



Canada Agricultural  
Review Tribunal  
Ottawa, Canada  
K1A 0B7

Commission de révision  
agricole du Canada

Citation: *Atkinson v Canadian Food Inspection Agency*, 2023 CART 11

Docket: **CART-2021-FNOV-009**  
**CART-2021-FNOV-015**

**BETWEEN:**

**SIMON ATKINSON**

**APPLICANT**

**- AND -**

**CANADIAN FOOD INSPECTION AGENCY**

**RESPONDENT**

**BEFORE: Marthanne Robson, Member**

**WITH: Mr. Simon Atkinson, representing himself, and  
Mr. James Stuckey and Ms. Laura Tausky, representing the  
Respondent**

**DECISION DATE: March 17, 2023**

**VIRTUAL HEARING DATE: April 26, 2022**

## 1. OVERVIEW

[1] Simon Atkinson (the Applicant) owns and operates an assembly yard near Brandon, Manitoba which provides feed, water and rest for animals in transport between other locations. Mr. Atkinson arranged for his neighbour to load about 328 animals into 10 compartments of a potbelly trailer for transport to an abattoir in Ontario.

[2] The load arrived at the abattoir with three animals with injuries, each in separate compartments: a dead lamb, a downed cull ewe that was subsequently euthanized and a dead newborn lamb. On January 22, 2021, the Canadian Food Inspection Agency (Agency) issued two Notices of Violation with warnings to Mr. Atkinson: #1920ON2189-1 for transporting or causing to be transported animals in an overcrowded conveyance contrary to subsection 140 (2) of the [Health of Animals Regulations](#) (*HA Regulations*) relating to the dead lamb and the downed cull ewe and Notice #1920ON2189-2 for loading, transporting or causing to be loaded or transported an animal that would probably give birth during the journey contrary to paragraph 138(1)(c) of the *HA Regulations*.

[3] The Tribunal reviewed the facts of both Notices together at a virtual hearing.

[4] The Agency Inspector who observed the unloading relied on calculations in the *Recommended Code of Practice for the Care and Handling of Farm Animals – Transportation*<sup>1</sup> (*Code*) to conclude that the compartments were overcrowded. The *Code* is a recommendation not a requirement. The Inspector ignored other evidence, including her own observations, that the animals were not crowded, and did not consider other possible causes for the animals' injuries or undue suffering. Two Agency veterinarians relied on the Inspector's conclusion that the compartments were overcrowded in coming to their own conclusions that the cause of death, injury or undue suffering was overcrowding. In the case of the downed cull ewe, this was contrary to the veterinarian's opinion letter that the animal went down in the trailer due to its poor physical condition.

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<sup>1</sup> [Recommended Code of Practice for the Care and Handling of Farm Animals – Transportation](#).

[5] The Agency did not prove on the balance of probabilities that overcrowding caused injury or undue suffering to the dead lamb or the downed cull ewe.

[6] The Agency veterinarian's evidence demonstrates that the dead newborn lamb was full-term. This proves on the balance of probabilities that Mr. Atkinson caused a pregnant ewe to be loaded and transported that would probably give birth during the journey. The Tribunal concludes that he committed the violation and is subject to a warning.

## 2. LEGAL FRAMEWORK

[7] One of the purposes of the [Health of Animals Act](#) (HA Act) and the [HA Regulations](#) (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. It has additional provisions to ensure that 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.

[8] The Agency issued two Notices to Mr. Atkinson. In [Doyon](#), the Federal Court of Appeal (FCA) held that violations under the administrative monetary penalty system should be analyzed according to their essential elements. The Agency issuing the Notice has the burden of proving all the essential elements of the violation on a balance of probabilities, meaning it is more likely than not that the violation occurred. If all the elements are proven, the Tribunal considers whether the applicant has raised a permissible defence. Violations under this system are absolute liability offences, meaning there are very few permissible defences. Due diligence (I did my best) and mistake of fact (I did not know) are not permissible defences.

## Overcrowding

[9] The first Notice (1920ON2189-1) alleges Mr. Atkinson transported or caused to be transported an animal in a vehicle that was crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein, contrary to subsection 140(2) of the *HA Regulations*.<sup>2</sup>

[10] There are four essential elements to this violation<sup>3</sup>:

1. an animal was transported in a railway car, motor vehicle, aircraft, vessel, crate or container;
2. the railway car, motor vehicle, aircraft, vessel, crate or container was crowded;
3. the crowding 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 transporting, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and the alleged violator.

