

**Date: 20080624**

**Docket: A-532-07**

**Citation: 2008 FCA 224**

**CORAM: SHARLOW J.A.  
PELLETIER J.A.  
RYER J.A.**

**BETWEEN:**

**CANADIAN FOOD INSPECTION AGENCY**

**Applicant**

**and**

**EDWARDS LIVESTOCK HAULING LTD.**

**Respondent**

Heard at Saskatoon, Saskatchewan, on June 5, 2008.

Judgment delivered at Ottawa, Ontario, on June 24, 2008.

**REASONS FOR JUDGMENT BY:**

**PELLETIER J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
RYER J.A.**

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**REASONS FOR JUDGMENT**

**PELLETIER J.A.**

**INTRODUCTION**

[1] Edwards Livestock Hauling Ltd. (Edwards) was issued with a Notice of Violation pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 (the Act) alleging that it had transported animals without segregating them by age or weight contrary to subsection 141(1) of the *Health of Animals Regulations*, C.R.C., c. 296 (the Regulations). Edwards believed that the animals it was transporting were more appropriately segregated by family group. Officials of the Canadian Food Inspection Agency (the Agency) issued a Notice of Violation to Edwards which it brought forward for review to the Review Tribunal, which set the Notice of

Violation aside. The Agency now seeks judicial review of the Review Tribunal's decision. The issue in this application for judicial review is whether the Review Tribunal has correctly interpreted the applicable regulations.

## **THE FACTS**

[2] Edwards was hired to transport a load of domestic wild boars from Canadian Classic Wild Boars near Melfort, Saskatchewan, to Trochu Meat Processors, in Trochu, Alberta, for slaughter. When the load arrived in Trochu, some eight hours later, the Agency's inspectors noted that two of the 162 animals being transported were dead upon arrival. This was not considered to be outside the normal range of fatality in the course of transportation but what did concern the Agency's personnel was that the boars were not segregated by age or weight as they believed subsection 141.(1) of the Regulations, reproduced below, required:

141.(1) Subject to this section, no person shall load on any railway car, motor vehicle, aircraft or vessel and no carrier shall transport animals of different species or of substantially different weight or age unless those animals are segregated.

141.(1) Sous réserve du présent article, il est interdit à quiconque de charger dans un wagon de chemin de fer, un véhicule à moteur, un aéronef ou un navire, ou à un transporteur de transporter, des animaux d'espèces différentes ou de poids ou d'âge sensiblement différents sans les avoir séparés.

[3] The following extracts from the decision of the Review Tribunal succinctly set out the competing viewpoints which give rise to this dispute:

The Applicant [Edwards] indicated that animals are brought from different producers to Canadian Classic Wild Boars (CCWB) and remain in segregated pens at CCWB according to producer. At the time the animals are loaded, CCWB tells the transporter which segregated animals come from which producer and whether or not there are problem animals that need to be further segregated for transport. The animals are then loaded on the trailer, segregated by producer in the same way they were segregated by CCWB.

...

Mr. Carson Richardson is the President of the CCWB and he confirmed the evidence of Mr. Edwards that CCWB sorted and segregated animals exclusively by producer. The reason is that the animals are raised by each producer communally in a group, and the group has already sorted out its pecking order. It is natural for a group (each member's status in the group having been defined) to protect itself from strangers. If a strange animal came into their territory, it was his view the group would kill the stranger. He also indicated that wild boars of the same size were more likely to fight each other than boars of different sizes as the larger animals would naturally protect the smaller ones.

[4] Edwards relies upon subsection 141.(4) of the Regulations which contemplates segregation on a basis other than age or weight:

141.(4) Animals of the same species that are incompatible by nature shall be segregated during transport.

141.(4) Les animaux de la même espèce, inconciliables de nature, sont isolés.

