



Citation: *A.S. L'Heureux Inc. v. Canada (Canadian Food Inspection Agency)*  
2014 CART 17

Date: 20140618  
Docket: CART/CRAC-1709

**BETWEEN:**

**A.S. L'Heureux Inc., Applicant**

**- and -**

**Canadian Food Inspection Agency, Respondent**

[Translation of the official French version]

**BEFORE: Bruce La Rochelle, Member**

**WITH: Marie-Josée Trudeau, counsel for the Applicant, and  
Anne-Marie Lalonde, representative for the Agency**

In the matter of an application made by the applicant, pursuant to subsection 11(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of a violation of paragraph 138(2)(a) of the *Health of Animals Regulations*, alleged by the respondent.

**DECISION**

Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation set out in Notice of Violation No. 1213QC0133-1, dated February 19, 2013, and that it is liable for payment of the penalty in the amount of \$6,600 to the respondent, the Canadian Food Inspection Agency, within thirty (30) days after the day on which this decision is served.

By written submissions only.

### **Alleged incident and relevant proceedings**

[1] By Notice of Violation No. 1213QC0133-1, dated February 19, 2013, the Canadian Food Inspection Agency (the Agency) alleges that A. S. L'Heureux Inc. (A.S. L'Heureux) committed a violation, on March 16, 2011, in Rivière-du-Loup. The Agency is entitled to issue a notice of violation up to two years after becoming aware of the alleged violation, pursuant to subsection 26(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (S.C. 1995, c. 40), which provides as follows:

*26. (1) No proceedings in respect of a violation may be commenced later than*

*(a) six months after the Minister became aware of the violation, in the case of a minor violation; or*

*(b) two years after the Minister became aware of the violation, in the case of a serious violation or a very serious violation.*

[2] According to the Notice of Violation, A.S. L'Heureux is accused of [verbatim translation] "loading or causing to be loaded, transporting or causing to be transported an animal that cannot be transported without suffering", in violation of paragraph 138(2)(a) of the *Health of Animals Regulations*. The animal in question was a hog with a lump under the abdomen.

[3] After receiving the Notice of Violation, on February 26, 2013, A.S. L'Heureux, through its counsel, Marie-Josée Trudeau, filed a request for review, dated May 13, 2013, which was received by the Tribunal on the same date. At first glance, it appears that A.S. L'Heureux filed its request for review too late. Under subsection 11(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, the deadline is 30 days after the day on which the notice of violation is served.

[4] The late date of the request for review is attributable to the fact that A.S. L'Heureux, at first instance, made a request for a compliance agreement with the Minister under paragraph 9(2)(a) and section 10 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (S.C. 1995, c. 40). The request was denied on April 25, 2013. Under section 12 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, A.S. L'Heureux had 15 days following the day on which notice of the Minister's decision was served to request a review by the Tribunal. On May 15, 2013, the Agency sent the Tribunal, by email, a copy of the Minister's decision dated April 25, 2013, and a certificate of service dated April 30, 2013.

[5] On May 22, 2013, A.S. L'Heureux filed, through its counsel Marie-Josée Trudeau and by registered mail, the original documents, replacing the documents submitted by fax. In a letter dated May 16, 2013, sent by email and by mail, the Tribunal informed A.S. L'Heureux that subsection 14(3) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187) requires the submission of original documents. When the

applicant does not present original documents (for example, a request for review bearing an original signature), the Tribunal may find the request for review inadmissible: see *Practice Note #11 - Determining Admissibility of Requests for Review and Practices Regarding the Exchange of Documents Amongst Applicants, Respondents and the Tribunal* (May 1, 2013).

[6] The Agency submitted its report (the Report), dated June 6, 2013, and received by the Tribunal on June 10, 2013. In accordance with paragraph 36(1)(b) of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* (SOR/99-451), the Report includes “any information relating to the violation and the decision of the Minister”. The Tribunal finds that the Minister’s decision, sent to the Tribunal before presentation of the Report, is part of the Report. In its Report, the Agency did not include any submissions on the evidence and the law.

[7] Usually, the Agency makes submissions on the evidence and the law by incorporating them in its Report. These may be arguments based on the alleged facts. The inclusion of submissions in the Report presenting “any information relating to the violation” is not mandatory. According to section 37 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)*, the Tribunal must send notice to the parties informing them that they have 30 days after the date of this acknowledgement letter from the Tribunal “to submit any additional information or representations, including any documents or other evidence”. The Tribunal sent the parties such an acknowledgement letter, dated June 11, by email and regular mail.