[11] The *Code* states that the humane transportation of animals is a joint responsibility of buyers, sellers, assembly point managers and truckers. It sets out guidelines for space requirements including maximum trailer loading densities for sheep. The Tribunal has concluded that the *Code* is a recommendation not a requirement. The Tribunal must consider all the evidence to determine whether the vehicle or container was, on the balance of probabilities, overcrowded.<sup>4</sup>

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<sup>2</sup> Note: this violation has been amended and replaced by section 148 [HA Regulations](#).

<sup>3</sup> [Transport Eugène Nadeau inc. v. Canada \(Canadian Food Inspection Agency\)](#), 2017 CART 16.

<sup>4</sup> [Harwil Farms Mobile Feeds Ltd. v Canadian Food Inspection Agency](#), 2022 CART 8, paragraph 3 and 41.

## **Loading or transporting an animal that will probably give birth during the journey**

[12] The second Notice (1920ON2189-2) alleges Mr. Atkinson loaded or transported or caused to be loaded or transported in a vehicle an animal that would probably give birth during the journey, contrary to paragraph 138(2)(c) of the [HA Regulations](#). This is the first opportunity for the Tribunal to review this violation. The Tribunal will discuss and determine the essential elements of the violation in the analysis section.<sup>5</sup>

### **3. ISSUES**

1.0 Did Mr. Atkinson cause the animals in the trailer to be loaded or transported?

#### Overcrowding

2.0 Was there overcrowding in the compartment containing the dead lamb?

2.1 Was there overcrowding to such an extent as to be likely to cause injury or undue suffering to the dead lamb?

2.2 Was there overcrowding in the compartment containing the cull ewe?

2.3 Was there overcrowding to such an extent as to be likely to cause injury or undue suffering to the downed cull ewe?

#### Loading or transporting an animal that will probably give birth during the journey

3.0 What are the essential elements of a violation of paragraph 138(1)(c) of the *HA Regulations*?

3.1 Was it probable that an animal would give birth during the journey?

3.2 Did Mr. Atkinson establish a permissible defence or legal reason to relieve responsibility for committing the violation?

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<sup>5</sup> This violation has been replaced by paragraph 139 (1) of the [HA Regulations](#): No person shall load, confine or transport an animal that is unfit, or cause one to be loaded, confined or transported. An animal that is in the last 10% of its gestation or has given birth during the preceding 48 hours is defined as "unfit" (136(1)(q)).

## **4. ANALYSIS**

### **1.0 Did Mr. Atkinson cause the animals in the trailer to be loaded or transported?**

[13] Mr. Atkinson owns the assembly yard where the animals were loaded on the trailer. All the animals loaded on the trailer spent some time in Mr. Atkinson's assembly yard. Mr. Atkinson was not present during the loading. Mr. Atkinson arranged for his neighbour, Mr. Hillis, to load the trailer. Mr. Atkinson prepared a loading chart for Mr. Hillis, which turned out to be irrelevant as the trailer which arrived was a slightly different configuration than what was expected. Mr. Atkinson relied on Mr. Hillis' experience loading sheep, as well as their long working relationship in the business of loading and transporting livestock. Brooklynn Transport LTD. billed Mr. Atkinson for the shipping of some of the sheep.

[14] Mr. Atkinson asked Mr. Hillis to load the animals and relied on his neighbour's experience loading animals. Therefore, the Tribunal finds that Mr. Atkinson caused the animals in the trailer to be loaded and transported even though he was not physically present at the time of loading. This is an essential element of both violations.

### **Overcrowding**

[15] The Inspector calculated loading densities based on the *Code*. Mr. Atkinson testified that he used personal experience, not the *Code*, to determine loading densities. In Mr. Atkinson's opinion, the *Code* is only a guide and is inconsistent and inaccurate. The Inspector admitted the *Code* is a guideline, not the law. The Tribunal must consider all the evidence to determine whether the compartment in question was, on the balance of probabilities, overcrowded.

