



Citation: *Western Commercial Carriers Ltd. v. Canada (Canadian Food Inspection Agency)* 2014 CART 33

Date: 20141117  
Docket: CART/CRAC-1741

**Between:**

**Western Commercial Carriers Ltd., Applicant**

**- and -**

**Canadian Food Inspection Agency, Respondent**

**Before: Chairperson Donald Buckingham**

**With: Ms. Julie Stephenson, representative for the applicant; and  
Mr. Robert Drummond, counsel for the respondent.**

In the matter of a request made by the applicant, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of subsection 140(1) of the *Health of Animals Regulations*, alleged by the respondent.

**DECISION**

**Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that the applicant, Western Commercial Carriers Ltd., committed the violation set out in Notice of Violation #1314BC0042, dated September 3, 2013, concerning events that took place on July 1, 2013, and is liable for payment of the penalty in the amount of \$6,000 to the respondent, the Canadian Food Inspection Agency, within thirty (30) days after the day on which this decision is served.**

The hearing was held in Grande Prairie, AB,  
Wednesday, June 18, 2014.

## REASONS

### 1. Alleged Incident and Central Issue

[1] Canada Day 2013 was a hot day in western Canada. Mr. Keith Stephenson (Mr. Stephenson), owner, director and employee of Western Commercial Carriers Ltd. (WCC) did not take the day off as a holiday. Instead, he was working hard, loading his tractor-trailer unit with 270 pigs in the early morning that day in Falher, Alberta and then driving to Langley, British Columbia. He arrived in Langley very early in the morning of July 2, 2013. At 07:00 that morning, as the pigs were unloaded at the Britco Pork slaughter house (Britco Pork), at least 30 pigs were found dead in the WCC trailer.

[2] The discovery of the dead pigs was made by employees of Britco Pork and by Canadian Food Inspection Agency (Agency) officials. As a result of this incident, the Agency on September 3, 2013, issued Notice of Violation #1314BC0042 to WCC, alleging that WCC had overloaded a conveyance, contrary to subsection 140(1) of the *Health of Animals Regulations* (HA Regulations).

[3] Subsections 140(1) and 140(2) of the HA Regulations, with the statutory heading proceeding the two subsections, read as follows :

#### PROHIBITION OF OVERCROWDING

*140. (1) No person shall load or cause to be loaded any animal in any railway car, motor vehicle, aircraft, vessel, crate or container if, by so loading, that railway car, motor vehicle, aircraft, vessel, crate or container is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.*

*(2) No person shall transport or cause to be transported any animal in any railway car, motor vehicle, aircraft, vessel, crate or container that is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.*

[4] The central element in contention in this case is whether WCC's trailer was, when it was loaded on July 1, 2013, overloaded, overcrowded or otherwise "crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein".

[5] If the Canada Agricultural Review Tribunal (Tribunal) finds that the Agency has established all of the elements required to support the impugned Notice of Violation, the Tribunal must then determine whether the Agency has proven that the amount of the penalty is as authorized under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act) and the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations).

### 2. Procedural History of the Case

[6] Notice of Violation #1314BC0042, dated September 3, 2013, alleges that on July 1, 2013, at Falher, Alberta, WCC [verbatim] “committed a violation, namely: Overload a conveyance contrary to section 140(1) 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*.”

[7] The Notice of Violation was deemed to have been served on WCC by the Agency on September 14, 2013. Pursuant to section 4 of the AMP Regulations, the violation was classified as a “serious violation” for which the penalty assessed was \$6,000.

[8] By registered letter dated October 7, 2013, WCC, through its directors Ms. Julie Stephenson (Ms. Stephenson) and Mr. Stephenson, requested a review by the Tribunal of the facts of the alleged violation, in accordance with paragraph 9(2)(c) of the AMP Act. Supplementary submissions setting out WCC’s reasons for the request were provided by WCC to the Tribunal on October 23, 2013. Tribunal staff confirmed with Ms. Stephenson that WCC wanted the Tribunal to review its case in English via an oral hearing at a location in northern Alberta.

[9] By letter dated October 29, 2013, the Agency sent its report (Agency Report) for the incident to WCC and to the Tribunal, the latter receiving its copy on October 31, 2013.

[10] In a letter dated November 1, 2013, the Tribunal invited WCC and the Agency to file any additional submissions with the Tribunal by December 2, 2013.

[11] In correspondence dated and filed between November 29 and December 2, 2013 (resubmitted by fax on December 4, 2013), WCC filed additional submissions with the Tribunal, which then provided a copy of those submissions to the Agency. The Agency filed no additional submissions before the December 2, 2013 deadline.

[12] On March 17, 2014, the Tribunal sent the parties Notices of Hearing, indicating that the oral hearing requested by WCC would be held on June 18, 2014, in Grande Prairie, Alberta. The Tribunal confirmed that both parties received the Notices of Hearing. The hearing requested by WCC was held on that day with WCC represented by its representative and director, Ms. Stephenson, and the Agency represented by its counsel, Mr. Robert Drummond (Mr. Drummond).

