

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20201007**

**Docket: A-449-19**

**Citation: 2020 FCA 165**

[ENGLISH TRANSLATION]

**CORAM: PELLETIER J.A.  
BOIVIN J.A.  
LOCKE J.A.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**PIERRE FAUTEUX, IN HIS CAPACITY AS  
A PARTNER IN TRANSPORT PIERRE  
FAUTEUX S.E.N.C.**

**Respondent**

Online videoconference hearing organized by the Registry on September 23, 2020.

Judgment delivered at Ottawa, Ontario, on October 7, 2020.

**REASONS FOR JUDGMENT BY:**

**BOIVIN J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
LOCKE J.A.**

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**REASONS FOR JUDGMENT**

**BOIVIN J.A.**

**I. Introduction**

[1] The applicant, the Attorney General of Canada, is filing an application for judicial review to set aside a decision rendered by the Chairperson of the Canada Agricultural Review Tribunal (the Tribunal) on November 5, 2019 (CART-1780) (the Tribunal's Decision). The Tribunal found that the respondent, Mr. Fauteux, had not unduly caused pain and suffering to a hog during

transport and therefore had not violated paragraph 138(2)(a) of the *Health of Animals Regulations* (C.R.C., c. 296) (the Regulations).

## II. Background

[2] On July 26, 2012, Mr. Fauteux delivered 225 hogs from the Ferme Porcine M.V. Inc., located in Ayer's Cliff, to the Les Viandes du Breton slaughterhouse located in Rivière-du-Loup. Travel between the farm and the slaughterhouse takes approximately five (5) hours. In this instance, the hogs arrived at the slaughterhouse in the early afternoon. During unloading, a slaughterhouse employee put one of the hogs in isolation because he was having trouble following the others. The employee then identified the hog as [TRANSLATION] "sick or injured" (Delivery receipt, July 26, 2012, applicant's file, exhibit 2).

[3] About an hour after arriving and being isolated at the slaughterhouse, the hog in question was examined by Canadian Food Inspection Agency (CFIA) veterinarian Dr. Line Pelletier. She performed an ante- and post-mortem inspection of the animal. The inspector's non-compliance report details her findings, including the hog's compromised condition and pain. She noted that the hog [TRANSLATION] "should not have been transported to the slaughterhouse in this condition" (Inspector's non-compliance report, exhibit 7, at para. 4).

[4] Subsequently, in March 2014, the CFIA issued a notice of violation to the respondent for loading or transporting an animal or causing one to be so loaded or transported that cannot be transported without suffering, pursuant to paragraph 138(2)(a) of the Regulations. In May 2014,

the respondent contested the notice of violation from the CFIA before the Tribunal and applied for a review.

[5] The Tribunal hearing was held on October 30, 2018. The issue before the Tribunal was to determine whether the hog was able to withstand transportation without undue suffering. The Tribunal rendered its decision a year later. Essentially, the Tribunal concluded that the CFIA had not discharged its burden of proof to demonstrate that the hog's condition, at the time of loading, could result in undue suffering during travel between the farm and the slaughterhouse. Consequently, the Tribunal concluded that the hog was able to withstand transportation and that the applicant did not violate paragraph 138(2)(a) of the Regulations. That decision is being challenged in this judicial review proceeding.

### III. Issue

[6] The only issue is whether the Tribunal erred in deciding that the respondent had not loaded or transported an animal or caused one to be so loaded or transported that could not be transported without suffering and thus did not violate paragraph 138(2)(a) of the Regulations.

### IV. Analysis

#### A. *Standard of review*

[7] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), the Supreme Court reiterated its holding propounded in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 R.S.C. 190: the presumption in a judicial review

proceeding is that the standard of reasonableness applies (*Vavilov*, at paras. 10, 16 and 23). There is no cause to depart from this presumption in this case. I would like to reiterate that in *Vavilov*, the Supreme Court of Canada insisted on “the need to develop and strengthen a culture of justification in administrative decision making” (*Vavilov*, at paras. 2 and 14). As a result, in testing the reasonableness of the Tribunal’s decision, this Court must not only take account of the outcome of the decision but also the justification in support of this outcome (*Vavilov*, at paras. 14, 74, 83, 86, 87 and 99).

B. *Tribunal’s decision*

[8] The Tribunal began its analysis by referring to this Court’s decision in *Doyon v. Canada (Attorney General)*, 2009 FCA 152, 312 D.L.R. (4th) 142. The Tribunal reiterated that paragraph 138(2)(a) of the Regulations does not prohibit the transport of a suffering animal to the extent that an injured or compromised animal may be transported provided that the necessary precautions are taken (Tribunal’s Decision, at para. 13). The Tribunal then considered the parties’ evidence, more specifically the testimony of Dr. Line Pelletier of the CFIA as well as that of Mr. Fauteux.