### **2.0 Was there overcrowding in the compartment containing the dead lamb?**

[16] The Inspector calculated the loading density for the 50 lambs in each of two belly compartments using the *Code* as a guide, with an average weight per lamb of 68, 70 and 73 pounds. According to her calculations at each of the three weights, each compartment

was either 11 or 12 lambs over capacity. She noted that for trips over 24 hours and in hot, humid weather, the *Code* recommends that the loading density be decreased by 15%. The trip lasted over 24 hours.

[17] The temperature in Brandon at the time of loading was 24.6°C with a humidex of 27. By 2300 hrs. the temperature was 15.1°C with no humidex. The Inspector's Report noted that at the time of unloading, data from Oshawa, 25 minutes south of Port Perry, showed the temperature 23.6°C with a humidex of 29. There was no data available for Port Perry.

[18] According to the Inspector's Report, the driver stated that he stopped in Nipigon and that all the animals were lying down when he checked. He also stopped in White River, Sault Ste. Marie and Parry Sound and didn't notice any issues when he checked the animals. He did not unload immediately when he arrived at his destination at 2:15 AM on July 2 because there was a truck in the unloading area and there was no room in the barn for his load. He began unloading about 9:30 AM.

[19] The Inspector noted that the "lambs in the belly looked overcrowded" but other than that, she did not notice anything of concern from observations outside the trailer. She observed that 99 lambs just unloaded from the belly compartment all appeared to be fit for the rest of the trip. They were bright and alert. There was no evidence of any injury or distress to any other animal in the belly.

[20] Mr. Atkinson's testified of his considerable experience in handling and transporting animals. He testified that his neighbour, Eric Hillis, was very experienced at loading sheep and was also a driver. He loaded transports 3 to 4 times a week and assisted Mr. Atkinson in loading every week for several years. Mr. Atkinson explained that loading sheep is a stressful situation, and as a defence mechanism, animals huddle together. He testified that it doesn't matter whether animals are in a trailer or a field, if they are stressed, they will pile up. In his opinion, one dead animal does not indicate that the load was overcrowded. Mr. Atkinson noted that it was very hot throughout the journey and the

animals would have been distressed if they were overcrowded. The Inspector admitted it was possible that the injury could have been caused by something other than overcrowding but that it was unlikely based on the *Code* and the lack of any underlying disease or health concerns with that specific animal.

[21] In this case, the Inspector did not consider other evidence, including her own observations, that the animals were not in fact overcrowded. She did not observe any other signs of overcrowding in the trailer or after the animals were unloaded, for example, injuries to other animals, distress, problems in breathing, or signs of anxiety. The Tribunal finds that the Agency did not prove on the balance of probabilities that the belly compartment containing the dead lamb was overcrowded.

## **2.1 Was there overcrowding to such an extent as to be likely to cause injury or undue suffering to the dead lamb?**

[22] There was no dispute that there were injuries to a dead lamb found in the belly compartment. It had no fleece on the right front shoulder/leg and the right shoulder was in an abnormal position. It was severely bloated. Agency veterinarian Dr. Ivanovich who examined the animal, concluded that trauma to the right shoulder caused hemorrhage, and death was due to severe trauma/pain causing shock. The warm weather and high humidex caused the lamb carcass to decompose quickly.

[23] Dr. Ivanovich relied on the Inspector's conclusion that the compartment containing the dead lamb was overcrowded in coming to her own conclusions. Dr. Ivanovich's Opinion Letter concluded overcrowding caused the death of the lamb. Dr. Ivanovich did not testify at the hearing.

[24] Dr. Wiley, another Agency veterinarian, testified as an expert at the hearing. She reviewed all the material filed with the Tribunal, including Dr. Ivanovich's Opinion Letter. Dr. Wiley also relied on the Inspector's calculations and conclusions that the compartment containing the dead lamb was overcrowded. In Dr. Wiley's opinion, overcrowding may



have caused the death of the lamb, but overcrowding definitely caused the likelihood of undue suffering, and could have exacerbated the injury or expedited the death of that lamb. She testified that with overcrowding, if the lamb went down during transportation, there could have been trampling which could have caused the dislocation to the shoulder. That is speculation of what happened and not evidence of actual overcrowding in this case. She testified she could not determine based on the evidence whether the injury, trampling and death could have been caused by the animals huddling rather than because of overcrowding.

