Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Maple Lodge Farms Inc.* v. *Canada (CFIA)*, 2016 CART14

Date: 20160531
Docket: CART/CRAC-1729

BETWEEN:

Maple Lodge Farms Inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

BEFORE: **Member Bruce La Rochelle**

WITH: **Ronald Folkes, counsel for the Applicant**
Jacqueline Wilson and Laura Tausky, counsels for the Agency

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(c) 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 an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order determines that the Applicant did not commit the violation, as set out in Notice of Violation 1213ON037201, dated June 19, 2013, based on undue exposure to the weather, an essential element of the violation, not having been established, on the balance of probabilities.

The hearing was held in Brampton, ON,
on October 15, 16 and 17, 2014;
January 6, 7, 8 and 9, 2015;
May 25, 26, 27, 28 and 29, 2015;
June 24, 2015 (half day);
September 9, 2015 (half day); and
followed by written submissions of both parties,
dated November 27, 2015.

REASONS

Preliminary: Extent of Hearing Time and Joinder of Violation Hearings

[1] This matter was heard concurrently with CART/CRAC-1728, involving different facts and different incident times. A decision in relation to CART/CRAC-1728 was released as 2016 CART 6 on March 14, 2016, and will hereinafter be referred to as "Maple Lodge Farms 2016a". As noted in *Maple Lodge Farms 2016a*, the extent of hearing time was a function of two matters, involving detailed facts and extensive arguments, being heard at the same time. As expressed by the Tribunal in *Maple Lodge Farms 2016a*, at paragraph 5, it may not be advisable for cases of this level of evidentiary and advocacy complexity to be heard concurrently, when the facts and violation times differ.

Preliminary: Quality of The Record and Submissions

[2] As noted in *Maple Lodge 2016a*, at the initiative of Mr. Folkes, on behalf of Maple Lodge Farms and as later agreed to by Ms. Wilson, on behalf of the Agency, the voluminous recorded testimony was transcribed and copies of the written transcripts were graciously provided to the Tribunal by counsel, at no charge. The quality of written concluding submissions by counsel greatly benefited from the ability to refer to written transcript pages in support. The extensive referencing to the transcripts and otherwise is acknowledged and appreciated by the Tribunal.

Procedural History

[3] By Notice of Violation 1213ON037201 the Applicant, Maple Lodge Farms Inc. (hereinafter referred to as Maple Lodge Farms) is alleged to have committed a violation contrary to paragraph 143(1)(*d*) of the *Health of Animals Regulations* (C.R.C., c. 296), found under the heading "Protection of animals from injury or sickness", and which provides as follows:

> ***143.*** *(1) No person shall transport or cause to be transported any animal in a railway car, motor vehicle, aircraft, vessel, 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…*

[4] The Notice of Violation was served on Maple Lodge Farms by electronic means on June 19, 2013. Further procedural matters were substantially identical to those described in *Maple Lodge Farms 2016a*, given that the case files proceeded concurrently. As in *Maple Lodge Farms 2016a,* the Tribunal determined that the concluding arguments of the parties would be by written submissions only, as particularized in an order appended to this

decision. Following the submission of concluding arguments, neither party took advantage of a right of reply accorded to them by the Tribunal.

Facts Not In Dispute

[5] The facts not in dispute are as follows :

(a) Between the morning of September 18, 2012, and the morning of September 19, 2012, eleven loads of spent hens from the Hillandale Farm in Gettysburg, Pennsylvania were loaded from that location and transported to the processing facilities of Maple Lodge Farms, located in Brampton, Ontario. The Hillandale Farm is a cage farm, meaning that the hens spend their entire egg-laying lives in cages.

(b) The loads were transported to Maple Lodge Farms by transporters using their own trucks, but with trailers provided by Maple Lodge Farms. These trailers employed a "dolly system", whereby the spent hens were placed in drawers, transported in dolly carts and mechanically loaded onto the trailers. The trailers, designed by Maple Lodge Farms, included the modification that the wheels of the trailer were completely under the trailer floor.

(c) On the particular trailer in question, 480 drawers of spent hens were loaded, with a density of sixteen spent hens per drawer, for a total of 7,680 spent hens to be transported. At the time of loading and transport, the hens were 93 weeks old, and had been taken off feed between six and eight hours prior to loading. The loading began at 10:15 a.m. on September 18, 2012, and finished at 12:45 p.m.

(d) The transport from Gettysburg, Pennsylvania to Brampton, Ontario took nearly 9 hours, with the transport departing from Gettysburg at 12:45 p.m. on September 18 and arriving in Brampton at 9 p.m. that evening. The trailer was then left in a roofed but unheated holding barn. In addition, the sides of the trailer were open and there were fans continuously operating in the holding barn. At the time of arrival, Maple Lodge Farms was commencing its sanitation shift, which lasted until approximately 4 a.m., during which time no processing takes place. As of the termination of the sanitation shift, the spent hens had been on the trailer for approximately sixteen hours.

(e) The weather at the commencement of and during the transport involved rain at the time of loading and rain at various points during the journey. The skies were overcast during the journey and the roads were wet at various points. During the journey, the temperatures dropped by approximately 12 degrees

Celsius, from approximately 22 degrees in Gettysburg to 9.6 degrees at the time the transport arrived in Brampton.

(f) During the course of the journey, both sides of the trailer were entirely open, the driver having opted not to use tarpaulins to cover either or both sides. The driver reported driving at speeds between 80 and 100 kilometres per hour. The driver stopped to examine the load on two occasions during the journey and reported nothing untoward.

(g) Subsequent to arriving at Maple Lodge Farms, the load was monitored hourly by Maple Lodge Farms personnel. Temperatures at the front, middle and rear of the load were taken by Maple Lodge Farms personnel using an infrared laser thermometer which recorded external temperatures of the drawers. At the time of the initial monitoring, nine dead spent hens were reported as being visible at the bottom of the trailer.

(h) The trailer was then taken outside the holding barn to be weighed. The time outside the holding barn was approximately one hour, with the load being weighed at approximately 4:30 a.m. and then moved to the live receiving area, where the trailer was unloaded. Slaughter of the load commenced shortly after 5 a.m.

(i) During the course of unloading, 337 spent hens were discovered to be dead, representing 4.4% of the load.

(j) *Ante-mortem* and *post-mortem* examinations on the spent hens were conducted by Agency veterinarians, involving samples of 10 spent hens for each examination, as selected by Maple Lodge Farms personnel.

Major Point of Dispute

[6] The major point of dispute between the parties relates to the severity of the weather and the effects of such weather on the spent hens.

Conclusion

[7] The Tribunal concludes that the Agency has not established, on the balance of probabilities, that the spent hens were unduly exposed to weather. Since undue exposure to the weather is an essential element of the violation, Maple Lodge Farms cannot be held to have committed the violation.

General Comments in Relation to the Evidence

[8] The primary concern of the Tribunal relates to the fact that most of the evidence was not that of direct participants in relation to the events in question. Most of the evidence presented led largely to inferences as to what might have happened. In this regard, the Tribunal considers that it must be particularly mindful of the cautions directed to it by the Federal Court of Appeal in *Doyon v. Canada (Attorney General),* 2009 FCA 152, per Mr. Justice Létourneau (Mr. Justice Blais and Madame Justice Trudel concurring), at paragraph 28:

> *[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.*

[9] The oral and written evidence to be considered by the Tribunal is voluminous. To the extent that the evidence of a particular witness is not referenced or not referenced in detail, this does not mean that the Tribunal has not duly considered such evidence. A similar approach will be found in relation to the Tribunal's approach to the written evidence, which has also been duly considered.

[10] The Agency's case rests largely on opinion evidence, incomplete direct evidence, plus documentary evidence. The opinion evidence advanced by the Agency is largely from Dr. Appelt, who did not examine this specific transport. The incomplete direct evidence advanced by the Agency is from Mr. Freiburger, who partially examined the load and took a series of crate temperatures, and from Dr. Sandhu, who examined a sample of birds in circumstances where their initial cause of wetness is uncertain. The documentary evidence advanced by the Agency was largely that of reports and forms filled out by the driver and Maple Lodge Farms personnel. The documents submitted are not evidence under oath.

[11] Maple Lodge Farms is not obliged to make the Agency's case. What one has in the present case is much conflicting evidence, such that it becomes impossible to establish, on the balance of probabilities, how these birds died and whether such deaths were the result of undue, or unjustified, exposure to the weather. It is even more difficult to determine any degree of compromised state of the remaining birds, given that the evidence throughout is that they were alert, with no evident challenges, beyond perhaps a degree of dampness that occurred at an uncertain time.

[12] From the perspective of Maple Lodge Farms, the current state of evidentiary confusion may not be unwelcome. It volunteers no one as a witness who was directly involved in the monitoring of the load. The transporter similarly does not volunteer direct evidence from the driver. The farmer and the catchers do not volunteer to appear or to provide affidavit or other evidence as to what they observed, or how they behaved. None of

these people is available for cross-examination. There is no credibility assessment; the documents are expected to largely speak for themselves, unless circumstantially challenged. For example, had it not been for two Maple Lodge cases being heard contemporaneously, the template-like uniformity in Dr. Sandhu's reports in the two cases, leading to issues as to the weight to be accorded such reports, to be discussed, may not have been as evident.

[13] In a case of this degree of complexity, particularly in view of the cautions expressed by the Federal Court of Appeal in *Doyon*, the Agency needs to establish more of its position through direct evidence. It needs to be in a position to examine the driver and those Maple Lodge personnel directly involved with receiving, unloading, monitoring and processing of the transport. If initial weather conditions are part of the case, as here, it needs direct evidence of those involved with the catching and loading of the chickens. The Agency has resources, through application to the Tribunal, to compel such testimony, in person or in other formats, such as videoconference or teleconference, that amount to direct testimony subject to cross-examination. It is very difficult for the Agency to establish its case in the absence of such direct evidence. In *Maple Lodge Farms 2016a*, the Agency was more easily able to make its case because both the Agency and Maple Lodge Farms agreed that the spent hens had remained stationery for some four hours, in sub-zero weather, at the commencement of the transport (paragraph 18, *Maple Lodge Farms 2016a*). From that perspective, the Tribunal was then able to accept the Agency's argument that, on the balance of probabilities, the spent hens had been subject to a "cold shock" at the commencement of the transport.

[14] A similar "cold shock" dimension was discussed by Dr. Appelt in the present case, in relation to wet, spent hens. Such a view is not expressed unequivocally. What is expressed is an opinion that spent hens that are wet at some point will cool and may encounter difficulties in recovering heat. Such spent hens will be more susceptible to cooling, to the point of hypothermia, at higher temperatures than would otherwise be the case with dry birds. Does this mean that a transport in the rain should be stopped?

[15] The absence of testimony under oath or other evidence from parties directly involved in the transport means that, despite the extent of the hearing days, the matter is akin to a Tribunal review by written submissions only, as supplemented by opinion evidence as to the meaning and significance of the documents, plus the physical state of the hens.

Post-Mortem **Examinations by Dr. Sandhu**

[16] Dr. Gucharan Sandhu, on behalf of the Agency, performed *the post-mortem* examinations on a sample of 10 birds, as selected randomly by Maple Lodge Farms personnel. The selection process is in accordance with existing practice agreed to between Maple Lodge Farms and the Agency.

