Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *E. Grof Livestock Ltd. v. Canada (Canadian Food Inspection Agency),* 2014 CART 11

Date: 20140328
Docket: CART/CRAC-1687

BETWEEN:

E. Grof Livestock Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

BEFORE: **Member Bruce La Rochelle**

WITH: **Donald R. Good, counsel for the Applicant; and**
Melanie Toolsie, counsel for the Agency

In the matter of an application 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 paragraph 138(2)(a)of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines, on the balance of probabilities, that the applicant committed the violation, as set out in Notice of Violation 1213ON2616 dated July 2, 2012, and is liable to pay the respondent, the Canadian Food Inspection Agency, a monetary penalty of $6,600 within thirty (30) days after the day on which this decision is served.

The hearing was held in Peterborough, Ontario,
on November 1, 2013,
with additional written submissions received on December 2 and December 9, 2013.

REASONS

Overview of Notice of Violation

[2] This case concerns the transportation of a Holstein cow for slaughter, in circumstances where it was later discovered that she had a severely infected leg. The respondent, the Canadian Food Inspection Agency (Agency), alleges, in Notice of Violation 1213ON2616, that on July 2, 2012, at Lindsay, Ontario, the applicant, E. Grof Livestock Ltd. (E. Grof Livestock) committed a violation, namely (quoted *verbatim*) "Load, transport or cause to be loaded or transported an animal that cannot be transported without suffering: to wit-Holstein cow bearing ear tag 009 639 949 delivered to St. Ann's Foods." This is alleged to be a violation contrary to paragraph 138(2)(*a*) of the *Health of Animals Regulations* (C.R.C., c. 296), the relevant portions of which read 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...*

[3] In the Notice of Violation, the alleged violation is categorized as a serious violation, for which a penalty of $6,000 is imposed. Such categorization is in accordance with the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-1870. Under Schedule 1, Part 1, Division 2, Item 233 of the AMP Regulations, the violation is described as "Load, transport or cause to be loaded or transported an animal that cannot be transported without suffering", and is categorized as "serious". The fact that the short form description of the violation refers to "suffering", while the actual violation refers to "undue suffering" does not change the elements of the violation, since the Agency would appear to be compelled to use the short form description, irrespective of issues of imprecision, further to section 3 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, which provides as follows:

> ***3.*** *The short-form descriptions that are set out in column 2 of Schedule 1 are established to be used in notices of violations in respect of violations of the corresponding provisions that are set out in column 1 of Schedule 1.*

[4] The $6,000 penalty amount is referenced to subsection 5(3) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, which provides, in part, as follows:

> ***5.*** *(3) The amount of the penalty in respect of a violation that is committed by a person in the course of business or in order to obtain a financial benefit is $6,000 for a serious violation…*

In accordance with section 6 and Schedule 3 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, the penalty amount may be adjusted upwards or downwards by up to 50%, depending on the assessment of gravity. In the current case, the gravity assessment did not result in an adjustment to the penalty amount by the Agency. Should the Tribunal find that the Agency has established the elements of the violation, on the balance of probabilities, the Tribunal must then determine whether it agrees with the Agency's assessment of the gravity value.

[5] The Tribunal must first determine whether the Agency has established, on the balance of probabilities, all the elements required to support the Notice of Violation, more specifically:

(i) Whether E. Grof Livestock loaded or transported or caused to be loaded or transported the cow in question and;

(ii) Whether the cow could not be transported without undue suffering during the expected journey, by reason of the state of her leg.

Procedural History

[6] Notice of Violation 1213ON2616, alleging the violation previously described, was issued on December 10, 2012, under signature of Michael Cole, Investigation Specialist of the Agency. The Notice of Violation appears to have been served on E. Grof Livestock at or around December 10, 2012, since on January 10, 2013, the Tribunal received, via fax, a Request for Review from E. Grof Livestock, via a word processed and unsigned memo from Jeff Groff, the President of E. Grof Livestock. No reasons were specified in the Request for Review. Through inquiries, the Tribunal determined that E. Grof Livestock wished to have an oral hearing, in English.

[7] On January 30, 2013, in response to the Tribunal forwarding a copy of the Request for Review to the Agency on January 17, 2013, the Agency filed its Case Report (Agency Report) with the Tribunal. No further submissions were filed by E. Grof Livestock and the Agency, prior to the hearing.

[8] The hearing was held in Peterborough, Ontario, on November 1, 2013, with Tribunal member Dr. Bruce La Rochelle presiding. The Agency called two witnesses at the hearing: Dr. Lori Dykeman, a Veterinary Inspector with the Agency and Mr. Michael Cole, an investigator with the Agency. E. Grof Livestock called Jason Grof, the transporter of the animal as a witness. Jason Grof is also a director and the treasurer of E. Grof Livestock. At

the hearing, Dr. La Rochelle requested further information and submissions from the parties, which he formalized in a letter dated November 5, 2013, sent to counsel for both parties via email and regular mail. In response and further to the date established by Dr. La Rochelle for such submissions, on December 2, 2013, both E. Grof Livestock and the Agency made additional written submissions. On December 9, 2013, the Agency made further written submissions, pursuant to a right of rebuttal accorded to the Agency by Dr. La Rochelle at the time of his written request for further submissions.

Evidence and Arguments

[9] The evidence and arguments that are therefore before the Tribunal are as follows:

(i) The Agency Report of January 30, 2013, and the submissions contained therein;

(ii) The testimony of Dr. Lori Dykeman at the hearing of November 1, 2013;

(iii) The testimony of Mr. Michael Cole at the hearing of November 1, 2013;

(iv) The testimony of Mr. Jason Grof at the hearing of November 1, 2013;

(v) The submissions of Ms. Toolsie, on behalf of the Agency, at the hearing of November 1, 2013;

(vi) The submissions of Mr. Good, on behalf of E. Grof Livestock, at the hearing of November 1, 2013;

(vii) Further written submissions of December 2, 2013, by Mr. Good on behalf of E. Grof Livestock ("E. Grof Livestock Submissions - December 2");

(viii) A photocopy of an unsworn statement by John Megans livestock dealer, contained in the E. Grof Livestock Submissions – December 2;

(ix) Further written submissions of December 2, 2013, by Ms. Toolsie on behalf of the Agency ("Agency Submissions – December 2");

(x) Further written submissions of December 9, 2013 by Ms. Toolsie on behalf of the Agency ("Agency Submissions – December 9").

Facts Not In Dispute

[10] The facts that are not in dispute are as follows:

(a) During the early morning of July 3, 2012, the cow in question, bearing ear tag 009639949 was transported by E. Grof Livestock in Lindsay, Ontario, to St. Ann's Foods Inc., a slaughterhouse located in St. Ann's, Ontario. The cow was part of a shipment of 38 cull beef and dairy cows. The transport arrived at the plant between 5:30 and 5:45 a.m. The duration of the transport was approximately 2.5 hours (Report, Case Summary, page 8; uncontested by E. Grof Livestock).

(b) The cow had been a dairy cow, belonging to a farming operation in Caledon Ontario, and was in milk production until June 12, 2012, at which time it was sold (Report, Tab 7).

(c) The load was inspected by veterinarian Lori Dykeman (Dr. Dykeman) at approximately 6:45 a.m. Dr. Dykeman observed four dairy cows in a separate transport compartment, all of whom exhibited lameness to varying degrees (Testimony of Dr. Dykeman).

(d) The cow in question was observed by Dr. Dykeman during the course of her observations and lameness assessments of the group of four. The cow in question exhibited right forelimb lameness, which Dr. Dykeman initially assessed as lameness Class 2. At the time of this assessment, Dr. Dykeman observed a large (10 cm x 10 cm) ulcer on the knee of this limb, which was draining and crusted with drained fluid. After the cow was offloaded from the trailer to the holding area, Dr. Dykeman increased the lameness assessment to lameness, Class 4 (Testimony of Dr. Dykeman).

(e) Dr. Dykeman photographed the animal prior to slaughter and also photographed the affected limb subsequent to slaughter (Report, Tab 1; testimony of Dr. Dykeman).

Facts in Dispute

[11] The primary fact in dispute relates to the state of the cow in question. At the outset of the hearing, counsel for E. Grof Livestock and for the Agency agreed that the issue to be addressed related to the nature and extent of the cow's injury, and whether such injury had occurred prior to transport. E. Grof Livestock asserts, through Jason Grof, that the cow in question was at all times in a Class 2 lameness category, and therefore able to be transported. The Agency asserts that the cow in question was in a Class 4 state of lameness and that the leg in question was infected to such a degree that the animal could not reasonably have been transported without causing undue suffering.

Assessment of the Evidence

[12] Dr. Dykeman initially assessed the cow, while in the transport and exiting from the transport, as being of Class 2 lameness. Upon further examination of the cow in the holding pen, she revised her classification to Class 4 lameness. These classifications originate from "Guidelines for Dealing with Compromised Cattle". This document is a joint publication of the Farm Animal Councils of Alberta, Saskatchewan, Manitoba and Ontario, and is included in Tab 8 of the Agency Report. The document is also included as page 59 of the *Code of Practice for the Care and Handling of Dairy Cattle*, published in 2009 by the National Farm Animal Council. Two other documents are also included in Tab 8 of the Agency Report: "Gait Scoring System for Dairy Cows" and "Guidelines for Dealing with Compromised Cattle".

