Date: 20090513

Docket: A-513-08

Citation: 2009 FCA 152

CORAM: **LÉTOURNEAU J.A.**
BLAIS J.A.
TRUDEL J.A.

BETWEEN:

MICHEL DOYON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Québec, Quebec, on May 7, 2009.

Judgment delivered at Ottawa, Ontario, on May 13, 2009.

REASONS FOR JUDGEMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: BLAIS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issue

[1] The applicant is challenging by judicial review a decision by the Review Tribunal (Agriculture and Agri-Food) which found that the applicant had violated paragraph 138(2)(*a*) of the *Health of Animals Regulations*, C.R.C., c. 296 (Regulations). According to column 3 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187 (AMPs Regulations), (SOR/2000-187), the violation is a serious one.

[2] Consequently, the applicant was fined a monetary penalty of $2000 under the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 (Act) and subsection 5(3) of the AMPs Regulations.

[3] The issues are the appropriate standard of review for the judicial review of the Tribunal's decision and the merits of that decision in respect of the evidence submitted. More specifically, the applicant argues that the Tribunal's finding is not supported by the evidence and that, in legal terms, it is therefore unreasonable.

The proceeding against the applicant

[4] Paragraph 138(2)(*a*) of the Regulations which is the basis for the proceeding prohibits the transportation of an animal when such transportation can cause the animal undue suffering by reason of the animal's infirmity, illness, injury or fatigue or any other cause, as follows:

138. (2) Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal	**138.** (2) Sous réserve du paragraphe (3), il est interdit de charger ou de faire charger, ou de transporter ou de faire transporter, à bord d'un wagon de chemin de fer, d'un véhicule à moteur, d'un aéronef ou d'un navire un animal :
(*a*) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey;	*a*) qui, pour des raisons d'infirmité, de maladie, de blessure, de fatigue ou pour toute autre cause, ne peut être transporté sans souffrances indues au cours du voyage prévu;

[Emphasis added]

[5] In factual terms, the applicant was accused of having transported a hog to the slaughterhouse even though, according to the allegations, the hog was compromised, emaciated and pale and suffering from articular arthritis of the left shoulder and compensatory swelling of the right carpus and tarsus.

[6] To properly understand the proceeding we have been asked to review, it is helpful to describe the administrative monetary penalty system applicable in this case.

Nature and purpose of the Act

[7] The Act, which was assented to on December 5, 1995, introduced an administrative monetary penalty system to enforce the following acts: the *Canada Agricultural Products Act*, the *Farm Debt Mediation Act*, the *Feeds Act*, the *Fertilizers Act*, the *Health of Animals Act*, the *Meat Inspection Act*, the *Pest Control Products Act*, the *Plant Protection Act* and the *Seeds Act*: see the definition of “agri-food Act” in section 2 of the Act.

[8] The Act established an alternative to the existing penal system and a complement to existing measures for the enforcement of agri-food Acts: see section 3 of the Act. According to its purpose, the system is intended to be a fair and efficient administrative monetary penalty system: *ibidem.* This results in the following characteristics and consequences.

[9] In terms of the substance of the law, the Minister of Agriculture and Agri-Food, or of Health depending on the circumstances (Minister), may make regulations classifying as minor, serious or very serious violations that are contraventions of an agri-food Act: see section 4 of the Act. This is what the Minister did through the AMPs Regulations.

[10] Violations are therefore not considered to be offences that can give rise to proceedings under section 126 of the *Criminal Code* for disobeying a statute: see section 17 of the Act.

[11] Violations of the Act are absolute liability offences for which, as stipulated in section 18, a defence of due diligence or honest and reasonable mistake of fact is not available: see *Fermes G. Godbout et Fils Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FCA 408. However, the same section allows as a defence every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act, to the extent that it is not inconsistent with the Act. These defences include intoxication, automatism, necessity, mental disorder, self-defence, *res judicata*, abuse of process and entrapment. I must say that, apart from the necessity defence, as used in *Maple Lodge Farms Ltd. v. Canada (Canadian Food Inspection Agency)*, [2008] C.A.R.T.D. No. 9, and a break in the chain of causation, I do not really see the benefit of most of these defences, especially if one compares them with the due diligence defence, which is excluded.