[17] While reservations have been expressed as to the joinder of violation proceedings, one benefit of such joinder is that one can compare the practices of Dr. Sandhu in relation to his *post-mortem* examinations in both *Maple Lodge 2016a* and the present case. What was observed and commented on by the Tribunal and Mr. Folkes during the hearings was the remarkable similarity in wording used by Dr. Sandhu in his reports of the *post-mortem* examinations in the two matters. Even though the time and circumstances were significantly different, identical wording is found in Dr. Sandhu's *post-mortem* examination reports in the two cases. It appears that a template approach was largely used, at least in relation to reporting the findings from the *post-mortem* examinations. As a consequence, the Tribunal is not in a position to accord such reports the weight that otherwise might be merited, based on concerns as to what a repeated, template-like description actually means, and further concerns as to what degree of veterinary judgement it reflects.

[18] The Tribunal acknowledges that greater credibility to Dr. Sandhu's testimony was accorded by the Tribunal in *Little Rock Farm Trucking 2* (2015 CART 30), at paragraph 103:

> *[103] Sandhu was a credible, articulate and knowledgeable expert witness. His observations led him to his conclusion that "death of birds could be rainy stormy weather", a conclusion which was honest and credible, particularly when it was made with less than absolute certainty on his part. As well, his conclusions were based on logical inferences which were consistent with other evidence presented in the case*

Evidence of Temperatures

[19] The Tribunal was presented with conflicting and confounding evidence in relation to temperature measures of the transport. The general approach adopted by Maple Lodge Farms is to use an infrared laser thermometer to measure outside compartment temperatures, and to then extrapolate from those temperatures as to what the likely temperatures would be inside the compartments. Much of the company's evidence as to the safety of the spent hens is based on such extrapolation, which is in turn tied to assumptions as to huddling, heat-seeking behaviours of the spent hens inside the containers. The evidence here is far from definitive, particularly since the empirical research on spent hens is not robust. Dr. Appelt, on behalf of the Agency, pointed out that much of the uncertainties about temperatures could be addressed through the installation of internal trailer thermometers.

[20] The Tribunal notes that, from *Little Rock Farm Trucking 2* (2014 CART 30), there is evidence of industry use of internal trailer thermometers. In that case, the principal of Little Rock Farm Trucking, Mr. Reuber, commented on how practices had changed when the company was compelled to transport spent hens using the newly-designed Maple

Lodge Farms trailers. His testimony, under oath and as summarized in paragraph 53 of that decision:

> *[53] Reuber added, however, that one cannot assume that the outside ambient temperatures are the same as they are inside the trailer because of the tarps. Even when the truck is moving, it will become warmer inside the trailer than the outside ambient temperature, because the trailers that LRFT owned and used (prior to using MLF trailers) had interior trailer thermometers that showed this to be the case…*

[21] Why, contrary to the practice of experienced transporters, Maple Lodge Farms did not install interior thermometers in their trailers, which were intended to be redesigned to improve the health and safety of spent hens during transport, was not addressed in the present case.

Industry Standards

[22] The Tribunal notes that reference was made by both parties to various industry standards. As the Tribunal has previously stated, such as in *Finley Transport v. Canada (Canadian Food Inspection Agency)*, 2013 CART 42, at paragraph 96, industry standards may provide guidelines as to behaviours otherwise considered acceptable, but cannot be determinative of whether a violation has been committed, particularly in an absolute liability regime. As the Tribunal stated, at paragraph 96 of *Finley Transport*, formalized industry standards "do not create bright lines, or absolute demarcations as to what is acceptable and what is not acceptable, in any absolute sense." With this caveat, the Tribunal remains mindful of industry standards in its deliberations herein. The Tribunal also notes that, in relation to the processing of spent hens and influencing their transport, Maple Lodge Farms effectively is the industry, processing approximately 90% of all spent hens processed in Canada.

Summary of Reasoning

[23] At paragraph 125 of the concluding submissions of the Agency, it provides a succinct, referenced summary of the evidence by which it contends that the spent hens were likely to incur undue suffering by reason of undue exposure to the weather. The Tribunal is choosing to address the majority of such points, sequentially.

[24] The Agency states that "the birds were loaded in heavy rain, with the tarps off the trailer, and rain was shown by weather reports to persist at various points in the journey". The Tribunal agrees that rain has been established to have continued at various points in the journey, in addition to overcast skies. The Tribunal does not agree that "heavy rain" at

the time of loading has been established, on the balance of probabilities, and also notes an absence of advocated precision as to what such term means.

[25] The Agency states that "the untarped trailer encountered wet roads in transit from Pennsylvania to Brampton, Ontario". The Tribunal agrees that such circumstances have been established, but does not see how the Agency has associated such lack of tarping and wet roads with wetness to the birds, or such wetness that can be categorized as undue exposure to the weather. This is particularly so in view of the revised trailer design by Maple Lodge Farms, which is specifically intended to minimize the effects of road spray. There is also no evidence as to the degree to which water from passing vehicles or otherwise penetrates the bird containers.

[26] The Agency states that "the temperature dropped 10 degrees Celsius around the Canadian border, to between 13 and 9 degrees Celsius". The Tribunal accepts that such a drop in temperature has been established, and that the overall drop in temperature over the entire journey was in fact higher.

[27] The Agency states that "the driver observed that the temperature and the wet roads made the birds cold". The Tribunal acknowledges that such a statement was made by the driver, but points out that such statement was made after the fact, in response to inquiries from Maple Lodge Farms (and also, presumably, his own employer) as to the circumstances surrounding the number of deaths. There is no evidence as to the experience of the driver, relative to assessing the credibility of this statement, which is in any event self-serving, and to be weighted as such. The driver is not a veterinarian and, on the evidence, expressed no concerns to anyone during the journey, notwithstanding inspecting the load twice en route. It is also unclear whether such inspections were discretionary on his part. There was no direct testimony of the driver, under oath, with attendant cross-examination. For the foregoing reasons, the Tribunal does not accord significant weight to the driver's observations.

[28] The Agency states that "temperatures under 13 degrees are below the comfort zone for spent fowl and have been shown to induce hypothermia in wet birds". The Tribunal does not view this statement as involving any absolute range, which is based on the testimony of Dr. Appelt, a veterinarian employed by the Agency and a principal Agency witness, and a study done of broiler chickens. The state of research in relation to spent hens is less well-developed, and the comparative fragility of the two types of birds not clearly established through empirical evidence. The Agency also does not reference the extensive evidence adduced by Maple Lodge Farms as to the counter-effects of birds huddling for warmth. If this were an absolute threshold of likely hypothermia, every transport of spent hens below this threshold, particularly in sub-zero weather, would be prohibited. The fact remains that it is currently legal to transport spent hens, over long distances, in weather far below 13 degrees Celsius.

[29] The Agency states that "Maple Lodge personnel noted 9 dead birds in the outside crates upon arrival at the plant on the night of September 18, 2012". The Tribunal agrees with this finding, though the Agency has not established what implications should reasonably be derived from such findings. Given their fragility, it is expected that a number of spent hens will die during transport, from various causes, including exposure to the weather. Whether such exposure to the weather is undue, is a separate matter. Whether such undue exposure is associated with undue suffering is a further separate matter. The fact that a spent hen dies does not necessarily mean that such spent hen suffered unduly prior to death. In itself, the discovery by Maple Lodge Farms personnel of 9 dead birds would not appear to lead to any implications in relation to likely undue suffering, due to undue exposure to the weather. However, the Tribunal did not have the benefit of the direct testimony of such personnel who were involved in the monitoring of this particular load.

[30] The Agency states that "eventually 337 dead birds were found on trailer D76, when the trailer was processed on September 19, 2012". This is an agreed finding of fact. The large number of deaths, representing 4.4% of the load, raises a reasonable inference that there were either problems with the transport, problems with the flock, or both, interacting together. In terms of problems with the transport, the Agency has specifically chosen to issue a notice of violation under a section of the *Health of Animals Regulations* that requires the establishment of likely undue suffering due to undue exposure to the weather. This is to be contrasted with another violation section of the *Health of Animals Regulations,* paragraph 138(2)(*a*), whereby it is prohibited to transport animals "that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey". Transport is prohibited in circumstances where the flock or any of its members are found to be generally unsuitable for transport, for whatever cause, and suffering unduly in fact, from such transport. The more precise causality in the section under consideration is balanced in part by the Agency needing to only demonstrate "likely" undue suffering, and where such likelihood need only be established on the balance of probabilities. It is conceivable that undue suffering in fact may not be likely, though this issue need not be considered further by the Tribunal, given its conclusion that undue exposure to the weather has not been established.

[31] The Tribunal has concluded that the key dimension that has not been established by the Agency is "undue exposure to the weather", irrespective of whether suffering or undue suffering is likely. A large number of spent hens died. A number may have died without suffering, or without suffering unduly. A number may have suffered or suffered unduly prior to death, while others may have suffered or suffered unduly, but not died. Exposure to the weather may have been a contributing factor to such suffering or undue suffering. The exposure to weather, under the circumstances, has not been sufficiently established to be undue. Wetness of spent hens from rain or road spray is not necessarily undue exposure to the weather.

[32] The Agency states that "most of the dead birds were found on the outside of the trailer". While this statement is referenced to the Maple Lodge Farms Live Receiving Report, it is contradicted by other observer reports that the dead birds were found throughout the transport. Maple Lodge Farms contends that the diagrammatic representation of where the dead birds are located is in fact a "going through the motions" exercise to satisfy the requirements of Agency veterinarians, but should not be relied on, where there are statements to the contrary. Once again, the Tribunal does not have the benefit of the testimony of the Maple Lodge Farms personnel who made and recorded the observations.

[33] The Agency states that "the DOAs [spent hens dead on arrival] observed by Inspector Freiburger and five of the ten birds necropsied by Dr. Sandhu were wet". What "wet" means in this context is unclear, as is the source of such wetness. Inspector Freiburger, an employee of the Agency who was monitoring the unloading of the spent hens and monitored the partial unloading of this particular trailer, had initially observed a number of "damp" birds. The wetness of the sample was contended by Maple Lodge Farms to be referenced to the bin from which the sample was taken. Whether a sample of ten is statistically adequate to come to conclusions as to the likely cause of death of a larger number of spent hens was not established. Neither was it established how any such degree of wetness provides evidence of undue exposure to the weather. If the source of the wetness is uncertain, a conclusion that exposure to rain is the likely cause of death is called into question, as is any conclusion derived therefrom as to undue exposure to the weather. Again, the Tribunal did not have the benefit of the testimony of the Maple Lodge Farms personnel who actually provided the sample to Dr. Sandhu.

