



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 20

Docket: CART-2160

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: April 13 and 14, 2022

1. INTRODUCTION

[1] Earl MacDonald and Son Transport Limited (MacDonald Transport) received a Notice of Violation (Notice) under subsection 138(2)(a) of the [Health of Animals Regulations](#) (HAR) and assessed a \$6,600 penalty for causing pigs to unduly suffer during transport. MacDonald Transport has asked that the Tribunal review the facts that have led to the violation and dismiss the Notice. I have concluded that the Canadian Food Inspection Agency (Agency) has failed to establish that an atypical mass protruding from the pig's stomach was more likely than not, a hernia. MacDonald Transport has avoided the Notice because there was insufficient evidence to demonstrate that the mass caused the pig to unduly suffer during 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 138(2)(a) of the [HAR](#) is subject to the AAAMP regime. The AAAMP regime contains two steps: (1) a determination that the violation was committed and (2) an assessment of the appropriate penalty. The Agency must prove both steps on a balance of probabilities.

[3] The AAAMP regime creates absolute liability offences which means that there are only a few defences that can be relied upon to avoid the Notice once step one has been proven. MacDonald Transport did not raise one of the acceptable defences, therefore, the Notice will be upheld if the Agency proves the following seven elements:¹

1. that the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);

¹ [Doyon v. Canada \(Attorney General\), 2009 FCA 152](#) at para 32 [Doyon].

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);
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.

[4] If the Agency proves the 7 essential elements, 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 accused has any prior violations or convictions, acted with intent or negligence, and contemplates the harm done or could have been done.

3. ISSUES

[5] An Agency Inspector segregated nine pigs during the unloading process at the Talbotville assembly yard for further assessment to determine if they were fit for transport. The pigs were euthanized, marked with identifying numbers, and necropsies performed. After further investigation, the Notice was issued. For reasons not provided to the Canada Agricultural Review Tribunal (Tribunal), the Agency agreed to ask the Tribunal to only consider pig #8 in the review of the Notice. As a result, the following issues must be decided:

1. *Was pig #8 transported by MacDonald Transport?*
2. *Did pig #8 have an umbilical hernia?*
3. *Did pig #8 unduly suffer during transport?*

[6] I did not consider any evidence included in the Agency's report that related to the 7 other pigs when I answered these questions.

4. ANALYSIS

Was pig #8 transported by MacDonald Transport?

[7] The Agency has established that pig #8 was transported by MacDonald Transport. Pig #8 bore a tattoo for identification, but not the legally required ear tag. This tattoo was not used by the Agency Inspector to verify the pig's origin. The Inspector relied on information provided from the driver and assembly yard staff and records to confirm who transported pig #8. MacDonald Transport asserts that the Agency has not met the burden of proof for the first element of the *Doyon* test.

[8] MacDonald Transport also asked that the Tribunal consider their driver's testimony that he would never have loaded pig #8 on the truck. I find this statement inconsistent with what he told the Inspector about the criteria he uses to assess whether an animal should be loaded. He stated that if the animal can walk onto the trailer without assistance, he will transport it. Pig #8 was able to walk without assistance. It was also in good body condition, but of smaller size than some of the other pigs that were transported at the same time. It is highly probable that other pigs obstructed the driver's view of pig #8's underbelly during loading. If pig #8 was not viewed from the side, the atypical mass may have been especially difficult to see.

[9] While the tattoo would have allowed the Tribunal to conclusively prove that pig #8 was transported by MacDonald Transport, proof beyond a reasonable doubt is not required. The Agency has established that it was more likely than not that pig #8 was transported by MacDonald Transport. Animals are unloaded one truck at a time and moved through the assembly yard *en masse*. For pig #8 to be from a different load, it would either have had to be left in the segregation pen from a previous pen or separated from a subsequent load and moved to the segregation pen

while animals transported by MacDonald Transport remained there. I find this unlikely given the testimony of the Inspector and her comments on the Inspector Non-Compliance Report that she observed pig #8 during the unloading process. The Non-Compliance Report also notes that an assembly yard employee said that he unloaded pigs from different farms into separate pens. The Agency has proven the elements 1, 2 and 3 of the violation.