[12] Section 21 adds a punitive dimension by distorting the principle of continuing offence found in penal law. A violation loses its continuous nature and constitutes a separate violation in respect of

each day during which it is continued, thus resulting in as many penalties as days on which the violation was continued. To this must be added an increase in the gravity of the violation and, consequently, the amount of the penalty for a subsequent offence, which occurs when a new violation is committed within three years of the preceding violation: see Schedule 3 of the AMPs Regulations.

[13] Procedurally, an act which can be proceeded with either as a violation or as an offence can, at the Minister's discretion, be punished as a violation or as an offence. However, choosing one type of proceeding precludes the other type: see section 5 of the Act.

[14] A proceeding for a violation makes the person who has committed the violation liable to a warning or to a penalty in accordance with the Act. The proceeding begins with that person being issued a notice of violation, which is similar in content to a ticket and includes the person's name, a description of the violation, the amount of the penalty to be paid, particulars concerning the time and manner of payment, and the right to have the facts of the violation reviewed: see section 7 of the Act. If the person named in the notice of violation makes the required payment, the person is deemed to have committed the violation in respect of which the amount is paid. The payment ends the proceeding. Where a person fails to request a review of the facts of the violation by the Minister or the Tribunal, the person is deemed to have committed the violation identified in the notice: *ibidem*, at section 9.

[15] A person named in a notice of violation who wishes to obtain a release from that notice of violation can do so by paying half of the penalty claimed as long as he or she does so within two (2) weeks of the date of the notice of violation: *ibidem*, at section 10. However, that reduction does not apply to those who request a review of the allegations.

[16] Proceedings must be instituted within six months of the day on which the Minister became aware of the violation, in the case of a minor violation. However, this period is extended to two years in the case of a serious violation or a very serious violation.

[17] It should be noted that the starting point of the time limit is not, as is generally the case, the commission of the alleged act, but the day on which the Minister became aware of it, which, for the benefit of the prosecutor, increases the time limit and raises concerns about the burden and manner of proof concerning the Minister's awareness: see section 26 of the Act. Naturally, the Minister bears the burden of proof as to the time he or she became aware of the alleged violation. The Minister can discharge that burden by submitting a certificate to that end, which is evidence of the facts in the absence of evidence to the contrary: *ibidem*.

[18] It must be borne in mind that in the case of a continuing violation, which, as we know, includes as many violations as days on which the unlawful act took place, the time limit runs separately for each violation.

[19] Subsection 4(2) limits penalties for individuals to $2000 for any violation, unless it is committed in the course of a business or to obtain a financial benefit. In any other case, the maximum penalty is $2000, $10 000 or $15 000 depending on whether the violation is minor, serious or very serious. Penalties constitute debts due to Her Majesty in right of Canada, recovery of which is statute barred five years after the debt becomes payable. Debts may be recovered in Federal Court. Debts are final and not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except in accordance with the Act and subsection 12(2) of the *Canada Agricultural Products Act:* see section 15 of the Act.

[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.

A draconian administrative monetary penalty system

[21] The Act contains a combination, as already mentioned, of elements that make the established system which is intended to be fair a highly punitive one. I will juxtapose these elements to illustrate this.

[22] First, the Act eliminates the principle of continuing violation by replacing it with a multiplicity of violations, depending on the number of days on which the violation in question occurred and giving rise to increased penalties.

[23] Second, the monetary penalties are nonetheless substantial depending on the gravity accorded through the AMPs Regulations. The penalties increase when a new violation is committed within three years of the preceding violation.

[24] Third, the Act punishes diligent individuals, even if they took every reasonable precaution to prevent the commission of the alleged violation. Fourth, the Act denies individuals who committed a violation the right to make a mistake, even if the mistake could have been made by a reasonable person in the same circumstances.

[25] Fifth, the Act denies those individuals the benefit of any reasonable doubt which they would be entitled to in case of a penal offence, instead deciding guilt on the basis of a mere balance of probabilities.

