IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Chilliwack Cattle Sales Ltd.,*
2013 BCSC 1059

Date: 20130417
Docket: 56044-2
Registry: Chilliwack

Between:

Regina

v.

Chilliwack Cattle Sales Ltd. and Kenneth Kooyman

Corrected Judgment: The text of this judgment was corrected on the front page on June 19, 2013

Before: The Honourable Mr. Justice N. Brown

Oral Reasons for Judgment

Counsel for the Crown:	D.R. Kier, Q.C.
Counsel for the Accused:	F.W. Hansford, Q.C.; A.W. Bevan; and T.E. Wallwork
Place and Dates of Trial:	Chilliwack, B.C. December 3-7; 10-14, 2012 and January 25, 2013
Place and Date of Judgment:	New Westminster, B.C. April 17, 2013

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I. CHARGES

[1] For Counts 1, 2, and 3, the Crown charges that on or about the 9th day of September, 2008 in Chilliwack, British Columbia, Chilliwack Cattle Sales Ltd. ("Chilliwack Cattle") and Kenneth Kooyman, the accused, unlawfully caused to be loaded on a motor vehicle four individual cows which by reasons of infirmity, illness, injury, or fatigue could not be transported without undue suffering during their expected journey to Alberta, Canada, in violation of s. 138(2) of the *Health of Animals Regulations*, C.R.C., c. 296, thereby committing an indictable offence, contrary to s. 65(1)(b) of *Health of Animals Act*, S.C. 1990, c. 21.

[2] As for the remaining counts, Crown alleges that between the 8th and 11th days of September, between the City of Chilliwack, B.C. and the Town of Golden, B.C., the accused did unlawfully cause to be transported two individual cows which by reasons of infirmity, illness, injury, or fatigue could not be transported without undue suffering during their expected journey in violation of s. 138(2) of the *Health of Animals Regulations*, thereby committing an indictable offence, contrary to s. 65(1)(b) of the *Health of Animals Act*.

[3] The infirmities, illnesses, fatigue or other maladies the Crown says the cows suffered are as follows.

[4] Count 1: a cow with Herd Tag 649, a large wound on its left hip, swollen erythemic raw and weeping carpal joints, systemic emaciation and dehydration.

[5] Counts 2 and 5: a cow with Herd Tag 592, a separating hoof wall accompanied by necrotic tissue, weeping open left carpal wound, swollen right carpal joint, systemic emaciation and dehydration.

[6] Counts 3 and 6: a cow with Herd Tag 876, acute or peracute mastitis in two quarters, erythema and inflammation in both hind feet, and inflamed fetlock joints in both hind legs.

II. RELEVANT STATUTES

[7] The relevant sections of s. 138 of the *Health of Animals Regulations*, Part XII, c. 296 state:

> (2) Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal
>
> (a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey;
>
> (b) that has not been fed and watered within five hours before being loaded, if the expected duration of the animal's confinement is longer than 24 hours from the time of loading; or
>
> (c) if it is probable that the animal will give birth during the journey.

[8] Now, the relevant section in this case given the evidence is subsection (a). Subsection (4) states that:

> (4) No ... 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.

[9] Turning now to the *Health of Animals Act*.

[10] Section 65(1) states that:

> 65. (1) Every person who contravenes any provision of this *Act*, other than section 15, or the regulations or who refuses or neglects to perform any duty imposed by or under the *Act* or the regulations is guilty of
>
> (a) an offence punishable on summary conviction and liable to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
>
> [As is the case here]
>
> (b) an indictable offence and liable to a fine not exceeding two hundred and fifty thousand dollars or to imprisonment for a term not exceeding two years, or to both.

[11] Another relevant section is s. 71, which states that:

> 71. Where a corporation commits an offence under this *Act*, any officer, director or agent of the corporation who directed, authorized, assented to or acquiesced or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for

> the offence, whether or not the corporation has been prosecuted or convicted.

[12] Section 72 states that:

> 72. In any prosecution for an offence under this *Act*, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that
>
> (a) the offence was committed without the knowledge or consent of the accused; and
>
> (b) the accused exercised all due diligence to prevent the commission of the offence.

III. OVERVIEW OF ESSENTIAL ELEMENTS OF THE CHARGES

[13] After first proving the accused loaded or caused to be loaded or transported animals onto a transport, s. 138 requires the Crown to prove:

> (a) they could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue, or any other cause; and
>
> (b) prove a causal link between the transportation, the undue suffering, and the animal's alleged infirmity, illness, injury or fatigue or for any other cause of undue suffering.

[14] Each of these essential elements the Crown must prove to establish the *actus reus* of the offence (*Doyon v. Canada (Attorney General)*, 2009 FCA 152 [*Doyon*] at para. 141).

[15] The Court in *Doyon* noted in that same para. 141 that for the term "expected journey" the French version of the section uses the term "*voyage prévu*"; best translated as the "journey foreseen".

A. Main questions requiring consideration

[16] This case requires answers to a number of questions. Stated broadly, they are:

1. What was the expected journey when the cattle were loaded for transport on September 9, 2008?

2. Which is the governing expected journey, that of Mr. Kooyman who selected them for transport, or that of Mr. Jennings who transported them?

3. What was the condition of the six cattle when loaded for transport?

4. What was the condition of the cows at various stages along the journey to Alberta?

5. Did the nature and length of the journey cause the cows' maladies that the Canadian Food Inspection Agency ("CFIA") veterinarian Dr. Brooks-Holtz said she observed in Golden, B.C.?

6. Was the condition of any of the six cows of such a kind that, with the exercise of due diligence, it could have been detectable by Mr. Kooyman or Mr. Jennings and others before they loaded the cattle for transport?

7. Were either Roberge Transport Inc. or Mr. Jennings employees or agents of the accused?

8. Who owned the cattle, Mr. Kooyman or Chilliwack Cattle Sales Ltd.?

9. What is the true nature of Mr. Kooyman's relationship to Chilliwack Cattle Sales Ltd.?

10. If the Crown has proven the *actus reus* of the offence, should Mr. Kooyman be acquitted because he exercised due diligence?

11. What constitutes due diligence?

IV. OVERVIEW OF THE FACTS

[17] The Crown called six witnesses, Brian Jennings the first.

[18] On September 9, 2008 he helped load 23 cattle and cows onto his tractor and cattle trailer unit at Chapman's Cattle Auction, in Chilliwack, B.C. Among these were six cows, three of which are the subject of the Indictment. Mr. Jennings' testimony was critical to the Crown's case. He is the only witness called by the Crown to give evidence on the condition of the cows when they were loaded at Chapman's Cattle Auction in Chilliwack on September 9; as well as on the journey, most notably during stops he made at Bridal Veil Falls, about 20 minutes driving east of Chilliwack, at Kamloops, and at Craigellachie. Craigellachie was Mr. Jennings' last stop before Golden, B.C. There, an inspector had noticed some of the subject cows were down and in awkward positions. To gain a sense of their conditions, he directed Mr. Jennings to pull the rig over for further inspection.

[19] Before continuing with the journey and other details that I have set aside for now, I will discuss Mr. Jennings' personal history and his experience hauling livestock.

A. Brian Jennings' background and experience

[20] Mr. Jennings was born and raised on a dairy farm. He has worked with dairy cows his whole working life. For over two decades, he had hauled cattle and cows in New Zealand and Australia. By 2008, after he immigrated to Canada, he had already been hauling livestock for many years. Because the highways in New Zealand pass through the same type of mountainous terrain we see in Alberta and British Columbia, where Mr. Jennings now does most of his hauling, he had no difficulty adapting.

[21] In 2008, Mr. Jennings had been hauling livestock for Roberge Transport Inc. for about 18 months. Roberge is one of Western Canada's largest livestock trucking companies. Farmers and other customers hire Roberge to haul cattle of various kinds and other types of livestock, such as pigs, between British Columbia, Alberta, Saskatchewan, and U.S. destinations. It dispatches drivers to various pickup and drop-off locations, including Chilliwack, British Columbia.

[22] Mr. Jennings owned his tractor unit. He was one of over 100 individuals who Roberge hires as independent contractors to haul the loads at the request of Roberge customers. Drivers who want to haul livestock, especially cattle, need time and experience to know how to haul the livestock skilfully. This is especially the case when hauling on windy mountain highways.

[23] Mr. Jennings testified that Roberge's drivers must have a lot of experience hauling cattle before hiring. Mr. Jennings certainly had the experience and skills needed to haul culled dairy cows, as well as determine if they are fit for transport. In fact, he has a final say as to whether an animal can load on his rig.

[24] After the cattle are loaded, he has a duty to pull over every hour or so, long enough to allow him to walk around the trailer and to inspect how the livestock are coping with the journey.

B. What are cull cows?

[25] The expression "cull cows" will come up a lot in these reasons. It certainly did in the evidence. I will say a little bit about that expression now.

[26] Cull cows are dairy cows that, for a wide variety of possible reasons, a dairy farmer decides to cut from their dairy cowherd. The list of possible reasons they want to do so is a long one. But here are some of the possible ones. The cow may no longer be able to produce milk in enough quantity or to a high enough standard. It might be unable to produce enough butterfat. It might slough off too many cells, which evidently make it difficult to make cheese. A calving cow might no longer be able to calve; or a farmer might want to change the herd's genetic makeup; or to reduce the size of the herd to stay within quota. Some dairy farmers prefer a particular conformation in a dairy cow and might select for that.

[27] Some farmers buy cull cows at auction to use in their own herd, as Mr. Kooyman sometimes did.

[28] Most cull dairy cows are about six years old, but they can be younger than that.

[29] Cull cows continue to hold economic value for farmers after they are no longer good milk producers because the farmer can still sell them for beef slaughter. This is when Chilliwack Cattle Sales provided an option for lower mainland dairy farmers.

[30] In summary, the evidence showed that the dairy farming industry is a complex business. To be financially successful, farmers must closely monitor productivity, the health and overall well-being of their dairy herds. Culling is an integral part of cycling of herds in the dairy farm industry. The term "culled cow" is not one reflexively synonymous with a sick or diseased cow.

C. Background on outbreak of BSE

[31] Some further background will put the September 9, 2010 journey into proper perspective.

