Federal Court of Appeal | Cour d'appel fédérale

Date: 20170110

Docket: A-543-15

Citation: 2017 FCA 5

[ENGLISH TRANSLATION]

CORAM: **SCOTT J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

L. BILODEAU ET FILS LTÉE
and
PATRICE GUILLEMETTE

Respondents

Hearing held at Montréal, Quebec, on January 10, 2017.

Judgment delivered from the bench at Montréal, Quebec, on January 10, 2017.

REASONS FOR JUDGMENT OF THE COURT BY: BOIVIN J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Montréal, Quebec, on January 10, 2017.)

BOIVIN J.A.

[1] The Attorney General of Canada (the applicant) is applying for judicial review of a decision by the Canada Agricultural Review Tribunal (the Tribunal) dated November 18, 2015 (2015 CART 22). The Tribunal's decision set aside the notices of violation issued against L. Bilodeau et Fils Ltée and Patrice Guillemette (the respondents) for the violation set out in

subsection 138(4) of the *Health of Animals Regulations*, C.R.C., c. 296 (the Regulations), as the Tribunal was of the opinion that the respondents did not commit the offence of transporting a cow that became unfit for transport.

[2] The facts on which this matter is based began on February 15, 2012, when Patrice Guillemette, an employee of L. Bilodeau et Fils Ltée (Bilodeau et Fils), became responsible for a trailer that contained 20 dairy cows and about 60 young dairy calves (examination of Mr. Guillemette, hearing transcript of June 11, 2015, Appeal Book, Vol. 1, Tab 22, p. 410, lines 13–17). Another Bilodeau et Fils employee had been responsible for the trailer for the first part of the journey, that is, from Nova Scotia to Saint-Jean-Port-Joli, and Mr. Guillemette was responsible for the trailer for the second part of the trip. At the time of the transfer of responsibility, Mr. Guillemette unsuccessfully tried to get two cows that were lying on their sides to stand (examination of Mr. Guillemette, hearing transcript of June 11, 2015, Appeal Book, Vol. 1, Tab 22, pp. 410–411). Being of the opinion that the cows were indolent but in good health and fit for transport, Mr. Guillemette transported them to the Levinoff-Colbex abattoir, located in Saint-Cyrille-de-Wendover, Quebec.

[3] When he arrived at the abattoir, Dr. Geneviève Comeau, the chief veterinarian of the Canadian Food Inspection Agency (the Agency), noticed that the two cows that had travelled lying down had difficulty getting up. However, after a few minutes of encouragement, they were able to stand and leave the trailer without assistance (humane transportation inspection report dated February 15, 2014, Appeal Book, Vol. 1, Tab 12, p. 85).

[4] After a more careful examination of the cows, Dr. Comeau saw signs that one of the cows—the one that gave rise to this application for judicial review—had been trampled and noticed that it was suffering from muscle tremors (examination of Dr. Comeau, hearing transcript of June 11, 2015, Appeal Book, Vol. 1, Tab 22, p. 207, lines 16–19). In other words, it had the appearance of a cow that had lain on its side for a very long time, which was confirmed by the soiled and compressed state of its bedding in the trailer (examination of Dr. Comeau, hearing transcript of June 11, 2015, Appeal Book, Vol. 1, Tab 22, p. 195, lines 10–14). Dr. Comeau concluded that the cow had been unfit for transport and that it should have been sent for veterinary care during the journey (examination of Dr. Comeau, hearing transcript of June 11, 2015, Appeal Book, Vol. 1, Tab 22, pp. 223–224).

[5] On February 7, 2014, Bilodeau et Fils was issued a notice of violation with a penalty in the amount of $7,800 (No. 1213QC0003, Appeal Book, Vol. 1, Tab 6, p. 24) for violating subsection 138(4) of the Regulations, and Mr. Guillemette was issued a notice of violation with a warning (No. 1213QC0003-2, Appeal Book, Vol. 1, Tab 8, p. 28) for the same violation. Subsection 138(4) reads as follows:

138. (4) No railway company or motor carrier shall continue to transport an animal that is injured or becomes ill or otherwise unfit for transport during a journey beyond the nearest suitable place at which it can receive proper care and attention.	138. (4) Une compagnie de chemin de fer ou un transporteur routier cesse le transport d’un animal blessé, malade ou autrement inapte au transport en cours de voyage, au plus proche endroit où il peut recevoir des soins.

