

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Stuart v. Canada (CFIA), 2011 CART 002

Date: 20110119
Docket: RTA-60391;
RT-1543

Between:

Scott Stuart, Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of subsection 138(4) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant did not committed the violation and is not liable for the payment of the penalty.

Hearing held in Calgary, Alberta,
October 20, 2010.

Canada 

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that on September 25, 2009 between Clyde and Calgary, Alberta, the applicant, Scott Stuart (Stuart) continued to transport a cow or cows that was/were injured during a journey beyond the nearest suitable place at which the animals could have received proper care and attention, contrary to subsection 138(4) of the *Health of Animals Regulations* (Regulations).

[3] The Tribunal must decide whether:

- the Agency has established all of the elements required to support the impugned Notice of Violation; and
- the Agency has established, more specifically and among other things, that the cow or cows that were found to be injured or dead at their unloading in Calgary were injured at some point before the last suitable place where Stuart could have stopped to give the animals proper care and attention.

Record and procedural history

[4] The Notice of Violation #0910ABSCA05 dated March 9, 2010, alleges that Stuart on or about 20:35 on the 25th day of September 2009, at XL-Beef (Calgary), in the province of Alberta, “committed a violation, namely: No person shall continue to transport an animal that is injured or becomes ill or otherwise unfit for transport during a journey beyond the nearest suitable place at which it can receive proper care and attention contrary to section 138(4) of the *Health of Animals Regulations*, which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.” During the oral hearing, the parties agreed that the place and time of the alleged violation would be amended to read “between 2:15 p.m. and 7:15 p.m.” instead of “about 20:35” and “between Clyde and Calgary” instead of “at XL-Beef (Calgary)”.

[5] Service by the Agency of the above Notice of Violation on Stuart was deemed to have occurred on March 19, 2010. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, Stuart’s alleged infraction is a serious violation for which the penalty assessed is \$2000.

[6] Subsection 138(4) of the Regulations reads as follows:

138.

...

(4) No railway company or motor carrier shall continue to transport an animal that is injured or becomes ill or otherwise unfit for transport during a journey beyond the nearest suitable place at which it can receive proper care and attention.

[7] In a letter dated March 15, 2010 and received by the Tribunal on March 16, 2010, Stuart requested a review by the Tribunal of the facts of the violation, as provided under paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. In that communication, Stuart informed the Tribunal that he wished to proceed with a review by way of oral hearing.

[8] On March 25, 2010, the Agency sent Stuart and the Tribunal its report (Report) concerning the Notice of Violation.

[9] In a letter dated March 26, 2010, the Tribunal invited Stuart to file with it any additional submissions in this matter, no later than April 26, 2010.

[10] No further submissions were received from the parties other than requests from the Agency's counsel for the issuance of two summonses for witnesses to appear at the hearing that was scheduled by the Tribunal for October 20, 2010. Both requests were granted.

[11] The oral hearing requested by Stuart was held in Calgary, Alberta on October 20, 2010, with Stuart self-represented and the Agency represented by its counsel, Ms. Shirley Novak.

Evidence

[12] The evidence before the Tribunal in this case consists of written submissions from both the Agency (the Notice of Violation and the Agency's Report) and from Stuart (his request for review) and oral testimony given at the hearing held on October 20, 2010. At the hearing, Petula Ruyter (Ruyter), Billy Kincaid (Kincaid) and Dave Kosko (Kosko) gave evidence on behalf of the Agency while Stuart gave evidence on his own behalf. During the hearing, the Agency also tendered one exhibit as evidence.

[13] Certain elements of the evidence are not in dispute:

- Stuart was the driver of a livestock transport truck and trailer owned by Roberge Transport Inc. (Roberge) on September 25, 2009;
- Stuart picked up a load of 41 cows from Clyde, Alberta in the early afternoon of September 25, 2009 and delivered them to the XL-Beef slaughterhouse in Calgary in the early evening of that same day;
- the livestock transport truck and trailer that was driven by Stuart to haul the cattle from Clyde to Calgary had four compartments: a front compartment (the nose), middle upper and lower compartments (the upper and lower bellies); and a rear compartment (the rear);
- when the cattle were loaded onto the transport trailer at Clyde, three cows were loaded into the nose; 15 cows were loaded into the upper belly; 15 cows were loaded into the lower belly; and eight cows were loaded into the rear;
- Stuart stopped once during the voyage from Clyde to Calgary, in Red Deer at approximately 5:15 p.m. for a 15-minute break during which time he inspected his load and noticed that two of the cattle in the rear compartment were lying down;
- when the cattle were unloaded from the truck at Calgary, 12 cows were unloaded from the rear; 15 cows were unloaded from the lower belly; 11 cows were unloaded from the upper belly; and three cows were unloaded from the nose;
- of the 12 cows unloaded from the rear, one was dead on arrival and fell out of the truck as unloading commenced, and an additional animal was euthanized after it entered the slaughterhouse compound; and
- during the journey between Clyde and Calgary, the gate that separated the upper belly and rear compartments opened, permitting four cows from the upper belly to fall into the rear compartment of the transport trailer.

[14] Important facts in dispute in this case relate to exactly when and why the gate that separated the upper belly and rear compartments opened, permitting four cows from the upper belly to fall into the rear compartment of the transport trailer. The parties argue that different consequences flow from a factual finding of whether the gate opened before or after Stuart's stop in Red Deer.

[15] Kincaid, the Agency's first witness, told the Tribunal that he was the night receiver at XL-Beef in Calgary on September 25, 2009. When Stuart arrived with his load and approached Kincaid to start to unload, Kincaid reported that Stuart said to him "I think I got a dead one". Then, when the unloading commenced, 12 cows came out of the rear compartment when only eight or nine cows can fit in that compartment. Kincaid told the Tribunal that, as the cattle from the rear compartment were unloaded, one dead cow did fall out and a second cow "was split" and had to be "knocked". When asked by the Tribunal what this meant, Kincaid replied that the cow was injured in its hind quarters, such that it had to be euthanized. Kincaid added that both dead cows were then dragged over to the dead animal pile in the slaughterhouse compound. When asked by Agency counsel if he remembered Stuart saying anything to him about Stuart's making or getting a call from the Roberge dispatcher during his journey on September 25, 2009, Kincaid replied that he could not remember. However, when reminded to review his statement, which was completed and signed by him on October 1, 2009 (Tab 1 of the Agency Report), Kincaid acknowledged and agreed with what he had written out then, which read as follows: "He [Stuart] told me he talked to the dispatcher, and the dispatcher asked if they were all standing, and he told them no, that two of them were sitting up. He was told to bring them all in to Calgary."

[16] Under cross-examination, Kincaid confirmed that he and Stuart both expressed surprise to find that 12 cows, instead of the eight that had been originally loaded in the rear in Clyde, came off that compartment of the trailer at XL-Beef in Calgary. As well, Kincaid confirmed that the injured cow that was euthanized was not injured before she came off the trailer, but that she slipped on the unloading ramp, which caused her to "split herself", an injury which then required her to be euthanized. Kincaid also confirmed that, after the Stuart load came in, he called the Agency to have an inspector come over to investigate the incident.

[17] Kosko, the Agency's second witness, told the Tribunal that he was the Roberge dispatcher on September 25, 2009. Kosko told the Tribunal that he received a call from Stuart late in the afternoon during the latter's stop in Red Deer. Stuart told Kosko that there were a couple of cows down in the load. Kosko told Stuart to go to Innisfail, the easiest and closest place nearby to check them, to get them up, and to see if they were okay. This evidence accords with Kosko's written statement (Tab 14 of the Agency Report). In that statement, Kosko confirms that the animals that Stuart reported as down were in the back. He added in his statement that: "I asked how he had loaded. He described how he had loaded them. Said he only had eight in the back end. I instructed him to go to Innisfail Auction. He was already on the south side of Red Deer that is why I said to go to Innisfail." Kosko also commented in his statement that, while Stuart does not have official livestock transportation training, he does have experience hauling livestock and training from his brother.

[18] Under cross-examination, Kosko confirmed that the dispatcher's responsibility is to determine that the load is okay and that if there are signs of distress to advise that the driver pull into the nearest safe place, examine the load and get up any animals that are down. He added, however, that drivers are not told what they must do as the ultimate responsibility and decision will always fall to the driver of the load.

