



Citation: 0830079 *B.C. Ltd. v. Canada (Canadian Food Inspection Agency)*, 2013 CART 34

Date: 20131024
Docket: CART/CRAC-1694

Between:

0830079 B.C. Ltd., dba: S&S Transport Ltd., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

**With: Mr. Steve Heppell, representative for the applicant; and
Mr. Nathan Murray, 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 140(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, 0830079 B.C. Ltd., dba: S&S Transport Ltd., committed the violation set out in Notice of Violation 1213BC0115, dated January 4, 2013 and is liable to pay the respondent, the Canadian Food Inspection Agency, a monetary penalty of \$3,000 within thirty (30) days after the day on which this decision is served.

The hearing was held in New Westminster, BC,
Wednesday, June 19, 2013.

REASONS

Alleged Incidents and Issues

[2] On January 4, 2013, the respondent, the Canadian Food Inspection Agency (Agency), issued to the applicant 0830079 B.C. Ltd., dba: S&S Transport Ltd. (S&S Transport) a Notice of Violation alleging that S&S Transport had transported or caused to be transported animals by truck that were crowded to such an extent as to be likely to cause injury or undue suffering to them, contrary to subsection 140(2) of the *Health of Animals Regulations*. The Notice of Violation in question, #1213BC0115, relates to an incident that allegedly took place on July 26, 2012, at Langley, British Columbia.

[3] Subsection 140(2) of the *Health of Animals Regulations* reads as follows:

140. (2) *No person shall transport or cause to be transported any animal in any railway car, motor vehicle, aircraft, vessel, crate or container that is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.*

[4] In this case, when considering the validity of Notice of Violation 1213BC0115, the Tribunal must determine whether the Agency has established all of the elements required to support the impugned Notice of Violation, more specifically:

- Element #1 - an animal was transported in a crate on a truck;
- Element #2 - that crate on the truck was crowded;
- Element #3 – the crowding was to such an extent as to be likely to cause injury or undue suffering to any animal contained therein; and
- Element #4 - there was a causal link between the transportation, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and S&S Transport.

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

Procedural History

[6] Notice of Violation 1213BC0115, dated January 4, 2013, alleges that on July 26, 2012, at Langley, British Columbia, S&S Transport, [verbatim] “committed a

violation, namely transport or cause to be transported animals in an overcrowded conveyance contrary to section 140.(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] On January 18, 2013, the Agency was deemed to have served S&S Transport with the Notice of Violation. Under section 4 of the Regulations, the violation was classified as a “serious violation” for which the penalty assessed was \$6,000.

[8] In a faxed letter dated February 4, 2013, sent by registered mail on February 6, 2013, to the Tribunal, S&S Transport requested a review by the Tribunal of the facts of the alleged violation, in accordance with paragraph 9(2)(c) of the Act. Tribunal staff confirmed that S&S Transport wanted the Tribunal to review its file in English via an oral hearing.

[9] On February 26, 2013, the Agency sent a copy of its report (Agency Report) regarding the Notice of Violation to S&S Transport and to the Tribunal. The Tribunal received the Report on March 1, 2013.

[10] In a letter dated March 4, 2013, the Tribunal invited S&S Transport and the Agency to file any additional submissions with the Tribunal by April 3, 2013. This date was later extended by the Tribunal to April 26, 2013.

[11] On or about April 25, 2013, S&S Transport faxed a 26-page document entitled “Presentation to tribunal in Canadian Food Inspection Agency (CFIA) vs. S&S Transport Ltd.” to the Agency. As it was clear these documents were in the nature of additional submission that the Tribunal had invited the parties to submit, the Agency, on April 26, 2013, faxed the entire document (Additional Submissions) it had received from S&S Transport, along with a covering letter explaining same, to the Tribunal.

[12] On May 10, 2013, the Tribunal sent the parties a Notice of Hearing, indicating that the oral hearing requested by S&S Transport would be held on June 19, 2013, in New Westminster, British Columbia. The Tribunal confirmed that both parties received the Notice of Hearing. The hearing requested by S&S Transport was held on that day. S&S Transport was represented by its president, Mr. Steve Heppell, and the Agency was represented by its counsel, Mr. Nathan Murray.

The Evidence

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

For the Agency:

- Notice of Violation 1213BC0115, issued January 4, 2013, relating to an incident that allegedly took place on July 26, 2012, at Langley, British Columbia; and
- Agency Report dated February 26, 2013, concerning the alleged violation.