[26] Lastly, the AMPs Regulations encourage the persons who have committed a violation not to have their violation reviewed by granting them a 50% discount of the penalty if the penalty is paid quickly: see subsection 10(2) of the AMPs Regulations.

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an *actus reus* which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.

[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

[29] We must now determine whether the law, procedure and rules of evidence were followed in the case at bar.

Analysis of the Tribunal's decision

1. Standard of review

[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”.

[31] The case at bar does not dispute this interpretation. 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.

[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.

2. Parameters of the violation

[33] Contrary to what the applicant suggests, it is not necessary for an animal to be suffering at the time and place of its being loaded for transportation for a violation of paragraph 138(2)(*a*) of the Regulations to be committed. Although this Court’s decision in *Samson v. Canada (Canadian Food Inspection Agency)*, 2005 FCA 235, at paragraphs 11 and 12, may be somewhat ambiguous in that

respect, it is clear to me, first, that the provision is not limited to cases in which an animal's condition worsens as a result of its being transported. It prohibits transportation in conditions that cause undue suffering to an animal thus transported.

[34] Beyond the reasons of an animal's infirmity, illness, injury or fatigue, the provision also proscribes the imposition of undue suffering for "any other cause" on an animal, which may otherwise be healthy. Undue suffering can result from suffocating, unsuitable, gruelling and intolerable transport conditions caused by, for example, cramped space, overcrowding, temperature, the length of the journey or a combination of such factors.

[35] Of course, proof of undue suffering can, with respect to the owner of the animal, be made more easily if, during loading, the animal was visibly ill and suffering before the decision to include it in the load was made.

[36] But it is also clear to me, second, that 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: see

Respondent's Record, Volume 1, at pages 59, 60, 61 and 64. Class 4 and 5 hogs must be euthanized at the farm: *ibidem* and also at page 94.

[37] When a hog has arthritis, it can be condemned upon arrival at the slaughterhouse if two or more of its joints are affected. It can therefore be transported to the slaughterhouse. However, if three visible joints or more are affected, the hog must be euthanized at the farm: *ibidem*, at page 96. The literature also indicates that where such animals may be transported, the same transportation measures must be taken as for lame animals.

[38] Lastly, as in the case of lameness and arthritis, there is no absolute prohibition against transporting an emaciated hog to the slaughterhouse, except where the hog is extremely thin, as illustrated in a picture that leaves no room for interpretation as to the miserable state of the hog's health. Such hogs must be euthanized at the farm: *ibidem*, at page 99.

[39] This review of the compliance indicators given to producers and transporters leads me to examine the *actus reus* of the violation set out under paragraph 138(2)(*a*) and to clarify the *Porcherie des Cèdres Inc.* decision, above. I will then consider the rule of interpretation applicable to a violation such as that of paragraph 138(2)(*a*).

[40] To facilitate the discussion that follows, I again reproduce paragraph 138(2)(*a*):

138. (2) Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or	**138.** (2) Sous réserve du paragraphe (3), il est interdit de charger ou de faire charger, ou de transporter ou de faire transporter, à

vessel and no one shall transport or cause to be transported an animal	bord d'un wagon de chemin de fer, d'un véhicule à moteur, d'un aéronef ou d'un navire un animal :
(*a*) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey;	*a*) qui, pour des raisons d'infirmité, de maladie, de blessure, de fatigue ou pour toute autre cause, ne peut être transporté sans souffrances indues au cours du voyage prévu;

[Emphasis added]

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

1. that the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);

2. that the animal in question was loaded onto or transported on a railway car, motor vehicle, aircraft or vessel;

3. that the cargo loaded or transported was an animal;

4. that the animal could not be transported without undue suffering;

5. that the animal suffered unduly during the expected journey ("voyage prévu" in French);

6. that the animal could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause; and

7. that there was a causal link between the transportation, the undue suffering and the animal's infirmity, illness, injury or fatigue, or any other cause.

[42] Each of these essential elements of the violation must be proven to make it possible to conclude that the accused has committed a violation.

