from the compartments above.

[18] The Agency contends that compartment “J” of the trailer was crowded well beyond the established loading density for transport in the weather conditions of that day. The evidence submitted by the Agency shows the weather was hot - the average temperature during loading and the journey was above 24 degrees Celsius. Dr. Branislav calculated the maximum loading density based on the surface area of compartment “J” and the minimum space required per hog as outline in the *Recommended Code of Practice for the Care and Handling of Farm Animals*. He determined that the maximum loading density for the compartment is 29 hogs in cool weather. Additionally, Dr. Branislav testified that section 8.6.16 of the *Code of Practice for the care and handling of farm animals - Transportation* recommends that dividers be used so that no more than 30 market hogs are held in any section of a trailer during transport.

[19] The Agency submitted evidence to demonstrate that hogs were not good “jumpers”. Dr. Branislav also testified that the doors of all the upper compartments and the adjacent compartment “G” were closed when the trailer arrived at the slaughterhouse. The Agency noted that the post-mortem examination of the hogs found in compartment “J” revealed there were no signs of bruising or fractures. This supports a finding that the hogs did not fall from the compartment above.

⁵ [*Transport Robert Laplante, supra note 3*](#) at para 27.

[20] Even if the hogs were properly loaded by Hishon Transport and moved between compartments during transport, the fact is that 35 hogs were found in compartment “J” when the trailer arrived at the slaughterhouse. The arguments and evidence of Hishon Transport do not contradict the Agency’s evidence that compartment “J” was overcrowded. In fact, Hishon Transport’s own Market Hog Loading Chart for its drivers shows that compartment “J” should have a maximum of 28 hogs when the temperature is above 24 degrees Celsius and 29 hogs when it’s between 15 and 23 degrees Celsius.

[21] I find the Agency has established on the balance of probabilities the second element for the violation under subsection 140(2) of the [HA Regulations](#). Compartment “J” contained 35 hogs, but should only have contained a maximum of 29 hogs based on the guidelines found in the *Recommended Code of Practice for the Care and Handling of Farm Animal* and by Hishon Transport’s own loading recommendation for its drivers. In these circumstances, based on the duration of the transportation and the recorded temperature en route to the slaughterhouse, I find that compartment “J” was overcrowded.

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

[22] In this case, the link is quite evident. Seven out of the 35 hogs in compartment “J” were found dead lying on the trailer floor, two hogs were in respiratory distress and one had to be euthanized for humanitarian reasons. The examination of dead hogs performed by Dr. Branislav revealed there were signs of asphyxia and suffocation as well as cyanosis in the ears, flanks, abdominal regions as well as the limbs. Dr. Branislav testified that the death of the hogs was the result of asphyxia and suffocation because of a lack of ventilation due to crowding. Dr. Branislav also confirmed the post-mortem examination performed on two hogs had no pre-existing conditions which could justify the injuries they sustained.

[23] The evidence showed a causal link between the transport, the crowding (which exceeded the recommended industry limits and Hishon Transport’s own Market Hog Loading recommendation to its drivers by 6 hogs), the actual death of seven hogs in the load. These injuries all occurred while the load was under the control of Hishon Transport and its employee.

[24] Based on the above, I find the Agency has proven on a balance of probabilities all the essential elements of the violation under subsection 140(2) of the [HA Regulations](#). I must now consider whether Hishon Transport has established a permissible defence.

III. Did Hishon Transport raise a permissible defence?

[25] 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.⁶ As for the permissible defences, 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.”*

[26] In practice, very few common law defences apply. Those which have been explicitly recognized by the Tribunal are necessity⁷, automatism⁸ and officially induced error of law.⁹

[27] Hishon Transport maintains that the hogs were properly distributed across the compartments during loading. It explained that since the incident they installed J-hooks to reduce or eliminate the opening and closing of gates between compartments. Although, this is commendable, it only illustrates that Hishon Transport is acting diligently and provides a possible explanation as to why 35 hogs were found in compartment “J” – it does not exonerate them from the violation.

[28] Hishon Transport did not raise a permissible defence or outweigh the Agency’s evidence. As a result, it is liable for committing the violation under subsection 140(2) of the [HA Regulations](#).