[19] Ruyter, the Agency's final witness, told the Tribunal that she is a health inspector designated under the *Health of Animals Act*, who works for the Agency and attended XL-Beef on September 25, 2009. Ruyter told the Tribunal that she had received a call from Kincaid that evening requesting that she come to XL-Beef to investigate the Stuart load. When she arrived at XL-Beef, the 10 remaining live cattle from the rear compartment were already on the scale for weighing. The one dead cow from the load and the other euthanized cow had been removed from this group. Ruyter then watched the unloading and weighing of the other cattle from the trailer: 11 cows from the upper deck; 15 from the lower deck; and three from the nose. Ruyter told the Tribunal that, while she conducted her investigation, Stuart was very cooperative, pleasant and forthcoming. Stuart told her that when he loaded the 41 cows, he had loaded them as follows: three in the nose, 15 in each of the upper and lower decks and eight in the rear. After loading each compartment, he secured the gate closing the compartment and had no problem in doing so. During her investigation, Stuart also told her that he had stopped in Red Deer, saw two down cattle on his trailer and had called the Roberge dispatcher, who said to go to Innisfail. Ruyter told the Tribunal that Stuart told her that the cattle that were down looked good and had their feet under themselves and were not in distress and so he continued on to Calgary. Ruyter told the Tribunal that she took 41 photos while at XL-Beef on September 25, 2009. Nine of these photos are located at Tab 4 of the Agency Report. Photos 4.1 and 4.5 show a gray cow that was dead on arrival on the Stuart load, with bloody abrasions on her right hind hip. Photo 4.2 shows the gray cow again with blood around her mouth and nose and a dead red-white-face cow. The back of the photo states that the red-white-face cow had no obvious injuries, but had been euthanized on the scale of XL-Beef.

[20] Under cross-examination, Ruyter confirmed that she was not at XL-Beef when the cattle from the rear compartment of the transport trailer moved from the trailer to the scales. She told the Tribunal that she could not speak directly to what happened when those cattle came off the trailer, nor could she give direct evidence as to the condition or treatment of the dead-on-arrival cow and the euthanized cow prior to her arrival. Ruyter confirmed that the two dead cows were already on the dead pile when she arrived. She confirmed that it was possible that injuries that could be observed on the dead cows could have occurred when the dead cattle were dragged over to the dead pile, as this task is sometimes accomplished by putting a chain around their necks and dragging them to the dead pile, which was 30-40 feet

away from where the cows were offloaded. Ruyter also confirmed, when asked on cross-examination, that of the 10 live animals that came out of the rear compartment, none showed visible injuries although during her direct examination she indicated that one black cow of the group did have a bloody nose (see photo 4.50 of Tab 4 of the Agency Report).

.../7

Page 7

[21] Stuart testified in his own defence. He told the Tribunal that, when loading the 41 cattle in Clyde, everything had gone well and that he had secured the compartments and the gates that closed each one off and proceeded from Clyde en route to Calgary. Stuart stopped in Red Deer to eat and checked the trailer. When he checked the back end, he noticed two cattle down, but they did not look to be in distress. There were no cattle piled up in the rear section and Stuart believed the two lying down with their feet under them were just being lazy. He prodded them. He stated that they were at the side of the rear compartment, which is the safest place in the trailer.

[22] Stuart then told the Tribunal that, while in Red Deer after inspecting his load, he phoned Kosko and told him that he had two down in the rear of the trailer, both with their feet under them. Kosko told Stuart that if he, Stuart, thought he had a problem, then he should go to Innisfail and readjust the load. Stuart told the Tribunal that after this call, in his opinion, he believed he had no need to go to Innisfail, because everything looked good, and so he proceeded to Calgary. When Stuart got to XL-Beef, he took his paperwork to Kincaid and told him that he had a couple of “downers” in Red Deer. When Stuart started unloading and after about the first three cows had left the trailer, the dead cow fell out of the rear compartment. Stuart was “mortified” to see that 12 cattle were in the rear compartment when there were only eight loaded into that compartment.

[23] Stuart then recounted to the Tribunal the plight of the red-white-face cow that was eventually euthanized at XL-Beef. He stated that the unloading ramp at XL-Beef was about 10 feet long and at about a 30 degree angle. The ramp, in five steps, dropped four feet. Then the cattle had to continue on for another 10 feet to get onto the weigh scale. The cow in question hit the third step, slipped and “split”, then it rested from its injury and then took several minutes to crawl onto the scale. The cow was then euthanized and removed to the dead pile. Stuart testified that neither the dead-on-arrival gray cow, nor the euthanized cow were the ones that were down in the rear compartment when he had stopped and examined his load in Red Deer.

