



Citation: *Greidanus Poultry Service Ltd. v. Canada (Canadian Food Inspection Agency)* 2013 CART 28

Date: 20130913

Docket: CART/CRAC-1618

Between:

Greidanus Poultry Service Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

**With: Mr. R. Ian Robertson, counsel for the applicant; and
Ms. Julia Turvey, counsel for the respondent.**

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 subsection 139(2) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines, on the balance of probabilities, that the applicant, Greidanus Poultry Service Ltd., did not commit the violation set out in Notice of Violation 1011QC0220 dated February 22, 2012, and is not liable for payment of the penalty to the respondent, the Canadian Food Inspection Agency.

The hearing was held in Kitchener, ON,
Wednesday, April 10 and Thursday, April 11, 2013.

REASONS

Alleged Incidents and Issues

[2] On February 22, 2012, the respondent, the Canadian Food Inspection Agency (Agency), issued to the applicant, Greidanus Poultry Service Ltd. (Greidanus Poultry), two Notices of Violation, each alleging that Greidanus Poultry had loaded animals in a way likely to cause injury or undue suffering to them, contrary to subsection 139(2) of the *Health of Animals Regulations*. Notice of Violation 1011QC0220 related to an incident that allegedly took place on January 19, 2011, at Bosanquet, Ontario, while Notice of Violation 1112QC0097 related to an incident that allegedly took place on November 8, 2011, at Teeswater, Ontario. Each of these cases is the subject of a separate proceeding and decision, although the parties agreed, and the Tribunal ordered, that the cases be heard together.

[3] Paragraph 139(2) of the *Health of Animals Regulations* reads as follows :

139. (2) *No person shall load or unload, or cause to be loaded or unloaded, an animal in a way likely to cause injury or undue suffering to it.*

[4] In this case, when considering the validity of Notice of Violation 1011QC0220 relating to the incident that allegedly took place on January 19, 2011, at Bosanquet, Ontario, as well, in the companion case, when considering the validity of Notice of Violation 1112QC0097 relating to the incident that allegedly took place on November 8, 2011, at Teeswater, Ontario, the Tribunal must determine whether the Agency has established all the elements required to support the impugned Notice of Violation, more specifically:

- Element #1 - a cargo was loaded;
- Element #2 - the cargo was an animal, or animals;
- Element #3 - the loading of the animal(s) caused or was likely to cause injury or undue suffering to the animal(s); and
- Element #4 - there was a causal link between the loading, the likelihood of injury or undue suffering of the animal(s), and Greidanus Poultry.

[5] Furthermore, if the Tribunal finds that the Agency has established all the elements required to support the impugned Notices of Violation, the Tribunal must determine whether the Agency has proved that the amount of the penalty for each Notice of Violation is justified under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act) and its Regulations.

Procedural History

[6] Notice of Violation 1011QC0220, dated February 22, 2012, alleges that on January 19, 2011, at Bosanquet, Ontario, Greidanus Poultry, [verbatim] “committed a violation, namely loaded animals in a way likely to cause injury ou [sic] undue suffering to them contrary to section 139(2) of the *Health of Animals Regulations* which is a violation of section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.”

[7] Notice of Violation 1112QC0097, dated February 22, 2012, alleges that on November 8, 2011, at Teeswater, Ontario, Greidanus Poultry, [verbatim] “committed a violation, namely loaded animals in a way likely to cause injury ou [sic] undue suffering to them contrary to section 139(2) of the *Health of Animals Regulations* which is a violation of section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.”

[8] On March 9, 2012, the Agency was deemed to have served Greidanus Poultry with both Notices of Violation. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (Regulations), each violation was classified as a “serious violation” for which the penalty assessed was \$6,000 each.

[9] In a letter dated March 14, 2012, sent by fax and later by registered mail to the Tribunal, Greidanus Poultry, through its legal counsel Mr. R. Ian Robertson (Robertson), requested a review by the Tribunal of the facts of both violations, in accordance with paragraph 9(2)(c) of the Act. That letter set out the reasons for its requests for review. Tribunal staff confirmed with Robertson that Greidanus Poultry wanted the Tribunal to review its files in English via an oral hearing at a location in Southwestern Ontario.

[10] On March 26, 2012, the Agency sent a copy of its reports (Reports (collectively), or Agency Report for the January 19, 2011 incident and Agency Report for the November 8, 2011 (specifically)), regarding each of the Notices of Violation to Greidanus Poultry and to the Tribunal. The Tribunal received the Reports on March 27, 2012. The Reports as submitted were, however, partly in French and partly in English.

[11] In a communication to the Agency dated March 27, 2012, the Tribunal invited the Agency to file any of its submission then currently in French in English, as English had been chosen by Greidanus Poultry as the language of the proceedings. On April 25, 2012, the Agency indicated that it was providing to Greidanus Poultry and to the Tribunal its entire submissions in English, with the Tribunal receiving its copy on May 1, 2012.

[12] In a letter dated May 2, 2012, the Tribunal invited Greidanus Poultry and the Agency to file any additional submissions with the Tribunal by June 1, 2012. This date was later extended by the Tribunal to August 7, 2012.

[13] In a letter dated August 7, 2012, and received by the Tribunal that day, Greidanus Poultry, through its counsel, Robertson, filed arguments in support of Greidanus Poultry’s requests for review.

[14] On March 6, 2013, the Tribunal sent the parties Notices of Hearing indicating that the oral hearing requested by Greidanus Poultry in the two matters would be held on April 10 and 11, 2013, in Kitchener, Ontario. The Tribunal confirmed that both parties received the Notices of Hearing. The hearing requested by Greidanus Poultry was held on those days with Greidanus Poultry represented by its counsel, Robertson, and the Agency represented by its counsel, Ms. Julia Turvey.