[10] The remaining elements require that I decide whether pig #8 unduly suffered during transport. The “Transportation of Animals Program Compromised Animals Policy” (*Compromised Animals Policy*) outlines that an animal’s status as unfit or compromised is often a key consideration in assessing when an animal has unduly suffered because of “infirmity, illness, injury or fatigue, and any other cause.” The Agency alleges that the pig #8 was unfit for transport because it had a large umbilical hernia.

Did pig #8 have an umbilical hernia?

[11] Although not binding, Agency policy provides that some pigs with an umbilical hernia are unfit for transport because they cannot be transported without undue suffering. Both the Agency and industry rely on the *Compromised Animals Policy* to guide decision-making related to the fitness of animals for transport. The *Compromised Animals Policy* specifies that a hernia makes a pig unfit for transport when it:

1. impedes movement (includes conditions in which the hind legs of the animal touches the hernia when the animal is walking);
2. is painful on palpation;
3. touches the ground when the animal is standing in its natural position; and, or
4. includes an open skin wound or obvious infection.

If pig #8 is found to have been unfit due to a hernia that meets the above criteria, elements 4 and 5 of the *Doyon* test will be proven.

[12] Photographs and videos of pig #8 capture a pig with a large, atypical mass, approximately the size of a volleyball, protruding from its abdomen. The mass also has black necrotic ulcers (scabs) on its underside that indicate that previously there were open wounds on the mass. The likely source of the scabs was the mass rubbing on the ground. Notes taken by the inspector and veterinarians who saw pig #8 describe the mass as touching the ground. The Agency veterinarian who performed the necropsy also noted that the mass had an open wound in his necropsy report and in his oral testimony. After completing the necropsy, he concluded that the mass was a hernia. His oral testimony on how he reached that conclusion was consistent with the notes in the necropsy report. He determined that the mass was a hernia because he felt a ring of thickened tissue around the 8-10cm opening in the abdominal wall and intestinal loops protruding through the hole.

[13] An expert veterinarian called by MacDonald Transport disputed that the mass was a hernia. She opined that the opening was more likely a “large outpouching which consisted of a polystic mass with abscessation.” She reached this opinion after reviewing the photographs of the opened mass and videos of the pig moving in the pen before it was euthanized. She noted that neither the ring nor intestinal loops were visible in the photos. Pig #8’s abdomen was not gaunt which would suggest that its contents had passed through the opening. Rather, the full abdomen is consistent with most of the intestines being present. There is also no evidence of sepsis to suggest that the intestines were being strangled as they pass through the abdomen wall. Her report referenced a range of scientific literature on out-pouching and hernias in further support of her expert opinion.

[14] The Agency has failed to prove on a balance of probabilities that the mass was a hernia. Oral testimony by the Agency veterinarian that he felt intestinal loops while performing the necropsy is the most compelling evidence the Agency has presented to support a finding that pig #8 had an umbilical hernia. While I have commented in a previous Tribunal decision² that a full necropsy is not always necessary, I do not find that the information gathered for this necropsy

² [EUSI Farms Ltd. and T. Burgin Trucking Ltd. v Canadian Food Inspection Agency, 2021 CART 29](#) at para 21.

report is sufficient to support the conclusion reached. The mass was not excised in a way that would allow the Agency's veterinarian to view the opening in pig #8's abdomen.

[15] Because I was not presented with evidence that tactile confirmation of the presence of intestine by the Agency veterinarian is as reliable as a visual confirmation of a hernia, I am unable to conclude that the evidence is sufficiently clear, convincing, and cogent to satisfy the burden of proof that pig #8 was unfit for transport. The expert veterinarian has presented a compelling explanation for the mass being caused by something other than a hernia. That pig #8 has a good body condition and a full abdomen, especially undermine the hernia diagnosis. That the Agency's veterinarian was unable to push the contents of the mass back through the opening after pig #8 was euthanized further suggests that the mass did not contain the contents of the abdomen. Finally, I was provided with no explanation why no intestines were visible given the size of the mass. If a hernia was the cause of the mass, one would expect that a large amount of the abdomen contents would have passed into the mass.

Did pig #8 unduly suffer during transport?