[5] The Agency issued a Notice of Violation to Edwards as provided in section 7 of the Act, alleging that Edwards had violated subsection 141.(1) of the Regulations. The Agency's position, in brief, is that subsections (1) and (4) are to be read cumulatively, that is, even when animals of the same species are segregated from other animals of the same species by reason of incompatibility, the compatible groups must also be segregated by age or weight as well.

[6] Edwards sought review of the Notice of Violation from the Review Tribunal. The latter reviewed the evidence, the material parts of which have been quoted above. It noted that Edwards had transported animals without segregating them by age or weight which, on the face of it, was in contravention of subsection 141.(1). But the Review Tribunal concluded that subsection 141.(1) was subject to the remaining provisions of the section, including subsection 141.(4) quoted above.

[7] The Review Tribunal's statement of its legal reasoning is found in the following passage:

Since I consider subsection 141(4) to be the operative subsection in this case, and since the Applicant complied with it, the Applicant cannot be found to be in violation of subsection 141(1).

[Applicant's Record, at p. 9.]

[8] As for the practical application of this reasoning, the Review Tribunal found that:

There was ample space on the trailer for 162 wild boars and sows, and taking into consideration the overall welfare of the animals, it was necessary to segregate animals that were incompatible and would be more likely to fight with each other, than to segregate them by weight or age.

[Applicant's Record, at p. 10.]

[9] As a result, the Review Tribunal set aside the Notice of Violation.

## **ANALYSIS**

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, at paragraph 57, the Supreme Court of Canada held that guidance as to cases where the correctness standard applies can be found in the existing jurisprudence. The Agency relies on this Court's decision at paragraph 7 of *Canada (Canadian Food Inspection Agency) v. Westphal-Larsen*, 2003 FCA 383, [2003] F.C.J. No.

1536 (*Westphal-Larsen*), where it was held that the standard of review of the Review Tribunal on a question of law is correctness, to argue that the standard of review in this case is correctness.

*Westphal-Larsen* has been applied by this Court in *Canada (Canadian Food Inspection Agency) v. Porcherie des Cèdres Inc.*, 2005 FCA 59, [2005] 3 F.C.R. 539 (*Porcherie des Cèdres Inc.*). This Court applied the correctness standard as well in *Samson v. Canada (Canadian Food Inspection Agency)*, 2005 FCA 235, [2005] F.C.J. No. 1090 and in *Fermes G. Godbout & Fils Inc v. Canada (Canadian Food Inspection Agency)*, 2006 FCA 408, [2006] F.C.J. No. 1967, two cases which applied *Porcherie des Cèdres Inc.*. As a result, it appears to have been decided that the standard of review of the Review Tribunal on a question of law is correctness, a conclusion which *Dunsmuir* invites us to adopt. Consequently, I shall proceed on the basis that the standard of review is correctness.

[11] The Agency cites a number of cases in which the phrase "Subject to..." has been interpreted: *Massey-Harris Co. Ltd. v. Strasbourg*, [1941] 4 D.L.R. 620 (Sask. C.A.) ("Subject to paragraph 5 of subsection (1) of section 504..."), *Trent University Faculty Assn. v. Trent University*, [1997] O.J. No. 3417 (C.A.) ("Subject to articles 7.4 and 7.6"), *Menzies v. Manitoba Public Insurance Corp.*, [2005] M.J. No. 313 (C.A.) ("Subject to the Regulations") and *Schnell v. Schnell*, [2001] S.J. No. 704 (C.A.) ("Subject to sections 17 to 20"). The common element in these cases is the use of the phrase "subject to" but not in the context of "subject to this section".

[12] The Agency's argument is that the subsections following subsection 141.(1) are intended to be applied cumulatively so that a requirement in a later subsection is intended to be in addition to

the requirement imposed in subsection 141.(1). This amounts to reading each succeeding subsection as though it began with the words "Subject to subsection (1)...".