### **3. The Evidence**

#### **3.1 *The Written Record and Evidence at the Hearing***

[13] The written record for the case consists of the following:

For the Agency:

- Notice of Violation #1314BC0042, dated September 3, 2013; and
- Agency Report dated October 29, 2013;

For WCC:

- Request for Review by Ms. Stephenson dated October 7, 2013;
- Further Submissions of Ms. Stephenson dated October 23, 2013; and
- Additional Submissions of Ms. Stephenson dated November 29, 2013, December 1, 2013 and December 4, 2013.

[14] As well, the parties tendered oral testimony at the hearing:

For the Agency (one witness):

- Dr. Peter Brassel (Dr. Brassel);

For WCC:

- Mr. Stephenson.

[15] The parties also tendered three exhibits at the hearing:

By the Agency:

- Exhibit 2 - extracts from the Canadian Agri-Food Research Council's "*Recommended code of practice for the care and handling of farm animals – Transportation*" (Transportation Code) (5 pages);

By WCC:

- Exhibit 1 - Copy of Agency Case File addressed to WCC dated September 4, 2013 (11 pages)
- Exhibit 3 - Copy of Agency letter with attachments dated September 25, 2013, including extracts from the Transportation Code and the Agriculture and Agri-Food Canada publication 1898/E "*Recommended code of practice of the care and handling of farm animals – Pigs*" (AAFC Practice Code)(18 pages)

### **3.2 Pertinent Evidence Not in Dispute**

[16] Early in the morning on Canada Day 2013, Mr. Stephenson took a WCC truck and trailer and loaded two lots of hogs from two barns of the Peace Pork Company (Peace Pork). Between 06:00 and 07:00, Mr. Stephenson loaded 60 hogs from Peace Pork's

Venture I barn and then drove about a mile down the road to load an additional 210 hogs from Peace Pork's Venture II barn. Both barns are located in northwestern Alberta near Falher. All loading of the hogs was complete by 08:15.

[17] At the time of loading, the temperature was between 20 and 22°C. As a result of these warm temperatures, Mr. Stephenson cut back on the number of pigs he loaded on July 1, 2013, leaving 10-11 hogs behind at Peace Pork's barns that he might have loaded for delivery to Britco Pork if it had been a cooler day.

[18] Mr. Stephenson has been driving trucks for more than 30 years with at least 25 of these being hauling livestock. He is trained in the humane transportation of animals demonstrated by his certificate of completion of the Canadian Livestock Transport Program. At the time of the alleged violation, Mr. Stephenson had been driving the Peace Pork to Britco Pork route once or twice a week. Mr. Stephenson has, for the last six years, been using the same trailer for this run and he told the Tribunal that the trailer's normal capacity is around 280 hogs, depending on the weight of the market hogs.

[19] July 1, 2013, turned out to be a difficult travel day for the pigs in question. Temperatures started out quite warm at the time of loading early that morning and then spiked during the day and evening to almost 40°C while the pigs were in transit. Apart from these temperature observations, the approximate chronology of the journey was as follows:

- (a) July 1, 2013, 06:00-08:15: Mr. Stephenson travelled to Venture I and II barns and loads the pigs;
- (b) 08:15-09:45: Mr. Stephenson drove to Valleyview, Alberta, where he stopped for a break and sprayed down the hogs to keep them cool;
- (c) 09:45-19:00: Mr. Stephenson drove toward destination with daytime temperatures spiking and the air seeming to have no cooling effect;
- (d) 19:00-23:00: Mr. Stephenson continued to drive toward destination arriving in Hunter Creek, BC, by 23:00, where he rested for an hour but the hogs were restless so he continued the trip;
- (e) July 2, 2013, 00:01-02:00: Mr. Stephenson completed the voyage and arrived at Britco Pork in Langley, BC. He did not unload the hogs, as his load was not one that had been designated for unloading in Britco Pork holding pens so he sprayed them down again in the trailer, which settled them down. He then waited for his turn to unload;
- (f) 06:00-07:00: WCC trailer was unloaded and 30 hogs were found dead on the trailer and an additional one had to be euthanized as it came off the truck.

[20] The parties agreed that, while Peace Pork employees brought the 270 hogs in two lots to the WCC trailer in preparation for loading on July 1, 2013, it was Mr. Stephenson who did the loading of the pigs and the one who decided how many hogs to load and how many to put into each compartment of the trailer. The parties also agreed that Mr. Stephenson did not believe the pigs had any health or disease-related conditions. Furthermore, the parties agreed that Mr. Stephenson did not notice any dead hogs on his load at any time during the voyage from Falher to Langley.

[21] As well, the parties agree on the configuration of the trailer and the number of hogs in each compartment. The WCC trailer had 12 compartments divided into four sections: the front section with three compartments, one over the other (for convenience the top one is referred to as F1, the middle one F2, and the bottom one F3); the front middle section with four compartments, one over the other (for convenience the top one is referred to as MF1, the next middle one down MF2, the next middle one down MF3 and the bottom one MF4); the back middle section with three compartments, one over the other (for convenience the top one is referred to as MB1, the middle one down MB2 and the bottom one MB3); and the back section with two compartments, one over the other (for convenience the top one is referred to as B1 and the bottom one B2).