[34] The Agency states that "there was no sign of infectious disease in the birds". The Tribunal agrees with this statement, based on the *ante-mortem* examination undertaken, though in the absence of evidence provided as to its statistical defensibility. Such examination involved an examination of only ten spent hens. Both parties used this finding for different purposes. Maple Lodge Farms initially contended that this meant that there was no cause to view the load as having been initially stressed, and hence no slaughter prioritization was required. This argument relates to matters of foreseeability and negligence, which are irrelevant to the absolute nature of the violation under consideration, and where violation foreseeability is not assessed from the perspective of Maple Lodge Farms. The Agency countered by asserting that an *ante-mortem* examination designed to ascertain disease was not intended to be used as an evaluation of any otherwise compromised condition of the load. The Agency now uses this finding to presumably imply that, by some process of elimination, the load was generally healthy and that therefore the deaths discovered must be the result of undue exposure to the weather. The Tribunal is inclined to accept the initial views of the Agency that the *ante-mortem* examination results are largely irrelevant to the issues under consideration.

[35] There is some disagreement between the Agency and Maple Lodge Farms as to the general state of health of spent hens. The Agency asserts that such hens will generally be in

a fragile state, given that they are subject to significant calcium deficiencies at this stage of their lives, and also are frequently poorly feathered. The poor feathering, or lack of feathering, may be a function of age or a function of the birds pecking each other, either prior to or during the transport. Evidence was given by Dr. Appelt in this regard that there is literally a "pecking order" among the hens, and that weaker hens will often be attacked by stronger hens in the enclosed cages on the farm. During the course of transport, such behaviours will continue, and will be aggravated by the stresses that the birds feel during transport. Such stress will be both generalized and manifested by the birds pecking each other during transport, since they have to that point spent their entire lives in stationary cages.

[36] Maple Lodge Farms, via Dr. Ouckama, asserts that the birds would not necessarily be fragile, based on their ages. Her comparison is the fragility of chickens raised specifically for meat, which are transported to slaughter at a few weeks of age. Spent hens, by way of contrast, are transported at much later stages of their lives—in the present case, at the age of 93 weeks.

[37] The Tribunal is of the view that the veterinary evidence in the present case and in numerous other cases establishes that spent hens are fragile, and subject to multiple challenges. Whether they are more or less fragile than broiler birds is not particularly relevant. Degrees of "undueness", both in relation to suffering and in relation to exposure to weather, must therefore be assessed in light of the fragile state of the spent hens. What might be "justified" exposure to weather for hogs or cattle may well be "unjustified" or "undue" in relation to spent hens.

[38] The Tribunal thus accepts the more general veterinary views advanced by witnesses for both parties (with the possible exception of Dr. Ouckama) that spent hens are fragile, compromised birds. What is undue exposure to the weather must be assessed with reference to such compromised state. The Tribunal has concluded that the weather conditions have not been sufficiently established that a conclusion as to undue exposure to the weather is reasonable, separate from determining if it has been established that any such undue exposure to the weather is associated with likely undue suffering. The more compromised the spent hens may be, the more difficult it would appear to be to establish the degree of exposure to weather that will be regarded as undue, or as being primarily or predominantly associated with any suffering or undue suffering of the spent hens. This is yet another evidentiary confluence that is to the advantage of Maple Lodge Farms.

[39] The Agency further supports its arguments in paragraph 129 of its concluding submissions, as follows:

> *129. In addition, many of the sister loads transported through similar weather conditions on September 18, 2012 experienced incidences of high mortality.; Five other loads investigated by the Agency had DOA rates between 4.95% and 9.92%. The comments from the drivers indicated these loads also*

> *travelled through on again/off again rain, along wet roads causing road spray, followed by a significant temperature drop at the border. To the extent Maple Lodge claims the variation in tarp configurations precludes an inference that weather was a factor, it is noteworthy that none of the drivers deployed both the left and right tarps, meaning at least one side of the trailer was left unprotected from the elements. While pulling both tarps may had led to ventilation problems, that does not undermine the inference that some birds likely suffered due to their exposure to the elements*.

[40] The Agency chose to focus on those loads where the death rates were such as to trigger an Agency investigation. The Agency focused on five loads in addition to the subject load, which it summarized as Appendix A of its concluding written submissions. At pages 64 and 65 of the concluding written submissions of Maple Lodge Farms, it chooses to focus on the total number of loads from the farm, amounting to 11 loads, in addition to the subject load. Three of these loads are not substantially comparable, since the loading and departures occur on the morning of September 19, rather than during September 18. The weather conditions on the first load of September 19 are noted as being clear and sunny. There are no sunny conditions noted on any load from the farm departing on September 18. At the same time, of the eight remaining loads, including the load under consideration, it cannot be said that a particular tarp configuration or lack thereof is necessarily associated with a high death rate. There is one load with very low death rates, where the load was protected by tarpaulins on both sides. What the Agency would appear to be implying is that in the load under consideration, undue exposure to the weather resulted from the birds not being protected via tarpaulin covers being on both sides, or any side, of the transport. The Agency nonetheless acknowledges that such covering might also increase the heat and moisture within the trailer.to the extent that the birds might suffer thereby, but argues that, on balance, the lack of any tarpaulin protection leads to the conclusion that the spent hens were unduly exposed to the weather.

[41] The Agency did not present to the Tribunal specific any independent evidence as to preferred tarpaulin usage in the weather conditions alleged, as related to an unspecified degree of wetness to which the spent hens were allegedly subject. The Tribunal has no basis for coming to a defensible conclusion as to the degree of wetness of the spent hens, and also whether such degree of wetness would necessitate complete tarpaulin cover, in order to avoid likely undue suffering. The Tribunal is not prepared to conclude, as the Agency appears to argue, that "surely the spent hens were wet, or very wet, and surely complete coverage with tarpaulins during the transport would have countered any likely undue suffering". This is conjecture bordering on pure speculation.

Ready Conclusions That Cannot Be Made

[42] On one interpretation of the facts, one might readily conclude as follows:

(a) The birds in question were from a weakened flock and hence more susceptible to the effects of wetness through rain.

(b) One could interpret the Maple Lodge Farms statement that the loading was delayed due to "heavy rain" as meaning that the birds were significantly wet when loaded—or wet beyond what would be justified, given their weakened state.

(c) One might further conclude that since this transport and two others with high death rates involved travel with no side protection whatsoever, given that the tarpaulin covers were not lowered during the journey, the birds must have been unduly exposed to the effects of weather during such period. Such effects would include degrees of rain plus water spraying up into the transport from the road.

(d) Such undue exposure would have been due to the cooling effects of the transport, since most of the journey involved overcast or rainy weather, and thus there was no evident sunny period, when the roads were dry, during which the effects of rain and road spray could have been effectively countered.

(e) One could point to the conclusion of the driver in that regard, where his explanation for the high death rates was due to the birds becoming too cold during the journey.

(f) One might also further conclude that matters became worse, not better, from the time that the birds arrived at Maple Lodge Farms, because fans were turned on, ostensibly to remove excess heat, but having the opposite effect of making the birds colder. In addition, the birds remained in such a state for nearly seven hours, since Maple Lodge Farms did not schedule any processing during the sanitation shift between approximately 9 p.m. and 4 a.m.

(g) One could then conclude that matters became additionally worse for the birds, when the transport was taken outside for weighing, immediately prior to being put into the slaughter line. The birds then spent an hour away from what minimal shelter Maple Lodge Farms had to offer, being put back into the cold, prior to being moved into Maple Lodge Farm facilities where they were unloaded and then slaughtered.

(h) One could view Maple Lodge Farms as having committed the violation on the basis of having assumed control, in Brampton, of a load compromised by undue exposure to the weather, and having committed the violation from that moment; *Maple Lodge Farms 2016a.*

(i) One could also view Maple Lodge Farms as having committed the violation on the basis that the effects of the weather exposure were made worse, and hence undue in their own right, during the time that the birds were actually under the control of Maple Lodge Farms in Brampton.

(j) Alternatively, based on Maple Lodge Farms having "caused" the transport from Brampton, one could hold Maple Lodge Farms responsible from the moment that the loading commenced in "heavy rain", and notwithstanding that any "shock to the system" thereby occurred in the United States.

(k) Alternatively, one could revisit the concept of control, on the facts and, if concluding that Maple Lodge Farms controlled the transport from Brampton, established that the violation occurred throughout the transport, including the loading and the "shock to the system" period in the United States.

[43] In the Tribunal's view, such ready conclusions are not supported, on the balance of probabilities, based on deficiencies in the evidence advanced by the Agency and contrary evidence advanced by Maple Lodge Farms. The Tribunal is left with the unsettling circumstances that over 300 birds in the load in question were found dead, but where it cannot be concluded, on the balance of probabilities, as to why or how they died. The ready, but unsupportable, conclusion is that "it must have been the weather", or "it must have been the weather, plus the seven plus hours that the birds remained in lairage". With respect to both such ready conclusions, counsel for Maple Lodge Farms has provided evidence to the contrary that goes beyond raising a doubt, which would be adequate to secure an acquittal in criminal proceeding, and instead establishes, on the balance of probabilities, that the cause or causes of deaths of these birds and the relationship of such deaths with weather, particularly undue exposure to the weather, remains uncertain. Given such uncertainty in relation to those birds that died, the Tribunal considers that it would be unwarranted to conclude that the birds remaining alive were subject to likely injury or undue suffering, due to undue exposure to the weather.

"Heavy Rain" and Delays in Loading; Road Spray

[44] In the Tribunal's view, the statement by Maple Lodge Farms that the "heavy rain" caused a delay in loading does not, in itself, establish how the spent hens were affected by such rain, particularly in the absence of a determination as to what "heavy rain" means in this context. The driver of the transport described the rain similarly. However, Mr. Robert, the director of live logistics at Maple Lodge Farms, testified that, to the best of his knowledge, the spent hens would have been loaded in the barn and that their exposure to rain would have been, at most, thirty seconds, as they were moved from the barn to the transport. Furthermore, while the containers for the spent hens are "not impervious" to the rain, as described by the Agency, there is no clear evidence as to how much rain would

likely have entered into one of the containers, over thirty seconds, during the course of loading.

[45] The specific circumstances of the delay in loading were not explained by Mr. Robert, who would not necessarily have known in any event; he wasn't there. It may be that the delay was due to waiting in the barn for the rain to subside. If the loading were to have occurred irrespective of the level of rain, loading delays might well have been minimal. One is not dealing with circumstances similar to *Maple Lodge Farms 2016a*, where the cause of the delay was generally agreed by the parties to be due to a mechanical failure associated with the transport. Once again, the Agency is in need (and, by implication, the Tribunal is in need) of more direct evidence from those who actually experienced the weather conditions, and how such conditions affected procedures.

[46] The Agency also contends that the spent hens at the bottom and sides of the containers were likely exposed to road spray, particularly in view of the fact that there was no tarpaulin protection at any point in the journey. This is countered by Maple Lodge Farms, which asserts that the dead spent hens were located throughout the trailer. In addition, the Agency did not address the structural revisions to the trailers, as discussed by Maple Lodge Farms, via Mr. Robert, and as illustrated in photographs.

[47] The Tribunal notes that a photograph of the specific trailer involved in this transport was not produced by Maple Lodge Farms nor demanded by the Agency. It is assumed, therefore, that a structurally revised trailer is the one that was used in this particular transport. If so, the new trailer type specifically has the wheels entirely under the floor of the trailer, which extends outwards, whereby the floor of the trailer acts as a barrier to road spray. There was no evidence as to how much or how little road spray would still affect the transported spent hens, given this change in trailer structure. There is also no evidence from the driver, who stopped twice to inspect the load, as to the state of wetness of the spent hens. These structural changes do not appear to have been accorded significant weight in the criminal trial of Maple Lodge Farms but are considered to be highly relevant in the present case. As was noted in *Maple Lodge Farms 2016a* and also in relation to the present case, the alleged violation involves incidents that occurred prior to the criminal conviction of Maple Lodge Farms.