For S&S Transport:

- its Request for Review, dated February 4, 2013; and
- its Additional Submissions sent to the Agency on or about April 25, 2013, which were then forwarded to the Tribunal by the Agency on April 26, 2013.

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

For the Agency:

- Ms. Heather Craig (Craig), an inspector with the Agency; and
- Dr. Sonwinder Benipal (Benipal), a doctor of veterinary medicine with the Agency.

For S&S Transport:

- Mr. Steve Heppell (Heppell), president of S&S Transport.

[15] The parties also tendered two exhibits at the hearing:

For the Agency:

Exhibit 1 “Recommended code of practice for the care and handling of farm animals – Chickens, Turkeys and Breeders from Hatchery to Processing Plant”, published by the Canadian Agri-Food Research Council (CARC) (undated) (section 5.2.2 to 5.3.1 (pages 31 and 32))

For S&S Transport:

Exhibit 2 “Canadian Livestock Transport Training & Certification Program – Poultry Module”, published by the Canadian Livestock Transporters (2010) (only “Chapter 6 – The Transportation Process” was tendered as the exhibit although the entire manual was presented)

[16] The parties do not dispute certain 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 incidents of July 25 and 26, 2012. As well, the parties did not dispute any materiality of the Notice of Violation referring to an alleged violation occurring on July 26, 2012, at Langley, British Columbia, when the undisputed facts of the incidents that underlie the alleged violation are as follows:

- producer: Country Drive Poultry, whose farm is located at Aldergrove, British Columbia;
- catching and loading crew: Country Drive Poultry, or a crew arranged for and paid by Country Drive Poultry;
- transporter: S&S Transport with Mr. Michael James Johnson (Johnson), the S&S Transport employee driving the two loads in question between the producer's farm and the processing plant on July 25, 2012;
- processing plant: Lilydale Inc. (Lilydale), Abbotsford, British Columbia;
- type and size of chicken transported: breeder or heavy fowl weighing approximately 4 to 5 kilograms each;
- number of chickens loaded and transported and loading density of chickens per crate (or as described by the parties, "per hole"): 6,018 on two trailers, as follows: 3,600 in trailer #209 with 84 holes containing 28 chickens per hole and 48 holes containing 26 chickens per hole; and 2,418 in trailer #210 with 93 holes containing 26 chickens per hole;
- date and time of delivery of the two trailers by S&S Transport to Country Drive Poultry: July 25, 2012, at approximately 2:30 p.m.;
- date and start time of catching and loading at Country Drive Poultry: for the first trailer #209, July 25, 2012, at approximately 7:30 p.m.; for the second trailer #210, 9:30 p.m.;
- date and end time of catching and loading at Country Drive Poultry: for the first trailer #209, July 25, 2012, at approximately 9:30 p.m.; for the second trailer #210, 10:30 p.m.;
- date and time of departure of loaded trailers from Country Drive Poultry: for the first trailer #209, July 25, 2012, at approximately 9:40 p.m.; for the second trailer #210, 11:15 p.m.;

- date and time of arrival of loads at processor Lilydale: for the first trailer #209, July 25, 2012, at approximately 10:05 p.m.; for the second trailer #210, 11:35 p.m. by S&S Transport driver Johnson and who was only on Lilydale site on July 25, 2012;
- date and time of processing at Lilydale: for the first trailer #209, July 26, 2012, at 9:55 a.m.; for the second trailer #210, 12:00 p.m. (noon);
- total length of time from beginning of loading to beginning of processing: for the first trailer #209, 14 hours 25 minutes of which 25 minutes was driving time for the driver of S&S Transport and 11 hours and 50 minutes was waiting time before processing at Lilydale; for the second trailer #210, 14 hours 30 minutes of which 20 minutes was driving time for the driver of S&S Transport and 12 hours and 25 minutes was waiting time before processing at Lilydale; and
- final total number of chickens found dead at time of unloading at Lilydale: 827 with 703 from the first trailer #209 and 124 from the second trailer #210.

