

**AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE
MONETARY PENALTIES ACT**

DECISION

In the matter of an application for a review of the facts of a violation of provision 138(2)(a) of the *Health of Animals Regulations*, alleged by the Respondent, and requested by the Applicant pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

Ferme Lancjeu Inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

TRIBUNAL MEMBER P. ANNIS

The case of Ferme Lancjeu Inc. was heard in conjunction with the case of Mr. Léo Parent. For this reason, the decision in Léo Parent will apply *mutatis mutandis* to this case.

Decision

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

REASONS

The Applicant requested an oral hearing pursuant to subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*. The oral hearing was held in Québec City on October 18, 2005.

The Applicant made his own submissions.

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

The Notice of Violation dated July 7, 2005, alleges that the Applicant, on the 7th day of February, 2005, at St-Anselme, in the Province of Québec, committed a violation, namely: “A fait charger et transporter un bovin par véhicule moteur, qui pour des raisons d’infirmité, de maladie, de blessure, de fatigue, ou pour toute autre cause, ne pouvait pas être transporté sans souffrances indues au cours du voyages prévu,” contrary to provision 138(2)(a) of the *Health of Animals Regulations* which states as follows:

138(2) Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal

(a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey.

In this context, “undue” has been defined by the Federal Court of Appeal in *Procureur général du Canada c. Porcherie des Cèdres Inc.*, [2005] F.C.A. 59, to mean “unjustified” or “unwarranted”. The Court held that the loading and transporting of a suffering animal would cause the animal unwarranted or unjustified suffering, and hence would be contrary to the purpose of the *Regulations*.

Subsequently, in *Canadian Food Inspection Agency v. Samson*, [2005] F.C.A. 235, the Court summarized its position as follows:

What the provision contemplates is that no animal be transported where having regard to its condition, undue suffering will be caused by the projected transport. Put another way, wounded animals should not be subjected to greater pain by being transported. So understood, any further suffering resulting from the transport is undue. This reading is in harmony with the enabling legislation which has as an objective the promotion of the humane treatment of animals.

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The Tribunal is of the view that the Court did not intend to eliminate a threshold to

determine what constitutes undue suffering, but intended to broaden the scope of situations where suffering is considered undue.

This conclusion is supported by the fact that the wording of the paragraph makes it evident that not every “infirmity, illness, injury, fatigue or any other cause” constitutes suffering worthy of a violation. Had this been the case, there would have been no need to use the word “undue”.

It is further bolstered by the fact that this type of violation has been designated under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* as a “serious” violation.

Also, the likely consequence of concluding that an animal would be caused undue suffering would be severe. The animal would, in most cases, have to be put down.

Finally, this conclusion is consistent with the position taken by the Canadian Agri-Food Research Council in its Guide to Handling Livestock at Risk set out on page 15 of its publication titled “*Transportation Code of Practice for the Care and Handling of Farm Animals*”, [Canadian Agri-Food Research Council : 2001], which document is frequently relied upon by the Respondent in establishing that a violation was committed.

Whether an animal was suffering, and could not, then, be loaded or transported without undue suffering during the expected journey, is a question of fact to be determined in each case by the condition of the animal at the time and the circumstances of the expected journey.

Facts

The issue in these cases is not whether the animal in question, (a Holstein cow belonging to the Applicant La Ferme Lancjeu Inc. that had been transported by the Applicant Transport Léo Parent Inc.) when examined on February 8th, 2005, was suffering unduly as that term is used in the *Regulations*. The Applicants in both appeals take no issue with that conclusion. Their submission is that the animal’s suffering was caused by events that occurred after the animal was unloaded at the Rolland Pouliot abattoir at St-Henri de Lévis.

The Agency called Dr. Jeanine Gauthier, a veterinarian with the Ministry of Agriculture, Fisheries and Food of the province of Quebec, who was assigned to the abattoir Pouliot and was working there on Monday, February 8th, 2005. She testified that around 10 a.m. on the 8th, she found the cow in question in a trailer bearing the sign of the abattoir.

She testified this was the first time she had ever encountered animals being penned in a trailer of this nature, as opposed to them being in the normal pens regularly used by the abattoir.

She testified that seven or eight cows walked off the trailer in the unloading process in a normal fashion. Two remained, both of which were lying down. When the cows were approached, one of them got up and exited under its own power. The remaining cow was that belonging to the Applicant, La Ferme Lancjeu Inc., which she subsequently identified and noted in her report later filed with the Tribunal.

Dr. Gauthier testified that the animal, when found on February 8th, 2005, showed signs of being in extreme distress. She described its state as moribund, barely being able to move. It attempted to lift its head, but could not and at one point let out a loud cry indicative of being in a situation of great suffering. Its rectal temperature was determined to be 37 degrees, a degree and a half below the normal temperature for a cow. This further confirmed Dr. Gauthier's conclusion that the animal was near death. In the circumstances, she ordered it to be euthanised immediately to limit further suffering.