Undue Exposure to the Weather; Undue Exposure to Rain

[48] With respect to undue suffering, the Federal Court of Appeal in *Canada (Attorney General) v. Porcherie des Cèdres Inc.,* 2005 FCA 59, has determined that "undue" suffering is not to be referenced to a baseline state of suffering of the animal at the commencement of transport. In other words, the suffering during transport does not have to be "excessive", relative to an animal's existing state of injury, for it to be undue. There is not a higher threshold before suffering becomes "undue", based on the fact that the animal is suffering at the outset. Rather, given that there would or should be concerns as to whether a

suffering animal should be transported at all, any "undue" threshold in relation to suffering should be lower, rather than higher. Thus, the Federal Court of Appeal in *Porcherie des Cèdres*) determined (per Madame Justice Desjardins, Mr. Justice Nadon and Mr. Justice Pelletier concurring), at paragraphs 26 and 27:

> *[26] ...It does not seem reasonable to me to interpret the words "undue" and "indu[e]" as meaning "excessive" and "excessif". In my opinion, a reasonable interpretation of "undue" and "indu[e]", in the context of the relevant legislation, can only lead to the conclusion that these words mean instead "undeserved", "unwarranted", "unjustified", "unmerited" or "inapproprié", "inopportun", "injustifié", "déraisonnable". This interpretation ensures that a suffering animal cannot be loaded and transported, since any such loading or transportation will cause "unjustified" and "unreasonable" suffering to the animal...*
>
> *[27] I conclude, therefore, that the transportation of an injured (and therefore suffering) animal could only cause unjustifiable or inappropriate suffering to that animal...*

[49] An issue therefore arises as to whether "undue" exposure to the weather may be similarly determined without reference to the state of the animal at the commencement of the transport. For example, should "undue" exposure be determined with reference the fragile state of the spent hens, or should the assessment be more general in nature? In the Tribunal's view, "undue" should be assessed with reference to such fragile state, by way of lowering the threshold in relation to an "undue exposure" determination, and thereby assessing whether such exposure to the weather was "unjustified", "unreasonable" (considered to be synonymous with "unmerited"), "inappropriate" or "unwarranted". What amounts to "undue" exposure to the weather will differ in circumstances of, for example, a larger, healthy cow, as opposed to a smaller, healthy bird. The nature of "undue" exposure to the weather will differ if the cow or the bird is sickly or fragile at the outset of the transport. In addition, in an absolute liability regime, it is irrelevant whether those subject to the notice of violation were aware of the nature and extent of an animal's sickliness or fragility. Such persons may argue that they would have altered the nature of the transport, had they known, but that is again irrelevant. The regulatory direction in this particular absolute liability regime appears to be that of those involved in the transport needing to be absolutely and accurately certain that an animal is suitable for transport and not likely to be exposed to injury or undue suffering due to undue exposure to the weather. If in doubt, a party concerned should cancel or at least stop the transport, pending further and extensive investigation.

[50] One conclusion from *Porcherie des Cèdres,* at paragraph 27, is that an injured animal is a suffering animal, that effectively cannot be transported without causing undue suffering to that animal. *Porcherie des Cèdres* was a case concerning the transportation of hogs, where the alleged violation was under paragraph 138(2)(*a*) of the *Health of Animals*

Regulations, previously discussed, referenced to the general suitability of an animal for being transported without undue suffering. It is currently legal to transport uninjured spent hens in rainy weather, provided exposure to such weather is not undue and, if exposure to such weather is undue, provided that injury or undue suffering of the spent hens during transport is unlikely.

[51] The Tribunal is of the impression, on the evidence, that during the course of the journey the weather conditions did not involve any major cloudburst, but rather a degree of rain and dampness that involved also periods where the weather was clear, though the skies generally overcast. In the Tribunal's view, such a situation cannot be viewed as involving "unreasonable" or "unwarranted" exposure by the spent hens to the weather, quite apart from whether such exposure makes injury or undue suffering likely. In the Tribunal's view, what would amount to undue exposure to the rain would be a situation where the rain was more torrential, either generally or at specific points in the journey, and where it could be established that the spent hens were exposed to such torrential effects. Spent hens are able to be legally transported in what may be termed "normal" rainy weather. An example of atypical conditions and conclusions derived therefrom is found in *Little Rock Farm Trucking 2* (2014 CART 30), where the driver chose to drive through a hurricane. The isolated incident of a hurricane gave rise to the view by the Tribunal that the decision of a reasonable person, nonetheless appreciative of the legality of transport during rainy weather, would have been to cancel the transport. The Tribunal viewed the circumstances, at paragraphs 106 and 107 of *Little Rock Farm Trucking 2*, as follows:

> *[106] …the best approach would have been to cancel the pick-up, however impractical this may be in the spent hen transportation business. Instead LRFT through its driver chose to pick-up in Pennsylvania, drive through the "horrible" conditions and deliver the spent hens to MLF. The chickens suffered and died en route. Dead chickens were already apparent on the load upon their arrival at the MLF facility.*
>
> *[107] Consequently, the Tribunal finds that the birds were subjected to undue exposure to weather on October 29, 2012, and as a result, the Agency has proved element 3 of the alleged violation.*

[52] In *Maple Lodge Farms 2016a,* there was general agreement between counsel that the hens had been exposed to four hours of sub-zero weather, as a result of what appeared to be a mechanical breakdown in the transport. In the present case, both counsel disagree as to the circumstances of the weather, both at the time of catching and loading, as well as during the period of transport. One must therefore determine, on the balance of probabilities, what the weather conditions were during the course of catching, loading and transport, and whether such conditions at any point amounted to undue exposure to the weather.

[53] As discussed in *Maple Lodge Farms 2016a,* it is legally permissible to transport spent hens in circumstances where such hens suffer in fact, or are likely to suffer, due to exposure to the weather. It is also legally permissible to transport such hens in circumstances where they suffer unduly, or are likely to suffer unduly, due to exposure to the weather. It is also legally permissible to transport such hens in circumstances where they are injured, or are likely to be injured, due to exposure to the weather. The violation only occurs in circumstances where the exposure to the weather is undue, and is associated with likely injury or undue suffering.

[54] There are differences of opinion between the Agency and Maple Lodge Farms as to the extent of the rain associated with the transport. Maple Lodge Farms contends that it was cloudy, with some rain, at certain points during the journey. The Agency provided evidence from nearby weather stations to demonstrate a greater degree of rain, with greater consistency throughout the journey. However, establishing the state of wetness of the birds during the transport is best addressed through direct evidence from the driver, whose evidence is not before the Tribunal. During the journey, the driver stopped twice to observe the birds, and did not report any concerns. In the absence of direct evidence from the driver, one is therefore not in a position, based on the evidence presented to that point, to come to a conclusion as to the state of the birds as of the time of arrival at Maple Lodge Farms. One might then look to see how the birds were regarded by Maple Lodge Farms receiving personnel at the time of arrival of the transport. Again, in the absence of direct evidence from personnel directly involved with the examination of the transport (Mr. Hilario's role was more an oversight one), the evidence is that of the written reports of Maple Lodge Farms receiving personnel. From the perspective of Maple Lodge Farms, these reports disclose little, if any cause for concern.

[55] The Agency provided extensive evidence of the weather conditions, based on reports from nearby weather stations, during the course of the journey. These portray a transport that is largely in rainy and cloudy weather, and where the temperature drops during the journey. Maple Lodge Farms relies instead on the report of the driver, which portrays lesser periods of rain and weather that is clear, rather than cloudy, at points. At issue is whether reports from "nearby" weather stations are adequate to establish the weather conditions experienced by this particular driver, on this particular route, at a particular time during the journey. One weather report relied on by the Agency is that of Rochester, where a thunderstorm was reported during that particular time of the journey. Maple Lodge Farms contends that Rochester has not been established to be sufficiently proximate to the route taken to enable one to reasonably infer that the thunderstorm in Rochester also affected the area of the route. Maple Lodge Farms points out that the driver would, illogically, have to go off route, driving into the thunderstorm, in order to experience it as represented by the Agency. The Tribunal is persuaded by the arguments of Maple Lodge Farms in that regard. From the Tribunal's perspective the route may have been more consistently overcast, but there does not appear to be a degree of rain, subsequent to commencement of the journey, that would be such as to create any identifiable shock to the system of the birds being transported. What the Agency needs

here is more direct evidence of the nature and extent of the thunderstorm and, in particular, that the conditions recorded in Rochester were also, on the balance of probabilities, the conditions experienced by the driver at this particular stage of the journey. The Agency needs to have more direct evidence to counter the report of the driver. Alternatively, the Agency needs to be in a position to discredit the driver's evidence, through cross-examination of what would then be sworn testimony, as opposed to an unsworn report.

[56] This same driver, as well as those involved in the loading, could have provided more persuasive evidence as to the nature and extent of the "heavy rain" at the time of loading the transport and the behaviours of others associated with the loading. For example, when Maple Lodge Farms asserts that the loading was delayed due to such rain, does this mean that the spent hens were loaded more slowly, based on the loaders wishing to wait for a break in the rain? Were the spent hens in fact loaded in the barn or loaded outside the barn, and thus more readily exposed to the rain? The only evidence in this regard comes from Mr. Robert of Maple Lodge Farms. Mr. Robert has prior direct experience with the transportation of spent hens, due to his previous employment with Little Rock Farm Trucking. He was not on site at the time that this particular transport was loaded. Mr. Robert stated that he believed that the spent hens would likely have been loaded in the barn, away from the rain, and once in the dolly containers, would be exposed to rain for no more than thirty seconds. This evidence is uncontroverted, and is the only evidence before the Tribunal s to the circumstances of the loading.