[32] Before the May 2003 outbreak of Bovine Spongiform Encephalopathy ("BSE") or Mad Cow Disease in Canada, Canadian farmers could ship all of their culled livestock to American processing plants which, until 2003, purchased about 90 percent of Canadian beef. The outbreak of BSE changed all of that for Canadian dairy farmers. They no longer had a place to sell cows culled for beef slaughter. Lower Mainland plants had nowhere near the capacity needed to slaughter and process large quantities of beef for domestic consumption.

[33] Chilliwack Cattle Sales and Chapman Auctioneers ("Chapman") found a way to meet the needs of Lower Mainland farmers and earn a profit. This is how it worked: Chilliwack Cattle Sales sent out a standing offer to Lower Mainland farmers to purchase their cull cattle for beef slaughter. The farmers had to arrange for their own shipment of cull cows to Chapman, where Chilliwack Cattle Sales accepted delivery and purchased them. The farmers left it to Mr. Kooyman to fix the buying price. Over time, this proved to be a very successful system for all concerned.

[34] Then, Chilliwack Cattle Sales contracted with Roberge Transport (“Roberge”) to transport the culled stock to Excel, a very large meat processing plant located in Alberta. Excel required Chilliwack Cattle Sales to give them several days' notice before they would accept any shipments. Excel would not accept partial shipments. Should Chilliwack Cattle be able to deliver only a partial load, they had to ship stock to Vandenberg Feeders Ltd. (“Vandenberg”), a large ranch in Picture Butte, Alberta. There, stock would rest, feed and water until Chilliwack Cattle Sales had added enough stock to make up the full load that Excel insisted on. They remained at Vandenberg’s not because they would not pass inspection at Excel, but because Chilliwack Cattle Sales needed additional time to assemble the full load Excel insisted on.

[35] For about six years, Excel remained one of few options available to Lower Mainland farmers who wanted to cull cows for beef slaughter.

[36] In the spring of 2008, however, about six months before the transport of the culled cows listed in the Indictment were trucked to Alberta, American authorities reopened their border to Canadian export beef, freeing Chilliwack Cattle Sales to once again ship culled cows to Washington State plants such as Schenk Packing Co. Inc. (“Schenk”).

[37] Until the border was reopened, about 340 to 350 cattle were unloaded weekly at Chapman, most of them destined for Alberta.

D. Pre-loading, loading, credibility findings

[38] Before discussing the evidence presented at trial on the fitness of the cull cows loaded on the September 9, I will briefly explain how cows unloaded at Chapman’s were processed by Mr. Kooyman; by Mr. Padgham, who owns Chapman; and by Chapman's employees.

[39] Without getting into much detail, this is what happened to the cows that had unloaded at Chapman, and which Mr. Kooyman or Mr. Padgham had found either fit or unfit for the expected journey, as was the case.

[40] If found fit for the expected journey, the cow was loaded and shipped to Alberta, either to Vandenberg's first and then to Excel, or straight to Excel, depending on the arrangements with Excel and the size of the load. If the cow met Schenk's exacting standards for size and fatness it could be shipped there, but the border closed to Canadian cattle. Excel accepted smaller and thinner stock than did Schenk.

[41] If a cow limped, for example, it was diverted to a local abattoir for beef slaughter. For that short journey, Chilliwack Cattle Sales had a trailer that carried up to nine cattle. If a cow could not walk or was too ill to make even that journey, or was otherwise unfit for the short journey, it was euthanized and taken away by a local mink farm.

[42] The subject cows had arrived at Chapman about four days before they were loaded on September 9. In the interval, Chapman was fully equipped to shelter, feed, and water them. Over the weekend that led to Monday, September 9, a Chapman employee ensured feed (which was purchased by Chilliwack Cattle Sales) was available to the cattle all weekend, and that the water system was in good working order. I find the cattle were well cared for during the four days they were kept at Chapman. They had shelter, lots of sawdust under foot, and could feed as much and as often as they wanted.

[43] Mr. Kooyman attended Chapman almost daily to classify and sort into pens the cattle unloaded by Lower Mainland farmers.

[44] I will not say too much now about Mr. Kooyman's background and his relationship to Chilliwack Cattle Sales because I have to deal with that again later.

[45] Suffice it now to say Mr. Kooyman was born and raised on a dairy farm. He left school in grade 10 and began working on his father's dairy farm. At age 25, he started Chilliwack Cattle Sales Ltd., of which he is president. He and his six brothers are shareholders. The company owns other related businesses and Mr. Kooyman is

sole owner of other businesses himself. He owns 3,500 head dairy cow herd spread over five farms.

[46] I find he is an experienced cattleman and has extensive knowledge of the dairy farm industry and the dairy industry as a whole. His knowledge and experience equip him to discern the sorts of conditions a cow might present him with. I find he is well qualified to decide whether a cow is fit for an expected journey without experiencing undue suffering. He is not an expert, of course, but considering the depth of his experience, I accord his observations the considerable weight they deserve.

[47] Although Mr. Kooyman has available to him 140 Chilliwack Cattle Sales' employees, he likes to carry out this aspect of the business. He goes to Chapman's up to six days a week. He buys the cattle and attends to all aspects of this side of Chilliwack Cattle Sales' extensive business ventures. I accept he finds this part of the business fascinating. He enjoys his work. It stimulates his interest. I mention this because observations from a witness fully engaged in their work and enjoying it would tend to be a more reliable observer than a witness who goes about their work in a disinterested way.

[48] In brief summary, from the time the cattle unloaded at Chapman on September 5, until they loaded for Alberta on September 9, at least four individuals looked over the cows to see if they were healthy enough to load and transport on their expected journey: Mr. Jennings, the driver; Mr. Kooyman; Mr. Barry Padgham, who owned Chapman; and Andries Swanepoel, one of the brand inspectors at Chapman.

[49] Mr. Padgham explained the routines he followed on September 5, when the six cows first unloaded, along with some others. He greeted the farmers, as usual, looked at the stock, tagged them, and carried out a quick preliminary assessment of their condition. Any bad stock are immediately put in a separate pen and marked for mink or dog food processing. Mr. Kooyman had given him authority to dispose of bad cows without waiting for his consent.

[50] Mr. Padgham explained he looks for conditions such as: sunken eyes or cancer eye; cold ears; oozing, open wounds; bad limps; swollen udders or udders with changes in colour or size; and mastitis, which can kill a cow within eight hours.

[51] Otherwise, cattle are then weighed and sent to the north end of the Chapman building where Mr. Kooyman prices them. Then they are immediately put on alfalfa and water. Chilliwack Cattle Sales pays for all feed costs.

[52] Mr. Kooyman usually sees the cows for the first time shortly after they are first unloaded and after Mr. Padgham has inspected them. Mr. Kooyman's first inspection is a fairly quick one, focused more on setting a price for each cow.

[53] Mr. Kooyman and Mr. Padgham then jointly look over the cows. They look for physical maladies rendering them unfit for loading on the expected journey. Then they sort them into pens. This takes 20 to 40 minutes. Those not fit to travel on the expected journey are sent to the local abattoir. Those unfit for even that short journey are euthanized and picked up by a mink or dog food processor. That day, about four cattle were diverted for euthanizing and processing for dog food.

[54] Between when the cows loaded on September 5, and through the weekend, Chapman employees kept a lookout for any signs of difficulty a cow might be experiencing at Chapman. I accept all these procedures were followed up to and including September 9; and that Mr. Padgham and Mr. Kooyman did not notice any condition or state in any of the subject cows that should have prompted them to segregate them for the local abattoir, or for euthanization on the site and pickup by the mink ranch or dog food manufacturer.

[55] In sum, by September 9, before the cattle loaded at 1500 or 1530 hours, the cows had been inspected four times by four individuals.

[56] Mr. Padgham has worked in the cattle business for 64 years. He bought Chapman in 1973 and has operated it continuously since then. The 23 livestock that Mr. Kooyman had selected for shipment to Vandenberg's in Alberta—sent there because the load was not full, were gradually released from their segregated pens at

Chapman and were then walked to the loading platform. Mr. Kooyman walked behind them as they exited their pens and as they walked towards the loading ramp area. They were turned into a long loading chute that had boards along each side. This channelled the cattle destined for the journey to a wooden ramp they had to walk up for a few feet. At the top of that wooden ramp, the cattle came upon a concrete platform. From there, the cows walked across a small ramp into the cattle trailer.

[57] Along the whole way to the chute, Mr. Kooyman walked behind. Mr. Padgham and Mr. Swanepoel stood on either side of the procession. As the cattle made their way to the loading platform, these three experienced cattlemen looked for any signs they might have missed on earlier inspections. Between the three of them, they had views from the front, from the sides, and to the rear.

[58] As for Mr. Jennings, he stood by the loading chute and the wooden rampway the chute led to. He watched as six cows – only three are subjects of the Indictment -- but six were loaded into the same pen – came toward him as he stood by the loading ramp. He followed their progress as they climbed the wooden ramp and made their way into the cattle trailer. He saw them climbing the aluminum rampway up to the second level. On the second level, he directed the six cows into a fenced and gated pen that had sufficient room for six cattle. This pen was located at the front of the trailer, just behind the nose of the trailer, where it attached to the trailer. Mr. Kooyman asked Mr. Jennings to put them there.

[59] Cattle in that part of the trailer feel the motion of the trailer more than cows placed in, say, the belly of the trailer. Only cows less able to handle the stronger trailer movements and motions generated in the top front part of the trailer would be put in the belly.

[60] Mr. Padgham testified the cattle loaded smoothly. None of the cattle had a problem climbing the wooden ramp that connected to the concrete loading platform. None of the six cattle who had to walk up the metal ramp to reach the second level had problems. None of the cattle needed prodding to go up the ramp. None had a

limp, none had open wounds or bleeding sores, none displayed any sign of pain or discomfort, none displayed signs of malaise or fatigue, and none displayed any of the problems listed in the Canadian Food Inspection Agency booklet. I find Mr. Padgham saw no signs of illness, infirmity, injury, fatigue, or other cause that would cause them undue suffering during the expected journey to Alberta.

[61] As for the suggestion that the cows were too old for the expected journey, the Court heard no evidence to say how old the cows were. Each cow's history, including their age, is kept in publically available records. But the only evidence about the age of the subject cows is that most cull cows are usually around six years of age.

