

***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*.

Denfield Livestock Sales Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

CHAIRMAN BARTON

Decision

Following an oral hearing and a review of all oral and written submissions, the Tribunal, by order, determines the Applicant did not commit the violation.

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 London, Ontario, on June 11 and 12, 2008.

There are three cases concerning the same event, namely, Denfield Livestock Sales Ltd. (Notice of Violation #0607ON009602), Neil T. Woodrow (Notice of Violation #0607ON009604) and John Drynan (Notice of Violation #0607ON009603). These three cases were heard together on the prior understanding and affirmation by the Applicants that their evidence would apply in all three cases.

Denfield Livestock Sales Ltd. (Denfield) was represented by Mr. Bruce Coulter.

Mr. Neil T. Woodrow and Mr. John Drynan represented themselves, although, throughout the proceedings, they were assisted by Mr. Bruce Coulter and Ms. Janet Drynan.

Evidence for the Applicants was given by Mr. Bruce Coulter, Mr. Brett Coulter, Mr. Neil T. Woodrow and Mr. John Drynan.

The Respondent was represented by its counsel, Mr. Samson Wong.

Evidence for the Respondent was given by Dr. Reg Clinton, Mr. Michael Cole, Mr. José Evangelho, Dr. Yves Robinson, Dr. Lucien Gross, and Mr. Peter Luyten.

After ascertaining that the parties had copies, the following documentation was put on the record for the purpose of the hearing:

- Notice of Violation #0607ON009602 dated May 1st, 2007;
- Letter dated May 2nd, 2007, from the Applicant requesting a review;
- Letter dated May 17th, 2007, from the Respondent including its case file submissions (Respondent's report);
- Letter dated June 14th, 2007, from the Applicant in response to the Respondent's report;
- Sequence of events agreed to by all parties at London, Ontario, on February 20th, 2008, as set out in the Tribunal's letter dated February 22nd, 2008;
- Letter dated February 27th, 2008, from Mr. Bruce Coulter enclosing excerpts from the Policy and Procedures Manual for Livestock Community Sales in Ontario;

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- Letter dated April 18th, 2008, from counsel for the Respondent regarding evidence from Ms. Gwen Coulter and whether load density was an issue;
- Letter dated May 12th, 2008, from the Applicant confirming no dispute as to facts set out in April 18th, 2008 letter regarding testimony by Ms. Gwen Coulter;
- Letter dated May 26th, 2008, from counsel for the Respondent enclosing the curriculum vitae of Dr. Lucien Gross and Dr. Yves Robinson;
- Letter received by the Tribunal on June 2nd, 2008, from Mr. Bruce Coulter outlining background and nature of the evidence proposed to be given by Mr. Doug O'Neil.

During the course of the hearing, the following exhibits were submitted and accepted in evidence;

- AP #1: Four Veterinary Community Sale Inspection Reports at Denfield (1 page).
- AP #2: Section 12 of the Ont. Reg. 729/90 Livestock Community Sales Act (Ontario) (2 pages).
- AP #3: Excerpt from the Livestock Community Sales Program Policy, Procedures, Training and Resource Manual - "Emergency Slaughter" (1 page).
- AP #4: Mr. Brett Coulter's certification as an Inspector under the Livestock Community Sales Act (1 page).
- AP #5: Letter dated June 10, 2008 from Mr. Steven Spratt, President, Ontario Livestock Markets Association (1 page).
- RES #1: Pictures with descriptions (56 pages).
- RES #2: Decision of Review Tribunal, Encan Sawyerville Inc. v. CFIA in English & French (4 pages each).
- RES #3: Supreme Court of Canada, Case of R. v. Jorgensen (29 pages).

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The Notice of Violation dated May 1st, 2007, alleges that the Applicant, on the 8th day of November 2006, at Denfield, in the Province of Ontario, committed a violation, namely: “Load, transport, or cause to be loaded or transported an animal that cannot be transported without suffering; to wit - one Holstein cow”, contrary to provision 138(2)(a) of the *Health of Animals Regulations*, which states:

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”.

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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.

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.

Agreed sequence of events

- November 7th, 2006, a.m. - Peter Luyten transported cow with tag #1689 to Denfield Livestock.
- 11:30 a.m. - Dr. Reg Clinton tagged cow “for slaughter only” and indicated “48 hours” on the certificate.
- Cow did not sell during the auction.
- Cow remained at Denfield overnight.
- John Drynan arrived at Denfield the evening of November 7th, and slept in his truck overnight.
- Cow is loaded in belly compartment in the early morning of November 8th, 2006.
- John Drynan transported the cow to Ontario Stockyards Inc. (OSI) en route to Levinoff Meat Packers (Levinoff) in Quebec.
- 8:30 a.m. (approximately) - en route while stopped for gas, John Drynan found the cow dead in the front part of the belly of the trailer.
- 9:40 a.m. - Inspector Michael Cole started his inspection of the inbound truck at OSI.
- 12:15 p.m. - Dr. Lucian Gross arrived to perform his post mortem examination on the cow, which was completed at 2:15 p.m.