[22] Dr. Brassel testified that he was the Agency meat inspection veterinarian at the time of the incident at Britco Pork, a slaughter facility exclusively processing pork. He testified that he was called down to examine the WCC load about 06:30 on July 2, 2013. Upon his arrival he noted dead pigs but the trailer itself had already finished its unloading and had pulled away from the unloading dock. He then counted 30 dead pigs from the load plus the one more that had to be euthanized after it had left the truck. Taking into consideration his observations that the dead pigs were slightly bloated and dark pink or purple in colour, he concluded that the pigs died en route. He told the Tribunal that as different dead pigs had different amounts of colour change, he could not determine exactly when the pigs had died.

[23] The pathology reports (Tab 8 of the Agency Report) for the three dead pigs, sent by Dr. Brassel to the British Columbia Ministry of Agriculture Animal Health Care Laboratory (BCMAL), concluded that pigs died of “porcine stress syndrome” or “transport death”. Dr. Brassel in agreeing with the findings of the BCMAL report, explained to the Tribunal that “porcine stress syndrome” or “transport death” are associated with transport over long distances, hot weather, inadequate air circulation and management factors before and during transport.

### ***3.3 Specific Evidence Regarding Loading Densities of the WCC Trailer***

[24] There was much evidence presented in order to establish an appropriate loading densities for the hogs transported by WCC which included:

- (a) an Agency/WCC diagram of maximal and actual loading capacity of the WCC trailer by compartment (Tab 5 of the Agency Report);

- (b) the Transportation Code (a portion of Exhibits 2 and 3);
- (c) the AAFC Practice Code (a portion of Exhibit 3);
- (d) various calculations and explanations by Agency officials; and
- (e) various calculations and explanations by Mr. Stephenson and Ms. Stephenson.

[25] Tab 5 of the Agency Report is a diagram of the WCC trailer completed jointly by Mr. Stephenson and Dr. Brassel at 07:45 on July 2, 2013. It indicates the trailer's compartmental configuration for market hogs indicating a maximum capacity, the actual load and the number of deads in each compartment. Below, is a synopsis of that information showing for each compartment the total maximum capacity of hogs to be hauled per compartment (M), the actual number hauled in each compartment (A), and, the actual number of dead hogs found in that compartment (D):

<b><u>F1</u></b>	23M-21A-0D	<b><u>MF1</u></b>	26M-26A-0D	<b><u>MB1</u></b>	19M-18A-0D	<b><u>B1</u></b>	30M-28A-4D
<b><u>F2</u></b>	23M-21A-0D	<b><u>MF2</u></b>	26M-26A-1D	<b><u>MB2</u></b>	25M-24A-5D	<b><u>B2</u></b>	30M-25A-4D
<b><u>F3</u></b>	23M-21A-1D	<b><u>MF3</u></b>	19M-18A-5D	<b><u>MB3</u></b>	25M-24A-5D		
		<b><u>MF4</u></b>	19M-18A-5D				

Totals: maximum capacity of trailer 288; actual load 270; number of dead 30+1

[26] The Transportation Code contains several provisions germane to this case:

...

8.6.6 *The stress and excitement associated with handling and transport can lead to serious health problems and death. Three of the most common and important health concerns are:*

- *heat stress or hyperthermia; death rate in transit to slaughter begins to rise when temperatures exceed 16°C (61°F);*
- *heart failure;*
- *porcine stress syndrome (PSS).*

...

8.6.9 *Porcine stress syndrome (PSS) is an inherited disorder of pigs. Animals with this genetic defect are extremely sensitive to stress and must be*

*handled with exceptional care. When PSS pigs are stressed, their body temperature suddenly rises, their skin develops red blotches, they collapse, and their limbs become rigid. Treat immediately in the same way as for cooling the heat-stressed pigs (see earlier).*

...

### **Care and Protection During Hot Weather Transit**

8.6.24 *Pigs have a low tolerance for hot temperatures and high humidity.*

...

8.6.26 *Ensure appropriate airflow through the vehicle. To protect pigs properly from the sun in the case of open-top trucks, use tarpaulins on the top only. Ensure ventilation from sides not covering slats or openings with tarpaulins or other materials.*

8.6.27 *Load and unload promptly. Make as few stops as possible. Heat builds up rapidly inside a loaded vehicle that is standing still. If an unavoidable delay occurs, run water on the floor, look for a shaded area or drive the truck around slowly until you can unload the pigs.*

8.6.28 *Schedule evening transport of pigs during hot weather to avoid traveling during the hottest hours or during rush hour traffic.*

...

8.6.44 *Do not exceed space allowance requirements as described in the charts in Appendix 2.*

[27] The AAFC Practice Code contains the following provisions:

#### **[page 36] Space requirements**

*Avoid crowding pigs in a way that causes injury or suffering. They should be able to stand in their natural position without touching either the deck or roof above them. Recommended space requirements for pigs in transit are outlined in Table 6 [page 37]. These requirements vary with temperature.*

...

### **Care of pigs in transit**

*Check pigs and the vehicle environment with the 1<sup>st</sup> hour after beginning each journey to ensure that the pigs are comfortable and that ventilation is*



*adequate for the conditions. Then check the pigs every 2-3 h, especially if weather conditions fluctuate. Drivers must be prepared for changing weather conditions. Remember, the animals have no control over their environment, therefore the driver is entirely responsible for their well-being and comfort.*

...

***[page 38] Precautions in hot, humid weather***

*Pigs have a low tolerance for hot temperatures and high humidity.*

...