[62] Defence counsel stressed that the Crown presents Mr. Jennings as a witness in whom the Court can place confidence. He is the Crown's only eyewitness on the condition of the cows, not just at loading, but also along the journey before they reached Golden, including earlier stops in Kamloops and Craigellachie, as mentioned earlier.

[63] Mr. Jennings testified the cows loaded fine and went up the ramps quickly. He followed them as they made their way on the aluminum ramp. He agreed with Mr. Kooyman and Mr. Padgham that a lame or weak cow could not climb it. He noticed no open wounds or unusual swelling in joints. I note in passing that some swelling in the knee joints of dairy cows is common because cows like to rest on their knees, which produces the equivalent of calluses around the joint.

[64] In sum, Mr. Jennings testified the cows were fit for loading and transport. He saw no sign of infirmity, illness, injury, fatigue, or any other cause that would cause them undue suffering during the expected journey. He saw no indication of any of the conditions mentioned in the *Regulations*. None were unable to stand or walk, none had to be dragged or carried, none gave any indication of fractures, shock, impending death, or any prolapse, dehydration, or exhaustion.

[65] No witness said the inspection procedures Mr. Padgham and Mr. Kooyman put the cattle through were lax or in some way lacking. Mr. David Zuest, a highly experienced inspector with CFIA, had attended Chapman in 2004; and there, with Mr. Kooyman present, he observed their loading and inspection procedures. After Mr. Zuest observed two such loadings in 2008, he recorded in a memorandum that the procedures were satisfactory. The same procedures used then were used by Mr. Kooyman and Mr. Padgham on September 9, 2008.

[66] The economics of Chilliwack Cattle Sales' business offered financial incentives against indifferent inspections or of taking a chance that an infirm, ill, injured, fatigued cow or suffering from some other malady known at the time might still successfully manage to complete the expected journey. Prices for culled cows typically range up from $1,000, depending on weight. If a cow should make it to Excel, say, but on arrival could not walk off the trailer when it came time to unload, Chilliwack Cattle Sales would have to pay a disposal fee of at least $175.00, plus the cost of euthanizing a cow. If a cow en route to Alberta becomes too ill to continue a journey and has to be disposed of say, at Revelstoke, Chilliwack Cattle Sales has to pay the cost of its euthanization, disposal and any other related costs.

[67] Mr. Jennings and Mr. Padgham's testimonies confirm that Mr. Kooyman always responded readily when they pointed out something about a cow that raised a question as to whether they could complete a journey without undue suffering. Mr. Kooyman would just cut the cow from the load upon their having brought the concern to this attention.

[68] I find Mr. Padgham and Mr. Kooyman were credible and reliable witnesses. I have also found Mr. Jennings' observations of the cows, both at loading and when he observed them during the journey, credible. He has a lifelong experience working with cattle, dairy cows in particular, as well as an adult lifelong experience driving them. He had a decent opportunity to view the cattle's physical condition during loading and the experience needed to know what types of problems to look out for.

[69] Mr. Padgham conveyed a combination of directness and civility often encountered in witnesses of his background and generation. He offered the Court a depth of experience from his dealings with cattle. He was not shaken in cross-examination. He had ample opportunity to make observations, informed ones, upon which he could base his evidence on the cattle's physical condition on September 9, 2008. He knew what types of problems to look out for on inspection.

[70] As for Mr. Kooyman, I also found him a credible and reliable witness. I did not find him shaken on cross-examination.

[71] Crown counsel challenges Mr. Kooyman's credibility based on statements Ms. Davies, a CFIA Inspector, purportedly took from Mr. Kooyman in a November 2008 interview.

[72] The CFIA has employed Ms. Davies as an Inspector for seven years. Her academic background lies in psychology and criminology. She also did a turn as an Immigration Commission Hearing Officer. Although certainly not lacking in intelligence, Mr. Kooyman lacked sophistication when it came to legal matters. When he spoke to Ms. Davies, I doubt he was aware of the extent of his legal jeopardy or of the nature of the penalties he could potentially face, or of how statements he might make during the interview could be parsed and used as a basis for a conviction.

[73] Ms. Davies testified that because she did not take anything Mr. Kooyman said as a confession, she did not advise him of his rights under the *Canadian Charter of Rights and Freedoms* [*Charter*]. He was not advised he could face charges based on evidence conscripted from him, or of his right to counsel and so on. Had Ms. Davies treated what Mr. Kooyman said as a confession, she explained, she would have given him a *Charter* warning. That may be so, but comes then next Mr. Kooyman to trial, there accused of offences that could see him fined very large sums of money and possibly jailed for up to 12 years; and there the first thing he finds facing him is the Crown relying on statements he allegedly made in order to prove his guilt.

[74] Ms. Davies attempted to record the interview but, for some reason, the recorder failed and she had to fall back on notes. Ms. Davies testified she carefully wrote down everything Mr. Kooyman said. But on some matters, what she wrote, for example, about the location of the six cows in the trailer, is not accurate.

[75] After the interview, which lasted about an hour, Ms. Davies sat down and finalized her recollection of the interview, compiling that what she wrote down during the interview. At the end of the interview, she did not give Mr. Kooyman a copy to go over and see if it needed correction or clarification.

[76] I am sure Ms. Davies did her best and was not ill-intentioned, but I discern examples of conflated facts, misunderstandings regarding the aspects of the loading operation, and an occasional tendency to leave potentially incriminating statements unexplored by further questioning. I also discerned a mild note of sarcasm at trial on occasion, and a certain reluctance to admit possible errors in her understanding, which is not the mark of a dispassionate witness.

[77] Although not called on to make a finding on *Charter* concerns, in my view, it would be fitting to note that, counting all the counts, the accused faced potential penalties and fines of 12 years' imprisonment and $1.5 million dollars, without a *Charter* warning. This is not to say that the *Charter* warned answers would be different ones. But if you know something serious might happen to you, unless you speak with the utmost precision, you are likely to speak with a mind much more concentrated on what is at hand than when at an informal meeting scheduled just to 'discuss what happened'.

[78] I also note that Mr. Kooyman assisted the Canadian Food Inspection Agency in their BSE investigations in 2008. On August 28, 2008, he received a letter from the Agency expressing its appreciation. The Inspection Manager for Fraser East wrote, "Your contribution is greatly appreciated in what was a very comprehensive and complicated investigation".

[79] I find Ms. Davies misapprehended Mr. Kooyman's evidence on some significant points. Mr. Kooyman did not say he loaded the cows at the back of the trailer because they were “weak”. An infirm cow would not be loaded and penned where they were, at the top level, because the ride in that top front quadrant of the trailer conveys more motion than it does in other parts of the trailer, such as the belly.

[80] Defence counsel suggested Ms. Davies' misreading of what Mr. Kooyman was explaining had ever since bedevilled the Crown's case which, at times, did seem to fixate on the belief that Mr. Kooyman loaded the subject cows in pens at the back, where "sick or weak cows are sent”.

[81] I find characterizing cows as “weak” would not be Mr. Kooyman's reflexive choice of words to describe a cow destined for the abattoir. I find that what he was trying to explain to Ms. Davies, assuming he used that language, was that infirm cows unfit for the expected journey would not load at the top level. They would be shipped to the abattoir. Cows with conditions matching those set out in s. 138 of the *Regulations* are usually transported the relatively short distance to the abattoir in a small trailer; although I gathered that occasionally some cows load into the belly of the trailer for drop off at the abattoir, en route to the longer destination.

[82] I heard no evidence of Ms. Davies' experience on the transporting of cattle, layout of trailers, and so on. If such experience were lacking, that might explain some of the miscommunications and misapprehensions that appear to have arisen from the interview.

[83] Ms. Davies records Mr. Kooyman as having referred to himself as the owner of the cattle. To the extent Mr. Kooyman said he was, I find he did so in the loosest possible sense of the word, and one which nowhere near expressed the true state of affairs regarding ownership. Ms. Davies made little effort to get to the underlying empirical data, so to speak, of what constituted his ownership.

[84] In my view, it would be dangerous to base a conviction on an unqualified acceptance of the statement Ms. Davies recounted. I find Mr. Kooyman's trial testimony, given within a context of specific questions and answers and subjected to extensive cross-examination, conveys a more reliable facsimile of what occurred on September 9, 2008.

[85] I find Mr. Kooyman did not own the cattle; Chilliwack Cattle Sales Ltd. owned the cattle. As mentioned, Mr. Kooyman is the C.E.O. of Chilliwack Cattle Sales Ltd., and one of six other Directors of a company with extensive holdings in the dairy and cattle industry. I find Mr. Kooyman conducted business for Chilliwack Cattle Sales as a shareholder. Chilliwack Cattle Sales Ltd. paid any expenses, paid the farmers who unloaded culled cattle at Chapman Auctioneers, negotiated with Roberge, and paid them for their contracts for service. Chilliwack Cattle Sales Ltd. is not what could be characterized as a closely held company.

[86] Turning briefly now to the reliability of Mr. Kooyman's evidence.

[87] I find he had ample opportunity to observe the cows' physical condition. He knew which physical states and conditions to look for and which their expected journey could expose them to undue suffering. Between when he first saw the cows, until he saw them loaded, he had a decent vantage point from which to notice such conditions and he took sufficient time to detect them.

[88] I find he saw nothing that should have prompted him to hold back any of the cows loaded for the expected journey. Specifically, he saw no signs of illness, infirmity, injury, fatigue, or any other cause that would have caused the cows to experience undue suffering during the expected journey of about 13 hours.

[89] On cross-examination, counsel showed Mr. Kooyman a booklet produced by the Canadian Food Inspection Agency. It listed a number of conditions a cow might present to someone intending to load or transport them and call on them not to load them. I accept Mr. Kooyman saw none of the conditions listed in that *Regulation*, and as noted, I accept that he also saw no sign of infirmity, illness, injury, fatigue, or

any other cause that should have prompted him to hold back any of the cows from the expected journey.

[90] At p. 5 of his report discussing normal industry standards, Dr. Vanderwal notes that Mr. Kooyman was always open to accept advice from his veterinary team and had never argued or attempted to change a decision his team made on an animal's suitability for transport. He gave them authority to make the call when they were positioned to do so. He said:

> Together, we have also moved many cattle, and loaded many cattle liners. In those circumstances, Mr. Kooyman is distinctly set apart from many operators in the cattle industry with his calm and quiet approach to handling cattle. We have no experience of inhumane handling before or loading, nor of handling or movement abuse of the animals by Mr. Kooyman.

