Commission de révision agricole du Canada

Canada Agricultural Review Tribunal

Citation: 9153-7225 Québec Inc. (also doing business as "Ferme Dion" and "Dion Farm") v. Canada (Canadian Food Inspection Agency), 2014 CART 26

Date: 20140911
Docket: CART/CRAC-1682

BETWEEN:

9153-7225 Québec Inc.
(also doing business as "Ferme Dion" and "Dion Farm")

Applicant

- and –

Canadian Food Inspection Agency

Respondent

[Translation from the official version in French]

BEFORE: **Bruce La Rochelle, Member**

WITH: **Robert Brunet, Counsel for the Applicant; and**
Lisa Morency, Counsel for the Agency

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 a violation of paragraph 138(2)(*a*) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

Following a review of all the oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that the applicant did not commit the violation as set out in Notice of Violation No. 1213ON262002, dated November 29, 2012.

Hearing held at Drummondville, on May 29, 2014

Alleged incident and relevant proceedings

[1] By Notice of Violation No. 1213ON262002, dated November 29, 2012, the respondent, the Canadian Food Inspection Agency (Agency) alleges that 9153-7225 Québec Inc. committed a violation on August 28, 2012, between Ayer's Cliff, Quebec, and St. Ann's, Ontario. According to the notice of violation, 9153-7225 Québec Inc. is accused, by notice of violation originally written in English and later translated by the Translation Bureau of the Department of Public Works and Government Services, as follows (to be discussed):

> [TRANSLATION]
> *Did load, transport or cause to be loaded or transported an animal that cannot be transported without suffering; to wit—Holstein cow bearing ear tag 107 76 257 delivered to St. Ann's Foods and found down upon arrival.*

The text of the violation refers, although not word for word, to paragraph 138(2)(*a*) of the *Health of Animals Regulations* (C.R.C., c. 296), which provides as follows:

> ***138.*** *. . . [N]o 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;*

[2] By certificate of service (CFIA form 5197) dated November 29, 2012, Michael Cole, an investigations specialist with the Agency's Enforcement and Investigation Services, certified that on December 9, 2012, he served the notice of violation [TRANSLATION] "by sending a copy by fax, registered mail or courier to the head office or the place of business of the person or the person's agent". Mr. Cole identified Gilles Dion as the individual on whom the notice of violation was served.

[3] The notice of violation sent to 9153-7225 Québec Inc. was accompanied by a letter from Michael Cole, in English, dated November 29, 2012. The letter was addressed to 9153-7225 Québec Inc., to the attention of Gilles Dion, but did not indicate Mr. Dion's title or his relationship to 9153-7225 Québec Inc. Mr. Cole notified Mr. Dion of the service of the notice of violation and advised him (as later translated into French by the Agency) "Please review the instructions provided on the reverse side of this notice of violation. It is important that you read this information carefully before choosing one of the proposed solutions and follow the instructions on how to exercise your rights . . .".

[4] After being served with the notice of violation, 9153-7225 Québec Inc. submitted a request for review, with reasons, dated December 31, 2012, and received by the Tribunal, by fax, on January 2, 2013. The request for review was signed by Gilles Dion but did not indicate his relationship to 9153-7225 Québec Inc.

[5] On January 4, 2013, the Tribunal notified the Agency by email that the notice of violation would have to be translated because the case was in French. By email dated January 4, 2013, the Agency asked whether its report would have to be translated, in addition to the translation of the notice of violation.

[6] The Agency's report, in English, was submitted to the Tribunal by mail on January 14, 2013.

[7] By letter dated January 14, 2013, sent to the parties by the Tribunal, the parties were notified that any other submissions that they wished to make would have to be filed with the Tribunal by February 13, 2013.

[8] On February 11, 2013, Mr. Dion submitted further submissions from 9153-7225 Québec Inc. by fax.

[9] By letter dated April 3, 2013, sent by the Tribunal by email and mail to Lisa Morency, counsel for the Agency, from the Department of Justice Canada, with copies to the Agency and 9153-7225 Québec Inc., the Tribunal ordered as follows:

> [TRANSLATION]
> *Since the applicant has indicated that it wishes to have an oral hearing in French, the Chairperson of the Canada Agricultural Review Tribunal (the Tribunal) orders that the Agency reproduce its report, and the English sentences appearing in the above-referenced notice of violation, in French. The report shall be presented to the Tribunal, as well as to the applicant, before Tuesday, April 20, 2013, final deadline.*
>
> *It should be noted that in similar situations in* Greidanus Poultry Services Ltd. v. Canada (CFIA) *(CART/CRAC-1618 . . .) and* Anthony Schoolcraft v. Canada (CFIA) *(CART/CRAC-1698 . . .), the Agency has provided translations of all documents in the record in the official language required by the applicant by request through the Tribunal.*

[10] By letter dated April 15, 2013, and sent to the Tribunal by email and fax, with copies to Ms. Morency and Mr. Dion, Marc Deveau, counsel for the Agency's Legal Services, advised the Tribunal as follows:

> [TRANSLATION]
> *. . . [T]he Canadian Food Inspection Agency (CFIA) undertakes to translate into French the notice of violation in docket No. CART-1682, as well as the narrative section (coming before the documentary evidence) . . . before April 30, 2013. However, the CFIA disagrees with the order to translate the documentary evidence . . . .*
>
> *We are of the opinion that the Crown has no legal duty—on the basis of the language rights provided under section 133 of the* Constitution Act, 1867, *subsections 19(1) and 20(1) of* Canadian Charter *or parts III and IV of the*

> Official Languages Act—*to translate documentary evidence into the official language of an applicant if the Crown has filed it in the other official language in a proceeding before a federal tribunal.*

The letter from Mr. Deveau also expressly applies to another case before the Tribunal: CART/CRAC 1638 (*Les Pères Trappistes de Rogersville*).

[11] By letter from Mr. Cole dated April 26, 2013, and received by the Tribunal on April 29, the Agency submitted a translation of the English sentences appearing in the notice of violation, as well as a translation of the narrative section of the report and its arguments on the application of the decision of the Federal Court of Appeal in *Doyon* (*Michel Doyon v. Attorney General of Canada,* 2009 FCA 152). The arguments regarding the application of *Doyon* were included as Tab 13 of the original English version of the report. In that letter, written in English, Mr. Cole states that the documentary copies of the translations were sent to Mr. Dion. The Agency did not submit a French translation of the documentary evidence or the appendices to the report. For example, the notes of Dr. Dykeman (Tab 6) were not translated into French. The Agency submitted a French translation of the titles of the documentary evidence ("Annexe E – Documents Prouvant La Violation" [Appendix E – Documents Proving the Violation]; page 21 of the French translation of the report) but not translations of the documents themselves.