[9] The Tribunal considered Dr. Pelletier’s testimony, based on her observations during the ante- and post-mortem inspection of the animal in question. The Tribunal noted that these inspections revealed the following:

- The hog was lying in an unusual position and was in pain;
- His tail showed signs of pronounced necrosis;
- He was unable to get up without assistance;
- He was underweight; and
- His carcass revealed that he was suffering from chronic arthritis and multiple abscesses.

[10] The Tribunal then considered Mr. Fauteux's testimony. In particular, the Tribunal noted that:

- Mr. Fauteux is thorough and pays close attention during hog loading;
- Thanks to his experience and varied training, he is able to determine whether a hog is able or unable to withstand transport;
- He never compromises to ensure that the animals transported do not suffer unduly;
- The hog in question climbed up to the higher portion of the trailer truck and was walking [TRANSLATION] "properly";
- The hog was able to withstand loading and transport;
- During unloading, the hogs became irritated and overcrowded on the ramp, which caused the injury on the hog's right hind leg.

(Tribunal's Decision, at paras. 16, 19-21)

[11] Upon considering these testimonies, the Tribunal found that there was no [TRANSLATION] "disparity" in the evidence presented seeing as, on the one hand, Mr. Fauteux observed the animal in question at the farm during loading, while, on the other hand, Dr. Pelletier observed the hog after it was unloaded at the slaughterhouse. The Tribunal found that the hog indeed did have an injury on its right hind leg, but that it was the result of overcrowding during unloading at the slaughterhouse. According to the Tribunal, the CFIA did not discharge its burden of proof to establish that at the time of loading, the hog's condition could cause undue suffering during transport. The Tribunal concluded that the hog was therefore able to withstand transportation and that Mr. Fauteux had not violated paragraph 138(2)(a) of the Regulations (Tribunal's Decision, at para. 25).

[12] However, in the light of the evidence provided, I am of the view that the Tribunal erred in its consideration of the evidence by ignoring, without explanation or justification, significant contradictions between Dr. Pelletier's and Mr. Fauteux's testimony with regard to the severity

and chronicity of the hog's condition. This application for judicial review should therefore be allowed for the reasons that follow.

C. *Tribunal's errors*

(1) Necrotic tail

[13] The first error committed by the Tribunal pertains to the evidence related to the hog's necrotic tail. Among other things, Dr. Pelletier testified that the animal's tail showed signs of [TRANSLATION] "pronounced necrosis on the tail extending from the base, with a frayed tip" (Transcripts, October 30, 2018, applicant's file, at p. 10). On the basis of the photos of the hog in the record, Dr. Pelletier said the following:

[TRANSLATION] ... I think you can see it in nearly all the photos. You can see it here. That here, that's not a normal tail, the end of the tail is dead, the tissue is dead. It's black, it's no longer alive. So, when I'm talking about a necrotic, flayed tail, dead tissue, it's really this right here. That here, it's not... it's not the tail of a normal hog. (Transcripts, October 30, 2018, applicant's file, at p. 11).

[14] When asked whether this condition was pre-existing at the time of loading, Dr. Pelletier stated that the hog's necrotic tail was a [TRANSLATION] "chronic [and] progressive" condition and that it [TRANSLATION] "did not occur during transport" (*Ibid*).

[15] As to Mr. Fauteux, he recognized that the hog's necrotic tail was a fairly obvious visual sign (Transcripts, October 30, 2018, applicant's file, at pp. 59-60). He also recognized that the *Guide de référence 2013 sur la manipulation et le bien-être des porcs durant le transport* (the Guide) indicates that animals with tail injuries are considered compromised. Mr. Fauteux also added that he had considered the hog's necrotic tail but that, in his opinion, this did not pose a

problem because [TRANSLATION] “it was pretty much healed” (Transcripts, October 30, 2018, applicant’s file, at pp. 60-61).

[16] However, although the Tribunal stated its intention to weigh the evidence related to the hog’s tail (Tribunal’s decision, at para. 22), it failed to analyze the two witnesses’ statements, which are altogether contradictory. Indeed, the Tribunal in no way considered the condition of the necrotic tail and offered no reason or justification in support of its conclusion that [TRANSLATION] “the other pre-existing conditions [including pronounced necrosis of the tail] described by Dr. Pelletier did not make the hog unable to withstand transport” (Tribunal’s Decision, at para. 25). The evidence, however, clearly shows that the pronounced necrosis on the tail of the animal was visible and easily recognizable prior to transport, as confirmed by the testimonies of both Dr. Pelletier and Mr. Fauteux. The Tribunal, therefore, was required to address the necrotic tail and explain why the hog was not compromised by this condition. This omission, combined with a lack of reasoning or justification, is not reasonable and constitutes an error (*Vavilov*, at para. 126).