(Tabs 1, 2, 3, 4, 5, 11, 12 and 15 of Agency Report, the Additional Submissions of S&S Transport and oral testimony of Craig, Benipal and Heppell)

[17] 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 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 may act as the crew of catchers and loaders or may arrange for a crew to attend to the farm to complete this process. In the present case, the S&S Transport driver brought two trailers to Country Drive Poultry on the afternoon of July 25, 2012, and left them there to be loaded. Country Drive Poultry loaded the two trailers and later in the day, the S&S Transport driver drove the two trailers, one after the other, to the processor Lilydale. After a wait of several hours at the processor, the chickens were removed from the cages and once inside the abattoir, were killed and processed. The chickens were inspected for health and humane transportation concerns. When dead or infirmed chickens were found, they were counted, a report prepared, and in this case, enforcement action was commenced by the Agency against S&S Transport for violating humane transportation regulations.

[18] There was before the Tribunal direct evidence as to how the chickens were loaded at Country Drive Poultry on July 25, 2012, how they were hauled by S&S Transport that same day and how they were found at unloading at Lilydale on July 26, 2012.

[19] With respect to the loading of the chickens, the Agency has provided at Tab 18 of its Report and S&S Transport at Tab 3 of its Additional Submissions, a document which was

created by the processor Lilydale (and updated on June 29, 2012), for its processing schedule for Thursday, July 26, 2012, which shows an anticipated delivery from Country Drive Poultry of 6,200 fowl, aged 398 (days), weighing 3.8 (kgs), at a loading density of 18 birds per cage in three loads to be caught and loaded by Own (Country Drive Poultry) starting at 7:00 p.m. (the night before) and then driven to Lilydale by S&S Transport.

[20] Evidence provided to the Tribunal shows that the loading did not go according to the projected “processing schedule” referred to in paragraph 19. The Agency has provided at Tab 3 of its Report, a “Live Poultry Receipt” dated July 26, 2012, which indicates that a shipment of 6,018 chickens from Country Drive Poultry to Lilydale actually came in two loads instead of three with 26 to 28 chickens per cage, instead of 18 birds per cage.

[21] Evidence also shows that the mortality of chickens rose sharply from the first *ante mortem* inspection completed by Craig until the time that all the birds from the two loads were unloaded. At Tab 4 of the Agency’s Report, Craig notes that for trailer #209 at 6:04 a.m., she observed nine dead chickens in the load; at 8:20 a.m., she observed 28 dead chickens; at 9:55 a.m., when the unloading of this load began, she observed 47 dead chickens; at 10:20 a.m., she observed 200 dead chickens on trailer #209; and at some time later when the whole trailer had been unloaded, she observed that a total of 703 of the 3,600 chickens in trailer #209 had died during or before unloading.

[22] Again at Tab 4 of the Agency’s Report, Craig notes that for trailer #210 at 6:04 a.m. and at 8:20 a.m., she observed two dead chickens in the load; at 12:20 p.m., 20 minutes after the unloading of this load began, she observed 80 dead chickens; and at some time later when the whole trailer had been unloaded, she observed that a total of 124 of the 2,416 chickens in trailer #210 had died during or before unloading.

[23] Craig gave oral evidence that the two loads that were unloaded at Lilydale on July 26, 2012, were overcrowded. She testified that when she observed the birds she saw chickens pushed against the walls of the cages and that there were some heads of chickens sticking out of the cages and some were already dead. She also testified that the load should have come in on three trailers instead of two, and even then, the second one had the last three rows of cages empty. She testified that the proper loading density for these heavy fowl was 18 to 22 birds per cage.

[24] Craig referred the Tribunal to calculations of appropriate loading densities for poultry set out at Tab 6 of the Agency Report, calculations completed by the Agency for Lilydale, which Craig told the Tribunal had been obtained from the National Farm Animal Care Council. Benipal confirmed to the Tribunal that these calculations had been completed by the Agency’s Dr. Morton. These calculations used the same basic data as set out at page 32 of Exhibit 1 - “Recommended code of practice for the care and handling of farm animals - Chickens, Turkeys and Breeders from Hatchery to Processing Plant”. Using the data for weight and number of chickens loaded at Country Drive Poultry on July 25, 2012, Craig estimated that the loading density for trailer #209 should have been 19 birds per crate and for trailer #210 should have been 18 birds per crate. Under cross-examination, Craig told the Tribunal that to her knowledge, S&S Transport did only one of the four stages

of: loading the birds at the farm, transport of birds to Lilydale, waiting at Lilydale and unloading of the birds at Lilydale. Craig also added under cross-examination that while it might have been strange for a driver to refuse to transport chickens that were deemed upon their arrival at the Lilydale plant as “acceptable” for transport, her position was that she observed overcrowding in the trailers at her first observation of the birds on the morning of July 26, 2012, even though there were not many dead chickens yet. Craig also testified that it is Lilydale, and not the transporter, who determines how long the birds must wait for processing, and that on July 26, 2012, turkeys that had been delivered to the plant went first and the chickens in question had to wait in the queue for processing.

