

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Patrick Klassen v. Canada (CFIA), 2011 CART 22

Date: 20111121
CART/CRAC-1566

Between:

Patrick Klassen, 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 subsection 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 committed the violation and upholds the Notice of Violation with Warning issued by the Agency.

By written submissions only.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that on November 12, 2009, between Lethbridge and Calgary, Alberta, the applicant, Patrick Klassen (Klassen) loaded, transported or caused to be loaded or transported an animal that could not be transported without undue suffering, contrary to subsection 138(2)(a) of the *Health of Animals Regulations* (Regulations).

[3] Subsection 138(2)(a) of the Regulations reads as follows:

138. ... (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; ...

[4] The Tribunal must decide whether:

- the Agency has established all of the elements required to support the impugned Notice of Violation; and
- the Agency has established, particularly that the cows that were found to be injured or dead at their unloading in Calgary were caused to suffer unduly by being transported.

Procedural history

[5] The Notice of Violation #0910CA0040 dated January 25, 2011, alleges that Klassen on the 12th day of November 2009, at or between Calgary and Lethbridge, in the province of Alberta, "committed a violation, namely: load, transport or caused to be loaded or transported 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*."

[6] Service by the Agency of the above Notice of Violation on Klassen was deemed to have occurred on February 7, 2011. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, Klassen's alleged infraction is a serious violation for which he was issued a warning.

[7] In a letter sent by Klassen on February 11, 2011, and received by the Tribunal on February 15, 2011, Klassen requested a 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] On February 24, 2011, the Agency sent Klassen and the Tribunal its report (Report) concerning the Notice of Violation with the Tribunal receiving its copy on February 25, 2011.

[9] In a letter dated February 28, 2011, the Tribunal invited Klassen to file any additional submissions in this matter, no later than March 30, 2011. No further submissions were received from the parties.

Evidence

[10] The evidence before the Tribunal in this case consists of written submissions from both the Agency (Notice of Violation and Report) and from Klassen in his request for review.

[11] Certain elements of the evidence are not in dispute:

- Klassen was the driver of a livestock transport truck and trailer dispatched by Roberge Transport (Roberge) on November 12, 2009;
- Klassen picked up a load of 47 cows from Lethbridge, Alberta at about 7:15 a.m. departing at about 7:30 a.m. on November 12, 2009 and arrived at XL-Beef slaughterhouse in Calgary at about 10:55 a.m., unloading them at about 11:35 a.m. on the same day;
- the livestock transport truck and trailer that was driven by Klassen to haul the cattle from Lethbridge to Calgary had five compartments: a front compartment (nose); middle upper and lower compartments (upper and lower bellies); a rear compartment (rear); and an upper rear “dog house” compartment (dog house);
- when the cattle were loaded onto the transport trailer at Lethbridge, five cows were loaded into the nose; 15 cows were loaded into the upper belly; 16 cows were loaded into the lower belly; nine cows were loaded into the rear; and two cows were loaded in the dog house;
- while the cows were distributed in the trailer correctly and met the loading density formula, a fair number of cows on the load were thin, weak, and in poor body condition;
- the floors of the conveyance had runny manure and pools of urine on them with only minimal bedding materials;
- upon arriving in Calgary, the rear compartment containing nine cows had one black cow (CCIA #124000261853278) that was dead and one red cow (CCIA #124000244160064) that was non-ambulatory and subsequently euthanized while still on the trailer; and
- the dead-on-arrival black cow had hoof marks on its exposed side.

[12] Some evidence in this case is in dispute. In Dr. Patal's written statement (Tab 2 of the Report), he reports that he asked Klassen when he last observed the cows standing. Klassen had replied that he observed the cows standing at 8:30 a.m. in Claresholm, Alberta. Klassen provided the same evidence in his own written statement that was given to the inspectors on November 12, 2009 (Tab 3 of the Report). However, this evidence conflicts with the statement that Klassen provided in his initial request for review wherein he states that he "stopped to check these cattle three times in a two hour drive because I was concerned for their health". Moreover, a third valuable source for determining how often Klassen may have stopped to check the cattle during the journey from Lethbridge to Calgary—his log book—was never produced in evidence or presented to Dr. Patel when he requested it of Klassen on November 12, 2009.

