



Canada Agricultural
Review Tribunal
Ottawa, Canada
K1A 0B7

Commission de révision
agricole du Canada

Citation: *Earl MacDonald and Son Transport Limited v Canadian Food Inspection Agency*,
2022 CART 19

Docket: CART-2161

BETWEEN:

EARL MACDONALD AND SON TRANSPORT LIMITED

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Patricia L. Farnese, Member

WITH: Mr. Robert W. Scriven, representing the Applicant; and
Mr. James Schneider, representing the Respondent

DECISION DATE: July 7, 2022

VIRTUAL HEARING DATE: March 24 and 25, 2022

1. INTRODUCTION

[1] Earl MacDonald and Son Transport Limited (MacDonald Transport) received a Notice of Violation (Notice) of subsection 140(2) of the [Health of Animals Regulations](#) (HAR) and assessed a \$7800 penalty for causing pigs to unduly suffer or be injured during transport because of crowded conditions. MacDonald Transport requests that this Tribunal review the facts of the violation and set aside the Notice and penalty. I have upheld the violation because the weather conditions necessitated that the loading density of the pigs be reduced. MacDonald Transport failed to reduce the loading density. Despite inconsistencies in quantifiable evidence, the Canadian Food Inspection Agency (Agency) has proven on a balance of probabilities that 7 pigs arrived dead and another 3 were in such a condition that they were euthanized during the unloading process as a consequence of crowding during their transport.

2. LEGAL FRAMEWORK

[2] The [Agriculture and Agri-food Administrative Monetary Penalties Act](#) (AAAMP Act) and [Regulations](#) set out a uniform process to enforce and address violations of many laws in the agriculture and agri-food sector. A violation of subsection 140(2) of the [HAR](#) is subject to the AAAMP regime. Anyone who receives a Notice can ask that the Minister of Agriculture review the facts of the violation. The Minister's decision can then be reviewed by the Tribunal. Alternatively, one can come directly to the Tribunal for that review. MacDonald Transport elected not to seek a ministerial review prior to coming to the Tribunal.

[3] The AAAMP regime contains two steps: (1) a determination that the violation was committed and (2) an assessment of the appropriate penalty. The government must prove both steps on a balance of probabilities.

[4] The AAAMP regime creates absolute liability offences which means that there are only a few defences that can be relied upon to avoid the responsibility for a Notice once step one has been proven. MacDonald Transport did not raise one of the permissible defences, therefore, the Notice for violating subsection 140(2) will stand if the Agency proves the following four elements:¹

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 therein; 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 MacDonald Transport.

[5] The absolute liability nature of the administrative monetary penalty regime does not change the Agency's burden. The Tribunal's must decide whether the Agency has proven on a balance of probabilities essential elements of the violation. Although directing the Tribunal to "be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link" because of the AAAMP regime's "draconian" and "highly punitive" nature, the Federal Court of Appeal in [Doyon v. Attorney General of Canada](#) did not change the burden of proof.²

[6] The Supreme Court of Canada outlined in [F.H. v. McDougall](#), "there is only one civil standard of proof at common law and that is proof on a balance of probabilities."³ The Supreme Court rejected any notion that the seriousness of the case or its consequences in anyway changes the level of scrutiny the evidence receives from the trier of fact. The question before this Tribunal is whether "it is more likely than not" that the essential element occurred. If the evidence is "sufficiently clear, convincing, and cogent to satisfy the burden of proof," the violation has been proven.

¹ [Transport Eugène Nadeau Inc. v Canada \(Canadian Food Inspection Agency\), 2017 CART 16.](#)

² [Doyon v. Canada \(Attorney General\), 2009 FCA 152](#) at para 32 [*Doyon*].

³ [F.H. v. McDougall, 2008 SCC 53](#) at para 40.

[7] Where the Agency proves all the elements for a violation, the Tribunal must decide the appropriate penalty amount. Where an absolute liability offence is alleged, this second step is important because it allows for the specific facts of the case to be considered. Step two asks whether the person found to have committed the violation has any prior violations or convictions, acted with intent or negligence, and contemplates the harm done or could have been done.

