



Canada Agricultural
Review Tribunal
Ottawa, Canada
K1A 0B7

Commission de révision
agricole du Canada

Citation: *Harwil Farms Mobile Feeds Ltd. v Canadian Food Inspection Agency*,
2022 CART 08

Docket: CART-1992

BETWEEN:

HARWIL FARMS MOBILE FEEDS LTD.

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Luc Bélanger, Chairperson

WITH : Mr. Robert W. Scriven representing the Applicant; and
Ms. Elizabeth Koudys, representing the Respondent

DECISION DATE: March 25, 2022

HEARING DATE: October 19-21, 2021

1. OVERVIEW

[1] Harwil Farms Mobile Feeds Ltd. (Harwil) requested that the Canada Agricultural Review Tribunal (Tribunal) review Notice of Violation (Notice) #1718ON3456 issued with a \$6600 penalty. Harwil allegedly transported two hogs that could not have been transported without undue suffering during the expected journey, contrary to paragraph 138(2)(a) of the [Health of Animals Regulations](#) (*HA Regulations*).

[2] The Notice concerns a load of Harwil hogs transported to an assembly yard in Talbotville, Ontario, on February 21, 2017. Canadian Food Inspection Agency (Agency) Inspector Vilchis and Veterinarian Pandher recommended the issuance of the Notice after observing one pig in the load with a prolapsed rectum and another with a fractured femur. The injury to the hog with a fractured femur occurred after loading and cannot serve as a basis for issuing the Notice. Consequently, the Tribunal must determine whether the hog with a prolapsed rectum could not be transported without undue suffering.

[3] To establish undue suffering the Agency must prove the suffering was unjustified or unreasonable. It requires actual evidence which shows the animal suffered unduly during the transport. The Agency cannot rely on a policy or guidelines suggesting that certain conditions may lead to undue suffering during transport *in lieu* of meeting its burden of proof. The Agency cannot use a “one size fits all” definition of undue suffering. The evidence in each case must be reviewed and considered.

[4] Violation issued under the administrative penalty regime are absolute liability in nature meaning the most punitive elements of penal law have been imported while excluding useful defences and reducing the prosecutor's burden of proof.¹ The Agency must rely on conclusive evidence before issuing violations. In this case, the evidence was limited on the condition of the hog with a prolapsed rectum and inconclusive on how transportation caused the animal to suffer unduly.

[5] I find that the Agency did not prove all the essential elements of the violation under paragraph 138(2)(a) of the [HA Regulations](#). Harwil did not commit the violation alleged in the Notice and is not liable for the \$6600 penalty.

2. PRELIMINARY MATTER

[6] At the hearing, Harwil brought a motion seeking to amend the *Agreed Statement of Facts* to withdraw its admission that one of the hogs subject to the violation was properly identified as theirs. It argued it was only when reviewing the evidence in person with their counsel that they realized the file was not conclusive on that point. Harwil claimed that retracting this admission would cause minimal prejudice to the Agency.

[7] The Agency argued that amending the *Agreed Statement of Facts* the day of the hearing was prejudicial because the presentation of the case, including the preparation for the examination in chief and cross-examination of witnesses was based the *Agreed Statement of Facts*. The Agency argued that the identification of the hog is an essential element of the legal test required to establish the violation.

¹ [Doyon v. Canada \(Attorney General\), 2009 FCA 152](#) [Doyon], at paras 27 and 28.

[8] The Tribunal engaged in active case management throughout the proceedings, holding a series of Case Management Conference Calls (CMCC). These CMCCs resulted in significant progress towards ensuring a fair, cost effective, efficient, and expeditious process leading up to the oral hearing. The parties worked collaboratively to approve and jointly submit an *Agreed Statement of Facts*, *Agreed List of Documents* and *Agreed Witness List* to the Tribunal.

[9] In the interests of fairness, cost effectiveness, efficiency, and expediency it is important that parties be held to negotiated agreements particularly when the Tribunal incorporated these agreements in binding orders. Both parties are represented by counsel with the necessary skill to assess and research their respective positions and enter into binding agreements for the benefit of their clients. Amending the *Agreed Statement of Facts*, the day of the hearing, would be prejudicial to the Agency. Harwil's motion is dismissed – it is bound by the *Agreed Statement of Facts*.