[13] The difference between Class 2 and Class 4 lameness classifications relates to whether, in accordance with industry standards, or generally accepted practice, the cow should have been transported. A cow with Class 4 lameness (described as "Requires assistance to rise, reluctant to walk, halted movement") is recommended to not be transported, while a cow with Class 2 lameness ("Visibly lame but can keep up with the group; no evidence of pain.") may be transported. Comparable provisions are found in relation to hogs, as discussed by the Federal Court of Appeal in *Doyon v. Canada (Attorney General),* 2009 FCA 152 at paragraph 36, in part, per Mr. Justice Létourneau:

> *[36] …the fact that an animal is compromised and suffering does not necessarily mean that it cannot be transported, especially if it remains ambulatory. The literature to help producers and transporters comply with the regulations identifies the class of "lameness". It indicates that hogs that fall into classes 1 to 3 may be transported to the slaughterhouse as long as the following measures are taken: isolating them from healthy hogs, transporting them to the slaughterhouse as quickly as possible, loading them last in the rear compartment of the trailer and unloading them first upon arrival at the slaughterhouse…Class 4 and 5 hogs must be euthanized at the farm….*

[14] It is important to note that lameness classifications are not determinative of whether a violation has been committed under paragraph 138(2)(*a*) of the *Health of Animals Regulations* and, in particular, whether the cow could not be transported without undue suffering. One needs to assess the general circumstances of transport, relative to the state of the animal. As discussed by the Agency in its Submission of December 2 (at page 7) in relation to the testimony of Dr. Dykeman:

> *Dr. Dykeman, who was accepted as an expert by CART at the hearing did not suggest that the document excerpts should be regarded or relied upon as a comprehensive means for determining the fitness of the animal to be transported. Rather, a determination of the animal's fitness to travel without undue suffering was described by Dr. Dykeman to entail a host of factors,*

including the animal's body condition, behaviour, posture or deportment, whether the limb was a weight bearing one, the motivation arising from the other herd animals, and the presence or absence of concurrent issues with the lameness, such as injury. Simply put, her evidence was that an assessment of the animal's fitness to travel without undue suffering could not be reduced to a cursory exercise, nor confined to one non-binding recommendatory guideline from among many. Any reasonable or honest belief on the part of the Applicant that adherence to such as chart would similarly not excuse the prohibited act.

[15] The Tribunal is in substantial agreement with the Agency sentiments. A wounded animal with Class 2 lameness may in fact be transported in circumstances of undue suffering, depending on the circumstances of the transport. The transport could aggravate the wound. The lameness classifications may nonetheless be important in determining whether the transport has occurred as the result of negligence on the part of the transporter, which is relevant to the assessment of the gravity value associated with the violation, which in turn may affect the penalty otherwise payable.

[16] The basis of Dr. Dykeman's revised conclusion as to the cow's lameness was her observation of an open, draining and scabbed wound on the right, front leg of the cow, following the cow's arrival in the holding pen. The cow was permitted to be slaughtered and its meat processed, with the exception of the infected leg, which was retained, skinned and photographed.

[17] A series of ten colour photographs were submitted by the Agency (Tab 1, Report). Eight of these photographs are of cows when alive, and two are of the skinned, right front leg of the subject cow, on the kill floor. All of the photographs are identified as having been taken by Dr. Dykeman. Each of the photographs is accompanied by a black and white copy, with written explanations provided by Dr. Dykeman of what is depicted in the photographs.

[18] The first photograph and photocopy with explanation appear to show a different cow than the cow in question, since the issue relating to this cow concerns an enlarged udder, rather than issues with the front right leg. This may be explained by a broader focus in parts of the Agency Report. In its Report, the Agency summarizes the observations of Dr. Dykeman in relation to the conditions of the four cows found in the particular compartment of the transport (Report, page 10). The Notice of Violation, however, relates to the cow that was considered by Dr. Dykeman to be the most severely compromised, as identified by ear tag 009639949. It is open to the Agency to address the condition of a number of animals in the Notice of Violation; see, as examples, *Poirier-Bérard Ltd. v. Canada (CFIA),* 2012 CART 23, relating to a load of chickens, and *Finley Transport Limited v. Canada (CFIA)*, 2013 CART 42, relating to a number of pigs. In this case, the Notice of Violation relates to one cow only. Therefore, photographs in the Report of cows other than the one in question need not be considered further, unless there is some basis for relating their condition to the assessment of the cow in question. For example, in *Finley Transport,* the veterinary conclusion as to deaths of pigs from heat exhaustion was supported by

evidence of the concurrent general distress exhibited by other pigs. The Tribunal does not see any basis to make such linkage in the current case. Photographs 2 through 6 are similarly of cows other than the cow in question, and therefore need not be considered further.

[19] Photograph 7 depicts the cow in question. In the explanation by Dr. Dykeman in the accompanying photocopy, the ear tag of the cow in the Notice of Violation is specifically identified. The cow is described as having "a right forelimb lameness, reluctant to bear weight on the limb, resting the limb on the dorsal aspect of the postern". In other words, the cow turns her lower front right leg inwards, so as not to rest on its hoof. Photograph 8 depicts the cow moving away, with her right front leg raised. Photograph 9 is a closer view of the cow, with her right front leg raised and bent inwards. Photograph 10 is said to depict the wound to which the cow was subject. What is shown is a large, ulcerated area of the inner front right leg. The ulceration covers virtually the entire area of the upper, inner leg joint, and shows drainage. As described by Dr. Dykeman in her written commentary to the accompanying photocopy of the photo, "There is a large area of ulceration, with draining erudate and crusts."

[20] Photograph 11 is described by Dr. Dykeman as showing "the skinned right front limb of Holstein (ET 9639949) as presented on the kill floor. The digital limb has been removed at the corpus." What is depicted is much yellowish liquid on the limb, which Dr. Dykeman testified was consistent with infection.

[21] Photograph 12 is a close-up photo of the limb, showing a significantly infected mass. As described by Dr. Dykeman, "Photo shows a close up of the cellulitis of the right front leg of Holstein, ET 9639949."

[22] Dr. Dykeman's general testimony, as well as her descriptions of what is depicted in the photographs are assessed with reference to her professional qualifications and experience, as described by Dr. Dykeman during the course of her examination by Agency counsel. Dr. Dykeman's assertions as to her qualifications and experience were not disputed by E. Grof Livestock. Dr. Dykeman is an employee of the Agency and the Veterinarian in Charge of St. Ann's Foods. She graduated in 1995 from the Ontario Veterinary College. She has spent twelve years with the Agency, in addition to having private practice and teaching experience. She supervises a staff of four inspectors and one other veterinarian. In addition to her duties as Veterinarian in Charge, Dr. Dykeman is also designated as a veterinary inspector. She has significant experience in the assessment of lameness and animal pain, plus has taken courses on the humane transportation of animals and related compliance under the *Health of Animals Act*.

[23] The testimony of E. Grof Livestock was by way of Jason Grof, who identified himself as having been the transporter of the animals. The Tribunal notes that in Dr. Dykeman's "Humane Transportation of Animals (Task 1101)" Report, Dr. Dykeman, in the "Comments"

section, identifies the driver as Mr. Ian Twa. Mr. Grof's self-identification as the driver, at the outset of his testimony, was not challenged by the Agency.

[24] Mr. Grof testified that he had not noticed anything untoward with respect to the cow in question, and that this view was reinforced by his lameness categorization of the cow (Category 2), a categorization that was initially agreed to by Dr. Dykeman. Mr. Grof's testimony was said to be supported by the unsworn affidavit of John Megans, dated November 29, 2013 (Tab 2, E. Grof Livestock Submissions – December 2). What Mr. Megans says in this affidavit is that, on or about June 27, 2012, he purchased a cow with ear tag #2556 from the Armstrong Manor dairy farm, and transported it to E. Grof Livestock in Lindsay. Assuming that the tag reference is that of the cow in question—which has not been established, given the difference in numbers—Mr. Megans asserts that he believes "this cow was walking on all 4 legs at the time it was loaded at the Armstrong farm and delivered to Lindsay" (Affidavit, paragraph 7). Mr. Megans further asserts that he only transports animals that are able to walk on all four legs.

[25] The weight of Mr. Megans' assertions is assessed with reference to the fact that the affidavit is unsworn and that the document submitted is a photocopy, without notarization as to Mr. Megans' signature and without notarization as to the integrity of the photocopy itself. In addition, Mr. Megans makes no reference to the state of the cow's leg, or to its state of lameness. His position seems to be that, so long as a cow can walk on all four legs, there is no cause for concern on his part. The Agency, in its Submission of December 9, 2013, notes that, given Mr. Megans' admission that he purchases and transports cull cows, he makes no reference as to why this cow was in a cull category and, in fact, acknowledges that he has no recollection of the cow in question. As the Agency notes, in relation to Mr. Megans' judgement, "The attention given to undertaking any assessment of the health of such compromised animals to be transported without undue suffering is wanting." (Agency Submissions – December 9, page 2).

[26] Investigator Cole testified at the hearing, as well as kept notes of his investigation, which are included as Tab 12 of the Agency Report. Mr. Megans' general sentiments are confirmed in the notes of Investigator Cole, dated January 21, 2013, whereby Investigator Cole records Mr. Megans' sentiment that he (reproduced *verbatim*) "only picks up if wt-bearing as per OMAFRA chart" (Report, Tab 12, page 10).

