

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Burgin v. Canada (CFIA), 2011 CART 009

Date: 20110609
Docket: RT-1552

Between:

Eugen Burgin, Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

In the matter of an application made by the applicant, pursuant to subsection 8(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of paragraph 138(2)(a) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not commit the violation and that the Notice of Violation with Warning has not been validly issued by the Agency to the applicant and is therefore set aside.

By written submissions only

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that, on January 18, 2010 at Forest, Ontario, the applicant, Eugen Burgin (Burgin) loaded or caused to be loaded three steer cattle that could not be transported without suffering, contrary to paragraph 138(2)(a) of the *Health of Animals Regulations* (Regulations).

[3] The Tribunal must decide whether the Agency has established all of the elements required to support the impugned Notice of Violation, including that:

- a. Burgin, the person named in the Notice of Violation, was the person who committed the alleged violation; and
- b. any or all of the three steers in question, by reason of infirmity, illness, injury, fatigue or any other cause, could not have been transported without undue suffering during their expected journey from Forest, Ontario to Mount Forest, Ontario.

Record and procedural history

[4] The Notice of Violation #0910ON001003 dated July 21, 2010, alleges that Burgin on or about 8:00 am on the 18th day of January 2010, at Forest, in the province of Ontario, "committed a violation, namely: Load or cause to be loaded an animal that cannot be transported without suffering contrary to section 138(2)(a) of the *Health of Animals Regulations*, which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*."

[5] Service by the Agency of the above Notice of Violation on Burgin was deemed to have occurred on July 31, 2010. The Notice of Violation stated that it was a Notice of Violation with WARNING and that the alleged violation was a "serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* for which this warning is issued, and there is no monetary penalty. ... Further violations may result in a monetary penalty or prosecution."

[6] Subsections 138(2) to (3) of the Regulations read as follows:

...

(2) 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

(a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey;

(b) that has not been fed and watered within five hours before being loaded, if the expected duration of the animal's confinement is longer than 24 hours from the time of loading; or

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

(2.1) For the purpose of paragraph (2)(a), a non-ambulatory animal is an animal that cannot be transported without undue suffering during the expected journey.

(2.2) Despite paragraph (2)(a), a non-ambulatory animal may be transported for veterinary treatment or diagnosis on the advice of a veterinarian.

(3) Paragraph (2)(b) does not apply to a chick of any species if the expected duration of the chick's confinement is less than 72 hours from the time of hatching.

[7] In a letter dated August 27, 2010 and received by the Tribunal on August 31, 2010, Burgin submitted a request for review (Request for Review) by the Tribunal of the facts of the violation, as provided under subsection 8(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

[8] As this case involved a request for review of a Notice of Violation with WARNING, the Tribunal proceeded with a review by way of written submissions alone and has, as a result, conducted its review exclusively on the basis of all written submissions presented to the Tribunal by Burgin and by the Agency.

[9] On September 13, 2010 the Agency sent Burgin and the Tribunal its report (Report) concerning the Notice of Violation with Warning. The Tribunal received the Report on September 15, 2010.

[10] In a letter dated September 15, 2010, the Tribunal informed Burgin that, if he wished to file any additional submissions in the case, he must do so no later than October 15, 2010. On October 13, 2010, the Tribunal did receive additional written submissions (Additional Submission) from Burgin, which the Tribunal provided to the Agency on October 15, 2010. No further written submissions were received by the Tribunal from either party.

[11] As a procedural matter, the Agency notes in its Report (page 7, first paragraph under the heading "CASE SUMMARY") that the name of the alleged violator on the Notice of Violation is "Eugene Burgin", but that this represents a spelling error and it should be corrected to "Eugen Burgin", which is the name which the Agency uses through its Report as the alleged violator (see Report page 1: "AMPs CASE FILE: Eugen Burgin ...", and page 3 "IDENTIFICATION OF THE ALLEGED VIOLATOR - ALLEGED VIOLATOR: Eugen Burgin").

[12] As such a change is in the nature of a clerical error and does not confuse or prejudice either party in determining who is alleged to be the violator in this case, the Tribunal hereby amends the Notice of Violation to reflect that it was issued to "Eugen Burgin".