[25] Tab 8 of the Agency Report is a document entitled “Flock Sheet Corrective Action” issued by Lilydale dated July 26, 2012, which lists corrective actions as follows [*verbatim*]: “Country Drive: Both 209 & 210 exceed the recommended loading density per crate. will call Procurement to investigate with catching/hauling crew.”

[26] At Tab 10 of the Agency Report, Benipal, in her notes, records that she carried out *post mortem* examinations on three of the dead birds found on loads #209 and #210 and her examination revealed no evidence of disease. She also reported that an employee of Lilydale told her that the birds were supposed to be brought to Lilydale in three trailers, but instead came in one full trailer and one trailer that was two-thirds full. Tabs 14 and 17 of the Agency Report are the request for, and the results from, tests concerning the cause of death of birds on trailers #209 and #210. The British Columbia Ministry of Agriculture, Animal Health Centre, Final Report (Tab 17) indicates that the birds examined showed “No evidence for underlying infectious disease. Lesions are compatible with acute death due to suffocation and/or hyperthermia.” Benipal, in her oral testimony, told the Tribunal that her *post mortem* examination showed that the three birds she examined did not show any sign of disease and that the farmer had indicated to Lilydale staff that there was no indication of any disease in the flock at the farm of origin.

[27] Tabs 11 and 12 of the Agency Report are documents entitled “Poultry Vehicle Transportation Inspection Report - 5224”, with the Report at Tab 11 for trailer #209 and the Report at Tab 12 for trailer #210. Both reports contain information about the loads that were delivered to Lilydale. Both were completed by Benipal on August 13, 2012, and both indicate at box 20 that the “Bird Condition at abattoir” was “Acceptable” but at box 26 that the “Shipment [is] not in compliance.” In her oral testimony, Benipal explained to the Tribunal that inspectors can deny loads where there are issues relating to disease or humane transportation. Benipal, under cross-examination, agreed that once the loads arrived at Lilydale, it was Lilydale that had responsibility for the birds and directed all aspects as to how and where they would wait, when they would be unloaded and the time of their slaughter.

[28] At Tab 13 of the Agency Report, Agency Inspector Ashley Cillis (Cillis) notes that she “...spoke with truck driver Steve who said the farmer from Country drive was told to load 24 birds per crate. When the truck driver Mike went to pick up the load he noticed the crates looked overstocked and he told the catchers to put in less birds per crate (when truck driver Mike showed up the catchers were still in process of catching and loading

birds onto trailers).” At Tab 21, there is a statement (although it is unclear by whom at the Agency it was taken) dated November 6, 2012 from Sharon Ahner, an employee of Lilydale which states that she recalls the July 26, 2012, shipments of birds from Country Drive Poultry. She recalls the loading densities of those loads to be 26 to 28 birds per crate for trailer #209 and 26 for trailer #210. She also notes that the producer requested three trailers for the birds but only filled two.

[29] In S&S Transport’s Additional Submissions, Heppell states *[verbatim]*:

...

In the case before us today, the agreement between Lilydale Poultry and S&S Transport was for S&S Transport to deliver trailers with cages to Country Drive Poultry, and after they were loaded to deliver the trailers to the Lilydale Abbotsford plant. It was arranged on July 25 in a phone call between myself and the owner of Country Drive Poultry to deliver trailers to Country Drive by 3.00 pm and have a truck return to the farm and pick up the trailers about 9.00 pm. The Lilydale kill schedule (TAB 3) shows Country Drive Poultry was supplying his own catching crew. S&S Transport did not engage in the catching and loading of poultry from Country Drive Poultry. In this agreement for the movement of poultry from Country Drive Poultry on July 26, 2012, the owner of Country Drive Poultry was to have his own workers catch and load his own poultry into caged trailers supplied by S&S Transport Ltd. ...