*Reduce loading density by about 10% if the temperature is above 16°C (60°F) and by up to 25% if the day is extremely hot and humid.*

...

*Load and unload promptly. Make as few stops as possible. Heat builds up rapidly inside a loaded vehicle that is standing still. If an unavoidable delay occurs, run water on the floor, look for a shaded area or drive the truck around slowly until you can unload the pigs.*

*Schedule transporting pigs during hot weather to avoid traveling during the hottest hours or during rush hour traffic.*

[28] Table 6 of the AAFC Practice Code [page 37] contains the notation “avoid transporting pigs at temperatures above 30°C” and sets out recommended maximum loading levels for pigs in different kinds of trailers at different temperatures. The parties agreed that the type of trailer used by WCC on July 1, 2013, was not one of the types listed in the table. They also agreed that the Table set out a density level for non standard vehicles which for each 210-230 pound pig is: 4.1 sq. ft./animal when temperatures are between 16-23°C; and 4.4 sq. ft./animal when temperatures are 24°C and up.

[29] In his testimony, Dr. Brassel told the Tribunal that loading densities are important for pigs, as they cannot sweat. Instead, they pant and get rid of excess heat through their ears. As the loading density increases, there is less airflow and less cooling which exposes the pigs to more heat and more stress. Loading densities are calculated for the overall load but also by compartment in a trailer as the pigs’ mobility is limited to the compartment in which they find themselves.

[30] With respect to this specific load, Dr. Brassel reported to the Tribunal that he maintained a record of the Chain of Custody (Tab 6 of the Agency Report) of the dead pigs from their collection from the WCC trailer to the BCMAL laboratory, where the *post mortem* on the pigs was completed and was convinced that the pigs examined at the BCMAL were the pigs that came off the WCC trailer. The BCMAL necropsy report stated that “The lesions

are consistent with those seen in Porcine Stress Syndrome or Transport Deaths. This is a multifactorial induced disease frequently associated with transport over long distances, hot weather, inadequate air circulation, and management factors before and after transport. The cause of death is attributed to cardiovascular and pulmonary collapse....”

[31] Based on his calculations for appropriate loading densities by compartment given a 25% reduction for hot weather, Dr. Brassel calculated the following recommended occupancy of pigs for each compartment on the WCC trailer for July 1-2, 2013 (with the first number as the 25% reduction number, the second number as the actual in the compartment and the third number as the actual number of dead pigs found in that compartment):

<b><u>F1</u></b>	20R-21A-0D	<b><u>MF1</u></b>	19R-26A-0D	<b><u>MB1</u></b>	16R-18A-0D	<b><u>B1</u></b>	24R-28A-4D
<b><u>F2</u></b>	20R-21A-0D	<b><u>MF2</u></b>	19R-26A-1D	<b><u>MB2</u></b>	19R-24A-5D	<b><u>B2</u></b>	24R-25A-4D
<b><u>F3</u></b>	20R-21A-1D	<b><u>MF3</u></b>	16R-18A-5D	<b><u>MB3</u></b>	19R-24A-5D		
		<b><u>MF4</u></b>	16R-18A-5D				

Totals: maximum capacity of trailer at 75% 232; actual load 270; number of dead 30+1

[32] In his testimony, Mr. Stephenson told the Tribunal that the loading density he decided on for the voyage of July 1-2, 2013 load was dictated by his general practice of reducing his loads for spring and summer transport by 10% due to increasing temperatures during these seasons. He also told the Tribunal that for cooler temperature trips, the WCC trailer’s normal load would be 280 hogs. He also explained that when the temperatures get much higher, he would reduce the load by 25% but that in the case at hand, he had no idea the temperatures would be spiking, as he drove through the mountains to his destination. Mr. Stephenson did however mention during cross-examination that at 07:00 on July 1, 2013, he googled temperatures for the interior of BC (Merritt and Kamloops) and found that it was already or would be later that day around 28-29°C.

[33] In the Additional Submissions of WCC - Exhibit G, dated December 4, 2013, Ms. Stephenson provides calculations to show that the loading density of the pigs on the WCC trailer on July 1, 2013, were within the AAFC Practice Code requirements. This document sets out that the square footage of the trailer was 1,309 square feet, that the average hog weight on the load was 249.05 pounds and that each hog had 4.848 square feet of space, which is more than the recommended minimum space in the AAFC Practice Code. These calculations are adjusted for both the average weight of the pigs and for the two temperature ranges, such that the AAFC Practice Code would have recommended a minimal 4.44 square feet for the pigs during temperatures from 16-23°C and 4.76 square feet for the pigs during temperatures over 23°C. Based on these calculations, Ms. Stephenson’s conclusion was “that the hogs had ample room for this journey and were not overloaded, as the allegations have stated. There was more than ample room in this hog trailer for the journey.”

#### 4. Analysis of the Evidence and Application of the Law

[34] At the heart of this case is a factual and interpretive dispute as to whether the load in question was overloaded, overcrowded, or as the legislation puts it, “crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein”.

