Federal Court  Cour fédérale

Date: 20191204

Docket: T-1604-18

Citation: 2019 FC 1559

Ottawa, Ontario, December 4, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

CANADIAN HORSE DEFENSE COALITION

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

JUDGMENT AND REASONS

[1] The applicant, the Canadian Horse Defense Coalition, is a federally incorporated non-profit organization. The Coalition's goal is to achieve a national ban on the slaughter of horses for consumption as well as a ban on the export of live horses for human consumption.

[2] The Coalition seeks judicial review of the conduct, practices, and policies of the Canadian Food Inspection Agency [CFIA] concerning the shipment of live horses by air from airports in Western Canada to Japan for slaughter.

[3] The Coalition also seeks to compel the CFIA to apply the requirements of two regulations pertaining to how horses are shipped by air: one which requires that horses be segregated from one another; and a second which requires that, while in transit, their heads not touch any roof or deck when standing in their crates in their natural position.

I. Background

[4] The Coalition has been actively engaged in the issue of live horse exports since 2012. It has no personal, proprietary, or pecuniary interest in the outcome of this judicial review and views itself as a public interest litigant. The Coalition claims the CFIA has been allowing large horses (those 14 hands in height or larger) to be shipped in a way that violates provisions of the *Health of Animals Regulations*, CRC c 296 [*HAR*].

[5] The CFIA is responsible for the administration and enforcement of the *Health of Animals Act*, SC 1990, c 21 [*HAA*] and the *HAR*. It has legislative authority for the humane treatment of animals during their transportation in and out of Canada. The Minister of Health is responsible for the overall direction of the CFIA, and the Minister of Agriculture and Agri-Food has statutory responsibilities under the *HAA*.

[6] The CFIA's *Compliance and Enforcement Operational Policy* outlines its approach to enforcing compliance with regulations, which includes regular inspections of horses departing from airports in the Prairie provinces. These inspections occur at several points in the shipping process: first, at a CFIA-approved farm site where pre-export requirements are verified; next, at the farm site after results from blood samples taken during the first inspection are analyzed; and

lastly, at the airport prior to the horses' departure. CFIA veterinarians or inspectors are on-site at the airport from the time the horses arrive until all containers have been loaded onto the aircraft, and they verify that all segregation and space regulations are respected.

[7] According to Dr. Cornelius Kiley, the National Manager of the Animal Welfare, Biosecurity and Assurance Programs Section of the CFIA, the standard for inspections is based on the professional judgment of a CFIA veterinarian or inspector. The veterinarian or inspector considers the inspection requirements under the *Interim Program Policy and Operational Guidance: Headroom Requirements and Loading Density Recommendations for Horses Transported by Air and by Land* [*IPPOG*].

[8] Formal implementation of the *IPPOG* occurred in August 2017. The *IPPOG* modified and specified the enforcement of various requirements set out in the *HAR*; notably, by allowing horses' heads to occasionally touch soft netting covering the top of the crates, and by allowing them to be shipped in groups as opposed to being segregated as stated in subsection 141(8) of the *HAR*. The CFIA says it drafted the *IPPOG* because no International Air Transport Association guidelines existed for horses exceeding 800kg at the time, and CFIA veterinarians and inspectors needed additional guidance in determining appropriate space requirements for larger horses, especially when being shipped by air.

[9] The *IPPOG* also acknowledges that headroom requirements for horses are difficult to apply consistently because different breeds of horses have different temperaments and natural stances, and that the export of large horses by air was an activity not foreseen by the existing

regulations. The *IPPOG* states that some horses, depending on their breed and behaviour, may be more comfortable and less anxious when shipped together, and that soft, pliable overhead netting is not considered an overhead structure as it is unlikely to cause a horse injury or undue suffering. Although the Coalition does not specifically challenge the *IPPOG*, it takes issue with the *IPPOG* indirectly as part of a wider effort by the CFIA to reform the regulations about shipment of animals (including horses) to ensure humane treatment.

