



Canada Agricultural
Review Tribunal
Ottawa, Canada
K1A 0B7

Commission de révision
agricole du Canada

Citation: *Brussels Transport Ltd. v Canadian Food Inspection Agency*, 2023 CART 20

Docket: CART-2022-FNOV-001

BETWEEN:

BRUSSELS TRANSPORT LIMITED

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Patricia L. Farnese, Member

**WITH: Andy Armstrong, for the Applicant, and
Alyson E. Sutton and Chris Araujo, for the Respondent**

DECISION DATE: June 30, 2023

VIRTUAL HEARING DATE: April 3 to April 5, 2023

1. INTRODUCTION

[1] Brussels Transport Limited (Brussels) received a Notice of Violation (Notice) with a \$13,000 penalty for contravening subsection 148(1) of the [*Health of Animals Regulations*](#) (*HA Regulations*). The Canadian Food Inspection Agency (Agency) issued the Notice following an investigation after five market hogs were found dead in the trailer they were transported in upon their arrival at the Olymel slaughterhouse in Saint-Espirit, Quebec on June 22, 2020. Brussels has asked that the Tribunal review the facts that have led to the violation and dismiss the Notice.

[2] I have concluded that the Agency has proven the essential elements of the violation. The Notice is upheld. Brussels failed to reduce the density of hogs in two compartments by 25% in response to the hot, humid weather during the hogs' transport. Although proof of actual harm is not required to establish that a subsection 148(1) violation has occurred, five arrived dead and other animals were observed in some respiratory distress upon arrival at Olymel. Consequently, I also find that a penalty of \$13,000 is appropriate in the circumstances because serious harm was caused by the overcrowding.

2. LEGAL FRAMEWORK

[3] The [*Agriculture and Agri-food Administrative Monetary Penalties Act*](#) (AAAMP Act) and accompanying regulations set out a uniform process (the AAAMP Regime) to enforce and address violations of many laws in the agriculture and agri-food sector. A violation of subsection 148(1) of the *HA Regulations* 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. Brussels' application, however, follows recent amendments to the *HA Regulations*. I must outline the elements of a section 148(1) violation before I can decide if the violation was committed.

[4] Section 148(1) replaced subsection 140(2) in the amended Regulations. Section 148(1) prohibits transporting (and confining) animals in overcrowded conditions:

148 (1) No person shall load an animal, or cause one to be loaded, in a conveyance or container, other than a container that is used to transport an animal in an aircraft, in a manner that would result in the conveyance or container becoming overcrowded, or transport or confine an animal in a conveyance or container, or cause one to be transported or confined, in a conveyance or container that is overcrowded.

[5] Previously, proof of the likelihood of injury or undue suffering as a result of overcrowding during transport was required to establish a violation:

140. (2) No person shall transport or cause to be transported any animal in any railway car, motor vehicle, aircraft, vessel, crate or container that is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.

[6] Overcrowding, injury, and undue suffering were not defined in the former regulations. Transporters and the Agency were left to assess when animal suffering crossed an ill-defined threshold from acceptable suffering to undue suffering based on a definition of “undue suffering” that emerged from court and tribunal decisions in previous cases.

[7] Subsection 148(2), however, now defines overcrowding in a way that makes it clear that any risk of suffering due to overcrowding during transport is not permissible:

(2) For the purposes of subsection (1), overcrowding occurs when, due to the number of animals in the container or conveyance,

(a) the animal cannot maintain its preferred position or adjust its body position in order to protect itself from injuries or avoid being crushed or trampled;

(b) the animal is likely to develop a pathological condition such as hyperthermia, hypothermia or frostbite; or

(c) the animal is likely to suffer, sustain an injury or die.

[8] Proof of likely suffering, injury, or death is only considered where the Agency relies on (c). The Agency must, nonetheless, prove the causal link with the risk of injury, being crushed, or trampled in (a) and the specified pathological condition in (b).