[12] The Agency's translation of the sentences in the notice of violation initially read as follows:

> *A embarqué et transporté ou fait embarquer et transporter un animal qui ne pouvait pas être transporté sans souffrances, à savoir une vache Holstein portant l'étiquette d'oreille n^{e} 107 764 257, livrée chez St. Ann's Foods et trouvée couchée à l'arrivée.*

On April 29, 2013, the Tribunal received a copy of an undated letter from Linda Brisebois, Legal Translator and Language Adviser, Public Works and Government Services Canada, to Jennifer Craig of the Agency's Enforcement and Investigation Services, giving an amended translation, as follows:

> *A chargé ou transporté ou fait charger ou fait transporter un animal qui ne peut être transporté sans souffrances, à savoir une vache Holstein portant l'étiquette d'oreille no 107 764 257, livrée chez St. Ann's Foods et trouvée couchée à l'arrivée*.

[13] On May 8, 2013, the Tribunal received a copy of a notice of application, dated May 6, 2013, style of cause *The Attorney General of Canada v. 9153-7225 Québec Inc.,* by which the Attorney General made an application for judicial review to the Federal Court of Appeal (docket No. A-157-13) regarding the order by which the Tribunal ordered the Agency to translate its record, including the documentary evidence, from English into French. The Attorney General argued, among other reasons, that the Tribunal erred in law in making that order.

[14] On August 1, 2013, the Tribunal received a letter, dated July 31, 2013, from an assistant at the Registry of the Federal Court of Appeal, along with a notice of discontinuance from the Attorney General of Canada, dated July 11, 2013, and registered on July 12, 2013, with regard to docket No. A-157-13.

[15] The Tribunal did not receive any documentation by which the documentary evidence of the Agency's other arguments were translated into French. Furthermore, the Tribunal did not receive any complaints from 9153-7225 Québec Inc. on this point.

[16] By letter dated September 3, 2013, the Tribunal sent the parties a notice of hearing, scheduled for September 19, 2013, in Drummondville. The hearing was held as initially scheduled. However, at the hearing on September 19, 2013, the parties agreed to adjourn to a later date because of a lack of translation services, as requested by the Agency. Dr. Dykeman, a veterinarian and the Agency's chief witness, spoke English only. The language of the hearing was French, and the other parties' testimonies were in French only.

[17] By letter dated March 10, 2014, the Tribunal sent the parties a notice of hearing, scheduled for April 24, 2014, in Drummondville. By letter dated April 17, 2014, received by the Tribunal by fax that same day and by mail on April 22, 2014, Robert Brunet, Q.C., identified himself as the representative of 9153-7225 Québec Inc. Mr. Brunet advised the Tribunal that he would not be available on April 24, 2014, and asked that the hearing be rescheduled. He also asked the Tribunal for information regarding its policy on requests for postponement and regarding whether a notice of appearance would have to be filed for him to be officially on the record.

[18] By letter dated April 22, 2014, sent by email and mail, the Tribunal replied to Mr. Brunet, telling him that his letter would suffice as a notice of appearance. The Tribunal also advised Mr. Brunet that he would have to provide a letter including all the information required by Practice Note No. 4, *Requests for Adjournments and Postponements of an Oral Hearing*. The Tribunal advised Mr. Brunet that a request for postponement would have to be made on the same date as the Tribunal's letter (April 22, 2014) in order to be considered by the Tribunal. Mr. Brunet replied by letter dated April 22, 2014, will all the required information.

[19] By letter dated April 24, 2014, the Tribunal advised the parties that the Tribunal had granted the request to postpone the hearing and had scheduled a new hearing for May 29, 2014. The Tribunal also advised the parties as follows:

> [TRANSLATION]
> *The Tribunal also would like to put the parties on notice that no further postponements or adjournments will be granted unless:*
>
> 1) *If the request is made more than nine (9) calendar days in advance of the scheduled hearing date, the party requesting the adjournment has a compelling reason in support of its request; or*

2) *If the request is made less than ten (10) calendar days in advance of the scheduled hearing date, the party requesting the adjournment has a compelling reason in support of its request* ***AND*** *will pay the Tribunal all costs incurred by the Tribunal due to the postponement or adjournment of the matter.*

[20] On April 29, 2014, a notice of hearing was sent to the parties by registered mail and by email. The new hearing was scheduled for May 29, 2014, in Drummondville.

[21] On May 22, 2014, seven days before the scheduled hearing, Mr. Brunet sent the Tribunal a submission by email, as follows (excerpt):

> [TRANSLATION]
> *Given that we plan to raise the same points of law as those raised in the motion to institute proceedings for declaratory judgment in 9126-5553 Québec Inc. vs. The Attorney General of Canada; given that our client plans to comply with the final and binding decision to be rendered in this motion to institute proceedings for declaratory judgment, without repeating the same debates; given that the same arguments will be raised in our case as in the motion to institute proceedings for declaratory judgment; and considering the principle of the hierarchy of courts, we ask that the hearing scheduled for May 29, 2014, be postponed pro forma until a final and binding decision is rendered on the motion to institute proceedings for declaratory judgment in docket No. AR3011-ALOMB7-BR0551, registered in the judicial district of St-François, in the Superior Court*.

Mr. Brunet did not give the details of the case before the Superior Court of Québec that are applicable in this case. Moreover, the parties to the case before the Superior Court were not the same as those before the Tribunal.

[22] By letter dated May 23, 2014, sent to the parties by email and mail, the Tribunal decided as follows (excerpts):

> [TRANSLATION]
> *. . . The Tribunal does not agree that the reasons you have given warrant an adjournment in this case . . . . Furthermore, as I stated in my last letter to the parties, the adjournments to this late date are having serious monetary repercussions. That being said, the Tribunal is not inclined to grant this request unless the applicant undertakes to cover the full costs that would be incurred in this adjournment, which in this case would be $2,300 (for interpretation services).*
>
> *The Tribunal therefore orders that the hearing take place as scheduled. However, the Tribunal would be prepared to grant a request for adjournment if you could obtain the consent of the Canadian Food Inspection Agency and if you provided the Tribunal with an undertaking from you to the effect that your client will pay, by cheque made to the order of the Receiver General for Canada,*

care of the Tribunal, the costs stated above ($2,300) by the close of business on May 27, 2014.

[23] In denying the request for adjournment, in which Mr. Brunet pleaded that he was awaiting a decision in a case regarding the same issues in the Superior Court of Québec, the Tribunal chose to not give any reasons. The letters from the Tribunal dated April 24, 2014, and May 23, 2014, were signed by Lise Sabourin, Tribunal Registry Services, but did not include an official order signed by a Tribunal member. By email to the Tribunal dated May 27, 2014, copied to Ms. Morency, on behalf of the Agency, Mr. Brunet requested as follows (excerpts):

> [TRANSLATION]
> *I would like to know who rendered a decision in our request for postponement.*
>
> *I would like to know what is meant by "interpretation fees".*
>
> *As for the price asked for the request for postponement, I find such a situation disgraceful and would like to know which decision maker made this decision to claim this amount.*

[24] By email dated May 27, 2014, sent to Mr. Brunet by Lise Sabourin, Tribunal Registry Services, copied to Ms. Morency, the Tribunal replied as follows (excerpts):

> [TRANSLATION]
> *The hearing will be held on May 29, 2014, as scheduled, but your client is free to seek judicial review of the decision of the Tribunal regarding its request for adjournment.*

[25] The hearing was held on May 29, 2014, as scheduled, without the Tribunal receiving a notice of application for judicial review or a notice from the Agency of its agreement to the request for adjournment.