[27] Investigator Cole also recorded in his notes a conversation he had on January 22, 2013, with the vendor of the cow, Philip Armstrong, who confirmed that the cow in question was sold to John Megans on June 27, 2012, but that the cow had been taken out of production as of June 12, 2012 (reproduced *verbatim*) "to dry off or maybe on penicillin @ out for withdrawal—definitely an injury" (Report, Tab 12, page 9). Notwithstanding that an opportunity was accorded by the Tribunal to E. Grof Livestock to obtain a further statement from Mr. Armstrong as to the state of the cow, no evidence from Mr. Armstrong was submitted. In the Agency case summary, at page 12, significantly

greater detail is expressed as to the sentiments of Mr. Armstrong. These details are not supported by either Inspector Cole's notes or Inspector Cole's testimony at the hearing.

[28] What the Tribunal has before it as evidence from Mr. Armstrong is a hearsay statement, attributed to Mr. Armstrong by Inspector Cole, as to the fact that there was "definitely an injury" associated with the cow, prior to its sale and initial pickup by Mr. Megans for transport to E. Grof Livestock. The Tribunal must weigh such evidence, relative to its hearsay nature, but cannot completely ignore it, particularly at first instance, solely on the basis that it is hearsay. As was stated by the Federal Court of Appeal in *Madison v. Canada*, 2012 FCA 80, per Madame Justice Sharlow, at paragraph 11, in part:

> *It is an error of law to exclude evidence, solely on the basis that it is hearsay, without first considering whether it is necessary and reliable…*

[29] The *Madison* decision was cited in greater detail by the Agency, in Footnote 15 of the Agency's Submission of December 2, 2013, in support of the principle that it is "an error of law for a decision-maker having such flexibility in respect of the evidence to apply a strict evidentiary rule to exclude otherwise reliable, probative evidence." (Agency Submissions—December 2, page 5). Furthermore, in *Doyon,* previously cited, the Tribunal is advised, at paragraph 54, per Mr. Justice Letourneau, as follows:

> *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… If it decides to reject the evidence, it must explain why…*

[30] In the present case, the state of the cow at the time of sale is highly relevant to the assessment of undue suffering during transport. The statement of Mr. Armstrong, as recounted by Inspector Cole, that the animal was subject to "definitely an injury" at that time, is therefore relevant evidence to be considered, in conjunction with the other evidence presented. The nature and extent of the injury was not particularized by Mr. Armstrong, on the evidence, such as whether the injury was visible, how large the wound appeared to be and whether there were any secretions from or crusting of the wound. No evidence of Mr. Armstrong was presented by E. Grof Livestock, despite an opportunity being accorded by the Tribunal to E. Grof Livestock to do so.

[31] In her oral testimony, Dr. Dykeman testified that the injury in question could not have occurred during transport. The large, infected area of the leg was a condition that, in her view, must have existed for some period prior to transport. In addition, she testified that the extent of infection disclosed in the skinned leg depicted in photographs 10 and 11 may be consistent with an animal that was being weaned off antibiotics during some period prior to transport.

[32] In his notes, dated November 19, 2012, Mr. Cole includes particulars of a conversation that he had with Jason Grof in relation to the cow. Mr. Grof, according to Mr. Cole, acknowledged that E. Grof Livestock (extracts reproduced *verbatim*) "does ship compromised, but only what the guidelines say they can, in their opinion—would not ship if thought it would go down, though lameness can change on way—won't send if not suitable, have refused in past—don't want trouble… very steep chute @ Grof yard—managed to make that fine…" (Report, Tab 12, page 2).

[33] Counsel for E. Grof Livestock argues that the physical state of the animal was only determined after the animal had walked off the transport at the slaughterhouse, and that therefore the conclusions from a *post mortem* examination could not be considered to represent the state of the animal either prior to or during transport. Furthermore, counsel for E. Grof Livestock focused on the state of lameness of the cow, rather than her state of injury. In particular (from page 3 of E. Grof Livestock Submissions – December 2, reproduced *verbatim*):

> *First for the Crown, on the issue of suffering on the truck is an opinion by Dr. Dykeman that the cow suffered during transportation. This was based on a post truck removal veterinarian examination and post mortem evidence not available to Jason Grof. It is also only an opinion which this Tribunal can accept or reject. The defense submits the opinion must be rejected since her examination of the cow leading to this determination was post transport. The charge period is during transport. Normally this distinction would not be important, however, in this specific case while the cow in question was moving down the ramp to exit the truck, Dr. Dykeman assessed the cow with class 2 lameness. An opinion is indirect evidence since it requires the veterinarian to extrapolate known post transport facts back to an earlier time during transport. At no time did Dr. Dykeman assess the cow on the truck during transport and while it was leaving the truck she assessed it as being okay to transport.*

[34] In the Tribunal's view, there is a necessary extrapolation as to the timing of the injury. In addition, the photographs of the injury were taken by Dr. Dykeman shortly after the cow was unloaded, and then supplemented by a *post mortem* examination, including *post mortem* photographs of the leg in question. All of this evidence becomes relevant to any such extrapolation. The injury was not noticed in the period immediately associated with the cow leaving the transport, but was noticed shortly thereafter, and associated with Dr. Dykeman's revisions to her assessment of lameness.

[35] The Tribunal notes that E. Grof Livestock did not call any veterinarian or person with comparable experience in veterinary sciences to counter the testimony of Dr. Dykeman. E. Grof Livestock's later submission also contained no challenge to Dr. Dykeman's testimony as a veterinarian, beyond an assertion that an extrapolation as to the timing of the cow's injury was not possible.

[36] Contrary to the opinion of counsel for E. Grof Livestock—an opinion shared by Jason Grof and John Megans—the issue does not turn on the state of lameness, but rather on the circumstances of a visible injury which may be viewed as being associated with such lameness. One then must examine the nature, extent and timing of the injury, as part of an overall assessment as to whether the animal could be loaded or transported without undue suffering.

[37] Based on the foregoing, the Tribunal concludes that the evidence establishes, on the balance of probabilities, that the cow in question was injured prior to transport by E. Grof Livestock, and that such injury to the right front leg was visible, prior to the commencement of transport. No conclusion need be reached as to whether such injury occurred prior to the purchase of the animal by John Megans from Armstrong Farms, or occurred during the transport of the animal by John Megans to E. Grof Livestock, or occurred while the animal was in the care of E. Grof Livestock, prior to being transported to the slaughterhouse. Rather, the conclusion of the Tribunal, on the facts, is that at the time of loading onto the E. Grof Livestock transport, the cow had an injury to her right front leg that was visible and should have been examined, given the nature of the open sore and the secretions therefrom. The degree of lameness was not determinative. It is the visible injury at the time of loading that becomes the relevant factor as to whether, in transporting the animal, undue suffering was likely to occur. This will be discussed, *post*.

Applicable Law and Analysis

One Cow or Several

[38] Further to sentiments expressed earlier, the Tribunal notes that, in its Report, the Agency summarizes the observations of Dr. Dykeman in relation to the conditions of the four cows found in a particular compartment of the transport (Report, page 10). The Report includes several photographs (photographs 1 to 6) of cows other than the cow in question. The Notice of Violation, however, relates to the cow that was considered by Dr. Dykeman to be the most severely compromised, as identified by ear tag 009639949. Contrary to the facts of *Poirier-Bérard* and *Finley Transport* cases, both previously cited, the Agency in the present case has chosen to focus on the condition of one cow only, rather than the group. The Tribunal has expressed its view that the conditions of the other cows are not relevant, under the circumstances, in terms of the Agency's obligation to prove its case with respect to this particular cow.

Alleged Tribunal Errors in Permitting the Submission of Additional Evidence by E. Grof Livestock

[39] The Agency submissions of December 2 and December 9 contain arguments by the Agency's legal counsel, Ms. Melanie Toolsie, in which reservations are expressed as to the basis upon which the Tribunal permitted the submission of additional evidence by E. Grof Livestock. The reservations relate to (a) the Tribunal's interpretation of a witness list submitted by the Agency and (b) the alleged irrelevance of the Tribunal's inquiry in relation to certain documentation relating to transportation qualifications and transportation standards.

Witness List

[40] At page 20 of the Report, the Agency provided the names and addresses of six witnesses. Four of these witnesses were non-Agency personnel involved at points of the transportation of the animal in question. Two of the witnesses were Agency personnel: Dr. Dykeman and Mr. Cole. Only Agency personnel appeared as witnesses. In Mr. Cole's testimony, he referred to statements made by Mr. Megans, who had initially loaded the animal and transported it to E. Grof Livestock. In the Agency Report, reference was also made to statements of Mr. Philip Armstrong, described by the Agency as one of the owners of the dairy from which the cow in question had been sold and transported. Mr. Armstrong was also on the witness list, but was not presented as a witness. The Tribunal took the position that the witness list presented by the Agency represented witnesses that the Agency intended to call at the hearing, given that, strictly speaking, a witness list was not otherwise required, other than to give notice to E. Grof Livestock as to the witnesses it could expect to see present. Thus, there would be no element of surprise to E. Grof Livestock, and its legal counsel could prepare for cross-examination accordingly.

[41] Ms. Toolsie contends that the "List of Witnesses" is no more than a summary of the names of persons found in the Report and that the following considerations should govern (Agency Submission, December 2, page 8; reproduced *verbatim*):

> *The list does not indicate that those witnesses would necessarily be called to provide oral evidence.*
>
> *At no time before or after the Agency's provision of the Case Report, did the Applicant contact the Respondent to confirm that it intended to rely upon the evidence of some witness included in that list. Indeed, at no time before the hearing did the Applicant communicate that it intended to call any witnesses on the list or otherwise, nor that legal counsel would represent at the hearing. Nevertheless, the Agency has received the CART's comment that such title could be misconstrued to suggest those persons would be called.*

Still, the conferral of an additional opportunity to the Applicant to procure evidence has had the constructive effect of splitting the case.