[35] The Tribunal’s role in this case is to determine the validity of the agriculture and agri-food administrative monetary penalty that has been issued under the authority of the AMP regime. It is not to access blame or culpability or make any findings of criminal intent or civil liability. The purpose of the AMP Act is set out in section 3:

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

[36] Section 2 of the AMP Act defines “agri-food act” as follows:

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

[37] Pursuant to section 4 of the AMP Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations to designate violations that may be proceeded with:

4. (1) The Minister may make regulations:

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

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

[38] The Minister of Agriculture and Agri-Food has made one such regulation, the Regulations, which designates as violations several specific provisions of the HA Act and the HA Regulations, as well as the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 to the AMP Regulations, which includes a reference to subsection 140(1) of the HA Regulations.

[39] The courts have examined the AMP regime with a certain degree of scrutiny, especially given that the violations entail absolute liability. In *Doyon v. Attorney General of*

Canada, 2009 FCA 152 (*Doyon*), Létourneau JA, writing on behalf of the Federal Court of Appeal, describes the regime as follows:

[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.*

...

[54] *The main function of a tribunal of first instance is to receive and analyse the evidence. In carrying out this important function, it may reject relevant evidence, but it cannot disregard it, especially if it contradicts other evidence of an essential element of the case: see Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General), 2008 FCA 13; Parks v. Canada (Attorney General), [1998] F.C.J. No. 770 (QL); Canada (Attorney General) v. Renaud, 2007 FCA 328; and Maher v. Canada (Attorney General), 2006 FCA 223. If it decides to reject the evidence, it must explain why: ibidem.*

[40] Moreover, the Federal Court of Appeal, in *Doyon*, points out that the AMP Act imposes a heavy burden on the Agency:

[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.*

[41] Section 19 of the AMP Act reads as follows:

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

[42] In *Doyon*, the Federal Court of Appeal, in order to determine if an applicant had committed a violation of the HA Regulations, was tasked with interpreting the meaning of “no person shall...transport...an animal that by reason of infirmity, illness, injury, fatigue or

any other cause cannot be transported without undue suffering during the expected journey” as that phrase is found in paragraph 138(2)(a) of the HA Regulations. In doing so, it developed an interpretation of that paragraph that parsed out “elements” of a violation that the Agency must prove, in order to uphold a Notice of Violation, seven in the case of an alleged violation of that particular paragraph.

[43] The Tribunal has, in subsequent cases that have come before it, applied the *Doyon* approach of parsing out the required elements of several HA Regulation violations. It has yet to do so for cases involving subsection 140(1) of the HA Regulations, as all four cases that have come before the Tribunal under this provision, came before the rendering of *Doyon* by the Federal Court of Appeal. However, in two cases that have come before the Tribunal after *Doyon*, the Tribunal has parsed out four elements for the Agency to prove to uphold an alleged violation under the related provision in subsection 140(2) of the HA Regulations.

[44] In *0830079 B.C. Ltd. v. Canada (CFIA)*, 2013 CART 34 (*S&S Transport*) the Tribunal set out, at paragraph 4, the four elements that the Agency must establish to sustain as valid a violation under subsection 140(2) of the HA Regulations. For a case examining an alleged violation of subsection 140(1) of the HA Regulations, then, the elements should be similar, only that the elements would focus on the loading aspect of the haul, as opposed to any other parts of the transportation. Therefore, the elements to be proved by the Agency to sustain a violation under subsection 140(1) will be:

- Element #1 - an animal was loaded onto a truck, trailer or compartment on the trailer;
- Element #2 - that the truck, trailer or compartment on the trailer was crowded;
- Element #3 – the crowding was to such an extent as to be likely to cause injury or undue suffering to any animal contained therein; and
- Element #4 - there was a causal link between the loading, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and WCC.

[45] Given the reasoning in *Doyon*, the Tribunal must carefully analyze the evidence offered by the Agency to prove, on a balance of probabilities, all the elements of the violation in coming to its decision.

#### **4.1 Finding concerning Element 1**

[46] Element 1—that an animal was loaded onto a truck, trailer or compartment on the trailer—is not in dispute. WCC, through its employee, Mr. Stephenson, loaded 270 hogs in

Falher, Alberta on July 1, 2013, and drove them to Langley, BC for slaughter, which occurred on July 2, 2013, at around 07:00.

#### **4.2 Finding concerning Element 2**

[47] Element 2—that the truck, trailer or compartment on the trailer was crowded—is in dispute and is at the crux of this matter. First, it is important to note that that subsection 140(1) of the HA Regulations does not prohibit “overcrowding”, or “overloading”, but rather crowding “to such an extent as to be likely to cause injury or undue suffering to any animal therein”.

[48] The Tribunal has carefully reviewed its own jurisprudence in the four cases where a violation of subsection 140(1) of the HA Regulations, and the seven cases where a violation of subsection 140(2) of the HA Regulations, have been the basis of an alleged AMP violation. The Tribunal is also mindful of the guidance offered in interpreting the HA Regulations set out by the Federal Court of Appeal in *Doyon, Canada (AG) v. Porcherie des Cèdres Inc.*, 2005 FCA 59 (*Porcherie des Cèdres*) and most recently in *Canada (ACG) v. Stanford*, 2014 FCA 234 (*Stanford*).

[49] In *Stanford*, Dawson JA comments on how the exercise of statutory interpretation is to be done, again in the context of determining the appropriate interpretation of the AMP Act and AMP Regulations:

*[41] The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court in Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, 1998 CanLII 837 at paragraph 21:*

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

...

