Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Dykman Farms Ltd. v. Canada (CFIA), 2012 CART 17

Date: 20120924
CART/CRAC-1590

Between:

Dykman Farms Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: **Tribunal Member Dr. Bruce La Rochelle**

In the matter of an application made by the Applicant, pursuant to subsection 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(2)(*a*) of the *Health of Animals Regulations,* alleged by the respondent.

DECISION

[1] Following a review of all written submissions of the parties, the Canada Agricultural Review Tribunal, by Order, determines that the Applicant committed the violation and upholds the Notice of Violation issued by the Agency. The Tribunal does not uphold the Agency's assessment of penalty. Instead, the Tribunal finds that the gravity value associated with the violation increases the penalty by 10%. The Applicant is liable to pay to the Respondent a monetary penalty of $2,200, within thirty days after the day on which Notice of this Decision is served.

By written submissions only.

REASONS

Alleged Incident and Issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that on June 23, 2010, at Ponoka, Alberta, the applicant, Dykman Farms Ltd. (Dykman Farms) loaded, transported or caused to be loaded or transported an animal that could not be transported without undue suffering, contrary to subsection 138(2)(*a*) of the *Health of Animals Regulations* SOR/91-525, section 2, made pursuant to the *Health of Animals Act* (Statutes of Canada, 1990, c. 21, and amendments thereto). The Tribunal notes that in the Notice of Violation, the correct subsection is referenced, but the wording of the violation omits the word "undue" before "suffering". The Tribunal further notes that a similar discrepancy arises as between the provisions of subsection 138(2)(*a*) in the Regulations and such provision as itemized as a serious violation under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*; SOR/2000-187 ("AMP Regulations"). See Division 2—*Health of Animals Regulations*; Item 238. The Tribunal views the description of 138(2)(*a*) in the AMP Regulations, wherein the word "undue" is omitted in the summary, as being an administrative error.

[3] The relevant portion of section 138 of the *Health of Animals Regulations*, under the heading of "Sick, Pregnant and Unfit Animals", being subsection 138(2)(a), reads, in part, as follows:

> **138.** *(2) …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*.

[4] The Tribunal must decide whether the Agency has established all of the elements required to support the Notice of Violation, in particular that the animal in question was caused to suffer unduly, by being transported. Should the Tribunal determine that the Agency has established all of the elements required to support the Notice of Violation, the Tribunal must then determine whether the penalty imposed was in accordance with the AMP Regulations.

Procedural History

[5] Notice of Violation #1011EA0013, dated July 14, 2011, alleges that Dykman Farms Ltd., on June 23, 2010, at Ponoka, Alberta, "committed a violation, namely: load, transport or caused to be loaded or transported an animal that cannot be transported without suffering contrary to section 138(2)(*a*) 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*."

[6] Service by the Agency of the above Notice of Violation on Dykman Farms was effected by way of sending a copy of same to Dykman Farms by courier on August 2, 2011.

[7] Under section 4 of the AMP Regulations, the alleged infraction by Dykman Farms is classified as a serious violation, for which the corporation was assessed a penalty of $2,000, being the amount stipulated at the time under subsection 5(3) of the AMP Regulations in relation to serious violations. As of October 12, 2010, the date of coming into force of amendments to the regulations (SOR/2010-215), the penalty for a serious offence was increased to $6,000. In the current case, the $2,000 penalty could have been increased or reduced by up to 50%, depending on the penalty adjustments set out in Schedule 2 of the AMP Regulations, as applied to Dykman Farms in this case.

[8] In an unsigned letter sent by Dykman Farms on August 31, 2011, and received by the Tribunal on September 1, 2011, Dykman Farms requested a review by the Tribunal of the facts of the violation, as provided under subsection 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

[9] On September 6, 2011, the Agency sent Dykman Farms and the Tribunal its report (Report) concerning the Notice of Violation with the Tribunal receiving its copy on September 8, 2011. The purpose of the Report, as specified in the Agency's letter, is to disclose the evidence that will be presented to the Review Tribunal in support of the Agency's position that a violation has occurred.

[10] In a letter dated September 8, 2011, the Tribunal invited Dykman Farms to file any additional submissions in this matter, no later than October 10, 2011. No further submissions were received from Dykman Farms.