The Evidence

General Observations

[15] At the start of the hearing, the parties agreed, and the Tribunal so ordered, to hear both cases together, with the understanding that where necessary, the parties would indicate where the evidence they were tendering was specific to only one of the cases, rather than to both cases.

[16] The written record for each case consists of the following:

For the Agency:

- Notice of Violation 1011QC0220, dated February 22, 2012, for the occurrence which allegedly took place on January 19, 2011, at Bosanquet, Ontario, and the Agency Report (both in its original form and in its translation into English in hard copy and on compact disk (CD)) relating to this incident; and
- Notice of Violation 1112QC0097, dated February 22, 2012, for the occurrence which allegedly took place on November 8, 2011, at Teeswater, Ontario, and the Agency Report (both in its original form and in its translation into English in hard copy and on CD), relating to this incident, including a letter dated November 15, 2011, at Tab 22 of the Report from Dr. Louis Fortin to Greidanus Poultry regarding this incident and others.

For Greidanus Poultry:

- its Request for Review filed by Robertson dated March 14, 2012, relating to Notice of Violation 1011QC0220, dated February 22, 2012, for the occurrence which allegedly took place on January 19, 2011, at Bosanquet, Ontario; and its Request for Review filed by Robertson dated March 14, 2012, relating to Notice of Violation 1112QC0097, dated February 22, 2012, for the occurrence which allegedly took place on November 8, 2011, at Teeswater, Ontario; and the letter dated December 6, 2011, from Greidanus Poultry to Dr. Louis Fortin (Tab 23 of the Agency Report) in response to the latter's letter (Tab 22 of the Agency Report) regarding this incident.

[17] As well, the parties tendered oral testimony at the hearing:

For the Agency:

- Dr. Stéphanie Lefebvre (Lefebvre), a doctor of veterinary medicine, who gave expert evidence regarding chicken pathology and also evidence relating to the incident of January 19, 2011;
- Dr. Louis Fortin (Fortin), a doctor of veterinary medicine, who gave expert evidence regarding chicken pathology and also evidence relating to the incident of November 8, 2011; and
- Mr. Donato Fazio (Fazio), an investigator for the Agency who investigated both incidents, filed documents in and compiled the Agency Reports for both incidents and who also gave evidence relating to both incidents.

For Greidanus Poultry:

- Mr. Terry Greidanus (Greidanus), owner and president of Greidanus Poultry, who gave expert evidence regarding chicken catching and loading and also evidence relating to the incidents of January 19, 2011 and November 8, 2011;
- Mr. James Bank (Bank), employee of Greidanus Poultry, who gave expert evidence regarding chicken catching and loading and also evidence relating to the incident of November 8, 2011;
- Mr. Gary Souch (Souch), employee of Greidanus Poultry, who gave expert evidence regarding chicken catching and loading and also evidence relating to the incident of January 19, 2011; and
- Mr. Jason Buttar (Buttar), employee of Greidanus Poultry, who gave evidence relating to the incident of January 19, 2011.

[18] The parties also tendered six exhibits at the hearing:

For the Agency:

- Exhibit 1 – Curriculum vitae and continuing professional education of Stéphanie Lefebvre (undated), relevant for both incidents in question;
- Exhibit 2 – Invoice dated January 26, 2011, from Greidanus Poultry to Ferme des Voltigeurs for catching and loading of Rombouts' load of January 19-20, 2011;

- Exhibit 3 - Curriculum vitae and continuing professional education of Louis Fortin (undated), relevant for both incidents in question; and
- Exhibit 4 - Invoice dated November 18, 2011 from Greidanus Poultry to Avicomax Inc. for catching and loading of Ritchie load of November 8-9, 2011.

For Greidanus Poultry:

- Exhibit 5- Booklet entitled “*Should this bird be loaded?*”. A guide for preparing, loading and transporting poultry (Ontario Farm Animal Council *et al.*, undated), relevant for both incidents in question; and
- Exhibit 6 - Booklet entitled “*Broiler Chicken Industry*” Safe Work Practices (Poultry Service Association *et al.*, undated), relevant for both incidents in question.

Evidence Common to Both Cases

[19] While the two incidents that form the basis of the respective charges for which Notices of Violation have been issued against Greidanus Poultry, the Tribunal is able to accept several pieces of evidence as being common to both incidents under investigation, even though the two incidents occurred almost 10 months apart.

[20] Basic to both incidents is the process of how live chickens get from their farm of origin to the processing plant where their lives will end. Greidanus, Bank, Souch, and Buttar provided the Tribunal with a picture as to how this process generally unfolds from the time of catching to the loading of the chickens at the farm of origin while Lefebvre, Fortin and Fazio provided the Tribunal with a picture of how the process unfolds from the unloading to the processing of the chickens at the abattoir. Of course, from a legal perspective, the rules set out in Part XII of the *Health of Animals Regulations* require that this entire process be completed in a humane way. As well, industry associations also acknowledge the importance of, and the steps to be taken to secure, the humane transportation of chickens (Tab 29 of Agency Report for incident of January 19, 2011; Tab 24 of Agency Report for incident of November 8, 2011; and Exhibits 5 and 6).