[25] The Agency did not prove that the compartment containing the dead lamb was overcrowded. The veterinarians' opinions relying on the fact that the compartment was overcrowded are not relevant. The Agency did not prove on the balance of probabilities that there was crowding in the belly of the trailer to such an extent as to be likely to cause injury or undue suffering to the dead lamb.

## **2.2 Was there overcrowding in the compartment containing the cull ewe?**

[26] The Inspector calculated according to the *Code* that the rear compartment, which contained the downed cull ewe, was 4-7 sheep overcapacity, depending on whether they were full wool or shorn/half wool. Other than these calculations, there was no other evidence that the animals in this compartment were overcrowded, such as injuries to other animals, distress or problems breathing. The driver stated that all the animals were lying down when he stopped the vehicle in Nipigon, which is evidence that the compartment was not overcrowded.

[27] Dr. Ivanovich's Opinion Letter noted that animals "need enough space to lie down and get up normally. Overcrowding prevents this normal behaviour and therefore causes undue suffering." These are general statements about overcrowding, but not actual evidence of overcrowding in this case.

[28] The Tribunal finds that the Agency did not prove on a balance of probabilities that the compartment containing the downed cull ewe was overcrowded.

### **2.3 Was there overcrowding to such an extent as to be likely to cause injury or undue suffering to the downed cull ewe?**

[29] The downed cull ewe was alive but unresponsive in the trailer. An employee of the abattoir euthanized the animal. Dr. Ivanovich observed that the downed cull ewe was missing fleece on the abdomen and during a post-mortem examination, found multiple areas of hemorrhage, clots of blood and bruising under the skin from the left shoulder to the left flank. Dr. Ivanovich observed that the animal was emaciated (body condition score of 1 or less) and believed it did not receive proper nutrition and access to food before the transport began. The animal suffered from a condition called serous atrophy; when fat converts to a liquid because the animal is seeking every available energy source to sustain it. Once that condition exists, death ensues within five days as the body continues to deteriorate and go into a state of shock. In Dr. Ivanovich's opinion it succumbed to its condition and went down in the trailer due to lack of energy to support the journey. Dr. Wiley did not give any evidence regarding the downed cull ewe.

[30] Dr. Ivanovich's Opinion Letter noted that paragraph 138(2)(a) of the *HA Regulations* states that "no person shall load or transport an animal that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey". The Inspector Noncompliance Report identified that there was noncompliance with that provision. The Agency chose to issue a notice of violation to Mr. Atkinson for overcrowding rather than for transporting an unfit animal.

[31] The Tribunal finds, on the balance of probabilities, that it was the condition of the downed cull ewe not overcrowding that led to the injury. The Agency did not prove on the balance of probabilities that there was overcrowding to such an extent as to be likely to cause injury or undue suffering to the downed cull ewe. The Tribunal finds that Mr. Atkinson did not commit the violation alleged in Notice #1920ON2189-1.

## **Loading or transporting an animal that will probably give birth during the journey**

### **3.0 What are the essential elements of a violation of paragraph 138(1)(c) of the *HA Regulations*?**

[32] Paragraph 138(2)(c) of the *HA Regulations* states:

*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  
(c) if it is probable that the animal will give birth during the journey.*

[33] The Agency must establish that it was probable that an animal would give birth during the journey. Probable means that it is supported by evidence strong enough to establish presumption but not proof.<sup>6</sup> The probability of birth is established before or at the time of loading or at any time during the transportation. However, as an Agency inspector is generally only present at the unloading of animals, there may only be evidence available after the fact.

[34] The essential elements of the violation are:

1. The applicant is the person named in the Notice;
2. the applicant loaded or caused to be loaded, transported or caused to be transported an animal;
3. the loading or transporting was on a railway car, motor vehicle, aircraft or vessel; and
4. it was probable that the animal would give birth during the journey.

[35] There is no need to add an additional essential element of a causal link to the applicant because the violation refers to causing to be loaded or causing to be transported.

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<sup>6</sup> Merriam-Webster online dictionary: [Probable](#).