[11] By Order dated August 1, 2012, the Tribunal ordered Dykman Farms to submit a signed Request for Review by registered mail, no later than August 31, 2012. Service by the Tribunal of the Order on Dykman Farms was effected by way of sending a copy of same to Dykman Farms by courier on August 1, 2012, as well as forwarding the Order via e-mail to Dykman Farms that same day.

[12] On August 20, 2012, the Tribunal received a signed Request for Review from Collin Dykman, President of Dykman Farms.

Evidence

[13] The evidence before the Tribunal in this case consists of written submissions from the Agency, in its Notice of Violation and Report. The submissions from Dykman Farms, per Collin Dykman are contained in the applicant's request for review.

[14] As acknowledged by Dykman Farms in its request for review, the facts are not in dispute. The relevant facts are summarized as follows.

[15] On June 23, 2011, an inspector for the Agency attended a cattle auction conducted at Ponoka, Alberta, on the premises of Vold, Jones and Vold Auction Market. The inspector noticed a Holstein cow that was bleeding and did not appear to be strong enough to stand. The cow appeared to have recently given birth or to have recently aborted its calf. The cow was euthanized later that day, by the Yard Manager of the auction market. Collin Dykman confirmed that he owned the cow in question and that the cow had given birth in the previous 48 hours.

[16] The cow in question had been brought to the auction by employees of Dykman Farms. Collin Dykman acknowledged that the cow should not have been transported to the auction, given the cow's physical state. In particular, Collin Dykman states in the Request for Review by Dykman Farms that "I am not disputing the fact that this animal was unfit for transportation…(t)he animal in question was to be euthanized that day on the farm." In particular, Collin Dykman states that he had instructed an employee to kill the cow while still on the farm, by shooting it.

[17] Collin Dykman acknowledged that there was an error in the selection of the animal for transport. He states that "…the driver whom I [Collin Dykman] told to take cattle out of the pen (which the cow in question was in), pulled the wrong animal for transport. I was not there at the time of loading to oversee what was going on the truck." The Tribunal notes that there is no evidence of bleeding or difficulty in standing at the time that the cow was loaded for transport. A cow that is bleeding and having difficulty in standing, prior to transport, would have been readily identified as the cow that Collin Dykman had instructed employees to euthanize, rather than to load for transport.

Arguments by the Applicant

[18] Dykman Farms was self-represented through its President, Collin Dykman. Collin Dykman asserts that the cow was loaded by his employees in error, and that he had instructed an employee to kill the cow while still on the farm, by shooting it. In particular, in its Request for Review, the Dykman Farms describes the circumstances as follows: "…this was totally an honest mistake.

[19] Dykman Farms, through its President, Collin Dykman, is knowledgeable about cattle and would not knowingly attempt to sell an animal that was physically unfit for sale. In particular, in its Request for Review, the Dykman Farms states "I [Collin Dykman] am well aware of what kind of cattle go through the markets…we take pride in the cattle we sell and would not try to sell an animal that is compromised."

[20] The primary objective of Dykman Farms in filing the Request for Review is to obtain a reduction of the $2,000 administrative monetary penalty. In particular, in its Request for Review, the Applicant states "I [Collin Dykman] feel the amount of this fine (is) excessive, for an honest mistake. I think that the amount of $200 or $300 would be sufficient."

Arguments by the Respondent

[21] Given the admissions by Collin Dykman as to the fact of the violation and the Request for Review by Dykman Farms being based on a request for a reduction in penalty, the arguments of the Respondent relate to the appropriateness of penalty calculation. The Tribunal will address these arguments in its analysis of the applicable law. The arguments of the Respondent surround the compliance history of Collin Dykman and, vicariously, of Dykman Farms.

[22] Collin Dykman is one of two directors of Dykman Farms. He and, through him, Dykman Farms has been repeatedly cautioned, verbally, by representatives of the Agency regarding the transport of compromised animals. Dykman Farms, through Collin Dykman, has also received an education letter regarding the transport of compromised animals. Notwithstanding such cautions and the education letter, Dykman Farms has chosen not to heed the regulations.

