



Citation: Les Élevages Nyco Inc. v. Canada (Canadian Food Inspection Agency), 2014 CART 27

Date: 20140924
Docket: CART/CRAC-1775

BETWEEN:

Les Élevages Nyco Inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

[Translation from the official version in French]

BEFORE: Member Bruce La Rochelle

**WITH: Marco Lampron, President and representative for the applicant; and
Louise Panet-Raymond, counsel for the Agency**

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

DECISION

Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not commit the violation set out in Notice of Violation No. 1213QC0046-3, dated February 27, 2014.

By written submissions only.

REASONS

Alleged Incident and Legislative Authority

[1] By Notice of Violation No. 1213QC0046-3, dated February 27, 2014, the Canadian Food Inspection Agency (Agency) alleges that Les Élevages Nyco Inc. (Élevages Nyco) committed a violation, on or about May 17, 2012, in Sainte-Séraphine, Quebec. The Agency is entitled to issue a notice of violation up to two years after the Minister became aware of the violation, pursuant to subsection 26(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (S.C. 1995, c. 40), which provides as follows:

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

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

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

[2] According to the Notice of Violation, Élevages Nyco is accused of [verbatim translation] “loading, causing to be loaded, transporting or causing to be transported an animal that cannot be transported without suffering”, contrary to paragraph 138(2)(a) of the *Health of Animals Regulations* (C.R.C., c. 296). Under Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187), the alleged violation is a serious violation. The animal in question was a sow with, as alleged, an abscess on the pelvis and buttocks of the left hind limb. In the Notice of Violation, Élevages Nyco is subject to a warning rather than a penalty.

Procedural History

[3] The Notice of Violation was issued to Élevages Nyco by being sent to the President, Mr. Marco Lampron, [translation] “by fax, registered mail or courier to the head office or place of work of the person or to the person’s agent” [paragraph 2(b), Certificate of Service, CFIA form 5197, signed by Ms. Stéphanie Hamel, an Agency administrative assistant]. Hamel’s signature is dated March 11, 2014, but the date of service is indicated as March 21, 2014. The difference between those dates is due to section 9 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, which provides as follows:

9. (1) A person who signs a certificate of service, in a form approved by the Minister, stating that the notice of violation was served on the person named in the certificate and the means by which service was effected is deemed to have served the document on the date that is determined pursuant to subsections (2) to (4).

(2) *A document sent by registered mail is served on the 10th day after the date indicated in the receipt issued by a post office.*

(3) *A document sent by courier is served on the 10th day after the date indicated in the courier's receipt issued to the sender.*

(4) *A document sent by fax or other electronic means is served on the date it is sent.*

[4] Therefore, it is assumed that the Notice of Violation was served by registered mail or courier, because by regulation, the date of service by regulation would differ (1 day or 10 days) if the Notice of Violation had been sent by fax. The Tribunal is of the opinion that the Agency's form contains a regrettable error in terminology. The Tribunal suggests that it would be better to refer to service by fax in another section of the form. In addition, the Tribunal suggests that it would be better for the form to state that the date of service is a date prescribed by regulation. However, the Federal Court, per Mr. Justice Annis, recently determined, in *L. Bilodeau & Fils Ltée c. l'Agence canadienne d'inspection des aliments*, 2014 CF 316 at paragraph 38, that such irregularities are [translation] "a minor irregularity in service" and therefore do not nullify a notice of violation, as a consequence. Nevertheless, the Court did not deny that it is an error to use two dates when completing the form. The Federal Court of Appeal's decision in *Clare v. Canada (Attorney General)*, 2013 FCA 265, was affirmed by Justice Annis in *Bilodeau*. In *Clare*, per Mr. Justice Near, the minor irregularity consisted of "a slight variation in the Applicant's address" (paragraph 23), rather than differences in dates on a form. In *Clare*, the regulations were used by the Court (at paragraphs 22 and 23) to determine the deemed date of service.

[5] By letter dated April 15, 2014, and received by the Tribunal on April 17, 2014, Élevages Nyco, per Marco Lampron, President, submitted a request for a review. The request for a review was deemed admissible by the Tribunal.

