

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Nadeau v. Canada (CFIA), 2010 CART 10

Date: 20100518
Docket: RTA-60373;
RT-1453

Between:

Jean-Guy Nadeau, Applicant

- and -

Canadian Food Inspection Agency, Respondent

[Translation of the official French version]

Chairperson Donald Buckingham

In the matter of an application for a review of a violation of paragraph 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*.

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 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 of which this decision is served.

Hearing held in Thetford Mines, Quebec
January 28, 2010.

REASONS

Alleged incident and issues

[2] The respondent alleges that on September 4, 2007, in Sainte-Hélène, Québec, Mr. Nadeau transported a compromised sow which could not be transported without undue suffering during the expected journey, contrary to paragraph 138(2)(a) of the *Health of Animals Regulations*.

[3] The Tribunal must determine whether:

- The respondent has established all the elements required to support the impugned Notice of Violation; and
- The respondent has established, specifically and among other things, that the compromised sow was not separated from the other hogs during the journey from the farm to the abattoir.

Record and procedural history

[4] Notice of Violation No. 0708QC0250, dated February 5, 2008, alleges that on September 4, 2007, in Sainte-Hélène, province of Quebec, Mr. Nadeau [TRANSLATION] “committed a violation, namely, having transported an animal that by reason of infirmity, illness, injury, fatigue or any other cause could not be transported without undue suffering during the expected journey, contrary to paragraph 138(2)(a) of the *Health of Animals Regulations*, which is a violation of 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*.”

[5] The respondent served the Notice of Violation on Mr. Nadeau on February 17, 2008. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, Mr. Nadeau’s alleged infraction is a serious violation for which the penalty is \$2,000.

[6] Paragraph 138(2)(a) of the *Health of Animals Regulations* reads 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;

[7] In a letter dated March 5, 2008, Mr. Nadeau requested a review by the Tribunal of the facts of the violation, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

[8] Mr. Nadeau also requested an oral hearing, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*. The hearing was held on January 28, 2010, in Thetford Mines, in the province of Quebec. Mr. Nadeau was represented by Charles Laflamme, Counsel. The respondent was represented by Louise Panet-Raymond, Counsel.

[9] On March 11, 2008, the respondent sent its report (Report) concerning the Notice of Violation to Mr. Nadeau and to the Tribunal.

[10] In a letter dated March 13, 2008, the Tribunal invited Mr. Nadeau to file with it any additional statements in this matter by no later than April 14, 2008. None was received.

[11] In a letter dated January 19, 2010, the respondent asked for permission to produce two further photographs of the pig that is the subject of the Notice of Violation in this matter and a document published by the Fédération des producteurs de porcs du Québec entitled *Le Transport des animaux fragilisés – évaluation des animaux à risque* [transporting compromised animals: assessing animals at risk]. With the consent of counsel for Mr. Nadeau, the photographs and the document were admitted into evidence at the hearing.

[12] Given that the Notice of Violation in this matter is the result of the same incident as that in the matter of *Bernard Breton inc.* [2010 CART 011], that the same counsel is representing both applicants and that the cases were to be heard consecutively on the same day, the Tribunal proposed to the parties that the evidence presented at the hearing be common to both cases. The Tribunal nonetheless invited the parties to make their arguments separately in each matter at the end of the hearing. The parties agreed to proceeding in this manner.

Evidence

[13] The respondent's evidence includes the Report and the oral testimony of three witnesses at the hearing, namely, Marie-Hélène Plamondon, Dr. Katie Bernard and Donato Fazio. Mr. Nadeau's evidence includes his request for review dated March 5, 2008, and two witnesses who appeared at the hearing, namely, Michel Brière and Jean-Pierre Breton.

[14] At the hearing, with the consent of Mr. Laflamme, the photographs and the document, as mentioned in the letter from the Canadian Food Inspection Agency (Agency) dated January 19, 2010, were received in evidence and respectively numbered as Exhibit P-2 (in a bundle) and Exhibit P-3.

[15] The respondent produced the following documents, numbered as follows:

- No 1: personal notes made by Ms. Plamondon on September 4, 2007;
- No. 2 (in a bundle): two photographs of the pig taken by Ms. Plamondon on September 4, 2007;
- No. 3: the document published by the Fédération des producteurs de porcs du Québec entitled *Le Transport des animaux fragilisés – évaluation des animaux à risque*.

