Court File No.: A-3-20

FEDERAL COURT OF APPEAL

CANADIAN HORSE DEFENCE COALITION

APPELLANT

AND:

MINISTER OF AGRICULTURE AND AGRI-FOOD

RESPONDENT

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard in Vancouver.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules,* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 2, 2020.

Issued by: Marc Richard
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Appeal

THE APPELLANT APPEALS to the Federal Court of Appeal from the judgment of Justice Boswell, dated December 4, 2019, by which the Court dismissed the Appellant's application for judicial review in Court File No. T-1604-18 (the "Judgment").

THE APPELLANT ASKS that the appeal be allowed, the Judgment be set aside and:

1. that the following declarations be made:

    i. that the CFIA has been interpreting s.141(8) of the *Health of Animals Regulations*, C.R.C., c. 296 ("*HAR*"), as it relates to the segregation of horses over 14 hands in height for transport, upon export by air, unlawfully;

    ii. the CFIA has been interpreting s.142 (a) of the *HAR*, as it relates to allowing the horses' heads to touch the roofs or decks of the crates upon export by air, unlawfully;

    iii. the CFIA's ongoing conduct, practice and/or policy in not requiring individual segregation of horses over 14 hands in height upon export by air, contrary to s.141(8) of the *HAR*, is unlawful;

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

    v. the CFIA's failure to enforce the segregation provisions under s. 141(8) of the *HAR*, and the natural standing provisions under s.

142(a) of the *HAR* is a breach of its public legal duty.

2. for an order or orders of mandamus requiring the CFIA to apply:

    i. the individual segregation requirements under s. 141(8) of the *HAR* on inspection of horses for export by air; and

    ii. s.142(a) of the *HAR* by not allowing the horses' heads to touch the roofs, including netting, of the crates, on inspection of horses for export by air.

3. for an order admitting the affidavit of Sinikka Crosland, sworn September 26, 2018 (the "Crosland Affidavit");

4. that the appellant's costs of the application and appeal be allowed. In the event the appellant is not successful at this appeal, the appellant respectfully requests an order that it not be required to pay the respondent's costs;

5. for any other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. The Application Judge erred in law in mischaracterizing the duty which was the subject of the judicial review. The Application Judge characterized the judicial review as a challenge to the CFIA's broad and discretionary duty in enforcing obligations owed by third parties on the export of horses by air from Canada under s. 141(8) of *HAR* which requires the segregation of large horses on transport by air, and s. 142(a) of *HAR* which requires an animal to be transported in conditions where the animal's head does not come into contact with a roof. This is not such a case. Rather, this case is a challenge to the CFIA's specific, defined and mandatory duty of inspection and certification that arises under s.19(1) of the

Health of Animals Act, SC 1990, c 21 ("*HAA*"). The appellant says that s.19(1)(b) of the *HAA* is at the very heart of this judicial review. In providing that a person may export a horse by air *only* upon receipt of a certificate from a CFIA veterinary inspector *certifying* that the exporter has met all prescribed requirements under the *HAR*, s. 19(1)(b) of the *HAA* requires a CFIA veterinary inspector to perform that inspection and to verify that all the prescribed requirements have been met. It imposes a duty directly on the CFIA on the export of animals under s. 19 of the *HAA* which is distinct from the CFIA's general duty to enforce third party compliance with the provisions of the *HAR*. As such, it was also incorrect for the Application Judge to find that the obligations imposed by the segregation and headroom requirements under the *HAR* fall on the owners and exporters in charge of the crates, and not on the CFIA. It is the CFIA veterinary inspectors, and not the owners/exporters, who have a mandatory duty to inspect and certify under s. 19(1) of the *HAA* prior to all shipments of horses exported by air. In coming to his conclusion, the Application Judge erred in law in relying on authorities that concerned a public officer's broad discretionary powers of enforcement which did not consider *mandamus* in relation to the specific and defined kind of duty that is imposed on the CFIA in this case.

2. The Application Judge erred in law by failing to determine the central issue raised in the Application which was whether the CFIA had breached its duty under s. 19(1)(b) of the *HAA* in certifying that horses loaded for export by air complied with the requirements prescribed under ss. 141(8) and 142(a) of *HAR* when the horses did not. This analysis required the Application Judge to determine the meaning and effect of s. 19(1)(b) of *HAA* and ss. 141(8) and 142(a) of *HAR* which, in error of law, he failed to do.

3. The Application Judge erred in law in finding that reasonableness was the applicable standard of review for the question raised in the proceeding. In the alternative, the Application Judge failed to apply the standard of reasonableness correctly for reasons including he did not consider whether the CFIA's

interpretation of ss. 19(1)(b) of the *HAA* and ss. 141(8) and 142(a) of *HAR* was reasonable.