Procedural issues

[26] The issues arising from the proceedings described above are as follows:

(a) Is the Tribunal entitled to order a party to have the written evidence it files translated from one official language of Canada into the other official language of Canada?

(b) Does a report by the Agency also include the written evidence added as tabs, or does the report include only the summary of facts and, if added to the report, the written arguments?

(c) Is the Tribunal entitled to order a party to reimburse the costs related to an adjournment as a condition for granting a request for adjournment? Mr. Brunet

strenuously objected to the Tribunal's position on this administrative issue, as demonstrated by the contents of his email of May 27. In addition, at the beginning of the hearing, after the Tribunal invited Mr. Brunet to speak further on this matter, Mr. Brunet described the position taken by the Tribunal as creating a [TRANSLATION] "degrading system" and [TRANSLATION] "a system not even found in an emerging country". In his view, such a system could pressure individuals into pleading guilty.

(d) Does a procedural order by the Tribunal have to be made in an official and public document, or is it sufficient to communicate the contents of a procedural order in a letter from a registrar of the Tribunal to the party affected?

(e) Is the Tribunal required to give reasons for a procedural order?

[27] The Tribunal believes that the questions enumerated remain to be discussed in another case or cases. Nevertheless, the Tribunal notes that at the beginning of the hearing, Mr. Brunet reserved his client's rights with regard to issues (c), (d) and (e). In relation to issue (c), the Tribunal has recognized, previously, that it is not entitled to order a party to pay costs. As the Tribunal stated 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.) . . . .*

The Tribunal also commented on this subject 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. t 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 . . . .*

Evidence and arguments before the Tribunal

[28] Following the hearing, the evidence and arguments raised before the Tribunal are as follows:

(a) The written reasons given by Mr. Dion, on behalf of 9153-7225 Québec Inc., when the request for review was filed on December 31, 2012 (Reasons, together with the Request)

(b) Additional submissions by Mr. Dion, dated February 11, 2013 (Additional Submissions of the Applicant)

(c) The testimony of Mr. Dion at the hearing;

(d) The submissions of Mr. Brunet at the hearing;

(e) The Agency's report, including the arguments, translated into French, and including the evidence, in the tabs, in English only (considered together as "the Report", despite Issue (b), as stated in paragraph 26, above);

(f) The testimony of Dr. Dykeman at the hearing;

(g) The submissions of Ms. Morency at the hearing;

(h) Exhibit 1 – Two documents, filed together by the Agency, published by the Ontario Farm Animal Council, in English only: "Body Condition Scoring for Dairy Cattle" and "Body Condition Scoring for Beef Cattle";

(i) Exhibit 2 – Excerpt from "Caring for Compromised Cattle", published by the Ontario Farm Animal Council: "Lameness Classes", filed by 9153-7225 Québec Inc., in English only.

In addition, the Agency filed a copy of the decision of the Federal Court of Appeal in *Canadian Food Inspection Agency v. Samson,* 2005 FCA 235, in support of its arguments.

Preliminary issue: List of witnesses

[29] The Agency filed a list of witnesses (Report, page 20). No list of witnesses was filed by 9153-7225 Québec Inc. Four names appear on the Agency's list:

Dr. Lori Dykeman, a veterinary inspector with the Agency

Brian Ricker, Foreman, St Ann's Foods

Daniel Lemus, Co-ordinator, Hazard Analysis Critical Control Point (HACCP), St. Ann's Foods

Michael Cole, an investigator with the Agency

[30] Dr. Dykeman appeared as the Agency's only witness. Gilles Dion appeared as 9153-7225 Québec Inc.'s only witness. It came as no surprise to the Agency that Gilles Dion was 9153-7225 Québec Inc.'s only witness, as he was 9153-7225 Québec Inc.'s truck driver and was regarded by the Agency as the company's senior manager.

[31] The Tribunal would like to remind the parties that, in the Tribunal's view, the absence of witnesses listed by one party may put the opposing party at a disadvantage. As the Tribunal noted in *E. Grof Livestock Ltd. v. Canada (Canadian Food Inspection Agency)*, 2014 CART 11, at paragraphs 42 and 43, in rejecting the argument of counsel for the Agency that a witness list is merely a summary of the names of individuals mentioned in the Agency's report:

> *[42] The Tribunal disagrees with the Agency's categorization of the list of witnesses submitted as being little more than a summary of names. If the Agency submits a list of witnesses, it is reasonable for both the Tribunal and E. Grof Livestock to expect that such witnesses will be called. If the Agency chooses not to call such witnesses, it is reasonable for the Agency to give notice to E. Grof Livestock and the Tribunal of its intentions, to enable E. Grof Livestock to arrange for such witness attendance on its behalf or to compel such attendance, through seeking the issuance of a summons by the Tribunal. Similar sentiments were recently expressed by the Tribunal in* Kobia v. Canada (CBSA)*, 2013 CART 44, at paragraph 20.*
>
> *[43] Under the circumstances of the current case, the Tribunal, in its discretion, chose to permit E. Grof Livestock to seek to obtain statements from witnesses listed but not called by the Agency, subject to the Agency having a right to cross-examine on same.*

[32] At the hearing, the Tribunal noted that the listed witnesses, apart from Dr. Dykeman, were not present, without explanation. Mr. Brunet did not object to the witnesses' absence, nor did he reserve the rights of his client in this regard. Consequently, contrary to the procedures adopted by the Tribunal in *E. Grof Livestock*, the Tribunal did not choose to exercise its discretion to give additional opportunities to obtain evidence from the absent witnesses.

Preliminary issue: Bias, at first instance?

[33] Soon after the hearing began, the Member, Dr. La Rochelle, remarked that he was already familiar with St. Ann's Foods and with Dr. Dykeman because Dr. La Rochelle was the Tribunal member who presided over the hearing and wrote the decision in *E. Grof Livestock Ltd.,* previously cited. Mr. Brunet replied by commenting on the subject of the level of Dr. La Rochelle's familiarity with St. Ann's Foods and Dr. Dykeman. Mr. Brunet suggested that the testimony of Dr. Dykeman could be influenced by the sentiments expressed by the Tribunal. The Tribunal asked Mr. Brunet if he was alleging bias on the part of the Tribunal and, if so, how he would like to address the matter. After discussing the matter with his client, Mr. Brunet announced that the applicant had decided, for reasons of efficiency, to trust in the wisdom of the decision-maker and to waive the right (if applicable) to request recusal.