[21] The procedure to get chickens from their farm of origin to the slaughter house for processing works approximately in the following fashion. Just prior to chickens reaching a desired market weight, the processor and the producer enter into negotiations for the sale and delivery of the birds from the producer’s barns to the processor’s slaughter house. The chickens, of course, must be collected, caught, placed in cages on trucks, transported, uncrated, and brought to the slaughter house kill floor. To complete and oversee this transfer, many players are involved. At the producer end of the process, the farmer will likely be present when a crew of chicken catchers and loaders arrives. The catchers catch

the chickens and then hand them up to the loaders who are on the transport trailer and who place the chickens in the crates on the transport trailer and close the lid on the crates. As the crates are filled, the truck driver moves his truck ahead until all the crates are filled. Once fully loaded, the trucker will secure the load, usually by tarping it, and drive the chickens a few kilometres or sometimes several hundreds of kilometres to the processor site. There, the cages will be removed from the truck, the chickens will be removed from the cages once inside the abattoir and then they will be killed and processed. The chickens will be inspected both *ante mortem* and *post mortem* for health and humane transportation concerns. If any dead or infirmed chickens are found, they will be counted, a report will be prepared, and if necessary, enforcement action may be commenced by the Agency against anyone violating humane transportation regulations during the whole process.

Evidence Specific to the Incident of January 19-20, 2011

[22] The parties do not dispute many of the facts concerning the commodity moved, certain aspects of the process used to move that commodity and the players involved in moving the commodity during the incident of January 19-20, 2011. Agreed facts are as follows:

- producer: Peter and Lisa Rombouts, whose farm is located at Bosanquet, ON
- catching crew: Greidanus Poultry, with Buttar acting as foreman of the catching and loading crew and Souch being one of the loaders of chickens into the cages on the truck
- size of chicken for transport: 3.8 - 4.0 kgs (large chickens - broilers)
- loading density of chickens per cage: 6-7
- number of chickens loaded and transported: 9,599 in two trailers, one with 4,824 chickens and one with 4,775 chickens
- transporter: Les Volailles Trans Canada Inc.
- processor: Ferme des Voltigeurs Inc., Saint-Charles-de-Drummond, QC
- date and time of start of catching and loading; for first trailer, January 19, 2011 at 5:45 p.m.; for second trailer, January 19, 2011, at 7:55 p.m.
- date and time of departure of last loaded trailer from farm: January 19, 2011, at 10:00 p.m.
- distance and approximate driving time from farm to processor: 924 km – about 10 hours 38 minutes

- date and time of arrival of load at processor: January 20, 2011, 6:00 a.m., for the first trailer and 7:43 a.m., for the second trailer
- date and time of commencement of processing: January 20, 2011, 9:30 a.m., for the first trailer and 2:30 p.m., for the second trailer
- total length of time from beginning of loading to beginning of processing: 15 hours 45 minutes for first trailer and 18 hours 35 minutes for second trailer
- person conducting *ante-mortem* and *post mortem* inspections at processor site at time of inspection: Luc Henri, CFIA inspector – *ante mortem* at 9:30 a.m., on January 20, 2011; Lefebvre – *ante mortem* at 10:15 a.m., on January 20, 2011, for first load of chickens; unspecified person – *ante mortem* at 2:30 p.m., on January 20, 2011, for second load of chickens
- number of chickens found dead at time of unloading at processing plant: 334
- number of chickens found dead at time of unloading at processing plant on their backs: 156
- Agency investigator conducting investigation after occurrence of incident: Fazio

(Tabs 20, 21, 23, 25 of Agency Report and oral testimony of Lefebvre, Fazio, Greidanus, Souch, and Buttar)

[23] The charge in this case against Greidanus Poultry relates to an allegation that it loaded chickens “*in a way likely to cause injury or undue suffering*” to the chickens on the evening of January 19, 2011. The Agency tendered several hundred pages of written materials in support of its position. At the oral hearing, the Tribunal heard from seven witnesses providing almost two full days of oral evidence. From an evidentiary point of view, the parties did not dispute that Greidanus Poultry loaded the chickens in question on the night of January 19, 2011. The evidence is equally clear that on January 20, 2011, when the birds were unloaded for processing, 334 of the 9,599 birds were dead and of these 156 were found dead on their backs. On this evidence, the Tribunal finds that the Agency has proven the first two elements of the alleged violation, as set out in paragraph 4 above, that is, a cargo was loaded, and the cargo was animals.

[24] It is the evidence that the parties have tendered concerning Element #3—the loading of the animal(s) caused or was likely to cause injury or undue suffering to the animal(s)—and Element #4—there was a causal link between the loading, the likelihood of injury or undue suffering of the animal(s), and Greidanus Poultry—that requires a close examination by the Tribunal.

[25] Both parties tendered direct and expert opinion evidence as to how the chickens were loaded on January 19, 2011, and how they might have died after they were loaded but before they were unloaded many hours and many kilometres later on January 20, 2011.

[26] The Tribunal will consider first the direct evidence provided by the parties by those who were present at the loading of the birds. This evidence comes before the Tribunal from both the Agency and Greidanus Poultry.

[27] From the Agency, there is written direct evidence at Tab 20 of the Agency Report that provides some insight into the catching conditions on the night of January 19, 2011. Tab 20 contains three documents and six photos. While the photos do not provide any clues to the manner of catching or loading of the chickens that night, the three documents do. The first of these documents is entitled "*Chicken Farmers of Ontario Flock Production and Marketing Form*" while the second and third documents are entitled "*Chicken Farmers of Ontario Flock Information Reporting Form*". The second and third documents provide a space to record contemporaneous comments "On catching process". In the second document one notes that for the first 4,824 chickens collected on the evening of January 19, 2011, the "*Chicken Farmers of Ontario Flock Information Reporting Form*" contains the comment "Good" regarding the catching process. For the rest of the 4,775 chickens collected on that evening, the "*Chicken Farmers of Ontario Flock Information Reporting Form*" contains the comment "OK" regarding the catching process. These comments, it was confirmed in the oral testimony by Greidanus, and not disputed by the Agency, are written or acknowledged by the producer who then signs off at the bottom of the form. All of the forms at Tab 20 of the Agency Report are signed by Lisa Rombouts, the producer of the chickens caught and loaded on January 19, 2011. The Agency tendered no other written, direct evidence on the catching conditions observed on the night of January 19, 2011.