II. The Regulations in Question

[10] The Coalition does not point to a specific decision or decisions made by the CFIA about the transportation of horses. Rather, it takes issue with the CFIA's failure to ensure that live horse shipments to Japan by air are compliant with subsection 141(8) and paragraph 142(a) of the *HAR*.

[11] These two provisions provide as follows:

> **141(8)** Every equine over 14 hands in height shall be segregated from all other animals during transport by air.
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> **142** No person shall transport or cause to be transported animals in a railway car, motor vehicle, aircraft or vessel unless
>
> (a) each animal is able to stand in its natural position without coming into contact with a deck or roof;

[12] Amendments to Part XII of the *HAR* enacted on February 20, 2019 will become effective on February 20, 2020. The prescriptive nature of the requirements in subsection 141(8) and paragraph 142(a) of the *HAR* will no longer form part of the enforcement regime under the *HAR* after February 20, 2020. These provisions will be repealed on February 20, 2020.

III. Issues

[13] The Coalition raises the following issues:

1. Is the CFIA's interpretation of subsection 141(8) and paragraph 142(a) of the *HAR* unlawful?

2. Is the CFIA in breach of its public legal duty by failing to enforce subsection 141(8) and paragraph 142(a) of the *HAR*?

[14] The Respondent raises the following issues:

1. Is the affidavit of Helen Sinikka Crosland, the Executive Director of the Coalition, admissible?

2. Are the orders of mandamus and declarations sought by the Coalition proper remedies to compel enforcement of the prohibitions contained in subsection 141(8) and paragraph 142(a) of the *HAR*?

IV. What is the Appropriate Standard of Review?

[15] The Coalition contends that the central issue in this case is the proper interpretation of subsection 141(8) and paragraph 142(a) of the *HAR*, and that the proper standard of review is correctness. The respondent does not challenge this standard of review; nor has the respondent offered any arguments on what the standard of review should be.

[16] To determine the proper standard of review as well as the proper remedy, if any, the decision, or conduct being impugned must be properly characterized. In my view, the Coalition

is not so much challenging the CFIA's interpretation of the regulations about segregation and headroom for horses but, rather, an ongoing series of CFIA policy decisions and the lack of strict enforcement of the two regulations at issue.

[17] Accordingly, reasonableness is the proper standard of review in this case. Questions of fact, discretion and policy, as well as questions where legal issues cannot be easily separated from factual issues, generally attract a standard of reasonableness which requires a level of deference to the decision-maker (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras 51 and 53).

[18] Because the Coalition challenges the CFIA's policy decisions about how it enforces the *HAR* and *HAA*, and since there are factual considerations intertwined with the legal basis of their application for judicial review, the Court should accord deference to the CFIA. Although neither the *HAA* nor *HAR* is an enabling or home statute for the CFIA, they are both connected to its duty to ensure animal welfare; therefore, reasonableness is the proper standard of review.

V. Analysis

[19] Two preliminary issues require the Court's attention: (i) is the affidavit of Ms. Sinikka Crosland admissible? And (ii), is this application moot due to the effective repeal of the two regulations at issue?

A. *Is the Crosland affidavit admissible?*

[20] The respondent contends that the affidavit of the Coalition's Executive Director, Helen Sinikka Crosland, is not admissible because it does not meet any of the exceptions for admitting new evidence on a judicial review. According to the respondent, the Crosland affidavit appends, as hearsay, copies of select media articles and petitions on the issue of live horse transport which were not before the CFIA when it adopted and implemented the *IPPOG*.

[21] I agree with the respondent that the Crosland affidavit is inadmissible evidence because it does not fit within the recognized exceptions to the general rule against permitting new evidence in a judicial review proceeding.

[22] The Court may admit new evidence on judicial review in three recognized circumstances. First, where the new evidence provides general background information that might assist in understanding the issues relevant to the judicial review, but does not add new evidence on the merits. Second, where the new evidence brings to the attention of the reviewing court procedural defects not found in the evidentiary record of the decision-maker. And third, where the new evidence highlights the complete absence of evidence before the decision-maker on a particular finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20 [*Access Copyright*]).

