

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: *EUSI Farms Ltd. and T. Burgin Trucking Ltd. v Canadian Food Inspection Agency*,
2021 CART 29

**Docket: CART – 2139
CART - 2140**

BETWEEN:

EUSI FARMS LTD.

APPLICANT

- AND -

T. BURGIN TRUCKING LTD.

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Patricia L. Farnese, Member

**WITH: Ms. Paula Lombardi, representing the Applicants; and
Mr. Benjamin Wong, representing the Respondent**

DECISION DATE: November 3, 2021

**VIRTUAL
HEARING DATE: June 14 and 15, 2021**

1. INTRODUCTION

[1] EUSI Farms Ltd. (EUSI Farms) and T. Burgin Trucking Ltd. (T. Burgin Trucking) were issued a Notice of Violation (Notice) with a warning for violating subsection 138(2)(a) of the [Health of Animals Regulation](#) (*HA Regulations*) after a lame cow was unloaded at a slaughtering facility. At issue is whether the compromised animal could be lawfully transported and if it could be transported, whether the animal unduly suffered during that transport.

[2] This is a review of the facts of the violation pursuant to subsection 8(1) of the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#) (*AAAMP Act*). I find that EUSI Farms and T. Burgin Trucking transported a steer that was unfit for transport due to lameness. Because the steer's transport was contrary to subsection 138(2)(a) of the [HA Regulations](#), the Notice with warning is confirmed.

[3] T. Burgin Trucking and EUSI Farms put forward a combined defence. For ease of reference, I will only refer to EUSI Farms going forward.

2. LEGAL FRAMEWORK

[4] The [AAAMP Act](#) and [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (*AAAMP Regulations*) set out a uniform process to enforce violations of many laws in the agriculture and agri-food sector. A violation of subsection 138(2)a) of the [HA Regulations](#) is subject to the [AAAMP Act](#) regime. Where an applicant requests a review by the Canada Agricultural Review Tribunal (Tribunal) under subsection 8(1) for a Notice issued by the Canadian Food Inspection Agency (Agency) with a warning and not a penalty, the Tribunal reviews the facts of the violation to determine if the violation was committed.

[5] For the Notice to be upheld, the Agency must prove on a balance of probabilities the following seven essential elements ([Doyon](#)¹):

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);

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

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] Undue suffering can arise when an unfit animal is transported for any reason other than veterinary treatment or diagnosis² or where a compromised animal is transported without sufficient provisions to minimize suffering.³ If the animal is found to have been unfit or if insufficient provisions were used during the transport of a compromised animal, the Agency must still establish that the animal suffered during transport for a violation to occur.

[7] The [AAAMP Act](#) regime creates absolute liability offences which means that there are only a few defences that can be relied upon to avoid the Notice once the elements of the offence have been proven. EUSI Farms did not raise a permissible defence.

3. ISSUES

[8] Elements 1,2, and 3 were conceded by EUSI Farms in the *Agreed Statement of Facts*. An animal, specifically a steer, was loaded onto a trailer and transported from EUSI Farms to a Cargill processing. At the hearing, EUSI Farms also did not contest the fact that the steer was compromised when it was loaded. Mr. Burgin, co-owner and principal operator, testified that they decided to transport the steer before its lameness worsened and made the animal unfit for transport.

[9] The following issues are disputed by the parties and must be determined by this review:

Issue 1: Was the steer unfit for transport because of lameness?

Issue 2: Did the steer suffer unduly during transport?

4. ANALYSIS

² [Waito Bros Inc. v Canada \(Canadian Food Inspection Agency\)](#), 2020 CART 24.

³ [Way-Alta Livestock Ltd. v Canadian Food Inspection Agency](#), 2019 CART 16 [Way-Alta].

I. Issue 1: Was the animal unfit for transport because of lameness?

[10] After reviewing the evidence, I find that the steer EUSI Farms loaded and delivered to Cargill was unfit for transport because of lameness. The [*Transportation of Animals Program Compromised Animals Policy*](#) (*Policy*) defines an unfit animal as “an animal with reduced capacity to withstand transportation and where there is a high risk that transportation will lead to undue suffering.” Guidelines within the [*Policy*](#) list criteria used to assess whether an animal is fit for transport. From the list of criteria, only lameness is relevant because the animal is ambulatory.