[13] The log book continued to be a topic of contention in the Agency investigation. On November 30, 2009, Inspector Petula Ruyter telephoned Klassen and asked some follow-up questions (Tab 10 of the Report). When asked why he never showed his log book, Klassen said that he phoned Roberge dispatch at the time of the incident and Roberge told Klassen that CFIA authorities have no right to view log books. Klassen was pressed to identify the Roberge dispatcher who gave him this advice, but Klassen did not want to identify anyone where he worked. He just commented "I should have given my logbook to the vet, I made a bad decision by listening to someone at Roberge. I should not have loaded the bad cows, I am a good driver to do thing (sic) right."

[14] In the same telephone call, Ruyter asked Klassen several questions about the condition of the cows when they were loaded. Klassen said "Some of the cows were in bad shape, like I said "scare crow cows", just skin and bones." After Klassen assured Ruyter that he thought the cows would make the trip, Ruyter asked Klassen why he didn't bed the trailer for the cows that were in poor shape. Klassen had no response as to why did not bed the trailer but just reiterated that he believed the cows would make the trip.

[15] Dr. Patel provided specifics about the non-ambulatory cow and dead cow in the case summary of the report. The non-ambulatory red cow had a body condition score (BCS) of 1.5, which is considered between poor and borderline on the BCS chart (Tab 12 of the Report). The red cow was photographed (Tab 5 of the Report) in the trailer prior to being euthanized. The *post mortem* analysis (Tab 6 of the Report) of the red cow was that she had chronic respiratory disease and had an enlarged heart.

[16] The black cow that was dead on arrival had a BCS of 2.0, which is considered borderline condition on the BCS chart (Tab 12 of the Report). Photos of the black cow (Tab 5 of the Report) taken by Dr. Patel showed hoof marks on its exposed side, which Dr. Patel opined were caused by the trampling of it by other cows. The *post mortem* analysis (Tab 6 of the Report) of the black cow revealed that she had a severe infection in her kidneys and ureters, a condition common to older cows.

[17] Dr. Patel also took photos showing the conditions inside the trailer, which were less than ideal with a distinct lack of bedding and a slippery, wet floor where the cattle had been standing during transport (Tab 5 of the Report).

[18] Klassen, in his request for review, states that he is a professional driver with 26 years experience in the industry. He rejects that he ever loaded and transported an animal to intentionally create suffering for a living, breathing animal. He stated that the cattle on this load were abused and worn out from calving and that they should never have been put through the auction mart but that he treated these cattle with the same treatment as every other load he had hauled. He judged them to be able to make the two-hour drive from auction to kill plant.

Analysis and Applicable Law

[19] 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:

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.

[20] The Act's system of monetary penalties (AMP) as envisaged by Parliament is, however, very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes the AMP system as follows, in 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.

[21] The Act does not contain a *de minimus* provision, nor does it permit the defence of due diligence. Section 18 of the Act states:

18. (1) *A person named in a notice of violation does not have a defence by reason that the person:*

(a) exercised due diligence to prevent the violation; or

(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.

[22] Where an AMP provision has been enacted for a particular violation, the applicant has very little room to manoeuvre when mounting his or her defence. In this case, section 18 leaves Klassen with few means of defence. Given Parliament's clear statement on the issue, the Tribunal acknowledges that it cannot dismiss the Notice of Violation, if Klassen, the truck driver, had only tried his best to avoid a situation that would aggravate the cows' condition. By itself, such evidence could not be considered to be a defence authorized by section 18 and could not exonerate Klassen. The Tribunal finds that any due diligence exercised by Klassen in this case is specifically excluded as a possible defence to the alleged violation.

[23] However, the Federal Court of Appeal also points out in *Doyon* that the Act places a heavy burden on the respondent. In 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.

[24] 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.*

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

[26] For there to be a violation of paragraph 138(2)(a), the Agency must establish the following elements, as listed in paragraph 41 of *Doyon*:

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.

[27] As to elements 1, 2 and 3, the Tribunal is satisfied that, according to the Agency's evidence, which was uncontested by Klassen, Klassen loaded and transported the cows in question in a livestock truck and trailer on November 12, 2009.

[28] With respect to elements 4, 5, 6 and 7, the Agency's evidence and logical inferences are sufficient to prove each element, on a balance of probabilities. Element 4 - that the two cows could not be transported without undue suffering - is proved by evidence from Dr. Patel and from the *post mortem* analysis reports and inferences from that evidence. The Tribunal accepts that the cows that were loaded by Klassen were not in prime condition, as Klassen himself admitted they were "scare cow cows" nearing the end of their useful life. As such, transporting them at all would entail some risk. The Agency proved evidence of the relatively poor BCS of the cows in question. As a result, it is reasonable to conclude that transporting animals of this kind opens the door that such animals might not be transportable without undue suffering. Nor is the fact that the both cows walked onto the trailer sufficient in itself to disprove this element of the violation. Given that the cows did walk on the trailer but were found to be either dead or in extremely poor condition just a few hours later, is sufficient evidence for the Tribunal to accept that the Agency has proved element 5 - that the animals suffered unduly during the expected journey. The cows clearly suffered unduly during the journey and the evidence of Dr. Patel and the *post mortem* analysis completed by the Agency are evidence of this fact.