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Condition of cow prior to loading and transporting from Denfield

The paramount issue in this case is the suitability of the subject cow for loading and transporting to Levinoff.

This subject cow was a 2 to 3 year old cull cow, which is a dairy cow no longer suitable for milk production. Dairy cattle are thinner than beef cattle. Cull cows have a normal body score of 2, on a scale of 1 to 5. Body score is the amount of under-skin fat.

Approximately 80% of the cattle shipped from Denfield to Levinoff are cull cows.

Evidence of Mr. Peter Luyten

Peter Luyten has been a dairy farmer all his life and consigns his cull cows to Denfield, which he trusts will bring him the best return.

He denies telling Inspector Cole, after the fact, that the cow was wobbly and unsteady on her feet and also denies that he stated he was not expecting much for her.

He testified he transported the cow to Denfield as the cow was losing weight. He said she was steady on her feet at the time.

He did acknowledge treating the cow, which had recently given birth, with a product called Excenel in case the cow had pneumonia or an infection, as this product does not affect milk or meat and would accordingly prevent any delays in shipping the animal.

Peter Luyten acknowledged receiving a Notice of Violation for transporting the subject animal on November 7th, 2006, from his farm to Denfield. He testified he considered he was coerced by the Respondent's inspectors to pay the reduced penalty in order to "get it over with".

Evidence of Dr. Reg Clinton

Dr. Clinton is a doctor of veterinary medicine, which discipline he has practiced for the past 8 years with the Kirkton Veterinary Clinic (Kirkton). He is designated as an Inspector under the *Ontario Livestock Community Sales Act* and Kirkton has been inspecting Denfield's sales for some time.

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Dr. Clinton testified he arrived at Denfield on November 8th, 2006, to inspect the animals

that were to be put up for auction starting at 12:30 p.m. He found the subject cow in a pen with two other animals (previously segregated because they were small or because there was some reason Denfield wished a veterinarian to look at them).

He testified he gave each a quick exam, between 3 and 5 minutes in length, and found that the subject animal did not appear to be lame, had no fever but had a low body score. He observed the cow had no obvious external sources of pain and did not have a greatly elevated respiration rate. When he approached the cow, it got up and walked away. Dr. Clinton noticed the cow had no difficulty turning or in taking the few steps she did take.

The doctor also observed the cow had sunken eyes, a sign of dehydration, and that it had a somewhat arched back and tucked-up abdomen. He concluded from this and from the poor look about her head that the cow “appeared painful.” However, he did admit that this was a subjective call as there were no obvious external signs of pain. He agreed that, to a lay person, there would have been nothing to show the animal was in pain.

In accordance with Regulations under the *Ontario Livestock Community Sales Act*, he marked the cow with an Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) “slaughter only” tag, meaning the cow was to be delivered and sold to an inspected slaughter plant only. The only restriction was that this was to be done within 48 hours.

On the Veterinary Community Sales Inspection Report, at Tab #8 of the Respondent’s report, Dr. Clinton indicated the reasons for this marking as “emaciated, painful and dehydrated”. On reflection, he testified he should have put down a low body score and not used the term “emaciated”. He also indicated that at the time he tagged this animal, he thought the animal was fit to be transported to a slaughter plant.

At the time, evidence revealed he assumed the slaughter plant would be London Meats, but was unaware that this firm had shut down temporarily. At the hearing, he testified that it was “probably not in the best interest of the animal” to have it transported to Quebec. There is no evidence to indicate that a different notation would have been put on the OMAFRA tag had the doctor known the destination was Quebec.

Dr. Clinton also testified he did not listen to the abdomen, lungs or heart, and agreed that it is not often possible to see outward signs of severe pneumonia.

He acknowledged as well that it would even be hard for a producer who knows his animals to say a cow was in pain, when it is not lame or does not have any obvious external features that would cause pain.

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The Applicant’s exhibit #1 is a copy of 4 Veterinary Community Sales Inspection Reports given to Denfield. Dr. Clinton testified these were given by Mr. Littlejohn, a

colleague of his in Kirkton. In all these cases, the animals in question were ordered euthanized as they were either labelled “unfit for slaughter” or “unfit for transport” on the report.

