



Citation: *Prairie Pride Natural Foods Ltd. v. Canada (Canadian Food Inspection Agency)*,
2016 CART 4

Date: 20160204
Dockets: CART/CRAC-1823

Between:

Prairie Pride Natural Foods Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

**With: Mr. G. Rangi Jeerakathil, counsel for the applicant;
Ms. Gwen MacIsaac, counsel for the respondent.**

In the matter of a request made by the applicant, pursuant to section 11(1)(b) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of paragraph 143(1)(d) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

Following a hearing and review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines, on a balance of probabilities, that the applicant did not commit the violation as set out in Notice of Violation 1415WA0135 issued March 9, 2015, concerning events that took place on May 8, 2014. Prairie Pride Natural Foods Ltd. is not liable therefore to pay any monetary penalty to the Canadian Food Inspection Agency.

The hearing was held in Saskatoon, Saskatchewan,
On Monday and Tuesday, September 14 and 15, 2015.

OVERVIEW

[1] Starting at 2:25 a.m., on May 8, 2014, a load of 5,820 poultry broiler birds was loaded from a chicken farm in Shaunovan, Saskatchewan, onto a truck and trailer operated by Prairie Pride Natural Foods Ltd. (PP).

[2] At approximately 3:20 a.m., while loading the last module of birds onto the PP trailer, one of the members of an independent catching crew crashed a forklift into the trailer, causing the vertical tarp bar located at the back of the driver's side of the trailer to bend into a "U" shape. The damage to the tarp bar prevented the PP driver from being able to close and properly secure the tarp.

[3] After seeking advice from the PP dispatcher in Saskatoon, the PP driver set off at 3:35 a.m., to drive the load from the farm to the PP slaughter house in Saskatoon without the driver side of the load tarped. The driver, however, took the precaution of making extra stops to try to maintain the chickens' warmth during transit. The truck arrived at the PP slaughter house around 9:30 a.m., and unloading of the trailer began almost immediately. The final module of chickens was unloaded from the trailer at around 11:40 a.m. that same day.

[4] Prior to the PP truck's arrival at its slaughter house, PP personnel alerted Canadian Food Inspection Agency (Agency) officials of the load's predicament. As a result, Agency officials attended the PP slaughter house that morning and while the trailer was being unloaded, found 180 dead birds.

[5] On the basis of their analysis of the situation, the Agency issued a Notice of Violation with Penalty to PP in the amount of \$9,000 for transporting animals with undue exposure to weather, contrary to paragraph 143(1)(d) of the *Health of Animals Regulations* (HA Regulations).

[6] PP has now requested that the Canada Agricultural Review Tribunal (Tribunal) review the facts surrounding the issuance of the Notice of Violation.

[7] In reviewing the facts of a case, the Tribunal's role is to weigh the evidence before it and to determine whether the Agency has proven, on a balance of probabilities, the elements that form the basis of the Notice of Violation.

[8] Where the Agency meets its burden of proof, the applicant will be held liable for a violation under the administrative monetary penalty system (AMP system), unless the applicant can establish a defence or excuse permitted under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act), the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), or as it pertains to this case, the HA Regulations.

[9] The pivotal issue in this case is whether the Agency has proven that the chickens were transported in a manner that was likely to induce injury or undue suffering of the chickens by reason of undue exposure to the weather.

REASONS

1. Background

[10] The parties submitted to the Tribunal the following agreed statement of facts [verbatim]:

1. *For the purpose of the within appeal, the parties agree, through their respective counsel, to the facts in this statement. The parties agree that other evidence may be introduced by either party, to the extent that such evidence is not inconsistent with the following facts.*
2. *Prairie Pride Natural Foods Ltd. ("**Prairie Pride**") operates a poultry processing facility. Prairie Pride sources and transports poultry birds from Saskatchewan poultry farms as part of its normal course of business.*
3. *On May 7, 2014, Prairie Pride inspected its trailers and confirmed that the tarp bars and the tarps were in working order.*
4. *On May 8, 2014, Prairie Pride was to load 35,520 poultry broiler birds from the Sierra Colony and transport them to Prairie Pride's processing facility located at 3535 Millar Avenue in Saskatoon, Saskatchewan. The Sierra Colony is a Hutterite Colony near Shaunovan, Saskatchewan.*
5. *Mr. Chad Zoller, one of Prairie Pride's live haul drivers, was instructed to transport 5,820 of the 35,520 birds using truck #514 and trailer #7. Prairie Pride leases this truck from Penske Truck Leasing and owns this trailer. Trailer #7 is a "curtain drape" trailer and has two tarps – one on the passenger's side of the trailer and one on the driver's side of the trailer.*
6. *Mr. Zoller arrived at the Sierra Colony at approximately 10:30 p.m. on May 7, 2014. The Silverfox Poultry Loading Ltd.'s ("**Silverfox**") catching crew began loading birds onto Mr. Zoller's trailer at approximately 2:25 a.m. on May 8, 2014.*
7. *At approximately 3:20 am, while loading the last module of birds onto Mr. Zoller's trailer, one of the members of the Silverfox catching crew crashed a fork-lift into the trailer, causing the vertical tarp bar located*