[57] In relation to the meaning of "undue", the Tribunal has been guided by *Porcherie des Cèdres* on multiple occasions: *Roelands v. Canada (Canadian Food Inspection Agency),* 2013 CART 8; *E. Grof Livestock v. Canada (Canadian Food Inspection Agency),* 2014 CART 11' *A.S. L'Heureux,Inc. v. Canada (Canadian Food Inspection Agency*), 2014 CART 17 and *Western Commercial Carriers Ltd. v. Canada (Canadian Food Inspection Agency),* 2014 CART 33. In *E. Grof Livestock.* at paragraph 82, the Tribunal expressed a degree of concern with respect to definitional imprecisions relating to "undeserved", "unwarranted", "unjustified" and "unmerited", stating that "such categorizations would appear to involve difficulties in application, being associated with varying degrees of subjective review". For example, implicit in the *Porcherie des Cèdres* definitions is that an animal can be transported and be exposed to suffering that is "deserved", "warranted", "justified" or "merited" and therefore, in any such case, not undue. How an animal could ever "deserve", "warrant" or "merit" suffering is very difficult to envisage. It is therefore to be hoped that the Federal Court of Appeal will provide clarification. The most readily operational definitional term would appear to be "unjustified" suffering, versus when such suffering can be justified. In the present cases, applying the same definition to "undue exposure to the weather", the issue would appear to be most readily evaluated from the perspective of "unjustified" versus "justified" exposure to the weather. Justified exposure to the weather would most readily be referenced to the ordinary circumstances in which it is legally permitted to transport, in this case, spent hens. This interpretation is considered to

be consistent with the views of the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54, at paragraph 10:

> *It has been long established as a matter of statutory interpretation that "the words of an Act are to 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": see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.*

[58] In the context of providing direction to the Tribunal on matters of statutory interpretation, the Federal Court of Appeal in *Attorney General v. Stanford* 2014 FCA 234, at paragraph 42, reminded the Tribunal of the Supreme Court of Canada's views. Mindful of the directions to the Tribunal by the Federal Court of Appeal in *Stanford* with respect to statutory interpretation, the Tribunal views the general legislative intent in subsection 143(1)(*d*) of the *Health of Animals Regulations* to be that of a general caution to those involved in animal transport. In addition, the provision is not limited to the commencement of transport but, as discussed in numerous decisions, relates to the entire period of transport, including waiting times prior to the animals entering a slaughterhouse. At any point, if there is undue exposure to the weather which may reasonably be associated with likely injury or undue suffering, a violation has occurred. A party to the transport could, and arguably should, stop the transport at that point, and can then argue that there was no transport of the animals, going forward. The general legislative caution to those associated with the transport would appear to be "don't commence or continue the transport if the weather conditions are out of the ordinary or extreme, and injury or undue suffering is likely to occur as a consequence". One could rephrase the legislative caution as "don't risk transporting animals in extreme weather".

[59] When speaking of "justified" exposure to the weather, it would seem that such justification could clearly occur with respect to birds originally wet who are then exposed to sunny and warmer weather during the balance of the transport, enabling them to dry off and regain heat during the transport. What is less clear concerns weather conditions that are rainy and overcast through much, if not most of the transport, in circumstances where the temperatures drop some 12 degrees Celsius during the transport. At what point have the spent hens been "unduly" exposed to the weather, and how does such undue exposure relate to the likelihood of undue suffering of the spent hens? This "justified" exposure to

weather is through the lens of a person appreciative of the fact that transport of spent hens in rainy weather is currently legal. It is not, however, a justification that is referenced primarily to an industry lens or industry norms. It is the perspective of the "reasonable person" generally, rather than that of the "reasonably experienced transporter of spent hens". The latter's range of justification is likely to be wider, emanating from bias of industry association. In this regard, the Agency contends that, in relation to animal transport, there is no balance to be struck between regular commercial activities and the protection of animals, contrary to the sentiments expressed by the Tribunal Chair in *Little Rock Farm Trucking 1,* 2014 CART 29, at paragraph 113.

> *[113] 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, that 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. Thus, the intention of Parliament to use both the phrase "undue suffering" and "undue exposure to the weather" in defining a violation must to be read with the context of this balancing in mind, given the scheme and object of the HA Act and HA Regulations.*

This Tribunal member agrees with the Tribunal Chair on this point, and hence the Agency's position is not adopted.

[60] As previously noted, matters should be assessed through the lens of the "reasonable person" who is appreciative of the legality of transporting spent hens in rainy weather. "Justification" is viewed from that perspective. Maple Lodge Farms has been able to counter apparently logical implications, at first instance, that an untarped transport travelling in rainy weather results in undue exposure to the weather. Notwithstanding that three such untarped transports had high death rates, Maple Lodge Farms has established that other transports, tarped based on driver assessment of how to best address weather conditions, also had high death rates. In addition, Maple Lodge Farms has addressed the expectations of a "reasonable person" that a lack of tarping could be justified if the weather conditions would dry the birds during transport. There is evidence that this is in fact what occurred. Both the driver's report and the evidence from Dr. Appelt support the view that during the journey, weather conditions were such that the birds could have dried from any earlier exposure to rain. When the birds arrived at Maple Lodge Farms, they were noted by Maple Lodge Farms personnel as being dry. Agency inspector Freiburger, in what amounted to a partial examination of the transport during the unloading of the birds, viewed at least some of them as being damp, rather than soaked, where the cause of such dampness was not particularized. Maple Lodge Farms suggests that such dampness could have been caused by fecal matter or other excretions dropped on certain birds.

Subsequent to Arrival at Maple Lodge Farms

[61] While the Agency has established that there was rain during much of the journey, it has not been able to establish, on the balance of probabilities, that the birds arrived at Maple Lodge Farms in a state referenced to undue exposure to the weather. It is by no means clear that the exposure to the weather was undue, and the fact that over 300 birds were found dead, throughout the transport, does not definitively establish that such deaths were due to undue exposure to the weather, as opposed to weather exposure generally, or a mix of causes. Given the lack of weight that the Tribunal places on Dr. Sandhu's *post-mortem* examinations, for the Tribunal to infer that the death rates must, of necessity, be associated with undue suffering due to undue exposure to the weather involves the very level of conjecture or speculation that the Federal Court of Appeal in *Doyon* warned the Tribunal against. The fact remains that over 300 birds in this transport died, where the cause of death of any bird has not, on the balance of probabilities, been clearly established, let alone where such cause is able to be generalized across the population.

[62] Maple Lodge Farms has provided details of the transport and lairage times for the load in question and other loads arriving at Maple Lodge Farms at or around the same time, as well as at other times, on the same days. The principal distinguishing element in the current load is the length of time that it remained in lairage: over seven hours. The transport arrived at the earlier part of the sanitation shift and so could not have been processed, irrespective of the state of the birds, until the following morning. All that monitoring the load would have accomplished was the prioritize the load for morning slaughter, but would have done nothing to alleviate any suffering of the birds during this waiting time caused by the sanitation shift. What such monitoring could have established is that something should have been done to alleviate suffering, but was not done, due to the sanitation shift.

[63] Given this distinguishing element of a lengthy time in lairage, one must then determine whether, during the period when the transport was under the control of Maple Lodge Farms, its extended delayed state in lairage may be associated with a state of undue exposure to the weather. The violation can be based on either acts of commission or acts of omission. In the concluding submissions, Mr. Folkes, on behalf of Maple Lodge Farms, has summarized the transport time, waiting time and death rates associated with contemporaneous transports of spent hens. One could see a pattern of lower holding times associated with lower death rates, in circumstances of transport of similar duration over similar weather conditions, one might reasonably conclude that the holding period associated with the load in question was the primary factor in the extent of deaths. The Tribunal would then need to assess whether the length of the holding period could be viewed as undue exposure to the weather or some other classified cause. On the other hand, Maple Lodge Farms has provided evidence of other loads, involving transport of similar duration over similar weather conditions, but involving shorter holding times and yet higher death rates than the load in question. While the Agency had a right to reply to the closing submissions, it chose not to do so.

[64] The Tribunal also does not have evidence with respect to the general characteristics of the particular flock that was transported. What has been presented on behalf of the Agency is evidence as to the general fragility of spent hens, which has been disputed by Maple Lodge Farms. The comparatively lower death rates associated with certain of the contemporaneous transports would appear to provide evidence contradicting the Agency's contention as to a general state of fragility, or that there is something profoundly different about the way the spent hens in the "low death rate" loads were transported or treated in lairage. The Tribunal is in need of stronger evidence to demonstrate how this particular load, under the circumstances, would have been affected by the rainy weather during transport and the extensive period of lairage.

[65] Furthermore, any tentative conclusion as to the state of wetness of the birds as of the time of arrival at Maple Lodge Farms or during lairage is confounded by the sampling method later used in the *post-mortem* examinations. Maple Lodge Farms argues against the views of Dr. Sandhu that the cause of death of the birds could have been due to exposure to rain. Quite apart from the reservations that the Tribunal has expressed in relation to the "template like" formatting of Dr. Sandhu's reports, Maple Lodge Farms suggests that the sample of birds was likely taken from the container of dead birds that could have been wetted from sanitation procedures—specifically, the washing of the chute down which such dead birds were excluded from processing. Mr. Freiburger suggests that the sample came from dead birds placed by Maple Lodge Farms personnel in a plastic bag, at some earlier stage, though Maple Lodge Farms has highlighted inconsistencies in this testimony (MLF Concluding Submissions, paragraph 147) While it seems illogical to select a sample of birds wet from sanitation procedures, when the objective is to assess how exposure to rain might have contributed to their deaths, the fact remains that there is no clear evidence as to where the birds for examination came from. Furthermore, Maple Lodge Farms asserts that the selection of birds from "the DOA bin" is its usual procedure in these circumstances (Maple Lodge Farms Concluding Submissions, paragraph 147). Why the sample of birds is not taken directly by Agency personnel is not clear, quite apart from an absence of evidence that a sample of ten is statistically defensible in order to make assertions about the conditions of the birds in the entire transport.

[66] Conclusions as to the state of the birds are further confounded by the fact that a selection of the birds-specifically, ten, as selected by Maple Lodge Farms personnel-was subject to an *ante-mortem* examination which concluded that, among the live birds examined, there were no concerns. Potential bias in the sample selection, in appearance or in fact, was not addressed before the Tribunal. The Agency points out that such examination was for the purpose of ascertaining the presence of disease in the flock, and where an apparently random selection a selection of 10 birds by Maple Lodge Farms personnel is asserted to be adequate to come to a statistically defensible conclusion as to the state of the flock. When one conducts *post-mortem* examinations using the same number of birds, but involving conclusions presumably referenced to a smaller population (the dead birds, rather than those remaining alive), the conclusions derived might appear to have greater statistical validity. However, no arguments were made in this regard.

[67] The Tribunal is therefore left in a position where it cannot conclude that the longer holding time associated with the load in question may be viewed as involving undue exposure to the weather.

The Additional Hour Outside During Weighing

[68] Maple Lodge Farms acknowledges that the transport was removed from lairage and remained completely outside, completely unsheltered, for approximately one hour, during weighing and prior to being moved into the plant for slaughter. One might be inclined to deduce that it was this further hour of exposure to the elements, and to a much lower temperature, acknowledged to be approximately 7 degrees Celsius, that triggered the significant death rate. Maple Lodge Farms has countered any such deduction with reference to the opinion of the Agency's witness, Dr. Appelt, that there would not likely be a significant decline in temperature within the crates, during this additional hour outside, from the temperatures estimated while the transport was in lairage. In addition, the temperatures were estimated by Agency inspector Freiburger when the transport was moved indoors and unloaded for processing. Maple Lodge Farms contends that Mr. Frieburger's temperature reading could not have occurred within moments of entry, but rather represented approximate temperatures of the transport areas during the outside hour. The Tribunal agrees with this contention.

Repetition of Conclusion

[69] The Tribunal therefore repeats its conclusion, initially disclosed in paragraph 7 herein, that it has not been established, on the balance of probabilities, that the spent hens were unduly exposed to the weather, at any point during the transport, including the time when the transport was under the direct control of Maple Lodge Farms. In the Tribunal's view, there does not appear to be a consistent pattern that would lead to a conclusion that the exposure to the weather was undue. If it were undue, one would expect to find greater consistency of outcomes. For example, one should anticipate generally similar disastrous results for spent hens being transported through a hurricane (*Little Rock Farm Trucking 2*), or spent hens being left outside, stationery and unsheltered, for four hours in sub-zero weather (*Maple Lodge Farms 2016a*).