S&S Transport, at this stage is denied any input in the loading process and is not present during the catching and loading process. ... At 9:40pm S&S hooked up to trailer 209 and at 11:15 pm hooked up to trailer 210 at Country Drive Poultry and assume responsibility for the movement of the trailers from Country Drive Poultry, to Lilydale Poultry. (TAB 4)

S&S Transport driver Mike Johnson has attended and passed the nationally recognized Canadian Livestock Training Course (TAB 5) and is knowledgeable in loading and transport of poultry. And has 12 years’ experience in transporting poultry

The duration of S&S transporting these birds including care and custody of the poultry between Country Drive Poultry and Lilydale Poultry in Abbotsford, BC. Was 25 min for trailer 209, 9:40 pm-10:05pm and 20 min for trailer 210, 11:15pm-11:35pm. (TAB 4) S&S Transport took the most direct route from Country Drive Poultry to Lilydale Poultry. ...

The arrangement with Lilydale Poultry is for S&S Transport to drive into the holding yard at Lilydale Poultry Marshal Road in Abbotsford, park the trailers in there designated parking spots and submit documentation on the load. Then the driver is to disconnect from the trailer and leave the yard. At this time S&S Transport has no further authority over the poultry. ... From this point

forward, S&S Transport is denied any input into the holding conditions, length of time waiting for slaughter or any other issues involving the birds inside the cages owned by S&S Transport. The interview with Gerry Beadle plant manager at Lilydale Abbotsford plant April 15 2013, it is clear S&S Transport has no authority or decision making ability. (TAB 7)

...

[30] During his oral testimony, Heppell told the Tribunal that he was born and raised on a poultry farm and after managing a turkey farm with his father, he bought his own farm, following which, five years ago, he purchased S&S Transport, which he has managed full-time ever since. The company has five trucks and eight trailers, which haul poultry to Lilydale, from farm to farm and from farms to other processors. With respect to the loads hauled on July 25, 2012, Heppell told the Tribunal that the birds were technically purchased at the farm by Lilydale and once the birds were loaded in the crates, they became the property of Lilydale. Heppell explained that Country Drive Poultry farm has a narrow driveway and only has space for two trailers at a time. Heppell stated that the arrangement with his company was for his driver to go back to the farm midway through loading to pick up the first trailer and then bring a third trailer. When the driver returned to the farm to fill out the paperwork before delivering the first trailer to Lilydale, the farmer informed him of the number of chickens that had been loaded per crate and in doing the math, the driver realized that if he brought a third trailer, it would remain empty and would have to be taken back empty. As such, the driver took the first trailer, came back empty, and then took the second trailer when it was finished loading. Heppell told the Tribunal that his driver's responsibility was only to move the trailers and that he wasn't authorised to make any decisions on the total number of birds loaded or the number of birds loaded per crate. When the driver arrived and the loading density was different than what had been specified, it did not appear abnormal as many factors may change what density at which the birds would be loaded. Heppell told the Tribunal that in the past the loading density for this type of load was 28 birds per cage. Moreover, for the welfare of animals, it is preferable that the crates are full, because if the birds have too much room to move around, they can sustain broken or dislocated legs. Finally, Heppell testified that while the catching is paid for by the farmer, the driving down the road is paid for by the processor, and all decisions regarding wait times, unloading at the plant and processing matters are the responsibility of the processor.

[31] Under cross-examination, Heppell told the Tribunal that there is no law that says S&S Transport can't refuse to deliver a trailer if it is in violation, but he added that refusing to haul a load might also result in the birds just sitting there until they die. Heppell agreed that while there would be nothing preventing S&S Transport from working with a farmer to reload a trailer so that it was less densely loaded, practically-speaking S&S Transport would not have the manpower to do so and that it would be up to the catching crew to complete such a reload. Finally, Heppell added that it is not within the ability of S&S Transport to set loading densities, but rather it is between the farmer, the processor and the catching crew to arrive at that number.

Applicable Law and Analysis

[32] 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.

[33] 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.

[34] 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...

[35] The Minister of Agriculture and Agri-Food has made one such set of regulations (the AAAMP 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 AAAMP Regulations, which includes a reference to subsection 140(2) of the *Health of Animals Regulations*.

[36] 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.

[37] 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.

[38] 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.*

[39] The charge in this case against S&S Transport relates to an allegation that it transported chickens in a container that was crowded to such an extent as to be likely to cause injury or undue suffering to any chicken therein. As noted in paragraph 4 above, establishing a violation requires the Agency to prove four elements, which in this case are:

- Element #1 - an animal was transported in a crate on a truck;
- Element #2 - that crate on the truck was crowded;
- Element #3 - the crowding was to such an extent as to be likely to cause injury or undue suffering to any animal contained therein; and
- Element #4 - there was a causal link between the transportation, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and S&S Transport.