at the back of the driver's side of the trailer to bend into a "U" shape. The damage to the tarp bar prevented Mr. Zoller from being able to close and properly secure the tarp.

- 8. Mr. Zoller contacted Mr. Sandy Zerebeski, Prairie Pride's Live Haul Manager and Logistics Coordinator, and advised him of the accident, that the tarp bar had been bent into a "U" shape, and that the tarp could not be closed and properly secured on the driver's side of the trailer.*
- 9. Mr. Zerebeski advised Mr. Zoller to transport the birds from the Sierra Colony to Prairie Pride's processing facility, with a tarp on the passenger's side of the trailer, but without a tarp on the driver's side of the trailer. Mr. Zerebeski also advised Mr. Zoller to drive at a lower speed and to stop along the way, in an attempt to warm the birds.*
- 10. Mr. Zoller departed the Sierra Colony at approximately 3:35 a.m.*
- 11. Because of the accident and the bent tarp bar, Mr. Zoller did not close and secure the tarp on the driver's side of the trailer. The tarp could not be fully secured without the tarp bar and the unsecured tarp could have flapped in the wind and caused a safety hazard for other vehicles.*
- 12. Because of the accident and the bent tarp bar, Mr. Zoller transported the birds from the Sierra Colony to Prairie Pride's processing facility with a tarp on the passenger's side of the trailer, but without a tarp on the driver's side of the trailer.*
- 13. As per Mr. Zerebeski's instructions, Mr. Zoller drove approximately 80 km per hour and stopped four times – in Gull Lake, Swift Current, Kyle and Rosetown – for approximately 15 minutes each time. Mr. Zoller checked the birds at each stop and observed some dead birds, that the birds were getting colder at each stop, but that they warmed up for each of the intervals of time that he was stopped.*
- 14. During the loading period, the temperature was approximately 0°C with wind at the Sierra Colony. During the transportation period, the outside temperature ranged from approximately -7°C with a wind chill to +7°C.*
- 15. Mr. Zoller arrived at Prairie Pride's processing facility in Saskatoon at approximately 9:30 a.m. on May 8, 2014.*
- 16. Prior to Mr. Zoller's arrival at Prairie Pride's processing facility, Mr. Gaetan Duret, Prairie Pride's Plant Manager, informed Dr. Gita Malik-Dahiya, a Canadian Food Inspection Agency ("CFIA") veterinarian, that one of the trucks transporting birds from the Sierra Colony would arrive at Prairie Pride's processing facility without a tarp on the driver's side of the trailer, that there had been an accident and the tarp bar had been*

bent at the Sierra Colony and that Prairie Pride had transported the birds without a tarp on the driver's side of the trailer.

17. *Upon Mr. Zoller's arrival at Prairie Pride's processing facility, Dr. Gita Malik-Dahiya conducted an ante-mortem and post-mortem veterinary inspection.*
18. *While doing the ante-mortem inspection at 9:45 a.m. on the load in trailer #7, Dr. Gita Malik-Dahiya noticed many dead birds in the two front modules and some dead birds in the back module of trailer #7. She also noticed that some of the birds were cold to the touch. Dr. Gita Malik-Dahiya visually observed the condition of the truck and trailer and that the side tarp bar was bent and the tarp was pushed in the space behind the last module.*
19. *While doing the post-mortem inspection of the birds in trailer #7, Dr. Gita Malik-Dahiya observed that the dead birds had little or no underlying pathology. Dr. Gita Malik-Dahiya determined that 180 of the 5,820 birds (3.09%) had arrived dead and that these bird's death were consistent with hypothermia.*
20. *Prairie Pride repaired the bent tarp system on trailer #7 on May 8, 2015.*
21. *Prairie Pride and Mr. Zoller did not contact Mr. Erin Wurtz, Manager of the Sierra Colony, to advise him of the accident. The accident occurred at 3:20 a.m., and Mr. Wurtz was not on site.*
22. *As a result, the CFIA issued Prairie Pride a Notice of Violation on March 9, 2015, for committing a violation contrary to section 143(1)(d) of the Health of Animal Regulations, and imposed a penalty in the amount of \$9000.00. Prior to March 9, 2015, CFIA had issued three Notice of Violations pursuant to the Health of Animals Regulations that imposed monetary penalties that were paid by Prairie Pride.*