[28] The Agency tendered no oral direct evidence concerning the catching conditions observed on the night of January 19, 2011, as no Agency personnel were present at the time of loading and all the witnesses called by the Agency were Agency personnel.

[29] From Greidanus Poultry, there is written direct evidence describing the catching and loading conditions on the night of January 19, 2011, although that evidence is very sparse. In its Request for Review, Greidanus Poultry makes the statement that "...their employees are thoroughly trained, that the birds in question were properly put into the shipping crates in an upright position and that any and all birds which may or may not have been found to be on their backs turned themselves over subsequently to being properly placed into the shipping crates...."

[30] During the hearing, however, Greidanus Poultry provided much more ample oral direct evidence concerning the catching conditions on the night of January 19, 2011, from both Souch and Buttar, who were present during the catching and loading of the chickens on that night.

[31] Souch testified that he has been a chicken catcher for 24 years and has been employed by Greidanus Poultry since 2005, catching chickens for the company. He was qualified as an expert and able to give expert opinion evidence in the catching and loading of chickens. Presently, he acts as a chicken loader for Greidanus Poultry. He told the Tribunal that he took a course in bird handling safety in 2010, put on by Greidanus Poultry and then, in 2011, participated in a second company training seminar on bird handling safety. Souch testified the general process for catching and loading birds was as follows:

1. farmer lifts feed and water from chickens;
2. transporter arrives;
3. catching and loading crew arrive;
4. foreman of catching and loading crew chases chickens up into a smaller fenced area of the barn to facilitate catching process;
5. transporter prepares for loading of chickens by taking off first row of crates on truck;
6. catchers start catching chickens by grabbing three to four chickens per hand;
7. catchers carry birds to loader who then fills crates on the truck; and
8. as a row of crates is filled on the truck, the loaders continue with the next row until the truck is fully loaded or no more chickens remain to be loaded.

Souch testified that there were eight people on the Greidanus Poultry crew that loaded the Rombouts' chickens on January 19, 2011. He was one of loaders on the trucks. Souch told the Tribunal that the driver of the transport truck instructed them how many chickens they should put in each crate and the number he gave was six or seven only, because they were big birds. Souch testified that the crates could have held eight to nine birds of that size and so he believed there was some extra room in the cage for the birds as loaded that night. Souch told the Tribunal that if he loaded any birds that landed on their backs, he would have flipped them back on their feet before he closed the lid on the crate. As well, if a bird were to die in the crate, it would have enough room to flip over onto its back. He testified that he did not see any birds die in the crates that night while loading and that he did not recollect any birds flipping on their backs after loading at the Rombouts' farm.

[32] In cross-examination, Souch told the Tribunal that sometimes the chickens are put into the crate on their backs, with as many as two per crate, but when he closed the lids on the crates on the Rombouts' load, he did not see any chickens on their backs. He testified that he must work quickly; he has about 15 seconds to load a crate and make sure that none remain on their backs. Souch testified that he did not see any dead chickens in the crates when he was finished loading at the Rombouts' farm. He firmly stated that it was not possible that he missed even one chicken remaining on its back in its crate in the

over 4,000 that he loaded that night. In response to the Agency's counsel's question, he informed the Tribunal that he was never informed that there was an issue with the way in which this batch of chickens had been caught and loaded.

[33] Buttar testified that he has been a chicken catcher and crew foreman employed by Greidanus Poultry for the last seven years. Presently, he acts as a crew foreman for Greidanus Poultry. He told the Tribunal that he took a course in bird handling safety in 2010, put on by Greidanus Poultry and then signed off on a company briefing on bird handling safety annually. Buttar testified that his job as foreman is to select competent, experienced catchers and loaders for an assigned job, to talk to the farmer, to set up the barn for catching and loading, and to determine how many chickens to load. Buttar testified he was the foreman of the Greidanus Poultry crew that loaded the Rombouts' chickens on January 19, 2011. As such, he organized the crew and discussed any flock issues with the farmer. Buttar told the Tribunal that on that night he did discuss flock health issues with the producer and the producer informed him that there had been a big death loss the week before the loading, up to 80 bird deaths per day during that period, which was verified when Buttar reviewed the producer's log on the day of the loading. Buttar testified that Mr. Rombouts stayed with the catchers and loaders during the entire loading process and didn't mention anything to Buttar about any concerns with the catching and loading of his birds. Buttar also stated, however, that at the end of the loading he chatted with the producer and noted that there were at least 60 dead birds and 10 smaller, injured or frail live birds in the producer's barn which were not loaded for transport by his crew. Buttar said that the crates into which these large chickens were being loaded that night would hold about nine 4-kg birds, and so, with loading instructions to load only six to seven birds per crate, there would have been room for up to two more birds in each crate.

[34] In cross-examination, Buttar told the Tribunal that the increased mortality at the Rombouts' farm in the days before the loading was not brought to his attention until the end of the loading process. While this increase was a concern, one of the loaded trucks had already left when this fact was brought to his attention and at any rate he told the Tribunal the decision to send or not to send the truck would be the producer's or the processor's. However, Buttar said that as foreman he has an obligation to only load birds that are fit for transport. In response to the Agency's counsel's question, he informed the Tribunal that he did not see any injuries to chickens that were loaded that evening. Buttar also testified that the producer, Rombouts, was around for the catching and the loading, talked to him and brought the catching crew soft drinks. During this time, Rombouts never said anything negative about the catching and loading. Buttar stated he was the foreman for the whole job, but that he could not see the catching and loading of all of the chickens for the whole time loaded onto the two trucks. He told the Tribunal that when he did see the loading, he was "certain that 100% were on their feet on both trucks".