[16] The applicant produced the following documents, numbered as follows:

- No. 4: excerpt from the Centre informatisé de renseignements sur les entreprises du Québec (CIDREQ), the Québec enterprise register computer centre, "État des informations sur une personne morale [state of information on a legal person] – Ferme St-Georges inc.", dated January 28, 2010;
- No. 5: excerpt from CIDREQ, "État des informations sur une personne morale – 9038-7747 Québec inc.", dated January 25, 2010;

- No. 6: excerpt from CIDREQ “État des informations sur une personne morale – Élevage la Bretagne inc.”, dated January 22, 2010;
- No. 7: letter from Mr. Hudon, Fédération des producteurs de porcs du Québec, to Mr. Laflamme, dated January 26, 2010;
- No. 8: letter from Jean-Pierre Breton, president of Bernard Breton inc., to Mr. Fazio, Canadian Food Inspection Agency, dated January 15, 2008.

[17] The Report contains, among other things, a summary of the violation (pages 9 and 10), the identification of the person alleged to have committed the violation (page 3 and Tab 1 at page 4), the receiving slip of the abattoir describing the details of the load (Tab 2), a map indicating the distance between the farm of origin and the abattoir (Tab 3), a photograph of the pig in question and the Ante-Mortem Screening Report (Tab 4), and the Inspector’s Non-Compliance Report, completed by Jacques Vézina (Tab 5).

[18] The following evidence was not contested:

1. On September 4, 2007, a truck with trailer transporting 31 sows and 12 piglets arrived at the L. G. Hébert et Fils Ltée abattoir in Sainte-Hélène-de-Bagot (Establishment No. 9) at around 11:30 a.m., and
2. The driver of the truck unloaded the trailer in the presence of Ms. Plamondon, who was the Agency inspector at Establishment No. 9.

[19] Ms. Plamondon testified at the hearing via teleconference. She confirmed that she had been present the entire time while the trailer containing the 31 sows and 12 piglets was unloaded on September 4, 2007. She was close to the truck when the driver, Mr. Nadeau, opened the door of the trailer. The pigs got off in a group, one after the other. In the middle of all the pigs, Ms. Plamondon saw a sow with a red mass on her rear. Ms. Plamondon immediately called the receiver to ask him to call the veterinarian to have the sow examined.

[20] Ms. Plamondon testified that she took photographs of the sow after the animal was unloaded on the morning of September 4, 2007. Three of these photographs are before the Tribunal, namely Exhibit 2 (in a bundle), produced at the hearing, and the photograph at Tab 4 of the Report, which is signed by Dr. Vézina, the Agency veterinarian at Establishment No. 9 on September 4, 2007. The photographs clearly show a ball-shaped, blackish-red rectal prolapse protruding from the sow’s rectum.

[21] The respondent also produced Exhibit 1, a page from personal notes signed by Ms. Plamondon and dated September 4, 2007, at 11:30 a.m. She had written the following on a sheet of paper: [TRANSLATION], “Name: Jean-Guy Nadeau”. She had also noted his address, date of birth and driver’s licence number, the truck’s licence plate number and the relevant facts, including [TRANSLATION] “registration number 1FVX8HCB0SL629203 Ferme St-Georges inc.; markings on the truck: Bernard Breton St-Narcisse, Lotb 475-6641; non-isolated prolapse with 30 sows and 12 piglets”. In reply to a question from Ms. Panet-Raymond, Ms. Plamondon stated that she believed that the name “Nadeau” was marked on the truck. Under cross-examination, when Mr. Laflamme questioned Ms. Plamondon about the licence number of the truck trailer and the name on the truck, Ms. Plamondon answered that she could not remember without referring to the notes she took on September 4, 2007, which she did not have in front of her (because she was testifying via teleconference).

[22] Dr. Vézina did not attend the hearing. However, he is the author of the Non-Compliance Report (Tab 5), dated September 4, 2007, which is part of the evidence. Dr. Vézina condemned the sow because of multiple abscesses and emaciation. The Non-Compliance Report confirmed the sow's condition: [TRANSLATION] "a sow with necrotic rectal prolapse placed in a truck with 30 sows and 12 piglets; hold number of sow DH 00". Dr. Vézina noted further in his report that [TRANSLATION] "during the *ante-mortem* inspection upon receipt of the animal, at 11:30 a.m. on September 4, 2007, when the animals were unloaded, there was a sow with a necrotic rectal prolapse, that is, a grapefruit-sized, ball-shaped, blackish-red mass of tissue, which was protruding from the rectum. The compromised sow had been placed with the other non-compromised animals, including 30 sows and 12 piglets". At the *post mortem* inspection, the sow was identified with tattoo number 06813 DH 00. In his report, Dr. Vézina also named the person suspected of having committed the violation as Jean-Guy Nadeau.