Her examination disclosed a number of infirmities which she concluded were the cause of the animal's suffering. In the first place she described the cow as being in a state of extreme emaciation. She observed an obvious loss of body mass and muscle, with the ribs of the animal visible due to its loss of weight. Secondly, Dr. Gauthier found a large swelling of approximately 10 inches in the jaw area of the cow. The swelling had opened and the puss was seen to be oozing from it. Dr. Gauthier concluded that the condition of the animal's jaw was painful and would have contributed to the unwillingness of the animal to eat and therefore its emaciated state. In addition, Dr. Gauthier observed several areas on the animal where there were skin lesions and an absence of fur. These were on its back and sides, in addition to a large area determined to be about 12 inches in size on the rump. The state of the animal's emaciation and the inflammation in the area of the jaw clearly pre-existed the animal's transportation that occurred on February 7th, 2005. Dr. Gauthier was also of the view that the skin lesions would have pre-existed, although there was some question raised as to whether skin lesions might have been the result of events that occurred after the unloading of the animals at the abattoir. Unfortunately, there were no photographs available which might have helped the Tribunal better understand the condition of the animal when viewed by Dr. Gauthier on February 8th, 2005.

Questions were put to Dr. Gauthier with respect to whether the impact of the infirmities were the cause of the animal's extreme distress. She indicated the skin lesions were unlikely to be a factor in the animals suffering, but that the state of extreme emaciation and the inflammation of the jaw would have. She was of the opinion that these, in conjunction with the transportation of the animal and the considerable delay between its unloading and being examined by her, would have been the cause of the animal's suffering.

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While the Tribunal is prepared to accept evidence of Dr. Gauthier, regarding the animal's condition the difficulty that it faces in this matter is that the evidence before it would appear to support a conclusion that the cow, when unloaded at the abattoir, did not appear to be manifesting any signs of being in undue distress, despite its infirmities.

To begin with, Mr. Jean-Luc Bilodeau, the owner of Ferme Lancjeu Inc., testified that just prior to transportation, apart from being smaller than a normal cow and having a chronic inflammation with its jaw, the animal was in normal condition and was not showing any signs of distress that would have made it inapt for transportation. Mr. Bilodeau is an experienced farmer, apparently the 4th generation of his family to be farmers. In addition, he testified that he was part of a group of farmers who use preventative medicine and other measures to maintain the health of their animals. As part of this program, veterinarians attended at his farm on a monthly basis to view his animals and to provide advice on preventative measures that could be taken to maintain their health.

Mr. Bilodeau provided a letter dated September 8, 2005, from his veterinarian Dr. Josée Bélanger. Dr. Bélanger confirmed she had examined the animal in December 2004 and having observed the chronic inflammation of the cow's jaw, advised that the animal should be kept until it could produce the calf that it was carrying. Thereafter, she recommended that the animal be eliminated from the herd given its smaller size. This recommendation apparently was made on a visit to the Applicant's farm on January 11, 2005. There were no comments regarding the animal's state of distress or whether it was apt for transportation.

Mr. Bilodeau further testified that in light of Dr. Bélanger's advice he chose the animal to be slaughtered to supply meat for his own family. As such, he obviously concluded the animal was fit for consumption. Mr. Bilodeau testified that the animal was not showing any sign of abnormality (apart from the condition noted not including the skin lesions), that would have suggested that the animal could not be transported to the abattoir, which was only 10 kilometers from his farm. He contacted the abattoir Pouliot and was advised that the animal could be slaughtered on February 8th, 2005. Accordingly, he arranged with Léo Parent, an experienced animal transporter, to transport the animal to the Pouliot abattoir on the afternoon of February 7th, 2005.

Léo Parent had been transporting animals for some 17 years and stated that he was fully aware of the requirements for transporting animals. Mr. Parent indicated that the entire trip would not have taken more than one half hour in total. He testified that the cow in question appeared perfectly normal in its comportment as it entered and exited his trailer. Dr. Gauthier also testified that she had heard from an unnamed person at the abattoir that

the animal had exited without assistance. There is a requirement to report to her an animal that is not ambulatory. In addition, the abattoir moved the cow into one of its trailers and it is hard to imagine that it would have done so, if the animal was not ambulatory.

In addition, Mr. Parent testified that on his trailer he separated Mr. Bilodeau's cow, which he estimated to weigh approximately 1000 to 1100 pounds, from the three other cows that he had picked up at another farm, which were in the 1500 to 1600 pound range. He indicated that this was always his practice when transporting animals of different sizes. More importantly, Mr. Parent stated that when he unloaded Mr. Bilodeau's cow, he placed it in one of the abattoir's regular pens containing watering facilities and separated again from the other animals. Neither he nor Mr. Bilodeau were aware until some time later, that someone at the abattoir would place his cow along with eight or nine other cows in a trailer without separation and without watering facilities. Mr. Parent indicated that he had never heard of animals being maintained in a trailer by the abattoir before and could not provide any explanation as to why the animals were penned in this fashion. He testified that when he left the abattoir on February 7th, 2005, there were very few animals present.