[11] Additional evidence was tendered by the parties in written form prior to, as well as during, the two days of hearing held in Saskatoon, Saskatchewan, on September 14 and 15, 2015. By way of written evidence, PP tendered its initial request for a compliance agreement with the Minister (April 18, 2015), its Request for Review to the Tribunal (May 4, 2015) and its additional submissions (May 20, 2015, July 23, 2015 and September 14, 2015). Written evidence from the Agency included the original Notice of Violation (March 9, 2015), the Minister's refusal to enter into a compliance agreement (April 22, 2015), the Agency Report with Annex of 24 documents (June 18, 2015) and its additional submissions (July 8, 2015). The parties tendered 11 exhibits at the hearing and examined six witnesses—three called by the Agency (Mr. Wurtz, Mr. Zoller and Dr. Stephens) and three by PP (Mr. Zerebeski, Mr. Pezderic and Dr. Fricke).

[12] Subsequent to the hearing, the parties provided written submissions concerning the application of the common law defence of necessity to this case.

2. Issues

[13] This case raises three issues:

- i. has the Agency proven each of the elements of the violation, on a balance of probabilities—particularly Element 3 of a violation of paragraph 143(1)(d) of the HA Regulations, that the chickens were transported in a manner that was likely to induce injury or undue suffering of the chickens by reason of undue exposure to the weather;
- ii. if the Agency has proven all the elements, has PP established the defence of necessity to excuse its actions of May 8, 2014; and
- iii. if the Agency has proven all the elements and PP cannot establish a defence of necessity, is the penalty of \$9,000 assessed in this case justified in law?

3. Analysis and Applicable Law

3.1 *Has The Agency Proved Each of The Elements of The Violation?*

[14] Paragraph 143(1)(d) of the HA Regulations states:

No person shall transport or cause to be transported any animal in a railway car, motor vehicle, aircraft, crate or container if injury or undue suffering is likely to be caused to the animal by reason of ...

(d) undue exposure to the weather ...

[15] It is incumbent on the Agency to prove, on a balance of probabilities, all the elements that form the basis of the Notice of Violation (*Doyon v. Attorney General of Canada*, 2009 FCA 152 (*Doyon*), at paragraphs 20 and 42).

[16] This Tribunal has applied the *Doyon* approach of parsing out the elements of a paragraph 143(1)(d) violation (*Exceldor Coopérative v. Canada (CFIA)*, 2013 CART 9, at paragraph 24). For there to be a violation under this paragraph, the Agency must prove the following five elements:

1. an animal was transported;

2. the animal in question was transported in a railway car, motor vehicle, aircraft, vessel, crate or container;
3. the animal transported was likely to incur injury or suffer unduly by reason of undue exposure to the weather;
4. the alleged violator transported, or caused to be transported, the animal in question; and
5. there was a causal link between the transportation carried out by or on behalf of the violator, in which the animal was likely to incur injury or suffer unduly by reason of undue exposure to the weather, and the undue exposure to the weather.

3.1.1 Proof of Elements 1, 2, and 4

[17] The parties agree and I so find, that the Agency has established Elements 1, 2 and 4. The evidence demonstrates that 5,820 chickens were transported on May 8, 2014, in a trailer owned by PP, which was pulled by a truck whose driver was employed by PP.

3.1.2 Proof of Element 3

[18] It is what constitutes the transporting of an animal “*if injury or undue suffering is likely to be caused to the animal by reason of ... undue exposure to the weather*”—Element 3 of an alleged violation of paragraph 143(1)(d) of the HA Regulations—that this Tribunal must interpret and apply to the facts of this case. These words must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Canada (AGC) v. Stanford*, 2014 FCA 234 (*Stanford*), at paragraphs 41 to 44).

[19] What is somewhat unusual in interpreting a violation under paragraph 143(1)(d) of the HA Regulations is that the word “undue” appears twice, once with reference to “suffering” and once with reference to “exposure”. Parliament’s use of the term twice is clearly intentional and hence each use of the word must be given appropriate significance.