Preliminary issue: Identity of the violator

[34] Mr. Brunet challenged the identity of the violator, suggesting that Gilles Dion was a self-employed worker who used the name "Ferme Dion" as a trade name. Since the photographs filed by the Agency included a photograph of the door of a truck with "Dion Farm" markings (Report, Tab 9, third photograph), and since the notice of violation was in the name of 9153-7225 Québec Inc., without including the name "Ferme Dion" or "Dion

Farm" as the trade name, Mr. Brunet argued that the actual violator was not named in the notice of violation.

[35] Ms. Morency referred to Tab 14 of the Report, which contained the search results for 9153-7225 Québec Inc., posted on the website registreentreprises.gouv.qc.ca. This shows that 9153-7225 Québec Inc. registered the names "Ferme Dion" and "Dion Farm" as trade names used by the company. The Tribunal therefore rejected Mr. Brunet's arguments regarding the identity of the violator. 9153-7225 Québec Inc. remains responsible for the actions of its employees and its agents. Furthermore, if Gilles Dion is a self-employed worker, rather than an employee or agent of 9153-7225 Québec Inc., no evidence was filed on this point. The Tribunal notes that Gilles Dion is acting as 9153-7225 Québec Inc.'s primary contact, as its only witness, and as its representative in filing the request for review. Gilles Dion is the principal actor in the company, apart from the fact that Steve Dion is registered in Quebec as principal and majority shareholder, chairman and secretary of 9153-7225 Québec Inc. The relationship between Steve Dion and Gilles Dion was not discussed at the hearing. In a previous case before the Tribunal, *9153-7225 Québec Inc. v. Canada (Canadian Food Inspection Agency)*, 2012 CART 1, (hereafter "*9153-7225 Québec Inc. (2012)*"), Mr. Dion was identified by the Tribunal (at paragraph 7) as an employee of the company, without objection from Mr. Dion.

[36] The Tribunal is satisfied that the names "Ferme Dion" and "Dion Farm" are used by 9153-7225 Québec Inc. as trade names. Consequently, the Tribunal changed the style of cause in this case, adding "also doing business as Ferme Dion and Dion Farm".

Preliminary issue: Wording of the notice of violation

[37] The Tribunal notes that the wording of the notice of violation is different from the wording specified in the relevant paragraph of the Regulations. In *Finley Transport Limited v. Canada* (*Canada Food Inspection Agency),* 2013 CART 42, at paragraph 24, the Tribunal confirmed that the Agency must use the wording of the short-form descriptions that are set out in column 2 of section 1 of Part 1 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 provision. The elements of the violation are the elements set out in the provision.

Preliminary issue: Previous violations and credibility

[38] Ms. Morency began introducing the details of the previous violations of 9153-7225 Québec Inc. as part of her closing arguments. The Tribunal questioned the purpose of introducing old facts, and Ms. Morency did not insist on introducing the details. The Tribunal considers that one purpose of such an attempt is to challenge the credibility of the defences of 9153-7225 Québec Inc., based on the testimony of Gilles Dion.

[39] Even though the Tribunal is not convinced that the previous violations are relevant, the Tribunal is not entitled to refuse to admit an element of proof. The principal role of the

Tribunal relates to the weight to be accorded to the evidence submitted. See for example *Canada (Border Services) v. Tao*, 2014 FCA 52 (hereafter "*Tao (FCA)*"). Therefore, if Ms. Morency had insisted on filing the details of the previous violations of 9153-7225 Québec Inc., for whatever reason, the Tribunal would have been obliged to weigh them, not exclude them.

Reasons of the applicant

[40] The reasons of 9153-7225 Québec Inc., through Gilles Dion, are found in two documents: the request for review dated December 31, 2012, and the additional submission, dated February 11, 2013. The reasons are as follows:

Request for Review, December 31, 2012:

> [TRANSLATION]
> *Trip on August 28, 2012, was done in good condition. But the too old cow did not get off. All the other cows got off in good condition. I am not responsible for old cows that were bought by the seller.*

Additional submission, February 11, 2013:

> [TRANSLATION]
>
> *Story*
>
> *Agricultural Review Tribunal*
>
> *In response to you Letter of Violation, I would like to tell you that I didn't violate anything like you say. I just did work to try to pay the fuel, insurance payment and repair. The transported animals come from the farmer to send to auctions that are supervised by Agriculture Canada and the sales agency . . . so I am not responsible for everyone's misfortune. The transport was done to standards. You can't make the old cows in the transport younger.*
>
> *In 2003 you made up a mad cow that cost me my farm after all these problems you made Levenoff go bankrupt . . . so today all that remains for you is to give back all that was stolen from me and to make things like they should be. As for your fine, it is a ridiculous amount in relation to an old worthless cow.*
>
> *Check what I did and what I have left. You will see that I got everything stolen so I have nothing left.*
>
> *from Gilles Dion*

[41] The Tribunal finds that the reasons raised by 9153-7225 Québec Inc., through Mr. Dion, are as follows:

(i) The cow was too old to unload.

(ii) Mr. Dion, on behalf of 9153-7225 Québec Inc., as transporter, is not responsible for old cows because the animals are "supervised" by the Department and by the sales agents.

(iii) The transport was done in accordance with the "standards".

[42] In addition, Mr. Dion complains that the Agency's actions in the past cost him dearly: he lost his farm. The Tribunal believes that in referring to "Levenoff", Mr. Dion is referring to the Levinoff-Colbex slaughterhouse, which went bankrupt in 2013, with a fiscal deficit of approximately $30 million, thereby causing a major loss for the Quebec government, which was involved in refinancing the slaughterhouse. See, for example, Alain Leforest and Denise Proulx, "Abattoir Levinoff-Colbex: une transaction financière peu rentable" [Levinoff-Colbex slaughterhouse: a money-losing financial transaction], TVA nouvelles and Argent Canoe, February 12, 2014.

[43] As mentioned, 9153-7225 Québec Inc. has previously been before the Tribunal and has, through Mr. Dion, expressed similar sentiments. As the Tribunal discussed in *9153-7225 Québec Inc. (2012),* at paragraph 27 (*per* Dr. Buckingham, Chairperson):

> *[27] In his closing arguments, Dion referred to the injustices visited upon transporters of weak livestock and the issues of the Agency's enforcement of the law, given the commercial realities in the livestock industry. Can a truck driver realistically control the entire loading process at an auction mart? Can a truck driver say, without any repercussions, that he cannot be at an abattoir at the prescribed time 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 based on 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. To carry out the mandate of the Regulations, many individuals within the supply chain must make decisions that may incur liability.*

[44] The Tribunal finds that in this case, Mr. Dion, on behalf of 9153-7225 Québec Inc., has not given reasons that include legitimate defences against an absolute liability violation. 9153-7225 Québec Inc. is still responsible for avoiding transporting a cow that could not be transported "without undue suffering", according to paragraph 138(2)(*a*) of the *Health of Animals Regulations.* The references to "standards", particularized or otherwise, are not relevant as defences against an absolute liability violation. On the other hand, an industry's standards are relevant in reviewing the gravity value of a violation and the resulting penalty.