[6] On the Tribunal form ("Request for a Review Pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Act*") completed by Marco Lampron and received by the Tribunal on April 30, 2014, Élevages Nyco indicated that it wanted a review by written submissions only. The option of a review by oral hearing, for a notice of violation with warning or a notice of violation with penalty, remains the choice of the applicant. Subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* provides as follows:

15. (1) *A review by the Tribunal shall be conducted orally where the person named in the notice of violation requests that the review be oral.*

[7] The Agency Report dated May 14, 2014, was received by the Tribunal on May 15, 2014, and the Agency also sent a copy of the Report to the applicant. That same day, the Tribunal sent an acknowledgement letter to the parties, by e-mail and regular mail. Pursuant to Rule 37 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)*

(SOR/99-451), the Tribunal informed the parties of the right to make additional submissions, before June 16, 2014. Rule 37 of the *Rules* provides as follows:

37. Within two days after receiving the report, the Tribunal must send an acknowledgement letter to each party indicating that the report has been received and that the parties have 30 days after the date of the letter to submit any additional information or representations including any documents or other evidence.

[8] On June 13, 2014, per Ms. Louise Panet-Raymond, counsel, the Agency sent additional submissions. Élevages Nyco did not make any additional submissions.

Preliminary Question: Penalty or Warning

[9] The Tribunal notes that in the Inspector's Non-Compliance Report (short form), a part of Tab 4 of the Agency Report, Dr. Refk recommended, with the approval of her supervisor and the inspection manager, that a notice of violation with penalty be issued. The Notice of Violation in the file is a notice of violation with warning, with no explanation provided or the change from the recommended penalty. Despite the Tribunal's noting that the difference is not explained, this matter remains a discretionary decision by the Agency. The Tribunal discussed as follows in *Williams v. Canada (Canada Border Services Agency)*, 2011 CART 19, at paragraph 30 (excerpt):

[30] ...The Agency Inspector chose to exercise his discretion by issuing Williams a Notice of Violation with Penalty rather than with Warning. Once he exercised his discretion, the Tribunal is not empowered under its enabling legislation to challenge, amend or in any other way change the exercise of that discretion.

Even if the recommendation of an Agency inspector is not followed by his or her superior, the Tribunal does not have the right to challenge such internal and discretionary procedures.

Preliminary Question: Place of the Violation; Error in the Notice of Violation

[10] In the introduction to the Agency's additional submissions dated June 13, 2014, Panet-Raymond indicated that the Report contained errors, as follows [translation]:

First, we draw the Tribunal's attention to two small inadvertent errors on the cover page and page 13 of the Minister's Report. The place of the violation should be Sainte-Hélène-de-Bagot, rather than Sainte-Séraphine.

[11] In fact, Sainte-Séraphine was identified as the place of the violation because Sainte-Séraphine is indicated in the Notice of Violation. The Agency changed Sainte-Séraphine to Sainte-Hélène-de-Bagot in the Report and called those errors [translation] "inadvertent", but it did not request a rectification of the Notice of Violation.

The Tribunal's position on the rectification of a notice of violation is summarized by Dr. Buckingham, Chairperson of the Tribunal, in *Hassan v. Canada (CBSA)*, 2013 CART 32, at paragraph 14 (excerpt):

[14] ...The Tribunal has on several other occasions been asked to grant, and in certain circumstances has granted, a rectification of the originating Notice of Violation. The Tribunal notes, for example, that in the Kropelnicki v. Canada (CFIA) series of decisions (2010 CART 22–25), involving reviews of Notices of Violation issued by the Canadian Food Inspection Agency, the Tribunal ordered rectification based on the consent of the parties. In other cases, even where there was no consent, such as in the case of Knezevic v. Canada (CBSA), 2011 CART 21, the Tribunal granted a rectification of the Notice of Violation where it was clear to the Tribunal that such a change would not prejudice Knezevic in knowing the case against her and in preparing her defence...

[12] Given that there was no request from the Agency to rectify the Notice of Violation, the Tribunal is not prepared to do so on its own initiative. The Tribunal therefore finds that the applicant did not commit the violation, as alleged, because the place of the violation alleged in the Notice of Violation is not in accordance with the facts alleged by the Agency.

[13] Even though the Tribunal has found that Agency has failed to establish its case because of a fundamental and unrectified error that was made in the Notice of Violation, the Tribunal has decided, in its discretion, to consider the case further.