Both Mr. Bilodeau and Mr. Parent testified that they felt that the cow in question should not have been penned in the trailer for an extended period, together with larger animals and without the usual watering and other facilities. Mr. Bilodeau stated that the trailer is designed for the animals in movement and it was not the same as a pen. In addition, he indicated that when the animals were maintained without separation, they would be moving around and around and that this would have caused a situation of distress for his smaller animal. He pointed out that the Agency information bulletin, which was included in documents filed by the Agency in reference to milk cows, recommended that for purposes of transportation, animals of substantively different sizes be kept apart. He argued that these same rules would apply to penned animals. There was no evidence available as to whether the animal had been given water or fed during the nineteen hour period between its unloading and viewing by Dr. Gauthier. The trailer however did not have watering facilities that are usually provided in normal holding pens. Dr. Gauthier did not offer any opinion to whether in fact the animal had been without water for up to 19 hours and that this might have contributed to the animal's distress.

Analysis

The Tribunal concludes that there is insufficient evidence to conclude that the cow was suffering unduly either before or during the "expected journey" as that term is used in paragraph 138(2)(a) of the *Regulations*. The Agency argues that the animal was not apt

for transportation in accordance with the *Regulations* on evidence of undue suffering

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observed some 19 hours after the discharging of the cow at the abattoir. While the Tribunal (and Applicants) agree that when observed by Dr. Gauthier on February 8th, 2005, the cow was suffering unduly, the evidence before the Tribunal is that the animal appeared to be acting normally both before and after transportation.

The difficulty in this case is that the treatment of the animals after unloading appears very likely to have caused the animal to begin suffering unduly. The Tribunal considers the state of undue suffering, as defined in the *Regulations*, to require some manifestation of comportment by the animal which forms a basis that the animal is in distress and that this distress meet a certain threshold to make it undue. It is noted that another animal, not owned or delivered by the Applicants was also slow to leave the trailer, and it may also have suffered the effects of its extremely unusual penning.

In support of this conclusion the Tribunal also notes that the Agency's Information bulletin filed as part of its report with respect to the transportation of animals in relation to lactating cows recommends that "Dairy cattle of substantially different sizes should be segregated".

The Agency's lawyer submitted that the state of extreme emaciation of the animal in conjunction with the severe lesion on its jaw, rendered it inapt for transportation. However, the Tribunal is of the view that a state of emaciation or other infirmity unless accompanied by some manifestation of undue distress or suffering in the animal, as described by observations or other clinical information, is not in itself sufficient to lead to a conclusion that an animal suffered unduly. This manifestation was observed some 19 hours after unloading at which time there was an absence of evidence of suffering and when intervening factors could very well have played a role in causing the animal to suffer unduly. The longer the period between unloading and manifestation of suffering, the more tenuous the causal link with transportation and the animal's pre-existing condition.

This said, the Tribunal is not suggesting by this decision that recourse to observations of an animal's condition taken some time after unloading are insufficient to conclude that a violation of the *Regulations* occurred. Nor does evidence that an animal was ambulatory and was seemingly normal upon unloading, necessarily preclude a finding that a later manifestation of undue suffering does not demonstrate a violation of paragraph 138(2)(a) of the *Regulations* particularly when there are no other intervening events which suggest they may have caused the animal's undue suffering. As mentioned, the difficulty in this case is that there is a real likelihood that intervening events caused the animal to ultimately suffer unduly from its infirmities.

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The Agency also argued, and with some basis for its position, that the producers and transporters should be held accountable under paragraph 138(2)(a) of the *Regulations*

when suffering occurs in the period after delivery and before slaughter, when that delay is anticipated by the parties prior to transportation of the animal. This may be the case where intervening events after unloading, and that are unrelated to the delay itself, contribute to cause the animal to suffer unduly. There may be other provisions in the *Regulations* that would be applicable, in those circumstances, but the relevant time frame for violations of paragraph 138(2)(a) is the expected journey.

In this case, the Applicants established that the cow in question was not manifesting undue suffering upon unloading while demonstrating that the type of penning in the subsequent 19 hour period, appeared inadequate and may likely have caused the animal to suffer unduly after the expected journey. They are not in a position to demonstrate more because they only learned about the violation well after February 8, 2005. The Agency, on the other hand, was in a position to investigate and report on the animal's treatment in the intervening period.

The evidence of the Applicants is that very unusual events took place over a considerable period of time after the unloading of the cow which could have caused the animal to begin to suffer unduly. This evidence has not been disproved. Accordingly, the Tribunal concludes that the Respondent had not established, on a balance of probabilities, that the violation was committed.

Dated at Ottawa this 1st day of November, 2005.

Peter Annis - Member