[23] Only the first exception in *Access Copyright* is relevant; neither the second nor the third exception is engaged in this case. The news articles included in the Crosland affidavit do not supply any general background information which is not already clear from other documentation in the record.

[24] The photographs included with the Crosland affidavit also appear in other affidavits in the record. While these photographs may be somewhat helpful in providing the Court with a picture of how horses are transported, the record also provides adequate descriptions of the shipment conditions in a way which leaves no doubt that horses are being shipped with soft netting covering their crates.

[25] I therefore agree with the respondent that the Crosland affidavit is inadmissible evidence and must be struck from the record because it does not fit within the recognized exceptions to the general rule against permitting new evidence in a judicial review proceeding.

B. *Is the Application moot?*

[26] In the respondent's view, subsection 141(8) and paragraph 142(a) of the *HAR* have been effectively repealed; amendments to the *HAR* come into force on February 20, 2020 and, hence, any decision by the Court will likely have no practical application, nor be binding on future decision makers.

[27] The Supreme Court of Canada stated in *Borowski v. Canada (Attorney General)*, [1989] SCJ No 14 at para 15 [*Borowski*] that the doctrine of mootness applies "when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case". This involves a two-step analysis: (i) it is necessary to determine whether the required tangible and concrete dispute between the parties has disappeared and the issues have become academic; and (ii), if the response to the first question is

affirmative, it is necessary to decide if the court should exercise its discretion to hear the case on its merits (*Borowski* at para 16).

[28] If there is "no longer a live controversy or concrete dispute", the case can be determined to be moot (*Borowski* at para 26). Even if a case may be moot because there is no longer a live controversy or concrete dispute, it is still necessary to determine whether the court should exercise its discretion to hear and determine the case on the merits where circumstances warrant.

[29] This second step of a mootness analysis considers three overriding principles: (i) the presence of an adversarial relationship (*Borowski* at para 31); (ii) the need to promote judicial economy (at para 34); and (iii) the need for the court to show a measure of awareness of its proper role as the adjudicative branch of government (at para 40). The reviewing court should consider the extent to which each of these principles may be present in a case, and the application of one or two may be overborne by the absence of the third and vice versa (at para 42).

[30] In my view, this application has not yet been rendered moot because the segregation and headroom regulations remain in force until February 20, 2020. These two regulations have not, as the respondent states, "been effectively repealed". A live controversy and dispute exists between the parties concerning the interpretation and enforcement of these regulations.

C. *Is the CFIA's interpretation and lack of enforcement of the segregation and headroom regulations unlawful?*

[31] The Coalition contends that the CFIA has, in contravention of the *HAR*, allowed horses to be shipped together and allowed horses' heads to touch netting covering the crates used to ship the horses.

[32] The Coalition says the wording of subsection 141(8) and paragraph 142(a) of the *HAR* is "abundantly clear, mandatory, and consistent with international standards". According to the Coalition, these provisions are not discretionary policies but are clearly mandatory due to the use of the word "shall". The Coalition thus contends that an internal administrative policy such as *IPPOG* cannot override the law, nor can it override a statutory public duty.

[33] The Coalition emphasizes that there are serious consequences when the CFIA does not enforce subsection 141(8) and paragraph 142(a) because there is evidence that horses may be contained in crates for up to 36 hours, from first loading to arrival at the destination airport. The Coalition says that CFIA veterinarians and inspectors are in breach of these two provisions and of their duty of inspection under paragraph 19(1)(b) of the *HAA*.

[34] The respondent reminds the Court that the CFIA has an administrative monetary penalty policy [AMP] in place through the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, SC 1995, c 40. This allows the Minister to deal with offenses under the *HAR* by way of an AMP violation. The respondent notes that CFIA inspectors also have the power to remove any affected animals from shipments and refer offenders to the CFIA's Enforcement and Investigation Services.