Evidence

[13] The evidence before the Tribunal in this case consists of written submissions from the Agency (the Notice of Violation and the Agency's Report) and from Burgin (his Request for Review and his Additional Submission).

[14] The upper portion of the Notice of Violation lists the essential information concerning the identity of the alleged violator. In this case, this portion of the document indicates that the Notice of Violation was "issued to: Surname: BURGIN; First Name: EUGENE" (which has since been amended by this Tribunal to "EUGEN" as noted above). The next identification box is entitled "Company/Business Name" and has been left blank. The final few boxes of this upper portion have been completed as follows" Address: 6531 Hickory Line, R.R. #6; City: Forest; Province/State: Ontario; Postal Code: N0N 1J0".

[15] Agency evidence contained in its Report identifies the alleged violator as "Eugen Burgin" (see cover letter dated September 13, 2010 - "Please find enclosed two copies of our case submission for Review by the Tribunal, concerning the above file for Eugen Burgin"; page 1 - "AMPS CASE FILE: Eugen Burgin, 6531 Hickory Line, RR#6, Forest, ON, N0N 1J0"; page 3 - "IDENTIFICATION OF THE ALLEGED VIOLATOR: ALLEGED VIOLATOR: Eugen Burgin, ADDRESS: 6531 Hickory Line, RR#6, Forest, ON, N0N 1J0"; page 7 - "*Please note that the NOTICE OF VIOLATION had a spelling error in Mr. BURGIN's name, EUGENE should have been EUGEN)."

[16] The Agency's Case Summary (page 7 of the Report) states in its first substantive paragraph that "On January 18, 2010, 40 steers were loaded from Eusi Farms Ltd. onto a tractor trailer at Forest, On. The trucking company was Roeszler Trucking Ltd of RR#1 Kirkton, ON. The driver was Ryan Masse. Eugen Burgin is listed as the President of Eusi Farms Ltd." In the penultimate paragraph of the Case Summary, the Agency also notes that "A Corporation Profile was obtained for Eusi Farms Ltd., Eugen Burgin is listed as the President."

[17] Tab 1 of the Agency Report consists of a two-page document described by the Agency as an Inspector's Non Compliance Report, Report of Inspector, Dr. Thurston. On the second page of that document there are two references to the owners of the cattle in question. At the very top of the page, a box marked "Owner Information-Owner's Name" contains the entry "Eusi Farms". Towards the bottom of that page, Dr. Thurston notes: "I spoke to the driver of the truck about these lame steers and about how the cattle arrived at the plant and he said they were purchased through OLEX but were picked up at the owners [sic] farm in Forest at approx 8:00 AM. ..."

[18] Tab 2 of the Agency Report is a Humane Transport Inspection Sheet, also authored by Dr. Thurston. In the box entitled "Owner/Propriétaire" under the section entitled "Load Description", Dr. Thurston has marked: "Eusi Farms Eugene Burbkig (not sure of last name)".

[19] Tab 4 of the Agency Report is the Bill of Lading completed by Roeszler Trucking Ltd. dated January 18, 2010. It records that 40 steers were loaded at Forest, Ontario, and were consigned to Freys Meats Ontario located in Mount Forest with the "Shipper" recorded as "Eusi Farms Ltd."

[20] In its Report Annex (page 10), the Agency lists Tab 5 of its Report as “Corporate Documents, Eusi Farms Ltd.”. The official document found at Tab 5, entitled “Corporation Profile Report”, was issued by the Province of Ontario, Ministry of Government Services on 2010/07/05. The document shows “Eusi Farms Ltd.” as being an active Ontario Business Corporation with the corporation name “Eusi Farms Ltd.”. The document also lists the company as having been incorporated in the jurisdiction of Ontario on 2003/12/31 with the Ontario Corp Number of 1565745. The company’s registered office address is 6531 Hickory Line, Forest, Ontario, Canada, N0N 1J0 with the company’s mailing address being listed as Eugene [sic] Burgin, 6531 Hickory Line, Forest, Ontario, Canada, N0N 1J0. Eugen Burgin is listed as the company’s president, secretary and treasurer, and one of its directors. The report concludes with a provision that states as follows: “This report sets out the most recent information filed by the corporation...”.