[8] Only the Agency sent submissions in reply, by letter dated July 11, 2013, which was received by the Tribunal by email on the same date and by courier on July 12, 2013 (the Agency’s submissions). On July 12, the Tribunal sent the Agency’s submissions to Marie-Josée Trudeau, the counsel the applicant appointed to represent it. To date, the applicant, through its counsel, has not filed any submissions.

[9] The Tribunal wishes to point out that the Agency must make its case when a request for review has been received by the Tribunal, even if the applicant has not made any submissions: see *Meneses-Benitez v. Canada (Canada Border Services Agency)*, 2012 CART 12, and *Hassan v. Canada (Canada Border Services Agency)*, 2013 CART 32. The Tribunal has not yet determined the circumstances in which it is possible to conclude that a request for review is considered to have been abandoned. In general, these circumstances will depend on statutory authorizations (*Pfizer Inc. v. Canada (Commissioner of Patents)*, [2000] 196 FTR 160 [FC]), a motion from a party (*PCL Constructors Northern Inc.*, 2005 CIRB 306 [Canada Industrial Relations Board]) or a warning issued to the parties before a tribunal renders an abandonment ruling (Decision No. 2149/11, Workplace Safety and Insurance Appeals Tribunal [2011]).

## **Evidence and Arguments before the Tribunal**

[10] The applicant raised the following grounds in its request for review:

[*verbatim translation*]

*The hog was ambulatory (A) the hernia did not impede its movements, (B) the hernia did not have an open skin wound. There was no sign of blood upon unloading and the hog was robust.*

[11] The applicant must prove the alleged facts, on a balance of probabilities. As the Federal Court of Appeal, per Justice Noël, wrote in *Canada (Procureur général) c. Bougachouch*, 2014 FCA 63, at paragraphs 33 and 36 (excerpt):

[translation]

[33] ... *the respondent's statement is based on a mere impression. An impression is not evidence ...*

[36] *In short, the Tribunal acted unreasonably in reversing the burden of proof on the basis of an impression ...*

[12] In *Bougachouch*, Mr. Bougachouch appeared before the Tribunal as the applicant at first instance, similar to the applicant in the present matter: see *Bougachouch v. Canada (Canada Border Services Agency)*, 2013 CART 20 and 2014 CART 7. Consequently, according to the Federal Court of Appeal's decision in *Bougachouch*, the Tribunal cannot accord any importance to an applicant's "impressions" in a request for review, unless it has evidence before it to explain this impression otherwise. As the Federal Court of Appeal reminded the Tribunal in *Bougachouch*, at paragraph 33 (excerpt), in citing *Doyon*, one of its earlier decisions:

[translation]

[33] ... *As stated by this Court in Doyon v. Canada (Attorney General), 2009 FCA 152, at paragraph 28, the Tribunal had to "rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay".*

[13] The following evidence is before the Tribunal:

- (i) The applicant's request for review
- (ii) The Agency's report (Report)
- (iii) The Agency's submissions (submissions)

## Facts Not In Dispute

[14] The following facts are not in dispute (Report, “Summary of the violation”):

- (a) On March 16, 2011, A.S. L’Heureux transported 180 hogs from Ferme Labrecque et Frères Inc., located in St-Bernard, to the Les Viandes du Breton Inc. slaughterhouse, located in Rivière-du-Loup.
- (b) The distance between the slaughterhouse and the farm is about 231 km, with the journey lasting about 2 h 20 min.
- (c) When the hogs were unloaded, Dr. Line Pelletier, a veterinarian of the Agency, noticed a hog with a lump under the abdomen.
- (d) After examining the animal, Dr. Pelletier noted that the hog had a large, misshapen mass under its abdomen. She also noted that the mass was an umbilical hernia. Moreover, she noted that the hernia had an open skin wound on its slope of about 7 cm in diameter.

## Issue

[15] The main issue in this case is whether the hog could have been transported without undue suffering. More specifically, paragraph 138(2)(a) of the *Health of Animals Regulations* prescribes as follows:

**138. (2)** ... 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;

...

## Preliminary question: the wording of the Notice of Violation

[16] The wording of the Notice of Violation is not the same as that of paragraph 138(2)(a). In the Notice of Violation, the Agency used [translation] “without suffering”, even though the statutory provision stipulates “without undue suffering during the expected journey”. In *Finley Transport Limited v. Canada (Canadian Food Inspection Agency)*, 2013 CART 42, the Tribunal commented on the wording of notices of violation. At paragraph 24 of the decision in *Finley Transport*, the Tribunal wrote that the Agency must use the wording of the short-form descriptions that are set out in column 2 of Schedule 1 to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187), even though it is different from the wording of the statutory provision. The elements of the violation are the elements set out in the statutory provision.