Denfield could not have euthanized this animal on site without the authorization of either an Ontario Inspector such as Dr. Clinton, or from the owner.

Evidence of Dr. Lucien Gross

Dr. Gross is a doctor of veterinary medicine and has worked with the Respondent in the area of reportable animal disease and transportation. His expertise was conceded by the Applicants.

Dr. Gross conducted a post mortem examination of the subject animal on November 8th, 2006, commencing at 12:45 p.m. and finishing at approximately 2:15 p.m. He had no prior history on this animal, but determined from the dentition that the cow was approximately 2 to 3 years old.

Dr. Gross reviewed the provisions of his report set out at Tab #13 of the Respondent’s report. He concluded that the hole under the skin and the broken pelvis occurred after the cow was dead, likely while being dragged from the belly of the truck or from being lifted by the fork-lift during the post mortem examination. He indicated the small laceration of the liver likely happened when the cow was alive, but he could not tell exactly when.

He acknowledged that the examination of a live animal (ante mortem) and of a dead animal (post mortem) are two completely different types of examinations, and he could not contradict the findings of Dr. Clinton.

He volunteered that he was not able to find any signs that the animal had been trampled on by other animals during transportation.

He concluded that the cow, in its condition weakened by severe pneumonia, likely collapsed from stress due to external factors.

Dr. Gross further testified that in his opinion, while the cow was alive, without there being obvious external signs, pneumonia could not have been detected by a casual observation or by a short inspection such as the one Dr. Clinton carried out.

Evidence of Dr. Yves Robinson

Dr. Robinson is a veterinary pathologist whose impressive background and credentials have been acknowledged by the Applicants.

Dr. Robinson was sent samples of lung tissue from the deceased animal, and the doctor diagnosed the cow as having had severe fibrinonecrotic pleuropneumonia.

He concluded that the cow would have had some difficulty breathing while alive and that pneumonia was the primary contributor to the death, likely triggered by stress.

He also stated this chronic disease had been existent for a few weeks.

Dr. Robinson also opined that Dr. Clinton's evidence in the field would have to be relied upon, which evidence he could not refute from the results of his analysis.

Evidence of Mr. Bruce Coulter

Denfield is owned and operated by Bruce Coulter, his son Brett, and his wife Gwendelyn, and has been in operation since 1986. Bruce Coulter is a licensed lay inspector, livestock dealer, and livestock auctioneer for the Province of Ontario, with 45 years experience in sorting, selling and transporting livestock.

In his written submissions, Bruce Coulter indicated that Neil Woodrow was the only buyer present at the auction on November 8th, 2006, who could have purchased the subject cow with a "slaughter only" tag. He was the person who suggested the cow be withdrawn from the sale to be later assessed for sending to Levinoff on a "subject to kill" basis.

As ascertained during the hearing, the terms "on spec", "on the rail" and "on a subject basis" are more or less synonymous with the term "subject to kill". These terms mean that the animal would be sent to a slaughter house and the farmer would not be paid unless, after slaughter, the animal's carcass passed inspection and was found fit for human consumption.

In his written submissions, Bruce Coulter stated the cow was separately assessed by himself, Brett and Neil Woodrow and that all three agreed that "she was not lame, not puffing, had bright eyes, and after being fed and watered would load and transport as good as the majority of cull cows."

While assessing the cow in question, the gate to its pen was left ajar and he said the cow

actually ran down the alley, after which the cow was put in a feed pen with the rest of the load where she immediately went to the manger and started to eat hay.

This evidence was confirmed at the hearing.

Evidence of Mr. Brett Coulter

Brett Coulter is also a licensed lay inspector, livestock dealer and livestock auctioneer, and has 25 years experience in the sorting, selling and transporting of livestock.

He testified that 80% of the cows transported to Levinoff are thin, which is a normal condition for cull cows.

In addition to his other evidence, he stated he put the subject animal in a segregated pen after the cow arrived at Denfield and that the cow ate a mouthful of hay and drank water. He did not consider that a cow in pain would do this.

Evidence of Mr. John Drynan

John Drynan outlined his lifetime familiarity with cattle and horses, and has been self-employed in the livestock transportation business for the 7 to 8 years prior to this incident.

In his written and oral submissions he testified he started loading the cattle at Denfield at around 5:30 a.m. He noticed the subject cow standing and walking around with the rest of the animals. He thought she appeared to be a bit thin, but had no sign of lameness or visible sickness.