[35] Almost the entirety of the evidence submitted in both written and oral form by the Agency relates to observations concerning the state of the birds found by Agency officials at the unloading of the poultry on January 20, 2011, at the Quebec abattoir and, by way of expert opinion, what those observations might mean in terms of cause of death of the 334

dead chickens on the two loads coming from Rombouts' Ontario farm loaded in Ontario the day before.

[36] The Agency's first witness, Lefebvre, is a qualified veterinarian employed by the Agency who was working at the Ferme des Voltigeurs Inc., Saint-Charles-de-Drummond, Quebec, on January 20, 2011, as the acting veterinarian in charge. She has extensive experience in chicken pathology and was qualified as an expert in that field for the purposes of giving expert opinion evidence. Her oral testimony, her written reports (Tabs 23 and 25 of the Agency Report), her email with Fazio (Tab 27) and the photos she took on the day in question (Tabs 22 and 23 of the Agency Report) describe the conditions of the chickens she found at unloading in Quebec. Lefebvre testified that at unloading, she and the other Agency inspector, Luc Henri, that were working at the abattoir that day, saw many chickens on their backs and when they observed this, she directed plant staff to count and collect the dead birds, making a note of how many dead birds were found on their backs. Lefebvre told the Tribunal that even with the packing density of six to seven chickens per crate, which was an acceptable density, it would have been impossible for a chicken to flip over onto its back. Among the birds found dead, about 45% were on their back, which is not normal. The only plausible explanation, in her professional opinion, was that the chickens that died on their backs had been improperly loaded on their backs. If they were loaded on their backs, because of their physiology, the birds would lack oxygen, their skin would show bluing, and they would suffer and die. Lefebvre testified that this is what she observed among the dead chickens on the two trailers.

[37] Lefebvre also testified that chickens do grow quickly and for some chickens, their hearts cannot keep up. There is a condition, or syndrome, known as "flip-over disease" where a chicken, which is on its feet, will suddenly flip over and die within minutes. She added that the cause of "flip-over disease" is still obscure, and its occurrence very rare, but the disease can wipe out up to 50% of a group of birds and those birds will not show any particular lesions when examined. At Tab 27 of the Agency Report, Lefebvre explains that Greidanus' explanation that the dead chickens on the load died of a heart attack caused by the stress of being handled and transported was not plausible for three reasons:

1. "...given the presence of other birds in the crate, it is not possible for a bird to have fallen into the dorsal position. If a bird is in the dorsal position, it is because it was placed in that position by the catcher.";
2. "...a carrier gave evidence with the first report attesting to the conditions under which the birds were caught."; and
3. "As for the explanation that the birds suffered a "heart attack," a small proportion of the dead birds found on their backs had symptoms of a heart problem (ascites). These birds would have survived transport if they had been placed in a normal position."

[38] Under cross-examination, Lefebvre told the Tribunal that she was not present when the chickens were loaded, that she first observed the chickens after they had already

started to be unloaded for processing and while the trailers that held the chickens had been tarped, she was not aware of when those tarps had been removed. She testified that the chickens were loaded to a density of six or seven per crate but could not say whether those crates could hold more. The chickens, when she observed them, were wet, bathed either in chicken excrement or in condensation, or both. When asked by counsel for Greidanus Poultry, Lefebvre told the Tribunal that she never contacted the producer for any follow-up information. Lefebvre testified that chickens grow very fast and that it takes a toll on their heart, but with the nuance that not all birds are affected, although this trend has increased in recent years with a pathology following from this phenomenon also increasing. Lefebvre also stated that while it is not normal to have chickens on their backs upon arrival at the abattoir, there are certainly more problems associated with loads that have to travel a longer distance between farm and abattoir. However, Lefebvre reiterated that it is practically impossible for chickens to flip over on their backs once they are in the crate.

[39] Fazio, another of the Agency's witnesses, was the Agency investigator who compiled the investigation report. He became involved when he was handed several files for different incidents involving Greidanus Poultry. He called Greidanus on February 15, 2011, and recorded the notes from their conversation at Tab 26 of the Report. Fazio reported that Greidanus told him the following: *[verbatim]*

Tuesday, February 15th 2011 at approximately 13h30 I called Mr. Terry Greidanus of Greidanus Poultry Services Ltd. I discussed the 5 reports I have concerning large poultry being loaded on their backs. According to Mr. Greidanus he has been trying to contact the veterinarians without success to discuss the problem. The birds are dying of heart attacks because of the stress of being handled and transported. When they die of heart attacks the trash and kick – can end up – upside down. There is room in these cages to turn over in the cage even for these large birds. He has had the same problem with these birds for the last 3 ½ years and has discussed the problem with his agent in Quebec Serge Lefebvre. It is the only abattoir (Ferme les Voltigeurs) that he loads large broilers – all the rest of his catching is smaller birds. Only these large birds have this problem – he stated that he will stop catching these birds - only these large birds have this problem – he stated that he will stop catching these birds – only problems. He also said that all his employees go through training before catching birds.

[Sic throughout]

After having this conversation with Greidanus, Fazio put the “heart attack” theory, this being the first time he had heard of it, to Lefebvre who relayed to him her response by email (Tab 27 of the Report). Fazio told the Tribunal that basically Lefebvre's response was that if it was a case of heart attack, then all the chickens would be dead but some were still alive at the destination on their backs.

[40] Under cross-examination, Fazio told the Tribunal that he did not contact the producer when conducting his investigation to obtain any information they might have

concerning what went on at the loading of the chickens because he didn't think that the producer stayed around during loading. Fazio told the Tribunal that he did not contact the transporter or the drivers of the loads when conducting his investigation to obtain any information they might have concerning what went on at the loading because he didn't think they would have relevant information. Fazio told the Tribunal that he did not contact any member of the Greidanus Poultry crew that was present at the loading on January 19, 2011, when conducting his investigation to obtain any information they might have concerning what went on at the loading. Fazio told the Tribunal that he did not ask Greidanus for the names of any of his crew that were present that night during his telephone call with Greidanus on February 15, 2011.