[23] Dr. Bernard testified at the hearing as an expert for the respondent. Dr. Bernard has been a veterinarian since 1995 and has been working for the Agency since 2000. She is often the duty veterinarian at Establishment No. 9, and it was established that she had access to the Establishment No. 9 files concerning the September 4, 2007, incident. The Tribunal qualified her as an expert for the purpose of the hearing. In Dr. Bernard's professional opinion, the photographs taken by Ms. Plamondon and signed by Dr. Vézina demonstrate that the sow was suffering from a rectal prolapse that had occurred several days prior to the incident. There was blood that had become dry and black. The reddish area was more recent and indicated a condition that could have arisen during the transportation of the animal.

[24] Dr. Bernard testified that, according to the standards for transporting compromised animals, an animal with a rectal prolapse must be transported to the abattoir as quickly as possible and no later than seven days after a prolapse has been diagnosed. The document published by the Fédération des producteurs de porcs du Québec entitled *Le Transport des animaux fragilisés – évaluation des animaux à risque* (Exhibit 3) indicates at page 11 that any animal compromised through a rectal prolapse must (within seven days) be sent directly to the abattoir in a separate compartment. Moreover, Dr. Bernard stated that the transportation of a sow in that particular condition could worsen the animal's condition.

[25] Dr. Bernard also noted that the photographs demonstrated that the sow was emaciated. Her rear was thin and abnormal. According to Dr. Bernard, an animal in such a condition should not have been transported.

[26] Mr. Fazio has worked for the Agency and for Agriculture Canada since 1981. For the last five years, he has been investigating Notices of Violation for the Agency. Mr. Fazio testified that in fall 2007, he had telephoned Mr. Nadeau about two incidents, including the one that occurred on September 4, 2007. During that telephone conversation, Mr. Fazio apparently asked Mr. Nadeau the following question: [TRANSLATION] "Who is your employer?". According to Mr. Fazio's testimony, Mr. Nadeau had replied "Bernard Breton inc."

[27] Mr. Brière testified on behalf of the applicant, Mr. Nadeau. Mr. Brière confirmed that he was the receiver on duty at Establishment No. 9 on September 4, 2007. He completed the receiving slip (Tab 2) for the 31 sows and the 12 piglets received at the L. G. Hébert et Fils ltée abattoir in Ste-Hélène-de-Bagot (Establishment No. 9) at around 11:30 a.m. on September 4, 2007. Two of the sows were described as being [TRANSLATION] "crippled", meaning that they were compromised. The driver, whose name Mr. Brière did not know, apparently told him to fill out the receiving slip in the name of "Bernard Breton".

[28] Jean-Pierre Breton was Mr. Nadeau's second witness. Mr. Breton is a businessman and shareholder of a number of companies that manage farming activities. He knows M. Nadeau because Mr. Nadeau worked for one of these companies, Ferme St-Georges inc., for 15 years. Mr. Breton and his brother, Raymond Breton, are the principal shareholders of Ferme St-Georges inc. One of Mr. Nadeau's duties at Ferme St-Georges inc. was to transport animals.

[29] Mr. Breton indicated that the decision to transport pigs—sows or piglets—is made independently and autonomously by the managers/owners of each company. Mr. Breton stated that he was never told that a sow with a rectal prolapse had been transported to an abattoir on September 4, 2007 until Mr. Nadeau returned to head office after the September 4, 2007 incident.

Analysis and applicable law

[30] The Tribunal's role is to rule on the validity of the agriculture and agri-food administrative monetary penalties established by the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act). The purpose of the Act is described 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.

[31] The scope of the administrative monetary penalty (AMP) system provided for by the Act, within the meaning intended by Parliament, is however very limited. The Federal Court of Appeal described the AMP system at paragraphs 27 and 28 of *Doyon v. Canada (Attorney General)*, 2009 FCA 152:

[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.

[32] The Act does not contain any *de minimus* legislative provisions and does not allow the person named in a Notice of Violation to claim, as a defence, having exercised due diligence to prevent the violation. Section 18 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* stipulates 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.

[33] When an AMP is established for the case of a violation of a particularly statutory provision, applicants have very little latitude to establish a defence. In this case, section 18 offers few defences to Mr. Nadeau. Given Parliament's clear position on this question, the Tribunal recognizes that it could not dismiss the Notice of Violation if Mr. Nadeau had attempted to avoid a situation in which the sow could be hurt or if Jean-Pierre Breton had never been informed of the September 4, 2007 incident and the sow's health by Mr. Nadeau. By itself, such evidence cannot be considered to be a defence authorized by section 18 and cannot exonerate Mr. Nadeau.

[34] However, the Federal Court of Appeal also points out in *Doyon* that the Act places a heavy burden on the respondent. At paragraph 20, the Court states as follows:

[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.

[35] Section 19 of the Act provides 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.