[42] The Tribunal disagrees with the Agency's categorization of the list of witnesses submitted as being little more than a summary of names. If the Agency submits a list of witnesses, it is reasonable for both the Tribunal and E. Grof Livestock to expect that such witnesses will be called. If the Agency chooses not to call such witnesses, it is reasonable for the Agency to give notice to E. Grof Livestock and the Tribunal of its intentions, to enable E. Grof Livestock to arrange for such witness attendance on its behalf or to compel such attendance, through seeking the issuance of a summons by the Tribunal. Similar sentiments were recently expressed by the Tribunal in *Kobia v. Canada (CBSA),* 2013 CART 44, at paragraph 20.

[43] Under the circumstances of the current case, the Tribunal, in its discretion, chose to permit E. Grof Livestock to seek to obtain statements from witnesses listed but not called by the Agency, subject to the Agency having a right to cross-examine on same.

Bifurcation and General Considerations of Procedural Fairness

[44] Counsel for the Agency submits that, in permitting additional submissions by E. Grof Livestock, the Tribunal has bifurcated the hearing. Furthermore, such bifurcation, if it in fact has occurred, has ended up splitting the case in a manner that runs counter to the general principles of expediency that are typically to be associated with administrative hearings. In particular, Ms. Toolsie submits as follows:

(i) "…the conferral of an additional opportunity to the Applicant to procure evidence has had the constructive effect of splitting the case. The Supreme Court of Canada has warned that such practice should rarely be entertained because to allow further evidence to be adduced after the other side has introduced evidence 'prevents unfair surprise, prejudice and confusion'." (Agency Submission, December 2, page 9; quoted *verbatim*. Footnote citation by Ms. Toolsie of *R.* v. *Krause* [1986] 2 SCR 466 at 473-474 in support.).

(ii) The provision of an additional opportunity for E. Grof Livestock to submit evidence potentially undermines (quoted *verbatim*) "the larger principle of finality and the stability of CART's decisions and processes". Therefore, any power that the Tribunal has in this regard, which may be referenced to the Tribunal's general adjournment powers on terms it considers appropriate, in accordance with Rule 42, should be employed judiciously (Agency Submission, December 2, page 9).

(iii) To the extent that the Tribunal's actions may be categorized as case-splitting, Ms. Toolsie submits, citing subrule 1(2) of the *Rules of the Review Tribunal*

(Agriculture and Agri-Food), SOR/99-451, that such action (quoted *verbatim*) "runs counter to the CART's own rules, which explicitly aim to 'permit the fairest, least expensive and most expeditious procedures'" (Agency Submission, December 9, pages 1-2).

(iv) Ms. Toolsie further submits, citing subsection 8(4) of the *Canada Agricultural Products Act,* RSC 1985, c. 20, that the action of the Tribunal in permitting the submission of further evidence by E. Grof Livestock (quoted *verbatim*) "runs counter…to the architectural design for the scheme evidenced in the *Canada Agricultural Products Act*, which enables the CART to "deal with matters that come before it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit." (Agency Submission, December 9, page 2; Ms. Toolsie's emphasis)

[45] In the Tribunal's view, the procedures adopted by the Tribunal involve the Tribunal's consideration of what is fair to all parties. Fairness does not necessarily equal celerity. The Tribunal exercises its discretion in seeking additional information that it believes it needs in order to fairly assess the positions of the parties. This is particularly so when, as here, the Tribunal encounters elements of surprise on the part of the position of a party and wishes to accord to the other party a fair opportunity to respond. In the Tribunal's view, the detailed and thoughtful additional submissions by both parties have contributed to the overall fairness and quality of the determinations. A focus on informality and expeditiousness, as referenced to subsection 8(4) of the *Canada Agricultural Products Act* and sub-rule 1(2) of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* can sometimes result in impediments to either party fairly presenting its case. With respect to the general principle of fairness in administrative law, the Tribunal refers to the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 28 (part) and the "statutory, institutional and social context" referred to therein:

> ***28.*** *…The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.*

[46] In this regard, the Tribunal is also guided in its deliberations through consideration of the notion of "Charter Values", as discussed by the Supreme Court of Canada in *Doré v. Barreau du Québec*, 2012 SCC 12. An administrative tribunal is compelled to demonstrate that it has "properly balanced the relevant Charter value with the statutory objectives" in arriving at its decision. Writing for a unanimous Court, Madame Justice Abella discussed an administrative tribunal's approach to Charter values, in paragraphs 55 to 58:

[55] How then does an administrative decision-maker apply Charter values in the exercise of statutory discretion? He or she balances Charter values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In Lake, *for instance* [Lake v. Canada (Minister of Justice), [2008] 1 S.C.R. 761, *the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the prima facie infringement of mobility rights under s. 6(1) (para. 27). In* Pinet, *the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).*

[56] Then the decision-maker should ask how the Charter value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the Oakes *context* [R. v. Oakes, [1986] 1 S.C.R. 103]. *As this Court recognized in* RJR-MacDonald Inc. v. Canada (Attorney General), *[1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the Charter balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of* Dunsmuir [Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190] *"falls within a range of possible, acceptable outcomes" (para. 47).*

[57] As LeBel J. noted in Multani, [Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256] *when a court is faced with reviewing an administrative decision that implicates Charter rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the* Oakes *framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing Charter values against broader objectives*.

[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant Charter value with the statutory objectives, the decision will be found to be reasonable.

The Supreme Court also noted, at paragraph 54:

> *[54] Nevertheless, as McLachlin C.J. noted in* Catalyst [Catalyst Paper Corp. v. North Cowichan (District), [2012] 1 S.C.R. 5] *"reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18). Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where Charter values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant Charter values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of Charter values in the analysis.*

[47] The Tribunal acknowledges that the application of *Charter* values in the context of administrative proceedings is problematic, given uncertainties as to the nature and extent of such values, as distinct from *Charter* rights. For example, most relevant *Charter* protections are found in the "Legal Rights" section of the *Charter* (sections 7 to 14) and this section of the *Charter* is frequently held to be not applicable to administrative or civil proceedings generally: *Fitzpatrick v. The Queen*, [1995] 4 S.C.R. 154, at paragraph 32. In circumstances where *Charter* rights do not apply, *Charter* values must nonetheless be considered: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 at paragraph 23. An administrative tribunal, in exercising its statutory functions, is obliged to act consistently with the *Charter* and its values: *R. v. Conway*, [2010] 1 S.C.R. 765, at paragraph 78.

[48] In the present case, the Tribunal considers that the relevant *Charter* value stems from section 7 *Charter* rights, whereby one has a constitutionally protected "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The relevant *Charter* value would appear to be that of procedural fairness, by way of analogy to "principles of fundamental justice" as affecting the Tribunal's view as to the proceedings appropriate to review whether a violation has been established, on the balance of probabilities. As has been noted, the Tribunal does not view procedural fairness as being synonymous with celerity.

[49] While the Tribunal is mindful of the views of the Supreme Court of Canada in *R. v. Krause*, cited by counsel for the Agency, the Tribunal does not see how the Court's views are applicable to the present case. The *Krause* case dealt with the circumstances when the Crown would be permitted to call rebuttal evidence in a criminal matter, in accordance with the provisions of the *Canada Evidence Act*.

Industry Standards

[50] The Tribunal requested of the Agency and E. Grof Livestock submissions on the relative authority of two documents: "Should This Animal Be Loaded?" and "Gait Scoring System for Dairy Cows". Both of these documents, as well as the "Guidelines for Dealing with Compromised Cattle" are contained in Tab 8 of the Agency Report, and are identified as being pages 59 to 60 of the *Code of Practice for the Care and Handling of Dairy Cattle*,

published in 2009 by the National Farm Animal Council. The original source of "Should This Animal Be Loaded?" is unclear, despite being included in the Code of Practice. The original source of "Gait Scoring System for Daily Cows" is identified as being the University of British Columbia Animal Welfare Program, which was adopted in Alberta as *Alberta's Humane Handling of Dairy Cattle—Standards for the Transportation of Cull Animals*. As has been previously noted, "Guidelines for Dealing with Compromised Cattle" is identified as a joint publication of the Farm Animal Councils of Alberta, Saskatchewan, Manitoba and Ontario. Of concern to the Tribunal was the apparent variation in standards, incorporated within the same general Code, as well as the authority of such Code.