[45] At the hearing, Mr. Brunet stated that because Mr. Dion was not a veterinarian, Mr. Dion could only rely on his best assessment, according to his experience as a

transporter, to determine whether a cow would be suitable for transport. This assessment is necessarily based on the transporter's impression that the cow can walk normally, at the beginning of the loading process. The Tribunal must point out that such arguments are not relevant in a statutory regime based on absolute liability. If there are any inequalities in this, it is up to the legislators, not the Tribunal, to remedy them.

[46] The Tribunal decided that the request for review would be admissible even through 9153-7225 Québec Inc. had not raised any legitimate defences, at first instance. The case before the Tribunal was opened in response to a request for review dated December 31, 2012. On May 1, 2013, the Tribunal published *Practice Note #11 – Determining Admissibility of Requests for Review and Practices Regarding the Exchange of Documents Amongst Applicants, Respondents and the Tribunal.* In *Farzad v. Canada (Canada Border Services Agency)*, 2013 CART 33, the Tribunal discussed the situation of unrecognized reasons, as follows (at paragraphs 31 and 32):

> *[31] In its discretion, in many cases involving the submission of no reasons or statutorily unrecognized reasons in support of a Request for Review, the Tribunal has nonetheless proceeded with the Request for Review, requiring the Agency to submit a report, to which an applicant is invited to respond. The provisions of Tribunal Rule 34, referenced ante, must be considered by the Tribunal, where it assesses the initial admissibility of a Request for Review. Where an applicant, in submitting a Request for Review, fails to provide reasons recognized by section 18 of the Act and as required by Rule 34, the applicant risks being subject to a finding by the Tribunal that the Request for Review is inadmissible. Reference is made to paragraph 3.3 of the Tribunal's* Practice Note #11 – Determining Admissibility of Requests for Review and Practices Regarding the Exchange of Documents Amongst Applicants, Respondents and the Tribunal, *issued on May 1, 2013, in which the requirement for the inclusion of reasons in the Request for Review is emphasized. Implicit in such requirement is that the reasons specified not be specious at the outset. The provision of specious reasons is the equivalent to providing no reasons at all.*
>
> *[32] In the Tribunal's view, this case exemplifies why the Tribunal has considered it advisable to issue Practice Note #11. Clearly, it is in the public interest, relative to hearing costs and related time and expenditure of resources, that an applicant in a case such as this be compelled to provide, at the outset, substantive reasons not otherwise prohibited by section 18 of the Act.*

[47] Presenting reasons that are not recognized is tantamount to an absence of reasons. See for example *Wilson v. Canada (Canadian Food Inspection Agency)*, 2013 CART 25 and *Soares v. Canada (Canada Border Services Agency)*, 2013 CART 39. Moreover, if the Agency does not agree with a Tribunal decision on the admissibility of a request for review, the Tribunal is of the opinion that the Agency is entitled to challenge that decision and to refuse to file a report until its challenge is dealt with. The Tribunal recognized that the Agency has

such a right in *Abou-Latif v. Canada (Canada Border Services Agency)*, 2013 CART 35, at paragraph 30:

> *[30] . . . Indeed, at the hearing, the Tribunal reminded the Agency that the Agency could request of the Tribunal that the Agency be relieved of its obligation to submit a report, until such time as an applicant meets the requirements of Rule 34.*

[48] After submitting the Report, it would appear that the Agency, from that moment on, remains with the obligation to support its evidence against the applicant's criticisms, even though the reasons originally submitted by the applicant were weak or not recognized. Even if the applicant's reasons are not recognized, the Agency must substantiate the notice of violation with evidence on a balance of probabilities, since there is a request for review that the Tribunal has treated as being admissible. Regarding cases opened by the Tribunal after May 1, 2013, the circumstances of their opening should not be the same. Furthermore, the Tribunal has been directed by the Federal Court of Appeal in *Canada (Attorney General) v. Bougachouch*, 2014 FCA 63 that the evidence supporting the applicant's defences must be submitted *by the applicant*; Tribunal does not have a right to establish a reverse onus of proof. Mr. Justice Noël, writing on behalf of the Federal Court of Appeal, criticized the Tribunal for doing so, at paragraph 36:

> *[36] To sum up, the Tribunal acted unreasonably in shifting the burden of proof on the basis of a mere impression and in criticizing the CBSA for not having entered in evidence the declaration cards and related statistics.*

[49] The Tribunal notes that in *Bougachouch*, Mr. Justice Noël held that it was not necessary to determine whether the Tribunal has the power to exclude evidence. At paragraph 30, the judge writes, "It is neither necessary nor appropriate to consider the question of whether the Tribunal had the power to exclude the evidence because in any event exclusion, although permitted, is unreasonable". On the other hand, Justice Near suggested, at least, in *Tao (FCA),* cited above, at paragraphs 24 and 26, that the exclusion of evidence is an error of law. As was discussed earlier, the Tribunal believes that the approach to take is that of weighing the evidence, rather than excluding it.

Facts not in dispute

[50] The facts which were not disputed by Mr. Brunet are as follows:

(i) The evening of August 28, 2012, the cow in question was part of a group of 30 cull cows and 40 bulls that were transported by Gilles Dion, the driver, in a truck and trailer owned by 9153-7225 Québec Inc., marked "Dion Farm" on the driver's side door (Report, Tab 4—CFIA form 5663, "Humane Transport Inspection", filled out by Dr. Dykeman (in English, untranslated); Tab 9—four photographs taken by Dr. Dykeman, showing the truck, the trailer and the permit numbers; Tab 15—copies of the notes taken by Michael Cole, an investigator with the Agency (in English, untranslated), showing on page 2

that Mr. Cole checked the ownership of the truck and trailer, by permit numbers).

(ii) The cow was owned by Mr. Bouffard, of Ayer's Cliff, Quebec, and was one of the group of cows and bulls transported from Ayer's Cliff to St. Ann's Foods in St. Anns, in the Niagara region of Ontario.

(iii) The shipment was loaded in Ayer's Cliff around 9:00 p.m. or 10:00 p.m. and arrived in St. Anns the morning of August 29, 2012. The journey took approximately 12 hours.

(iv) The unloading of the animals began around 12:40 p.m. and, after a break due to a lack of space in the barn of the slaughterhouse, resumed at 1:40 p.m.

(v) After all the compartments in the transport vehicle were emptied, Dr. Dykeman noticed that one cow remained inside and could not get up.

(vi) Dr. Dykeman entered the vehicle and, after observing the cow, gave it a body condition score of 1.5 out of 5; she also found that the cow was suffering from multiple heath issues.

(vii) The cow was only able to crawl on its front legs, with half of its body remaining outside the trailer compartment. Since the cow could not disembark and go inside the slaughterhouse, the cow was euthanized where she was laying by the slaughterhouse's foreman, Brian Ricker.