[11] The [*Policy*](#) explains that a lameness can make an animal unfit for transport even if it is ambulatory in circumstances where transport will cause undue suffering. A lame animal that “has imperfect locomotion, a slight limp” can be transported with special provisions, but a lame animal becomes unfit for transport if it has “an obvious limp with uneven weight bearing, and the inability to bear any weight on one leg is immediately identified (unable to use a foot to walk).”

[12] The Agency previously endorsed a set of 5 lameness classes to help guide transport decisions. Class 2 animals were those animals that were “unable to keep up” and may have had “some difficulty climbing ramps.” Class 2 animals were allowed to be transported if special provisions were used to prevent undue suffering. Class 3 animals were deemed unfit for transport because they were “those that require assistance to rise but can walk freely.” The lameness classes, while easy to implement, did not reflect the [*Policy*](#), which emphasizes the severity of the limp and the quality and manner of its gait. An animal that is compromised due to lameness may be unfit for transport even when the animal requires no assistance to rise and walk.

[13] In 2013, the Agency updated the [*Policy*](#) with a document called *Lameness Descriptions Rendering Animals Compromised or Unfit for Transport*, which no longer references lameness classes. The Agency now describes an unfit animal as “lame enough that it exhibits pain or suffering, halted movements or reluctance to walk” and one that “is lame that it cannot walk on all of its legs (non-weight-bearing walking).” The new approach no longer draws a dividing line between animals that are unfit or compromised due to lameness based on whether the animal needs assistance to rise and move. The [*Policy*](#) separately identifies unfit animals as non-ambulatory animals and lame animals who will unduly suffer if transported. If the [*Policy*](#) is applied with the dividing line used in the lameness classes, describing an animal as unfit for transport where “the animal cannot be transported without undue suffering because of lameness” is redundant.

[14] The [Policy](#) warns that the condition of animals who are compromised due to lameness can quickly worsen. The rate at which the condition can deteriorate is the rationale provided for only recommending transport where the limp is “slight” or when “the lame leg may not be immediately identifiable.” In the video of the steer in the inspection pen, the steer demonstrated a pronounced and obvious limp with minimal weight bearing on the injured leg. The steer’s movement was halted to avoid putting weight on the injured leg and stood with just the toe of the hoof intermittently touching the ground for balance. The steer also preferred lying in the pen to standing and bearing weight even though it was in an unfamiliar environment. If I adopt a common understanding of slight, meaning superficial, not profound, or trivial, the steer’s limp far exceeded that threshold.

[15] Although the [Policy](#) defines an unfit animal as one that has “the inability to bear *any* weight on one leg”, I do not interpret that as meaning if the animal *ever* puts weight on the leg, it must not be unfit. The video clearly demonstrates that the steer is reluctant to add weight to the injured leg and only does so when and to the extent that it is required to facilitate balance. The steer also regularly lifts and holds its leg off the ground when standing. This interpretation is consistent with both the [Policy’s](#) directive that only an animal with lameness that results in a “slight” limp be transported and the overall purpose of section 138(2) to reduce undue suffering.

[16] Because EUSI Farms was charged under section 138(2) of the [HA Regulations](#), the relevant timeframe for assessing whether the animal was unfit for transport, as outlined in the [Policy](#), is when the animal is loaded. Any other interpretation of the timeframe for assessing whether an animal is unfit would make section 138(4) redundant.

[17] EUSI Farms maintains that the animal was not unfit when it was loaded. Mr. Burgin testified about the elaborate procedures used at EUSI Farms to select and send animals to slaughter. That process is informed by the expertise of their consulting veterinarian, Dr. Dimmers, and includes an assessment of whether the animal is fit for transport using lameness classes previously endorsed by the Agency. He further testified that he and his staff, who also were trained on how to assess fitness for transport using the lameness classes, decided to transport the steer when they did after considering the steer’s compromised state.