Analysis and Applicable Law

[23] This Tribunal's mandate, following a request for review of the facts, is twofold: (i) to determine whether the applicant committed the violation and (ii) to determine whether the penalty imposed was in accordance with the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[24] The agriculture and agri-food administrative monetary penalties are issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Statutes of Canada, 1995, c. 40). The purpose of the Act and the role of the Tribunal in relation thereto are specified as follows:

> **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.*
>
> **14.** (1) *After concluding a review requested under this Act, the Tribunal shall, by order, as the case may be,...*
>
> > *(b) determine whether or not the person requesting the review committed a violation and, where the Tribunal decides that the person committed a violation but considers that the amount of the penalty for the violation, if any, was not established in accordance with the regulations, the Tribunal shall correct the amount of the penalty…*

[25] It is to be noted that the Tribunal has no jurisdiction to reduce an administrative monetary penalty based on any considerations other than whether the penalty was properly classified and assessed for any applicable "Penalty Adjustments", pursuant to the AMP Regulations. The Tribunal has no discretionary or equitable jurisdiction, such as in relation to balancing the interests of the parties, considerations of fairness, or financial or humanitarian concerns. The case at hand is primarily referenced to whether the amount of the penalty was established in accordance with the Regulations.

[26] The system of review established under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* accords an Applicant a right to have the circumstances reviewed by the Minister or the Tribunal, at the Applicant's option. In addition, if the administrative monetary penalty is $2,000 or greater, the Applicant has an option of entering into a compliance agreement with the Minister, in lieu of paying the penalty. In particular, it is provided in section 9(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* as follows:

> ***9.*** *(2) Instead of paying the penalty set out in a notice of violation or, where applicable, the lesser amount that may be paid in lieu of the penalty, the person named in the notice may, in the prescribed time and manner,*
>
> > *(a) if the penalty is $2,000 or more, request to enter into a compliance agreement with the Minister that ensures the person's compliance with the agri-food Act or regulation to which the violation relates;*
> >
> > *(b) request a review by the Minister of the facts of the violation; or*
> >
> > *(c) request a review by the Tribunal of the facts of the violation.*

[27] There is no jurisdiction on the part of the Minister or the Tribunal to reduce an administrative monetary penalty, based solely on equitable considerations or extenuating circumstances. The only occasion where the Minister can reduce an administrative monetary penalty, assuming the offence has been properly classified, is when a compliance agreement is entered into between the Applicant and the Minister. Specifically, it is provided in section 10(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* as follows:

> **10.** *(1) ….the Minister may enter into a compliance agreement…with the person making the request on such terms and conditions as are satisfactory to the Minister, which terms may*
>
> > *(a) include a provision for the giving of reasonable security, in a form and in an amount satisfactory to the Minister, as a guarantee that the person will comply with the compliance agreement; and*
> >
> > *(b) provide for the reduction, in whole or in part, of the penalty for the violation*.

[28] If an Applicant directs a Request for Review to the Minister, the Applicant has a further right of review by the Tribunal of the Minister's decision. The Applicant also has a right of review by the Tribunal of the facts of the violation, should the Minister refuse to enter into a compliance agreement, as requested by the Applicant. Specifically, it is provided in sections 11(1)(*b*) and 12(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties* Act as follows:

> ***11.*** *(1) Where the Minister refuses to enter into a compliance agreement pursuant to a request…the person who made the request may, in the prescribed time and manner,*
>
> *…*
>
> *(b) request a review by the Tribunal of the facts of the violation.*
>
> ***12.*** *(2) Where the Minister decides…that a person has committed a violation, the person may, in the prescribed time and manner, request a review of the Minister's decision by the Tribunal.*

[29] Furthermore, once an Applicant has submitted a Request for Review to the Tribunal, the Applicant cannot appeal to the Minister if the Applicant is dissatisfied with the Tribunal's decision. The Applicant's remedy, in such circumstances, is to request a judicial review by the Federal Court.