[41] Fazio also told the Tribunal that as the investigator in this case, he had prepared the Agency Report. The Tribunal notes that the Agency Report contains 30 tabs of evidence. While the Tribunal is generally very appreciative of the great breadth of evidence filed in these cases by the Agency, it is clear that Tabs 3-19 and 30, representing almost two-thirds of the evidence provided in the written submissions, relates to events involving Greidanus Poultry but which happened prior to the incident of January 19, 2011. None of those events appears to have evoked the issuance of a Notice of Violation by the Agency, let alone a finding that Greidanus had committed any violation.

[42] Two other expert witnesses, one for the Agency, Fortin, and one for Greidanus Poultry, Greidanus, presented expert opinion evidence concerning the matters of this case.

[43] Fortin is a qualified veterinarian employed by the Agency who was working at another Quebec abattoir on January 20, 2011, and so was not present when the chickens were unloaded, and thus, had no direct observations of the chickens. He has, however, extensive experience in chicken pathology and was qualified as an expert in that field for the purposes of giving expert opinion evidence. Most of his evidence related specifically to the events of the November 8-9, 2011 incident involving Greidanus Poultry. However, as general expert opinion evidence, Fortin opined that it is unusual to find that many birds on their backs at unloading and that there is no real explanation for this other than that they were placed like this when they were placed in the crate, as there is not enough room in the crate for a chicken to turn over on its back or, if on its back, to turn onto its feet. With respect to the possibility of this incident being a result of "flip-over disease", Fortin opined that the chickens on their back did not die of flip-over disease because it is a disease where death ensues within a minute after onset of disease and, because of the loading density in the crate, the birds would not have been able to flip themselves onto their backs.

[44] Greidanus is the owner of Greidanus Poultry, a company incorporated in 2006. He has caught and loaded chickens for 22 years, catching well in excess of one million birds over that period. He has been involved in the publication of two industry publications on the humane treatment and transportation of animals (Exhibits 5 and 6). He teaches Greidanus Poultry employees on the humane treatment and transportation of chickens. He has extensive experience in chicken catching and loading and was qualified as an expert in that field for the purposes of giving expert opinion evidence. Greidanus was not present for the loading of chickens on January 19, 2011, so most of his evidence related generally to

the procedures in place at Greidanus Poultry for loading chickens, how catching and loading occurs and the reactions of chickens in the process he has observed through his extensive experience. As general expert opinion evidence, Greidanus opined the average loading time per trailer is about two hours, with the trucker always present, as he has to move the truck ahead bit by bit and the farmer is responsible for being onsite but may not always be present. The processors inform the catching and loading crew what time to begin at the farm, while it is the trucker that informs the crew how many birds to load per crate, depending on the weight of the birds and the outside temperature. Greidanus told the Tribunal that his company had experienced a lot of problems shipping birds to Quebec because of the increased transport distance and the heavy size of birds that are shipped. The birds now grow so rapidly that they are stressed and it takes so little to make them die, he stated. Greidanus testified that he has seen birds dying in a crate and has seen a bird flip over and die in its crate. He says that, based on his professional experience and observation, when this occurs, the bird flips and flops and then a large number of these turn over and die on their backs and this can occur within the confines of a transportation crate. As well, Greidanus opined that it is also possible that a bird that is on its back in a crate can right itself onto its feet within the crate. Specifically regarding the incident on January 19, 2011, Greidanus told the Tribunal that he spoke by telephone with the producer, Rombouts, who said he had noticed a higher than average mortality rate during early January. Rombouts also told Greidanus that the loading that evening went well.

[45] When asked under cross-examination, Greidanus agreed that about 9,600 chickens were loaded by his crew in around two hours and that it was possible for a loader to load a chicken into the crate on its back, particularly with the heavier chickens. Greidanus added that he would not leave a chicken on its back in a crate but that “everyone is human and it is possible to miss [righting] a chicken [back onto its feet]”. He also told the Tribunal he could not remember the exact date of his call to the Rombouts.

Applicable Law and Analysis

[46] The Tribunal’s role is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the Act. The purpose of the Act is set out in section 3:

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.

[47] Section 2 of the Act defines “agri-food act” as follows:

2. ...“agri-food Act” means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act.

[48] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations to designate violations that may be proceeded with:

4. (1) The Minister may make regulations:

(a) designating as a violation that may be proceeded with in accordance with this Act

(i) the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act...

[49] The Minister of Agriculture and Agri-Food has made one such regulation, the Regulations, which designates as violations several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, as well as the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 to the AMPs Regulations, which includes a reference to subsection 139(2) of the *Health of Animals Regulations*.

[50] The courts have regarded this regime with some scrutiny, especially because the violations entail absolute liability. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, Justice Létourneau, writing on behalf of the Federal Court of Appeal, describes the regime as follows:

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.

[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.

[51] Moreover, the Federal Court of Appeal, in *Doyon*, points out that the Act imposes a heavy burden on the Agency:

[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation, and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.

[52] Section 19 of the Act reads as follows:

19. In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.

[53] Therefore, it is incumbent on the Agency to prove, on the balance of probabilities, all the elements of the violation. In the present case, for there to be a violation of subsection 139(2), the Agency must establish four elements as outlined in paragraph 4 above. As already stated, the parties do not contest that the Agency has proved the first two of these. What the Tribunal must consider now, given the abundance of direct and expert opinion evidence, which is largely in direct contradiction between the parties, whether the Agency has proven the other two elements of the violation.