[43] In *Porcherie des Cèdres Inc.*, above, it is clear that, as I have already mentioned, the essential substance of this Court's decision related to the rejection of the Tribunal's excessiveness criterion for establishing undue suffering. In practice, it became extremely difficult for the prosecutor to prove the undue suffering experienced by the animal being transported, thus compromising the protective purpose of the *Health of Animals Act*. The Tribunal therefore replaced it with a less demanding test, that of unjustifiable, unreasonable and inappropriate suffering.

[44] As mentioned by counsel for the respondent, it is true that paragraphs 26 and 36 of that decision 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, given the fact that the person who has committed the violation has absolute liability, that the prosecutor has a considerably reduced burden of proof and that the person who has committed a violation risks higher penalties in the event of a subsequent violation (see sections 5 and 6 and Schedule 3 of the AMPs Regulations).

3. The Tribunal's errors

[50] Using different terms than I, counsel for the applicant criticizes the Tribunal's management of the evidence and the unwarranted probative value accorded to it. For the following reasons, I

believe that some of his criticism has merit and requires our intervention. I would add, and I will begin with that point, that the Tribunal erred in formulating the question that it said it had to rule on.

a) Error as to the scope of the *Samson* decision

[51] At page 4 of the reasons for its decision, the Tribunal writes:

> At issue is whether the hog was suffering when it was loaded, which would mean that its transport would have caused it increased, and therefore undue, suffering.

[52] To its credit, it formulated the question in this manner because it felt bound by this Court's decision in *Samson*, above. The Tribunal quotes paragraph 12 of that decision, which reads 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.
>
> [Emphasis added]

[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.

b) Analysis and management of the evidence

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

[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: see the Applicant's Record at page 35. 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, as we will see later, 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: see Applicant's Record at page 73. The rejection of this credible testimony warranted an explanation that was never given.

[57] In addition, the Tribunal ignored the evidence from the cross-examination of the veterinary surgeon which weakened and even contradicted the version she had provided during the examination-in-chief and in her Non-Compliance Report.

[58] In fact, although she stated that the hog had [TRANSLATION] "great difficulty moving around", she was obliged to admit under cross-examination that she had not seen the hog get on or off the trailer; in short she had not see the hog move around: see page 3 of the Tribunal's decision, where it appears that the veterinary surgeon reiterated the observations she had recorded in her Non-Compliance Report; see the Non-Compliance Report in the Respondent's Record, Volume 1, pages 24 and 40; see the cross-examination in the Applicant's Record, at pages 43, 44, 51 and 52.

[59] Furthermore, after saying that she had seen the hog alive for a period of 10 to 15 minutes, she had to concede that she had seen it for only five (5) minutes: see the cross-examination in the Applicant's Record, at page 43.

[60] These contradictions, which are of importance to the animal's alleged undue suffering during transportation, are found in the evidence of the prosecution. They could not be ignored: see

Industrial Teletype Electronics Corp. et al. v. City of Montreal, [1977] 1 S.C.R. 629. The failure to refer to it suggests, as the Supreme Court decided in *Industrial Teletype Electronics Corp.*, that the Tribunal "did not fully assess all the evidence submitted to [it]": *ibidem*, at page 636.

[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.

[62] In fact, the journey was to take an hour and a half. However, as a result of a decision to which the applicant was not party and over which he had no control, the animals had to be sent to a slaughterhouse that was further away and not the one originally planned and agreed on, which was no longer able to accommodate them. Consequently, the journey time, to which a waiting period of fifty (50) minutes was added before the animals were unloaded, more than doubled: see in the Respondent's Record, Volume 1, the official delivery receipt, the arrival time and the unloading time. This was no longer the expected journey, while the very wording of paragraph 138(2)(*a*) of the Act stipulates that, for there to be a violation, an animal must have unduly suffered during the "expected" journey ("voyage prévu" in French). In other words, for the purposes of the producer's responsibility, the causal link may be broken if the expected journey is changed by necessity or the intervention of a third party, as it was in this case.

[63] Moreover, since the Tribunal was of the opinion that the animal had suffered unduly, it should have verified whether the suffering had not been the result of the change made to the

expected journey, in short, whether, with regard to the applicant, there had not been a break in the causal link because of this change.