[24] Under cross-examination, Stuart confirmed that he has been transporting cattle for Roberge since 1992. He told the Tribunal that when he loaded the 41 cattle on September 25, 2009, they were all in good condition. During the voyage from Clyde to Calgary, he felt no significant movements of animals or anything untoward about the load, although moving cattle is moving a live load and one can feel the cattle moving when the truck moves through curves and corners and during starts and stops. Stuart confirmed to Agency’s counsel that he had stopped to get food at Red Deer and to inspect his load. During his inspection he noticed animals down at the back on the driver’s side of the rear compartment. He did not find it odd that the two animals did not get up but he called Kosko to

inform the dispatcher of this state of affairs. Kosko told him that he should go to Innisfail and readjust if there was a problem. Counsel posed a final question to Stuart as follows: "Did there appear to be more than eight in the back at that time?" to which Stuart responded "No, I can't say there were and I had enough room to readjust the two even if they would not get up."

.../8

Page 8

Analysis and Applicable Law

[25] This Tribunal's mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act). The purpose of the Act is set out in section 3:

3. The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.

[26] Section 2 of the Act defines "agri-food Act":

2. "agri-food Act" means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act;

[27] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations:

4. (1) The Minister may make regulations

(a) designating as a violation that may be proceeded with in accordance with this Act

(i) the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act,

[28] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187, which designates as violations several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and include a reference to subsection 138(4) of the *Health of Animals Regulations*.

[29] Subsection 138(4) is a portion of Part XII of the Regulations entitled “Transportation of Animals”. The provisions included in this section guide producers, transporters and all others involved in the humane transportation of animals which are destined for human consumption. When these provisions are violated, the provisions in Part XII enable the Agency to take enforcement action against violators.

.../9

Page 9

[30] Subsection 138(4) of the Regulations contributes to safeguarding animal health by setting standards for animal safety and protection from sickness and injury while travelling. In this context, the law requires transporters not to transport an animal “*beyond the nearest suitable place at which it can receive proper care and attention*” when the transporter becomes aware that an animal is “*injured or becomes ill or otherwise unfit for transport during a journey*” thereby limiting the exposure of such animals to additional risks.

[31] Section 138(4) of the *Health of Animals Regulations* sets out five elements that must be proved for a violation to arise:

1. the alleged violator was a railway company or a motor carrier;
2. the alleged violator transported an animal;
3. the animal transported was an animal covered by the Regulations;
4. the animal transported was injured or became ill or otherwise unfit for transport during the journey; and
5. the alleged violator transported the injured, ill or otherwise unfit animal beyond the nearest suitable place at which it could have received proper care and attention.

[32] It is the Agency which bears the burden of proof for proving all the elements of the alleged violation on the balance of probabilities. Elements 2 and 3 are not in issue as the parties agree that animals transported on September 25, 2009 by Roberge, and its driver, Stuart, were “cattle”, a defined term in the Regulations and thus are animals subject to the Regulations. However, given the evidence in the present case, certain challenges exist with respect to elements 1, 4 and 5 of the violation.

[33] With respect to element 1, it is important to note that Part XII “Transportation of Animals” of the Regulations contains a long list of prohibitions or required actions to protect against improper and dangerous practices that could harm animals during transport. Examining the Part as a whole (sections 136 to 159), one notes a clear and sharp distinction between two types of potential violators. On the one hand, many potential violations are directed against any “person” (see section or subsections 138(2), 139(1), 139(2), 140(1), 140(2), first part of 141(1), 142(2), 143(1), 144(1), 144(2), 148(1), 148(3), 151(3), 153(1), and

157). On the other hand, several potential violations in Part XII are directed against carriers and companies which transport animals including “air carrier” (see sections or subsections 138(1), 146, 149, 150, 151(1), 152(2)), “sea carrier” (see sections or subsections 138(1), 143(4), 147, 148(6), 150, 152(1), 152(2), 152(3), 153(2), 154, 155, 156, 158(1), 158(2) and 159), “railway company” (see section or subsections 138(4), 149, and 151(1)), “motor carrier” (see sections or subsections 138(4), 149, and 151(1)) or simply the generic word “carrier” (see subsection 139(3), 139(4), 139(5), 139(6), second part of 141(1) and section 145).