[40] Given the evidence presented in this case, it is clear, and the Tribunal so finds as fact, that chickens were transported from Country Drive Poultry to Lilydale in trailers

owned and driven by S&S Transport. As such, the Agency has proven the first element of the alleged violation.

[41] The evidence of Agency witnesses Craig and Benipal, as well as the Lilydale notice for corrective action (Tab 8 of the Agency Report) and its processing schedule (Tab 18 of the Agency Report and Tab 3 of S&S Transport's Additional Submissions), all indicate that the loading density for the loads transported was 26 to 28 birds per crate. Furthermore, this loading density far exceeded the 18 to 22 birds per crate that Lilydale or the Agency had agreed was an acceptable loading density for loads hauled by S&S Transport. From this evidence, the Tribunal concludes that the crates on trailers #209 and #210 loaded, hauled and unloaded on July 25 and 26, 2012, were crowded well beyond established loading densities, and as such, the Agency has proven the second element of the alleged violation.

[42] The Tribunal finds as fact that by the time the two loads of chickens, loaded on July 25, 2012, and delivered to Lilydale that same day, were slaughtered by mid-day on July 26, 2012, 827 (with 703 from the first trailer #209 and 124 from the second trailer #210) of the 6,018 chickens had died. *Post mortem* examinations and pathology reports from an independent laboratory showed that there was no evidence of underlying infectious disease in the chickens and that their acute death could be attributed to suffocation and/or hyperthermia which, more probably than not, was caused by the overcrowding of birds into their transportation crates. The evidence also shows that the negative effects of the overcrowding were experienced exponentially over time by the chickens with only 11 deaths observed at 6:05 a.m., and 827 deaths observed by the early afternoon when unloading had finished. With the pathology report ruling out disease, the Tribunal is convinced, on a balance of probabilities, that the chickens suffered and died, either by suffocation or by hyperthermia in increasing numbers on July 26, 2012, due to the fact that they were overcrowded in their crates while waiting a significant period at Lilydale before they were processed. Given this finding by the Tribunal, the Agency has proven the third element of the violation that the overcrowding of the crates caused or was likely to cause injury or undue suffering to the animals contained therein.

[43] All that remains then is proof by the Agency, on the balance of probabilities, of the fourth element of the violation—that there was a causal link between the transportation, the crowding, the likelihood of injury or undue suffering of the animal(s) due to crowding, and S&S Transport. On this point, S&S Transport argues there is no such causal link. The actual hauling time by the S&S Transport driver was less than 30 minutes for each of the loads of chickens on the evening of July 25, 2012. Then each of the loads of chickens sat at the processor's yard for several hours until mid- or late-morning on July 26, 2012, when they were processed. S&S Transport makes the argument that there were four distinct phases in the chickens moving from the farm to the processor. Phase 1 was the loading of the chickens into the S&S Transport trailers. Phase 2 was the hauling of the chickens from Country Drive Poultry to Lilydale. Phase 3 was waiting at Lilydale until it was time for the loads to be processed while Phase 4 was the unloading and processing of the loads at Lilydale. From the evidence, the amount of time each phase took is as follows: Phase 1: about one to two hours; Phase 2: about 0.5 hours; Phase 3: about 12 hours; Phase 4: about one to two hours. S&S Transport argues that its minimal involvement in the entire

sequence of loading to unloading should absolve it of any liability. Further, it argues that the company had no real control over loading densities. Its employee did his job in hauling the chickens for a mere 30 minutes or less and then the company's role was finished. The chickens died, or mostly died, at Lilydale because of Country Drive Poultry's or Lilydale's decision on loading densities and as such, there is no causal link between the transportation, the overcrowding, the likelihood of injury or undue suffering of the animals due to overcrowding and S&S Transport itself.