### **3.1 Was it probable that an animal would give birth during the journey?**

[36] There was no animal identified in the evidence as having given birth. The evidence related only to the dead newborn lamb found on the trailer. Dr. Ivanovich examined the dead newborn lamb and concluded in the Opinion Letter that it was alive when born and had been up and walking. She estimated it to be born full-term and one-day old. It suffered severe internal injuries that led to its death. In her opinion the lamb was trampled after its birth. The Necropsy Report noted that the lamb was not in a state of decay and the carcass was cool, concluding it died in the last few hours of transport. In Dr. Ivanovich's opinion a pregnant ewe was loaded and gave birth to this lamb on the journey from Manitoba to Ontario. The Inspector had no doubt that the load contained a pregnant ewe that was probable to give birth during transportation. Dr. Wiley did not give any evidence concerning the dead newborn lamb.

[37] The only evidence of the probability that an animal would give birth during the journey is the fact that there was a dead newborn lamb estimated to be full-term and one-day old on the trailer. The Tribunal is inclined to agree with the Inspector's opinion that it would be unlikely that the lamb was born and then loaded onto the trailer. Mr. Atkinson testified that the gestation period for sheep is five months. A full-term lamb was born sometime between loading and unloading approximately 43 hours later. That is less than 2 days of the total gestation period. The Tribunal concludes that an animal was loaded and it was probable that the animal would give birth during the journey.

[38] The Tribunal concludes that the Agency proved on a balance of probabilities that Mr. Atkinson caused an animal to be loaded and transported in a vehicle that was probable to give birth during the journey.

### **3.2 Did Mr. Atkinson establish a permissible defence?**

[39] The load containing the dead newborn and the pregnant ewe originated in Alberta before stopping at Mr. Atkinson's facility. Mr. Atkinson argued that the Alberta shipper should have inspected the animals and was responsible for identifying and not shipping a pregnant ewe that was probable to give birth. The Inspector noted in her report, both the Alberta shipper and Mr. Atkinson were listed as contravening that provision. The Tribunal concluded that even though Mr. Atkinson was not personally present at the loading, he is responsible because he caused the pregnant ewe to be loaded and transported from his facility.

[40] In Mr. Atkinson's opinion, the only way to identify with certainty that an ewe is pregnant is by ultrasound. A visual inspection does not clarify. He argued that that would be too expensive, and the technology is not available at his feed station. He admitted that he did not take any additional steps to verify for pregnant animals, and to his knowledge neither did Mr. Hillis or the driver.

[41] The Inspector testified that part of good husbandry is to keep records, to know when animals are bred and when they are likely to give birth as well as to examine them if they are in gestation and determine if they are likely to give birth. The Inspector testified that other ways to check whether a sheep is pregnant and will probably give birth are to observe whether there is discharge from the vulva, examine the teats as they can become engorged with milk, and shear the animal so it is easier to see. A pregnant animal can become restless and go off feed. Mr. Atkinson testified that these practices were unreasonable and cumbersome.

[42] Mr. Atkinson's arguments amount to a defence of due diligence, that he did his best in the circumstances, even though he did not take any additional steps to verify for pregnant animals. The defence of due diligence is explicitly excluded by law.<sup>7</sup> The Tribunal finds that Mr. Atkinson committed the violation in Notice # 1920ON2189-2.

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<sup>7</sup> 18 (1) (a) of the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#) (AAAMP Act).

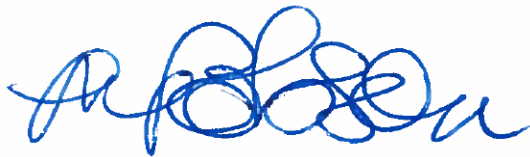
## 5. ORDER

[43] The Tribunal sets aside Notice of Violation #1920ON2189-1.

[44] Mr. Atkinson caused an animal that could probably give birth during the journey to be loaded or transported in a vehicle contrary to paragraph 138(2)(c) of the *HA Regulations* as set out in Notice of Violation #1920ON2189-2 and is subject to a warning.

[45] This violation is not a criminal offence. After five years, Mr. Atkinson may apply to the Minister of Agriculture and Agri-Food to have the violation removed from the records, in accordance with section on 23 of the *AAAMP Act*.

Dated this 17<sup>th</sup> day of March 2023.



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Marthanne Robson  
Member  
Canada Agricultural Review Tribunal