5. TOTAL GRAVITY ASSESSMENT

IV. Was the penalty established in accordance with the regulations?

[29] Section 5 of the [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (AAAMP Regulations) classifies subsection 140(2) of the [HA Regulations](#) as a serious violation with 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.](#)).¹⁰ A numerical score is associated with each of the three criteria. Those scores are totalled to determine whether the penalty should be increased or decreased based on the total gravity value.

⁶ [Ibid](#) at para 11; see also [AAAMP Act](#), s 18(1).

⁷ See [Maple Lodge Farms Ltd v Canada \(CFIA\)](#), RTA n° 60291, [RTA n° 60295](#), [RTA no 60296](#), and [RTA n° 60297](#).

⁸ See [Klevtsov v Canada \(MPSEP\)](#), 2017 CART 10.

⁹ 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.

¹⁰ [A. S. L’Heureux Inc. v Canada \(Canadian Food Inspection Agency\)](#), 2018 CART 9.

[30] Following 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: Hishon Transport had 2 prior violations under the [HA Regulations](#) in the five years preceding the violation, 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 Hishon Transport should have known that the quantity of hogs in compartment “J” was excessive given its load capacity. The Agency further argues that the driver failed to follow their own loading recommendations. Accordingly, a gravity level of 3 was assessed by the Agency; and
- Harm: The Agency submits the fact that 7 hogs under the care of Hishon Transport died and at least two suffered respiratory distress during transport, demonstrates the violation committed caused serious harm to the health of the animals. Therefore, the Agency assessed a gravity level of 5.

[31] The Agency submits the penalty of \$7,800 for this violation is justified in fact and law.

1st criterion: history of the offender

[32] Hishon Transport had 2 prior violations in the previous 5 years; the Agency assessed a gravity value of 5. 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.

[33] I find that the Agency properly assessed this gravity value.

2nd criterion: the nature of the intent or the extent of negligence in committing the violation

[34] In assessing a gravity value of 3 for the second criterion, the Agency must show that the violation was committed intentionally or by negligence as establish in [A. S. L'Heureux Inc.](#)¹¹ I must therefore conduct an analysis of whether the Agency proved there was intent on Hishon Transport’s part or that it failed to demonstrate diligence in the particular circumstance which led to issuing of the violation.

¹¹ [Ibid](#) at paras 52, 55 and 59.

[35] Hishon Transport could have easily verified the weather conditions, the expected journey and the size of the hogs in order to assess the proper number of animals that should be placed in Compartment “J” to avoid causing them undue suffering. The evidence shows the average temperature during loading and the journey was above 24 degrees Celsius. Hishon Transport’s own loading recommendation to its driver shows that Compartment “J” should only have 28 hogs when the temperature is above 24 degrees Celsius.

[36] Accordingly, I find that the Agency has properly determined that Hishon Transport was negligent in transporting 35 hogs in compartment “J”. The gravity value of 3 for this criterion is correct.

3rd third criterion: the gravity of the harm that was caused or could be caused by the violation

[37] As the Agency assessed a value of 5 for this criterion, I must determine whether it established that the violation caused 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.¹²

[38] The testimony of Dr. Branislav, who explained how the hogs died, leaves no doubt in my mind that the violation caused serious harm to the animals. I find that the Agency properly assessed the gravity value for this criterion.

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

6. ORDER

[40] I find that Hishon Transport violated subsection 140(2) of the [HA Regulations](#) as set out in the Notice of Violation # 1516QC0041.

[41] I ORDER that Hishon Transport pay to the Agency the administrative monetary penalty in the amount of \$7,800 within 30 days of the date on which this decision is served in accordance with section 15(3) of the [AAAMP Regulations](#).

[42] Finally, I wish to inform Hishon Transport that this violation is not a criminal offence. After five years, Hishon Transport 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 Ottawa, Ontario, on this 16th day of June 2021.

¹² [AAAMP Regulations](#), SOR/2000-187, Schedule 3, Part 3, s 3.

(Original signed)

Luc Bélanger
Chairperson
Canada Agricultural Review Tribunal