General Concerns Going Forward

[70] Having concluded that undue exposure to the weather has not been established, on the balance of probabilities, the Tribunal therefore does not need to analyze in detail how such weather exposure affected the spent hens during transport, from the perspective of likely injury or undue suffering. This is so notwithstanding that the Tribunal has addressed

a number of such aspects in an ancillary fashion, the Tribunal also does not need to address whether, if injury or undue suffering in fact is established, it must always be viewed as likely. These and a number of other issues, remain to be addressed in future deliberations.

[71] There are other issues that remain of concern, going forward. One relates to the ability of Maple Lodge Farms to more accurately measure the temperatures within the trailer and the dolly drawers. Another relates to the sanitation shift and distressed loads during such shifts. While a discussion of such matters may appear to be superfluous editorializing, given the Tribunal's conclusion herein, this Tribunal member considers that there are a number of points that merit being placed on the public record at this time.

(a) Temperature Measurement

[72] With respect to the measurement of temperatures within the load, much debate surrounded the accuracy of using infrared readings of external crates (or between the crates), from which to extrapolate internal crate temperatures. In this regard, "crates" may more appropriately be described as "drawers", relative to the revised trailer design by Maple Lodge Farms. There appears to be general agreement that these measurements are approximations, with also agreement that, in general, the internal crate temperatures will be warmer than external crate temperatures. However, as Dr. Appelt testified, a more accurate and reliable measure would be to rely on thermometer readings in the transport generally or, potentially, within each crate or drawer. In *Maple Lodge Farms 2016a,* reference is made to the availability of such thermometers. Among the cases cited before the Tribunal in the present case and in *Maple Lodge Farms (2016a)* were the 2014 *Little Rock Farm Trucking* decisions. In reviewing these decisions, the Tribunal noted earlier the following summary of sworn testimony from Mr. Reuber, the owner of *Little Rock Farm Trucking 2*, at paragraph 53 of 2014 CART 30:

> *[53] Reuber added, however, that one cannot assume that the outside ambient temperatures are the same as they are inside the trailer because of the tarps. Even when the truck is moving, it will become warmer inside the trailer than the outside ambient temperature, because the trailers that LRFT owned and used (prior to using MLF trailers) had interior trailer thermometers that showed this to be the case…*

[73] This evidence establishes that the use of thermometers in trailers is an older technology. Despite this, when Maple Lodge Farms designed its "improved" trailers, internal trailer thermometers appear to not have contemplated as part of the design. To the extent that Maple Lodge Farms insists that its trailers be used by transporters, there is thus less precise information available as to internal crate temperatures than would be the case if thermometers were present. How a trailer design by the major processor of spent hens in Canada could exclude such thermometers as part of a revamped trailer design is a matter of some contemplation. One could view such omission as resulting in the measurement of

internal trailer and internal crate temperatures becoming more confounding. In the present case, no person directly involved in transporting the load in question was sought by the Agency to be compelled to testify. As a result, this is an apparent design oversight that was not specifically addressed in the present case, beyond Dr. Appel's assertion that such internal thermometers were technically feasible.

(b) Institutional Wilful Blindness and Intentional Harm

[74] With respect to loads in lairage during the sanitation shift, Maple Lodge Farms regularly monitors such loads for stress, including visual observation and the taking of laser-referenced temperatures which are used to extrapolate to approximate internal crate temperatures. Quite apart from questions as to the accuracy of such temperature measurements, if there were to be load stressed to the extent that it was later determined to involve undue suffering to the birds due to undue exposure to the weather or another prohibited cause, there is nothing Maple Lodge Farms could do to alleviate such undue suffering. If such undue suffering developed during the lairage period, all Maple Lodge Farms could do, if it appreciated the circumstances of the load, would be to accelerate the slaughter in the early morning, once the sanitation shift had ended. Since Maple Lodge Farms has not incorporated twenty-four processing flexibilities, there are periods when birds may be suffering unduly and nothing will be done to alleviate such suffering, beyond the effects of the ambient temperatures and the shelter afforded by a roofed but unheated holding area.

[75] The Agency addressed the apparent redundancy of load examinations in circumstances where nothing could be done if a load were determined to be stressed, which would occur if a load arrived during the sanitation shift, as occurred here. As the Agency notes in paragraph 116 of its concluding submissions:

> *116. …given that trailer D76 arrived at the start of the sanitation cycle in the slaughter facility, Maple Lodge could not accelerate the processing of the load. The fact that Maple Lodge accepts loads of animals into their unheated barns during hours when they cannot be slaughtered, even if they are suffering unduly as a result of inclement weather conditions, discloses a careless disregard for the care of birds during the transportation process.*

[76] Were the Tribunal to have found that the load in question was associated with likely undue suffering due to undue exposure to the weather, the Tribunal has viewed such "do nothing" circumstances as amounting to intentional harm: In *Finley Transport,* the Tribunal expressed such sentiments, at paragraphs 93 and 99, as follows:

> *[93] With respect to assessing whether the violation was committed through a negligent or an intentional act, the Tribunal notes that virtually all assessments of this category that have been reviewed by the Tribunal have been with*

reference to negligence. Short of a violator admitting to having intentionally committed the violation (such as occurred in Meyers Fruit Farms v. Canada (CFIA), RTA-60327 [2008]) no case has yet come before the Tribunal where the negligence was of such a degree as to amount to being equivalent to intent. In the Tribunal's view, there can be negligence involving such extreme indifference to a clearly foreseeable outcome that the outcome may be regarded as having been intended. This concept is already recognized in the well-established definition of fraudulent misrepresentation in civil matters, where the statement in question must be false and made either knowingly, or recklessly, careless of whether it be true or false: Derry v. Peek, (1889) 14 App. Cas. 337 (H.L); Skuratow v. Commonwealth Insurance Co., 2005 BCCA 515. In the latter case, a "wilfully false statement" was held (at paragraph 16), to include a statement made recklessly, careless as to whether it be true or false. Similarly, in taxation matters, phrasing is used such as "knowingly, or in circumstances amounting to gross negligence", implying that gross negligence can be of such a degree as to be equivalent, in substance, to intent: see section 163(2) of the Income Tax Act (R.S.C. 1985, c. 1 [5th Supp.], as amended) and Panini v. Canada, 2006 FCA 224. In the Tribunal's view, a similar direction may be considered in assessing intent under the Regulations and related gravity value calculations.

…

[99] On the evidence, the transporter did nothing to alleviate the hogs' distressed circumstances, having arrived early at the slaughterhouse, despite the animals literally suffering before his eyes. They were simply left, unaided for up to half an hour, on the evidence, until unloaded and slaughtered. While there were no fans in the loading alley at the time, there was also no attempt to cool down the hogs through watering them, or seeking to determine whether water was obtainable. High degrees of distress on the part of the hogs, including death from heat exhaustion, are significantly foreseeable. The level of gross negligence of the transporter during the period when the animals are suffering, to a significant and aggravating extent, in a stationary transport, approaches the equivalent to intentional harm…

[77] On the evidence, the only time that Maple Lodge Farms will not accept a load is on Fridays, because it does not process over the weekend. It does not insist that no loads arrive during the sanitation shift. This is a business decision that may have justification in terms of human health considerations, but clearly does not prioritize animal welfare considerations.

[78] In addition, it was never clearly explained why only the bottom and lower side drawers of a trailer were examined by Maple Lodge Farms personnel from the perspective of assessing whether a load was stressed. Neither the Agency nor Maple Lodge Farms

addressed whether there was any physical impossibility of examining the load from higher or broader perspectives, prior to unloading. No Maple Lodge employee directly involved in examining the load was ever compelled by the Agency to testify. It remains a choice of Maple Lodge Farms as to which witnesses it wishes to present, while it is the choice of the Agency as to which witnesses it wishes to compel to testify.

[79] With respect to reports as to the locations of dead birds, the Tribunal was faced with Maple Lodge Farms asserting that the diagrammatic representations of such locations were unreliable. In effect, Maple Lodge Farms employees were asserted to be drawing circles on a diagram to satisfy the requirements of Agency veterinarians on site. Maple Lodge Farms asserted that the more credible information was in written descriptions of the locations of dead birds. The integrity of the practice was not able to be defended by the Agency, in the absence of direct evidence of those who prepared these reports. As has been noted, Maple Lodge Farms did not voluntarily present any witness whose testimony would significantly advance the Agency's case, nor was it in any way obliged to do so.

[80] The Tribunal is concerned that the processes adopted by Maple Lodge Farms, both in isolation and together, are measures that are not intended to provide Maple Lodge Farms with the best evidence as to the state of the spent hens, from the perspective of taking actions to alleviation of harm. There was informal commentary by Mr. Folkes as to the occasional cancellation of a transport, but neither the Agency nor Maple Lodge Farms provided evidence as to the frequency of such cancellations, based on animal welfare considerations. It remains uncertain as to when animal welfare considerations dominate transport efficiency considerations. In addition, with respect to spent hens, such animal welfare considerations appear to predominantly take the form of accelerating the slaughter. Suffering, undue or otherwise, is relieved through death. In terms of the company-wide sanitation shift at Maple Lodge Farms, even the acceleration of slaughter is not possible in circumstances of immediate and profound suffering of the spent hens.

(c) Addressing Outcomes Through Legislation and Regulation

[81] While the current decision may appear to involve an indifference towards the health and well-being of the spent hens, it remains important to balance what is legal against what is prohibited, irrespective of one's views as to the nature of the activity that is legal. Advocates of animal welfare may sometimes not appreciate these distinctions. Wet spent hens can be legally transported, over long distances, to end up waiting for seven hours or so at Maple Lodge Farms, before being killed. In the current case, the total crate time exceeded twenty hours, if one includes loading times prior to departure, in circumstances where there is a recognition within the industry that transports over four hours in duration involve significantly greater stresses to the birds.

[82] Notwithstanding the evidence of Dr. Ouckama to the contrary, the prevailing veterinary opinion is that spent hens are compromised animals, with various weaknesses,

including brittle bones, due to calcium deficiencies. The dominant laying environment for spent hens is a cage environment, where they spend their entire lives—in this case, 93 weeks or life, or less than two years. They are then legally permitted to be transported over long distances in all sorts of weather conditions, prior to being slaughtered. It would appear that there is an argument that spent hens cannot be transported over significant distances without undue suffering, in any weather circumstances or otherwise. Yet they are. There would appear to be potentially repetitive violations under section 138(2)(*a*) of the *Health of Animals Regulations*, dealing with general unsuitability for transport, yet chicken transportation cases do not regularly involve this section. The judicial prohibition against the transportation of injured animals, developed over a decade ago by the Federal Court of Appeal in *Porcherie des Cèdres* does not appear to be regarded as applicable to the compromised state of spent hens.