.../10

Page 10

[34] Considering the mandatory and prohibited actions set out in Part XII for which an entity might be found liable, it is important to note that some such actions are directed against any “person” on the one hand and against “carriers” on the other. This use of different categories of entities is significant or else all actions for which liability can attach could have been captured by legislative drafters choosing either the generic word “person” or the more specific word “carrier” and its related words. Because the Regulations use two different categories, those violations that are set out as applying to “carriers” must require the violator to be a “carrier” or company, and not simply a “person” who might be related to, or working for, that carrier or company. In section 2 of the Regulations “*carriers*” are defined as “*air carrier, sea carrier, motor carrier or railway company*” while a “*motor carrier*” is defined as “*the owner or operator of a motor vehicle engaged in the transportation of animals by motor vehicle.*”

[35] The Regulations are clear that “carriers” including “motor carriers”, as entities with a higher level of control of activities surrounding the transport of animals, are tasked with certain additional or special responsibilities under the Regulations that might not otherwise attach to any “person”. In the case of “motor carriers” this responsibility attaches to both the owner, in this case Roberge, and to the operator, in this case Stuart, of the motor vehicle engaged in the transportation of animals by the Roberge transport trailer. Given the evidence adduced by the Agency, it is clear that Stuart was the operator of the transport trailer carrying the 41 cattle on September 25, 2009 and that the first element of the violation is proved on the balance of probabilities.

[36] The Act’s system of monetary penalties (AMP), as set out by Parliament is very strict in its application. The Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. The smallest, even unintentional, violations of certain agriculture and agri-food laws which can be harmful to human health, animal health or Canadian agriculture in general are caught by the Act. Section 18 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* states:

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.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

.../11

Page 11

[37] The whole AMPs system, including its severity, has been the subject of comment by the Federal Court of Appeal. In the case of *Michel Doyon v. Attorney General of Canada*, 2009 FCA 152, the Court cautions this Tribunal and advises it to be “circumspect in managing and analysing the evidence and in analysing the essential elements of the violation” in an alleged AMP violation as follows, at paragraphs 27 and 28:

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor’s burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him – or herself.

[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker’s reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

[38] In this case, the severity of the AMPs system and the impact of section 18 of the Act in particular would exclude any excuse that Stuart might raise, such as he is a conscientious driver and always tries his best not to do anything to hurt the animals under his care while he is a driver for Roberge. Clearly such statements, in and of themselves, by Stuart would not be permitted defences under section 18.

[39] Again quoting from *Doyon*, at paragraph 20:

[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation, and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.

[40] Section 19 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* reads as follows:

19. In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.

.../12

Page 12

[41] With respect to element 4 (that an animal transported was injured or became ill or otherwise unfit for transport during the journey), it is clear from the evidence that at unloading in Calgary, there was one animal that was injured while en route to Calgary and that, in fact, to the surprise of all present, it fell out of the trailer dead during the unloading process at Calgary.

[42] Difficulties arise, however, with respect to the sufficiency of evidence presented to the Tribunal by the Agency to substantiate element 5 of the alleged violation. With respect to element 5 (that the alleged violator transported the injured, ill or otherwise unfit animal beyond the nearest suitable place at which it could have received proper care and attention), the evidence presented by the respective parties is conflicting, with Stuart giving direct evidence that none of the animals was in distress at Red Deer and the Agency adducing indirect and hearsay evidence that there were problems with the animals that were detectable during the driver's stop at Red Deer. There were 41 animals on the load that arrived in Calgary in the evening of September 25, 2009. Of those cattle that were unloaded, 39 were found to be in good condition, one was dead on arrival and one had to be euthanized once off the transport trailer. Uncontradicted evidence from Stuart and Kincaid was that this latter animal slipped on the unloading ramp, "split" itself and had to be euthanized while on the weigh scale. There is no evidence that would suggest that before this cow came off the trailer it was not in good condition. Moreover, the evidence is clear that all 41 cattle were in good condition when they were loaded at Clyde in the afternoon of September 25, 2009.