Testimony and experience of Dr. Dykeman

[51] The only witness for the Agency was Dr. Lori Dykeman, an Agency employee. The Tribunal hired translation services to allow Dr. Dykeman to understand the language of the hearing, which was French. The translators took turns remaining next to Dr. Dykeman, translating the French directly into her ear. Neither Mr. Dion nor Mr. Brunet requested translation services for Dr. Dykeman's testimony in English. Mr. Dion, through Mr. Brunet, said that he would use the translation services if necessary. In addition, Mr. Brunet chose to cross-examine Dr. Dykeman in English, even though he was entitled to cross-examine her in French, using the translation services at the hearing. These facts are mentioned as examples of the necessity of respecting the applicant's right to choose the official language of the hearing, and of the Tribunal's duty to ensure that all the parties are able to understand the oral evidence in the official language of their choice. The question remains as to the responsibility for translating the written evidence.

[52] In regard to Dr. Dykeman's experience, Mr. Brunet recognized Dr. Dykeman as an expert. The Tribunal noted in *Finley Transport Ltd. v. Canada (Canadian Food Inspection Agency)*, 2013 CART 42, that in hearings before administrative tribunals, it is not strictly necessary to recognize a witness as an expert. The Tribunal is entitled to hear and weigh anyone's opinion. At paragraph 55 of *Finley Transport*, the Tribunal discussed this point, as follows:

> *[55] . . . The Agency wished to qualify Dr. Asiegbunan as an expert, which the Tribunal accepted, as did John Finley, on behalf of Finley Transport. The Tribunal noted at the time that it was, strictly speaking, not necessary for Dr. Asiegbunan to be qualified as an expert, since the Tribunal was not subject to strict rules of evidence and the weight accorded to Dr. Asiegbunan's testimony was therefore more a matter of an assessment of overall credibility, rather than formal qualification as an expert . . . .*

[53] Despite having already been recognized as an expert at first instance, Dr. Dykeman detailed her qualifications. She testified that she is the veterinarian in charge at St. Ann's Foods. She graduated in 1995 from the Ontario Veterinary College. She has spent 12 years with the Agency, in addition to having private practice and teaching experience. She supervises a staff of four inspectors and one other veterinarian. In addition to her duties as veterinarian in charge, Dr. Dykeman is also designated as a veterinary inspector. She has significant experience in the assessment of animal suffering, plus has taken courses on the humane transportation of animals and the related standards under the *Health of Animals Act*. Mr. Brunet did not challenge the experience and expertise of Dr. Dykeman.

Condition of the cow

[54] The impressions as to the state of the cow came from two individuals: Gilles Dion and Dr. Lori Dykeman. According to the interpretation by the Tribunal of Mr. Dion's words, in the request for review and the supplementary submissions, Mr. Dion describes the cow as "too old to unload" and that "an old cow cannot get younger during transport". Furthermore, according to Dr. Dykeman, in the form "Humane Transport Inspection" (Report, Tab 4), Mr. Dion, speaking in English with Dr. Dykeman, admitted that among the cows in the vehicle, there were "around five that weren't doing so well".

(a) Admissions of Mr. Dion

[55] Therefore, Mr. Dion, on behalf of 9153-7225 Québec Inc., admitted that (1) five cows with unspecified health issues were among the group of cows transported and (2) the cow that was the subject of the notice of violation was too old to unload. According to *Tao (FCA)*, the Tribunal most consider and weigh Mr. Dion's admissions, on behalf of 9153-7225 Québec Inc., even if the admissions could be against the applicant's legal interests and were not given under the supervision of his legal counsel. In *Tao v. Canada (Canada Border Services Agency),* 2014 CART 6 (hereafter *Tao [2014]*), the Tribunal reconsidered the facts in *Tao (2013),* as directed by the Federal Court of Appeal in *Tao (FCA)*. The Tribunal concluded, at paragraph 45, that Mr. Tao's admissions had little probative value:

> *[45] The Tribunal has determined that it is reasonable to conclude that it has not been established, on the balance of probabilities, that Mr. Tao explicitly admitted that the items in question were meat and, in particular, beef. If the Tribunal had determined that it was reasonable to conclude that Mr. Tao had*

made an explicit admission as to meat or beef, the weight to be accorded to any such explicit admission would be considered to be a separate issue . . . .

[56] The Tribunal finds that, in the present case, Mr. Dion's admissions, in terms of their probative value, are similar to those of Mr. Tao, considered more specifically by the Tribunal in *Tao (2014).* Mr. Dion said almost nothing at the hearing, apart from stating, in response to Mr. Brunet's questions that, contrary to Dr. Dykeman's evidence, he was not present when Mr. Ricker tried to encourage the cow to stand up before it was euthanized. Mr. Dion's statements regarding the condition of the cow remain written statements, rather than oral testimony with cross-examination. In carefully examining what Mr. Dion wrote, as well as what he is alleged to have said, according to the testimony and notes of Dr. Dykeman, the Tribunal is of the opinion that Mr. Dion knew that the five cows were not in good condition and that one of the cows, at the end of the unloading, appeared to be unable to disembark. "Not in good condition" was not particularized. In addition, Mr. Dion's admissions do not show that Mr. Dion knew why the cow could not get up. Moreover, an admission that a cow is "too old to unload" does not amount to an admission that a cow is "too old to be transported without undue suffering". Therefore, the Tribunal is of the opinion that Mr. Dion's admissions do not assist the Agency in supporting its arguments.

(b) Admission of Mr. Dion and "*Charter* values"

[57] In *Tao (2014)*, the Tribunal discussed, at paragraphs 27 to 29, the implications of *Doré v. Barreau du Québec* 2012 SCC 12. In *Doré*, the Supreme Court directed administrative tribunals to incorporate "*Charter* values" into their deliberations, even though "*Charter* rightgs" are not applicable to administrative offences. In *Tao (2014),* other than referring to *Doré* and "*Charter* values", the Tribunal was not required deliberate further on the subject because the Tribunal concluded that Mr. Tao's admissions did not, in any event, have significant probative value. The Tribunal finds that the same is true in the present case, with regard to Mr. Dion's admissions. Furthermore, prior to *Tao (FCA)*, the Tribunal distinguished oral admissions made at the time of the events related to the notice of violation from written admissions in a request for review. In *Farzad v. Canada (Canada Border Services Agency),* 2013 CART 33, the Tribunal distinguished the facts of the admissions as follows, at paragraphs 50 and 51:

[50] . . . Mr. Farzad, in his Request for Review, stated as follows (reproduced verbatim*):*

. . .

> On June 6, 2012 I had just returned from Afghanistan and I had a few apples with me. Before I enterned the Airport of Canada I have eaten some and left over were only two small apple in my big . . .