He further stated that “this cow walked/ran 280 feet from the pen to the loading ramp and climbed up the stair step ramp into the trailer. She was then able to walk down the ramp into the trailer into the front of the belly of the trailer. At no time did she have trouble keeping up with the other cows or appear to be having any difficulty getting to or on the trailer.” He added “at no time did I give her any assistance to load.”

Evidence of Mr. Neil T. Woodrow

Neil Woodrow has been purchasing cows for 23 years, and at the time was a cattle buyer for Levinoff.

He purchases between 250 and 300 cattle a week for shipment to Levinoff.

In his written submissions, Neil Woodrow testified that when the subject animal came in the auction ring it was skinny and had an OMAFRA sticker on her back. He observed that there were no indications the animal was unfit for transport to Levinoff, which he further confirmed in his testimony at the hearing.

He explained that OMAFRA tags were originally given to prevent dealers from taking a cow from one sale to another, and to prevent farmers from bidding on their own cows at a sale. He indicated that OMAFRA tags could be placed on perfectly healthy but wild cows to prevent them from going to another farmer.

He also explained that with an OMAFRA tag, if an animal's carcass passes inspection, the farmer will receive the going market price at the time of slaughter. In this case, it was Mr. Woodrow's estimate that Mr. Luyten would have received approximately 20¢ a pound if the cow had passed inspection, well above the 10¢ level at which the auction was stopped. He considered it was in the best interest of Levinoff and of the farmer to have the cow transported on a "subject to kill" basis.

He said he could not, nor does he know of anybody, who can tell what is inside a cow. Accordingly, he would not be able to predict whether any cow would pass inspection after slaughter. He said a cow could fail inspection for any number of reasons, including cancer, arthritis, bad (cancerous) eye, pneumonia or emaciation.

Onus of proof

Section 19 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* provides that the Minister (as represented by the Respondent) must establish, on a balance of probabilities, that the person named in the Notice of Violation committed the violation identified in the Notice.

In order to met this onus, the Respondent must establish, as a matter of fact, that the subject animal, at the time of loading and transportation, had an infirmity, illness, injury, fatigue or other cause that prevented it from being transported without undue suffering during the expected journey.

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There is no doubt the Applicants relied considerably on the judgement of Dr. Clinton

who sanctioned the transportation of the cow to a slaughter facility within 48 hours, by reason of his OMAFRA tag.

However, I find equally compelling, the evidence of Bruce Coulter, Brett Coulter, and Neil Woodrow, who all have had extensive experience in the cattle industry, and who each independently assessed the cow as being fit for transport to Levinoff. I am also satisfied the Applicants were aware of their obligations under both provincial and federal legislation in this regard.

The evidence of Dr. Gross and Dr. Robinson is informative, but the evidence of both doctors was based on their post mortem examinations. Their evidence neither adds to, nor contradicts the evidence of the condition of the subject animal prior to its being loaded and transported.

I find Dr. Clinton's evidence in this regard, then, to be most informative.

Dr. Clinton's evidence did not reveal the cow had any visible signs of infirmity, illness, injury or fatigue. In his undated statement at Tab #9 in the Respondent's report, he stated the subject animal "appeared to be in a significant amount of pain", and in Tab #8 stated the reasons for the OMAFRA tag as "emaciated, painful, dehydrated".

He testified at the hearing he should have put "low body score" instead of "emaciated" on this form.

Regarding the symptoms of pain however, he agreed at the hearing this was a subjective assessment based on a poor look about her head and a somewhat arched back and tucked-up abdomen. Although there is no evidence either way, the arched back could have been a hereditary condition.

I also find from the evidence that there were no outward signs to indicate the subject animal was suffering from ephezima or severe pneumonia, and no other reasons for the three Applicants to consider that the subject animal could not be transported without undue suffering during the expected journey to Levinoff.

The animal had a low body score, but this is normal for cull cows, and especially for this cow which would have had a haggard look from not having fully recovered from recently calving.

There was no evidence the animal's head was drooped or that the animal was bawling, which are normal indicators of pain.

I do not consider the subjective assessment by Dr. Clinton that the subject animal appeared to be in pain (severe or otherwise) to be sufficient evidence on which to find, as a matter of fact, that the animal could not have been transported without undue suffering during the expected journey. The evidence in this case does not meet the required balance of probabilities onus to support a finding that the Applicant committed the violation.

Accordingly, it is not necessary to address the other identified issues such as whether or not Denfield, “caused” the loading and transportation, or whether the gravity value of these violations was properly assessed.

Dated at Ottawa this 24th day of July, 2008.

Thomas S. Barton, Q.C., Chairman