[35] Neither party adduced any evidence as to how frequently CFIA veterinarians or inspectors have enforced the *HAR* through these means, but it is evident there are several different enforcement mechanisms available to the CFIA to ensure compliance with subsection 141(8) and paragraph 142(a) of the *HAR*. The CFIA is clearly engaged in ensuring the protection of animal welfare through regulatory enforcement; it is a key part of its mandate under the *HAA* and is apparent throughout its guidance documents.

[36] Although the parties disagree about the proper treatment of horses in transit by air, I do not see the CFIA's difficulties in consistently enforcing subsection 141(8) and paragraph 142(a) of the *HAR* as being unlawful. If anything, more clarity is required on the best way to manage horses shipped by air, but this does not amount to an unlawful act in my view.

D. *Is the CFIA in breach of its public legal duty?*

[37] The Coalition contends that the CFIA's public legal duty to inspect horses prior to export is implied.

[38] The respondent contends that subsection 141(8) and paragraph 142(a) of the *HAR* impose obligations only on owners and those in charge of the horses and crates used to transport them. According to the respondent, paragraph 19(1)(b) of the *HAA* imposes obligations on persons exporting animals from Canada by vessel or air—not on the CFIA. The respondent therefore argues that no public legal duty exists.

[39] The respondent points to *Sylvain v Canadian Food Inspection Agency*, 2004 FC 895 [*Sylvain*], where the applicant sought to force the CFIA to comply with subsection 105(1) of the *HAR* to ensure that containers or crates used to transport poultry were thoroughly cleaned and disinfected. In *Sylvain*, the Court dismissed the applicant's request for an order of mandamus, stating that: "The provision at the heart of this litigation… does not impose any obligation on the respondent but rather on the owners and persons in charge of the crates used to transport poultry. The respondent's role is to ensure that the Regulations are enforced, which is within its discretionary power. The applicant did not show how the respondent failed to fulfill its legal obligation to act" (para 29).

[40] I agree with the respondent's submission that the CFIA's specific means of enforcing the *HAR* are a matter of policy, and any duty it owes is to the Crown rather than to any individual or group. In my view, the CFIA has no public legal duty to the Coalition to enforce the *HAR*; if anything, its enforcement and regulatory duties are to the Minister who has granted the CFIA responsibility for ensuring the regulations and laws concerning animal transport are met.

E. *Are mandamus and declarations proper remedies?*

(1) *Should an order for mandamus be issued*?

[41] The Coalition seeks an order or orders of mandamus. It says the CFIA's veterinarians and inspectors owe a public legal duty to ensure that the requirements under subsection 141(8) and paragraph 142(a) of the *HAR* are met, and that it has the right to demand performance of this duty.

[42] The Federal Court of Appeal defined test for whether mandamus can issue in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742 at para 45:

1. There must be a public legal duty to act;
2. The duty must be owed to the applicant;
3. There is a clear right to performance of that duty, in particular:
    i. the applicant has satisfied all conditions precedent giving rise to the duty;
    ii. there was
        1. a prior demand for performance of the duty;
        2. a reasonable time to comply with the demand unless refused outright; and
        3. a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay
4. Where the duty sought to be enforced is discretionary, the following rules apply:
    i. in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

ii. mandamus is unavailable if the decision-maker's discretion is characterized as being “unqualified”, “absolute”, “permissive” or “unfettered”;

iii. in the exercise of a “fettered” discretion, the decision-maker must act upon “relevant” as opposed to “irrelevant” considerations;

iv. mandamus is unavailable to compel the exercise of a “fettered discretion” in a particular way; and

v. mandamus is only available when the decision-maker's discretion is “spent”; *i.e.,* the applicant has a vested right to the performance of the duty.

5. No other adequate remedy is available to the applicant;
6. The order sought will be of some practical value or effect;
7. The Court in the exercise of its discretion finds no equitable bar to the relief sought;
8. On a “balance of convenience” an order in the nature of mandamus should (or should not) issue.

[43] In view of my finding above that no public legal duty to act exists, mandamus cannot be issued.