[43] Given the evidence and as was stated above, one must conclude that certainly one animal—the dead-on-arrival one—was injured or otherwise became unfit for travel during the journey from Clyde to Calgary. When exactly this injury or unfitness occurred is important but unclear from the evidence. The Agency alleges that it occurred before, or at, Red Deer when Stuart noticed that two of his load were down, sitting on their feet and as a result he called the Roberge dispatcher to report the incident and to seek advice as to what to do. Stuart gave evidence that, while he did notice that two cows were down when he stopped at Red Deer, neither was in distress. As an experienced animal transporter with some 18 years of experience, the Tribunal accepts Stuart's evidence that there was sufficient room in the rear compartment to get the animals to move around and that, while he received advice from the

Roberge dispatcher to go to Innisfail if he thought there was a problem, it was up to him as the driver to determine if the cattle were in distress. He decided that, based on his observations, there was no problem and so proceeded to Calgary. Moreover, even upon his arrival in Calgary and when 12 animals were found to be in the rear compartment, neither the dead-on-arrival cow or the cow that split itself and had to be euthanized on the weigh scale were either of the ones that were down in the rear compartment in Red Deer.

.../13

Page 13

[44] As Stuart did not stop again after Red Deer, the Agency must satisfy the Tribunal, to prove element 5, that, on the balance of probabilities, either or both of the two cows that were down in the rear compartment at Red Deer were injured, sick or unfit and that as a result Stuart would have been obliged by the Regulations to stop at the nearest suitable place at which that or those animals could have received proper care and attention, which the parties have agreed would have been Innisfail, Alberta. The Tribunal accepts that the mere fact that animals are lying down in the rear compartment is not sufficient for a finding that those animals are in distress, are injured or otherwise unfit for transportation. Stuart was an experienced animal handler and transporter, a credible and forthright witness, and fully cooperative agent with the Agency investigation. He gave evidence at the hearing that when he observed the two cattle that were lying down in the rear compartment they were not in distress, and that there was plenty of room in the rear compartment when he tried to move them to get up. Moreover, after he left Red Deer, Stuart felt no significant shifting of his load while on route to Calgary.

[45] While it is impossible to determine what exactly happened on the journey from Clyde to Calgary, the Tribunal holds as a finding of fact that a mechanical failure of the gate that separated the rear and upper belly compartment occurred somewhere between Red Deer and Calgary, which permitted four animals from the upper belly to fall into the rear compartment. From this mishap, one cow died. That was unfortunate, but not an event which Stuart could have known about prior to his arrival at Calgary, and as such could not have known that he was transporting an injured, ill or otherwise unfit animal. When he did discover the injured (and by then dead) animal when he arrived at the slaughterhouse in Calgary, he was at the nearest suitable place at which it could have received proper care and attention, albeit that at that point it was too late to attend to the animal.

[46] Given these factual findings, the Tribunal holds that the Agency has failed to prove all elements of the alleged violation. The Tribunal finds that the only unfit or injured animal hauled on the Roberge trailer driven by Stuart sustained its injuries after Stuart's stop in Red Deer. Any subsequent injuries that were sustained by the animals were not discovered by Stuart until the time of unloading at Calgary. As a result of these findings, the Tribunal holds that Stuart did not commit the violation and is not liable for payment of the penalty. Given the

lack of sufficient evidence on the matter, it would be “mere conjecture ... speculation, hunches, impressions or hearsay” to conclude that, on the balance of probabilities, the one dead cow that was found in Calgary or the two cows lying down in the rear compartment that Stuart observed while stopped in Red Deer were ones that required him to stop at “the nearest suitable place at which it could have received proper care and attention”.

.../14

Page 14

[47] The *Doyon* decision requires the Tribunal to “*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.*” Too much speculation and impression must be entertained to uphold a finding of a violation by Stuart of subsection 138(4) of the Regulations with respect to his transportation of animals on September 25, 2009.

[48] It was unfortunate that a cow died on September 25, 2009 in the trailer that Stuart was driving, but all the elements of the alleged violation that may have arisen from those events have not been made out by the Agency on the balance of probabilities. The Tribunal finds, as a result, that the applicant did not commit the alleged violation and is not liable for payment of the monetary penalty.

Dated at Ottawa, this 19th day of January, 2011.

Dr. Donald Buckingham, Chairperson