[91] In short, Dr. Vanderwal found that Mr. Kooyman was knowledgeable and experienced in these matters.

E. The Expected Journey

[92] A journey of any kind has at least four facets: the journey expected, the time of that expected journey, the journey actually travelled, and if the journey extended beyond what was expected, the reasons for the delay.

[93] For the cows' expected journey to Picture Butte, 13 to 14 hours seemed to be what counsel aptly called the gold standard for the time expected for the journey, among all witnesses. Dr. Vanderwal, with many years of experience providing veterinarian services for cattle and in the transport of cattle, agreed this length was an optimal one for culled cows, but he would not like to see the journey's length exceed 20 hours.

[94] The driver, Mr. Jennings, thought the journey to Picture Butte should take 13 to 14 hours. His own journey from Wainwright, Alberta to Langley, British Columbia, which was a greater distance than the one to Picture Butte, took 13 hours the previous day.

[95] Another September 9th load of cattle that Mr. Kooyman shipped from Chilliwack for Alberta that day arrived in less than 14 hours.

[96] As for the expectations of Roberge Transport, about four years or so prior, the shareholders of Chilliwack Cattle Sales and Roberge negotiated terms of transport from Chilliwack to the Excel plant. Roberge confirmed that the journey would complete in about 13 to 14 hours and undertook to do make it so.

[97] I find the evidence, considered as a whole, shows that on September 9, 2008, and without unexpected delays, Mr. Kooyman could expect Mr. Jennings to easily complete the journey from Chilliwack to Picture Butte in that range.

[98] When the subject cows loaded as part of a complement of 23 cattle on September 9, 2008, Mr. Jennings said nothing to Mr. Kooyman to give him reason to believe that the cows' expected journey would be other than the one from Chilliwack to Picture Butte that Mr. Kooyman had called on Roberge Dispatch to deliver.

[99] Mr. Jennings did not tell Mr. Kooyman he intended to remain in the Chilliwack area for two hours before setting out for Bridal Veil Falls. Neither did he tell him that he would sleep overnight for eight hours in Craigellachie. I accept Mr. Kooyman had no reason to accept either of those eventualities. In summary, he had no reason to accept other than an uneventful 13 to 14 hour journey to Alberta of a kind that Roberge had carried out for Chilliwack Cattle Sales likely hundreds of times.

[100] I accept Mr. Kooyman's testimony that had Mr. Jennings told him he would not leave the Chilliwack area for two hours and would stay overnight in Craigellachie for eight hours, he would not have permitted Mr. Jennings to transport the load. Instead, he would have asked Roberge to send another driver. Nothing urgent demanded departure at that particular time.

[101] This is a strict liability offence (*R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299). The Crown must prove the *actus reus* beyond a reasonable doubt. If the defendant raises a defence of due diligence, they must prove that defence on the balance of probabilities.

1. Whose expected journey?

[102] As for which actor's expected journey is the relevant one on these charges, I find it was Mr. Kooyman's expected journey. The charges Mr. Kooyman faces, relate to his expectations, to his fault, and his to control. I agree with defence counsel's submission that it makes no sense to focus concern on a journey other than on the one expected by the person the Crown asks the Court to punish. Unless another actor whose expected journey is much lengthier than is expected by the principal is an agent of the person accused and the law thus holds the accused accountable for the agent's actions, it would be perverse to punish the accused for actions of the other actor over whom they have no control, once the journey is underway. The accused's belief about the length of the journey, however, must be an honest one. In other words, it must have about it an air of reality, considering all the circumstances.

[103] The length of the journey links inextricably with the condition of the cows observed at loading because their condition when the loaded determines whether they can complete the journey without undue suffering.

[104] I also agree with defence counsel that, theoretically speaking, the Crown could have charged the driver for his role as transporter, based on the departures he knew would occur from the journey expected and undue suffering this could cause.

F. The actual journey

[105] I turn now to the actual journey.

[106] I find Mr. Jennings left Chilliwack between 1500 and 1530 hours. From there, the journey did not complete for 33 hours. As an aside, it is noteworthy no evidence showed that those cattle that did successfully complete the actual journey 33 hours later experienced undue suffering during the journey, despite its extended length.

[107] As counsel for Chilliwack Cattle pointed out, after one calculates Mr. Jennings' actual driving time as accurately as the evidence allows, and time for load checks; for loading at Bridal Veil Falls; for unloading at Didsbury, Alberta; and then taking out Mr. Jennings' inexplicably delayed departure from Chilliwack; and for

his overnight sleep at Craigellachie; the actual length of journey falls easily within the range of 12 hours and 50 minutes to 13 hours and 20 minutes.

[108] The unexpected delay was caused by a combination of the following: after loading the cattle at 1500, Mr. Jennings was supposed to stop at Bridal Veil Falls, about a 15 minute drive east of Chilliwack, to add a handful of cattle to the load. He did not arrive there until 1700 hours, as long as two hours longer than expected. Mr. Jennings could not explain what had kept him in the Chilliwack area for two hours. He did not tell Mr. Kooyman that after loading the cattle at Chapman's he would linger in Chilliwack for up to two hours instead of being well on his way to Kamloops by then. I note the Bridal Veil Falls stop was a very brief one, taking up just a few minutes to load the handful of cattle.

[109] Mr. Jennings stopped at Kamloops for a break and load check at 2115 hours, and remained there for 30 minutes, between 2115 and 2145 hours. He checked the condition of the cattle by walking around the trailer and visually inspecting them. He saw no problems, no signs of distress. They were all standing. Mr. Jennings appeared to have stayed outside Kamloops for one-half hour before he left at 2145 hours; by then, six and one-half hours into the journey.

[110] Mr. Jennings arrived in Craigellachie at 2345 hours, just before 11:00 p.m., about two hours later, now eight and one-half hours since loading. He decided to sleep there until morning. As mentioned, he had not told Mr. Kooyman he would be doing that. Mr. Kooyman testified his experience was that drivers rested and fuelled before they loaded at Chapman's.

[111] Before Mr. Jennings retired to his sleeping berth, he walked around the trailer with a flashlight and visually inspected the cattle. The cows looked fine; some were lying down, as Mr. Jennings said they tend to do at night. After breakfast, he checked the cattle and saw no cows in distress. He said he likes to get the cows standing before going on the road; and they all got up and were all standing when they left Craigellachie for Golden, at 7:45 a.m.

[112] I find that about one hour and 15 minutes later, around 9:00 or 9:15 a.m., Mr. Jennings arrived at the truck scales in Golden, B.C. This is a mandatory stop for trucks entering Alberta. He had planned on going to a coffee shop for coffee, but an inspector advised him that cows were down. He ordered him to pull the truck over so CFIA agents could inspect the cows. Mr. Jennings said he was not surprised to hear an animal was down because they get up and down all the time during a journey. He added that apparently healthy animals can just die en route and that such occurrences are not predictable.

[113] Ms. Kathy Durham and Mr. David Zuest, CFIA inspectors on duty that day at the scales, inspected the cows. I find that four of the six cows were down at the Golden scales. Two were lying on their sternums, which is a normal resting position for cows. One cow was lying in a semi-sternal position. One cow, 649, was lying flat on its side. Mr. Zuest told Mr. Jennings some of the cows were in an abnormal position and were perhaps in distress. He directed him to park the rig to let the cows rest.

[114] After about 15 minutes, Mr. Zuest asked Mr. Jennings to see if the cows would get up. All the cows but one, 649, which was lying flat on its side, could get up at the scales.

[115] As I mentioned earlier, I find all six cows had stood up when Mr. Jennings got them up at Craigellachie in the morning. I accept Mr. Jennings testimony that none of the cows signalled they were in distress before leaving for Golden. Somewhere along the way to Golden, I find the cows had become somewhat entangled; some recumbent cows were likely trampled to some extent by standing cows. No one knows why the cows became entangled along the way.

[116] To allow for a proper investigation, Mr. Zuest ordered Mr. Jennings to drive to the Golden rodeo grounds. Mr. Jennings made arrangements to off-load the cattle there. After his arrival at 10:30 a.m., no one from CFIA had yet arrived and did not do so for another one-half hour. Meanwhile, however, Mr. Jennings had started unloading cattle at the rodeo grounds. For reasons not made clear, he was

instructed to reload those cattle. With the exception of the subject cows, the rest of the load then remained on the trailer for about two hours without feed and water. Mr. Jennings arranged for those and it was available to the remaining cattle when they later unloaded.

[117] Regarding delays after leaving Golden scales, no one expected a journey that involved an extended stop at the Golden weigh scales and rodeo grounds that then resulted in the cattle standing about unloaded, unfed, and unwatered for several hours. I note Dr. Vanderwal was critical of this.

[118] It is impossible to be sure whether the delay between when the culled cows were observed at Golden scales at 9:00 a.m., and when Dr. Brooks-Holtz examined them about two hours later, worsened their conditions, but it could not have improved them. Even so, apart from the culled cows which were soon euthanized at the rodeo grounds, the rest of the cattle arrived uneventfully at their final destination in Picture Butte, as noted earlier.

[119] Mr. Jennings was able to get all the cows up for the purposes of off-loading with the exception of Cow 649. Mr. Zuest had arrived at about 11:19 a.m. He saw three cows walk down the ramp without too much difficulty, one cow with some difficulty, and a fourth with extreme difficulty and unable to make it down the ramp. Cow 649 made some gestures towards getting up, but she could not. She was later euthanized where she was. Cow 876 struggled to get to her feet but could not gain proper rear footing. She dragged her feet as she struggled to make her way down the metal gangway to the alleyway leading to the unloading pen; but she collapsed and could not get up again.

G. Veterinary opinion

[120] Two veterinarians assisted the Court; Dr. Brooks-Holtz called by the Crown, and Dr. Vanderwal for the defence.

[121] Dr. Brooks-Holtz has been employed by the Canadian Food Inspection Agency for six years and has been a veterinarian for ten. Between 2002 and 2006,

she worked in a mixed animal practice that included both large and small animals. The larger ones included horses and dairy cows, the mid-size ones sheep, goats, pigs, and other general farm animals.

