

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Réseau Encans v. Canada (CFIA), 2012 CART 10

Date: 20120522
Docket: CART/CRAC-1562

Between:

Réseau Encans Québec Inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(c) 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 of the written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable to pay the respondent a monetary penalty of \$2,000 within 30 days after the day on which notice of this decision is served.

By written submissions only.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that, on April 24, 2009, at Grand-Mère, Quebec, the applicant, Réseau Encans Québec inc. (Réseau Encans) transported or caused to be transported two calves that could not be transported without undue suffering, thus contravening paragraph 138(2)(a) of the *Health of Animals Regulations* (Regulations).

[3] Subsections 138(2) and (3) of the Regulations provide 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.

[4] The Tribunal must determine whether the Agency has established all of the elements required to support the impugned Notice of Violation, that is,

- a. whether Réseau Encans, the offender, committed the alleged violation;
- b. whether one or both of the calves in question, by reason of infirmity, illness, injury, fatigue or any other cause, could not be transported without undue suffering during the expected journey from Saint-Isidore to Grand-Mère, Quebec.

Record and procedural history

[5] Notice of Violation No. 1011QC0099, dated December 15, 2010, alleges that, on April 24, 2009, at Grand-Mère, Quebec, Réseau Encans [TRANSLATION] “committed a violation, namely, caused to be transported by motor vehicle animals that by reason of infirmity, illness, injury, fatigue or any other cause could not be transported without undue suffering during the expected journey, contrary to paragraph 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] The Notice of Violation is deemed to have been served on Réseau Encans by the Agency on January 15, 2011. Pursuant to section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, the violation is a serious violation for which a \$2,600 penalty was imposed.

[7] In a letter dated January 28, 2011, which the Tribunal received that same day, Réseau Encans, through its president, Eduardo Maciocia, requested a review by the Tribunal of the facts of the violation, as provided by paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. In a phone conversation with Tribunal staff, the company requested that the review of the written submissions be conducted in French. The Tribunal therefore conducted its review on the basis of the written submissions that were provided by the parties.

[8] In a letter dated February 22, 2011, the Agency submitted its report (Report) regarding the Notice of Violation to Réseau Encans and to the Tribunal with the Tribunal received its copy of the Report on February 23, 2011. The Tribunal, having received the Report after the specified time limit for submission, reviewed the parties’ arguments as to the reasons for which it should grant the Agency an extension of time to file the Report. After reviewing the arguments, the Tribunal granted the Agency an extension to file the Report. As a result, the Report was added to the record and is included in the Agency’s evidence in this case.

[9] In a letter dated February 23, 2011, the Tribunal asked Réseau Encans to file additional submissions (Additional Submissions) in this case, no later than March 25, 2011.

[10] In response to the Tribunal’s request, Réseau Encans sent a letter with appendices (Applicant’s Additional Submissions) dated March 22, 2011, setting out its position regarding the Report. This document, received by the Tribunal on March 24, 2011, is included as evidence in this case.

[11] In an email dated March 24, 2011, the Tribunal asked the Agency to respond to the Applicant’s Additional Submissions by making its own additional submissions, no later than March 31, 2011.

[12] The Agency then filed submissions (Agency’s Additional Submissions) dated March 31, 2011, and received by the Tribunal that same day, which is also included in the

evidence for this case. Neither Réseau Encans nor the Agency filed any further documentation in this case.

Evidence

[13] The evidence filed with the Tribunal in this case included written documents submitted by the Agency (Notice of Violation, Agency's Report and Agency's Additional Submissions) and by Réseau Encans (Request for Review and Applicant's Additional Submissions).

[14] The parties agreed on the following fact: on April 24, 2009, Réseau Encans staff had transported two calves from Marché d'animaux de l'Est (Saint-Isidore) to the Louis Lafrance & Fils abattoir (Grand-Mère).