*[44] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted “no matter how plain the disposition may seem upon initial reading” (ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context, including the apparent purpose, the interpreting court aims to ascertain legislative intent, “[t]he most significant element of this analysis” (R. v. Monney, [1999] 1 S.C.R. 652, 1999 CanLII 678 at paragraph 26).*

[50] Therefore, in keeping with an interpretation where the alleged violation is “read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme

of the Act, the object of the Act, and the intention of Parliament”, how is one to interpret the violation under subsection 140(1) of the HA Regulations?

[51] While the scheme and object of the HA Act and HA Regulations is not explicitly stated in the legislation, references to the importance of regulating the humane transport of animals within the Canadian agriculture and food system surfaces in section 64(1)(i) of the HA Act, which states that:

*The Governor in Council may make regulations for the purpose of protecting human and animal health through the control or elimination of diseases and toxic substances and generally for carrying out the purposes and provisions of this Act, including regulations ... (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.*

[52] Again, Part XII of the HA Regulations, in which the standard set out in subsection 140(1) is found, is entitled “Transportation of Animals”. Given their content, the HA Regulations, in this Part, must also be interpreted as establishing standards for the protection animal health while those animals are in commercial transport from a producer’s barn to a processor’s slaughter facilities.

[53] The animal health protection provisions of the HA Act and HA Regulations do not, therefore, exist in a vacuum. The context of the legislation is that animal health is to be protected within the agricultural and agri-food production systems that currently exist in Canada.

[54] While Parliament has enacted a specific provision to protect animal health for animals arising from loading so that they might be protected from the likelihood or actual injury or undue suffering of animals on a load, this provision must be interpreted so as to maintain a balance between the regular commercial activities of actors in agricultural and agri-food production systems and the protection of the animals in those systems. Thus, the actual words used in subsection 140(1) in defining a violation must to be read with the context of this balancing in mind, given the scheme and object of the HA Act and HA Regulations.

[55] In assessing the evidence to prove Element 2, the Tribunal must interpret the words “crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein” in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[56] By necessity, the loading and transportation of animals will require that they be forced or compassed into a confined space. The agriculture and agri-food industries, along with regulators have recognized that such actions can expose animals to a likelihood or actual injury or undue suffering. Accordingly, recommended codes of practice have been developed, which set out general recommended loading densities and how they will vary, depending on size of animals transported and ambient weather conditions. Proper loading densities contribute to maintaining the welfare of the animals transported and to the agriculture and agri-food industries' ability to operate in a variety of weather conditions that Canada presents on a year-round basis. When loading densities will be exceeded and this puts the animals loaded and transported at risk and when such a risk leads or is likely to lead to injury or undue suffering of the animals, the operator will be exposed to liability under the HA Regulations.

[57] Given this contextual interpretation concerning violations of subsection 140(1) of the HA Regulations, the Tribunal must determine if the WCC trailer on July 1, 2013, was loaded in such a way as to be "crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein." The Tribunal finds that it was. On the day in question, the evidence points, on the balance of probabilities, that there should have been fewer pigs loaded than was the case. The decision on July 1, 2013, by Mr. Stephenson to load 270 pigs, instead of his usual 280 hogs, or even the mutually agreed upon maximum trailer carrying limit of 288 market hogs, had unfortunate ramifications on the health of certain pigs on the load as the transportation of the load progressed.

[58] The Tribunal has considered the recommended practice codes setting out criteria for appropriate loading densities and the evidence from the parties as to the actual loading densities on the day in question. Three methods were presented for establishing appropriate load densities in this case—the first was the real-time-at-loading calculation by Mr. Stephenson of total number of animals for the load given the weather conditions; the second was the real-time-at-unloading and subsequent application of the Transportation Code, Annex 2, animals per compartment calculation, completed by Dr. Brassel; and the third was the after-the-fact, space-per-animal calculation using the AAFC Practice Code's, Table 6, completed by Ms. Stephenson.

[59] The results of each method yield different appropriate loading densities. Using Mr. Stephenson real-time-at-loading calculation, the appropriate load density would be 90% of his usual loading density of 280 or 252 hogs, given a temperature of 21-22°C. Using the real-time-at-unloading and subsequent application of the Transportation Code, Annex 2, animals per compartment calculation, completed by Dr. Brassel, who based his calculations on the fact that the pigs had travelled through weather well in excess of 23°C, and thus, an appropriate loading density should have been 75% of a regular load, he concluded that every compartment on the WCC load exceeded the appropriate loading density and that the entire load should have not exceeded 232 hogs. Using the after-the-fact space-per-animal calculation based on the AAFC Practice Code's set out in its Table 6, Ms. Stephenson was convinced that, even given the average size of pig, and a temperature above 23°C, each pig on average had more than the required space to meet the loading density requirements set out in the general "non standard vehicle allowance per animal".



She did not comment how that Code's comment to "avoid transporting pigs at temperatures above 30°C" might have affected her calculations concerning the welfare of the pigs loaded onto the WCC trailer on July 1, 2013. Another calculation for determining the appropriate density for the load might be 90% of the maximum capacity of the WCC trailer completed by mutual agreement of Mr. Stephenson and Dr. Brassel, set out as Tab 5 of the Agency Report, on July 2, 2013. If one applies a 10% reduction due to higher temperatures at loading using this metric, then the appropriate density would have been 90% of 288 or 259 hogs.