[20] While the scheme and object of the HA Act and HA Regulations is not explicitly stated in the legislation, references to the importance of regulating the humane transport of animals within the Canadian agriculture and food system is evident in section 64(1)(i) of the HA Act. Again, Part XII of the HA Regulations, in which the standard set out in paragraph 143(1)(d) is found, is entitled “Transportation of Animals”. Thus the HA Act and the HA Regulations in Part XII are to be interpreted as establishing standards for the protection of animal health while those animals are in commercial transport, that is, for any part of travel from a producer’s barn to a processor’s slaughter facilities. The animal health

protection provisions of the HA Act and HA Regulations do not, therefore, exist in a vacuum. The context of the legislation is that animal health is to be protected within the agricultural and agri-food production systems that currently exist in Canada.

[21] While Parliament has enacted a specific provision to protect animal health for animals during transport from undue suffering by reason of undue exposure to weather, the provision must be interpreted so as to maintain a balance between the regular commercial activities of actors in agricultural and agri-food production systems and the protection of the animals in those systems. The deliberate intention of Parliament to use both the phrase “undue suffering” and the phrase “undue exposure to the weather” in defining a violation under paragraph 143(1)(d), must therefore be read in the context of this balancing in mind, given the scheme and object of the HA Act and HA Regulations.

[22] “Undue” under this legislative scheme means “undeserved”, “unwarranted”, “unjustified” or “unmerited” (*Canada (AG) v. Porcherie des Cèdres*, 2005 FCA 59, at paragraph 26 and *Doyon*, at paragraph 30).

[23] While this definition was in the context of a different, but related provision (paragraph 138(2)(a)) of the HA Regulations), it provides guidance for the interpretation of “undue” found twice in paragraph 143(1)(d) of the HA Regulations.

[24] As well, I am guided by the grammatical and ordinary meaning of the word “undue”, as found in the Canadian Oxford Dictionary, which defines “undue” as “excessive”, “disproportionate”, “unwarranted”, “inappropriate”, “improper”, or “unjust”.

[25] Given the context of the HA Regulations as regulations to protect animal health within existing agricultural production systems, the word “undue” in the context of “undue exposure to the weather”, at its narrowest, refers to situations where animals are “unjustifiably exposed to the weather” or “undeservedly exposed to the weather”.

[26] Looked at from another perspective, liability will attach to an actor in the Canadian agri-food system primarily where animals in their care and control are exposed to weather that is beyond any “justified” or “warranted” exposure to the vagaries of Canadian weather.

[27] Canadian meat industry participants are required to pursue their activities year-round in all types of Canadian weather. It goes without saying that when individuals and corporations care for food animals from the point of loading to the point of slaughter, they are required to expose their animals to the weather. Without the qualifier “undue exposure”, this provision of the HA Regulations would prohibit the transportation of food animals whenever they might be exposed to the weather in which they suffer or are likely to suffer. Parliament, however, has added the qualifier “undue” so that only certain types of exposure to the weather will attract liability.

[28] To determine if transportation was likely to cause injury or undue suffering due to undue exposure to the weather, one needs to examine: (a) the weather conditions prevailing at the time of loading, transport and unloading; (b) the overall health and

condition of the birds at loading; and (c) any industry guidelines for hauling such birds in such weather conditions.

[29] In the present case, weather conditions did not appear extreme. At the time of loading, in the middle of the night on May 8, 2014, the temperature at Shaunovan was 0°C. The Poultry Vehicle Transportation Report completed by Agency Inspector Gita Malik-Dahiya records the weather conditions at loading as “Clear and wind 0° C”, en route as “Dry -1°C” and at destination as “Clear and Dry 7°C” (Tab 3 of Agency Report). Government of Canada data showed that between 3:00 a.m., and 10:00 a.m., at Swift Current (which is close to Shaunovan) and Saskatoon, the temperature varied between +9.3°C and -4.1°C. With the wind-chill factor, the temperature may have been as low as -9°C, although there is no record as to whether it reached this temperature where the load was and for how long if it did. There was no recorded precipitation during the period but rather that it was clear with winds of between 8 and 36 km/h (Tab 11 of the Agency Report). The PP driver form for the load reported the outside temperature at the farm as 0°C with conditions marked as “Clear/Wind” (Tab 10 of the Agency Report). For early May in Saskatchewan, there was no suggestion in the evidence that these weather conditions were exceptional or unusual and certainly not in the extreme range of the conditions reported in *R. v. Maple Lodge Farms*, 2013 OJC Court File No. Brampton 10-1160 or in *Poirier-Bérard v. Canada (CFIA)*, 2012 CART 23.

