

**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

TRIBUNAL MEMBER P. ANNIS

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 Monetary Penalties Regulations*. The oral hearing was held in Québec City on May 5, 2005.

The Applicant was represented by Mr. Clément Nadeau and his son, Mr. Steve Nadeau.

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

The Notice of Violation dated November 1, 2004, alleges that the Applicant, on the 20th day of April, 2004, at St-Henri, in the Province of Québec, committed a violation, namely: “a chargé et transporté des porcs par véhicule moteur qui pour des raisons d’infirmité, de maladie, de blessure, de fatigue ou pour toute autre cause, ne pouvaient pas être transportés sans souffrances indues au cours du voyage prévu” contrary to provision 138(2)(a) of the *Health of Animals Regulations*. Provision 138(2)(a) 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.

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.

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 salient evidence on this issue is as follows:

Dr. Claude Favreau, a veterinarian employed by the Respondent, testified that on April 20, 2004, she examined 2 pigs at the abattoir #330 at St-Henri which had been transported there by the Applicant from a farm situated some 40 km away.

The two pigs in question both exhibited umbilical hernias measuring some 30 to 40 cm in diameter. The hernias were so large that they touched the ground. Dr. Favreau testified that the pig identified as R-49 was required to stand on the tips of its hooves because of the size of the hernia.

She described the suffering of the animals as being manifested from the pigs rounded back and lowered head. In addition she testified that the hernia was red and warm to the touch caused by increased blood flow and had indications of sores on it. In the photograph of the animal introduced by the Respondent, it would appear that the bottom of the hernia had become darkened by being dragged along the ground.

The pig identified as R-48 had a somewhat smaller hernia but which also touched the ground. Its condition was considerably worse than that of the pig R-49 in that it manifested laboured breathing and signs of distress. The post-mortem conducted on pig R-48 disclosed that the animal was suffering a severe peritonitis, in addition to having pneumonia, as well as being somewhat emaciated. As a result of the pig's condition, the carcass was condemned as being unfit for human consumption.

Dr. Favreau further testified that the condition of the animals as seen by her on April 20, 2004, pre-existed considerably the date of inspection in as much as hernias were genetic in nature, being a condition the animals had lived with for some time.

Mr. Steve Nadeau and Clément Nadeau testified on behalf of the Applicant. They indicated to the Tribunal that they were fully informed on the issue causing undue suffering to animals and that they had been very careful in the treatment of their animals to ensure that none occurred. They pointed out that in the case of the two animals in question, they were separated and transported to St-Henri in isolation from the other 48 pigs that travelled with them.

Mr. Steve Nadeau and Mr. Clément Nadeau also stated that they were fully aware of signs that would demonstrate when a pig or other animal was suffering. They testified that the pigs in question had a genetic problem from birth and that over the course of their lives the pigs had adjusted to their condition. They stated that these pigs lived relatively normal lives and carried on without any undue suffering. They were capable of moving quite readily and they certainly were not aware of any sores or any significant lesions the pigs were suffering from at the time they were loaded for transport.

They also challenged Dr. Favreau's conclusion that the animals, when she examined them, were in fact suffering. They disagreed that the photographs even showed the pigs were in anything but a normal condition, apart from the hernias which they stated caused them no discomfort and only minor inconvenience while living at the farm. They further testified that they were very concerned by being branded as having treated their animals with cruelty. If they had thought that the two animals in question were suffering from the hernias, they would not have transported them. They further indicated they had been shipping pigs with hernias for many years and no one had ever suggested to them that a large hernia on a pig would cause it undue suffering.

In some respects, the Tribunal finds this a difficult case. Dr. Favreau's professional opinion that the animals were suffering is contradicted by two very experienced pig farmers, who the Tribunal finds, conducted their business with due regard to the welfare of their animals. There is no question in the Tribunal's mind that the Applicants examined the pigs in question and concluded that they were fit for shipment despite the very large hernias each manifested. Further, the Tribunal does not consider this to be a case where an animal has an infirmity which normally causes suffering. A hernia is a

genetic infirmity and like many birth defects, an animal can adapt to it and move forward without necessarily suffering pain or other distress.

The Tribunal's decision, however, is made somewhat simpler by the condition of pig R-48, because it evidenced clear signs of significant suffering when examined at the abattoir at St-Henri. Moreover, the clinical observations of Dr. Favreau were confirmed by her post-mortem that disclosed a condition of severe peritonitis and pneumonia. I further accept her testimony that this condition existed at the time of loading and caused or contributed to the animal's suffering.

The Tribunal is also satisfied that the penalty should not be reduced pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*. Despite the Applicant's good faith, it cannot conclude that the violation was committed without negligence. Even if pig R-48 was not showing signs of distress prior to being loaded, the smaller state of the pig, in conjunction with the hernia, should have raised, in the Applicant's mind, concerns about whether the animals could be loaded and transported without causing it undue suffering.

The Tribunal is satisfied that the Respondent has established, on a balance of probabilities, that the Applicant caused to be loaded and transported animals that by reason of their infirmities could not be loaded or transported without undue suffering during the expected journey. The Tribunal is also satisfied that the amount of the penalty for the violation was established in accordance with the *Regulations*.

Dated at Ottawa this 15th day of August, 2005.

Peter Annis - Member