[64] Lastly, the Tribunal's decision does contain an account of the evidence but no real analysis of it like the one seen in *Maple Lodge Farms Ltd.*, above. A justification of the Tribunal's decision can be found in the following rather laconic terms at page 5 of the decision:

> On the basis of the evidence introduced at the oral hearing, assessed in light of the recommendations in Exhibit R-2, the Tribunal concludes that the animal's thinness and the presence of other injuries (inability to put weight on the left hind leg because of arthritis and swelling of the right carpus and tarsus) rendered the hog unfit for transport, and that the hog experienced undue suffering within the meaning of the Regulations and the case law.

Where can this assessment be found in the decision, and what is it? These questions not only remain unanswered, but also become critical, given the failures described above and the last item I am about to examine, namely the quality and reliability of the evidence against the applicant.

c) Quality and reliability of the evidence against the applicant

[65] I have already alluded to the contradictions in the prosecution's evidence. But there are also several other elements which, in my opinion, diminish the quality and reliability of the evidence of the prosecution in this case.

[66] The veterinary surgeon saw the hog alive for only five minutes. No photographs were taken of the animal when it was alive which could have, had this been the case, revealed its distress and

suffering. If it was possible to photograph the animal after it was euthanized, why was it impossible to do so beforehand? No explanation was given.

[67] According to the applicant, neither Inspector Gomez, who called the veterinary surgeon, nor the veterinary surgeon saw the animal move when it climbed up to and down from the second level of the truck on its own: see the Applicant's Record, at page 5.

[68] In her *ante mortem* (before death) screening record, the veterinary surgeon describes a tall, emaciated, anaemic hog that was suffering from arthritis on the shoulder joint and swelling of the right carpus and tarsus: see the Respondent's Record, Volume 1, at page 36 (emphasis added). In the Inspector's Non-Compliance Report written twenty-five (25) minutes later, she then speaks of a very emaciated, very sick hog, which she condemned for polyarthritis and emaciation (emphasis added): *ibidem*, at page 40. Later, in a letter dated June 29, 2006, she describes the hog as being extremely thin and in very bad condition, which the photographs taken after euthanasia do not seem to confirm: *ibidem*, at pages 47 to 49 and 72 (emphasis added). She reiterates in that letter that [TRANSLATION] "with every movement [the animal] protected its shoulder" although she did not see it walk: *ibidem* and Applicant's Record, at page 43.

[69] Inspector Gomez, in describing the violation, states that the hog was very sick, very thin, lame and unable to use its front leg: *ibidem*, at page 37. At the *ante mortem* stage, he had described the hog as being emaciated and having difficulty moving around freely: *ibidem*, at page 40. Without

more ado, he concluded that the animal had been suffering during its transportation. Yet it will be recalled that, according to the applicant, he never saw the animal move around.

[70] Counsel for the applicant questions the veterinary surgeon's scientific diagnosis of arthritis as causing the animal pain. He describes the following evidence in support of his argument:

a) the veterinary surgeon saw the hog alive for five minutes at most;

b) she did not see it move around or get on or off the truck;

c) she was not able to study its behaviour;

d) she did not examine it, neither before nor after it died;

e) she took no blood sample;

f) she took no x-rays; and

g) she did not puncture the joint to aspirate fluid.

[71] It would be ill advised for the purposes of this case to try to determine whether one or more of the operations described above are necessary to make a scientific diagnosis. But the fact is that these items of evidence were established and that they undeniably cast a shadow on the quality and reliability of the evidence against the applicant. It is surprising that the Tribunal ignored them, especially if one adds the contradictions arising from the prosecution's own evidence.

Conclusion

[72] In conclusion, the Tribunal's error concerning the scope of the *Samson* decision, above, the errors made in managing and analysing the evidence and the failure to recognize and gauge the weakness of the prosecution's evidence led the Tribunal to render a verdict that, in my view, was unreasonable and that should be set aside.

[73] For these reasons, I would allow the application for judicial review with costs and set aside the decision of the Review Tribunal dated September 11, 2008.

"Gilles Létourneau"
J.A.

"I agree
Pierre Blais, J.A."

"I agree
Johanne Trudel, J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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