[21] Tab 6 of the Agency Report is a package of three documents including a covering letter dated July 21, 2010 from the Agency’s Roger Weber (Weber) to Burgin, the Notice of Violation issued to Burgin signed by Weber and a Certificate of Service also signed by Weber. The covering letter is addressed to “Eugene Burgin” but its second substantive paragraph reads as follows: “This notice deals with the incident that occurred when a load of cattle were picked up at Eusi Frams [sic] Ltd by Roeszler Trucking Ltd and delivered to Frey’s at Mount Forest on January 18, 2010. ...” The Certificate of Service states that “I Roger Weber, an official of the Canadian Food Inspection Agency, certify that on 2010/07/31 I served a true copy of the document Notice of Violation with Warning to Eugene [sic] Burgin in the manner indicated below: ... by sending a copy of it by registered mail, courier, fax, or other electronic means to the last known address or usual place of residence at: Courier, EUSI Farms Ltd. 6531 Hickory Line, RR #6, Forest, ON N0N 1J0”. The right side of the Certificate of Service, entitled “a person other than an individual to wit: a corporation, organization or other legal entity:”, has been left blank.

[22] Both Burgin’s Request for Review and his Additional Submission were completed on plain paper with the self-styled letterhead as follows: “Eusi-Farms Ltd., c/o Eugen Burgin, RR.#6 Forest, ON, N0N 1J0”. Both documents were signed: “Sincerely, Eugen Burgin”.

[23] With respect to other substantive aspects of the incident in question, the parties agree that 40 steers were transported from Forest to Mount Forest, Ontario on January 18, 2010 by Roeszler Trucking Ltd. The parties present conflicting evidence, however, on the following two matters: (1) whether three steers on the load were segregated from the other animals in the trailer in which they were being transported; and (2) whether three steers were lame or sufficiently lame during their transport and upon their arrival at Freys Customs Meats to violate the legal standard set out section 138(2)(a) of the Regulations. However, for the reasons set out below, the Tribunal does not need to assess the conflicting evidence with respect to these two substantive elements of the case.

Analysis and Applicable Law

[24] This Tribunal's mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act). The purpose of the Act is set out in section 3:

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3. *The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.*

[25] Section 2 of the Act defines "agri-food Act":

2. *"agri-food Act" means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act;*

[26] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations:

4. (1) *The Minister may make regulations*

(a) *designating as a violation that may be proceeded with in accordance with this Act*

(i) *the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act,*

[27] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187, which designates as violations several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and include a reference to paragraph 138(2)(a) of the *Health of Animals Regulations* (Regulations). Item 233 under Schedule 1 sets out the mandatory sanction for a violation of paragraph 138(2)(a) of the Regulations as being a "serious violation". Burgin, in his Additional Submission, has requested that this Tribunal "change the warning of Serious violation to a warning of Minor violation". None of the Agency, the Minister, or this Tribunal has the power to declare the level of sanction for a violation of paragraph 138(2)(a) of the Regulations, other than has been set out at item 233 under Schedule 1. Nor is the Tribunal empowered to amend or revise the discretionary choice exercised by the Agency to issue to Burgin a Notice of Violation with WARNING vs. a Notice of Violation with PENALTY. In either case, the function of the Tribunal under the Act is only to assess whether the Agency has established all the elements of the alleged violation.

[28] Paragraph 138(2)(a) is a portion of Part XII of the Regulations entitled "*Transportation of Animals*". The provisions included in this section guide producers and transporters in the humane

transportation of animals, which are destined for human consumption. When these provisions are violated, the provisions in Part XII enable the Agency to take enforcement action against violators.

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[29] To assist in the humane transport of animals, paragraph 138(2)(a) of the Regulations requires that *“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 ... that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey.* For there to be a violation of paragraph 138(2)(a), the Agency must establish the following elements, as set out by the Federal Court of Appeal in paragraph 41 of its decision in *Doyon v. Canada (AG)*, 2009 FCA 152:

1. that the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);
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 or transported was an animal;
4. that the animal could not be transported without undue suffering;
5. that the animal suffered unduly during the expected journey;
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, or any other cause.