[51] The Agency responded to the Tribunal's request, questioning the relevance of such information in the current proceedings, given that the violation was one of absolute liability. The Agency interpreted the Tribunal's request as leading to an assessment of due care on the part of E. Grof Livestock, which the Agency correctly asserted was irrelevant to the determination of whether the violation had been committed. The Agency's broad assessment of the purpose of the requested information is as follows (Agency Submission - December 2, pages 5-6, reproduced *verbatim*):

> *Evidence led to demonstrate the exercise by the Applicant of due diligence to prevent the violation, or to demonstrate the Applicant's reasonable and honest belief in facts, that if true, would have exonerated them, are simply not relevant to the issue before CART on a section 9(2)(c) review.*

[52] At first instance, the Tribunal agrees with the submission of the Agency, to the extent that due diligence is purported to be raised as a defence. As the Tribunal noted in *Finley Transport Limited v. Canada (CFIA)*, 2013 CART 42, at paragraph 49, concerning compliance with industry standards in relation to an assessment of overcrowding:

> *[49] In addition, good faith attempts to address any "code" conflicts in relation to crowding, or otherwise, would not be a defence in any event. Counsel for the Agency cited the decision of the Federal Court of Appeal in* Godbout*, previously cited* [Fermes G. Godbout & Fils v. Canada (CFIA), 2006 FCA 408]. *This case involved applications for judicial review by five animal farmers. All had been held by the Tribunal to have committed violations in relation to the transportation of sick or injured animals, contrary to paragraph 138(2)*(a) *of the HA Regulations. Their principal argument in support of judicial review, as particularized in paragraph 6 of the Federal Court judgement, was that the Tribunal had failed "to take into account the prevailing practices at the time of the alleged offences, as well as the ambiguities and inconsistencies which characterized the transportation of animals at that time." Writing for the Court, Mr. Justice Létourneau viewed these arguments as being equivalent to a defence of good faith and due diligence, which are not recognized defences in relation to violations of absolute liability.*

[53] The Tribunal nonetheless considers that evidence of due diligence is relevant to the assessment of the general credibility of witnesses in relation to asserted facts. In addition, the Tribunal considers such information to be relevant to the assessment of the negligence component associated with the gravity value calculation.

[54] Jason Grof testified that the "Should This Animal Be Loaded?" document is the industry standard for livestock transportation in Ontario, and that the document is posted at slaughterhouses throughout the province. The fact of the posting of such a document, though not its authority, was confirmed by the testimony of Dr. Dykeman.

[55] The relative authority of industry-based or industry-influenced standards relating to animal transport was discussed by the Tribunal in *Finley Transport,* at paragraphs 40 to 44. The history of such standards is referenced to a national Code established by the Canadian Agri-Food Research Council in 2001, being a consensual document agreed to by various stakeholders, including government representatives. The National Farm Animal Council has responsibility for subsequent revisions to Code documents.

[56] The Agency's views as to the effects of code provisions is as follows (Agency Submission, December 2, page 7, extracts reproduced *verbatim*):

> *The two documents titled "Should This Animal Be Loaded?" and "Gait Scoring System for Dairy Cows" are excerpts, which were included by the Respondent Agency in its report. Both excerpts were described in the Respondent's oral evidence to derive from the National Farm Care Council's Code of Practice for the Care and Handling of Dairy Cattle, a document exceeding 60 pages in its entirety. The inclusion of the excerpts in the Respondent's record was explained as for the purpose of providing a background for references in Veterinary Inspector Dr. Lori Dykeman's notes and evidence, which touched upon lameness scales or ratings of the dairy cull cow in the NOV.*
>
> *…an assessment of an animal's fitness to travel without undue suffering could not be reduced to a cursory exercise, nor confined to one non-binding recommendatory guideline from among many…*

[57] The two documents are therefore components of a national Code, involving input from both industry and government, in terms of origins. The two documents address lameness dimensions associated with whether an animal should be transported. The Tribunal is in agreement with the Agency's view that the documents are not determinative, particularly in circumstances of inconsistencies between documents.

Transporter Certification

[58] At the hearing, Jason Grof presented a card which represented his qualification as a Certified Livestock Transporter. The card had expired within the twelve months prior to the hearing date, but was valid as of the time of the violation in question. At the hearing, Mr. Grof also described the nature of the certification process. The Tribunal invited the parties to make submissions as to the nature and effect of the certification process. Similar to information as to the nature and authority of lameness standards, the Tribunal considers that certification information relating to Mr. Grof is relevant to the overall assessment of the facts, as well as to the assessment of negligence in the context of the gravity value assessment. The nature of the certification process is referenced to a one day transportation course. In his testimony, Jason Grof advised that certain slaughterhouses would not accept loads transported by uncertified transporters, though the overall effect of the certification is viewed by the Tribunal as more referenced to industry-enhanced credentialism. On the evidence presented, there is no legal requirement that a transporter be so certified in order to transport animals, no regulatory monitoring of such certification and no regulatory consequences for failure to maintain such certification or for acting contrary to principles associated with such certification.

Combined Relevance of Industry Standards and Transporter Certification

[59] The Tribunal views industry standards and transporter certification to be important to the assessment of the credibility of the testimony of the parties. The testimony of an attending veterinarian may be highly persuasive and require, in certain circumstances, competing veterinary evidence, in order to be successfully challenged. In other cases, the expertise of the transporter or other party associated with a violation may provide an adequate challenge to veterinary evidence. This occurred in the *Doyon* case, previously cited, wherein the Federal Court of Appeal considered that the Tribunal had not properly weighed the expertise and evidence of the transporter, as against the veterinary evidence presented by the Agency. As stated by Mr. Justice Létourneau, at paragraph 56:

> *[56] Moreover, the applicant is a pork producer with twenty-nine (29) years' experience. Of his own accord, he took a course on the transportation and euthanasia of compromised hogs at a continuing education centre… He had seen the hog over a long period and ensured that it would be transported in isolation, while the veterinary surgeon…saw the hog alive for five minutes at most…*

[60] Furthermore, to the extent that industry standards may be viewed as involving a direct input from government, the Court has considered that such government input may be used to ascertain legislative intent. As stated by the Court in *Doyon*, at paragraph 46:

> *[46] I do not think that one has to conclude from that decision that the slightest suffering existing before transportation, however minor it might be, will necessarily lead to a violation of paragraph 138(2)(*a*) if the suffering animal is transported. Nor do I believe that this was Parliament's intention, if I rely on the information provided to stakeholders (producers, transporters, inspectors and prosecutors) to ensure compliance with and enforcement of the Act.*

Undue Suffering and Statutory Interpretation

[61] The violation that E. Grof Livestock is alleged to have committed relates to whether the cow could be transported without undue suffering during the expected journey, by reason of the state of her leg. The expected journey was of a duration of two and one half hours. The Tribunal has earlier determined that it is reasonable to conclude, on the balance of probabilities, that the injury occurred prior to the cow being loaded for transport by E. Grof Livestock. The Tribunal further determines that on the balance of probabilities, it is reasonable to conclude that the pain associated with the cow's wound would be aggravated by movement during transport. There is also the issue as to whether the cow was being weaned off antibiotics, which would have further aggravated the pain. The question then becomes whether such aggravation of pain, from various causes, would amount to undue suffering, under the circumstances, such that the cow should not have been transported at all.

[62] Counsel for E. Grof Livestock cites the decision of the Federal Court of Appeal in *Canada Border Services Agency v. Castillo,* 2013 FCA 271, and the decision of the Ontario Court of Justice, per Madame Justice Kastner, in *R. v. Maple Lodge Farms,* 2013 ONCJ 535, for the following propositions (E. Grof Livestock submissions – December 2, page 4; propositions reproduced *verbatim*): (a) "…any amount of suffering would ground the charge" (*Castillo*) and (b) "The court accepted that on all loads a number of chickens will normally die, usually less than 5%. It only becomes cruelty if too many die." (*Maple Lodge Farms*).

[63] What counsel for E. Grof Livestock appears to be arguing is that any apparent plain meaning of a statutory violation (*Castillo*) must be tempered by a degree of appreciation of the realities of the commercial transport of animals (*Maple Lodge Farms*). Counsel's arguments are as follows (E. Grof Livestock submissions – December 2, page 4; reproduced *verbatim*):

> *It is still a reality that the few who die will suffer. Without such an accommodation, livestock trucking would be impossible. When trucking compromised animals even with special handling procedures like placing at the rear of the truck some pain may be inevitable. The truck stops to quick or lurches to the side for some reason. The cows bump against each other or the side of the truck and feel pain. It is submitted that to be the basis for a*

> *section 138 charge, the pain experienced by the cow must exceed some normal limit where it becomes unacceptable, just like the number of dead chickens becomes to high to be acceptable, notwithstanding the lower level of normal pain is still pain, like the lower number of acceptable dead chickens still suffered when they died.*

[64] The Tribunal does not agree with the submission by counsel for E. Grof Livestock that the *Castillo* decision stands for the proposition that "any amount of suffering would ground the charge". Rather, *Castillo* is one of three recent cases of the Federal Court of Appeal, the other two being *Attorney General of Canada v. El Kouchi,* 213 FCA 292, and *Attorney General of Canada v. Savoie-Forgeot*, 2014 FCA 26, whereby the Court considered that the plain meaning of particular legislative provisions did not support elements of the violation identified by the Tribunal. All of the decisions were decisions involving the Canada Border Services Agency. Of particular relevance to the current case is the view of the Federal Court of Appeal in *El Kouchi* (at paragraph 17) that the elements of causation related to section 138(2)(*a*) of the *Health of Animals Regulations* may not apply to other violations. The matter remains one of ascertaining and applying the plain meaning of legislation.

[65] In the current case, based on the wording of section 138(2)(*a*) of the *Health of Animals Regulations,* causation is highly relevant, as discussed by the Court in *Doyon*. At paragraph 41 of *Doyon*, the Court identifies causation as an explicit element of the violation:

> *[41] For there to be a violation of paragraph 138(2)(a), the prosecutor must establish…*
>
> > *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.*

[66] The views of the Court in *Doyon* are elaborated in paragraphs 44 to 49 (part), as follows, in which the earlier decision of the Federal Court of Appeal in *Attorney General of Canada v. Porcherie des Cèdres* 2005 FCA 59 (CanLII) is also discussed :

> *[44] As mentioned by counsel for the respondent, it is true that paragraphs 26 and 36 of that decision* [Porcherie des Cèdres] *seem to indicate that it is prohibited to transport a suffering animal, at the risk of violating paragraph 138(2)(*a*) of the Act.*
>
> *[45] But the two paragraphs must be read in light of the evidence. The animal had serious injuries, including "an open fracture with a lot of necrosis of the skin,*

muscle and bone tissue". No doubt such an injury must have been extremely painful, and transportation could only result in undue suffering.