3. ISSUES

[8] Upon arrival at Conestoga Meat Packers Ltd., 7 pigs were dead and 3 others were euthanized to put an end to their undue suffering. MacDonald Transport does not dispute the first element of the offence. MacDonald Transport loaded pigs from 4 locations onto a single trailer and transported them to Conestoga Meat Packers Ltd. The following issues remain:

1. *Was the trailer crowded?*
2. *Did the crowding cause the pigs' death?*

4. ANALYSIS

Was the trailer crowded?

[9] Eight of the 10 compartments of the trailer that transported the pigs were crowded meaning they had too many pigs for the available space. This conclusion is based on the description provided by the driver to the Inspector of how he loaded the animals onto his truck, the average weight of the pigs, and the space available to the pigs in each compartment. The Agency has proven the second element of the violation.

[10] The [HAR](#) does not prescribe a process to determine when a trailer is crowded. Crowding is a factual finding based on the condition of the animals and the conditions of transport. The Tribunal and the industry routinely rely on non-binding industry guidelines found in the

Recommended Code of Practice for the Care and Handling of Farm Animals (the *Animal Code*) and the Code of Practice for the Care and Handling of Pigs (the *Pig Code*) to determine the number of animals that can be transported in a single trailer without the animals becoming crowded. The Codes consider size of the animals, the number of animals being transported, and the size of the trailer used. Weather conditions are also a factor where, as in this case, they are relevant.

[11] MacDonald Transport asserts that I am unable to decide whether the animals were crowded because the precise number of animals, their weight, and the size of the trailer is unknown. I disagree. I must decide whether the animals were crowded relative to the context within which the pigs were transported and whether crowding caused the death of the 7 pigs on the trailer and the need to immediately euthanize 3 more. While the evidence about the amount of space each animal would have had relative to their size and the size of the trailer is important, the regulations do not provide a clear threshold of when the animals are crowded. That is a question of fact that is proven on a balance of probabilities taking into consideration the totality of the evidence before me.

[12] I find there were at least 180 pigs transported. The discrepancy in the number of animals the Agency recorded as having been transported by MacDonald Transport is not material given my finding that the trailer did not have enough space for 180 animals. The diagram the Inspector prepared on the day of the incident based on the driver's description of where he placed the animals in the trailer identifies 180 pigs as having been transported. Although hearsay, the driver was in the best position to know how many animals were on the truck as he loaded them. MacDonald Transport did not introduce any evidence that contradicts their driver's recollection. All other records submitted into evidence by the Agency list more animals on the trailer except the photographs of the processor's copies of the Ontario Pork Producer receipts. When added, these receipts total 156. This final number, however, reflects the number of animals that were processed by the packer and does not include the animals removed by the Inspector during unloading and any other animals that would have been removed during the processing process.

These receipts do not reflect the number of pigs transported. I have not considered 156 as a possible count of the pigs that were transported.

[13] MacDonald Transport has likewise raised concerns about relying on imprecise measurements to calculate the minimum space pigs require during transport. The Tribunal does not have the exact weights of the pigs during transport. Instead, the Agency asks that I use an average weight of 4 pigs calculated from their average dead weight, which was assessed as 85% of their live weight. This calculation establishes an average weight of 117.58 kg. The Agency asserts this calculation is reasonable because use of a similar proportion is widely accepted as accurate by the industry. For example, the amount paid by the packer for the pigs that were processed after delivery by MacDonald Transport was calculated based on the dead weight being 85% of the live weight.

[14] I have no difficulty accepting the Agency's approach to estimating the weight of the transported pigs. Without weighing each animal as it was loaded, there is no way of knowing precisely what an animal weighed during transport. While the Applicant questioned whether a 15% deduction for the head was reasonable, they provided no evidence to suggest that 15% was a significant overestimate. Rather, the evidence before the Tribunal was that 15% was also being used by Conestoga Meat Packers Ltd.

[15] MacDonald Transport also took issue with the Agency's measurements of the trailer because they were taken from outside the trailer and relied upon an approximation of the space lost in two compartments due to the presence of the loading ramp. There were also discrepancies in the descriptions of the trailer's length in the Agency's evidence. The Inspector measured the trailer from outside the trailer and prepared a diagram that was entered into evidence. The Inspector's diagram of the trailer contains measurements that, when totaled, set the trailer's length as 48'8". The Humane Transportation of Animals (Task 1101) form that the Inspector prepared when she recommended the violation, lists the trailer's length as 48' and 49'.