[15] In its Report, the Agency presented the following evidence:

- The trip from Marché d'animaux de l'Est (Saint-Isidore) to the Louis Lafrance & Fils abattoir (Grand-Mère) made on April 24, 2009, took approximately two hours (Tabs 3 and 8 of the Report).
- On April 24, 2009, when they arrived at the Louis Lafrance & Fils abattoir (Grand-Mère), both bovines each had a compound fracture to the hind leg (Tabs 4 and 7 of the Report); one of them had a fracture to the right tibia, and the other, a fracture to the left buttock (Tab 5 of the Report).
- On April 24, 2009, upon arrival at the Louis Lafrance & Fils abattoir (Grand-Mère), one bovine was non-ambulatory and was moving about on its folded-under front legs (Tabs 4 and 7 of the Report).
- On April 24, 2009, in her inspection report at the Louis Lafrance & Fils abattoir (Grand-Mère), the inspector noted that, after the transporter had left Marché d'animaux de l'Est (Saint-Isidore), she had been alerted that these two calves would be arriving, but that she was [TRANSLATION] "not aware that the fractures were compound fractures" (Tab 4 of the Report).
- Investigator Véronique Dumontier noted that, during the conversation she had on February 16, 2011, with Jacques Boucher of Marché d'animaux de l'Est (Saint-Isidore), he had acknowledged that the calves did have fractures but specified that they were not compound fractures when they left the auction (Tab 9 of the Report).
- In its "Compromised Animals Policy", the Agency states that the transport of animals having a fractured limb is not authorized (at page 8 of Tab 6 of the Report).

[16] In Réseau Encans's submissions in its Request for Review to the Tribunal, Mr. Maciocia states, [TRANSLATION] "According to the version of our staff and of the transporter, these two compromised animals were isolated and transported with care to Abattoir Lafrance in Grand-Mère".

[17] Furthermore, in its Additional Submissions, Mr. Maciocia states that Réseau Encans acted appropriately when, on April 24, 2009 it had the two calves transported. Both calves had been injured at Réseau Encans on the morning of April 24, 2009, and both were limping. In accordance with the Agency's document on *Livestock Transport Requirements in Canada*, page 5, Mr. Maciocia notes that [TRANSLATION]: "compromised animals can be transported if specific steps are taken to prevent additional injury or undue suffering. In using the services of a transporter which was heading directly to a suitable abattoir and having the two calves in question as its only load, REQ acted in compliance with the guidelines. In addition, in accordance with the decision guidelines for the transport of compromised cattle, published in the magazine *Bovins du Québec*, August-September 2004 issue, REQ staff located a transporter, with an empty trailer, who could quickly take the two feeder calves to the provincially or federally inspected slaughterhouse which could slaughter these calves as quickly as possible. The decision guidelines state that it is permissible, among other things, to transport for emergency slaughter, an ambulatory animal having a recent injury, a recent serious wound, an unsupported limp (3 limbs), etc."

[18] Here is Mr. Maciocia's conclusion, taken from the Additional Submissions: [TRANSLATION] "The loading of the calves at the auction was done gently and required no assistance. As well, neither of the two calves had a compound fracture at the time of loading. The Lafrance abattoir was also a suitable choice. Two inspected abattoirs, Lafrance and Levinoff-Colbex, were operating on Friday, April 24, 2009. Located at an equal distance from the Saint-Isidore auction mart, the Lafrance abattoir could slaughter the calves as soon as they arrived. REQ, therefore, made the right choices to minimize the stress and suffering of these animals which, upon leaving the auction mart, were fit for transport for emergency slaughter".

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, as follows:

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] Section 2 of the Act defines "agri-food Act" as follows:

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;

[21] Under section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations as follows:

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,*

[22] The Minister of Agriculture and Agri-Food has made one such set of regulations, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, which designates as violations certain contraventions of the provisions of the *Health of Animals Act*, the *Health of Animals Regulations*, the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, which includes a reference to paragraph 138(2)(a) of the *Health of Animals Regulations* (the Regulations).

[23] However, the Agency must establish that it issued the Notice of Violation to the person who committed the violation, that is, the person who loaded and transported the animals in question. The Federal Court of Appeal also pointed out in *Doyon v. Canada (AG)*, 2009 CAF 152, that the Act imposes a heavy burden on the Agency. Paragraph 20 of the decision reads as follows:

[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] Furthermore, in *Doyon*, the Federal Court of Appeal warns and advises the Tribunal to “be circumspect in managing and analysing the evidence and in analysing the essential

elements of the violation” when dealing with an alleged contravention of the Act. Below is the context in which this directive is set out by the Court (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.

[26] The rigour of the administrative monetary penalty regime therefore makes the Agency responsible for identifying the person who committed the violation in question. In this case, the Tribunal finds that the parties agree on the identity of the person who committed the violation in question and that it is indeed Réseau Encans. It should also be emphasized 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.*”

[27] Paragraph 138(2)(a) of the Regulations is located in Part XII, entitled “Transportation of Animals”. The purpose of this Part of the Regulations is to assist producers, transporters and all other parties in the humane transportation of animals intended for human consumption. When those provisions are contravened, Part XII permits the Agency to take action against the persons who have committed the offences.

