AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE MONETARY PENALTIES ACT

DECISION

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

Transport M.J. Marcoux Inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Member Peter Annis

The case of Transport M.J. Marcoux Inc. was heard in conjunction with the case of Jérôme Fournier. For this reason, the decision in this case will apply *mutatis mutandis* to the case of Jérôme Fournier.

Decision

Following an oral hearing and a review of the written submissions of the parties including the report of the Respondent, the Tribunal, by order, determines the Applicant committed the violation and is liable for payment of the penalty in the amount of $2,000.00 to the Respondent within 30 days after the day on which this decision is served.

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REASONS

The Notice of Violation dated August 10, 2004, alleges that the Applicant, on the 22nd day of January, 2004, at St-Edouard-de-Frampton, in the province of Quebec, committed a violation, namely: "Avoir chargé et transporté un animal de ferme (porc) dans un véhicule moteur, qui ne pouvait être transporté sans souffrances", contrary to provision 138(2)(a) of the *Health of Animals Regulations*, which states:

> 138(2) Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal
>
> (a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey.

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

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

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

The Tribunal is of the view that the Court did not intend to eliminate a threshold to determine what constitutes undue suffering, but intended to broaden the scope of situations where suffering is considered undue.

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

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It is further bolstered by the fact that this type of violation has been designated under the

Agriculture and Agri-Food Administrative Monetary Penalties Regulations as a "serious" violation.

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

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

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

The salient evidence on this issue is as follows:

This is the hearing on the merits in these matters which has been delayed in order to allow the Tribunal to hear a constitutional challenge that the Applicant brought claiming that paragraph 138(2)(a) the *Health of Animals Regulations* was invalid on the basis that the words "undue suffering" are vague. That challenge was dismissed by order of the Tribunal dated August 15, 2005.

A further oral hearing was held in Quebec City on October 19, 2005, pursuant to the Applicant's request for an oral hearing in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monerary Penalties Regulations.* The Applicants continued to be represented by their solicitor Me Bruno Marcoux and Me Paré. The Respondent was represented at this hearing by Me Patricia Gravel. The Tribunal allowed the evidence previously presented by the parties in the constitutional hearing to be adopted and referred to in this hearing on the merits.

This hearing concerns the transportation of a hog originating from a producer: Ferme Célinière which had been transported to the abattoir Olymel Inc. by the Applicant transporter Transport M.J Marcoux Inc.

At the hearing, Dr. Jobidon presented extensive clinical evidence, supported by photographs, describing the condition of the animal which she considered to be in a state

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of extreme suffering. The Applicant did not challenge the clinical observations of Dr. Jobidon on the condition of the animal, although it did object to Dr. Jobidon offering an

opinion on whether the animal was suffering unduly. After hearing Dr. Jobidon's qualifications in addition to those described during the constitutional hearing, the Tribunal has no reluctance is declaring her qualified to give evidence on aspects of suffering by animals. The Tribunal recognizes that there may be some issue as to whether an expert should give evidence on the fundamental question before the Tribunal.

In this case this issue does not arise in as much as the evidence clearly demonstrates that the hog was suffering unduly from pre-existing infirmities and was not apt for transportation as this would give rise to undue suffering, contrary to paragraph 138(2)(a) of the *Regulations*.

This evidence, which is not challenged by the Applicants, demonstrates that the hog was significantly underweight with two seriously infected members, the inflamation and swelling of which was obvious from photographs introduced by Dr. Jobidon. These infirmities were chronic and pre-existed the animal's transportation. Moreover, the effects of the transportation, as observed shortly after its unloading, rendered it comatose with other related signs of extreme distress to the point that Dr. Jobidon ordered its immediate euthanasia to limit its suffering.