Evidence and Arguments Before the Tribunal

[14] The evidence and arguments before the Tribunal consist of the following:

- (a) The written reasons submitted by Marco Lampron on behalf of Élevages Nyco in support of the Request for a Review dated April 15, 2014 (reasons accompanying the Request for a Review);
- (b) The Agency Report of May 14, 2014 (Report);
- (c) The Agency's additional submissions dated June 13, 2014 (Agency's additional submissions)

(a) Facts Not in Dispute

[15] The facts that are alleged by the Agency and not disputed by Élevages Nyco consist of the following:

- (a) On May 17, 2012, Élevages Nyco transported a group of eight sows and one hog from its farm, located in Sainte-Séraphine, Quebec, to the L.G. Hébert et Fils Ltée abattoir, in Sainte-Hélène-de-Bagot, Quebec. The animals belonged to

Élevages Nyco. The transport time was about 50 minutes. The sows and the hog belonged to Élevages Nyco, which was also acting as the transporter.

- (b) An Agency veterinarian, Dr. Refk, located at the abattoir, noticed that one of the sows could not get up without Mr. Lampron's assistance and that once up, the sow was not able to walk by itself or remain standing for long. With the support of Mr. Lampron and Mr. Pascal Belval, an abattoir employee in receiving, the sow was able to make it to the unloading dock, where the animal collapsed.
- (c) Before Mr. Lampron and Mr. Belval managed to get the sow to the unloading dock, Dr. Refk noticed open wounds on both of the sow's hind legs. In addition, because of her sense that the sow was suffering. Dr. Refk asked Mr. Lampron three times to stop.
- (d) Dr. Refk conducted a *post-mortem* examination of the sow. She also took photographs of the sow's hind legs and left buttock during the *post-mortem* examination.

(b) Evidence, Arguments and Analysis

[16] Following the *post-mortem* examination, Dr. Refk concluded that the sow had an abscess on the pelvis and buttocks of the left hind limb. In Dr. Refk's professional opinion, the photographs that she took show the chronic nature of the infection, given the presence of pus and edema inside the buttocks. Dr. Refk was also of the opinion that the sow was in the same condition at the time of loading.

[17] Élevages Nyco made the following arguments (reasons accompanying the Request for a Review):

- (a) The sow did not have any difficulty getting into the truck.
- (b) The sow was probably injured by the other sows in the truck.
- (c) Upon arrival at the abattoir, the other sows were jostling a great deal, and as a result the sow in question could not get up.

[18] The Tribunal notes that Élevages Nyco did not submit any evidence to support its reasons. The only potentially relevant reason is that the sow is alleged to not have had any difficulty getting into the truck. As the Tribunal discussed in *E. Grof Livestock Ltd. v. Canada (Canadian Food Inspection Agency)*, 2014 CART 11, the fact that an animal does not have difficulty getting into the truck is not determinative. The issue under investigation is whether "undue suffering" was experienced by an animal during transport and, if yes, whether the animal could not have been transported without such undue suffering. The Tribunal discussed as follows in *E. Grof Livestock*, at paragraph 36:

[36] *...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.*

[19] In addition, the Tribunal has been directed by the Federal Court of Appeal in *Doyon v. Canada (Attorney General)*, 2009 FCA 152, per Mr. Justice Létourneau, as follows, at paragraph 28 (excerpt):

[28] *...the decision-maker's reasons for decision...must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.*

[20] Even though the directions of the Federal Court of Appeal in *Doyon* apply to the Tribunal's reasons for decision, the Tribunal is of the opinion that the same reasoning also applies to the reasons advanced by the parties in the present case before the Tribunal. Therefore, because the reasons advanced by Élevages Nyco in relation to the occurrence, namely, that (a) the sow was "probably" injured by the other sows in the truck and (b) upon arrival, the sow was jostled by the other sows, are not supported by evidence, those reasons cannot be anything but conjecture. On the other hand, the Tribunal has before it the photographs taken by Dr. Refk, the results of her *post-mortem* examination, and her professional opinion.

[21] With respect to the photographs, the Agency submitted 13 photographs that were taken by Dr. Refk and are numbered 5 to 19, with photograph 8 omitted. Dr. Refk explained the omission by indicating that [translation] "the photos were out of focus and not clear and therefore deleted or not put onto the CD of photos that you [the Agency] have..." (Report, Tab 6; email from Dr. Refk to Ms. Carla Abbatemarco, an Agency investigator, in response to the investigator's questions). Photographs 5, 6 and 7 show the sow's hind legs. The Tribunal is of the opinion that the photographs are not in the correct order. Photograph 7 shows both hind legs, neither of which is cut yet. The open wounds can be seen on the *right* hind leg only. A large area of discoloration can be seen on the *left* hind leg. About half of the skin on the lower portion of the left hind leg is discoloured, namely, brown and gray rather than the normal pink colour. No open wounds can be seen on the left hind leg.