[16] My conclusion that the Agency failed to establish that a hernia made pig #8 unfit for transport does not end the matter. The presence of the mass protruding from pig #8's abdomen may still have cause undue suffering during transport thereby proving the remaining elements of the *Doyon* test. The facts of this case, however, do not favor completing the analysis in the order outlined in *Doyon*. The question to be decided next is whether the Agency has proven that the animal unduly suffered.

[17] Once it has been decided that the animal was not unfit for transport, the subsequent question usually is whether the animal is compromised and was transported with sufficient measures to reduce undue suffering. The *Compromised Animal Policy* defines a compromised animal as one "with reduced capacity to withstand transportation but where transportation with special provisions will not lead to undue suffering." A finding that animal is compromised and that

insufficient measures were taken to prevent undue suffering generally proves elements 4, 5 and 6. The *Compromised Animal Policy*, however, is of little assistance in this case because the presence of an atypical mass is not on the exhaustive list of ailments and injuries that make an animal compromised. The question of whether adequate measures were in place does not arise.

[18] An animal does not have to fall within the definition of an unfit or compromised animal for a violation to occur. Subsection 138(2)(a) of the [HAR](#) prescribes that a violation will occur if an animal unduly suffers during transport because of “infirmity, illness, injury, fatigue or any other cause.” A plain reading of subsection 138(2)(a) clearly reveals that it applies to situations other than when an animal is unfit or compromised. In these situations, it is more logical to continue the analysis with the final element of the *Doyon* test. Only if it is proven that the animal unduly suffered during transport, will it become necessary to consider elements 4 through 6.

[19] The Agency has not provided sufficient evidence to demonstrate that pig #8 unduly suffered. Although “undue suffering” is not defined in the legislation, the meaning of “undue” for the purposes of subsection 138(2)(a) was defined in [Attorney General of Canada v Porcherie des Cèdres Inc.](#) as “unjustifiable, unreasonable and inappropriate suffering.”³ To infer that suffering occurred because of the mere presence of the atypical mass would be unreasonable in light of the evidence presented.

[20] Where the veterinarian expert’s opinion about whether pig #8 demonstrating pain differs from the Agency’s witnesses and evidence, I find the veterinarian expert’s opinion more objective. I find that the Agency’s veterinarians and inspector’s opinions were influenced by their conclusion that pig #8 had a hernia. While the Agency veterinarian testified and his notes, as well as those of the Inspector, stated that pig #8 was displaying behaviour indicative of pain, the behaviours observed were not described. When asked to describe those behaviours during the hearing, the Agency veterinarian noted that pig #8 arched its back while walking. He explained that an arched back is a sign of pain and was also how the pig prevented the mass from touching the ground. The

³ [Canada \(Attorney General\) v. Porcherie des Cèdres Inc., 2005 FCA 59](#)

expert veterinarian reached a different conclusion. She correctly observed that the arched back was only present when pig #8 moved backwards. The back naturally arches whenever a pig's front legs move closer to their back legs.

[21] The mass did not touch the ground while pig #8 stood in the pen in any of the videos. The scabs may have been caused when the animal rose to standing or the mass may previously have been larger. Whatever their cause, the scabs prove that pig #8's condition was chronic. Its otherwise good body condition is not consistent with a finding that the mass or the presence of broken skin caused pig #8 significant pain. The expert veterinarian testified that pigs often refuse to eat in response to pain. The expert veterinarian also accurately noted that pig #8 was not demonstrating common signs of stress or acute pain such as aggression, irregular breathing, vocalizations, anxious eye movement, and reluctance to walk. Finally, without evidence that signs of acute pain, such as from the mass swinging during the transport, would have subsided by the time of the pig #8 as observed in the holding pen, I am unable to infer that the mass caused undue suffering during transport.

[22] Having found that the Agency has not met its burden to prove that pig #8 unduly suffered, the decision to proceed with this review based solely on the experience of pig #8 results in the Notice issued to MacDonald Transport being set aside.

5. TOTAL GRAVITY VALUE ASSESSMENT

[23] Given my finding that the violation has not been proven on a balance of probabilities, there is no need to review the Agency's Total Gravity Value assessment.

6. ORDER

[24] I find that Agency has failed to prove that MacDonald Transport committed the violation in Notice #1819ON2001. The Notice with penalty is set aside.



Patricia L. Farnese
Member
Canada Agricultural Review Tribunal