[60] The Tribunal has commented in other cases that have come before it under the related subsection 140(2) of the HA Regulations that recommended densities, set out in codes of practice, are merely guidelines and are not in themselves determinative of whether a violation has been committed (*F. Ménard Inc. v. Canada (CFIA)*, (RTA #60126) at page 4; and *Finley Transport Ltd v. Canada (CFIA)*, 2013 CART 42 (*Finley Transport*). At paragraph 50 of *Finley Transport*, the Tribunal held that "Overcrowding remains a question of fact, to which various codes or standards may be referred to in support, but which ultimately becomes a determination based on the particular circumstances". The Tribunal continues to adopt this position.

[61] Given all the particular circumstances of the day and load in question, the Tribunal finds that at loading the WCC was "crowded". By his own admission, Mr. Stephenson said that the day was warm at 21-22°C, and that he googled temperatures in Merritt and Kamloops and they were at or were going to be 28-29°C. On this basis, Mr. Stephenson, himself, decided he would load 10% less hogs. He told the Tribunal that 280 hogs was his regular load and the evidence showed he made this same trip frequently. A 10% reduction would have required Mr. Stephenson to load only 252 hogs that morning. A 25% reduction, if he thought the temperatures would exceed 23°C, would have required him to load only 210 hogs. But instead, he loaded 270 hogs, leaving 10 or 11 behind. Dr. Brassel's calculations showed that similar reduced numbers should have been loaded. Therefore, the Tribunal does not find that Ms. Stephenson's calculations alone showing that, on a strict mathematical basis, the recommended average space per animal densities were not exceeded is sufficiently persuasive to disprove the fact that the load was "crowded" and in fact "overcrowded", given all the other evidence.

### **4.3 Finding Concerning Element 3**

[62] The Tribunal finds that Element 3—the crowding was to such an extent as to be likely to cause injury or undue suffering to any animal contained therein—has also been proved, on the balance of probabilities.

[63] The Federal Court of Appeal in *Porcherie des Cèdres*, at paragraph 26, (albeit in the context of paragraph 138(2)(a) of the HA Regulations violations) has considered the meaning of the word "undue" and in relation to "undue suffering". There the Court held "undue" to mean "undeserved", "unwarranted", "unjustified" or "unmerited" suffering.

Moreover, the Federal Court of Appeal later cited this interpretation with approval in its *Doyon* decision, at paragraph 30.

[64] So, given the context of the HA Regulations, as regulations to protect animal health within existing agricultural production systems, the Tribunal finds that given the elevated temperatures during transport, the crowded conditions on the trailer and the evidence from the necropsy report that the cause of death of the pigs examined was “transport death”, on the balance of probabilities, the crowding was to such an extent as to cause injury or undue suffering to the pigs on the load.

#### ***4.4 Finding concerning Element 4***

[65] Finally, the Tribunal also finds that Element 4—that there was a causal link between the loading, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and WCC—has been proved by the Agency, on the balance of probabilities. It is noteworthy that the Agency chose to serve WCC with a Notice of Violation under subsection 140(1) of the HA Regulations, as it relates to the loading of the pigs, rather than under subsection 140(2) of the HA Regulations, as it relates to the transportation of the pigs, as Mr. Stephenson carried out both. However, the evidence in this case showed a causal link between the loading, the crowding (which exceeded what it should have been given prevailing and then progressively hotter conditions encountered during transport) and the likelihood of injury or undue suffering while under the control of WCC and its employees.

[66] Ms. Stephenson presented a theory, in closing argument, that this case might be totally a case of mistaken identity and that the dead pigs found at Britco Pork had not come off the WCC trailer but another trailer unloading at approximately the same time as the WCC trailer. While such a theory, if proven, might well have exonerated WCC, there was scant, if any, evidence to support it. Therefore, the Tribunal finds that the causal link required by Element 4 has been proven, on the balance of probabilities.

[67] The Tribunal is cognizant that Canadian meat industry participants are required to pursue their activities year-round and in all types of Canadian weather. When individuals and corporations care for food animals, from the point of loading to the point of slaughter, they will expose their animals to all kinds of conditions and that they do, in most circumstances, succeed in providing care for them which will not expose them to liability under the HA Regulations. Unfortunately, this was one of those occasions.

### **5. Defences Available Under the Law**

[68] The system of administrative monetary penalties set out by Parliament is very strict in its application. The AMP Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the AMP Act states 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.*

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

[69] When an administrative monetary penalty provision has been enacted for a particular violation, as is the case for subsection 140(1) of the HA Regulations, WCC has little room to mount a defence. In this case, section 18 excludes practically any excuse that WCC may raise, including Mr. Stephenson's honest impression that he had not overcrowded the WCC trailer and that he did everything he could have done to prevent the pigs from overheating in the extreme heat he encountered en route to Langley from Falher on July 1-2, 2013. Although his actions, at least while en route, were a proper exercise of due diligence, they do not constitute a permitted defence under the AMP Act. Given Parliament's clear statement on the issue, the Tribunal accepts that such arguments by WCC and its representative, Ms. Stephenson, are not to be valid defences under section 18.