[16] The discrepancy in the measurements of the trailer's size is not significant. The measurements contained on the diagram are sufficiently reliable and I have used them to calculate the space requirements for each pig. MacDonald Transport did not lead evidence that directly disputes the accuracy of the measurements recorded on the Inspector's diagram despite having access to the trailer. I also find that if measuring from outside the trailer created any variance in the measurements, that variance was to MacDonald Transport's advantage. Measurements from inside would have reduced the open space as the thickness of dividers would have been considered.

[17] Likewise, I have no evidence before me that challenges the 30% reduction of available space in those compartments where the loading ramp is found. Having just measured the trailer, the Inspector was in a good position to estimate the space lost to the ramp. Thirty percent is also a fair estimate when I view a photograph trailer compartment with the ramp in conjunction with the stated measurements of that compartment. Again, MacDonald Transport had access to the trailer and was free to submit evidence that would support their assertion that the Inspector's estimate was inaccurate or unreliable.

[18] According to the widely endorsed Pig Loading Density Requirements found in the *Animal Code*, pigs that weigh 117.58kg require 4.47sqft of space during transport. The *Animal Code*, however, also recommends that the maximum density be reduced by 25% during hot, humid weather. Twenty-five percent is only a recommendation because the actual stress experienced by the pigs is ultimately what should guide transportation conditions.

[19] The Livestock Weather Safety Index from the *Pig Code* assists farmers with determining when weather conditions are cause for transporters to be on alert, pose a danger for animals, or are an emergency. Transportation is to be avoided during the hottest parts of the day when conditions pose a danger because the temperature exceeds 37.8°C. Transport is not recommended to be avoided below 37.8°C, but can proceed within this "alert" range. It follows that reducing density is recommended when temperatures are in the "alert" range. Elsewhere in

the *Pig Code*, reducing density is recommended for transport during hot, humid weather. No such recommendation would be required if the pigs are either not to be transported or can be transported as usual within the alert range.

[20] The evidence before this Tribunal is that the animals were transported while temperatures were in the alert although the temperature did cross into the danger range at one point during the voyage. The *Pig Code* does not specify by what percentage density should be reduced. MacDonald Transport noted that a 25% reduction is not mandated and argued against relying on the *Animal Code* because the *Animal Code* is currently under revision. Although dated, MacDonald Transport offered no evidence that the 25% recommendation, which is based on peer-reviewed studies, has been discredited.

[21] Moreover, MacDonald Transport failed to adduce any evidence that the driver took into consideration the weather conditions and reduced the load to provide the pigs with space to better regulate their body temperatures. The *Pig Code*, while not binding, does establish that animals cannot be humanely transported during temperatures within the alert range without a reduction in loading density. Therefore, reducing pig density was required to prevent undue suffering and injury and the failure to do so established element 3 of the offence.

[22] After considering the totality of the evidence in this case regarding the size and number of pigs transported, the trailer's size, and the weather conditions, I find the evidence to be sufficiently clear, convincing, and cogent to establish the second element of the violation. Rather than present more accurate measurements of the trailer or their own evidence to challenge the weights and numbers of pigs transported, MacDonald Transport, relied on a strategy of identifying discrepancies in the Agency's evidence. Some variances in the counts and measurements do not necessarily prevent the burden of proof from being established. To find otherwise would create an impossible burden on inspectors that would frustrate the objective of the [HAR](#) of facilitating the production and sale of safe animal products without undue animal suffering. At times, evidence of undue suffering is not present until the animals have been slaughtered. Insisting on

no variances would require an impractical level of scrutiny by Agency inspectors of every animal and every transport vessel.

Did the crowding cause the pigs' death?

[23] The violation requires that there be a causal link between crowding in the trailer and the pigs' undue suffering or injury. In this case, the animals were transported on a hot day that became hotter as they were loaded, transported to load additional pigs at 2 stops, and unloaded at Conestoga Meat Packers Ltd. The evidence presented to the Tribunal supports the finding that the animals were healthy upon loading. While MacDonald Transport challenged the Agency's veterinarian's conclusion that the pigs had no underlying health conditions, they adduced no evidence to rebut this conclusion. I find that there was no underlying health condition that can explain why 7 pigs were dead on arrival and 3 others were in such distress that they were immediately euthanized to avoid further suffering.