[22] Photographs 5 and 6 show the lower portions of the hind legs. In both photographs, there seems to be a cut on the left hind leg that is not evident in photograph 7. In addition, photograph 6 seems to show that the cloven hoof on the right hind leg is cut, which is not evident in photograph 7.

[23] Photographs 9 to 19 (with photograph 8 omitted) are very blurry and were submitted to show the condition of an abscess on the *pelvis* and *buttocks* of the left hind leg. The Tribunal finds it difficult to make the connection between these photographs and photographs 5 to 7. Dr. Refk made the following observations (Tab 4, "Humane

Transportation Inspection [Task 1101]”): [translation] “At *post-mortem*, the sow presented with an abscess on the pelvis and buttocks. The chronic nature of the infection is demonstrated by the presence of pus and edema inside the buttocks (see photographs 9, 10, 15, 14, 13, 12).”

[24] The Tribunal does not agree with Dr. Refk that the photographs demonstrate what she claims. It is not possible to determine which part of the sow was photographed. Influenced by the photographs of the legs (photographs 5 and 7), the Tribunal assumed, logically, that the photographs that followed were from the examination of the legs or, at least, one of the legs. Given the extent of the blurriness, the lack of explanations and the lack of a logical order for the photographs, the probative value assigned by the Tribunal to this type of evidence is very minimal.

[25] In contrast, the Tribunal has assigned greater probative value to photographs submitted in other cases. For example, in *E. Grof Livestock*, previously cited, the Tribunal described the photographic evidence, at paragraphs 17 to 22, as follows:

[17] A series of ten colour photographs were submitted by the Agency (Tab 1, Report). Eight of these photographs are of cows when alive, and two are of the skinned, right front leg of the subject cow, on the kill floor. All of the photographs are identified as having been taken by Dr. Dykeman. Each of the photographs is accompanied by a black and white copy, with written explanations provided by Dr. Dykeman of what is depicted in the photographs.

[18] The first photograph and photocopy with explanation appear to show a different cow than the cow in question, since the issue relating to this cow concerns an enlarged udder, rather than issues with the front right leg... Therefore, photographs in the Report of cows other than the one in question need not be considered further... Photographs 2 through 6 are similarly of cows other than the cow in question, and therefore need not be considered further.

[19] Photograph 7 depicts the cow in question. In the explanation by Dr. Dykeman in the accompanying photocopy, the ear tag of the cow in the Notice of Violation is specifically identified. The cow is described as having “a right forelimb lameness, reluctant to bear weight on the limb, resting the limb on the dorsal aspect of the postern”. In other words, the cow turns her lower front right leg inwards, so as not to rest on its hoof. Photograph 8 depicts the cow moving away, with her right front leg raised. Photograph 9 is a closer view of the cow, with her right front leg raised and bent inwards. Photograph 10 is said to depict the wound to which the cow was subject. What is shown is a large, ulcerated area of the inner front right leg. The ulceration covers virtually the entire area of the upper, inner leg joint, and shows drainage. As described by Dr. Dykeman in her written commentary to the accompanying photocopy of the photo, “There is a large area of ulceration, with draining erudate and crusts.”

[20] Photograph 11 is described by Dr. Dykeman as showing “the skinned right front limb of Holstein (ET 9639949) as presented on the kill floor. The digital limb has been removed at the corpus.” What is depicted is much yellowish liquid on the limb, which Dr. Dykeman testified was consistent with infection.

[21] Photograph 12 is a close-up photo of the limb, showing a significantly infected mass. As described by Dr. Dykeman, “Photo shows a close up of the cellulitis of the right front leg of Holstein, ET 9639949.”

[22] Dr. Dykeman’s general testimony, as well as her descriptions of what is depicted in the photographs are assessed with reference to her professional qualifications and experience...

[26] The photographic evidence submitted by the Agency in the present case is, in the Tribunal’s opinion, much weaker than the photographic evidence submitted by the Agency in *E. Grof Livestock*. In addition, in *E. Grof Livestock*, the level of detail of the photographs (quality of the photographs themselves and the written explanation for each photograph) enabled the Tribunal to identify and examine those photographs that were more relevant and to reject those that were not relevant at all. The Tribunal was also able, in *E. Grof Livestock*, to determine and examine the extent of the injury and of the infection. In the present case, the Tribunal cannot even determine which part of the sow’s body is shown in the photographs of the “infection”.