[122] During Dr. Brooks-Holtz's service at the Canadian Food Inspection Agency since 2006, she served one year at the Armstrong branch in the Slaughter Poultry Division. She then assumed her current animal health position, specialized in the import and export of live cattle; disease control, focused particularly on BSE; transportation; and animal identification. A considerable portion of her time there is taken up with completing necessary paperwork for export cattle inspections, testing, and control to prevent outbreaks of disease.

[123] During the trial, I ruled that Dr. Brooks-Holtz lacked expertise to give a forensic opinion on the question of what the condition of the subject cows would have been when observed at loading. This would presumably have been based on her gross physical examination of the cows at the Golden rodeo grounds.

[124] This was the first time Dr. Brooks-Holtz had been called on to conduct a post-mortem roadside examination; or based on a post-mortem examination, been asked to testify about what conditions that likely would have been observable at an earlier time. She had some degree of training in pathology and, of course, as a veterinarian, a general understanding of the length of time it could take for a disease or pathology to progress.

[125] In short, Dr. Brook-Holtz agreed she can give a diagnosis and form a general opinion about the progress of certain diseases. She confirmed, however, that she has no training in how to apply that knowledge to the disease process in a particular animal based on a post-mortem examination. In other words, Dr. Brook-Holtz agreed she has no forensic training that qualifies her to draw from post-mortem examinations inferences on the likely apparent condition of an animal at a given earlier time.

[126] Therefore, I could not qualify Dr. Brooks-Holtz as a forensic veterinarian, qualified to opine on the likely apparent condition of the cattle on loading based on her post-mortem examination. She was qualified, however, to express an opinion regarding the condition of the cows she examined at the Golden rodeo grounds as to any infirmity, illness, fatigue, or other identifiable disease she saw present. She was also qualified to state her understanding of the natural development of disease processes she observed.

[127] Dr. Vanderwal provided a summary of his opinion, marked as Exhibit 10. He has been a doctor of veterinary medicine since 1977, when he graduated from Western College of Veterinary Medicine with distinction. He has confined his veterinary practice to large animals and, in particular, dairy cattle. He deals with dairy cattle on a daily basis. The clinic in which he is a partner is involved in extensive research projects.

[128] Between 1990 and February 29, 2012, he and his clinic team have been personally involved in certifying over 45,000 head of cattle and over 1,200 truckloads for transport by Chilliwack Cattle Sales alone. Chilliwack Cattle Sales represents, however, only a portion of his clinic's clientele.

[129] He grew up on a family-operated dairy farm and he has continued to be involved in its operations. His herd is composed entirely of Holstein cattle of the kind that are the subject of this case, and his farm milks over 350 cows daily. He has overseen the export of 22,000 animals since the 2005 re-opening of the border.

[130] From his personal experience, he is aware of the general practices and standards of veterinarians and cattlemen in the Lower Mainland regarding the transport of cattle. He is also personally familiar with the practices of Chilliwack Cattle Sales and of Mr. Kooyman. He has attended Chapman’s auctions on many occasions and is familiar with their premises and practices.

[131] He was not present on September 9, when the cattle loaded. He cannot express an opinion on the cows' suitability for transport based on personal observation.

[132] I found him an expert in veterinary medicine and veterinary practice with special knowledge and expertise in dairy cattle. His expertise also encompasses the practices and procedures of related to transport of cattle in the Lower Mainland of British Columbia and to assessment of their fitness to travel within the compass of s. 138 of the *Regulations*.

[133] Dr. Vanderwal had access to photographs, statements and a "will say" statement provided by Crown and to an opinion on undue suffering provided by Dr. Brooks-Holtz dated November 20, 2008, as he sets out in his report.

[134] In his report, Dr. Vanderwal noted two specific areas of complete agreement between he and Dr. Brooks-Holtz. The first was the apparent level of suffering of some of the animals in the trailer, which he stated was acceptable. The second was that everyone must make best effort to prevent and alleviate animal suffering to the best of their ability.

[135] There were also areas of general disagreement. The first being that there is not an absolute ability to retrospectively discern animal health at specific points in time, which in this case, refers to time of loading. Second, he opines that after extended periods of time, the combination of unknown mitigating circumstances and the inability to achieve the level of diagnostic accuracy that only clinical and post-mortem examinations bring, makes it impossible to achieve scientific accuracy about prior conditions of the affected cows so many hours before. In sum, he said scientific certainty is not achievable based on the evidence available.

[136] Crown counsel suggested Dr. Vanderwal was biased because he performed services for Chilliwack Cattle Sales Ltd. Dr. Vanderwal, however, had completed the mandatory statement confirming his awareness of his duty to the Court to act impartially and not to act as an advocate for either the Crown or the accused. I found

no indication during his testimony that he was trying other than to assist the Court on the questions at hand. Further, he has provided expert opinions to CFIA on previous occasions. Further, I note Dr. Brooks-Holtz is employed by CFIA, which arguably gives far greater cause for bias than in Dr. Vanderwal's case. The accused does not allege bias on Dr. Brooks-Holtz's part.

[137] I found the evidence of both experts assisted. However, where opinions directly differed, I prefer the testimony of Dr. Vanderwal, given his much greater experience, including that which he garnered from his experience conducting post-mortem examinations. I find his opinion more scientifically rigorous where called for and cautious where caution was called for. He was respectful of Dr. Brooks-Holtz's opinion and thought her observations were fitting.

[138] Although not present in Golden, photographs and videos, and other facts were available to him, as were of course Dr. Brooks-Holtz's observations on her gross post mortem examinations of the cows. Therefore, I did not find the fact that he was not at the scene put him at a significant disadvantage—especially given the limited scope of his opinion and the caution with which he comes to. In short, he did not extend his opinion beyond what the available evidence justified.

[139] As noted earlier, the Crown carries the burden of establishing a causal link between the transportation, the undue suffering, and the animals' infirmity. If the Crown cannot show the animals suffered any infirmity, illness, injury or fatigue, or other cause when loaded, there is no link between the expected journey and suffering observed at a later point in time.

V. DISCUSSION OF OPINION EVIDENCE

[140] I have found that none of the witnesses, all experienced handlers of dairy cows, observed any sign of lameness, disease, illness, etc. that would have required them not to load a particular cow.

[141] Crown counsel referred often to Mr. Kooyman loading sick cows. But as noted earlier, Mr. Jennings was the Crown's witness, and he saw no sick cows.

Irrespective of her observations in Golden, Dr. Brooks-Holtz granted that when it comes to a question of the observable condition of a cow at unloading, she would defer to the opinions and observations of those who loaded them.

[142] This still leaves open the question of whether any of the conditions condition observed in Golden would have somehow signalled their presence enough on loading in Chilliwack that, through the level of due diligence the loader's duty called for, the loaders should have discovered them. In shorter words, should I infer from the conditions Dr. Brooks-Holtz observed on gross post-mortem in Golden that a duly diligent inspection in Chilliwack should have discovered their presence then?

[143] Dr. Vanderwal reviewed all the available information, including Dr. Brooks-Holtz's observations and diagnoses, some of which he disagrees with. As noted, he opines that after a journey of 20 hours, without lab samples, lab testing or autopsy it is impossible to say scientifically that the suffering observed in Golden was inevitable or observable when the cows were loaded.

[144] In *Doyon,* the Federal Court of Appeal had before it a case of animals which the tribunal below found were suffering at the time of loading – so that question was not an issue. But the Court criticized the tribunal's assumption that it followed from such a finding that:

> [53] ... [T]he result of transportation is necessarily greater and hence undue suffering. Such a conclusion is neither automatic nor inevitable. The prosecutor must prove the causal link between the undue suffering and [the journey. And not just any journey but the expected length of the journey].

[145] Dr. Brooks-Holtz mistakenly assumed the cattle had been loaded after 6 o'clock, which is not the correct time; it was actually three hours later. That faulty fact aside, the point here is that for the purposes of the loader's liability, it is the expected journey that is the essential element. At para. 62 the Court explained :

> [62] ... [T]he causal link may be broken if the expected journey is changed by necessity or the intervention of a third party [as had occurred in that case].

[146] At para. 63 the Court said:

> [63] ... since the Tribunal was of the opinion that the animal had suffered unduly, it should have verified whether the suffering had not been the result of the change made to the expected journey, in short, whether, with regard to the applicant [which would be the accused in this case], there had not been a break in the causal link because of this change.

[147] The Court also commented on various inadequacies in the veterinarian's evidence, which included a failure to take a blood sample, aspirate fluid, or take x-rays. The Court did not say whether such shortcomings alleged by counsel would represent steps the veterinarian should have taken before they gave a diagnosis but did find "they undeniably cast a shadow on the quality and reliability of the evidence against the applicant" (para. 71).

[148] I hasten to note that Dr. Brooks-Holtz conducted her examinations in difficult circumstances and she did not have available to her a kit for taking blood samples and so on. No one questions her conscientiousness. But significant limitations in an examination that limit the ability of an accused facing penal sanctions to respond fully should not be overlooked. Given the nature of the penalties faced by the accused, they might well and fairly say, in effect, to a prosecutor, "if you ask science to convict me, you should have sufficient field kit available to ensure science has found out all the circumstances allowed to be found out." Syringes to take blood samples, for example, are highly portable.

[149] I turn now to some of Dr. Brooks-Holtz's observations and some of the differences about them between her and Dr. Vanderwal. I will spare most of the details.

1. Cow 649

[150] Cow 649 was the cow that could not get up and was euthanized where she lay in the trailer. Dr. Brooks-Holtz had no particular diagnosis for that cow. Dr. Vanderwal agreed that, absent a verifiable diagnosis, the cow's systemic condition reflected the presence of ketosis and hypothermia. He then asks, rhetorically, which systemic disease could cause her to deteriorate so quickly. We do not know, he says.

[151] As for the wound Dr. Brooks-Holtz noted, Dr. Vanderwal pointed out that when such a large animal falls, it is not a tidy process and her fall could have injured other cows around her in the pen. He also noted that the presence of serum at the wound site that Dr. Brooks-Holtz noted indicates a recent trauma, which is consistent with the wound occurring during transport. I also note the euthanized cow had to be dragged down the metal gangway, with its traction ridges.

2. Cow 876

[152] As for Cow 876, Dr. Brooks-Holtz diagnosed a peracute udder infection in that cow (sudden sharp onset). I understand this type of infection can develop with rapid and toxic systemic effect less than 8 to 24 hours before first being observable.