[30] The Notice of Violation in this case is the result of an offence created by regulation (the *Health of Animals Regulations*, Consolidated Regulations of Canada, c. 296), made pursuant to section 64(1) of the *Health of Animals Act.* Under section 64(1) and subsection 64(1)(i) of the *Health of Animals Act*, the Governor in Council may make regulations…generally for carrying out the purposes and provisions of this Act, including regulations

> **64.** (1) (i) *for the humane treatment of animals and generally*
>
> *(i) governing the care, handling and disposition of animals,*
>
> *(ii) governing the manner in which animals are transported within, into or out of Canada, and*
>
> *(iii) providing for the treatment or disposal of animals that are not cared for, handled or transported in a humane manner.*

[31] The relevant regulation is subsection 138(2)(*a*) of the Health of Animals Regulations, previously referenced and reads, in part, as follows:

> **138.** *(2) …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 …*

[32] The term "undue suffering" in the legislation has been subject to recent interpretations by the Federal Court of Appeal. In *Attorney General of Canada (Canadian Food Inspection Agency)* v. *Porcherie des Cèdres* and in *Attorney General of Canada (Canadian Food Inspection Agency)* v. *Serbo Transports Inc.,* two cases heard together (reported at 2005 FCA 59) it was held, reversing a decision of the Tribunal, that the meaning of "undue" in "undue suffering" in section 138(2) of the *Health of Animals Regulations* could not mean "excessive", but rather means "undeserved", "unwarranted", "unjustified", "unmerited" (paragraph 26). The court specifically found that there are cases where an injured or sick animal cannot be transported without undue suffering (paragraph 36). In *Canadian Food Inspection Agency v. Samson* (2005 FCA 235), the Court referenced the decision in Porcherie des Cèdres (paragraph 11) and interpreted section 138(2)(*a*) of the *Health of Animals Regulations* 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. (paragraph 12)*

[33] The system of administrative monetary penalties (AMP), as envisaged by Parliament, is very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes the AMP system as follows, in 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.*

[34] The system of administrative monetary penalties may appear to have elements of penal law, so that related defences and burdens of proof might apply, such as a beyond reasonable doubt burden of proof. The elements of penal law are found in section 126 of the *Criminal Code* of Canada, as follows:

> **126.** *(1) Every one who, without lawful excuse, contravenes an Act of Parliament by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.*

[35] In contrast, it is provided by section 17 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* that a violation under that Act is not considered to be an offence, and *Criminal Code* section 126 is explicitly not applicable, as a consequence.

[36] The *Agriculture and Agri-Food Administrative Monetary Penalties Act* does not contain a *de minimus* provision, nor does it permit the defence of due diligence. Section 18 of the 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.*

[37] The burden of proof, as provided in section 19 of the Act, is proof, "on a balance of probabilities, that the person named in the Notice of Violation committed the violation identified in the notice."

[38] The Act also provides, in section 20, for vicarious liability of an employer or principal, for the acts of an employee or agent:

> **20.** *(2) A person is liable for a violation that is committed by any employee or agent of the person acting in the course of the employee's employment or the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.*

[39] In this case, the Agency has chosen to issue a Notice of Violation to Dykman Farms. On the facts of the case, the Agency could have issued a Notice of Violation to Collin Dykman, or to the employee who loaded the animal, or to all three parties, including Dykman Farms.

[40] The strictness of the AMP regime must, understandably, apply to both Dykman Farms and the Agency. Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities.

[41] For there to be a violation of paragraph 138(2)(*a*), the Agency must establish the following elements, as listed in 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;

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.

[42] As to elements 1, 2 and 3, the Tribunal is satisfied that, according to the Agency's evidence, which was uncontested by Dykman Farms, that Dykman Farms, through one of its employees, loaded and transported the cow in question in a livestock truck and trailer on June 23, 2010.

[43] With respect to elements 4, 5, 6 and 7, the Tribunal is satisfied that the Agency's evidence, which was uncontested by Dykman Farms, is sufficient to prove each element, on a balance of probabilities, as follows:

> (a) Element 4: The animal could not be transported without undue suffering. The evidence is that the cow in question had very recently given birth or was subject to an abortion. The animal was bleeding following its arrival at the auctioneer, and had difficulty standing. As discussed earlier, the animal could not have been bleeding or having difficulty standing at the time of loading, due to the description by Dykman Farms of the loading as involving an "honest mistake". If the animal had been in the same condition at the time of loading as it was found after its arrival at the auctioneer, the loading would constitute a most egregious and deliberate act of animal cruelty. Applying *Canadian Food Inspection Agency* v. *Samson* (2005 FCA 235), discussed earlier, the Tribunal holds that, in the circumstances of this case, a cow who has given birth within the previous 48 hours cannot be transported without undue suffering.
>
> (b) Element 5 – 7: Having established element 4, the Tribunal finds, as a consequence that the cow suffered unduly during the expected journey, due to her condition, and that an adequate causal link as related to the transportation, the animal's infirmity and undue suffering has been established.