[9] Section 138.3 creates a non-exhaustive list of risk factors that transporters must monitor during transport that the Tribunal can consider to decide if subsection 148(2)(c) has been contravened. These factors, while not conclusive proof of overcrowding, assist with identifying when suffering, injury or death are likely to occur because they are identified as having an impact on an animal's capacity to withstand transport:

138.3 (1) Every person who loads, confines or transports an animal in or unloads an animal from a conveyance or container, or causes one to be so loaded, confined, transported or unloaded, shall, before loading, confining, transporting or unloading the animal, assess the animal's capacity to withstand the loading, confinement, transporting and unloading by taking into account any risk factors that could reasonably be viewed as having an impact on the animal's capacity to withstand the loading, confining, transporting and unloading, including

- (a) the current condition of the animal;
- (b) any pre-existing infirmity, illness, injury or condition of the animal;
- (c) the space requirements for the animal;
- (d) the compatibility of the animal with any other animal;
- (e) animal handling and restraint methods;
- (f) the expected time that the animal will be without feed, safe water and rest;
- (g) the expected duration of the transport and confinement of the animal in the conveyance or container;
- (h) the foreseeable delays during transport and at the destination;
- (i) the foreseeable weather conditions during transport;
- (j) the foreseeable conditions that may be encountered during transport that could result in sharp inclines and declines, vibration and shifting of the container or swaying of the conveyance; and
- (k) the type and condition of the conveyance, container and equipment.

(2) Every person who confines or transports an animal in a conveyance or container shall monitor the animal in a manner and frequency that is appropriate to assess the animal's capacity to withstand the confinement and transport, taking into account the risk factors set out in subsection (1).

[10] When considered with the language of subsection 148(2), Parliament's changes on the overcrowding violation inform how the elements of the violation are defined. To sustain the Notice, the Agency must, therefore, prove that:

Element One: Brussels loaded, transported or confined an animal or caused an animal to be loaded or confined;

Element Two: in a conveyance or container, other than a container that is used to transport an animal in an aircraft;

Element Three: when the conveyance or container was or would become overcrowded because:

(a) the animal cannot maintain its preferred position or adjust its body position in order to protect itself from injuries or avoid being crushed or trampled;

(b) the animal is likely to develop a pathological condition such as hyperthermia, hypothermia or frostbite; or

(c) the animal is likely to suffer, sustain an injury or die.

[11] Overcrowding is a factual finding that is determined from the condition of the animals and the conditions of transport. The Tribunal, the Agency and transporters routinely rely on industry guidelines of best practices 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. Recent changes to the Regulations have not changed the relevance of the Codes to the questions of overcrowding.

[12] 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 the first step has been proven. In other words, if the Agency proves the essential elements and Brussels does not raise an acceptable defence, the Notice will be upheld.

[13] The Tribunal must decide the appropriate penalty amount if the Agency proves the essential elements. Where an absolute liability offence is alleged, this second step is required 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 IN THIS APPLICATION

[14] Brussels' applications requires that I decide three issues:

- a. Whether Brussels transported pigs in an overcrowded trailer?
- b. If yes, is alleged unfairness in the Agency's enforcement practice an acceptable defence?
- c. If no, did the Agency imposed an appropriately calculated penalty?

4. ANALYSIS

(a) Did Brussels transport pigs in an overcrowded trailer?

[15] Brussels and the Agency agreed that several facts are not disputed. On June 22, 2020, Scott Thom loaded 170 market hogs onto a trailer at Denfield, Ontario for Brussels. The Trailer was driven to the Olymel establishment at Saint-Espirit, Quebec by Derek Borth, a Brussels employee. The hogs were transported approximately 772 km in

about 8.5 hours. These agreed facts establish the first two elements of the violation. Brussels transported animals (element one) in a conveyance, the trailer (element two).

[16] The remaining agreed facts are relevant to the final element. The journey began around noon. The following temperatures were recorded that day along the route:

- 24°C at 12:00 in Kintor, Ontario
- 30°C at 15:00 in Port Hope, Ontario
- 24°C at 20:00 in Saint-Espirit, Quebec
- 22°C at 21:00 in Saint-Espirit, Quebec

[17] The Parties also do not dispute that Dr. André Gauthier, a veterinary inspector with the Agency, and Marie-Christine Langevin, an Agency inspector, were at Olymel when the hogs arrived. The remaining facts are in dispute.

[18] The Agency contends that five dead hogs were found in the two rear compartments of Brussels' trailer. Dr. Gauthier examined the hogs, without performing a necropsy, and observed signs of asphyxia, suffocation, and cyanosis in the abdominal regions and the limbs. He testified that many of these signs can be seen in a photograph of the five dead hogs submitted as evidence. He further explained that these signs along with his observations of the sizes of the trailer compartments, and the fact that other hogs were observed to be in respiratory distress after unloading led to his conclusion that the hogs' deaths were caused by hyperthermia due to overcrowding and exposure to hot temperatures.