*[46] I do not think that one has to conclude from that decision that the slightest suffering existing before transportation, however minor it might be, will necessarily lead to a violation of paragraph 138(2)(*a*) if the suffering animal is transported. Nor do I believe that this was Parliament's intention, if I rely on the information provided to stakeholders (producers, transporters, inspectors and prosecutors) to ensure compliance with and enforcement of the Act.*

*[47] In short, through its actus reus, paragraph 138(2)(*a*) does not prohibit the transportation of a suffering animal to the slaughterhouse, nor does it permit the transportation of a healthy animal in conditions that would cause it undue suffering.*

[48] One must refer to the essential elements of the offence and, especially, not lose sight of the causal link that must exist between the transportation, the undue suffering and the reasons listed in the provision. These range from infirmity to any other cause, including fatigue.

[49] As this provision triggers a substantial monetary penalty, we must guard against a liberal interpretation that extends the scope of the essential elements, which are already quite broad…

[67] Counsel for E. Grof Livestock argues, based on the *Maple Lodge Farms* decision, that some degree of discomfort on the part of transported animals is always to be expected, and that such discomfort can be along an acceptable continuum to include, in certain circumstances, death. *Maple Lodge Farms* was a case involving strict liability charges under the *Health of Animals Act*, in particular subsection 65(1), as referenced to paragraph 143(1)(*d*) of the *Health of Animals Regulations*. A strict liability offence may be countered by a defence of due diligence. The idea behind an administrative monetary penalties regime is to establish violations of absolute liability, where a defence of due diligence is not available, as an alternative regulatory mechanism to criminal charges. In addition, a strict liability offence requires proof of all essential elements beyond a reasonable doubt, and also involves a reverse onus, as the Crown is not obliged to prove negligence. Once the elements of the offence have been established beyond a reasonable doubt, it is incumbent upon the accused to raise a defence of due diligence. In contrast, elemental proof in relation to an absolute liability violation is established on the balance of probabilities. In the current case, due diligence on the part of E. Grof Livestock is only relevant to the assessment of the element of negligence associated with the gravity value calculation of the violation penalty amount, but not as to whether the violation was committed in fact.

[68] In *Maple Lodge Farms*, nearly 10% of approximately 20,000 chickens, in two loads, died during two winter transports at different times (paragraph 27). The Canadian Food Inspection Agency had established a mortality threshold, prior to an investigation being triggered in relation to animal welfare or infectious diseases (paragraph 156). The mortality threshold was between 2% and 4%, depending on the type of chicken (paragraph 157). Thus, as a matter of policy, it was accepted by the Canadian Food Inspection Agency that some chickens would inevitably die during transport, irrespective of the degree of care taken by the transporter. When an investigation was triggered, only then would considerations of undue suffering become relevant. Such an investigation could result in the issuance of a Notice of Violation to the transporter (or another actor), instead of being charged with a strict liability offence, as was the case in *Maple Lodge Farms*. Counsel for E. Grof Livestock advocates for a comparable tolerance threshold in relation to the transportation of cows, and further argues that such tolerance thresholds should apply to an administrative monetary penalties regime.

[69] *Poirer-Bérard v Canada (CFIA),* previously cited, was a case involving section 143 of the *Health of Animals Regulations*, which was also the offence section in *Maple Lodge Farms*. In *Poirier-Bérard*, the Tribunal held that thresholds were irrelevant in relation to absolute liability violations in the absence of a legislative provision to the contrary. As noted in paragraph 61 of *Poirier-Bérard*, in part:

> *[61] In the present case, Poirier-Bérard admitted that a certain mortality rate is always to be expected after live poultry is transported. The Agency must address the following question, which the Agency says provides evidence of negligence: Is the mortality rate higher than normal? In the Tribunal's opinion, the mortality rate is not relevant. If a single rooster, among all the others, is found frozen to death, the connection with negligence is that it is up to Poirier-Bérard to decide whether or not to transport the birds in extreme cold. Even if transporting live poultry in extreme cold is industry practice, the practice itself could be considered to amount to negligence. A chicken must be treated in the same manner as a cow. If Parliament wanted to make an exception based on the type of animal, it could have done so. Parliament has made no such exception to date…*

Therefore, in the opinion of the Tribunal, there is no tolerance threshold to be recognized in relation to absolute liability violations associated with animal transport, irrespective of the animal type.

[70] The fact that injury to or the death of an animal has occurred during transport does not necessarily mean that undue suffering has occurred, or that the transport is the cause of such undue suffering, if not otherwise proven. Both of these elements must be separately established, in accordance with the directions of *Doyon*, previously cited, wherein the Court, at paragraph noted that a suffering animal can be transported without undue suffering, while a healthy animal can be subject to undue suffering during transport:

> *[47] In short, through its* actus reus, *paragraph 138(2)(*a*) does not prohibit the transportation of a suffering animal to the slaughterhouse, nor does it permit the transportation of a healthy animal in conditions that would cause it undue suffering.*

[71] At the same time, if an animal cannot be transported without being subject to undue suffering and such animal is thereafter transported, it would appear to be a rare case where one could conclude that the transport and the undue suffering were not related. In *Poirier-Bérard,* at paragraph 53, the Tribunal was of the view that the circumstances of the deaths of the chickens provided proof of undue suffering, on the balance of probabilities, and that the circumstances of the deaths occurring during transport provided proof of undue suffering during transport, on the balance of probabilities:

> *[53] To sum up, we have two unheated trailers; a temperature under -20 °C; a trip lasting several hours; small, featherless, genetically weak roosters; and birds found frozen to death. So there is no doubt that this load could not have been transported without causing undue suffering. Freezing to death is more than "ordinary" suffering*

[72] Caution must be nonetheless exercised by the Tribunal in arriving at such conclusions since, as noted by the Federal Court of Appeal in *Doyon*, an injured animal may be transported without causing undue suffering. As discussed in paragraph 53 of *Doyon*:

> *[53] Given how it viewed the issue, the Tribunal seems to have understood and assumed that, if suffering at the time of loading is proven, the result of transportation is necessarily greater and hence undue suffering. Such a conclusion is neither automatic nor inevitable. The prosecutor must prove the causal link between the undue suffering and transportation. This error explains, I believe, the Tribunal's overly cursory analysis of the evidence.*

The Court's view here is particularly important to the Tribunal's later deliberations, since most decisions of the Tribunal to that point, many of which were reviewed in *Porcherie des Cèdres*, had held that, once an animal had been established to be suffering, prior to transport, the transport would generally cause undue suffering. One notable exception was the Tribunal decision in *Porcherie des Cèdres* itself, which was reversed by the Federal Court of Appeal, based on disagreements with the Tribunal's interpretation of "undue suffering", to be discussed.

[73] In *Doyon*, a primary concern of the Court was the fact that the expertise of the transporter had been largely discounted by the Tribunal, in favour of accepting veterinary evidence involving a cursory examination. As the Court in *Doyon* discussed, at paragraphs 55 and 56:

> *[55] In the case at bar, the Tribunal briefly related the applicant's testimony, but excluded it without analyzing it or indicating why it was excluding it. Yet this testimony dealt with essential elements of the violation and contradicted that of the veterinary surgeon.*
>
> *[56] Moreover, the applicant is a pork producer with twenty-nine (29) years' experience. Of his own accord, he took a course on the transportation and euthanasia of compromised hogs at a continuing education centre… He had no prior record when the proceeding was instituted. He had seen the hog over a long period and ensured that it would be transported in isolation, while the veterinary surgeon…saw the hog alive for five minutes at most. It was not in his interest to incur a $2000 penalty for a hog worth $100 when he would have spent only $3.50 if he had decided not to include the hog in the load and to keep it at the farm… The rejection of this credible testimony warranted an explanation that was never given.*

[74] The Tribunal is of the view that, as between the testimony of Dr. Dykeman and that of Mr. Grof, Dr. Dykeman's evidence is to be preferred, based on evidence of the comparative degrees of examination of the cow in question. The wound was an obvious and large one, though admittedly one that was evident on the inner part of the leg. There is no evidence that Mr. Grof noticed it or factored such a wound into his decision to transport the cow. This is quite different from the situation in *Doyon*, where the transporter was familiar with the animal over a long period and made particular arrangements for its transport. While in the present case, the lame cows were segregated, no particular care was taken with respect to this particular cow, who was both lame and whose health was affected by a large, open and infected leg wound.