Correctness of Penalty Classification

[44] Under the AMP Regulations, a violation can be classified as minor, serious or very serious. (Section 4, AMP Regulations). Under Schedule 1 of the AMP Regulations, the violation in question is classified as serious. (AMP Regulations, Schedule 1, Division 2—*Health of Animals Regulations*; Item 238).

[45] In keeping with an underlying legislative objective of encouraging compliance without criminal sanction, it is provided in the AMP Regulations that the initial penalty may be adjusted upward or downward, depending on the degree of gravity (AMP Regulations, Schedule 2). Gravity is assessed in relation to specific regulatory criteria, under three general headings: history (with reference to the compliance history of the offender), intent or negligence, and harm (AMP Regulations, Schedule 3). The Agency may choose to include a justification for adjusting or not adjusting the penalty, as the case may be. The Tribunal has an independent jurisdiction, and legislative obligation, to assess the appropriateness of the penalty, irrespective of whether a justification is provided by the Agency. In this case, the Agency chose to include a justification for the penalty amount, which the Tribunal shall now review.

[46] **History—**It is to be noted that Dykman Farms received a copy of the Agency's report, under cover letter dated September 6, 2011. The Agency's report includes details of the compliance history of Dykman Farms. Dykman Farms did not file any rebuttal evidence in relation to the Agency's report. Concerning to the compliance history of an offender, there are three potential gravity values. At the time, of the violation, the history was referenced to three years prior. That period has now been extended to five years. A gravity value of 0 is assessed if this is a first violation in the past three years, 3 if there has been a violation in the past three years, and 5, for any other set of violations in the past three years. "Past three years" is referenced backwards from the date of the current violation. In this case, the current violation occurred on June 23, 2010. There is one previous violation, occurring on October 7, 2008, relating to the same type of violation as in the current case. In particular, a load of cattle was transported by Dykman Farms, in circumstances where the entire load "should not have been transported by reason of infirmity, illness, injury, fatigue or any other case, as their transport could have caused undue suffering during the expected journey", contrary to section 138(2)(*a*) of the *Health of Animals Regulations*. The Agency has submitted case details in relation to the 2008 violation. Instead of imposing a monetary penalty, the Agency chose to issue a warning, which took the form of an "Education Letter" sent to Dykman Farms on October 9, 2008, two days following the violation. Under the AMP Regulations, one previous violation increases the gravity level by 3 points. The Tribunal agrees with this assessment.

[47] **Intent or Negligence—**Offences under the AMP Act are absolute liability offences, where lack of intent or lack of negligence are not available as defences. However, under the AMP Act, the presence of negligence increases the gravity value by 3, while the presence of intent—that is, the deliberate contravention of a regulation—increases the gravity value by 5. In this regard,

Collin Dykman admits, on behalf of Dykman Farms, that the animal in question was transported through error on the part of an employee, who had been instructed to shoot the animal. This would appear to indicate negligence on the part of Dykman Farms. The position of the Agency is that the animal was deliberately transported, in direct contravention of the regulations. In support of its position, the Agency cites the fact that Collin Dykman, on behalf of Dykman Farms, had received an education letter in relation to the 2008 violation. The Agency also asserts that Collin Dykman, on behalf of Dykman Farms, "has been repeatedly verbally cautioned regarding the transport of compromised animals".