[19] Brussels disputes that the trailer was overcrowded and challenges the measurements of the trailer compartments and the weight of the hogs relied upon to determine that there was overcrowding. Brussels also attempted to raise doubt that the photo of five dead hogs submitted into evidence were of the hogs from its trailer because the identifying tattoos were visible in the photograph. Therefore, even if those hogs showed signs of death caused by hyperthermia, there is no proof that the hogs in the photo came from Brussels' trailer.

[20] Brussels' driver provided the Agency with an explanation of how the hogs were distributed in the trailer and where the five dead pigs were located on the day the incident occurred. As the driver removed the dead hogs while unloading the trailer, and as he provided his explanation to Inspector Langevin shortly thereafter, I have no reason to doubt the accuracy of this account. I find one compartment (compartment A), located in the middle level of the trailer, held 24 hogs of which three arrived dead. The second compartment (compartment B), located in the belly of the trailer, held 18 hogs of which two arrived dead.

[21] The trailer was measured by Dr. Gauthier on the day of the incident with the assistance of Brussels driver, who held the end of the tape measure. The driver testified that he did not verify or otherwise concern himself with the measurements recorded by Dr. Gauthier. Dr. Gauthier testified that the measurements were taken from outside the trailer, so the actual size of each compartment would be smaller.

[22] Brussels disputes Dr. Gauthier's measurement of 106.25 sq. ft. for compartment B and argues that it was one foot longer than measured. Brussels does not take issue with Dr. Gauthier's measurement of 140.25 sq. ft. for compartment A but disputes its location. Brussels devoted much time to the location of compartment A during the hearing although its location has no bearing on the question of overcrowding. Compartment A is identified as the second compartment from the back on the middle level in the diagram of the trailer Dr. Gauthier drew after measuring the trailer. The driver testified that three dead hogs were found in the final compartment of the middle level of the trailer. He further testified that he never would have loaded 24 hogs in the second compartment because it is a smaller compartment, and all the animals would have died during transport.

[23] I find the size of compartment B is 106.25 sq. ft. as Dr. Gauthier described. I also find that compartment A was the last compartment contrary to Dr. Gauthier diagram. Brussels' driver was shown the diagram that Dr. Gauthier drew and asked to confirm if the diagram was accurate under cross-examination. He confirmed the dimensions were accurate, but the location of the compartment that held 25 hogs was incorrectly labelled.

The driver further agreed that the final compartment, and not the second as Dr. Gauthier recorded on his diagram as compartment A, is the largest and is a standard design for trailers of this kind. The second compartment in the middle is smaller than the final compartment and is the same size as the one above and below (compartment B).

[24] The Agency used an average live weight of approximately 130 kg or 285 lbs to calculate the space requirements for humane transport of the hogs. This weight was derived from the average carcasses weight of (103.7kg) from that load as recorded by Olymel. The carcass weight represents approximately 80% of the live weight. The Agency provided email verification from the Les Éleveurs de porcs du Québec to support the use of a ratio of 0.8/1 for carcass to live weight as it is the industry standard in Quebec.

[25] Brussels does not accept the average weight because it was derived from Olymel's register of slaughter that listed only 156 hogs. Brussels suggested that the average should be divided by 165, 170 hogs loaded minus the five dead, and that 156 was an inversion of the last two numbers of 165. Therefore, the total weight of 16,179.1 kg was incorrectly divided by 156 to establish an average carcass weight of 103.7 kg.

[26] I find that the average weight of the hogs transported by Brussels was 285 lbs as indicated by the Agency. The review of the register of slaughter shows that each carcass' weight is provided individually and only 156 hogs are identified as belonging to Brussels' load. Moreover, Mr. Francis Lavoie, the CFIA Inquiry Specialist who assisted with readying this matter for the hearing, testified that he verified the register to confirm that the register only contained the weights for 156 hogs. His review was undertaken because he also wondered whether the numbers had been inverted. I accept the Agency's evidence that some hogs that arrive alive are not recorded on the register if they are otherwise removed from the production line during slaughter. The register is also used to determine the price owed by Olymel for the hogs delivered. Brussels provided no evidence that they challenged the register at the time, which would support a finding that the register was inaccurate.