4. The Application Judge erred in law in characterizing this matter as "[the appellant] 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". This mischaracterization bears on the Application Judge's flawed standard of review analysis. This mischaracterization implies that challenging statutory interpretation, on the one hand, and challenging an ongoing course of conduct/policy, on the other hand, are mutually exclusive. They are not mutually exclusive. In this case, the appellant is alleging that the CFIA's ongoing conduct/policy is unlawful *because* it has been incorrectly interpreting the legislation. At its core, this case is about the CFIA's unlawful statutory interpretation of the *HAA* and *HAR*. As such, the correct standard of review is correctness.

5. Related to this issue is that the Application Judge mischaracterized the nature of the appellant's argument. The appellant is not asking the court to determine the *manner* of enforcement by dictating to the CFIA *how* it should enforce the prescribed segregation and headroom requirements. Specifically, the appellant is not seeking to constrain the CFIA's determination as to what form the segregation may take, nor is it seeking to dictate to the CFIA how to determine whether a horse is "able to stand in its natural position without coming into contact with a deck or roof". Rather, the appellant is seeking an order of *mandamus* requiring the CFIA to abide by its specific, defined and mandatory duty of inspection and certification that arises under s.19(1) of the *HAA*.

6. The mischaracterization at paragraphs 1, 4 and 5 herein bears on the application of the Application Judge's flawed finding that *mandamus* cannot be issued in this case. The appellant says that because a CFIA veterinary inspector's duty is specific and defined under s.19(1) of the *HAA*, it is exactly the kind of duty that can

be enforced by *mandamus*, and that none of the principles barring its exercise under *Apotex* apply.

7. The Application Judge also erred in finding that the CFIA's difficulties in *consistently* enforcing the segregation and headroom requirements under ss. 141(8) and 142(a) of the *HAR*, respectively, is not unlawful. Laws exist to be *always* followed, and the public expects the same. In addition, there was no evidence to justify the finding that the CFIA "has difficulties in consistently enforcing subsection 141(8) [of the *HAR*]". The Application Judge misapprehended the evidence on this point and thereby erred.

8. The Application Judge also erred by not concluding that an internal administrative policy, such as the IPOGG, cannot override the law, nor can it override a statutory public duty.

9. The Application Judge also erred in concluding that the Crosland Affidavit is inadmissible. In this case, the appellant is challenging an unlawful course of conduct, not a singular decision of the Minister or the CFIA. The Application Judge erred in law by extending authorities which concern the evidence admissible on a judicial review of a decision under s.18.1(2) of the *Federal Courts Act* to a judicial review of unlawful conduct under s.18.1(1) of the *Federal Courts Act*, when those authorities do not apply to s. 18.1(1). In the alternative, the Application Judge made an error of law or an error of mixed law and fact in failing to find that the Crosland Affidavit fell, in whole or in part, within an exception to the test in *Access Copyright* including any new exception which this Court may recognize in this appeal in respect of an application for judicial review under s. 18.1(1) of the *Federal Courts Act*.

10. The Crosland Affidavit is necessary as it provides information and evidence on the CHDC as a public interest litigant as well as the CFIA's (unlawful) ongoing conduct and the nature of the harm arising from the CFIA's failure to adhere to its duty

under s. 19(1)(b) of the *HAA*.

11. The Application Judge also erred in law in finding that the impugned provisions of the *HAR* will be *repealed* on February 20, 2020 with the result that a declaration would serve no practical benefit. The appellant says that the amendments to the *HAR* which will come into effect on February 20, 2020 are in substance the same as sections 141(8) and 142(a) of the *HAR*, and therefore, the amending provisions will consolidate and declare the law as set out under sections 141(8) and 142(a). They do not repeal those provisions. In the alternative, if the current provisions will be repealed effective February 20, 2020, there is still a live controversy between the parties concerning the nature of the CFIA veterinary inspector's duty to certify under s. 19(1)(b) of the *Health of Animals Act* that "all of the prescribed requirements have been complied with" and the segregation and headroom requirements which will apply on certification under s. 19(1)(b) of the *HAA* from February 20, 2020. The adoption of the amending provisions has not removed the substratum of the litigation, and the matter is not moot. In the further alternative, if the matter is moot, the appellant respectfully asks this Court to exercise its discretion to hear and allow the application under the *Borowski* principles on the grounds that there is an adversarial context, a decision will have practical effect and concerns an issue of public importance, and would not intrude on the legislature's responsibilities. At its core, this case raises an important public issue dealing with the protection of animals, and which is rarely raised at a court of this level. It concerns whether a federal entity can selectively disapply provisions governing the humane transportation of animals. Declining to hear this matter would send a chilling message to the public that animals do not matter. With respect, doing so would be wrong.

12. Such further and other grounds as counsel may advise and this Honourable Court may permit.

January 2, 2020

Per: Rebeka Breder and Stephanie McHugh

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I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____ day of JAN 0 2 2020 A.D. 20____

Dated this _____ day of JAN 0 2 2020 20____

MARC RICHARD
REGISTRY OFFICER
AGENT DU GREFFE