[70] Consequently, the Tribunal concludes that the Agency has, on a balance of probabilities, proved all the essential elements of the violation and, therefore, the Notice of Violation with Penalty is upheld.

## **6. Conclusions**

[71] The only issue that remains to be determined by the Tribunal is whether the Agency has proven that the penalty of \$6,000 is justified under the AMP Act and the AMP Regulations. The Tribunal finds that this amount is justified under the AMP Act and the AMP Regulations for the following reasons.

[72] Calculation of the appropriate penalty begins with a determination of the status of the violation being minor, serious or very serious, as per Schedule 1 to the AMP Regulations. A violation of subsection 140(1) of the HA Regulations belongs to the category of serious violations. Specifically, the violation in question set out in the HA Regulations, namely, "Overload a conveyance or cause a conveyance to be overloaded", is called a serious violation in Item 244, Division 2, Part 1, Schedule 1 to the AMP Regulations. On the day on which the violation was committed, section 5 of the AMP Regulations stated that a serious violation carried a penalty of \$6,000. In the present case, the base amount of \$6,000 can be either increased or decreased on the basis of

three factors: number of prior violations, degree of intentionality of the violator, and harm done. Values from 0 to 5 are assessed by the Agency for each of the three factors and then totalled to determine the final amount of the penalty. If the total is between 6 to 10, the base penalty amount is not adjusted. If the total is below 6, the base penalty amount is decreased; if the total is above 10, the amount is increased.

### **6.1 *Prior Violations***

[73] According to Part 1 of Schedule 3 to the AMP Regulations, if the perpetrator of the alleged violation committed no violations in the five years preceding, the day on which the violation being assessed was committed, a gravity value of 0 is assessed. The Tribunal agrees with the Agency's assessment of 0 for this factor, as it has presented no evidence of any prior violations by WCC.

### **6.2 *Intent or Negligence***

[74] According to Part 2 of Schedule 3 to the AMP Regulations, the Agency must assess whether the violation was committed with intent or negligence. The Agency may assess a value of 0, which is to correspond to a situation where "[t]he violation subject to the assessment is committed without intent or negligence" (Item 1). A value of 0 may also be assessed where "[t]he person who commits the violation subject to the assessment makes a voluntary disclosure of the violation and takes necessary steps to prevent its re-occurrence" (Item 2). A value of 3 is assessed where "[t]he violation subject to the assessment is committed through a negligent act" (Item 3); and a value of 5 is assessed where "[t]he violation subject to the assessment is committed through an intentional act" (Item 4). The Agency determined that the violation was committed through a negligent act (Agency Report, page 17) stating "The company and driver must take steps to calculate the loading density for each trip (based on the required factors of weather, space and hog weight) rather than rely on historical data to assume what the acceptable number of hogs will be for that journey".

[75] While the above assessment by the Agency may appear harsh, given the many conditions that must be taken into consideration by a driver when loading his load, it does highlight the fact that the driver admitted that he should reduce his load by 10% on the day in question and then he did not do so. In this, he was negligent. Had he loaded only 252 pigs rather than 270, the load would have had at least one less pig in each compartment, which might have resulted in significantly less suffering and death for the rest of pigs that were loaded and transported that day. While evidence is clear that once en route, Mr. Stephenson did everything in his power to avoid harm coming to the pigs, it was his choice to load 270 pigs that was negligent.

[76] The Tribunal, therefore, agrees with the Agency's assessment of a value of 3.

### **6.3 Harm**

[77] On the third factor, the Agency assessed a gravity value of 5, because there was serious harm to animal health. As stated above, WCC was responsible to ensure that their trailer was not crowded to such an extent as to be likely to cause injury or undue suffering to animals loaded therein. The Tribunal has found, as fact, that it failed in this regard. According to Item 3 of Part 3 of Schedule 3 (“Harm”), a gravity value of 5 is assessed when “[t]he violation subject to the assessment causes (a) serious or widespread harm to animal or plant health or the environment”. The Tribunal agrees with the Agency that this violation caused serious harm to animal health on July 1-2, 2013.

### **6.4 Penalty Amount, Order and Possibility of Removal Order in Five Years**

[78] The Tribunal, therefore, on the basis of the evidence presented, finds that a fair total gravity value for the penalty adjustment in this case is 8, as proposed by the Agency. Because the Tribunal agrees with the Agency’s assessment for the total gravity value for the present violation at 8, Schedule 2 to the AMP Regulations directs that the base penalty amount not be reduced or increased. The correct assessment of the penalty amount is \$6,000 as stated in the Notice of Violation.

[79] Consequently, the Tribunal, by order, determines that WCC committed the violation and orders it to pay the Agency a monetary penalty of \$6,000 within thirty (30) days after this decision is served.

[80] The Tribunal wishes to inform WCC and Mr. and Ms. Stephenson that this violation is not a criminal offence. The Tribunal thanks the Stephensons for the character references they provided to the Tribunal. As this matter is an administrative matter, it should not be construed as in any way impugning their character or their good name in their community, or the integrity of their business operations. Moreover, after five (5) years, WCC will be entitled to apply to the Minister to have the violation removed from its record, in accordance with subsection 23(1) of the AMP Act, which provides as follows:

*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, Ontario, this 17<sup>th</sup> day of November, 2014.

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Donald Buckingham, Chairperson