3. LEGAL FRAMEWORK

[10] 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. There are additional provisions to ensure 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.

[11] The Tribunal has the power to review the facts of a violation upon request.²

² [Agriculture and Agri-Food Administrative Monetary Penalties Act, SC, c 40, s 8\(1\) \(1995\)](#) [AAAMP Act].

[12] The [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (AAAMP Regulations)³ 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 Notice to Harwil with a \$6600 penalty.⁴

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

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;

[14] In [Doyon](#),⁵ the Federal Court of Appeal (FCA) held that violations under the administrative monetary penalty system should be analyzed according to their essential elements, each of which must be proven on a balance of probabilities before an applicant can be found liable.⁶ Proving on the balance of probabilities means that it is more likely than not that all the elements of the violation occurred.

³ [Agriculture and Agri-Food Administrative Monetary Penalties Regulations, SOR 2000-187](#) [AAAMP Regulations].

⁴ [Ibid](#) s 5(1).

⁵ [Doyon](#), *supra* note 1.

⁶ [Ibid](#) at paras 20, 28 and 42.

[15] [Doyon](#)⁷ 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.⁸

[16] A central issue in the analysis is the meaning of undue suffering referred to in elements 4, 5, 6 and 7. This FCA has considered the interpretation of “undue suffering” in [Porcherie des Cèdres Inc.](#)⁹ and in [Samson v. Canada](#).¹⁰ The Court provided a more detailed interpretation of the meaning in [Doyon](#)¹¹ at paragraphs 30 to 36:

[30] In Attorney General of Canada v. Porcherie des Cèdres Inc., 2005 FCA 59, ... the issue was to determine the meaning of the expression “undue suffering” found in paragraph 138(2)(a). The Court was of the opinion that the Tribunal had interpreted “undue” too restrictively by giving it the meaning of “excessive”. The Court gave it the more usual, all-encompassing meaning of “unjustifiable”, “unreasonable” and “inappropriate”.

⁷ [AAAMP Regulations](#), *supra* note 3, s 5(1).

⁸ [Doyon](#), *supra* note 1, at para 41.

⁹ [Canada \(Attorney General\) v. Porcherie des Cèdres Inc., 2005 FCA 59.](#)

¹⁰ [Samson v. Canada \(Canadian Food Inspection Agency\), 2005 FCA 235.](#)

¹¹ [Doyon](#), *supra* note 1.

[31] *The case at bar does not dispute this interpretation. However, it does challenge the very parameters of the violation, that is, its essential elements and their scope. At issue are also the sufficiency and the probative value of the evidence of undue suffering, the causal link and the Tribunal's interpretation and application of that evidence.*

...

[33] *Contrary to what the applicant suggests, it is not necessary for an animal to be suffering at the time and place of its being loaded for transportation for a violation of paragraph 138(2)(a) of the Regulations to be committed. Although this Court's decision in Samson v. Canada (Canadian Food Inspection Agency), 2005 FCA 235, at paragraphs 11 and 12, may be somewhat ambiguous in that respect, it is clear to me, first, that the provision is not limited to cases in which an animal's condition worsens as a result of its being transported. It prohibits transportation in conditions that cause undue suffering to an animal thus transported.*

[34] *Beyond the reasons of an animal's infirmity, illness, injury or fatigue, the provision also proscribes the imposition of undue suffering for "any other cause" on an animal, which may otherwise be healthy. Undue suffering can result from suffocating, unsuitable, gruelling and intolerable transport conditions caused by, for example, cramped space, overcrowding, temperature, the length of the journey or a combination of such factors.*

[35] *Of course, proof of undue suffering can, with respect to the owner of the animal, be made more easily if, during loading, the animal was visibly ill and suffering before the decision to include it in the load was made.*