[18] Mr. Burgin testified that the decision to transport also considered that the steer's lameness was expected to worsen. He testified that he timed the transport for after the wound healed and before the extent of the lameness made the animal unfit for transport to minimize suffering to the steer. Mr. Burgin and his staff, however, were relying on whether the animal needs assistance as the determining factor of whether a lame animal was compromised or unfit. Mr. Burgin was shown the *Transport Decision Tree* from the National Farm Animal Care Council which reflects the updated Agency guidance. He testified that he was familiar with this document and that the Agency no longer uses lameness classes. Even if mistake was a viable defence to this violation, Mr. Burgin was not under the mistaken belief that lameness classes continued to be used by the Agency to determine when a compromised animal was fit for transport. Mr. Burgin's assessment of the condition of the steer when it was loaded is not persuasive because it is based on an outdated interpretation of the [Policy](#).

[19] That the driver, Mr. David Wall, permitted the steer to be loaded does not change my conclusion that the animal was unfit for transport. Mr. Wall's assessment is also unpersuasive even though he is trained on how to safely and humanely haul cattle and has significant experience. I accept Mr. Wall's testimony that had he believed the steer was unfit for transport, he would not have loaded it. Nonetheless, Mr. Wall testified that he keeps a copy of the outdated lameness classes in his truck. Mr. Wall's explanation that he will not load an unfit animal, which he defined as one that cannot stand, is unable to walk independently onto the truck, or goes down confirms that his assessment that the steer was fit for transport is also based on the outdated lameness classes.

[20] On a balance of probabilities, I find that lameness prevented the steer from being able to be transported without undue suffering. The Agency has proven elements 4 and 6 of the violation of subsection 138(2)(a) of the [HA Regulations](#). I accept Dr. Saraladevi's expert assessment that the extent of the infection and swollen tissue observed during necropsy indicated that the lameness at the time of loading would not have been slight. Dr. Saraladevi's testimony that the tissue had a persistent infection at the wound site was also consistent with Mr. Burgin's testimony that the steer was treated for an infection in the weeks leading up to transport.

[21] Where there is contradictory evidence provided by the expert witnesses, I attribute more weight to the evidence of Dr. Saraladevi. Dr. Dimmers did not inspect the steer before or after it was euthanized. Dr. Dimmers also acknowledged that some things, like the open wound, were not easily visible in the video and therefore did not provide him with an accurate record of the steer's condition. Dr. Dimmers was also reluctant to acknowledge the extent to which the steer favoured its lame leg in the videos submitted into evidence. He was also unreasonably critical of Dr. Saraladevi's post-mortem inspection, namely that only a partial necropsy was completed and that her notes did not reference the absence of fractures. I accept Dr. Saraladevi's explanation that a partial necropsy and the detail in her notes were appropriate given the animal presented with an open wound and apparent lameness in just one leg.

II. Issue 2: Did the steer suffer during transport?

[22] The final elements of a subsection 138(2)(a) offence, elements 5 and 7, have been proven because the steer unduly suffered and that suffering was the result of being transported. The Federal Court of Appeal in [Doyon](#)⁴ has instructed that even where I have found that an animal was unfit for transport because undue suffering will result, I must still establish a causal link between the animal experiencing undue suffering and its transport. EUSI Farms challenged this causal link and asserted that the undue suffering began after transport and was caused when the steer was segregated for inspection. Having already found that the balance of evidence supports the finding that the steer's condition was such that any transport would cause undue suffering, evidence that the steer's condition worsened during transport firmly establishes the causal link. The evidence shows that the steer's lameness was more pronounced when it was unloaded than when it was loaded and that a healed wound reopened.

[23] The Tribunal has previously held that: "while "transportation" obviously includes the actual time "on the road", it has several stages, including the physical actions of loading, hauling and the unloading of animals."⁵ EUSI Farms highlighted that the Cargill receiver described on the Cargill Receiving Card the steer as a limper 2 while it was unloaded. As explained, an animal that would have been classified as a limper 2 can still unduly suffer. A finding that the steer's condition was exacerbated by the inspection does not necessarily relieve EUSI Farms of responsibility for committing the violation in this case.

[24] In his testimony Inspector Samuel stated the steer's front leg was swollen and that it was not bearing weight on that leg during unloading. These observations were also noted in the written notes he prepared shortly after observing the animal. Mr. Wall testified that although he did not recall this specific steer, he would not have loaded the animal if he thought it was at risk of going down. An animal not bearing weight on one leg would be at risk of going down. Because Mr. Wall loaded the animal, the evidence supports, on a balance of probabilities that the animal's condition worsened during transport.