[6] On November 18, 2015, the Tribunal set aside the two notices of violation, determining that “the Agency [had] not proven, on a balance of probabilities, that the cow in question was unfit for transport during the journey” (Decision of the Tribunal, paragraph 40).

[7] The applicable standard of review in this case is reasonableness.

[8] In support of his application, the applicant essentially alleges that the Tribunal committed two errors. First, the Tribunal misapprehended the evidence, particularly by failing to deal with the uncontradicted testimony of two veterinarians and by not taking into account the Compromised Animals Policy (Policy), which defines when an animal is unfit for transport. Second, it misinterpreted the text of subsection 138(4) of the Regulations.

[9] Regarding the first alleged error, we are of the opinion that the applicant did not demonstrate the existence of an "erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it" as required by paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Tribunal mentioned that it had concerns about the evidence submitted by the Agency. A court of appeal must show deference to the assessment and weighing of the evidence by the decision-maker at first instance—in this case, the Tribunal. This is especially true here, where the Tribunal's main task was to decide whether the Agency proved the essential elements of an offence defined by this Court as being "draconian" (*Doyon v. Canada (Attorney General)*, 2009 FCA 152, 395 N.R. 176 (*Doyon*)). In *Doyon*, this Court pointed out that 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" given the severity of the penalties provided under this system (paragraphs 27–28).

[10] The applicant relies on *Doyon* to argue that the Tribunal erred by failing to consider a relevant piece of evidence, namely the Policy, which defines when an animal is unfit for

transport. We are instead of the opinion that the Tribunal did consider the Policy but decided that it had very little probative value in this case (Decision of the Tribunal, paragraph 27). It was open to the Tribunal to draw this conclusion because, as the respondents note, the Policy does not have force of law and is not binding on the Tribunal. The applicant did not satisfy us that the Tribunal made an erroneous finding of fact.

[11] In support of her second argument, the applicant alleges that the Tribunal concluded that an animal must have "serious injuries", a requirement found in subsection 138(2) and not in subsection 138(4) of the Regulations, to be considered unfit for transport. According to the applicant, this is an erroneous interpretation of subsection 138(4) of the Regulations, which stipulates that when an animal is injured, ill or otherwise unfit for transport, it becomes the driver's responsibility to discontinue the transport of the animal.

[12] We are not satisfied that the Tribunal imposed such requirement. The Tribunal considered five decisions that also deal with the interpretation of subsection 138(4) of the Regulations (Decision of the Tribunal, paragraphs 29–37). In two of those decisions, while the assessment of whether the animals were unfit for transport was based on visible injuries, the Tribunal nonetheless considered other symptoms and characteristics that led to the finding that the animals were unfit for transport, such as the presence of soupy urine and feces on a cow (Decision of the Tribunal, paragraphs 33, 35). The Tribunal also considered a case in which a notice of violation was set aside because the individual who was imposed the penalty could not have known that the animal was ill and he came to the reasonable conclusion that the "cow was lying down because it was sluggish" (Decision of the Tribunal, paragraph 30 citing

David Mytz v. Canada (CFIA), 2003 CanLII 71515, RTA #60084). In this case, the Tribunal weighed the evidence and the relevant case law to conclude that the Agency did not establish the responsibility of the respondents on a balance of probabilities (Decision of the Tribunal, paragraph 40).

[13] Ultimately, in subsection 138(4) of the Regulations Parliament did not adopt a cow's ability to stand without assistance as the only criteria for determining whether an animal is fit for transport. It is therefore up to the carrier, during the transport, and, subsequently, to the Tribunal, to evaluate whether a cow is or was unfit for transport, taking into account the specific context of each case. That is what the Tribunal did in this case.

[14] Given these circumstances, we are of the opinion that the Tribunal's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraph 47, [2008] 1 S.C.R. 190).

[15] For these reasons, the application for judicial review will be dismissed with costs.

"Richard Boivin"

J.A.

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-543-15
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. L. BILODEAU ET FILS LTÉE AND PATRICE GUILLEMETTE
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 10, 2017
REASONS FOR JUDGMENT OF THE COURT BY:	SCOTT J.A. BOIVIN J.A. DE MONTIGNY J.A.
DELIVERED FROM THE BENCH BY:	BOIVIN J.A.

APPEARANCES:

Sarom Bahk Pascale-Catherine Guay	FOR THE APPLICANT
Jean-Claude Beauchamp	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPLICANT
Jean-Claude Beauchamp Montréal, Quebec	FOR THE RESPONDENTS