[153] As for this cow's inability to stand on her rear legs and walk down the ramp, Dr. Vanderwal opined that a spinal cord injury best explains what caused this. He opined that such a spinal injury could occur during transit caused by another's cow falling or thrashing about. He pointed out too that Mr. Jennings testified another cow knocked this cow down as it barged its way past her to the exit of the trailer.

3. Cow 592

[154] Dr. Brooks-Holtz opined that cow 592 suffered from chronic foot rot. The lesions she observed she surmised could have become visible because of an accelerating process of infection. As for whether this condition could have been apparent during loading, Dr. Vanderwal stated that even if the condition were present, it would not equate with the presence of an abnormal gait at the time of loading.

[155] Dr. Vanderwal further noted that foot rot usually resolves within about four weeks' time with the use of hoof splints, which take strain off the joint and that Cow 492 was presenting with a healed abscess.

[156] As for the joint swelling around the knees observed by Dr. Brook-Holtz, other witnesses, including Mr. Kooyman, noted that swelling around the knee joints of culled cows is common because they prefer to rest on their knees in a sternal

position. It is callous built up around the joint, not a condition emanating from within the joint that gives the appearance of swelling.

[157] I accept Dr. Vanderwal's opinion that despite its thin appearance, at least to a casual lay observer, Cow 592 is not in an emaciated condition. Holstein cows genetically tend towards thinness. Their productivity as milk producers does not depend on their having a large body mass: some Holsteins do, others do not. Schenk calls for large cows with lots of fat. Excel accepts thinner cows.

[158] Directed to Photograph 59 of Exhibit 7, Dr. Vanderwal pointed to significant fill on the left front quadrant and on the left hind quarter of Cow 592 that are inconsistent with emaciation.

[159] I will delve no further into the differing opinions of the veterinarians. Considering all the evidence, I prefer Dr. Vanderwal's evidence that the conditions that Dr. Brooks-Holtz observed in the subject cows would not necessarily manifest in lameness when they loaded in Chilliwack. Further, I find events that occurred during the journey after loading could differentially explain several of the conditions noted by Dr. Brooks-Holtz in Golden.

[160] By the time the cows unloaded in Golden, their journey had well exceeded optimal length. I asked Dr. Vanderwal if he questioned whether it was necessary to euthanize all the cows; or whether, instead, with rest and time to feed, they could revive. He opined that had the time and facilities been available, two of the cows could have been revived.

[161] I have considered all the evidence and the expert opinions of Dr. Brooks-Holtz and Dr. Vanderwal. I have considered all the evidence, in conjunction with their respective opinions. I have also noted the absence of clinical evidence that would confirm reliably what events or conditions precipitated the state of the subject cows observed in Golden.

[162] I find the evidence fails to prove beyond a reasonable doubt that any of the subject animals presented with conditions at the time of loading that obliged

Mr. Kooyman to withhold them from transport. Several differential explanations, some acknowledged by Dr. Brooks-Holtz and some offered by Dr. Vanderwal, explain some of the conditions noticed, such as cuts, wounds and swelling, and so on. I find the condition of the subject cows at Golden cannot be linked causally to the expected journey of the accused, Mr. Kooyman and Chilliwack Cattle Sales.

[163] I accept Dr. Vanderwal's opinion stated at p. 10 of his report:

> M. Summary of analysis
>
> …
>
> 2. It is not scientifically or medically sound to work backwards from the observations of animals that had been travelling on a truck for approximately 20 hours without food and wafer, and without knowledge of their actual time in the truck, the nature of their journey, or their actual presentation at loading. It is simply not possible to conclude with certainty how they must have presented at time of loading.
>
> 3. It is entirely possible that when loaded into the truck in Chilliwack, the cows were not displaying any overt signs or symptoms which would then support the view that they could not travel to Alberta without suffering unduly. This statement acknowledges agreement that the animals were suffering when they arrived in Golden. Animal welfare and awareness of suffering are important to me, and I in no way intend for this assessment to be cavalier, and represent insensitivity to what occurred.
>
> 4. Clinical judgment respecting these animals and the development of their various issues does not override the best evidence of eyewitnesses respecting the condition of the cattle at the time of loading. A lack of resources to conduct an acceptable post mortem leaves us without diagnoses of the underlying conditions, and cannot reliably support the rejection of such evidence as inconsistent with medical fact. The development of the observed conditions in these cows does not follow a linear and repeatable formula of scientific certainty respecting the prediction of how an animal will tolerate transport, based on an examination at any time, that permits one to conclude what they must have looked like on loading, or at any remote time after loading.

[164] I also note Dr. Vanderwal's comments at p. 10 of his report about the effects of the trailer's movements on cows located in the top-front level. As the rig brakes, turns, and runs over rough patches of road, cows in that location must exert more energy to maintain their balance and position.

[165] I recall also Mr. Jennings' testimony about the winding mountainous road conditions of the sections of highway around Craigellachie and Banff, which require him to lower his speed and drive with a view to giving the cattle the smoothest ride possible.

[166] In short, we do not know what caused the deterioration in the animals' condition from the time they left Craigellachie until they reached Golden scales and later the rodeo grounds. What can be said with certainty is that by the time the cows were unloaded at the rodeo grounds they had been in transport for 21 hours and that they should have reached their destination at least eight hours earlier.

[167] Mr. Kooyman had no control over that extended journey, one which the rest of the loaded cattle nonetheless managed to complete uneventfully after being fed and watered at the Golden rodeo grounds. We cannot speculate what might have been had that not occurred.

VI. DISCUSSION OF LEGAL PRINCIPLES.

A. Were Roberge and Jennings employees of the accused?

[168] I turn now to discuss some of the legal questions. The first of these is whether Roberge and Jennings acted as employees of the accused or as their independent contractors.

[169] Section 72 of the *Health of Animals Act* states:

> 72. In any prosecution for an offence under this *Act*, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that
>
> (a) the offence was committed without the knowledge or consent of the accused; and
>
> (b) the accused exercised all due diligence to prevent the commission of the offence.

[170] The section does not mention independent contractors. Nor does it use words such as "person hired." Judges have tried over the years to settle on a definitive way to characterize the difference between an employee and an independent contractor,

without success; eventually coming to the realization that there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, para. 46). The reason the distinction is important in many cases is because it can determine whether a party being sued is responsible for negligent acts of another.

[171] The primary tests that have evolved are "the control test", "the enterprise test", and the "organization test", also referred to as the "integration test". Which of these best illuminates the character of the relationship between the person paying for the service and person providing depends on a variety of factors.

[172] The control test was comprehensively developed in *Performing Right Society Ltd. v. Mitchell and Booker (Palais de Danse) Ltd.*, [1924] 1 K.B. 762 [*Performing Right Society*]. Of the various tests discussed in the cases, it seems the one most serviceable for this one, and worth a lengthy quotation.

[173] In *Performing Right Society,* the Court said at pp.766-769:

> It seems convenient, ere examining the agreement with the band, to consider the tests to be applied in deciding whether a man be a servant or an independent contractor. Those words have been discussed in many cases. Definition has been difficult: see Macdonell's Master and Servant, 2nd ed., p. 9. The word "servant" has been used in many aspects and in many statutes. Here we are freed from any question of the context or purpose of an Act of Parliament. The case is to be decided on general principles. The decisions are numerous and not always easy to follow. The distinction between "servant" and "independent contractor" does not seem to rest merely on the magnitude of the task undertaken. …
>
> The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, all these bear on the solution of the question. But it seems clear that a more guiding test must be secured. In Macdonell's Master and Servant, 2nd ed., p. 7, a servant is defined as "one who for a consideration agrees to work subject to the orders of another." This is useful but not, I venture to think, complete. The following words from Smith's Master and Servant, 7th ed., p. 238, give point to that remark: "The employer [i.e. of an independent contractor] may nevertheless reserve to himself by contract general rights of watching the progress of the works which the contractor has agreed to carry out for him, of deciding as to the quality of materials and

> workmanship, of stopping the works or any part thereof at any stage, and modifying and altering them, and of dismissing disobedient or incompetent workmen employed by the contractor, and yet he will not thereby of necessity render himself liable to third persons for the negligence of the contractor in carrying out the works." …
>
> It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually of vital importance. The point is put well in Pollock on Torts, 12th ed., pp. 79, 80: "The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, hut directs or at any moment may direct the means also, or, as it has been put, 'retains the power of controlling the work'; see per Crompton J. in *Sadler v. Henloch*, (1) A servant is a person subject to the command of his master as to the manner in which he shall do his work: see per Bramwell L.J. in *Yewens v. Noakes* (2), and the master is liable for his acts, neglects and defaults, to the extent to be specified. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand." The rule is stated in much the same way in Salmond's Law of Torts, 6th ed., p. 96, where that able jurist says: "A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master"; and he illustrates his statement as follows: "Thus, my coachman is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the cabman whom I engage for a particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place; if an accident happens by his negligence he is responsible, and not I."…
>
> I need only refer further to the words of Bowen L.J. in *Donovan v. Laing*, *Wharton, and Down Construction Syndicate*. (1) They are these: "By the employer is meant the person who has a right at the moment to control the doing of the act." This judgment of Bowen L.J. was approved by the Privy Council in *Bain v. Central Vermont Ry. Co.* (2) It is not without interest to observe that much the same rule prevails in criminal as in civil law, and many of the decisions are instructive. I need only make reference to Archbold's Criminal Pleading, 26th ed., pp. 601, 612, and to the judgment of Blackburn J. in *Reg. v. Negus* (3), where he says: "The test is very much this, viz., whether the person charged [that is, as a clerk or servant] is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control."

[174] In my view, the nature of the relationship and the element of control explained there also describe well the nature of the relationship and elements of control

between Chilliwack Cattle Sales and Roberge, and between Roberge and Jennings. I find they are, in each instance, independent contractors for service.

[175] See also *671122 Ontario Ltd. v. Sagaz Industries Canada Inc., supra*, where Justice Major discussed the various tests touted as useful to distinguish whether the relationship between parties is one of employment or of independent contract. As mentioned, the primary ones are the "control test", the "enterprise test, and "the organization test, also called the "integration" test." The latter was used by Denning L.J. (as he then was, in *Stevenson Jordan and Harrison Ltd. v. MacDonald*, 1952] 1 The Times L.R., (C.A.) at p. 111, where he said:

> One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

[176] In my view, this test also assists the accused in this case.