### **Analysis of the evidence and the arguments**

[17] According to Dr. Pelletier, the hog's umbilical hernia impeded the animal's natural gait. Furthermore, when the hog moved, the hernia would swing, and its hind legs would hit the hernia. More specifically, in an email dated June 4, 2013, sent by Dr. Pelletier to Véronique Dumontier, an investigator with the Agency, Dr. Pelletier wrote the following (Report, Tab 7):

[*verbatim translation*]

*Further ante-mortem observations.*

*During my ante-mortem examination of the animal in motion, I observed that the animal's hind legs hit the umbilical hernia when the hernia would swing from side to side while the hog was moving around in the holding pen. The hernia therefore impeded the animal's natural gait and exposes it to accidental injuries while being handled and transported. Moreover, these activities expose the animal to a real risk of a ruptured hernia and subsequent disembowelment.*

*An open skin wound is painful, and the animal suffers unduly during close contact with other animals, which is inevitable and almost constant during such activities. Moreover, the fact that the animal unintentionally "self-inflicts" blows to itself while moving also causes it suffering and discomfort.*

*Dr. Line Pelletier*

In its Report (Tab 8), the Agency provided three photographs of the hog, which show the umbilical hernia with red injuries.

[18] A.S. L'Heureux did not present any opposing evidence. A.S. L'Heureux's sole submissions appear in its request for review. In this case, given the quality of the parties' evidence, the Tribunal is of the view that the Agency's evidence is more convincing, on the balance of probabilities. Consequently, the Tribunal finds that the Agency has established, on the balance of probabilities, that (a) the hog had an umbilical hernia, and (b) the hog was injured during transportation as a result of the umbilical hernia. Do these findings suffice to conclude that the hog was subjected to undue suffering?

[19] The fact that the hog was ambulatory is not decisive in determining whether there was undue suffering. In *E. Grof Livestock Ltd. v. Canada (Canadian Food Inspection Agency)*, 2014 CART 11, at paragraph 36, the Tribunal examined the link between the degree of mobility and undue suffering:

*[36] Contrary to the opinion of counsel for E. Grof Livestock...the issue does not turn on the state of lameness, but rather on the circumstances of a visible*

*injury which may be viewed as being associated with such lameness. One then must examine the nature, extent and timing of the injury, as part of an overall assessment as to whether the animal could be loaded or transported without undue suffering.*

[20] With regard to the nature of undue suffering, the Tribunal relied on *Canada (Attorney General) v. Porcherie des Cèdres*, 2005 F.C.A. 59, in *E. Grof Livestock*, at paragraph 79:

*[79] In Porcherie des Cèdres, previously cited, the Federal Court of Appeal held, at paragraph 17, that for suffering to be “undue” it need not be “excessive”, notwithstanding a dictionary definition that includes “excessive” as one definition of “undue”. Rather, the Court’s view, per Mr. Justice Nadon, at paragraph 26, in part, was as follows:*

*[26] ...It does not seem reasonable to me to interpret the words “undue” and “indu[e]” as meaning “excessive” and “excessif”. In my opinion, a reasonable interpretation of “undue” and “indu[e]”, in the context of the relevant legislation, can only lead to the conclusion that these words mean instead “undeserved”, “unwarranted”, “unjustified”, “unmerited” or “inapproprié”, “inopportun”, “injustifié”, “déraisonnable”. This interpretation ensures that a suffering animal cannot be loaded and transported, since any such loading or transportation will cause “unjustified” and “unreasonable” suffering to the animal...*

*The Court also noted, at paragraphs 27 and 35, in part:*

*[27] I conclude, therefore, that the transportation of an injured (and therefore suffering) animal could only cause unjustifiable or inappropriate suffering to that animal. Using the English text of paragraph 138(2)(a) of the Regulations, the suffering that will be caused to the animal while being transported will be “unjustified” or “unwarranted”.*

*[35] ...there can be no doubt that the purpose of the relevant legislation is to prevent animals from suffering unjustifiably and unreasonably. Specifically, the purpose of the Regulations is to prevent the transportation of suffering animals...*

[21] At paragraph 31 of *Doyon*, previously cited, the Court largely adopted the definition of “undue” given in *Porcherie des Cèdres*:

*[31] The case at bar does not dispute this interpretation [in Porcherie des Cèdres]. 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.*

[22] At paragraph 86 of the decision in *E. Grof Livestock*, the Tribunal described its obligation as follows:

*[86] Based on the foregoing, it is the responsibility of the Tribunal to determine, on the basis of reasonableness and as referenced to a balance of probabilities burden of proof (a) whether the suffering is "inappropriate", "unjustified" or "unreasonable", according to the statutory interpretation of "undue" suffering in Doyon and (b) whether such inappropriate, unjustified or unreasonable suffering may be associated with the transport of the animal ...*

[23] After weighing the submissions made by the Agency and by A.S. L'Heureux (solely in its request for review), the Tribunal prefers the Agency's evidence, particularly the testimony of Dr. Pelletier. As Dr. Pelletier stated (Report, Tab 7):

[translation]

*The hernia therefore impeded the animal's natural gait and exposes it to accidental injuries while being handled and transported. Moreover, these activities expose the animal to a real risk of a ruptured hernia and subsequent disembowelment.*

[24] As a result, the Tribunal has concluded, in accordance with the directions of the Federal Court of Appeal in *Porcherie des Cèdres* and *Doyon*, that the hog's suffering must be considered as having been "undue" in the sense of "inappropriate" or "unreasonable". There is a link, moreover, between undue suffering and the transport. It can certainly be anticipated that a hog with an umbilical hernia of such a size would be injured during transportation. The Tribunal concludes that A.S. L'Heureux committed the violation, as alleged by the Agency.

### **Review of gravity value assessment**

[25] Since the Tribunal has concluded that A.S. L'Heureux committed the alleged violation, it must now examine the Agency's assessment of the gravity value and how this value affects the amount of the penalty. The criteria to be considered in establishing the gravity value of a violation are set out in Schedule 3 to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*. These criteria, of which there are three, are (i) history (statutory compliance history); (ii) intent or negligence; and (iii) harm.

#### **(i) Compliance history**

[26] Regarding its compliance history, A.S. L'Heureux committed a violation in the past under the *Health of Animals Act* and its regulations in the five years preceding the day on

which the violation at issue here was committed. In its Report, at page 11, the Agency referred to a [verbatim translation] “ticket (formerly notice of violation)” regarding a violation committed in January 2009. The Notice of Violation issued a warning rather than a penalty. A.S. L’Heureux did not challenge the fact that there had been a previous violation. Consequently, in accordance with Schedule 3, a gravity value of 3 was attributed as a result of this previous violation

## **(ii) Intent or negligence**

[27] With respect to intent or negligence, the Agency found that the violation was committed as a result of negligence, and it consequently attributed a gravity value of 3 to the violation. The Agency reasoned as follows (Report, page 12):

[verbatim translation]

*In this matter, the CFIA considers A.S. L’Heureux to have been negligent, since the driver would have realized, at a glance, that the hog was not fit for transportation as a result of its hernia. The animal’s condition was visible to the naked eye, and the A.S. L’Heureux driver had a duty to ensure that each hog getting onto his vehicle was fit to travel without undue suffering.*

[28] The Tribunal agrees with the Agency’s assessment. A.S. L’Heureux, which is liable for acts of negligence committed by an employee, did not present any evidence to the contrary. The Tribunal is of the opinion that, in this case, A.S. L’Heureux breached its statutory duty of care as a result of conduct that differs from how a reasonable person would have behaved in similar circumstances.

[29] As the Tribunal pointed out in *E. Grof Livestock*, above, at paragraph 93, the visibility of an injury or other aspects of an animal’s physical condition remain very relevant, especially when examining the circumstances of negligence or intent:

*[93] Had the injury been visible on the external part of the leg, such that it could not have been overlooked by any reasonable person, the gravity value in relation to intent or negligence could have differed. In Finley Transport Limited v. Canada (CFIA), 2013 CART 42, the Tribunal concluded that negligence may be further assessed as gross negligence, and that, in certain circumstances, gross negligence may be considered to amount to intent. As the Tribunal stated in Finley Transport, at paragraph 93 (part)*

[93] ... In the Tribunal’s view, there can be negligence involving such extreme indifference to a clearly foreseeable outcome that the outcome may be regarded as having been intended...

[30] The Agency stated that [translation] “...the driver would have realized, at a glance, that the hog was not fit for transportation as a result of its hernia. The animal’s condition was visible to the naked eye ...”. The Tribunal agrees with the Agency, especially after

seeing the pictures of the hog that it submitted (Report, Tab 8). On the other hand, the hog was part of a group of 180 hogs being transported at the same time. The Tribunal cannot, therefore, conclude on the balance of probabilities, that the hog in question was specifically seen by the driver or any of the other employees assigned to loading the animals. There is no evidence on this point. Consequently, the Tribunal cannot make a finding of “gross negligence [that] may be considered to amount to intent”, as stated by the Tribunal in *E. Grof Livestock*.