(2) Underweight hog

[17] The second error made by the Tribunal pertains to the hog being underweight; this factor was also mentioned in the testimonies of record, notably in relation to pre-existing conditions



prior to transport. The Tribunal failed to address the contradictory evidence on this aspect and offered no logical reasoning in support of its conclusion, which ignores this factor.

[18] The Guide includes relevant information on weight variations in hogs. It notably references two density chart tables for slaughter hogs. These charts indicate that hog weight can vary from 91 kg to 250 kg. The Guide also indicates that an emaciated and weak animal is unable to withstand transport (Guide, applicant's file, exhibit 13, at p. 5).

[19] It is worth reiterating that in this case, the hog's weight during the post-mortem inspection was recorded at 76.6 kg. In her testimony, Dr. Pelletier also indicated that the animal weighed nearly 25 kg less than what would be considered a normal carcass (Transcripts, October 30, 2019, applicant's file, at p. 24). As to Mr. Fauteux, he attributed the hog's conditions, including its being underweight, to the time spent in transport and the fact that [TRANSLATION] "it was shoved harder than the others during unloading, and that's what caused it" (Transcripts, October 30, 2019, applicant's file, at pp. 62-63).

[20] The Tribunal, however, did not comment on this condition of the hog nor did it explain how a hog weighing 25 kg less than a normal hog could have developed this condition during transport, if this was not a pre-existing condition. Given the evidence presented, it is unreasonable for the Tribunal to have also ignored the fact that the hog was underweight in its reasons. Without any justification, it is impossible to determine the Tribunal's decision-making process without guessing or making conjectures, which would go against Supreme Court pronouncements on this subject (*Vavilov*, at para. 97).

(3) Injury to the right hind leg

[21] Lastly, the Tribunal's decision is also flawed in terms of the condition affecting the hog's right hind leg. In that respect, Mr. Fauteux vaguely explained that if the animal had had difficulty during unloading at the slaughterhouse, it could have injured itself from overcrowding during unloading and thus the injury was not related to pre-existing conditions. He added that during unloading, he was at the back of the trailer and as a result could not see everything that was happening during unloading (Transcripts, October 30, 2018, applicant's file, at pp. 46-48). The respondent's testimony on the deterioration of the hog's condition as a result of overcrowding is based in hypothesis and speculation.

[22] As to Dr. Pelletier, she contradicted Mr. Fauteux by stating in her testimony that the condition affecting the hog's right hind leg, like the necrotic tail and low weight, was a pre-existing condition affecting the hog's ability to withstand transport (Transcripts, October 30, 2018, applicant's file, at p. 21):

[TRANSLATION] This animal here has had this for weeks. Not for an hour, not for a few days. The inflammatory process, the infectious process that has occurred here, all the tissue degradation, it really takes a few weeks for this in this case.

[23] Despite the obvious [TRANSLATION] "disparity" between these testimonies, the Tribunal accepted Mr. Fauteux's testimony about overcrowding during unloading without further explanation, adding that it is [TRANSLATION] "unmistakable that this injury to the hog made it difficult for it to follow the group, that after unloading it was unable to get up without assistance and that it was feeling pain" (Transcripts, October 30, 2018, applicant's file, at para. 24).

[24] By ignoring Dr. Pelletier’s testimony on another condition of the hog and, given the lack of justification or intelligible or rational analysis, based on the Tribunal’s reasons for its decision, the Court cannot determine the reasoning that was followed to lead to the obtained outcome. As a result, it is difficult to understand the basis for the Tribunal’s decision, and intervention from this Court is warranted (*Vavilov*, at paras. 74, 81, 85, 102, 103 and 128). In conclusion, it is appropriate to reiterate the comment made by our Court in *Doyon* (a case similar to this one) at paragraph 54:

The main function of a tribunal of first instance is to receive and analyze 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*.

[25] For all these reasons, I am allowing the application for judicial review with costs, setting aside the Tribunal’s decision and referring the case to another member of the Tribunal to render a new decision in accordance with these reasons.

“Richard Boivin”

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J.A.

“I agree.

J.D. Denis Pelletier”

“I agree.

George R. Locke”

Translation certified true  
on this 5th day of March 2021.  
François Brunet, Revisor

**FEDERAL COURT OF APPEAL**

**COUNSEL OF RECORD**

**DOCKET:** A-449-19

**STYLE OF CAUSE:** THE ATTORNEY GENERAL OF  
CANADA v. PIERRE FAUTEUX,  
IN HIS CAPACITY AS A  
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PIERRE FAUTEUX S.E.N.C.

**PLACE OF HEARING:** BY ONLINE  
VIDEOCONFERENCE

**DATE OF HEARING:** SEPTEMBER 23, 2020

**REASONS FOR JUDGMENT BY:** BOIVIN J.A.

**CONCURRED IN BY:** PELLETIER J.A.  
LOCKE J.A.

**DATED:** OCTOBER 7, 2020

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