[30] However, in addition to, or included in, the first element listed above, the Agency must prove that it has issued its Notice of Violation to the person who committed the violation, that is, to the person who caused the loading and transport of the animals in question. The Federal Court of Appeal in *Doyon* points out that the Act imposes an important burden on the Agency. At paragraph 20, the Court states:

[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation, and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.

[31] Section 19 of the Act reads as follows:

19. *In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.*

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[32] The Federal Court of Appeal further cautions this Tribunal and advises it to be "circumspect in managing and analyzing the evidence and in analyzing the essential elements of the violation" in an alleged AMP violation as follows, at paragraphs 27 and 28:

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.

[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

[33] Therefore, the strictness of the AMP regime reasonably must apply to both Burgin and the Agency. Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities.

[34] The strictness of the AMP regime therefore places the burden on the Agency to correctly identify the legal person who has committed the violation in question. In the present case, the Tribunal finds that the Agency has failed in this task. There is overwhelming evidence that the three steers in question were owned, controlled and possessed by Eusi Farms Ltd.. Consequently, it was not Burgin that caused these animals to be transported. Roeszler Trucking Ltd., the transporter of the cattle, identifies in its Bill of Lading (Tab 4 of the Agency Report) that the shipper of the cattle was the corporation Eusi Farms LTD. (emphasis added). The Agency's own evidence demonstrated this as well. At paragraph 16 above, the Tribunal notes that the Agency, in its Case Summary, states that "On January 18, 2010, 40 steers were loaded from Eusi Farms Ltd. onto a tractor Trailer at Forest, Ontario (emphasis added). The Agency, moreover, felt it necessary to produce the corporate record for Eusi Farms Ltd. which it did at Tab 5 of its Report, and which show that Eusi Farms Ltd. is indeed a separate legal entity, registered as a company in the province of Ontario. At Tab 6 of the Report, the Agency's Inspector Weber again refers to the central role of Eusi Farms Ltd. in the matter that is the subject of the Notice of Violation. In his covering letter to Burgin he states: "This notice deals with the incident that occurred when a load of cattle were picked up at Eusi Frams [sic] Ltd by Roeszler Trucking Ltd and delivered to Frey's at Mount Forest on January 18, 2010 (emphasis added)." As well, the Certificate of Service states that "I, Roger Weber, an official of the Canadian Food Inspection Agency, certify that on 2010/07/31, I served a true copy of the document Notice of Violation with

Warning to Eugene [sic] Burgin in the manner indicated below: ... by sending a copy of it by registered mail, courier, fax, or other electronic means to the last known address or usual place of residence at: Courier, EUSI Farms Ltd., 6531 Hickory Line, RR #6, Forest, ON N0N 1J0” (emphasis added). A review of these documents, collected by the Agency in its investigation for the issuance of the Notice of Violation and which have now been presented in its Report to this Tribunal, show clearly that it was not Burgin who was the person causing the transportation of the animals.

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[35] Granted, Eusi Farms Ltd. is a small, closely held corporation and its corporate identity is closely connected in a practical and operational sense to its director, officer and shareholder Burgin. Nevertheless, Eusi Farms Ltd. enjoys any legal benefits and is subject to any legal obligations set out in law. Eusi Farms Ltd., like all other corporations in Ontario, is governed by the principles of corporate law as they apply in Ontario.

[36] One such principle of the law of corporations is that a corporation is a separate legal entity and person from its directors and officers (see Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd edition, London, Ontario: Scribbers Publishing 2006 at page 81 (Welling)). As Professor Welling states: “A corporation has full legal personality and must, as far as possible, be treated by analogy to an individual” (Welling at page 84). As such, it functions in its own legal right, although it is dependent on its directors, officers and employees to physically carry out its activities. Yet, all liabilities it incurs, rights it exercises and profits or losses it realizes flow to the corporation as a distinct legal person. Professor Welling adds: “The separation of the corporation’s personality from that of its founder means simply that he – like anyone else – has no liability for corporate acts, provided the legal foundations are adhered to and no personal improprieties such as tort or fraud, accompany the corporate transaction” (Welling at page 85). These are the rare instances where the “corporate veil” may be “pierced” and where certain liabilities might flow back to the directors, officers and employees of the corporation (Welling at pages 143-157).