[54] Counsel for the Agency, in its closing arguments at the hearing, directed the Tribunal to consider two cases already decided by the Tribunal. Counsel cited in support of its position the cases of *Transport Robert Laplante et Fils Inc. v. Canada (CFIA)*, 2010 CART 05 (*Laplante*) and *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, RTA-60347, issued March 4, 2009 (*Maple Lodge*). Both of these cases involved an alleged violation of subsection 139(2) of the *Health of Animals Regulations*. *Laplante* involved a pig with a fractured hind leg and *Maple Lodge* involved several injured chickens. The Tribunal's determination in *Laplante* resulted in the Notice of Violation being set aside while in *Maple Lodge* it was upheld. However, in both cases, the injury for which the Notice of Violation was issued and under examination by the Tribunal occurred when the animals were being unloaded. Thus, direct evidence could come from Agency witnesses and was held to be sufficient or wanting, depending on the case, to prove an allegation that the "unloading" of the animal(s) caused or was likely to cause injury or undue suffering to the animal(s) (Element #3); and there was a causal link between the loading or unloading, the likelihood of injury or undue suffering of the animal(s), and the alleged violator (Element #4) who was the person who had unloaded the animal.

[55] Here the case is much different because the charge relates to the loading, rather than the unloading of the animals. The question for the Tribunal to determine is whether the birds were improperly loaded, that is, loaded in a way that was likely to cause injury or undue suffering by Greidanus staff on the night of January 19, 2011. According to all the direct evidence provided by Greidanus Poultry witnesses, Souch and Buttar, as well as the comments of the producer on the catching process as recorded in the "*Chicken Farmers of Ontario Flock Information Reporting Form*" submitted by the Agency, the chickens were loaded according to the usual standard process and if a chicken was loaded on its back accidentally, it was righted to its feet before the crate was closed. The direct evidence is unequivocal that while it was humanely possible to miss one or two chickens that were not righted to their feet, missing 156—the number found dead on their back the next day at the abattoir was not possible. On the other hand, the Agency's expert opinion evidence is that it was not possible for 156 chickens to have died and flipped over onto their backs given the

pathology observed at the abattoir on January 20, 2011 (Lefebvre). But then again, perhaps it was possible for so many chickens to have flipped over en route and at the abattoir before unloading, given the professional opinion of experienced chicken catchers (Greidanus and Souch).

[56] The Federal Court of Appeal in *Doyon*, when judicially reviewing the Tribunal's finding regarding an alleged violation falling under a different, but related, section of the *Health of Animals Regulations* stated the following:

...

b) *Analysis and management of the evidence*

[54] The main function of a tribunal of first instance is to receive and analyse the evidence. In carrying out this important function, it may reject relevant evidence, but it cannot disregard it, especially if it contradicts other evidence of an essential element of the case: see Oberde Bellefleur OP Clinique dentaire O. Bellefleur(Employer) v. Canada (Attorney General), 2008 FCA 13; Parks v. Canada (Attorney General), [1998] F.C.J. No. 770 (QL); Canada (Attorney General) v. Renaud, 2007 FCA 328; and Maher v. Canada (Attorney General), 2006 FCA 223. If it decides to reject the evidence, it must explain why: ibidem.

[55] In the case at bar, the Tribunal briefly related the applicant's testimony, but excluded it without analyzing it or indicating why it was excluding it. Yet this testimony dealt with essential elements of the violation and contradicted that of the veterinary surgeon.

[56] Moreover, the applicant is a pork producer with twenty-nine (29) years' experience. Of his own accord, he took a course on the transportation and euthanasia of compromised hogs at a continuing education centre: see the Applicant's Record at page 35. He had no prior record when the proceeding was instituted. He had seen the hog over a long period and ensured that it would be transported in isolation, while the veterinary surgeon, as we will see later, saw the hog alive for five minutes at most. It was not in his interest to incur a \$2000 penalty for a hog worth \$100 when he would have spent only \$3.50 if he had decided not to include the hog in the load and to keep it at the farm: see Applicant's Record at page 73. The rejection of this credible testimony warranted an explanation that was never given.

...

[57] The Tribunal is mindful of these dicta from the Court in *Doyon* in this case and in this light, has carefully considered the evidence provided by both Greidanus Poultry and the Agency. The Tribunal received oral testimony from seven witnesses. The Tribunal has

no reason to question the credibility of any of those witnesses, as all were clear, enlightening, forthright, and direct in their presentation of evidence of what they witnessed on January 19 and 20, 2011, or of expert opinion evidence that they gave drawing on their own experience and professional background.

[58] Concerning Elements #3 and #4 of the alleged violation, the Tribunal has direct, unequivocal evidence from the Greidanus employees who provided eye-witness accounts that they followed normal catching and loading procedures on the night of January 19, 2011. Souch, as a loader, testified under oath that he neither loaded any birds on their backs, nor saw any birds on their backs when the lids were closed on the crates on the load leaving the Rombouts' farm. Buttar, as the catching and loading crew foreman that night, saw no birds on their backs when the lids were closed on the crates on the load leaving the Rombouts' farm either. This evidence was uncontradicted by any direct evidence produced by the Agency, as the latter produced documents, which also stated that the catching process that night was either "Good" or "Ok" on a document signed off by the producer. The Agency in its investigation of the alleged violation did not choose to collect any evidence from the producer, or the truck driver or anyone else that might have contradicted the direct evidence of Souch or Buttar.