[13] This construction cannot have been intended because a number of the subsections which follow subsection (1) have nothing at all to do with segregating animals by age or weight. The full text of section 141 is reproduced below:

141.(1) Subject to this section, no person shall load on any railway car, motor vehicle, aircraft or vessel and no carrier shall transport animals of different species or of substantially different weight or age unless those animals are segregated.

141.(1) Sous réserve du présent article, il est interdit à quiconque de charger dans un wagon de chemin de fer, un véhicule à moteur, un aéronef ou un navire, ou à un transporteur de transporter, des animaux d'espèces différentes ou de poids ou d'âge sensiblement différents sans les avoir séparés.

(2) Subsection (1) does not apply to a female animal and its suckling offspring.

(2) Le paragraphe (1) ne s'applique pas à une femelle allaitante accompagnée de son petit.

(3) Every cow, sow or mare with its suckling offspring shall be segregated from all other animals during transport.

(3) Chaque vache, truie ou jument allaitante et son petit sont isolés.

(4) Animals of the same species that are incompatible by nature shall be segregated during transport.

(4) Les animaux de la même espèce, inconciliables de nature, sont isolés.

(5) Groups of bulls, de-tusked boars, rams and goat bucks, if mature, shall be segregated from all other animals during transport.

(5) Les groupes de taureaux, de verrats désarmés, de boucs ou de béliers adultes sont isolés.

(6) Every mature boar that has not been de-tusked and every mature stallion shall be segregated from all other animals during transport.

(6) Chaque verrat adulte aux défenses non enlevées et chaque étalon adulte sont isolés.

(7) An equine shall, unless its hind feet are unshod, be segregated from other equines during transport.

(7) Un équidé dont les pattes postérieures sont ferrées est isolé des autres équidés.

(8) Every equine over 14 hands in height shall be segregated from all other animals during transport by air.	(8) S'il s'agit de transport aérien, chaque équidé de plus de 14 mains de hauteur est isolé des autres équidés.
(9) Every mature bull shall be securely tied during transport by air.	(9) S'il s'agit de transport aérien, les taureaux adultes sont solidement attachés.
(10) Every horse shall be segregated from all other animals during transport by sea.	(10) S'il s'agit de transport maritime, chaque cheval est isolé.

[14] It is apparent that the requirement of subsection (1) and subsections (6), (8), (9) and (10) are not cumulative since the latter deal with cases of individual segregation as opposed to grouping animals of the same species by age or weight. Those subsections are clearly exceptions to the rule set out in subsection (1). The obvious intent of the legislative draftsman is that animals are to be grouped by age or weight unless some other subsection provides more specific guidance as to their treatment. This can be achieved by making subsection (1) subject to the subsections which follow it as suggested by the expression "Subject to this section...".

[15] If one looks for other examples of how the legislative draftsman has employed the expression "Subject to this section...", this point of view is confirmed. While there are too many examples to list them all, the following are sufficient to make the point.

[16] Section 11 of the *Access to Information Act*, R.S.C. 1985, c. A-1, provides as follows:

11.(1) Subject to this section, a person who makes a request for access to a record under this Act may be required to pay	11.(1) Sous réserve des autres dispositions du présent article, il peut être exigé que la personne qui fait la demande acquitte les droits suivants :
(a) at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by	a) un versement initial accompagnant la demande et dont le montant, d'un maximum de vingt-cinq dollars, peut être



regulation;

(b) before any copies are made, such fee as may be prescribed by regulation reflecting the cost of reproduction calculated in the manner prescribed by regulation; and

(c) before the record is converted into an alternative format or any copies are made in that format, such fee as may be prescribed by regulation reflecting the cost of the medium in which the alternative format is produced.

fixé par règlement;

b) un versement prévu par règlement et exigible avant la préparation de copies, correspondant aux frais de reproduction;

c) un versement prévu par règlement, exigible avant le transfert, ou la production de copies, du document sur support de substitution et correspondant au coût du support de substitution.