Despite this evidence, the Applicants contended that the violation should be dismissed on the basis that the test for "undue suffering" should be based upon usage or custom in the industry at the time in question, purportedly in accordance with the Federal Court decision in *Attorney General of Canada vs. Porcheries des Cèdres Inc.,* [2005] F.C.A. 59. In this respect, the Applicants cited the following passages to support their proposition:

> [24] The applicant is asking that we reject the Tribunal's interpretation and adopt the meaning of the word "undue" which, in his opinion, is the most reasonable, namely:[TRANSLATION] "which is contrary to reason, rules or usage".
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> [26] In my opinion, the applicant's arguments are well-founded. It does not seem reasonable to me to interpret the words "undue" and "indu[e]", as meaning "excessive" and excessif".

In order to provide an evidentiary basis for this submission, which it should be noted was presented contrary to Rule 37 of the *Rules of the Review Tribunal (Agriculture and Agri-Food),* without any prior observations or notice to either the Tribunal or the Agency, the

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Applicant presented evidence of Mr. Michel Marcoux, the driver of the truck that transported the hog. Mr. Marcoux did not challenge any of the Agency's evidence on the

condition of the animal, rather he attempted to introduce evidence to the effect that prior to the Agency changing its position on enforcement, animals could be shipped without a violation in the same condition as the hog in question in this hearing. The Tribunal refused this evidence because it did not appear relevant and moreover would have been unfair to the Agency to allow it in without prior notice to the Agency pursuant to the Tribunal's *Rules*.

In any event, the Tribunal pointed out that Dr. Jobidon had, in her testimony from the constitutional hearing, acknowledged that there had been a modification in the Agency's enforcement policies in Quebec, leading to more notices of violation being handed out starting in 2003.

In deciding this matter, the Tribunal does not agree with the Applicant's submission that the determination as to whether an animal may be transported without undue suffering should be based upon usage or custom in the industry. The Tribunal also disagrees that the passage quoted from the *Porcheries des Cèdres* decision stands for that proposition. Usage in the industry was not part of the case before the Court as its decision was based completely on the evidence of the state of the animal. There is no suggestion in the Court's reasons that a usage in the industry that would treat an animal with cruelty should be applied to determine the definition in paragraph 138(2)(a) of the *Regulations*. Indeed, the exact opposite result would flow from its conclusions.

The matter of undue suffering is to be determined based primarily upon common sense experiences of what would constitute suffering in an animal in relation to clinical observations of the animal's infirmities and its related manifestation of distress as described by professional veterinarians and other persons experienced in the field of animal agri-food production. The Federal Court decision supported a broader application of the definition of undue suffering as being more consonant with society's norms on prevention of cruelty to animals. Besides, any usage in the industry that would condone a situation of cruelty to animals would reflect poorly on the industry and not be in its best interest.

The Applicant also argued that the case against him should be dismissed because the Agency had destroyed the carcass of the animal in question, thereby preventing it from having the opportunity to obtain evidence with which it could defend itself. Once again, this was a submission made for the first time at the hearing without prior notice to the Tribunal or the Agency, and contrary to Rule 37 of the *Rules of the Review Tribunal Agriculture and Agri-Food*. Nevertheless, dealing with the issue on the merits, the

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Tribunal is not satisfied that the Applicant suffered any prejudice by the destruction of the carcass. The evidence of the animal's condition in terms of its infirmities and clinical

observations was not challenged by Mr. Marcoux and moreover was supported by evidence of Dr. Jobidon, including the photographs which clearly showed the emaciated state of the animal, its infection and its morabund condition. There is no reason to conclude that the unavailability of the carcass would have affected any of this evidence particularly in a case were the animal's undue suffering appears to be so apparent and really beyond controversy.

Accordingly, the Tribunal is satisfied on the basis of the evidence presented to it that the animal in question could not be transported without causing it undue suffering during the expected journey and accordingly, finds that the Applicants committed the violation of paragraph 138(2)(a) of the *Regulations* as set out in the Notice of Violation.

Dated at Ottawa this 8th day of November, 2005.

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Peter Annis-Member