[25] An open wound is visible in the photographs taken by Inspector Samuel of the steer after unloading. Inspector Samuel also testified that the wound was one of the reasons he segregated the animal. Mr. Wall and Mr. Burgin testified that the wound was healed when the steer was loaded. I find that the wound must have opened while the steer was being transported. The open wound, although small, would have added to the steer's suffering, which was already above the threshold permitted by the [Health of Animals Act](#) because the steer's condition made it unfit for transport.

⁴ Doyon, [supra](#) note 1.

⁵ [0830079 B.C. Ltd. v. Canada \(Canadian Food Inspection Agency\)](#), 2013 CART 34 at para 45.

General Comments

[26] Much of the hearing was devoted to debating the adequacy of the special provisions EUSI Farms made to minimize the steer's suffering during transport, in the event I found the animal compromised rather than unfit. The arguments raised by the parties warrant some general comments that may help future application of the [Policy](#) in similar situations.

[27] The Tribunal has previously held that industry guidelines are of assistance when deciding whether sufficient provisions were taken to prevent undue suffering when a compromised animal is transported.⁶ Specifically, the Humane Handling Guidelines for Beef Cattle (*Beef Cattle Guidelines*) contain best practices in animal transport that identify factors that increase the likelihood that undue suffering will occur and provisions that can be taken to minimize suffering in response. The specific provisions to be used whenever animals are lame, however, are not explicitly mandated. Rather, transporters are expected to use their judgment to determine what provisions are necessary to prevent undue suffering.

[28] EUSI Farms maintains sufficient provisions were taken to ensure the animal did not suffer during transport. These provisions were informed by regular training and advice provided by their veterinarian, Dr. Dimmers. Dr. Dimmers does not agree with the segregation recommendation for transporting compromised animals in the *Beef Cattle Guidelines* because a standing, injured animal can use the other animals as support while being transported and avoid being bounced like "a ping-pong ball" within the compartment. Following Dr. Dimmers' advice, the steer was transported in the rear compartment with 7 other animals. As a result, the Agency did not accept that the animal was sufficiently segregated during transport. The steer was in the rear compartment with one less animal than the compartment could hold. Dr. Saraladevi, testified that the animal should have been loaded with no more than one other animal in its compartment.

[29] Had the animal been compromised, I would have found that EUSI Farms' approach was a special provision aimed at reducing suffering during the transport of a compromised animal. EUSI Farms was entitled to rely on the advice of its veterinarian in this case. The recommended segregation approach favored by the *Beef Cattle Guidelines* is not a mandatory requirement. The *Policy* explicitly directs that veterinary advice be sought when deciding what special provisions are required when transporting a compromised animal. That EUSI Farms relied on advice from Dr. Dimmers about how to transport compromised animals generally, and not advice sought out in this specific case, does not change my conclusion.

⁶ Way-Alta , [supra](#) note 3.

[30] Relying on my decision in *Way-Alta*⁷, the Agency also asserted that the reduced animal numbers in the compartment should not be considered a special provision because the driver and Mr. Burgin testified that they always loaded that compartment below its capacity. In *Way-Alta*⁸, I concluded that special provisions require something more than what is expected for the transport of all cattle. This case is distinguishable from *Way-Alta*⁹ because loading below capacity is not a general expectation of all cattle transport; preventing overcrowding is expected. In this case, the lame steer still had room to lie down if standing became too painful. That EUSI Farms regularly employs a special provision for reasons other than to prevent undue suffering of a compromised animal should not preclude EUSI Farms from relying on this provision in defence to a Notice.

5. ORDER

[31] The Agency has established the elements of subsection 138(2)(a) of the [HA Regulations](#) on a balance of probabilities. EUSI Farms and T. Burgin Trucking caused a steer to be transported that could not be transported without experiencing undue suffering and that animal unduly suffered during transport. I order that the Notice of Violation # 1819ON1923 with a warning issued on August 8, 2019 to EUSI Farms Ltd. and T. Burgin Trucking be upheld.

Dated at Saskatoon, Saskatchewan, on this 3rd day of November 2021.

(Original signed)

Patricia Farnese
Member
Canada Agricultural Review Tribunal

⁷ [Ibid.](#)

⁸ [Ibid.](#)

⁹ [Ibid.](#)