[44] The Tribunal is not convinced by S&S Transport's argument on this point, that it was not causally linked to anything other than for the 30 minutes or less where it was directly involved in hauling the chickens between Country Road Poultry and Lilydale. The evidence shows that S&S Transport delivered its trailers to Country Road Poultry in the early afternoon of July 25, 2012. Its driver returned in the evening and saw that instead of three trailers being needed, Country Road Poultry catchers had filled only one and two-thirds trailers. This realization alone might reasonably have set off alarm bells for all parties involved in the loading, hauling and processing of these chickens. Even though prior documentation had signalled that three trailers should have been necessary, the driver chose to drive only the two trailers to Lilydale and leave them there, in S&S Transport trailers, for processing which would occur hours later, albeit upon the instructions of Lilydale. The Tribunal finds that each of the actors in the process, that is Country Drive Poultry, S&S Transport, and Lilydale, was "connected with" or causally linked to the transportation, the overcrowding, and the likelihood of injury or undue suffering of the animals due to overcrowding. While the catching crew, and Country Drive Poultry that had employed them, had perhaps the most direct link to the overcrowding, and a likelihood of injury to the birds, both S&S Transport and Lilydale were also undeniably "connected with" the transportation and the likelihood of injury or undue suffering of the animals due to overcrowding of the chickens on July 25 to 26, 2012.

[45] Counsel for the Agency cited a number Tribunal decisions where the definition of "transportation" or "transport" under the *Health of Animals Regulations* have been considered, including *Sure Fresh Foods v. Canada*(CFIA), 2010 CART 16; *Ménard v. Canada*(CFIA), RTA 60126; and, *Glenview Livestock Ltd. v. Canada*(CFIA), RTA 60162. The Tribunal is also mindful of guidance from the Federal Court of Appeal in *Canada (A.G.) v. Ouellet*, 2010 FCA 268, which dealt with the judicial review of a Tribunal decision considering a violation under subsection 141(1) of the *Health of Animals Regulations*, which reads "...no person shall load on any railway car, motor vehicle, aircraft or vessel and no carrier shall transport animals of different species or of substantially different weight or age unless those animals are segregated...". In that case, the Federal Court of Appeal specifically rejected a Tribunal finding that "transport" ceases when the animals are in their conveyance awaiting their imminent unloading at an abattoir. Therefore, it appears that the definition of "transportation" under the *Health of Animals Regulations* is now quite settled law. While "transportation" obviously includes the actual time "on the road", it has several stages, including the physical actions of loading, hauling and the unloading of animals. Without a doubt, the causal link in *Ouellet*, was temporally close and very direct. In that case, the transporter was the actor that performed the prohibited act as it was the transport driver who, while the load was waiting for unloading at the abattoir, allowed a

cow and the calves which had been separated to co-mingle contrary to subsection 141(1). In that case, the waiting time to be unloaded was a mere 10 minutes. However, even in the present case, where each of the actors actively contributed to the one or more of the loading, hauling and unloading of the animals, a causal link, albeit less direct than the one noted in *Ouellet*, is still present. On the balance of probabilities, the evidence before the Tribunal is sufficient to hold that the Agency has proven the fourth element of the offence.

Defences Available to S&S Transport

[46] The Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the Act states:

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.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

[47] When an administrative monetary penalty has been enacted for a particular violation, as is the case for subsection 140(2) of the *Health of Animals Regulations*, S&S Transport has little room to mount a defence. In the present case, section 18 of the Act excludes practically any excuse that the company might raise including any claim by the driver that he did his best to intervene to ensure that the birds were not loaded in an overcrowded manner or that he believed that they were not overcrowded. Ultimately, it is the responsibility of every actor in the chain of transporters to ensure that the Regulations are respected. Given Parliament's clear statement on the issue, the Tribunal finds that S&S Transport has not raised any permitted defences under section 18.

[48] However, S&S Transport did raise another argument in its defence, alleging that it has *[verbatim]*: "...been denied a process which is "fair" by not being heard during the investigation. Further inquiries with Country Drive Poultry would have exposed additional facts that contributed to the high mortalities at Lilydale Poultry on July 26, 2012. How can an investigation be considered complete and fair when 2 of 3 parties involved were not interviewed?" (Additional Submissions of S&S Transport, page 1). While it may be frustrating for a party to see itself charged with a violation under the *Health of Animals Regulations*, when other parties may have been more clearly involved in the events under investigation, the Agency has a large degree of discretion in how it conducts its investigations and against whom it issues notices of violation. The Tribunal can, of course,

examine if the Agency somehow carried out its responsibilities in bad faith with respect to a party under investigation. In the case of *Amalia Eustergerling v. Canada (CBSA)*, 2012 CART 19, the Tribunal noted at paragraph 44:

[44] In the present case however, in discharging her public duty, Inspector 10481 did not depart from the lines or objects of the statute under which she was acting. She did not abuse her discretion towards Eustergerling or act in bad faith. ... In acting within the parameters of these legislative instruments, Inspector 10481 was free to exercise her discretion, once she was convinced that Eustergerling had committed a violation, by issuing to her a Notice of Violation with Penalty. No doubt, Inspector 10481 had a choice, and not a duty, to issue a Notice of Violation with Penalty or a Notice of Violation with Warning, and given the circumstances, Inspector 10481 felt that the issuance of a Notice of Violation with Penalty was warranted.