[51] . . . The Tribunal regards this written admission as amounting to a form of what is sometimes referred to in criminal law as a "guilty, with an explanation" plea. Such a plea is not recognized in criminal law; the permissible plea is generally either guilty or not guilty. See, as an illustration of this point,

> R. v. Lambrecht *2008 CanLII 14892 (ON SC), 2008 CanLII 14892 (ON SC), at paragraph 33. In the case at hand, there is an "admission, with an explanation" by Mr. Farzad, which the Tribunal considers to amount to an admission to having committed the violation, since the explanation given is not a defence accorded statutory recognition. The Tribunal considers such admission to be substantially different from an admission at the time of inspection discovery, particularly in response to inspector questions, where the traveller has not first been cautioned . . . .*

[58] Therefore, the question of applying "*Charter* values", as discussed and directed by the Supreme Court in *Doré*, must be left for another case. The Tribunal would nevertheless point out that in *Tao (FCA)*, the Federal Court of Appeal identified two errors of law made by the Tribunal. One error, regarding protection against self-incrimination, was identified by the Court, at paragraph 26, as having "no basis in law":

> *[26] The second part of the Tribunal's error stems from the Tribunal's mistaken belief that Mr. Tao deserved protection against self-incrimination in his conversation with the CBSA officer in the form of a caution from the officer. There is no basis in law for the Tribunal to exclude evidence of Mr. Tao's statements to the CBSA officer due to a lack of a caution from the officer.*

Another error of law identified by the Court in *Tao (FCA)*, at paragraphs 25 and 26, was that the Tribunal ignored the statutory provisions of the *Customs Act.* At paragraph 25, the Court wrote as follows:

> *[25] . . . Furthermore, sections 12 and 13 of the* Customs Act *obliged him to report all the goods that he was bringing into Canada and to answer truthfully any question asked by a CBSA officer about the goods. Mr. Tao did not have an option to remain silent about anything found in his luggage.*

[59] Several questions remain. How can the Tribunal follow the directions of the Supreme Court in *Doré*? Does a right against self-incrimination still have "no basis in law" in cases of administrative violations? How can the Tribunal incorporate, or at least consider, "*Charter* values" in reviewing statutory provisions in administrative law that require self-incriminating admissions? Should an admission be given a different weight if it is in a request for review or other written form, as opposed to oral admissions made during questioning by the Agency? The answers will come from other cases.

(c) Testimony of Dr. Dykeman

[60] The cow could not be unloaded from the vehicle after it arrived at the slaughterhouse and had to be euthanized in the vehicle. The decision to condemn the animal was made by Dr. Dykeman after Brian Ricker, St. Ann's Foods' foreman, tried to force the cow to get up by using an electric cattle prod. Initially, Dr. Dykeman testified that it was Mr. Ricker and Mr. Dion who together tried to force the cow to move. On cross-examination by Mr. Brunet, Dr. Dykeman admitted that she remained inside the

slaughterhouse when the efforts to make the cow move were made. Her impression was based on the cow's cries. When questioned by Mr. Brunet, Mr. Dion denied having participated in attempts to force the cow to get up. After Dr. Dykeman condemned the cow, she remained inside the slaughterhouse and did not witness the shot fired by Mr. Ricker.

[61] According to Dr. Dykeman, there are multiple causes that could prevent a cow from getting up. According to her testimony and her supporting notes (Report, Tab 6), in English with a translation supplied by the Tribunal, those causes are as follows:

(i) The cow was 5 to 10 per cent dehydrated;
(ii) The cow's four legs were in poor condition, with excessively long hooves and foot rot;
(iii) The left hind leg had a prosthesis attached to it;
(iv) Both of the cow's knees were swollen and their skin was visibly damaged;
(v) Arthritis.

Dr. Dykeman also found that the cow's eyes were sunken.

[62] Mr. Brunet's cross-examination of Dr. Dykeman revealed the following:

(i) A 5 to 10 per cent dehydration of the cow, assuming it occurred during transport, was not serious in itself;
(ii) Long hooves on transported animals are not serious in themselves;
(iii) The transported cow's foot rot was not serious in itself;.
(iv) There could be many reasons for attaching a prosthesis. The reason for using one in this case is unknown.

[63] According to Dr. Dykeman, the cow had been suffering from arthritis for a long time, and the severity of the arthritis was the main cause of the cow's suffering during transport. Her conclusion was based on the degree of swelling in the cow's knees. She referred to photographs that she took at the scene. One photograph shows the cow before it was euthanized, with half of the cow outside the vehicle. The other photograph shows two of the cow's legs after the cow was euthanized. Regarding the visibly damaged skin on the cow's knees, as shown in the photograph by the clearly red and injured knees, Dr. Dykeman testified, as part of her examination in chief, that the damage to the skin could have been caused by the cow's movement in trying to exit the vehicle—for example, in the Tribunal's view, as a result of being poked with the electric cattle prod. It was the degree of the swelling of the cow's knees, not the red wounds, that was relevant, according to Dr. Dykeman.

[64] The Tribunal finds that Dr. Dykeman confused frequency with seriousness in arriving at her conclusions. Long hooves and foot rot in transported cows are not rare, according to Dr. Dykeman, nor are they serious in themselves. The Tribunal is of the opinion that the singularity or frequency of an animal's health challenge is not relevant. The relevant facts concern, first, whether in the circumstances an animal suffering from a health challenge, rare or frequent, experienced undue suffering during transport. The

second question concerns whether the findings of undue suffering by the animal mean that the animal could not be transported without undue suffering.

[65] In addition, whether an animal is ambulatory is not decisive in order to determine whether there was undue suffering. In *E. Grof Livestock*, previously cited, 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.*

[66] Regarding Dr. Dykeman's conclusions relating to the cow's arthritis, she admitted, in responding to questions from the Tribunal, that it would have been preferable to perform a *post-mortem* examination of the cow's swollen legs. Otherwise, her conclusions are based primarily on visual impressions and her professional judgment. In the Tribunal's opinion, the two photographs taken by Dr. Dykeman show a degree of swelling in the knees of the cow's two front legs, with a degree of deeper swelling on the left leg. The cause or causes of the swelling have yet to be established.

[67] Dr. Dykeman explained that the Agency has no established facilities or installations for carrying out *post-mortem* examinations of cows that are euthanized in a transport vehicle. The policy is to have cows euthanized in the trailer transported to the animal's owner, with an obligation to place the animal in quarantine, or to transport the animal, under licence, to a location approved in advance by the Agency. In the case at hand, the cow was transported to Atwood Pet Supplies Ltd., in Atwood, Ontario (Report, Tab 3), a facility classified as a rendering plant, so that the cow could be tested for BSE before disposal (Report, Tab 3, CFIA form 4208, "Requirement to Quarantine and/or Licence to Transport Animals or Things", signed by Dr. Dykeman, with details in English, untranslated).

[68] In the Tribunal's opinion, it appears that the Agency's policy is based on the weight and size of a cow that has died in a transport vehicle. It is difficult to move a dead cow into a slaughterhouse from a vehicle. In answering the Tribunal's questions, Dr. Dykeman testified that she and her superiors discussed the difficulties in establishing the cause of death or condemnation of a cow that is found dead or is euthanized in a vehicle, without a *post mortem* examination. To date, these discussions remain without resolution. In answering questions from the Tribunal and Mr. Brunet, Dr. Dykeman testified that she did not know why cows are not transported to veterinary schools when *post-mortem* examinations are deemed necessary. Moreover, Dr. Dykeman was not questioned about the possibility of cutting off the cow's front legs, while it was lying dead in the vehicle, so as to permit a *post-mortem* examination inside the slaughterhouse.