[28] To facilitate the humane transportation of animals, paragraph 138(2)(a) of the Regulations provides 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 an offence under paragraph 138(2)(a), the Agency must establish the following elements, as identified by the Federal Court of Appeal at paragraph 41 of its decision in *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.

[29] With respect to elements 1, 2, and 3, the Tribunal is satisfied that, as shown by the evidence provided by the Agency which was not challenged by Réseau Encans, Réseau Encans had the two calves in question transported in a cattle transport truck on April 24, 2009.

[30] With respect the other elements, the evidence and the logical conclusions presented by the Agency are sufficient to prove each element, on the balance of probabilities. Element 5—that the animals suffered unduly during the expected journey—has been established on the balance of probabilities by the evidence of the Agency inspectors who observed that when the cattle arrived at the abattoir, each of the two calves had a compound fracture and one calf was non-ambulatory. Mr. Maciocia observed that neither of the two calves had a compound fracture when they were loaded. The fractures became worse over the course of the “expected journey”. According to all of the guides filed by the parties, the change from a simple fracture to a compound fracture is serious and increases an animal's suffering.

[31] Regarding elements 4, 6 and 7, once the sender has decided to transport a compromised animal, there is an increased likelihood that the expected journey will cause undue suffering. Thus, the mere fact of transporting them involves some degree of risk. The Agency has provided evidence on the condition of both calves upon their arrival, that is, that each had a compound fracture and one was non-ambulatory. Consequently, in regards to element 4, and by means of the provision set out in subsection 138(2.1) of the Regulations, it is reasonable to conclude that the transportation of animals of this kind opens the door to the statement that such animals could not be transported without undue suffering. The fact that the two calves were loaded without assistance into the trailer, even if they were alone in the trailer, is not sufficient, in itself, to refute this element of the offence.

[32] Given that the calves were loaded despite the fact that Réseau Encans' staff was aware that each had a fracture, that the calves presented compound fractures and that one of them was in a very serious condition a mere two hours later upon arrival at the abattoir, the Tribunal is of the opinion that it has sufficient evidence to find that the Agency has proven element 6, that is, that the animals could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause, on the balance of probabilities,

on the basis of the evidence from the reports and the emails of the Agency inspectors (Tabs 4, 7 and 8 of the Report).

[33] Finally, in regards to element 7—that there is a causal link between the transportation and the undue suffering—the Tribunal is convinced that, on the balance of probabilities, the transportation of the calves caused their suffering. Once again, the evidence filed by the Agency shows that the transportation of the calves did cause them undue suffering.

[34] Taking into account the evidence and the applicable legislative provisions, the Tribunal has concluded that the Agency has established, on the balance of probabilities, that Réseau Encans committed the violation, and therefore, confirms the Notice of Violation issued by the Agency.

[35] However, the Tribunal cannot confirm the amount of the penalty of \$ 2,600 set out in the Notice of Violation. In the Agency's Report, on page 11, the Agency alleges that Réseau Encans committed three violations for which it was found liable under the *Health of Animals Act* or the Regulations, in the three years preceding the date of the violation. Despite this allegation, the Report contains no documentation of these three violations which would prove, on the balance of probabilities, that Réseau Encans has committed prior violations; instead, this allegation was simply announced to the Tribunal. Without such evidence, the Tribunal cannot agree with a gravity value of 5 for "Prior Violations", and substitutes for it, a gravity value of 0 for "Prior Violations". This adjustment brings the total gravity value to 10. Therefore, as set out in Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, the penalty for this violation is \$2,000, without any further adjustment.

[36] In view of the facts, the Tribunal concludes that the Agency has established, on the balance of probabilities, all of the essential elements of the violation. The Tribunal, by order, determines that Réseau Encans committed the violation and must pay the Agency a monetary penalty of \$2,000 within 30 days of the date on which notice of this decision is served.

Removal of any record of the penalty after five years

[37] The Tribunal wishes to inform Réseau Encans that this violation is not a criminal offence. After five years, Réseau Encans may request that the Minister remove the violation from its record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, which reads as follows:

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 22nd day of May 2012.

Donald Buckingham, Chairperson