[36] The narrow scope of the AMP system must reasonably apply to both the applicant and the respondent. Consequently, the respondent must prove all the elements of a violation, on a balance of probabilities.

[37] It is appropriate to reproduce paragraph 138(2)(a) of the *Health of Animals Regulations*, C.R.C., c. 296 (the Regulations) at this point :

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;

[38] For there to be a violation of paragraph 138(2)(a), the respondent must establish the following elements, as listed at paragraph 41 of *Doyon*:

- 1. that the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);
- 2. that the animal in question was loaded onto or transported on a railway car, motor vehicle, aircraft or vessel;
- 3. that the cargo loaded or transported was an animal;
- 4. that the animal could not be transported without undue suffering;

- 5. that the animal suffered unduly during the expected journey (“voyage prévu” in French);
- 6. that the animal could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause; and
- 7. that there was a causal link between the transportation, the undue suffering and the animal’s infirmity, illness, injury or fatigue, or any other cause.

[39] But before it even starts to analyze the elements of the violation, the Tribunal must establish the identity of the driver of the truck trailer, who arrived at Establishment No. 9 on September 4, 2007, transporting 43 pigs. Ms. Plamondon indicated that the driver’s name was Jean-Guy Nadeau. Dr. Vézina identified Mr. Nadeau as the person who committed the violation in his Non-Compliance Report. Mr. Fazio confirmed that Mr. Nadeau was the truck driver involved in the incident on September 4, 2007. Mr. Nadeau’s witnesses do not contradict this evidence. However, Mr. Brière stated that he did not know the driver’s name. The Tribunal accepts that Mr. Nadeau was the driver of the truck trailer that arrived at the abattoir on September 4, 2007, transporting 43 pigs.

[40] As to elements 1, 2 and 3, the Tribunal is satisfied that, according to Ms. Plamondon’s and Dr. Vézina’s evidence, a sow was transported in the truck trailer driven by Mr. Nadeau.

[41] As to elements 4, 5, 6 and 7, the respondent’s evidence is convincing and suffices to prove each element, on a balance of probabilities. The Tribunal recognizes that Ms. Plamondon and Dr. Vézina examined a sow with a necrotic rectal prolapse, that is, a grapefruit-sized, ball-shaped, blackish-red mass of tissue, which was protruding from the rectum of the compromised sow. Ms. Plamondon’s observations also indicate that the compromised sow was among the non-compromised animals. In his Non-Compliance Report (Tab 5), Dr. Vézina noted that a compromised animal that can be transported without suffering must be separated from non-compromised animals. The document published by the Fédération des producteurs de porcs du Québec entitled *Le Transport des animaux fragilisés – évaluation des animaux à risque* (Exhibit 3) indicates at page 11 that any animal compromised through a rectal prolapse must (within seven days) be sent directly to the abattoir in a separate compartment.

[42] Consequently, the Tribunal accepts that the respondent has proven elements 4, 5, 6, and 7, as required in *Doyon*, above, in the following manner. First, under the best conditions, even this sow could have been transported in her compromised condition without undue suffering. But the conditions of the September 4, 2007, journey were not the best, and the sow could not be transported without undue suffering because she was already compromised and was not placed in a separate compartment for the journey. The evidence shows that the sow suffered unduly during the journey because of her existing infirmity. There is therefore a clear causal link between the transportation, the undue suffering and the sow’s infirmity.

[43] According to the testimony of the expert witness, Dr. Bernard, the prolapse (the blackish area) had been there for several days. Dr. Bernard stated that transporting a sow in such a condition could worsen her condition. Dr. Bernard explained that the red area of the prolapse was very recent. This is consistent with the conclusion that the sow’s condition worsened as a result of her being transported. Moreover, the document published by the Fédération des producteurs de porcs du Québec entitled *Le Transport des animaux fragilisés – évaluation des animaux à risque* (Exhibit 3) advises against transporting such an animal, unless it is transported in a separate compartment, which was not the case here. If the sow had been transported in this manner, the risk of worsening her condition might have been reduced.

[44] Consequently, the Tribunal concludes that the respondent has, on a balance of probabilities, proven all the essential elements of the violation. The Tribunal, by order, determines that Mr. Nadeau committed the violation and orders him to pay the respondent a monetary penalty of \$2,000 within 30 days after this decision is served.

[45] However, the Tribunal wishes to inform Mr. Nadeau that this violation is not a criminal offence. After five years, he will be entitled to apply to the Minister to have the violation removed from his record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*:

23. (1) Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from

(a) where the notice of violation contained a warning, the date the notice was served, or

(b) in any other case, the payment of any debt referred to in subsection 15(1),

unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.

Dated at Ottawa, this 18th day of May, 2010.

Donald Buckingham, Chairman