[83] The legislature has seen fit to specify that, in certain circumstances, an animal cannot be transported without undue suffering, to thus legislatively eliminate any doubt. Those circumstances relate to a non-ambulatory animal, where the term is defined and the prohibition made explicit *Health of Animals Regulations,* section 2 and subsection 138(2.1). These sections were subject to discussion by the Tribunal in *L. Bilodeau et Fils Ltée* and *Patrice Guillemette v. Canada* (CFIA) 2015 CART 22, where (at paragraph 28) the Tribunal determined, among other matters, that the non-ambulatory state must be other than temporary: The Agency has applied to the Federal Court of Appeal for judicial review of this decision of the Tribunal. The matter has not yet been heard by the Federal Court of Appeal, as of the time of writing the decision herein.

[84] Legislative concerns could be made explicit with respect to spent hens generally, or by way of legislatively deeming undue suffering to occur and be prohibited if the transport exceeds a particular duration, such as four hours. This would compel industry participants to slaughter the spent hens at an earlier stage, at facilities less remote from the farm, after which the slaughtered chickens could be transported for processing—such as in refrigerated trucks. Such legislatively-mandated shorter transportation times could also eliminate the need to essentially starve the spent hens, prior to slaughter, whereby they are taken off feed four or five hours prior to being transported, in the interest of avoiding contamination from fecal matter. Could not the hens simply be washed, immediately prior to or following slaughter?

[85] A legislature could similarly restrict lairage times, as well as generally prohibit the transport of spent hens below certain temperatures. A legislature could also mandate that there be internal temperature measurement equipment on all transport trailers. A legislature could mandate driver inspections of the transport at regular intervals, with such reports being forwarded to the Agency plus to others involved in the transport. A legislature could mandate independent inspections by Agency personnel or its designates, both during the transport, at the commencement of the transport and at the moment when the transport arrives. Similar procedures could be mandated for the transport of other animal types.

[86] In short, one cannot fault Maple Lodge Farms for conducting itself generally in manners that are currently legally permitted. It is for the legislature, not the Tribunal, to more precisely constrain Maple Lodge Farms and other industry participants, in the interest of animal welfare. What the Tribunal can do is to carefully evaluate the evidence and determine whether the Agency has established its case, on the balance of probabilities. The Tribunal is subject to significant cautions directed to it by the Federal Court of Appeal in *Doyon* that findings of fact must be supported in an unequivocal manner, notwithstanding that the burden of proof emanating from such facts is that of balance of probabilities. For example, the Tribunal is not to make conjectures or suppositions concerning the state of the weather, or the extent of wetness to which the spent hens may have been exposed.

[87] A determination, as here, that the Agency has not proven its case, should not be taken as an endorsement by the Tribunal of the transportation practices adopted. In some respects, from the perspective of animal welfare, it defies logic that spent hens can be transported at all, let alone over long distances, all year round, day and night, but the legal reality is that this is currently permitted. While there is evidence that this practice is not adopted in western Canada (*Little Rock Farm Trucking 3* [2014 CART 31], at paragraph 30), where the spent hens are described as being "simply disposed of", the reason for the lack of transportation in western Canada of spent hens for slaughter and processing has not been made clear. There is also no evidence as to how the spent hens in western Canada are "simply disposed of".

(d) Absolute Liability and Strict Liability

[88] One background issue that regularly arises in cases of this nature, involving the commercial transport of animals, is whether an absolute liability regime is a regulatory regime that is both effective and fair to both parties. The essence of responsible, humane transport of animals is the exercise of due care. Despite such due care, animals will still die in transport and some will suffer unduly, irrespective of whether death occurs. Due to the significant cautions of the Federal Court of Appeal in *Doyon*, which were accompanied by sentiments involving reservations concerning absolute liability regimes generally, the Tribunal is particularly mindful of its obligations in relation to evidence. At the same time, industry participants are in the unenviable position of being held to have "committed" a violation, despite exercising best efforts to the contrary, or to have "committed" such violation despite an absence of volition. The acceptance of a "compromised load", without knowledge of the state of the load, is one example: *Maple Lodge Farms 2016a.* The exercise of due care remains irrelevant to whether a violation has been committed.

[89] It is well established that regulatory compliance is best achieved when the regulated views the regulations as being reasonable and fair constraints on behaviors, and where due diligence is valued and of primary concern. In the view of this Tribunal member, perhaps

greater regulatory effectiveness and fairness to all parties in relation to animal transport would be achieved through violations in this area being strict liability offences, rather than absolute liability violations.

Order

[90] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order determines that the Applicant did not commit the violation as set out in Notice of Violation 1213ON037201, dated June 19, 2013, based on undue exposure to the weather, an essential element of the violation, not having been established, on the balance of probabilities

Dated at Ottawa, Ontario, on this 31st day of May, 2016

_____

Bruce La Rochelle,
Part-Time Member

ANNEX 1

Date: 20150119
Dockets: CART/CRAC-1728 and 1729

BETWEEN:

Maple Lodge Farms Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

BEFORE: **Member Bruce La Rochelle**

WITH: **Ronald E. Folkes, counsel for the Applicant and Jacqueline Wilson, counsel for the Agency**

In the matter of the form of closing arguments in relation to files CART/CRAC-1728 and CART/CRAC-1729.

ORDER

Counsel for the Applicant and Counsel for the Respondent shall submit their closing arguments in relation to CART/CRAC-1728 and CART/CRAC-1729 by written submissions only. Such written submissions must be received by the Tribunal by 5:00 p.m. within ten juridical days from the completion of the submission of evidence in both CART/CRAC-1728 and CART/CRAC-1729.

REASONS

[1] At the time of this writing, there have been six hearing days in relation to two requests for review submitted by the Applicant, Maple Lodge Farms Ltd. ("Maple Lodge Farms"). The first set of hearing days was October 15-17, 2014, followed by second set of hearing days during January 7-9, 2015 inclusive. The number of hearing days remaining to complete the submission of evidence is estimated by both counsel to be at least four days, though counsel vary in their estimates as to the maximum number of days required. The evidence in both files is highly complex and detailed, involving extensive review by counsel on examination-in-chief and in cross-examination of witnesses. In addition, there is substantial veterinary evidence, either presented to date or to be presented, also involving or anticipated to involve extensive review by counsel on examination-in-chief and in cross-examination.

[2] At the conclusion of the second set of hearing dates, counsel were canvassed by the Tribunal as to the views of counsel with respect to closing arguments being submitted in writing. Mr. Folkes, on behalf of Maple Lodge Farms, advised the Tribunal that he was not opposed to making written closing arguments but that he wished to preserve a right to make subsequent oral arguments in reply. Mr. Folkes cited this practice as being consistent with a recent, unspecified court case with which he had been involved. The Tribunal notes that such an approach would in any event be consistent with the practice adopted by Madame Justice Kastner in *R. v. Maple Lodge Farms*, 2013 ONCJ 535, where Mr. Folkes was also counsel for Maple Lodge Farms. In that case, extensive written submissions were made by the Crown and by Mr. Folkes, followed by oral submissions shortly thereafter. It is unclear whether the procedure adopted was on consent of counsel or as ordered by Madame Justice Kastner, independent of such consent.

[3] During the course of discussion at the hearing, Ms. Wilson, counsel for the Respondent. the Canadian Food Inspection Agency ("the Agency") expressed her reservations in relation to closing arguments being both written and oral. Her view was that such arguments should be exclusively written or oral. In a later written communication to the Tribunal, copied to Mr. Folkes, Ms. Wilson expressed her preference for the closing arguments to be exclusively oral, based on her views that such form of submission would be more efficient.

[4] The Tribunal must balance various interests, with the primary consideration being a balancing of fairness and efficiency considerations, as provided in section 3 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (S.C. 1995, c. 40):

> ***3.*** *The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.*

[5] In the Tribunal's view, procedural and substantive fairness to both parties must be the primary consideration in its deliberations, notwithstanding potential conflicts with efficiency. Efficiencies can take the form of considerations of cost or celerity in the resolution of a matter. In many cases, given the limited defences available in an absolute liability regime, matters can be resolved quickly and in a cost-effective manner. This has been the Tribunal's experience with a large number of cases involving the Canada Border Services Agency and violations in relation to the importation of food. As mentioned by the Tribunal during the hearing, the same efficiency considerations are not as readily experienced by the Tribunal in cases involving violations initiated by the Canadian Food Inspection Agency. These cases are often far more complex, from an evidentiary perspective and at times from the perspective of procedural issues. The applicants are frequently parties whose business reputations are potentially seriously impacted by the violation, and whose defences are accordingly far more vigorously pursued. Thus, the Tribunal must be particularly concerned that the parties consider that the matter has been addressed by the Tribunal in a procedurally and substantively fair manner, even though such matter may involve longer hearing periods, with associated elevated costs, as well as longer time periods generally to resolve the matter by way of rendering a decision.

[6] The preeminent nature of fairness in the Tribunal's proceedings is recognized in the Tribunal's own rules. Rule 3 of the *Rules of the Review Tribunal (Agriculture and Agri-Foo*d) (SOR/99-451; "Tribunal Rules") provides as follows:

> ***3.*** *If the application of any rule would cause unfairness to a party, the Tribunal may avoid compliance with the rule.*

There is no rule that permits the Tribunal to avoid compliance based on efficiency considerations. Subject to judicial review as to the resolution of any perceived conflict between Rule 3 of the Tribunal Rules and section 3 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, the Tribunal is of the opinion that efficiency considerations become relevant only when they do not conflict with the Tribunal's views as to procedural and substantive fairness to the parties. In addition, subject to judicial review to the contrary, it is the Tribunal's view that the Tribunal's conclusions as to fairness govern matters here, irrespective of sentiments of a party or parties to the contrary. The assessment and conclusion by the Tribunal of what is fair to the parties will be a function of the nature and complexity of the matter before the Tribunal. In many cases, the parties' views as to fairness in relation to an approach to a particular matter, particularly if agreed to by both sides, will be readily adopted by the Tribunal, though it is not bound to do so.

[7] *R. v. Maple Lodge Farms*, previously cited, was a trial involving two representative criminal charges under the *Health of Animals Act*, relating to events occurring in 2008 and 2009. The trial involved fifteen hearing days between September, 2011 and June, 2013, in addition to a day of oral submissions on January of 2013, which itself was preceded by extensive written submissions by the parties in December, 2012 and January, 2013: The Crown's written submission was nearly 40 pages, while the written submission by the

defence exceeded 100 pages. The judgement contains no procedural review, and so the reason for the hearing date in June, 2013, following closing submissions, is unexplained. The judgement of 484 paragraphs and nearly 100 pages was rendered in September, 2013, convicting Maple Lodge Farms on both counts. Following conviction, there were two days of sentencing representations in March of 2014, and a sentence rendered. Reasons for sentence were issued in April, 2014, as reported in *R. v. Maple Lodge Farms*, 2014 ONCJ 212. Thus, the time from commencement of proceedings to the release of the reasons for sentence amounted to over two and a half years. These are summary observations of the facts, without any negative imputation intended.

[8] The current proceedings involve administrative monetary penalties relating to absolute liability violations under the *Health of Animals Regulations,* where the burden of proof of the violation elements is the balance of probabilities, rather than beyond reasonable doubt. In addition, being an absolute liability regime, the defences available to Maple Lodge Farms, beyond challenging the Agency's evidence as not satisfying the burden of proof, are very restricted. It is therefore understandable that Maple Lodge Farms will be spending significant time in challenging the Agency's evidence and in introducing evidence in support of the countervailing versions of the facts. To date, six hearing days have been held. If, as is anticipated, another four hearing days are required to complete the introduction and examination of the evidence, these hearings will be approaching 70% of the time expended in evidentiary introduction and review in the criminal proceedings referenced.