[177] Justice Major's illumination of this and the other tests to determine whether a person is an employee or independent also bears a full quotation. He begins with the "control test" / "enterprise test" as discussed by Denning, L.R.:

> [41] This decision imported the language "contract of service" (employee) and "contract for services" (independent contractor) into the analysis. The organization test was approved by this Court in *Co-operators Insurance*, *supra* (followed in *Mayer*, *supra*), where Spence J. observed that courts had moved away from the control test under the pressure of novel situations, replacing it instead with a type of organization test in which the important question was whether the alleged servant was part of his employer's organization (from *Fleming*, *supra*, at p. 416). [Emphasis added.]
>
> [42] However, as MacGuigan J.A. noted in *Wiebe Door*, the organization test has had "less vogue in other common-law jurisdictions" (p. 561), including England and Australia. For one, it can be a difficult test to apply. If the question is whether the activity or worker is integral to the employer's business, this question can usually be answered affirmatively. For example, the person responsible for cleaning the premises is technically integral to sustaining the business, but such services may be properly contracted out to people in business on their own account (see R. Kidner, "Vicarious liability: for whom should the 'employer' be liable?" (1995), 15 *Legal Stud.* 47, at p. 60). As MacGuigan J.A. further noted in *Wiebe Door*, if the main test is to demonstrate that, without the work of the alleged employees the employer would be out of business, a factual relationship of mutual dependency would

always meet the organization test of an employee even though this criterion may not accurately reflect the parties' intrinsic relationship (pp. 562-63).

[43] Despite these criticisms, MacGuigan J.A. acknowledges, at p. 563, that the organization test can be ofassistance:

> Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright [in *Montreal*] addressed the question "Whose business is it?" [Emphasis added in original.]

[44] According to MacGuigan J.A., the best synthesis found in the authorities is that of Cooke J. in *Market Investigations, Ltd. v*. *Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pp. 737-38 (followed by the Privy Council in *Lee Ting Sang v*. *Chung Chi-Keung*, [1990] 2 A.C. 374, *per* Lord Griffiths, at p. 382):

> The observations of Lord Wright, of Denning, L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" [Emphasis added in original.]. If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. [Emphasis added.]

[45] Finally, there is a test that has emerged that relates to the enterprise itself. *Flannigan*, *supra*, sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An

> "enterprise risk test" also emerged in La Forest J.'s dissent on cross-appeal in *London Drugs* where he stated at p. 339 that "[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents."
>
> [46] In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations …" (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing *Atiyah*, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.....The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. [Emphasis added.]
>
> [47] Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. [Emphasis added.]
>
> [48] It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case. [Emphasis added.]

[178] As stated earlier, after the 2003 BSE crisis in the Canadian cattle industry, the directors of Chilliwack Cattle Sales asked Roberge to transport from time to time its cattle from Chapman, in Chilliwack, to Excel and/or Vanderwal in Alberta. Chilliwack Cattle set two contractual conditions that they saw as critical to ensure Roberge met the company's objectives: Roberge would complete the journey in about 13 hours.

Roberge agreed. Chilliwack Cattle also specified minimal standards for bedding in trailers. Roberge agreed. Apart from these, all else remained in Roberge's control. Whether Roberge had a driver available for dispatch to Chilliwack; and if so, when, depended on Roberge's managements systems.

[179] Chilliwack selected Roberge because it was an enterprise that had extensive experience and specialized equipment need to transport cattle to Alberta and other locations. Roberge controlled its enterprise, selected its own drivers and directed them to its customer's loading location.

[180] I should note in passing that Roberge agreed to transport cattle for Chilliwack Cattle Sales not for Mr. Kooyman and Roberge. Roberge bills Chilliwack Cattle Sales for specific journeys, not Mr. Kooyman.

[181] As explained in *Performing Right Society*, if one hires someone dedicated to making journeys for them, such as a chauffeur, they become a servant, an employee. But if one hires a cabdriver, say, for a particular journey, specifying the location for pickup and drop off, the cabdriver is not their employee, and the person who hires them for the journey is not responsible for their negligent actions.

[182] Except for the destination and length of journey and the amount of bedding Chilliwack Cattle Sales stipulated for the trailer floor, Chilliwack Cattle Sales gave no orders to Roberge. It did not direct them on how to carry out its contractual obligations. As a homeowner might specify a type of flooring and other specifications for a house the builder agrees to build, leaving the builder how to complete the work specified, so did Chilliwack Cattle leave how it completed the journey specified in control of Roberge and of the driver's selected.

[183] Mr. Jennings testified that he is just one of hundreds of sub-contractors who transport cattle on contract for Roberge. He is not obliged to give all of his service to Roberge. As I have found, he knew Mr. Kooyman expected a 13-hour journey, but neither Roberge nor Chilliwack Cattle Sales, nor Mr. Kooyman, ordered him about or directed the methods by which he was to accomplish that objective. Nor did he

otherwise direct him as to how he had to complete the journey. Once loaded in compliance with s.138, the cattle become his responsibility. He had to look out for their well-being during transport. He owned his own tractor unit (the truck in other words) and leased the trailer from Roberge. He assumed all financial risks.

[184] Both Roberge and Mr. Jennings engaged to perform their services as a person in businesses on his own accounts. Mr. Jennings billed Roberge for its services to Roberge; Roberge billed Chilliwack Cattle Sales for its services to Chilliwack Cattle Sales, including those subcontracted to Chilliwack Cattle Sales. They each owned their own equipment. They each assumed the risk of equipment losses due to accidents, for example. In the performance of their tasks, they each could profit from sound management.

[185] As between Chilliwack Cattle Sales and Mr. Jennings, Chilliwack Cattle Sales did not dispatch him or send him on a journey for a purpose, Roberge did. Mr. Jennings could refuse to load a cow if, in his discretion, he thought it unfit for the journey, irrespective of whatever Mr. Kooyman thought he could load it, or of whether Mr. Kooyman directed him to load it. Mr. Jennings could refuse.

[186] Crown counsel stressed that Mr. Jennings testified he called Mr. Kooyman to report what had happened in Golden. But this does not show Mr. Kooyman or Chilliwack Cattle were employers of Mr. Jennings any more than would a building contractor telling a homeowner that their under-construction home failed to pass an inspection. Mr. Kooyman denied he had such a conversation with Mr. Jennings: he testified the only report he ever received about what had happened in Golden came from Roberge. I prefer Mr. Kooyman's evidence. Had such a conversation occurred, it is of a kind he is most likely to remember. That said, in my view, nothing turns on whether the conversation took place.

[187] In summary, I have considered *Performing Right Society* and *Sagaz.* I note that no one conceptual framework or single answer is conclusive. Applying the conceptual approaches and the questions most relevant to this case to the evidence as a whole, I find neither Roberge nor Mr. Jennings were employees of Chilliwack

Cattle Sales. Both acted as independent contractors: Chilliwack Cattle Sales with Roberge for a specific journey of expected length; and Roberge subcontracting with Mr. Jennings to drive a journey of expected length; independent contractor and independent subcontractors in their turns, not employees.

B. Were Roberge and Jennings agents of the accused?

[188] The Crown submits Roberge and Mr. Jennings were the accused's agents. I disagree. In *R. v. Kelly*, [1992] 2 S.C.R. 170, Justice Cory adopted Fridman's definition of agency set out in *The Law of Agency*, 5th ed. London: Butterworths, 1983 at p. 183:

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

[189] In *R. v. Arnold* (1994), 88 C.C.C. (3d) 92 (N.S. C.A.) at para. 9, the Nova Scotia Court of Appeal referred to the portion of Fridman's statement where he expands on the concept of agency, at pp. 15-16 of the sixth edition. There, Fridman highlights the significance of the agent's authority to bind the principal. He states:

> The question of the authority of an agent is at the very core of the agency.
>
> …
>
> But as a means of describing the legal nature of the agency relationship, the notion of authority is unsatisfactory, because it does not go far enough.
>
> …
>
> The missing explanation is provided by the analysis of the relationship in terms of the agent's power to affect his principal's legal position.

[190] Fridman notes that not only does an agent have the legal power to affect the principal's relationship with third parties: the principal is also under a "correlative liability to have his legal relations altered." He continues:

> ... [T]he agent, in effect, acts in such a way that he produces the same results as if the principal had acted personally and the agent had never appeared on the scene at all.

[191] Neither Roberge nor Jennings had the authority to alter the accused's legal relationships as third parties or to bind them to contractual relations. CFIA agents directed Mr. Jennings to do certain things he was obliged to do as the person transporting the cattle. Both he and Roberge were individually responsible for their own conduct.

[192] There is no ambiguity in s. 72, or in its use of the word "agent," to justify departure from how it is has been defined on high authority. Even if there were some ambiguity or if a doubt remained about Parliament's intentions, the penal consequences faced by the accused argue strongly against liberal expansion of its established legal meaning. Had Parliament intended a liberal definition, they could have defined it expressly (*Bell ExpressVu Limited Partnership v. Rex,* [2002] S.C.J. No. 43; see also the negative comments of the Court in *Doyon* regarding liberal interpretations of s. 138).

[193] For the proposition that a broader definition of agency applies in this case, the Crown relied on *Rossco Ventures Ltd. v. British Columbia*, 2007 BCCA 36 [*Rossco*], included in the defence book of authorities.

[194] In *Rossco,* the Court found that when a judge has to decide under the *Rules of Court* whether to require witness to participate in an examination for discovery as an agent, for that purpose, the judge could adopt a definition of agent broader than the classic one. Even then, the broader definition still has limits; and, the Court found that, even using the broader definition, it would not order the purported agent to testify. In sum, *Rossco* does not alter the law's well-established definition of what constitutes an agent, especially in a criminal context.

[195] In summary, I find neither Roberge nor Mr. Jennings were employees or agents of either accused. At all material times, Roberge and Mr. Jennings acted autonomously as independent contractors. Section 138 holds each responsible for their own actions as transporters and in Mr. Jennings' case, also as a loader.

C. Due diligence

[196] I turn now to discuss due diligence.

