RTA# 60236

AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE MONETARY PENALTIES ACT

DECISION

In the matter of an application for a review of the facts of a violation of provision 138(2)(a) of the *Health of Animals Regulations* alleged by the Respondent, and requested by the Applicant pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act.*

Transport Eugène Nadeau Inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

CHAIRMAN BARTON

Decision

Following an oral hearing and a review of the written submissions of the parties including the report of the Respondent, the Tribunal, by order, determines the Applicant committed the violation and is liable for payment of the penalty in the amount of $2,000.00 to the Respondent within 30 days after the day on which this decision is served.

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REASONS

The Applicant requested an oral hearing pursuant to subsection 15(1) of the *Agriculture and Agri-Food Administrative Penalties Regulations*.

The oral hearing was held in Quebec City on April 4th, 2006. This file was heard with files RT # 1346 (NOV# 0506QC0130) and RT # 1268 (NOV# 0405QC0266).

The Applicant was represented by Mr. Clément Nadeau.

The Respondent was represented by its solicitor, Ms. Patricia Gravel.

Evidence for the Respondent was given by Dr. Kathy Harrison.

The Applicant agreed to allow the Chairperson to conduct the oral hearing with the aid of an interpreter.

For the record the solicitor for the Respondent made the following observation:

> **"**We understand that the Applicant has been informed by the Tribunal that the Chairperson would preside over the hearing today with the help of an interpreter, through simultaneous translation, and that the Applicant agreed to this procedure. However, the CFIA was not consulted on this matter. Our client does not plan to object today to the hearing of the appeal because all the parties and witnesses are in attendance, but it reserves the right to point to any legal defect that might affect its rights, the interpretation of the law and its application to this file, all in accordance with the provisions of the *Official Languages Act*."

The Notice of Violation # 0405QC0255 dated April 28, 2005, alleges that the Applicant on the 18th day of February, 2005 at Vallée-Jonction in the province of Québec committed a violation namely: "A chargé et transporté un porc par véhicule moteur qui, pour des raisons d'infirmité, de maladie, de blessure, de fatigue ou pour toute autre cause, ne pouvait pas être transporté sans souffrances indues au cours du voyage prévu," contrary to provision 138(2)(a) of the *Health of Animals Regulations*, which states as follows:

> 138(2) Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal

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

At the outset of the hearing I ascertained whether each party had copies of the following key documents in this file:

> Notice of Violation dated April 28, 2005.
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> Letter dated May 11th, 2005, from the Applicant requesting a review.
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> Letter dated May 20th, 2005, from the Respondent enclosing its report.
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> Letter dated August 18th, 2005, regarding hearing dates.

Having confirmed both parties had copies, these documents were entered on the record as evidence for the purpose of the hearing.

In this context, "undue" has been defined by the Federal Court of Appeal in *Procureur général du Canada c. Porcherie des Cèdres Inc.*, [2005] F.C.A. 59, to mean "unjustified" or "unwarranted". The Court held that the loading and transporting of a suffering animal would cause the animal unwarranted or unjustified suffering, and hence would be contrary to the purpose of the *Regulations*.

Subsequently, in *Canadian Food Inspection Agency v. Samson*, [2005] F.C.A. 235, the Court summarized its position as follows:

> What the provision contemplates is that no animal be transported where having regard to its condition, undue suffering will be caused by the projected transport. Put another way, wounded animals should not be subjected to greater pain by being transported. So understood, any further suffering resulting from the transport is undue. This reading is in harmony with the enabling legislation which has as an objective the promotion of the humane treatment of animals.

The Tribunal is of the view that the Court did not intend to eliminate a threshold to determine what constitutes undue suffering, but intended to broaden the scope of situations where suffering is considered undue.

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This conclusion is supported by the fact that the wording of the paragraph makes it

evident that not every "infirmity, illness, injury, fatigue or any other cause" constitutes suffering worthy of a violation. Had this been the case, there would have been no need to use the word "undue".

It is further bolstered by the fact that this type of violation has been designated under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* as a "serious" violation.

Also, the likely consequence of concluding that an animal would be caused undue suffering would be severe. The animal would, in most cases, have to be put down.