[17] Subsection 11.(1) provides a general rule as to the fees payable with respect to an access request. The following subsections either provide specific exceptions to that rule (subsection (2), (3) and (6)), or provide the means by which the rule is to be applied (subsections (4) and (5)).

Subsection (2) provides for an additional fee for document searches which exceed five hours while subsection (3) provides for an additional fee for documents produced from machine readable records. Subsections (4) and (5) deal with the mechanics of payment. Subsection 6 provides for the possibility of fees being waived in certain circumstances. The structure of the section, then, is of a general rule which is subject to the exceptions, or the means of application, provided in the following subsections.

[18] The same is true of the *Currency Act*, R.S.C. 1985, c. C-52, subsection 8.(1) of which provides as follows:

8.(1) Subject to this section, a tender of payment of money is a legal tender if it is made

8.(1) Sous réserve des autres dispositions du présent article, ont pouvoir libératoire :

(a) in coins that are current under section 7; and	a) les pièces qui ont cours légal en vertu de l'article 7;
(b) in notes issued by the Bank of Canada pursuant to the <i>Bank of Canada Act</i> intended for circulation in Canada.	b) les billets destinés à circuler au Canada et émis par la Banque du Canada aux termes de la Loi sur la Banque du Canada.

[19] Subsection 8.(1) provides that payment in coins is legal tender but subsection (2) limits the amounts in respect of which certain denominations of coins are legal tender. Subsections (2.1) and (3) provide rules by which the amount of legal tender is to be calculated and subsection (4) provides an exception to the rule in subsection (1). Once again, the same structure is apparent.

[20] Finally, section 53.(2) of the *Privacy Act*, R.S.C. 1985, c. P-21, provides as follows:

53.(2) Subject to this section, the Privacy Commissioner holds office during good behaviour for a term of seven years, but may be removed for cause by the Governor in Council at any time on address of the Senate and House of Commons.	53.(2) Sous réserve des autres dispositions du présent article, le Commissaire à la protection de la vie privée occupe sa charge à titre inamovible pour un mandat de sept ans, sauf révocation motivée par le gouverneur en conseil sur adresse du Sénat et de la Chambre des communes.
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[21] Subsection (2) fixes the term of office of the Privacy Commissioner, while subsection (1) deals with the mechanics of the appointment (by Governor in Council under the Great Seal of Canada), subsection 3 with a clarification of the rule (a Commissioner can be reappointed for a second term) and subsection(4) deals with an exception to that rule (interim appointment).

[22] The examples could be multiplied but they would not make the point any clearer than do these three examples. The expression "Subject to this section" is a means of setting out a rule, and

within the same section, setting out the exceptions to that rule or the means of application of that rule.

[23] Section 141 of the Regulations is a clear application of this legislative drafting technique. Animals are to be segregated by age or weight unless some other form of segregation is provided within the section. Subsection 141.(4) provides another basis of segregation. It is interesting to note that section 141.(4) carries within it the possibility of individual segregation as well as segregation by affinity groups. This is consistent with the evidence given by Edwards, as recounted by the Review Tribunal, that:

At the time the animals are loaded, CCWB tells the transporter which segregated animals come from which producer and *whether or not there are problem animals that need to be further segregated for transport.*

[My emphasis.]

## **CONCLUSION**

[24] I am satisfied that the interpretation which the Review Tribunal gave to subsection 141.(4) is correct as it is consistent with the language used by the draftsman as well as being consistent with other examples of the use of the phrase "Subject to the section" as a legislative drafting technique.

[25] Since the Review Tribunal's decision was correct, there is no basis for our intervention.

[26] I would therefore dismiss this application for judicial review with costs.

"J.D. Denis Pelletier"

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J.A.

"I agree  
K. Sharlow J.A."

"I agree  
C. Michael Ryer J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-532-07

**STYLE OF CAUSE:** *Canadian Food Inspection  
Agency and Edwards Livestock  
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**CONCURRED IN BY:** SHARLOW J.A.  
RYER J.A.

**DATED:** June 24, 2008

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