[37] However, Professor Welling cautions: “where, however, the corporation is less economically powerful, the workplace smaller, and the shareholdings less diversified, observers often become sloppy, forget the existence of the corporation, and analyze transactions as if they were the acts of the individuals involved. The temptation is greatest where a sole shareholder forms the entire management team and is also the corporation’s only employee. For most practical purposes this little corporate world can be treated as if the shareholder were the proprietor. For legal purposes, however, failure to analyze the business in terms of the corporate entity role will all too often lead to the wrong conclusion” (Welling at page 126). The Tribunal holds that is what has happened in the present case. There has been a confusion and sloppiness as to the identity of the violator, that is, who in law actually caused the transportation of the cattle in question on January 18, 2010.

[38] There is no sound legal basis in this case for the Agency to seek to attach liability to a director or officer of a corporation under the Act when such liability could attach to the corporation that is carrying out activities that are allegedly in violation of the law. AMP violations are not a matter of criminal law and there has been no allegation of tort or fraud committed in this case. The Act sets out regulatory violations that can attach to individuals or corporations, as the facts of each case dictate. The Act, in its section 3 as noted above in paragraph 24, specifically states that the AMP system is

“an alternative to the existing penal system”. Moreover, the Act and the forms used in its enforcement (that is the Notice of Violation and the Certificate of Service) clearly contemplate the possibility of corporate violators, as both contain boxes to fill out when corporate violators are the legal persons violating the *Health of Animals Act* or its Regulations. In the present case, neither form was completed in that fashion.

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[39] Finally, it is important to note that subsection 20(2) of the Act holds a person “liable for a violation that is committed by any employee or agent of the person acting in the course of the employee’s employment or the scope of the agent’s authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act”, but not *vice versa*.

[40] The Tribunal has also taken into consideration the Federal Court of Appeal's recent decision in *Canada (Attorney General) v. Denfield Livestock Sales Limited* (2010 FCA 36), which examined the meaning of the expression "cause the movement of" within the meaning of section 176 of the Regulations. However, that decision has limited application to the present case as the phraseology under examination is different and from a different section of the Regulations ("cause to be transported" within the meaning of paragraph 138(2)(a) of the Regulations) and in *Denfield* the Court was not considering whether it could “pierce the corporate veil” but rather if another actor down the production chain could exercise sufficient power and control over an animal to be caught by the liability regime set out in section 176 of the Regulations. The *obiter dictum* and the result in that case is of no application to the present case where the wrong person was named in the Notice of Violation.

[41] Moreover, the fact that the corporation and Burgin have the same address does not permit one to argue that the two legal entities, one a corporation and one an individual are the same in law, for the purposes of assessing liability under the Act. To argue that such a link is sufficient to attribute personal liability to Burgin in this case would be too tenuous a connection and would ignore the Federal Court of Appeal’s findings in *Doyon* and their emphasis on the already enhanced strictness of the AMPs system and the applicant’s very limited avenues for mounting a defence.

[42] Consequently, the Tribunal finds that, in this case, the Agency has failed to prove, on a balance of probabilities, that the person named in the Notice of Violation was the person who committed the violation. Under s. 19 of Act, for a violation under paragraph 138(2)(a) of the *Health of Animals Regulations* to be maintained, the person named in the Notice of Violation, Eugen Burgin, must be the person who "caused" the steers in question "to be transported". According to the evidence filed, the Tribunal finds that it was not Burgin who caused the transport of the 40 steers from Eusi Farms Ltd. on January 18, 2010. If such a violation, as is alleged by the Agency, occurred, it was not Burgin who committed it. In the circumstances, the Tribunal finds that Burgin did not commit the violation and the Notice of Violation with WARNING issued to him is set aside. Given the Tribunal’s finding on the identity of the alleged violator, any determination of factual findings by the Tribunal on the existence of elements 2 through 7 as set out in paragraph 29 above are not necessary.

Dated at Ottawa, this 9th day of June, 2011.

Dr. Donald Buckingham, Chairperson