[75] The Tribunal is mindful of the caution expressed by the Federal Court of Appeal in *Doyon* that it cannot be automatically assumed that an injured or suffering animal, prior to transport, will of necessity be subject to undue suffering during transport. As the Court noted, at paragraph 61:

> *[61] The Tribunal also failed to analyze the evidence to establish the necessary causal link between transportation and the suffering it deemed undue. In doing so, it neglected to consider an element of the* actus reus *and to ensure that proof of the* actus reus *had been made.*

[76] The Court in *Doyon* emphasized, as has been noted, that the relationship between undue suffering and the transport must be otherwise established, and not automatically assumed. At the same time, the Court cautioned the Tribunal, at paragraph 28 of *Doyon*, as follows:

> *[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

[77] It was Dr. Dykeman's conclusion, based on her examination of the nature and extent of the wound, both *ante mortem* and *post-mortem*, that the suffering of the cow would have been aggravated through transport. A strict reading of *Doyon* may imply that if there is no direct evidence of the state of the cow either prior to or during transport, as will frequently be the case, it is not possible for the Agency to establish a linkage between undue suffering and the transport. This is a principal argument of counsel for E. Grof Livestock. In the Tribunal's view, such a reading of *Doyon* places an impossible balance of probabilities burden of proof on the Agency.

[78] In the present case, the Tribunal has accepted Dr. Dykeman's testimony that the nature and extent of the cow's wound must have existed at the time of transport, despite Dr. Dykeman not having directly observed the animal at that time. The Tribunal has further accepted Dr. Dykeman's testimony that the pain and discomfort of the cow would have been aggravated through transport. On what basis may such aggravation of pain and discomfort be regarded as undue suffering?

[79] In *Porcherie des* Cèdres, previously cited, the Federal Court of Appeal held, at paragraph 17, that for suffering to be "undue" it need not be "excessive", notwithstanding a dictionary definition that includes "excessive" as one definition of "undue". Rather, the Court's view, per Mr. Justice Nadon, at paragraph 26, in part, was as follows:

[26] ...It does not seem reasonable to me to interpret the words "undue" and "indu[e]" as meaning "excessive" and "excessif". In my opinion, a reasonable interpretation of undue" and "indu[e]", in the context of the relevant legislation, can only lead to the conclusion that these words mean instead "undeserved", "unwarranted", "unjustified", "unmerited" or "inapproprié", "inopportun", "injustifié", "déraisonnable". This interpretation ensures that a suffering animal cannot be loaded and transported, since any such loading or transportation will cause "unjustified" and "unreasonable" suffering to the animal...

The Court also noted, at paragraphs 27 and 35, in part:

[27] I conclude, therefore, that the transportation of an injured (and therefore suffering) animal could only cause unjustifiable or inappropriate suffering to that animal. Using the English text of paragraph 138(2)(a) of the Regulations, the suffering that will be caused to the animal while being transported will be "unjustified" or "unwarranted".

> *[35] …there can be no doubt that the purpose of the relevant legislation is to prevent animals from suffering unjustifiably and unreasonably. Specifically, the purpose of the Regulations is to prevent the transportation of suffering animals…*

[80] In *Porcherie des Cèdres*, the Court did not explicitly categorize its decision to reverse the Tribunal as being based on either on an error in law by the Tribunal (correctness) or unreasonableness of the Tribunal's decision. Rather, the Court, at paragraph 17, categorized the statutory interpretation adopted by the Tribunal as leading to an absurd result.

[81] *Porcherie des Cèdres* was later viewed by the Court in *Doyon,* as having been based on correctness. At paragraph 30, the Court in *Doyon* viewed *Porcherie des Cèdres* as follows:

> *[30] In Attorney General of Canada v. Porcherie des Cèdres Inc., 2005 FCA 59, our Court held that the standard of correctness applied when a Tribunal's decision subject to review had to do with questions of statutory interpretation. In that case, the issue was to determine the meaning of the expression "undue suffering" found in paragraph 138(2)(*a*). The Court was of the opinion that the Tribunal had interpreted "undue" too restrictively by giving it the meaning of "excessive". The Court gave it the more usual, all-encompassing meaning of "unjustifiable", "unreasonable" and "inappropriate".*

[82] More precisely, from a reading of paragraph 26 of *Porcherie des Cèdres*, previously reproduced, there are actually four categorizations of "undue", rather than three, with some issue as to the translation into English of the decision originally rendered in French:

> *[26] …"undeserved", "unwarranted", "unjustified", "unmerited" or "inapproprié", "inopportun", "injustifié", "déraisonnable".*

While all such categorizations would appear to involve difficulties in application, being associated with varying degrees of subjective review, the Court in *Doyon* appears to have adopted "inopportun" (inappropriate), "injustifié" (unjustified) and "déraisonnable" (unreasonable), to the exclusion of "inapproprié" (translated as "undeserved", but also commonly understood to mean "incongruous" or "wrong"). What will therefore be inappropriate, unjustified or unreasonable suffering, and therefore undue suffering, will depend on the facts of the case.

[83] The Court in *Doyon*, at paragraph 31, adopted its prior definition of "undue" in *Porcherie des Cèdres* (with the exception of "undeserved/inapproprié"), while at the same time limiting the application of such definition:

> *[31] The case at bar does not dispute this interpretation* [in Porcherie des Cèdres]. *However, it does challenge the very parameters of the violation, that is,*

> *its essential elements and their scope. At issue are also the sufficiency and the probative value of the evidence of undue suffering, the causal link and the Tribunal's interpretation and application of that evidence.*

[84] *Porcherie des Cèdres* was decided prior to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick,* 2008 SCC 9, which determined that the review standard of a tribunal's interpretation of its governing statute or one closely related to it is presumed to be based on reasonableness, and subject to deference accordingly. Writing for the majority of the Court, Justices Bastarache and Lebel stated the principle as follows, at paragraph 54, in part:

> *[54]…Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity…*

[85] In *Doyon*, the Federal Court of Appeal viewed the matter as being one involving a reasonableness assessment. At paragraph 32, Mr. Justice Létourneau stated as follows:

> *[32] It cannot be reasonably argued that there is a total lack of evidence of a violation in this case. The exercise undertaken by the Tribunal involved applying the law to the facts of the case. Its decision therefore involves a question of mixed fact and law reviewable on a standard of reasonableness: see Dunsmuir v. New Brunswick, 2008 SCC 9. It goes without saying, however, that errors of law as to the definition of the essential elements of a violation and the management of the evidence can render a decision unreasonable.*

[86] Based on the foregoing, it is the responsibility of the Tribunal to determine, on the basis of reasonableness and as referenced to a balance of probabilities burden of proof (a) whether the suffering is "inappropriate", "unjustified" or "unreasonable", according to the statutory interpretation of "undue" suffering in *Doyon* and (b) whether such inappropriate, unjustified or unreasonable suffering may be associated with the transport of the animal. In the Tribunal's view, given the nature of the injury to the cow in question, as particularized by Dr. Dykeman, transport of such an animal would be inappropriate or unreasonable. With respect to the "unjustified" third category, a basis to categorize the transport as "justified" could be by way of an attempt to reference some criterion of reasonableness or exigency under the circumstances. However, if the Tribunal were to accept such "justifications", this would appear to contradict the absolute nature of the violation. Given that the Tribunal has concluded that the "inappropriate" or "unreasonable" categorizations may be applied in the present case to a finding of undue suffering, the Tribunal need not further consider the "unjustified" category.

[87] The Tribunal has further accepted the evidence of Dr. Dykeman that the injury, and the pain associated therewith would be aggravated through transport. Having come to this

conclusion, as well as its assessment in relation to the timing and nature of the injury, the Tribunal finds that E. Grof Livestock has committed the violation alleged.

Review of Gravity Value Assessment

[88] Having determined that the violation has been committed by E. Grof Livestock, the Tribunal must next review the Agency's assessment of gravity value, which in turn relates to the amount of the penalty. The gravity value considerations are particularized in Schedule 3 of the *Agriculture and Agri-Food Administrative Monetary Penalty Regulations.* There are three dimensions to gravity considerations: (i) history (referring to compliance history), (ii) intent or negligence and (iii) harm.

(i) Compliance History

[89] In terms of compliance history, E. Grof Livestock has committed one previous violation under the *Health of Animals Act* and Regulations, in the five years preceding the day on which the current violation was committed. Based on this fact and in accordance with Schedule 3, a gravity value of 3 is assigned for such previous violation though erroneously described by the Agency as a "penalty adjustment". E. Grof Livestock does not challenge this description of its compliance history. The Tribunal agrees with the Agency's assessment.

(ii) Intent or Neligence

[90] In terms of intent or negligence, the Agency concludes that the violation was committed through a negligent act and accordingly assigns a gravity value (erroneously described as a "penalty adjustment") of 3, in accordance with Schedule 3. The reasoning of the Agency is as follows (Report, page 17, reproduced *verbatim*):

> *While the company did not intentionally desire to cause the animal to suffer, their negligence in failing to properly assess the animal as unfit for the expected journey ultimately led to this cow suffering unduly during the transportation process. As the party responsible for the care and control of the animals temporarily in their livestock yard, they* (sic) *alone have the opportunity to assess these animals prior to loading for the final journey to slaughter.*

The Agency bases its determination of negligence on the opinion of Dr. Dykeman, the evidence of whom the Tribunal has also accepted over the evidence of Mr. Grof. As the Agency notes (Report, page 17):

> *In the professional opinion of the CFIA Veterinarian at destination, at least one cow was compromised and had been compromised prior to loading, and was in*

> *her veterinary opinion unfit to be loaded and transported over the expected journey.*

[91] The Tribunal agrees with the assessment by the Agency. As the Tribunal noted in *Finley Transport,* compliance with industry standards is influential, but not determinative, as to whether negligence has in fact occurred. As the Tribunal noted therein, at paragraph 96 (part):