[29] Element 6 - that the cows could not be transported without suffering because of illness or other causes - is proved, on the balance of probabilities, by the evidence from the phone call between Agency inspector Ruyter and Klassen (Tab 10 of the Report) and the Agency *post mortem* analysis (Tab 6 of the Report). In the phone call, Klassen told Ruyter that he did not take extra precautions for these cattle, such as providing any extra bedding and that he knew the cows were in bad shape and so put them in the back of the trailer. The *post mortem* analysis also indicated these cows were not only weak, but had other health conditions related to their age and poor BCS. The red cow had a chronic respiratory infection and the black cow had a severe kidney infection. Given these two conditions and the subsequent result, these cows were, on the balance of probabilities, too ill to be transported without suffering because of their existing infirmities.

[30] Finally, with respect to element 7 - whether transporting the cows was the cause of the cows' suffering - the Tribunal is convinced, on the balance of probabilities, that the transporting of the cows was the cause of their suffering. Again, the Agency's evidence demonstrates that transporting the cows caused their suffering. The photos of Dr. Patel of the hoof marks on the dead black cow show that during transport, trampling occurred which would have caused or increased that cow's suffering. In written statements from Klassen, he said

that each cow walked on in Lethbridge. Upon arrival, one was dead and the other was down. The *post mortem* analysis proves that the cows had ailments indicative of being old cows that were no longer in prime form. While the evidence did not irrefutably show that the red cow was immobilized and the black cow died from transport, the evidence of the decline of each cow over the course of the journey allows the Tribunal to make the logical inference that the Agency has proved this element as well.

[31] In light of the evidence and the applicable law, the Tribunal must conclude that the Agency has established, on a balance of probabilities, that Klassen committed the violation and upholds the warning issued to him by the Agency.

[32] This case raises some delicate issues of enforcement by the Agency given commercial realities in the livestock industry. If it were unlawful to transport a cow outside of the 2.5-3.0 BCS range, gun and ammunition sales to Canadian cow-calf operators would increase dramatically. The majority of cows falling below the 2.5-3.0 BCS range are usually the ones which end up making the trip to town. The harsh reality is that cows that cannot maintain moderate condition, good milk flow and good mobility, are of little economic value to a rancher. If an operator could not ship those cows to town, he or she would be forced to euthanize them on site and forego any value left in the cow. The Regulations provide minimal guidance on exactly which cows, and under which conditions cows, can be shipped without attracting liability under the Regulations. The Regulations do, however, require operators and transporters to exercise caution when they are shipping cattle that are in less than optimal health and have sub-optimal BCS scores and require that such transportation cannot exacerbate suffering. The Regulations place a burden on a truck driver to ensure that no animal suffers during transport because of sickness, injury, or any other cause. Given commercial realities, however, one wonders how much discretion a truck driver really has when it comes to transportation decisions. Can a truck driver realistically control the entire loading process at an auction mart? Can a truck driver tell his dispatcher - without any repercussions - that he cannot make an appointment at an abattoir because the load had to be reloaded to accommodate certain animals? While these scenarios may seem fundamentally unfair to those who transport animals, the law requires this Tribunal to uphold or dismiss Notices of Violation given the specific evidence before it. The Tribunal has no jurisdiction to decide on industry standards, corporate structures, job classifications, or due diligence exercised by industry members. Carrying out the mandate of the Regulations requires many individuals within the supply chain to make decisions that could potentially result in liability. However, a Notice of Violation with Warning, as was used in this case, is a valuable tool at the Agency's disposal to address compliance issues in the animal transportation where exercises of due diligence by the violator will permit no other defence to the alleged violation.

[33] The Tribunal does wish to inform Mr. Klassen that this violation is not a criminal offence. After five years, he will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*:

23. (1) *Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from*

(a) where the notice of violation contained a warning, the date the notice was served, or

(b) in any other case, the payment of any debt referred to in subsection 15(1),

unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.

Dated at Ottawa, this 21st day of November, 2011.

Dr. Donald Buckingham, Chairperson