[59] There is no compelling reason why the Tribunal should completely ignore this direct, uncontradicted evidence in favour of the evidence offered by the Agencies witnesses, who collected their evidence, not at the time of loading, but several hours and several hundred kilometres later at the time of unloading. Unlike the *Laplante* and *Maple Lodge* cases cited by Agency counsel, here the direct evidence from the catchers and loaders, unless it is untrustworthy, which the Tribunal has found that it is not, is the best evidence available to the Tribunal to determine if the Agency has proved Elements #3 and #4 of the alleged violation. While the evidence presented by Lefebvre and Fortin, without any direct evidence of a contrary state of affairs at the time of loading, might have been sufficient to prove the third and fourth elements of the alleged violation, the Tribunal cannot accept that it does so in light of credible direct evidence to the contrary. If it did, the Tribunal would run the risk of doing exactly what the Court cautioned the Tribunal not to do in the *Doyon* case.

[60] With respect to Element #3, therefore, there is insufficient evidence, on the balance of probabilities, to prove that the manner in which the chickens were loaded on January 19, 2011, "caused or was likely to cause injury or undue suffering to the animal(s)", as the direct evidence indicates that the chickens were loaded at the correct density in the upright position, or if the occasional chicken was initially loaded on its back it was righted to its feet before the crate was closed. Granted, the catchers and loaders are working very quickly, but the evidence was that they are trained professionals and, according to their training and experience, did their job correctly that night.

[61] Of course, what is unclear is exactly when and how the chickens did die. Experts on both sides had their theories. The veterinarians Lefebvre and Fortin had their theory that it was because the chickens were loaded on their backs and were not righted before transport which is in direct contradiction to the only direct evidence given on how the

loading occurred on the night of January 19, 2011. Greidanus has his theory that the chickens were large stressed birds that travelled a very long distance and died of a heart attack en route, which may or may not be consistent with the rare phenomenon mentioned by Lefebvre and Fortin, which has been observed in chickens called “flip-over disease”.

[62] Furthermore, any conclusion by the Tribunal that, on a balance of probabilities, the 334 dead chickens were likely to be caused injury or undue suffering because of the way they were loaded by Greidanus employees, would require the Tribunal to totally disregard or find completely untrustworthy the evidence of Buttar, Souch and the written declaration of producer Rombouts. The Tribunal found all the witnesses to be credible and therefore finds that the Agency has provided insufficient evidence to prove, even on a balance of probabilities, that the injury took place while the chickens were being loaded. Do other possibilities exist for where and how the injury and death of the chickens took place? Yes, the chickens might have been in a fragile state before loading, as indicated by the producer log sheets, showing a higher than normal mortality rate in the days and weeks before the shipment. The chickens might have experienced increased stress due to their heavy weight, the long distance and the long period of time between the farm of origin and the abattoir, which could have resulted in increased mortality while en route. But this is all speculation, as no one conclusion is obvious as to why the chickens died that night.

[63] The Tribunal is aware that the Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Subsection 18(1) of the Act reads as follows:

18. (1) *A person named in a notice of violation does not have a defence by reason that the person*

(a) exercised due diligence to prevent the violation; or

(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.

[64] The findings by the Tribunal above, however, do not relate to a defence of due diligence or mistake of fact by Greidanus Poultry. Clearly, had Greidanus Poultry raised such arguments, Parliament’s unequivocal statement on the issue in subsection 18(1) would have disallowed them.

[65] Given that section 18 of the Act, in particular, makes it impossible for an applicant to rely on evidence of past or best practices to defend against a charge, it would seem appropriate in the interest of fairness for the Tribunal not generally to accept from the respondent, evidence of similar past practices or activities of an applicant (unless they resulted in the issuance of a Notice of Violation which was not challenged or was upheld) in proving what might have happened on a particular day by the applicant. In this case, it is clear that Tabs 3-19 and 30, representing more than half of the evidence provided in the written submissions, relate to events that happened prior to January 19, 2011.

[66] Accepting such evidence would be in the nature of accepting “similar fact” evidence. While the Tribunal, under its enabling statutes, has a large latitude to accept many kinds of evidence, “similar fact” evidence is rarely held under Canadian law to be of much probative value. The Supreme Court has favoured an approach that allows the probative value of such evidence to be weighed against the prejudice that may be caused to the accused party. It should be noted that the term prejudice, in this instance, is not in relation to the case of the accused, but rather to the opportunity of the accused to engage in a fair proceeding. In the case of *R. v. Arp* [1998], 3 SCR 339, Justice Cory held that similar fact evidence must provide a significant probative value in comparison with the possible prejudice caused in addition to a significant degree of similarity in the evidence based upon an objective improbability of coincidence. There are also three potential risks that may arise from the admission of similar fact evidence. The first issue relates to the evidence being used in order to “paint” the accused as a “bad” person in order to assess guilt by character. The second seeks to punish an accused for past conduct, rather than the conduct that forms the subject of the present case. Lastly, similar fact evidence may be used to distract and confuse a decision-maker from the real issues of the case, often in order to hide gaps in the evidence provided.

[67] Concerning the application of similar fact evidence in matters that are before the Tribunal, there is little question that a Tribunal member has the option of considering and admitting similar fact evidence. But the value of such evidence appears quite limited. The primary objective of the Tribunal is the review of Notices of Violation issued in relation to violations of the Act. As such, past conduct would not provide any clarification on whether the violation occurred, but may be considered in a determination of the correctness of the quantum of the penalty assessed.

Conclusion

[68] Accordingly, the Tribunal concludes that, on a balance of probabilities, the Agency has failed to prove all of the essential elements of the violation, and that Greidanus Poultry, therefore, did not commit the alleged violation. Consequently, Greidanus Poultry is not liable for payment of the monetary penalty. Furthermore, because the Tribunal concludes that the Agency has failed to establish all of the required elements in support of the impugned Notice of Violation, it is not necessary to consider whether the Agency has proved that the amount of the penalty is justified under the Act and its Regulations.

Dated at Ottawa, Ontario, this 13th day of September, 2013.

Dr. Don Buckingham, Chairperson