[36] *But it is also clear to me, second, that the fact that an animal is compromised and suffering does not necessarily mean that it cannot be transported, especially if it remains ambulatory. The literature to help producers and transporters comply with the regulations identifies the class of "lameness". It indicates that hogs that fall into classes 1 to 3 may be transported to the slaughterhouse as long as the following measures are taken: isolating them from healthy hogs, transporting them to the slaughterhouse as quickly as possible, loading them last in the rear compartment of the trailer and unloading them first upon arrival at the slaughterhouse...*

[17] In this case, the first three elements are not in dispute. Harwil loaded and transported the hogs in question (element 1) on a motor vehicle (element 2) and the cargo was animals (element 3). The main question is whether the Agency proved Harwil exposed the hogs to “*unjustifiable*”, “*unreasonable*” and “*inappropriate*”¹² suffering during the expected journey by reason by reason of infirmity, illness, injury, fatigue or any other cause.

4. ISSUES

[18] The first issue is whether the Agency proved all the essential elements of the violation to establish Harwil transported hogs that could not have been transported without undue suffering during the expected journey.

[19] The second issue is whether Harwil raised a permissible defense relieving them of the responsibility for committing the violation.

5. ANALYSIS

a) General Facts

[20] On February 21, 2017, at approximately 10:00 a.m., transporter Aane Versteeg, loaded and transported 110 hogs owned by Harwil. The hogs were picked up from various farms and unloaded at Zantingh Hog Assembly Yard (Zantingh), located in Talbotville, Ontario.

¹² [Doyon](#), *supra* note 1, at para 30.

[21] Inspector Vilchis and Dr. Pandher from the Agency were present at Zantingh to conduct Humane Transportation of Animals inspections. Inspector Vilchis noted that at approximately 2:25 p.m. Mr. Versteeg arrived at Zantingh. Inspector Vilchis confirmed during his testimony that Mr. Versteeg had to wait until another trailer finished unloading before he could start unloading. While waiting, both Inspector Vilchis and Dr. Pandher talked to Mr. Versteeg who stated that the load had a few prolapsed rectums, some hogs had hernias and that none had been segregated.

[22] Inspector Vilchis testified that he observed part of the unloading and noticed a hog with a severe prolapsed rectum and another who showed signs of lameness. Although he was not able to go inside the trailer, Inspector Vilchis was of the view that none of the hogs had been transported with special provisions. He recorded part of the unloading with his cellphone and took pictures.

[23] Harwil's hogs were all unloaded into a barn for assessment by Zantingh's employee and segregation of compromised animals. The compromised animals could not be euthanized right away so Zantingh's employee put them in an isolation pen.

[24] Once the two hogs were in an isolation pen, Dr. Pandher performed ante-mortem and post-mortem examinations of the hogs. Dr. Pandher's examination revealed that the hog showing signs of lameness had a proximal femur fracture. In his opinion, the prolapsed rectum on the second hog appeared 2 or 3 days old and that the animal suffered unduly during transport to Zantingh's assembly yard.

[25] At the conclusion of the inspection and based on all the information gathered, Inspector Vilchis, issued a Non-compliance Report. In the opinion of Inspector Vilchis, as well as the opinion his supervisor and inspection manager, the hogs were not transported in compliance with the requirements of the [*HA Regulations*](#).

[26] On July 26, 2018, after conducting a review of the Non-compliance report submitted by Inspector Vilchis and the documents within, the Agency issued the Notice with a penalty of \$6600 to Harwil.

b) Did the Agency prove all the essential elements of the violation under paragraph 138(2)(a) of the [HA Regulations](#) that were in dispute?

Elements 4 and 5 – the animal could not be transported without undue suffering and suffered unduly during the expected journey

[27] Elements 4 and 5 require the Agency to prove, on the balance of probabilities, that the transportation of the two hogs could not have been undertaken on February 21, 2017, without undue suffering and that the animals suffered unduly during the expected journey. This means there needs to be evidence which shows that while under the care and control of Harwil or its agent, the two hogs subject to the Notice were exposed to “unjustifiable”, “unreasonable” and “inappropriate”.¹³ There must also be conclusive evidence to show that the animal suffered during the journey itself. Given this determination is linked with the respective conditions the animals, I will review and analyze the evidence pertaining to each hog.