[9] In matters before the Tribunal, an applicant has, by regulation, a right to an oral review, or hearing, upon request. The other form of review is by written submissions only. Implicitly, the review is by written submissions only, unless the applicant requests otherwise. Subsection 15(1) *of the Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187) provides as follows:

> ***15.*** *(1) A review by the Tribunal shall be conducted orally where the person named in the notice of violation requests that the review be oral.*

[10] In the context of the Tribunal's review mandate, the term "hearing" exclusively refers to an oral review. The other form of review is by written submissions only. This restricted view of the nature of a "hearing", in the context of the Tribunal's review mandate, is supported by Rule 34 of the Tribunal Rules, which provides as follows:

> ***34.*** *An applicant who requests a review by the Tribunal must indicate the reasons for the request, the language of preference and, if the notice of violation sets out a penalty, whether or not* (sic) *a hearing is requested.*

Pursuant to the Tribunal Rules, the default review format is therefore by written submissions only, in the absence of a request for an oral review, which takes the form of a hearing. The hearing process, as described in Rules 12 to 15, of the Tribunal Rules, is referenced to an oral hearing only, as follows:

> ***12.*** *(1) A hearing before the Tribunal may, on the request of any party to the hearing, be held in camera if that party establishes that the circumstances of the case so require.*
>
> *(2) The Tribunal may order a witness at a hearing to be excluded from the hearing until called to give evidence.*
>
> ***13.*** *All hearings before the Tribunal must be recorded.*
>
> ***14.*** *Unless the order of proceeding has been agreed to by all parties in advance, the Tribunal must establish the order of proceeding at the start of the hearing.*
>
> ***15.*** *(1) Witnesses at a hearing may be examined orally on oath or affirmation.*
>
> *(2) Either party at a hearing is entitled to examine their* (sic) *own witnesses, to cross-examine any witnesses of the other party, and to re-examine their own witnesses for clarification.*

[11] At issue is whether the right to an oral review, or hearing, means that the parties have a right to make concluding arguments orally. In the absence of any judicial views to direct or influence the Tribunal to the contrary, the Tribunal has determined that the right to an oral hearing is not associated with a right, in any absolute sense, to make concluding arguments orally. A primary function of the oral hearing is that of credibility determinations, where an applicant believes that such is warranted, and where such credibility determination is particularly complemented through an oral examination and cross-examination process. In this regard, in *Khan* v. *University of Ottawa,* 1997 CanLII 941 (unparagraphed), the majority of the Ontario Court of Appeal (Laskin, J.A., with Brooke, J.A. concurring), commented as follows:

> *In many academic appeals, procedural fairness will not demand an oral hearing. An opportunity to make a written submission may suffice. For example, I doubt that students appealing their grades because they believe they should have received a higher mark would ordinarily be entitled to an oral hearing. What distinguishes this case is that the determining issue before the Examinations Committee was Ms. Khan's credibility. In denying Ms. Khan relief the Committee judged her credibility adversely. In my view, the Committee should not have done so without affording her an in-person hearing and an opportunity to make representations orally. In the most recent edition of his text entitled* Administrative Law *(3rd ed., Toronto: Carswell, 1996) Professor Mullan wrote at para. 108:*
>
> > An oral hearing may be required in certain circumstances and particularly where Charter rights are at stake and in those common

> situations where credibility of the parties and witnesses is a factor in the decision-making process….
>
> *Many courts in many different settings have emphasized that when a decision turns on credibility, a decision-maker should not make an adverse finding of credibility without affording the affected person an oral hearing. In* Singh v. Canada (Minister of Employment and Immigration)*,* [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422*, Wilson J., after observing that "fundamental justice" in s. 7 of the* Canadian Charter of Rights and Freedoms *includes procedural fairness, explained at pp. 213-14 S.C.R., p. 465 D.L.R. why an issue of credibility should not be determined on written statements:*
>
> > I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"* (1975), 62 D.L.R. (3d) 1 at pp. 3-5, [1976] 2 S.C.R. 802 at pp. 806-8, 6 N.R. 359 (per Ritchie J.). I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions*.*

[12] Furthermore, as the Supreme Court of Canada noted, per Madame Justice L'Heureux-Dubé, in *Baker v. Canada (Minister of Citizenship and Immigration*) [1999] 2 S.C.R. 817, at paragraphs 22 and 28:

> *[22] Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker*.

> *[28] …The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.*

[13] More recently, the Federal Court, per Mr. Justice de Montigny, in *Black v. Canada (Advisory Council for the Order),* 2012 FC 1234 (affd. 2013 FCA 267*),* commented as follows, at paragraph 68:

> *[68] …the duty of procedural fairness does not confer an unqualified right to an oral hearing. The core issue, from a procedural fairness perspective, is whether an oral hearing is necessary to provide a reasonable opportunity for parties to effectively make their case…*

[14] Based on the nature and extent of the evidence introduced to date in both matters, and in view of the complexity of such evidence and its comprehensive examination and cross-examination by counsel, the Tribunal is of the view that written closing arguments are required by both parties, and that this will be the exclusive form of submission. The Tribunal anticipates that the balance of the evidence to be introduced will be similarly complex and subject to a similar degree of rigorous examination and cross-examination by counsel. It is the Tribunal's view that fairness to both parties requires that their closing arguments, necessarily involving a review and assessment of a complex and voluminous amount of evidence, be in writing. The Tribunal is of the view that the integrity and credibility of the evidence will have been comprehensively addressed by both counsel during the hearing, through *viva voce* testimony and argument and the requirement of written closing arguments or submissions does not compromise fairness to counsel in this regard.

[15] The Tribunal notes that the Federal Court of Appeal has recently commented on the correctness review standard in relation to administrative determinations of procedural fairness. In *Re: Sound v. Fitness Industry Council of Canada,* 2014 FCA 48, the Court of Appeal, per Mr. Justice Evans, discussed the standard of review in paragraphs 34 to 42 as follows:

> *[34] The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness:* Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.*
>
> *[35] Courts give no deference to decision-makers when the issue is whether the duty of fairness applies in given administrative and legal contexts. This is evident from the discussion in* Dunsmuir v. New Brunswick, *2008 SCC 9; [2008] 1 S.C.R. 190 at paras. 77 et seq. (*Dunsmuir*) of whether David Dunsmuir was entitled to*

procedural fairness before his employment in the provincial public service was terminated.

[36] However, the standard of review applicable to an allegation of procedural unfairness concerning the content of the duty in a particular context, and whether it has been breached, is more nuanced. The content of the duty of fairness is variable because it applies to a wide range of administrative action, actors, statutory regimes, and public programs, with differing impacts on individuals. Flexibility is necessary to ensure that individuals can participate in a meaningful way in the administrative process and that public bodies are not subject to procedural obligations that would prejudice the public interest in effective and efficient public decision-making.

[37] In the absence of statutory provisions to the contrary, administrative decision-makers enjoy considerable discretion in determining their own procedure, including aspects that fall within the scope of procedural fairness: Prassad v. Canada (Minister of Employment and Immigration), *[1989] 1 S.C.R. 560 at 568-569 (*Prassad*). These procedural aspects include: whether the "hearing" will be oral or in writing, a request for an adjournment is granted, or representation by a lawyer is permitted; and the extent to which cross-examination will be allowed or information in the possession of the decision-maker must be disclosed. Context and circumstances will dictate the breadth of the decision-maker's discretion on any of these procedural issues, and whether a breach of the duty of fairness occurred.*

[38] Dunsmuir *does not address the standard of review applicable to tribunals' procedural choices when they are challenged for breach of the duty of fairness. However, the Court held (at para. 53) that the exercise of administrative discretion is normally reviewable on a standard of reasonableness. This proposition would seem applicable to procedural and remedial discretion, as well as to discretion of a more substantive nature. It is therefore not for a reviewing court to second-guess an administrative agency's every procedural choice, whether embodied in its general rules of procedure or in an individual determination.*

[39] That said, administrative discretion ends where procedural unfairness begins: Prassad *at 569. A reviewing court must determine for itself on the correctness standard whether that line has been crossed. There is a degree of tension implicit in the ideas that the fairness of an agency's procedure is for the courts to determine on a standard of correctness, and that decision-makers have discretion over their procedure.*

[40] Thus, writing for the majority in Baker v. Canada (Minister of Citizenship and Immigration), *[1999] 2 S.C.R. 817 at para. 27, Justice L'Heureux-Dubé included the decision-maker's procedural choice and agency practice as factors*

that courts must take into account when determining the contents of the duty of fairness in any given context. She stated that considerable weight should be given to this choice when the legislature had conferred broad procedural discretion on the agency or its expertise extended to procedural issues.

[41] Justice Abella endorsed these observations when writing for the majority in Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 230-231. She said (at para. 231):*

> *Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process. The determination of the scope and content of a duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the Agency's constituencies.*

[42] In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

[16] As noted by Mr. Justice Evans in *Re: Sound*, "administrative discretion ends where procedural unfairness begins". On the particular procedural matter that is the subject of this Order, there would appear to be no specialized expertise that the Tribunal brings to its determination that would, it itself, merit deference from a superior court. While the tendency towards judicial deference appears to continue to broaden, as exemplified recently by the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission),* 2013 SCC 67, the Tribunal continues to benefit from superior court correction and guidance, without any particular deference being demonstrated. Recent examples include the decisions of the Federal Court of Appeal in *Canada (Border Services Agency) v, Tao*, 2013 FCA 52, *Canada (Attorney General) v. Tam,* 2014 FCA 220 and *Canada (Attorney General) v. Stanford*, 2014 FCA 234. Such decisions, given their precedential effects, also provide more general guidance to others, beyond that specifically provided to the Tribunal.

[17] The purpose of issuing this Order at this time is to put the parties on notice as to the expectations of the Tribunal, so that they may commence at least framing or thinking about their written submissions now. The issuance of the Order is also timed so that either party

may determine whether it wishes to seek judicial review of same, prior to the commencement of a further period of hearing days, anticipated to be in April, 2015, at the earliest. In such circumstances, the actual hearing of evidence need not be postponed, in the Tribunal's view. Rather, concluding arguments would not be heard, pending a decision from the Federal Court of Appeal as to whether the Tribunal is within its rights to insist on written concluding arguments exclusively, contrary to the wishes of counsel for the Agency, and also contrary to the wishes of counsel for Maple Lodge Farms, who wishes to preserve a right to make oral submissions, following the submission of written concluding arguments.

Order

[18] The Tribunal therefore makes the following Order:

> **Counsel for the Applicant and Counsel for the Respondent shall submit their closing arguments in relation to CART/CRAC-1728 and CART/CRAC-1729 by written submissions only. Such written submissions must be received by the Tribunal by 5:00 p.m., within ten (10) juridical days from the completion of the submission of evidence in both CART/CRAC-1728 and CART/CRAC-1729.**

Dated at Ottawa, Ontario, this 19th day of January, 2015.

Original signed by:

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Dr. Bruce La Rochelle, Member