[27] Subsection 138.3(1) of the HA Regulations explicitly lists the animal's space requirements and the expected temperatures as risk factors to be considered when transporting animals. The Agency has provided uncontested evidence that the animals were transported in temperatures that ranged between 29-38°C when humidity is considered. The Pig Loading Density Requirements found in the Animal Code, specify pigs that weigh 285 lbs require 4.85 sq. ft. of space during transport. The Animal Code, however, also recommends that travel be avoided, whenever possible, during hot, humid weather. If travel proceeds in those conditions, the Animal Code specifies that the maximum density be reduced by 25%. The Livestock Weather Safety Index from the Pig Code assists farmers with determining when weather conditions warrant reducing the density of animals being loaded. The Pig Code, while not binding, provides that animals cannot be humanely transported during temperatures within the danger range without a reduction in loading density. A temperature of 38°C is well within the danger range identified in the Pig Code.

[28] I find the Agency has proven the final element of the violation because the weather conditions warranted a 25% reduction in livestock density. Brussels' failure to reduce the density of animals in compartments A and B made it likely that the hogs would suffer, sustain an injury, or die as consequence of being overcrowded contrary to subsection 148(2)(c) of the Regulations. Compartment A should have had no more than 19 hogs rather than the 24 that Brussels loaded, given the size of the compartment and the space requirements of each hog of an average weight of 285 lbs. Compartment B should have only had 14 hogs instead of the 18 present. I note that even if I had accepted Brussels' length for compartment B, they would still have had one too many hogs for that size of compartment.

[29] Subsection 148(2)(c) of the *HA Regulations* does not require proof of actual suffering, therefore, there is no need for me to make a finding with respect to the cause of death of the five hogs to establish the violation occurred. The violation is established if, on a balance of probabilities, an animal is likely to suffer. The Animal Code and the Pig Code establish specific best practices for the humane transport of hogs. Both recommend

reducing loading densities by 25% in hot, humid weather to provide sufficient ventilation to assist the regulating the hogs' body temperatures during transport in trailers that only rely on passive ventilation. In the absence of any evidence that artificial means were used to keep the hogs cool, failing to reduce load density is sufficient to prove that the animals were likely to suffer.

(b) Is alleged unfairness in the Agency's enforcement practice an acceptable defence?

[30] Brussels did not raise any acceptable defences to the violation. The Federal Court of Appeal in [Doyon](#) describes the AAAMP regime of violations and penalties as draconian and highly punitive. Even common defences of due diligence (I did my best) and mistake of fact (I did not know) are not permitted. Brussels asks the Tribunal to consider the fairness of the Agency's practice at Olymel to only pursue enforcement where more than three hogs arrive dead. They urge this Tribunal to recognize that "deadstock" is expected when dealing with livestock. Brussels suggests that the Agency's admitted practice of not pursuing enforcement for every dead hog recognizes that reality. Brussels urges the Tribunal to recognize that three is an arbitrary threshold and, therefore, Brussels is being unfairly treated.

[31] While I am sympathetic to Brussels' concern about the apparent arbitrariness of the Agency's decision to only investigate when more than three hogs arrive dead in a single load, the Tribunal has no mandate to specify that all breaches of the regulations be enforced. The Federal Court of Appeal in [Chu](#) has also explicitly outlined that I do not have the authority to review the Agency's exercise of discretion even when circumstances suggest that that exercise was not only arbitrary, but may be an abuse of process:

...it was unreasonable for the Tribunal to review the Minister's discretion to issue the notice of violation and the applicable penalty. Parliament has clearly limited the Tribunal's powers to determining whether a violation has been proven and if so, and if applicable, whether the amount of the penalty has been imposed in accordance with the Regulations (the Act, ss. 14(1); *Canada (Attorney General) v. Vorobyov*, 2014 FCA 102, 459 NR 134 at para. 42). By reviewing the Minister's

discretion, the Tribunal unreasonably interpreted its statutory powers and exercised authority contrary to the text of the Act.

[32] As Brussels has not raised an acceptable defence, the only question remaining is whether the Agency assessed the total gravity value in accordance with the [*AAAMP Regulations*](#).

(c) Was the Penalty Calculated Appropriately?