### **(iii) Harm**

[31] With respect to the gravity of the harm, the Agency attributed a gravity value of 5, which corresponds to the conclusion that the harm related to the violation caused “(a) serious or widespread harm to animal...health” (item 3(a) of Part 3 of Schedule 3 to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*), with the Agency reasoning as follows (Report, page 13):

[*verbatim translation*]

*In this case, A.S. L'Heureux Inc. loaded a hog with a hernia that was impeding its movement, presenting an open skin wound. In acting in this manner, A.S. L'Heureux Inc. transported a hog by causing it undue suffering, since it was transported over a distance of 231 km, for approximately 2 h 20 min, to the slaughterhouse even though it was not transportable and should have been euthanized at the farm. In doing so, A.S. L'Heureux caused serious harm to animal health.*

[32] The Tribunal agrees with the Agency, given the evidence that it presented. In its decision in *E. Grof Livestock*, at paragraphs 98 and 99, the Tribunal discussed the link between “undue suffering” and the gravity of harm:

*[98] From the wording of the violation and the wording of gravity value in relation to harm, the conclusion of the Agency herein is that “undue suffering” may be associated with causing “minor harm”. At first instance, this appears to be a contradiction: how can a situation associated with undue suffering also be associated with minor harm? This in turn raises a concern as to whether suffering must be major, in order to be undue. From the definitions of undue suffering identified in Doyon and discussed earlier herein, the suffering must be “inappropriate”, “unjustified” or “unreasonable”.*

*[99] It is to be noted that the gravity values in relation to harm are associated with a large number of violation circumstances, not limited to violations under the Health of Animals Act or Regulations, in that the harm is that which can be associated with “human, animal or plant health or the environment”. At first instance, it would seem that minor harm is more readily*

*associated with violations in other agriculture and agri-food statutes, not relating to the undue suffering of animals.*

[33] The total gravity value therefore becomes 11: that is, 3 (violation history) + 3 (negligence) + 5 (harm). Pursuant to Schedule 2 to the *Agriculture and Agri-Food Administrative Monetary Penalty Regulations*, the penalty amount is increased by 10%, that is, from \$6,000 to \$6,600. The Tribunal agrees with the total gravity value assessed by the Agency.

### **Observations on A.S. L'Heureux's lack of evidence**

[34] The Tribunal has noted above, at paragraphs 8 and 9, that A.S. L'Heureux did not present any evidence to support the reasons it provided in its request for review. The Tribunal also set out the circumstances in which it might be possible to conclude that a request for review has been abandoned. The Tribunal finds it troubling that a serious proceeding was instituted and that only one party filed detailed submissions.

[35] The Tribunal is not currently entitled to award costs. As the Tribunal indicated in *Webb v. Canada (Canada Border Services Agency)*, 2013 CART 27, at paragraph 20:

*[20] The Tribunal is not currently with a legislative mandate to award costs. This is so notwithstanding that the Tribunal is constituted as a court of record, pursuant to section 8 of the Canada Agricultural Products Act, R.S.C., 1985, c. 20 (4th Supp.) ...*

[36] The Tribunal also commented on this in *Favel Transportation Inc. v. Canada (Canadian Food Inspection Agency)*, 2013 CART 17, at paragraph 33:

*[33] The question of whether the Tribunal should have the power to award costs is a policy question to be decided by Parliament. It is not for the Tribunal to determine that it has the necessary jurisdiction simply because it may feel that it should award some costs in this specific case. ...*

[37] There is a serious lack of evidence in the A.S. L'Heureux file, containing nothing but the applicant's request for review, which relies on unsupported statements. If the Tribunal had the power to award costs, it might have done so in this case.

### **Conclusion**

[38] Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal (the Tribunal), by order, determines that the applicant committed the violation set out in Notice of Violation No. 1213QC0133-1, dated February 19, 2013, and that it is liable for payment of the penalty in the amount of \$6,600 to the respondent, the

Canadian Food Inspection Agency, within thirty (30) days after the day on which this decision is served.

[39] The Tribunal wishes to inform A.S. L'Heureux that a finding that it has committed the alleged violation does not mean that it has been convicted of a criminal offence. In light of the company's violation history and assuming no future violations, the company may in the future apply to have its name removed from the Minister's record of those who have committed violations.

Dated at Ottawa, Ontario, this 18th day of June 2014.

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Bruce La Rochelle, Member