Hog with a broken femur

[28] Dr. Pandher testified that he observed part of the unloading and examined the lame hog in the pen. His Necropsy Report stated the hog was lame in the right hind leg and was hesitant to walk and support its body weight on the injured leg. Dr. Pandher’s Necropsy Report stated that when he gently palpitated the hog’s right hind leg the animal felt pain and walked away limping. There was no sign of external injury or swelling on the hog’s skin surface.

¹³ [Doyon](#), *supra* note 1, at para 30.

[29] Inspector Vilchis' notes and the testimony of Dr. Pandher confirmed that Zantingh's employees euthanized the lame hog at 5:28 p.m. and the hog with a prolapsed rectum at 5:29 p.m. Dr. Pandher conducted post-mortem examinations of the hogs. It was only once he completed an incision of the hip joint, that he was able to diagnose the lame hog had suffered a proximal femur fracture.

[30] In his Report of Inspector, Dr. Pandher stated that the congestion of the tissue was recent, the injury or lesion was fresh, not old in nature and could have happened on the truck during transportation. Although his Report of Inspector, Dr. Pandher suggests the injury probably occurred 1-4 hours prior, during cross-examination he admitted the injury was at most 6 hours old.

[31] The evidence before the Tribunal does not lead me to conclude the lame hog could not be transported without undue suffering. The Agency had all the evidence it needed to conclude the lame hog's injury occurred after Mr. Versteeg loaded the animals. Mr. Versteeg started loading the animal at 10:00 a.m. and Dr. Pandher's post-mortem examination did not start before 5:28 p.m. His original assessment was that the injury occurred 1-4 hours prior. Even if the Tribunal were to take into consideration Dr. Pandher's view that the injury occurred 6 hours prior, it is still well after the animals were loaded. Under 138(2)a) of the [HA Regulations](#), Harwil is not liable for an injury that was not present when the hog was loaded for transport. It is unfortunate it was only during the hearing the Agency realized this error, given it possessed all the evidence it needed prior to issuing the Notice.

[32] The Agency did not prove on the balance of probabilities that the hog with the broken femur could not be transported without undue suffering. The Agency's case rests on the condition of the hog with a prolapse rectum.

Hog with the Prolapsed Rectum

[33] Dr. Pandher testified that he observed and performed an examination of the hog with the prolapsed rectum for the first time in the isolation pen. In his Necropsy Report, he noted the prolapsed rectum was approximately 5 x 1.5 inches in size, that the mucosal surface appeared red and black, infected, edematous, and inflamed. In his opinion, these injuries were chronic in nature, appeared at least 2 to 3 days old and happened well before loading because there was formation of fibrosis and necrotic tissue, a process which occurs 24 to 48 hours after cellular death due to lack of blood supply. Dr. Pandher also noted there was fresh blood oozing out of the prolapsed section of the rectum. He attributed that to biting or rubbing caused by the herd mates during transportation and loading/unloading. On that basis, he concluded the hog suffered unduly.

[34] The Agency produced only 5 pictures (IMG165227054, 165229210, 165258779, 165318876 and 165323147) showing the hog with a prolapsed rectum in the isolation pen. Out of these, only IMG165258779 is not blurry and taken close enough to allow the Tribunal to appreciate the nature of the hog's condition. The picture also shows that the hog was marked on the back with pink paint. It is unclear what the identifier is, but it appears to be "FEB3".

[35] The Agency also submitted three short videos (152817395, 153317270 and 153550979) taken by Inspector Vilchis during unloading and two videos (165408414 and 165528127) taken when the hogs subject to the Notice were in the isolation pen. The videos of the unloading do not show any hogs with markings on their back. Accordingly, I cannot rely on them to assess the condition of the hog with the prolapsed rectum because the hog was not seen in the videos. This leaves a short 10-second video (165528127) taken in the pen, where we only see the hog with prolapsed rectum from its snout to its front leg.

[36] In this matter, the Tribunal also had the benefit of having the expert opinion of Dr. Suzanne Burlatschenko, who was called by Harwil, a veterinarian and teacher with specialty consultative services in swine health and production. Dr. Burlatschenko reviewed the Agency's report and provided her opinion and analysis with respect to the hog with a rectal prolapse.