[69] The Tribunal wishes to distinguish the facts in this case from those in *E. Grof Livestock*, cited above. *E. Grof Livestock* concerns the same slaughterhouse, the same veterinarian, Dr. Dykeman, and a cow suffering from alleged health challenges. One highly

relevant difference between *E. Grof Livestock* and the case now before the Tribunal is the fact that the cow in question in *E. Grof Livestock* was able to disembark and enter the slaughterhouse. After the cow entered the slaughterhouse and was slaughtered, one of its limbs was condemned by Dr. Dykeman because of a large ulcer on the knee of this limb, which was draining and crusted with drained fluid (*E. Grof Livestock*, paragraph 10, "Facts not in dispute"). Because the cow was slaughtered inside the slaughterhouse, Dr. Dykeman was able to perform a *post-mortem* examination. She also took photographs of the cow before it was slaughtered, and of the limb condemned after the cow's death. The seriousness of the ulcer and the seriousness of the draining fluid were clear. The Tribunal noted as follows, at paragraphs 30, 31, 33 and 34 of *E. Grof Livestock*:

> *[30] In the present case, the state of the cow at the time of sale is highly relevant to the assessment of undue suffering during transport . . . .*
>
> *[31] In her oral testimony, Dr. Dykeman testified that the injury in question could not have occurred during transport. The large, infected area of the leg was a condition that, in her view, must have existed for some period prior to transport. In addition, she testified that the extent of infection disclosed in the skinned leg depicted in photographs 10 and 11 may be consistent with an animal that was being weaned off antibiotics during some period prior to transport.*
>
> . . .
>
> *[33] Counsel for E. Grof Livestock argues that the physical state of the animal was only determined after the animal had walked off the transport at the slaughterhouse, and that therefore the conclusions from a post mortem examination could not be considered to represent the state of the animal either prior to or during transport . . . .*
>
> *[34] In the Tribunal's view, there is a necessary extrapolation as to the timing of the injury. In addition, the photographs of the injury were taken by Dr. Dykeman shortly after the cow was unloaded, and then supplemented by a post mortem examination, including post mortem photographs of the leg in question . . . .*

[70] In this case, without evidence from a *post-mortem* examination of the cow's legs, the Tribunal finds that it is difficult for the Agency to establish, on a balance of probabilities, whether the cow was suffering from arthritis, or what the nature and extent of its suffering was during the journey. The Tribunal finds that the Agency has not established, on a balance of probabilities, that the cow had arthritis. Dr. Dykeman admitted that there were other conceivable causes for the swelling of the cow's knees. One possibility is that the cow injured its knees in trying to stand up in the vehicle when poked with the electric cattle prod. Furthermore, Dr. Dykeman admitted that cows occasionally remain in a trailer, without getting up, because of fatigue, rather than because of health issues related to suffering or, more specifically, rather than because of health issues related to undue suffering.

[71] Having concluded that the Agency has not established, on a balance of probabilities, that the cow had arthritis, the Tribunal finds that the Agency has not established, on a balance of probabilities, that the other facts alleged as health challenges constitute undue suffering. There is no evidence before the Tribunal that the degree of dehydration, the long hooves, the foot rot and the prosthesis, together or individually, caused undue suffering. On the contrary, Dr. Dykeman testified that the health conditions listed are not inherently serious. Furthermore, she was not questioned regarding the effect of a "set" of such alleged health issues, if arthritis were to be eliminated as the cause. Justice Létourneau, writing for the the Federal Court of Appeal, gave the Tribunal the following guidance in this regard in *Doyon,* cited above, at paragraph 28:

> *[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.*

The directions of the Federal Court of Appeal apply to the circumstances of the applicant and the respondent. In the Tribunal's view, in the present case, on a balance of probabilities, the Agency has not provided enough "evidence based on facts", with regard to "undue suffering".

[72] The Tribunal acknowledges and would like to examine the differences between the deductive reasoning in the present case and the reasoning in the veterinary testimony in *Finley Tranport,* previously cited. In *Finley Transport*, the main issue was whether the hogs died because of heatstroke. The veterinary evidence from *post-mortem* examinations of the hogs was that, by a process of deductive reasoning, heatstroke was the most plausible explanation for the deaths. The Agency's veterinarian testified as follows in *Finley Transport*, at paragraph 58:

> *[58] With respect to the specific hog reported on in the necropsy report, Dr. Asiegbunan found, in virtually all respects, that there were no significant abnormalities, including in relation to the heart, which he dissected. One area where he did find a significant abnormality was under the category of "joints/bones/muscles", where Dr. Asiegbunan found "Pale coloration of gluteal muscles". Dr. Asiegbunan found this observation to be consistent with stress, because pigs do not have sweat glands. He was unable to say that the discoloration was due exclusively to heat stress, as opposed to general stress, though he was able to conclude from his examination that the animals were not predisposed to stress. In his experience, an animal with a predisposition to stress would be one with a heart condition, peritonitis or pneumonia, where "stress" is considered to be a physiological condition that impedes blood flow.*

[73] In *Finley Transport*, there were conflicts in the veterinary testimony. Testifying on behalf of Finley Transport, a veterinarian discussed the studies he had done regarding microscopic lesions in hogs. He advanced the results of these studies as an alternative

explanation for the deaths. The Tribunal (at paragraph 62) implicitly determined that more conclusive and replicated results were required:

> *[62] Given that mortality rates are three times higher in summer than in winter, the issue . . . concerns the means by which the transporter has acted to minimize stressors. Dr. van Dreumel acknowledged that further research is needed, and that he is engaged in same . . . .*

[74] In *Finley Transport,* the applicant did not succeed in challenging the Agency's veterinary evidence based on deductive reasoning and *post-mortem* examinations. The result occurred even though the applicant relying on opposing veterinary testimony. The only logical explanation with regard to the cause of hogs' deaths was heatstroke. In the case at hand, there are several logical explanations for a cow remaining on the ground.

[75] Having concluded that the Agency has not established, on a balance of probabilities, that the cow in question could not be transported without undue suffering, the Tribunal finds that it is not necessary to review the Agency's calculation of the gravity value.

[76] The Tribunal would like to point out that its solution should not be taken as a criticism of the judgment or professionalism of Dr. Dykeman. Sometimes, professional judgment and the evidence appear to align perfectly, only for it to be discovered later that such is not the case. Even though the Tribunal does not agree with Dr. Dykeman's determination in the present case, owing to evidentiary issues, it still respects her judgment.

Conclusion

[77] Following a review of all of the oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not commit the violation, as set out in Notice of Violation No. 1213ON262002 dated November 29, 2012.

Dated at Ottawa, Ontario, this 11th day of September, 2014.

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Bruce La Rochelle, Member