

**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*.

9038-9420 Québec 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.

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 Thetford Mines on April 6th, 2006. This file was heard with file RT # 1223 (NOV# 0405QC0009) and the Respondent's evidence is the same for both files.

The Applicant was represented by its President, Mr. Jean-Guy Fortier.

Evidence for the Applicant was given by Mr. Fortier, Mr. Jean-Claude Manningham and Dr. Yanick Dubois.

The Respondent was represented by its solicitor, Ms. Marie-Claude Couture.

Evidence for the Respondent was given by Dr. Carlos Diaz.

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 # 0405QC0008 dated September 22, 2004, alleges that the Applicant on the 17th day of February, 2004, at Princeville in the province of Quebec committed a violation namely: “Avoir fait charger et transporter un animal de ferme (porc) dans un véhicule moteur de la compagnie J.C. Manningham Inc. Qui ne pouvait être transporté sans souffrance” contrary to provision 138(2)(a) of the *Health of Animals Regulations*, which states as follows:

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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 September 22, 2004.

Letter dated October 12th, 2004, from the Applicant requesting a review and giving reasons.

Letter dated October 20th, 2004, from the Respondent enclosing the report.

Letter dated November 19th, 2004, from the Applicant with 4 sets of documents with a number of exhibits.

Letter dated November 29th, 2004, from the Respondent in reply.

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:

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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.

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.

I have carefully reviewed all written documentation submitted to the Tribunal as well as the verbal evidence and submissions made at the hearing. I wish to again complement both parties for their excellent written and verbal presentations.

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I also want to note that neither the good practises exercised by the Applicant, nor its good faith and intentions are at issue here. The mandate of this Tribunal is to ascertain whether the Respondent has established, on a balance of probabilities, that a violation

was committed, and if so whether the penalty was properly assessed in accordance with the *Regulations*. Due diligence is not a defence 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

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

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

There are two main issues to determine, the identity of the pig in question, and whether the condition of the pig precluded it from being loaded and transported without causing it undue suffering.

Identity of pig

J.C. Manningham Inc. transported a load of pigs (including 35 pigs owned by 9038-9420 Québec Inc.) to the Olymel abattoir, arriving there on February 17th, 2004, at 10:34 a.m. The tattoo number on 15 of the pigs was # 10135, and on 3 of the pigs was # 10145. On arrival, one of the pigs listed on the official receipt of the abattoir was shown to be wounded.

Mr. Fortier testified that tattoo # 10135 was given to pigs who have no problems, and tattoo # 10145 was given to pigs who did have problems such as hernias. In its initial request for review dated October 18, 2004, the Applicant admitted one of the pigs in this load did have a hernia, and elaborated upon how it normally treated animals with this condition. Mr. Manningham also indicated in his letter dated November 15, 2004, that one of the 3 smaller pigs that was transported had a hernia and was compromised. He indicated these pigs weighed approximately 80 kilograms each.

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Dr. Diaz testified he identified the pig as shown in the pictures enclosed with the Respondent's report as belonging to the Applicant, 9038-9420 Quebec Inc., by its tattoo #10145, and by the abattoir # HA81 #4. He indicated there was only one #4 used at the abattoir that day. He estimated the weight of the pig to be approximately 60 kilograms,

but subsequently admitted he was not an expert in judging the weight of animals and could have been out by at least 10 kilograms. He also indicated it was hard to tell the weight from a picture and also he may not have considered the weight of the hernia.

At the hearing, the original pictures were tabled, and the pig in question was almost certainly bearing tattoo #10145.

On this issue, I find that the pig in question was owned by 9038-9420 Québec Inc., and was transported by J.C. Manningham Inc. on the date in question.

Condition of the pig

In his Non Compliance Report and at the hearing, Dr. Diaz described the pig's hernia as necrotized, ulcerated, chapped, and which almost touched the ground. He stated in his vast experience, that this was the largest hernia he had ever seen. When he tried to stimulate it, the pig had trouble getting up and refused to walk because of the pain caused by his movements. He testified the lesion with the abscess was at least 2 weeks old and that the red marks shown on the pictures were not fresh as they were forming scabs. He also indicated the pig had trouble walking as its paws touched the massive hernia. In his view, the animal should have been euthanized at the farm.

When the pig was being loaded, Mr. Manningham did acknowledge that he stood to the right side of the loading ramp and could only see the good side of the compromised pig.

There is no question that pigs with hernias are and will continue to be loaded and transported without causing the pigs undue suffering.

However, based on the size of the hernia, the age and nature of the wounds, and the evidence of physical suffering on inspection by Dr. Diaz, I am compelled to find on a balance of probabilities that the pig should not have been transported in these circumstances.

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Dated at Ottawa this 2nd day of May 2006.

Thomas S. Barton, Q.C., Chairman