[27] The burden of proof could be met by the Agency by various means; photographic evidence is one of several such means. The Agency submitted what is described as the “Ante-Mortem Report” and “Post-Mortem Report” (Report, Tab 8). In fact, the “Ante-Mortem/Post-Mortem Report” is a one-page form titled “Ante-Mortem Inspection Report”, on which there is a box for “Ante-Mortem Findings” and another for “Post-Mortem Findings”. The “Ante-Mortem Findings” box contains brief notes written by Dr. Refk: [translation] “fracture? abscess”. The “Post-Mortem Findings” box contains Dr. Refk’s conclusions: [translation] “abscess on left hind leg (pelvis, buttock)”. There are no written details about what Dr. Refk did to arrive at those conclusions. Moreover, in *Finley Transport Limited v. Canada (Canadian Food Inspection Agency)*, 2013 CART 42, the evidence presented by the Agency, by means of a necropsy report, was much more detailed. The Tribunal summarized as follows in *Finley Transport*, at paragraphs 56 and 58:

[56] Dr. Asiegbunan reviewed a necropsy report that he had prepared following a post mortem examination of two of the dead hogs...

[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”...

[28] The Tribunal is of the opinion that in the present case, there is a weakness of evidence with respect to the procedure followed by Dr. Refk in arriving at her conclusions about the nature and extent of the sow's injuries. In addition, the conclusion of Dr. Refk, establishing a link between the alleged injuries and "undue suffering" during transport is not expressed in her report, "Humane Transportation Inspection". Instead of expressing a conclusion in her inspection report, dated May 29, 2012, Dr. Refk expressed her conclusions in an email, dated October 18, 2013, more than a year later, written in reply to requests from Mélanie Carbonneau, an Agency inspector, dated October 16, 2013 (Report, Tab 10), as follows [verbatim translation]:

...the sow was subjected to undue suffering during transport because it could not walk, get up by itself or remain standing for long (inability to put weight on the left hind leg and a wound on the right hind leg, making the sow less stable). In the truck, the movements (braking, acceleration) added to the pain experienced by the sow, because it had to try to remain upright, despite its instability, alongside the other sows, so that it would not fall and be unable to get back up, at which point it could get trampled by the other animals.

[29] Even if the Tribunal were convinced, on a balance of probabilities, concerning the nature and extent of the sow's injuries, as asserted by Dr. Refk (and the Tribunal is not so convinced), the Tribunal is of the opinion that Dr. Refk's conclusions concerning "undue suffering" are too speculative. There is no evidence of knowledge on Refk's part about the methods or circumstances of driving a truck in general, or about the actual truck in which the sow was transported. In addition, the transport time, 50 minutes, was very short. The Agency must establish, on a balance of probabilities, that the sow, considering its health status, could not be transported without undue suffering. As was discussed by the Federal Court of Appeal in *Doyon*, previously cited, at paragraphs 46 to 49:

[46] I do not think that one has to conclude...that the slightest suffering existing before transportation, however minor it might be, will necessarily lead to a violation of paragraph 138(2)(a) if the suffering animal is transported. Nor do I believe that this was Parliament's intention, if I rely on the information provided to stakeholders (producers, transporters, inspectors and prosecutors) to ensure compliance with and enforcement of the Act.

[47] In short, through its actus reus, paragraph 138(2)(a) does not prohibit the transportation of a suffering animal to the slaughterhouse, nor does it permit the transportation of a healthy animal in conditions that would cause it undue suffering.

[48] One must refer to the essential elements of the offence and, especially, not lose sight of the causal link that must exist between the transportation, the undue suffering and the reasons listed in the provision. These range from infirmity to any other cause, including fatigue.

[49] As this provision triggers a substantial monetary penalty, we must guard against a liberal interpretation that extends the scope of the essential elements, which are already quite broad...

[30] The Tribunal is therefore of the opinion that the Agency has failed to establish, on a balance of probabilities, that the sow was injured, as alleged, or that the fact of the alleged injuries meant that the sow could not be transported without undue suffering. Therefore, even if the Notice of Violation could be rectified, the Agency's case was not otherwise successfully established.

Conclusion

[31] Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that the applicant did not commit the violation set out in Notice of Violation No. 1213QC0046-3, dated February 27, 2014.

Dated at Ottawa, Ontario, this 24th day of September 2014.

Member Bruce La Rochelle