[197] Although my findings thus far dispose of the question of the *actus reus* in this case, I should still dispose of the question of whether Mr. Kooyman acted with due diligence.

[198] In *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510 [*MacMillan Bloedel*], MacMillan Bloedel faced charges of depositing a deleterious substance in water frequented by fish, contrary to s. 36(3) of the *Fisheries Act*, R.S.B.C. 1979, c. 137. At para. 25, the Court recounted the findings of Justice Dickson in *R. v. Sault Ste. Marie,* (*City*) (briefly mentioned earlier) regarding offences in which the prosecution did not have to prove the existence of a *mens rea*. In *Sault Ste. Marie,* Justice Dickson explained that "the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care." This test requires the Court to consider "what a reasonable man would have done in the circumstances."

[199] The defence of due diligence may arise in two circumstances: either if the accused reasonably believed in a mistaken set of facts, which if true would render the act or omission innocent, and/or if they took all reasonable steps to avoid a particular event. The offences in the present case are offences of strict liability.

[200] In *MacMillan Bloedel,* the Court of Appeal also discussed *R. v. Rio Algom Ltd.*, [1988] O.J. No. 1810 (Ont. C.A.) [*Rio Algom*]. In Rio, a gate guarding a railroad crossing over swung on its hinge and collided with a railway car on an adjoining track and killed a railroad worker. The railroad company was charged with failing to repair and take reasonable precaution for the protection of workers. No one had foreseen the possibility of such an accident occurring. On appeal, the issue was whether the trial judge had correctly found that the defence of due diligence applied. At para. 31, of *MacMillan Bloedel*, the court quoted from p. 182 of the decision, which I quote in part:

> ... The test which should have been applied was not whether a reasonable man in the circumstances would have foreseen the accident happening in the

> way that it did happen but rather whether a reasonable man in the circumstances would have foreseen that an "overswing" of the gate could be dangerous in the circumstances and if so whether the respondent in this case had proven it was not negligent in failing to check the extent of the overswing in order to consider and determine whether it created in any way a potential source of danger to employees and in failing to take corrective action to remove the source of danger.

[201] In the circumstances, I find it was reasonable of the Chilliwack Cattle Sales to hire a large trucking company such as Roberge, given its extensive experience and equipment designed to ship cattle safely. Roberge had the experience, the knowledge and the equipment necessary. It concentrates all its accumulated knowledge on the transportation of cattle. It has developed its own policy manual to govern transportation of animals. It agreed with Chilliwack Cattle Sales that it would complete the journey to Alberta in 13 hours, which the evidence demonstrates is easily achievable, barring unforeseen circumstances. For several years prior, Roberge had carried out all its contractual obligations with Chilliwack Cattle Sales without problems. I gather that is still the case.

[202] I find, therefore, that in no way could either Mr. Kooyman or Chilliwack Cattle Sales fairly be characterized as having been wilfully blind. Rather, they placed reasonable reliance on a large trucking company whose specialized knowledge allowed them to offer the best transportation service available for transportation of cattle from the Lower Mainland of British Columbia to Alberta.

[203] Whether a corporation can avail itself of the defence of due diligence would depend on whether "such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself" (*Sault Ste. Marie (City),* para. 72).

[204] If Mr. Kooyman and Chilliwack Cattle Sales were actively involved when the animals began to suffer during the journey (*Sault Ste. Marie (City)* para. 70), they might be found liable. That is not so here. If Chilliwack Cattle Sales' contract with Roberge gave it the right to control all of Roberge's activities, that would be a different case. But that it is not so here. If Chilliwack Cattle Sales had arranged for

transportation of the cattle with a small local independent contractor with minimal experience in the transport of cattle from British Columbia to Alberta, that also would be a different case.

[205] I note the principles recounted in *R. v. Canadian National Railway Company,* [2003] 8 W.W.R. 503, 2003 CanLII 38653 (M.B. P.C.) at paras. 59 to 61:

> [59] The Court in *Sault Ste. Marie* essentially held that the liability of the defendant for an offence of strict liability will rest on control and on the steps taken to prevent the particular event. The Court held that "this control may be exercised by 'supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control.'"
>
> [60] To exercise due diligence to prevent something being done is to take all reasonable steps to prevent it: *Tesco Supermarkets Ltd. v. Nattras,* (1971) 2 All E.R. 127 (House of Lords) at page 158. The House of Lords went on to say:
>
> > To treat the duty of an employer to exercise due diligence as unperformed unless due diligence was also exercised by all his servants to whom it had reasonably given all proper instructions and on whom he could reasonably rely to carry them out, would be to render the defence of due diligence in providing it.
>
> [61] It was noted in the case of *R. v. Lackie Bros. Ltd.* (1982), 7 W.C.B. 262 (Ont. Co. Ct.) at page 3, that there is no duty imposed on an employer by health and safety laws to anticipate every possible failure. All that is expected is that the employer will exercise every reasonable precaution.

[206] See also *R. v. Pacifica Papers Inc.*, 2002 BCPC 265, paras. 135 to 137; and *R. v. Rezansoff*, 2003 BCPC 106 [*Rezansoff*], para. 31.

[207] In *Rezansoff*, a due diligence defence was upheld where a property owner hired a man to remove toxic pesticides from a shed. Instead of disposing of them as asked, he dumped them into a gully. The hired hand had an expired pesticide-handling certificate, although he when he last tested, he had actually received a score five percent less than the score he needed to receive a certificate. Even so, the Court found the owner had not turned responsibility over to someone who was "woefully inadequate to manage pesticides"; and that the due diligence defence had been made out. Perhaps that is a low watermark for the standard care required to establish due diligence for the disposal of toxic substances.

[208] In *R. v. Commander Business Furniture Inc.*, [1992] O.J. No. 294 (Ont. C.J.) at para. 95, the Court listed a number of various factors which courts have weighed and balanced when they assess whether the accused exercised due diligence. Of these, the only pertinent one, as I read the list, is "industry standards."

[209] At para. 109, the judge referred to *R. v. Placer Developments Ltd.* (1983), 13 C.E.L.R. 42 (Yuk. T. Ct.) at p. 15, which states in part:

> ... The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required, and the extent the accused could control the causal elements of the offence.
>
> ... To successfully plead the defence of reasonable care the accused must establish on a balance of probabilities that no feasible alternatives could be employed to avoid or minimize harm.

[210] This passage alludes to the well-known principle that the exact nature of a harm need not be foreseeable; only the general nature of it. It is also trite law that the standard of care required increases in step with the degree of risk at play.

[211] I have found Mr. Jennings knew that he had to complete the journey in about 13 hours. And I agree with defence counsel's submission that it was not foreseeable that Mr. Jennings would not comply with that expectation and condition of the contract. The difference is not a matter of two or three hours. The time of the actual journey to Golden fell well out of the maximum 20 hours recommended by Dr. Vanderwal.

[212] The accused had not encountered problems with unduly extended delivery times with Roberge in previous years. If they had occurred, I find they would have come to Mr. Kooyman's attention because he had to have the approval of either Excel or Vandenberg for delivery times. Had the loads not been showing up as agreed, Mr. Kooyman would have heard about it.

[213] Crown counsel submits Mr. Kooyman should have familiarized himself with the regulations governing rest for drivers and made sure Mr. Jennings had slept before loading; and so be able to complete the journey in the time expected with no

need to stop for a mandatory rest. I disagree. Mr. Kooyman had every reason to believe and to expect that drivers picking up loads were ready, willing, and able to complete the journey in 13 hours. This was a condition Roberge had agreed to.

[214] Mr. Jennings testified that he chose the route and controlled how he completed the journey. Considering, however, all the evidence, including Mr. Jennings's experience and dealings with Roberge and Chilliwack Cattle Sales, I find he knew his autonomy did not extend to the extent of having discretion to complete the journey expected in a length of time significantly outside its expected range of about 13-hours – barring unforeseen circumstances he could not control. In my view, reasonably could the accused rely on Roberge to ensure its drivers complied with their own legal duty to rest before loading; and reasonably could they rely on Roberge to send a driver ready, willing, and able to complete the expected journey in approximately 13 hours.

[215] As for the method of the loading operation, I find it met or exceeded industry standards. Dr. Vanderwal and Mr. Zuest confirmed this. I appreciate industry standards is not the only test for due diligence. Mr. Zuest found no fault with the procedures used. He, with other CFIA agents, are charged with responsibility to enforce the *Regulations*. Further, those men who supervised loading on the day and night of September 9, 2008, could be characterized fairly as expert in their work.

[216] As Dr. Vanderwal stated in his report at page 5:

> This does not mean that Mr. Kooyman, or indeed a veterinarian selecting cattle for transport, will be 100% correct in predicting what would happen to an animal being transported. The exercise of such judgment is subjective and experiential, and what is important when the animals are actually assessed for loading and transport is observation and experience. Both personally, and as a member of a veterinary team with specific expertise in this field, I and we have been wrong in our subjective evaluation of fitness for transportation and export of cattle from time to time. Even though a veterinary inspection generally leads to high accuracy in predicting suitability for transport, as veterinarians we have all had the humbling experience of certifying an animal fit to travel one day that-was unfit the next day by the time the transport truck arrived, and hence was not even loaded, or of certifying animals which are loaded and die unexpectedly en route. It does not happen often to veterinarians, but it does happen. It is simply not possible to be 100% accurate in making predictions about cows that are seen at a moment in time.

[217] This is not to say that such misjudgment occurred in this case, but that even armed with experience and with the exercise of due diligence, a cow can unduly suffer on an expected journey due to illness or infirmity or other causes not detected, or detectable, on loading.

[218] In summary, I find the defendants exercised due diligence in their loading practices generally; and that on September 9, 2008, they did. I also find they exercised due diligence in hiring Roberge to transport cattle for the expected journey of about 13 hours to Picture Butte, Alberta.

[219] In final summary then, and considering all the evidence, including findings made earlier in these reasons, I find the Crown has failed to prove beyond a reasonable doubt the essential elements of the *actus reus* for each of the subject cows alleged at the times and places alleged in the charges.

[220] I also find the accused have established on the balance of probabilities that they exercised due diligence with respect to each of the subject animals at the times and places alleged in the counts.

[221] I find Chilliwack Cattle and Mr. Kooyman did all the law required of them and I find both not guilty on all counts.

"N. Brown J."