Finally, this conclusion is consistent with the position taken by the Canadian Agri-Food Research Council in its Guide to Handling Livestock at Risk set out on page 15 of its publication titled "*Transportation Code of Practice for the Care and Handling of Farm Animals*", [Canadian Agri-Food Research Council : 2001], which document is frequently relied upon by the Respondent in establishing that a violation was committed.

Whether an animal was suffering, and could not, then, be loaded or transported without undue suffering during the expected journey, is a question of fact to be determined in each case by the condition of the animal at the time and the circumstances of the expected journey.

The Applicant did not provide any written or oral evidence to refute the evidence of the Respondent regarding the medical condition of the animals.

On February 18, 2005, the Applicant transported a load of 70 pigs to the Olymel abattoir. The distance of the transportation was approximately 20 kilometres and the truck arrived at the abattoir at about 9:21 a.m. One pig in the load was set aside by an attendant of Olymel for ante-mortem examination.

In her evidence at the hearing, and in her Non Compliance Report set out at tab 8 of the Respondent's report, Dr. Harrison testified that the pig was prostrated in a corner of the pen and had great difficulty standing on three legs. The pig had multiple abscesses, details of which are clearly set out in the evidence. She further testified these conditions had existed for some time and that the pig had been suffering for weeks. Additionally, when approached, rather than trying to escape, the pig simply remained on the ground crying and shaking. The inspector condemned the pig as unfit for food purposes.

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On cross-examination, when asked whether the Applicant was a negligent company, the Doctor replied that she was not passing judgement, and could not do so on the

examination of a single pig.

Summation by Applicant

In these cases, Mr. Nadeau, as a carrier, indicated there is a bio-security risk in unloading an animal that has been loaded for transport. The risk is that the animal might have become contaminated from bacteria while in contact with other animals on the load. In his view, if an animal is unloaded in these circumstances, it would have to be euthanized immediately to avoid the risk of further contamination. The Applicant was not equipped to do that.

The Applicant further stated that he and the producers always inspect the animals prior to loading to select only those animals suitable for shipping, and that they leave behind the animals that are in the worst condition. Further, he said that all pigs suffer while being transported due to the stresses involved, and that they breathe faster when they are tired.

He informed the Tribunal of his vast experience in the industry and his concern regarding payment of these violations.

In closing, he stated “Im not saying that I’m not responsible”.

He also then emphasized that the Applicant’s actions were not intentional, and that he took care to leave animals behind if need be to avoid them suffering.

Summation of the Respondent

Ms. Gravel reviewed the provisions of paragraph 138 (2)(a) and emphasized the position taken by the Federal Court of Appeal regarding the transportation of wounded animals.

In connection with the calculation of the gravity value for possible adjustment of the penalty, she indicated this violation was committed for failure to comply with the *Regulations* and the reference materials regarding the care and handling of farm animals. As such it was committed through negligence. This is less serious than committing a violation intentionally, which carries a higher gravity value.

The Tribunal does not question the Applicant’s knowledge and experience in the field. Nor does it consider the Applicant was acting with any intention to cause undue suffering.

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Over the course of the years, however, the legislation has been more stringently enforced, and the parameters as to what constitutes “undue suffering” have been more narrowly

judicially interpreted by the Federal Court of Appeal.

Some past practices that may have been acceptable earlier may now not be allowed.

In all these cases, the onus is on the Respondent to establish on a balance of probabilities that the violation was committed. Here we have the direct medical evidence of a highly qualified inspector detailing the types of injuries, the duration of the injuries, the impact of these injuries on the animal, and the conclusions that the animal could not have been transported without undue suffering.

As earlier noted, there is no direct evidence to dispute the medical findings of the Respondent.

However good the intentions of the Applicant were and however careful the Applicant was, due diligence is not a defence to a violation by reason of subsection 18(1) of the *Agriculture and Agri-Food Monetary Penalties Act* which states as follows:

> 18.(1) A person named in a notice of violation does not have a defence by reason that the person
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> (a) exercised due diligence to prevent the violation; or
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> (b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.

Accordingly, I must conclude that the Respondent has established a violation was committed and that the penalty was properly calculated in accordance with the *Regulations*.

Dated at Ottawa this 1st day of May 2006.

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Thomas S. Barton, Q.C., Chairman