[44] The Coalition has not proven that a public legal duty to act exists, which is the first requirement for an order of mandamus to be issued. Subsection 141(8) and paragraph 142(a) of the *HAR* do not impose any obligation on the CFIA. The obligations imposed by these two provisions fall upon the owners and those in charge of the crates and containers used to transport horses. The CFIA’s role is to ensure that the *HAR* are enforced, which is within its discretionary power. The Coalition has not shown how the CFIA failed to fulfill its legal obligation to act (*Sylvain* at para 29).

[45] Although the Coalition can expect the Minister and the CFIA to regulate horse shipments, it cannot dictate how they do so - that is not the purpose of the remedy of mandamus. As the Federal Court of Appeal outlined in *Distribution Canada Inc. v MNR*, [1993] 2 FC 26 [*Distribution Canada*]:

> [27] There is no doubt that … the Minister "owe[s] the public a clear legal duty to enforce the law". This implies that he must take all reasonable means to enforce the provisions of the Act. The reasonableness of those measures requires the assessment of policy considerations which are outside the domain of the courts since they deal with the manner in which the law ought to be enforced. What the appellant claims, however, is that the Minister is not doing all he can. …
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> [28] It must be said at the outset that one of the purposes of the Customs Tariff is the collection of revenue. If the respondent finds that the cost of collecting duty and taxes from persons returning to Canada exceeds the amount collected, the Minister ought to have discretion so as to appropriately tailor the means to the end. If the enforcement of the Act leads to a depletion of revenues, the respondent cannot be said to be acting in conformity with the Act. In such cases, no more can reasonably be expected of him.
>
> …
>
> [30] The result, in my view, becomes obvious. Only he who is charged with such public duty can determine how to utilize his resources. This is not a case where the Minister has turned his back on his duties, or where negligence or bad faith has been demonstrated. It is a case where the Minister has established difficulties in implementation and where he enjoys a discretion with which the law will not interfere.

[46] As in *Distribution Canada*, the Minister in this case has the discretion to choose how to "tailor the means to the end" and enforce the *HAA* and *HAR* to ensure animal welfare.

(2) *Should the requested declarations be made*?

[47] The Coalition requests the following declarations:

a. The CFIA has been interpreting subsection14l(8) and paragraph 142(a) of the *HAR* unlawfully;

b. The CFIA's ongoing conduct, practice or policy of not requiring individual segregation of horses over 14 hands in height upon export by air, contrary to subsection141(8) of the *HAR*, is unlawful;

c. The CFIA's ongoing conduct, practice or policy of not requiring horses be crated in a manner to ensure they may stand in a natural position upon export by air under paragraph 142(a) of the *HAR* is unlawful; and

d. The CFIA's failure to enforce segregation under subsection 141(8) of the *HAR*, and the natural standing provisions under subsection 142(a) of the *HAR* is a breach of its public legal duty.

[48] The Supreme Court of Canada stated in *Ewert v Canada*, 2018 SCC 30, that:

> [81] A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available: … [Citations omitted]. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought: … [Citations omitted].
>
> …
>
> [83] A declaration is a discretionary remedy. … [Citation omitted].

[49] I decline to make the declarations the Coalition seeks. They would serve no practical effect because the impugned provisions of the *HAR* will be repealed on February 20, 2020 and no longer in force.

[50] This is not a case where the Minister or the CFIA has turned their back on their duties; nor one where they have demonstrated negligence or bad faith. It is a case where they have clear discretion as to enforcement of the *HAA* and *HAR*, this Court should not interfere or intervene.

VI. Conclusion

[51] The Coalition's application for judicial review is, therefore, dismissed.

[52] The Coalition shall pay to the respondent within 30 days of the issuance of this judgment costs in the lump sum amount fixed at $500.

JUDGMENT in T-1604-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and the Applicant shall pay to the Respondent within 30 days of the issuance of this judgment costs in the lump sum amount fixed at $500 (inclusive of any disbursements and taxes).

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1604-18
STYLE OF CAUSE:	CANADIAN HORSE DEFENSE COALITION v CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 30, 2019
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