[33] Brussels was fined \$13,000. Changes to the Regulations have increased the penalties and stigma associated with violations aimed at safeguarding the welfare of animals by changing the classification of many violations from serious to very serious offenses. Schedule 1 of the *AAAMP Regulations* classifies subsection 148(1) of the *HA Regulations* as a very serious violation. Section 5 of the *AAAMP Regulations* imposes a \$10,000 penalty for serious offences although the penalty can be adjusted in some cases.

[34] 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 the *AAAMP Regulations* outlines the percentage the penalty should be increased or decreased based on the total gravity value.

History

[35] The Agency justifiably gave Brussels 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 five years from the date of the violation. The present violations occurred on June 22, 2020. Brussels does not dispute that they received two (2) Notices of Violations in August of 2015 for serious

violations involving transporting an animal which could not be transported without suffering. Those violations fall within the specified time period.

[36] I note that the *AAAMP Regulations* are quite explicit that the gravity value is elevated where there is history that a “violation has been committed.” The Inspector Non-Compliance Report noted that Brussels received a letter of non-conformity from the Agency in June 2019 after a load with 190 hogs had three dead. It also speaks of two further “letters” being sent in 2019 for violations also located at Olymel’s slaughterhouse at Saint Esprit, Quebec and two other “cases” in 2020. Brussels correctly points out that, for the purpose of assessing Total Gravity Values, warning letters and pending cases are merely unproven allegations. A violation has been committed only where an applicant has admitted that the violation and paid the fine or this Tribunal has upheld a Notice of violation.

Negligence or Intent

[37] A score of 3 for the second criteria of negligence or intent is befitting in the circumstances. Brussels is an experienced livestock transporter and ought to know that temperature changes during transport must be anticipated. Brussels driver testified that he loads the same number of animals in winter and summer. This failure to reduce the load in response to the hot, humid conditions is proof of negligence.

Harm

[38] Finally, the Minister assessed a gravity value of 5 because the actions of Brussels caused serious harm to animals. In total, five animals died because Brussels 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.

[39] While a finding of whether the hogs actually suffered is not required to prove the violation, actual suffering is relevant to the penalty imposed as harm is considered in the Total Gravity Factor calculation. In this case, the Agency must prove harm because Brussels was assessed a Gravity Value of 5. A Gravity Value of 5 is only justified where the violation “causes” serious harm to animals. Lesser gravity values are assessed where the violation “could cause” harm, therefore proof of actually suffering need not be proven.

[40] I find that five hogs died and other hogs were experiencing respiratory distress. Dr. Gauthier provided clear and compelling evidence that withstood cross-examination on the quality and accuracy of his examination of the five dead hogs. Dr. Gauthier concluded that the hogs died as a result of the overcrowding because they showed visible symptoms of hyperthermia. These symptoms included blue discoloring on the belly and the ears and rigor mortis in the feet. He observed that these were large hogs in good body condition. These facts, combined with the temperature and observations of animals from the same load panting during their unloading, which improved when they were given space, supported a diagnosis that the hogs died from hyperthermia. When asked why he did not undertake a necropsy to rule out other possible causes of death, Dr. Gauthier provided a reasonable explanation. He stated that the hogs are unable to regulate their own body temperature because they lack sweat glands. Hogs, therefore, are highly sensitive to hot, humid conditions. In his many years of experience, large hogs, such as these, regularly perish during transport in overcrowded conditions on hot, humid days. Moreover, no animals from that load were observed showing symptoms of any other illness or condition that could explain the five deaths.

[41] I also find that the five dead hogs, Dr. Gauthier examined were the same hogs in the photo submitted into evidence and the same dead hogs removed from Brussels truck. Marie-Christine Langevin testified that she took the photograph after verifying that each hog had the same tattoo number and recording that number on the ante-mortem screening record.

[42] With a total gravity value of 13, Schedule 2 of the *AAAMP Regulations* directs that the \$10,000 penalty be increased by 30%. The Minister's penalty of \$13,000 was therefore properly assessed.

5. Orders

[43] I find that Brussels has committed the violation in Notice #2021QC0019 and must pay the penalty of \$13,000 to the Agency within thirty days of being notified of this decision as required by subsection 15(3) of the *AAAMP Act*.

[39] This violation is not a criminal offence. After five years, Brussels 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*.

Dated this 30th day of June 2023.



Patricia L. Farnese
Member
Canada Agricultural Review Tribunal