> *[96] Given that Finley Transport followed the Recommended Densities document, which permitted the number of hogs that were loaded in the various compartments, may Finley Transport, via its employee who effected the transport, nonetheless be considered to be negligent? In the Tribunal's view, both the national Code and the Recommended Densities document do not create bright lines, or absolute demarcations as to what is acceptable and what is not acceptable, in any absolute sense. Judgement must be exercised in the particular context, as noted by then Tribunal Chairperson Barton in the* Wendzina *case, previously discussed* [Wendzina v. Canada (CFIA), 2007 RTA 60288]. *The Supreme Court of Canada has held that compliance with a "recognized and respectable practice of a profession" will generally be inconsistent with negligence:* Ter Neuzen v. Korn *[1995] 3 S.C.R. 674 at paragraph 38. However, the Court is still at liberty to challenge a standard practice as being "fraught with obvious risks" or ignoring the "elementary dictates of caution" (paragraphs 39 to 42, citing* Fleming on Torts *[1987] and* Roberge v. Bolduc *[1991] 1 S.C.R. 374.). Industry standards are often considered to be "highly probative when defining a standard of care": Biddle, Green, Mannix and Winkelman, "Industry Standards As a Source of Liability for Trade Associations and Association Members" (2002, at page 3; Crowell and Moring LLP).*

[92] There is a breach of a statutory duty of care, associated with conduct that is other than how a reasonable person would conduct himself or herself in similar circumstances. In the Tribunal's view, the principal reason for a conclusion as to negligence relates to the nature and extent of a visible leg injury. The Tribunal has accepted the evidence of Dr. Dykeman that the injury must have been present at the time of loading. There is no evidence, however, that the injury would have readily been ascertainable on a general inspection. Both Dr. Dykeman and Mr. Grof initially had identical impressions of the cow: she was limping, but otherwise uninjured. This is because the injury was on the inner part of the leg, rather than the outer part. What the Agency contends, in assessing negligence, is that employees of E. Grof Livestock should have more closely examined the cow for visible injuries, prior to transport. Had they done so, this particular injury would have been discovered and the cow determined to be unfit for transport. Deficiencies in the examination, prior to loading, therefore form the basis of the negligence assessment by the Agency, with which the Tribunal is in agreement.

[93] Had the injury been visible on the external part of the leg, such that it could not have been overlooked by any reasonable person, the gravity value in relation to intent or negligence could have differed. In *Finley Transport Limited v. Canada (CFIA)*, 2013 CART 42, the Tribunal concluded that negligence may be further assessed as gross negligence, and that, in certain circumstances, gross negligence may be considered to amount to intent. As the Tribunal stated in *Finley Transport*, at paragraph 93 (part):

> [*93] …In the Tribunal's view, there can be negligence involving such extreme indifference to a clearly foreseeable outcome that the outcome may be regarded as having been intended…*

[94] Similarly, had the injury to the animal been completely internal, whereby the only evidence before a transporter was that the animal was limping to a degree, prior to loading, negligence would appear to be less likely to be determined. An omission to discover the existence of an internal injury, such as a bone fracture, might make a finding of negligence less likely, but would not, of itself, be a bar to a violation having occurred. Negligence is irrelevant to the absolute liability nature of the violation, but is relevant to the assessment of the gravity value.

(iii) Harm

[95] The Agency assessed the gravity value (erroneously categorized as a "penalty adjustment") for harm as 1, which represents a conclusion that the violation caused minor harm to the health of the animal. The reasoning of the Agency is as follows (Report, page 18):

> *The lame cow in question was most certainly subjected to undue stress, pain and suffering, as she endured loading, transport and unloading in her compromised state. In the professional opinion of the CFIA Veterinarian in Charge at the plant, this animal would not have been fit to withstand the additional stresses imposed by transportation.*
>
> *Some precautions were taken in transporting this animal, as she was loaded and transported in the rear compartment of the trailer. In addition, the journey was a relatively short one, though closer options likely existed.*

[96] The Tribunal has addressed harm in several cases. *Dykeman Farms Ltd. v. Canada (CFIA)*, 2012 CART 17 was case also involving, as here, paragraph 138(2)(*a*) of the *Health of Animals Regulations*. The facts (as described in paragraph 15) were that a bleeding cow who had recently given birth was transported to auction, in circumstances where she was unable to stand, following unloading, and needed to be euthanized on site. The Agency was noted (at paragraph 50 of *Dykeman Farms*) as having assessed the violation as causing minor harm to the animal. The Tribunal determined (at paragraphs 51 and 52) that, in the absence of clear justification by the Agency for this position, the violation was more

appropriately categorized as having caused serious harm to the health of the animal. A similar concern as to evidentiary justification led the Tribunal in *0830079 B.C. Ltd. dba: S&S Transport Ltd. v. Canada (CFIA)*, 2013 CART 34, at paragraph 56, to change the gravity assessment of the Agency from "serious harm" to "minor harm". In *Finley Transport*, at paragraph 100, the Tribunal agreed with the Agency's assessment that serious harm had been caused to animal health through an overcrowded transport on an extremely hot day. In *Poirier Bérard*, at paragraph 62 and *in 9020-2516 Quebec Inc. v. Canada (CFIA),* 2011 CART 7, at paragraph 49, the Tribunal agreed with the Agency's assessments that serious harm had been caused to animal health, as a result of chickens freezing to death during transport.

[97] The Tribunal is of the opinion that the evidence in the present case could lead to a reasonable conclusion that serious harm was caused to an animal, as a result of the transport. The Agency, on the other hand, considers that harm has been mitigated in part by the comparatively short journey and the efforts made to make special accommodation for the transport of the animal. The Tribunal notes that such accommodation was made in the context of the animal being identified as part of a group of animals with limping issues, as opposed to the specific wound to which this particular animal was subject.

[98] From the wording of the violation and the wording of gravity value in relation to harm, the conclusion of the Agency herein is that "undue suffering" may be associated with causing "minor harm". At first instance, this appears to be a contradiction: how can a situation associated with undue suffering also be associated with minor harm? This in turn raises a concern as to whether suffering must be major, in order to be undue. From the definitions of undue suffering identified in *Doyon* and discussed earlier herein, the suffering must be "inappropriate", "unjustified" or "unreasonable".

[99] It is to be noted that the gravity values in relation to harm are associated with a large number of violation circumstances, not limited to violations under the *Health of Animals Act* or Regulations, in that the harm is that which can be associated with "human, animal or plant health or the environment". At first instance, it would seem that minor harm is more readily associated with violations in other agriculture and agri-food statutes, not relating to the undue suffering of animals.

[100] Under the circumstances, and with deference to the Agency, it does not appear to the Tribunal to be at all reasonable to categorize the harm in the present case as "minor". It may be that there will be cases where "undue suffering" is somehow only associated with "minor harm" to the health of an animal, based on developments in the concepts of "inappropriate", "unjustified" or "unreasonable" suffering being undue. In the present case, the Tribunal does not consider it reasonable conclude that the harm was minor. Rather, in the Tribunal's view, the transportation of this particular cow, with such a seriously and overtly infected and injured leg, cannot result in other than serious harm to that animal's health, on the balance of probabilities. There can be no reasonable accommodation during transport to render the harm minor, given the veterinary conclusion accepted by the

Tribunal that the animal should not have been transported at all. The Tribunal accordingly assesses the gravity value under the category of "harm" as 5, in accordance with the regulations.

[101] The total gravity value therefore becomes 3 (violation history) + 3 (negligence) + 5 (harm). The total gravity value of 11. Pursuant to Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Penalty Regulations*, the penalty amount is increased by 10%. As a result of its review of the Agency's assessment of gravity values, the Tribunal therefore determines that the penalty amount should be increased from $6,000 to $6,600.

Conclusion

[102] Consequently, the Tribunal, by order, determines that E. Grof Livestock committed the violation and orders it to pay the Agency a monetary penalty of $6,600 within thirty (30) days after this decision is served.

[103] The Tribunal wishes to inform E. Grof Livestock that a determination that E. Grof Livestock has committed the violation is not the same as being convicted of a criminal offence. The Tribunal also wishes to inform E. Grof Livestock and any other interested party that the decision herein should not be taken to impugn the general reputation of E. Grof Livestock. The Tribunal is convinced that management of E. Grof Livestock, as represented by Jeff Grof and Jason Grof, being respectively the President and Secretary of the company, was seriously concerned about this particular Notice of Violation. The Tribunal accepts that Jason Grof, the officer of E. Grof Livestock who actually transported the cow in question, genuinely, but erroneously believed that his assessed degree of lameness of the cow was determinative of her fitness to be transported, without causing undue suffering. John Megans, the purchaser of the cow, thought similarly. The obvious state of injury of the cow, despite her ability to walk, did not appear to be a factor in the determination as to her fitness to be transported.

[104] Given that E. Grof Livestock had transported compromised animals in the past, the state of compromise of the cow in the present case would appear to have been misjudged, without any imputation by the Tribunal of bad faith or deliberate intent to harm on the part of E. Grof Livestock. Concern on the part of E. Grof Livestock management was further evidenced through the retention of specialist counsel to present its case.

[105] The Tribunal wishes to advise E. Grof Livestock that a finding that it has committed the violation alleged does not mean that it has been convicted of a criminal offence. Relative to the company's violation history and assuming no future violations, the company may apply in the future to have its name removed from the Minister's record of those who have committed violations.

[106] The Tribunal acknowledges that this area of regulatory law in relation to animal welfare is problematic for transporters and their industry.

Dated at Ottawa, Ontario, this 28th day of March, 2014.

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Dr. Bruce La Rochelle, Member