[30] The condition of the birds must also be considered. The birds are reported to be young broilers in good condition, 35 days old weighing on average 2.11 kg. (Tab 8 of Agency Report; testimony of Mr. Wurtz and notes of Agency official taking notes of conversation with Mr. Wurtz at Tab 17 of the Agency Report). The PP driver, in the document he completed (Tab 10 of the Agency Report), notes that the barn conditions were dry and the birds were dirty. The “Flock Information Reporting Sheet”, tendered as Exhibit 6 at the hearing, showed that the birds had no underlying health issues, that feed and water had been withdrawn from the chickens on May 7, 2014, and that the estimated mortality rate of the birds at 6.2%. The evidence tendered points to a fairly standard, healthy bunch of market ready birds.

[31] Evidence as to industry guidelines provided by the parties in this case does not provide clear-cut guidance for the situation which prevailed on May 8, 2014. The four documents tendered by the parties to illustrate industry guidelines gave, at best, vague generalities for how to deal with “extreme weather”, “cold weather”, and “freezing rain and wind”. Moreover, these industry guidelines provided little specific information concerning the use of tarps.

[32] There was no unequivocal position from the two expert witnesses—Dr. Stephens and Dr. Fricke—that industry guidelines required the load hauled on May 8, 2014, to have both tarps on the load. While the parties and the expert witnesses agreed that the death of the chickens examined in Saskatoon by Agency officials was caused by hypothermia, there was no agreement, nor unequivocal evidence to the effect that deciding to leave Shaunovan at 3:35 a.m. on May 8, 2014, when the ambient temperature was 0°C would likely cause

injury or undue suffering to the birds because of undue exposure to the weather on the trip up to Saskatoon.

[33] The question, then, I must answer is this: on the balance of probabilities, has the Agency proved that driving the load to Saskatoon in the early morning of May 8, 2014, with only one tarp drawn, constituted the transportation of chickens likely to incur injury or undue suffering by reason of undue exposure to the weather? I think not. The likelihood was, no doubt, a possibility but the evidence does not suggest that it was a probability. Indeed it was a cool spring night when the last of the loading occurred, but it was clear and dry. The birds were healthy and young. While the evidence suggests that but for the late night crash damaging the tarp system, the PP driver would have deployed both tarps, there was no industry requirement, practice or policy that required tarping of both sides of the load in the prevailing weather conditions. The evidence, as presented, is not enough to prove that it was a certainty, or even that it was a probability, that tarping only one side of the load would result in animals being transported in a manner likely to incur injury or undue suffering by reason of undue exposure to the weather. In coming to this finding, I am especially persuaded by the evidence, including the expert evidence of Dr. Fricke, that it was reasonable given the circumstances to transport the chickens with only one tarp to Saskatoon in the early morning of May 8, 2014.

[34] It is, no doubt, a delicate balancing act between protecting animal welfare and allowing prudent commercial operators to do their jobs. This is a case which arises from difficult circumstances, but there is insufficient proof to convince me that the Agency has met the burden of proving Element 3 of the alleged violation.

3.1.3 Proof of Element 5

[35] Having found Element 3 of the violation is not proven by Agency, I need not examine whether Element 5 – the causal link between the transportation carried out by PP, the likelihood of the animals to incur injury or suffer unduly by reason of undue exposure to the weather, and the undue exposure to the weather – is proven.

3.2 Has PP Established The Defence of Necessity?

[36] In light of my findings above, it is not necessary to explore the fulsome evidence and arguments with respect to the defence of necessity presented by the parties.

3.3 Is The Penalty in Case Justified in Law?

[37] Because of my finding that the Agency has not proven all the elements of the violation, it is not necessary for me to consider whether the Agency has proven that the amount of the penalty is justified under the AMP Act and AMP Regulations.

4. Disposition

[38] I find, for the reasons set out above, that the Agency has not established, on a balance of probabilities, Element 3 of the alleged violation. Accordingly, I hold that, on a balance of probabilities, the Agency has failed to prove all of the essential elements of the violation, and that PP, therefore, did not commit the alleged violation. Consequently, PP is not liable for payment of a monetary penalty in this case.

Dated at Ottawa, Ontario, on this 4th day of February, 2016.

Dr. Donald Buckingham, Chairperson