[48] The Agency contends that the receipt of an education letter, plus repeated verbal cautions, to one of the directors of Dykman Farms, is sufficient to establish that Dykman Farms intentionally contravened the regulations in this particular case. With respect, the Tribunal disagrees. The Tribunal does not have evidence before it that Collin Dykman deliberately instructed an employee load an unfit animal. Collin Dykman's admission that this occurred through error has not been contradicted by any evidence presented by the Agency. The Agency appears to take the position that repeated verbal cautions and an earlier warning letter are adequate to establish intent in substance, by way of behaviours that might amount, at best, to a form of wilful blindness. Had the Agency wished to so argue, it would be expected that independent evidence of the series of verbal cautions would have been submitted, such as by way of further evidence of those cautioning Collin Dykman, on behalf of Dykman farms.

[49] A more complete discussion of intent is not necessary to address the matter here. The Tribunal concludes that intent has not been established, while negligence has been admitted. Therefore, the gravity is assessed at 3, rather than 5.

[50] **Harm—**The degree of harm that is caused or could be caused by the violation is specified under the AMP Regulations to affect the gravity of the violation. A violation that causes or could cause minor harm to the health of an animal is assessed a gravity value of 1. A violation that could cause major harm to the health of an animal is assessed a gravity value of 3. A violation that in fact causes major harm to the health of an animal is assessed a gravity value of 5. In this case, a cow who had given birth within the previous 24 hours was found to be in significant distress, following transport. In this case, the Agency contends that the violation could have caused minor harm to the health of an animal, and assesses a gravity value of 1. The reasoning of the Agency in this regard is somewhat convoluted, and is reproduced *verbatim*:

> *The transport of animals to markets and to slaughter is always under scrutiny; (sic) by consumers, by animal rights groups and by international trading partners. When animals are not treated and transported humanely, it hurts the entire livestock industry. Therefore, by not conforming to the CFIA Health of Animals Regulations, Dykman Farms Ltd. brought unwanted negative publicity to an industry still reeling from BSE, drought and a high Canadian dollar.*

> *Furthermore, unfit animals may also include diseased animals. Introducing a diseased animal to an auction market situation increases the risk of spread of disease, and diseased animals entering the human food chain further risks (sic) the industry and increases the possibility of the loss of some International (sic, re capital "I") markets.*

[51] With respect, the Tribunal finds that the Agency's reasoning in relation to the gravity assessment based on "Harm" to be speculative, at best. The reasoning does not demonstrate even a rudimentary understanding of the regulatory criteria, and must be entirely discounted, as is the Agency's gravity classification in that regard.

[52] Under "Harm", the Tribunal is nonetheless with jurisdiction to substitute its gravity classification for that of the Agency. The Tribunal holds that the transport of the animal in the cirumstances of this case in fact caused serious harm to health of the animal, such as the bleeding and ambulatory difficulties that were noticed at the auction market, and that a gravity assesssment of 5 is warranted.

[53] The total gravity value in relation to the violation is therefore 3 (prior violation), 3 (negligence) and 5 (harm) for a total gravity value of 11. According to Schedule 2 of the AMP Regulations, this results in an penalty increase of 10%, which the Tribunal so orders. The penalty to Dykman Farms is therefore assessed at $2,200.00.

[54] As in the past, Dykman Farms was the identified violator, rather than Collin Dykman personally or anyone else associated with Dykman Farms. The Tribunal notes that a potential difficulty with issuing a Notice of Violation against Dykman Farms, without also issuing a Notice of Violation to the related individual actors, is that there results in no violation history against individual actors, even though involved with the same fact situations. If a primary objective of the legislative régime is to encourage compliance by individuals as well as corporations, a later Notice of Violation issued to an individual actor in this case could have a lesser effect: a first violation for an invidual compared to a second violation for the corporation, on the same set of facts.

[55] The Tribunal wishes to inform the Dykman Farms that this violation is not a criminal offence. After five years, the applicant will be entitled to apply to the Minister to have the violation removed from its 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.

[56] The Tribunal advises the Dykman Farms that the 2008 violation may be treated similarly, unless it is the opinion of the Minister that it is not in the public interest to do so. Given two violations in a comparatively short period of time, involving the same fact situations, the Dykman Farms is cautioned that a further violation may involve more serious consequences, which may not be limited to the corporate entity, but also include those persons considered to be principally associated with the violations.

Dated at Ottawa, this 24th day of September, 2012.

_____

Dr. Bruce La Rochelle, Member