[37] Dr. Burlatschenko explained that rectal prolapse is a relatively common condition in hogs. The occurrence of the condition ranges from 1% to as high as 15%. Her report also provided a summary of pain assessment in hogs. She explained that "pain is described as a perceptual phenomenon" and defined as "an unpleasant sensory and emotional experience associated with acute or potential tissue damage". Citing various sources, she clarified that an animal deviating from its normal behaviour is the most significant indicator of pain. Behavioural indicators of pain include postures, facial expression, stereotypical movements, and vocalizations. Dr. Burlatschenko added that vocalizing, restlessness, lack of mobility, abnormal posture and reduced interest in surroundings may be the result of acute pain.

[38] During her testimony Dr. Burlatschenko questioned many of the findings in Dr. Pandher's Necropsy Report. More specifically, she stated that Dr. Pandher's opinion that the injuries or lesions were at least 2 or 3 days old and happened well before loading was speculative because an analysis of a tissue sample would be required to accurately age a wound and none were submitted. Dr. Burlatschenko explained that Dr. Pandher speculated when he concluded that the fresh blood oozing out of the prolapsed segment of the rectum was due to biting or rubbing during loading and transport because a hemorrhagic rectal prolapse would inevitably result in blood smears on the bodies of the pen-mates as a result of inadvertent contact or active investigation of other pigs. Lastly, in her opinion, there was no true necropsy because there was no dissection of the dead hog. Dr. Burlatschenko described Dr. Pandar's Necropsy Report as an external examination.

[39] Dr. Burlatschenko reviewed the pictures and video (165528127) of the hog with the prolapsed rectum. In her opinion, the hog in the video did not display behavioural signals that could be associated with pain or discomfort. It appeared alert, aware of its surroundings, was not exhibiting avoidance behaviour, looked to have a good body condition, and was investigating the lame hog.

[40] During cross-examination Dr. Pandher's explained there was no need to undertake further investigation and complete a full necropsy of the hog once he clinically identified the condition because the *Transportation of Animals Program Compromised Animal's Policy* (Policy) states animals with a prolapsed rectum are considered compromised and transporting them without specific provisions leads to undue suffering. In his opinion a prolapsed rectum equals undue suffering.

[41] During his testimony, Dr. Pandher relied on the Policy to explain why the hog was compromised and suffered unduly. This Policy may serve as a guide for the industry, the Agency and the Tribunal to interpret undue suffering of animals, but it cannot be relied on to neglect the Agency's obligation to adduce evidence to prove a violation occurred. In this case, the testimony of Dr. Pandher and the evidence submitted by the Agency to support a finding that the hog with the prolapsed rectum suffered unduly during the expected journey is marred by speculations – it is not based on facts. The evidence must demonstrate that an animal has suffered unduly during transport.

[42] Dr. Pandher testified that in video (165528127) the hog with the prolapsed rectum did not exhibit any signs of pain and showed normal social behaviour. Contrary to the information contained in his Inspector Report, during cross-examination, Dr. Pandher admitted that there were no indications on the hog itself or in the videos submitted that hogs were biting or chewing on the prolapsed rectum. Dr. Pandher admitted he assumed that the reason there was fresh blood oozing from the prolapsed rectum was because of biting and chewing, even though there are a variety of reasons which could lead to the bleeding.

[43] In [Doyon](#),¹⁴ the FCA explained that “Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor’s burden of proof”. It further directed that the decision-maker “must be circumspect in managing and analyzing the evidence and in analyzing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker’s reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.”

[44] I find that the Agency did not prove all the essential elements of the violation under paragraph 138(2)(a) of the [HA Regulations](#). Accordingly, I find that Harwil has not committed the violation.

6. ORDER

[45] I conclude that Harwil did not commit the violation in Notice #1718ON3456, dated January 17, 2018. Harwil does not have to pay the \$6600 penalty.

Dated at Ottawa, Ontario, on this 25th day of March 2022.



Luc Bélanger
Chairperson
Canada Agricultural Review Tribunal

¹⁴ [Doyon](#), *supra* note 1, at paras 27 and 28.