[24] The evidence adduced by the Agency also proves that it is more likely than not that exposure to heat during transport contributed to undue suffering. The Agency's veterinarian conceded that some pigs may have died because of the heat even if they had not been crowded. Where the burden is to be established on a balance of probabilities, a person does not automatically escape liability for a violation because they are able to point to another plausible explanation for the outcome that is not an essential element especially when no evidence is adduced to support the other explanation. I am entitled to consider the relative probabilities of an event occurring when assessing the burden of proof.

[25] Understanding the probabilities is aided by the *Pig Code*. The *Pig Code* does not prohibit transport in temperatures in the alert range. If heat alone was likely to injure or kill the animals in the alert range, transportation would not be recommended at the temperatures when the pigs were transported. Instead, the recommendation to reduce the density of animals loaded supports the conclusion that if the animals are not crowded, they are more likely than not to be transported

without suffering or injury. It follows that a finding of the reverse, that the animals more likely than not died because of being crowded, is also true.

[26] In addition, the Agency's veterinarian, who was familiar with the *Pig Code*, the *Animal Code* and the weather conditions on that day, was unwavering in her conclusion that the most likely explanation for why these healthy animals died was due to being unable to regulate their temperature in a crowded trailer. I, therefore, find that the Agency has met their burden of proof and affirm the violation.

[27] MacDonald Transport did not raise any permissible defences to the violation. Consequently, the only question remaining is whether the Agency assessed the total gravity value in accordance with the [AAAMP Regulations](#).

5. TOTAL GRAVITY VALUE ASSESSMENT

[28] MacDonald Transport was fined \$7800. Schedule 1 of the [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (AAAMP Regulations) classifies subsection 140(2) of the [HAR](#) as a serious violation. Section 5 of the AAAMP Regulations provides that a penalty of \$6,000 is warranted for serious offences although the penalty can be adjusted 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*). Schedule 3 of the [AAAMP Regulations](#) attaches a numerical score to each of the three criteria. Those scores are totalled to determine the "total gravity value". If an adjustment is required, Schedule 2 of the [AAAMP Regulations](#) outlines the percentage the penalty should be increased or decreased based on the total gravity value.

[29] The Agency justifiably gave MacDonald Transport a score of 5 in the compliance history category. Schedule 3, Part 1 of the [AAAMP Regulations](#) mandates a score of 5 if more than one minor or serious violation has occurred within the preceding 5 years. MacDonald Transport had

received Notice of Violations for three serious violations within the relevant time period. Two of the violations were for breaching the same section of the regulations.

[30] A score of 3 for the second criteria of negligence or intent is befitting in the circumstances. The Inspector's report noted that the driver described that some of the animals were breathing fast while they were loaded due to the weather conditions. MacDonald Transport did not object to the inclusion of this evidence. The evidence also establishes that the weather was objectively hot and humid throughout the loading, transport, and unloading. This is not a situation where a sudden, unexpected turn in weather occurred. Yet, there is no evidence that any steps, including to adjust the load density, were taken by MacDonald Transport to accommodate the weather conditions. This failure to act is proof of negligence.

[31] Finally, the Minister assessed a gravity value of 5 because the actions of MacDonald Transport caused serious harm to animals. In total, 10 animals unduly suffered and died because MacDonald Transport transported the pigs in crowded conditions. Schedule 3, Part 3 of the [AAAMP Regulations](#) outlines that a gravity score 5 is to be awarded when there is serious or widespread harm to animal. Death meets that requirement.

[32] With a total gravity value of 13, Schedule 2 of the [AAAMP Regulations](#) directs that the penalty be increased by 30%. The Minister's penalty of \$7800 was properly assessed.

6. ORDER

[33] I find that MacDonald Transport has committed the violation in Notice and must pay the penalty of \$7800 to the Agency within thirty days of being notified of this decision as required by paragraph 15(3) of the [AAAMP Act](#).

[34] This violation is not a criminal offence. After five years, MacDonald 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](#).



Patricia L. Farnese
Member
Canada Agricultural Review Tribunal