[49] Likewise in this case, there is no suggestion that the Agency was acting outside the parameters of its legislated mandate or in bad faith, and as such, it enjoys a broad discretion to issue notices of violation. If challenged however, it then becomes the Agency's responsibility to prove the validity of the violation, which it has done in this case. While it may be the case that only S&S Transport was pursued by the Agency in this case, and that such a course of action may appear "unfair" to S&S Transport or even to members of the general public, the Agency has proven the essential elements to support the Notice of Violation in question against S&S Transport.

Penalty, Quantum and Removal of All Record of the Penalty After Five Years

[50] The Tribunal concludes that the Agency has, on a balance of probabilities, proven all the essential elements of the violation and, therefore, the Notice of Violation with Penalty is upheld. Furthermore, having found that S&S Transport has raised no legally permitted defence to the alleged violation, the only issue that remains to be determined by the Tribunal is whether the Agency has correctly assessed the Total Gravity Value for the violation and then made the appropriate penalty adjustment, if any is necessary, under the Act and the Regulations.

[51] In the circumstances and given the evidence in this case, the Tribunal finds that a penalty of \$6,000 cannot be justified under the Act and the Regulations. The Tribunal instead finds that a penalty \$3,000 is justified under the circumstances for the following reasons.

[52] The calculation of the appropriate penalty begins with a determination of the status of the violation being minor, serious or very serious as per Schedule 1 of the Regulations. A violation of subsection 140(2) of the *Health of Animals Regulations* carries with it the classification of being a "serious violation". At the time of the violation, section 5 of the Regulations states that a serious violation carries with it a penalty of \$6,000. From the base amount of, in this case \$6,000, the penalty can either be increased or decreased based upon

three factors: (1) prior violations; (2) degree of intentionality; and (3) harm done. Values between 0 and 5 are assessed by the Agency for each of the three factors and then totalled to determine the total gravity factor which will then determine the final adjusted penalty amount. If the total gravity factor is between 6 and 10, the base penalty amount is not adjusted. If the total is below 6, the penalty is reduced by up to 50% and if it is above 10, the penalty is increased by up to 50%.

[53] In the present case, the Agency has assessed S&S Transport with a total of 8 and, therefore, has not adjusted the penalty, as per item 6 of Schedule 2 of the Regulations. The Agency has arrived at the total of 8 by assessing: (1) 0 points for prior violations, acknowledging at page 15 of the Agency Report that the company has "NIL" prior violations within the previous five years; (2) 3 for degree of intentionality, alleging that the violation subject to the assessment was committed through a negligent act and listing facts in support as follows: *"S&S TRUCKING disregarded the recommendations/request of LILYDALE INC. to place 18 birds per crate in 3 trailers. Statements to LILYDALE staff indicate the driver's acknowledgement and his advisement to the catching crew that the birds were being overloaded. However, the transport continued."*; and (3) 5 for harm done, alleging S&S Transport's violation caused serious harm to animal health and listing facts in support as *"Failing to adhere to the recommended number of birds per crate during transport resulted in the death of 827 birds."*

[54] At the hearing, counsel for the Agency chose to present no additional evidence, either through witnesses or by written submission in support any of the Agency's assessments. Counsel simply informed the Tribunal that the appropriateness of the penalty was set out at page 15 of the Agency Report. An examination of page 15 of the Agency Report provides very limited justification for the assigned values. However, regarding the first factor, the Tribunal agrees with the Agency's gravity assessment of 0. With respect to the second and third factors, the Tribunal does not find that the Agency has adduced sufficient evidence, on the balance of probabilities, to support its penalty adjustment calculation.

[55] Regarding the second factor, Schedule 3, Part 2 of the Regulations outlines four options: (1) 0 points for "the violation subject to the assessment is committed without intention or negligence"; (2) 0 points for "the person who commits the violation subject to the assessment makes a voluntary disclosure of the violation and takes necessary steps to prevent its re-occurrence"; (3) 3 points for "the violation subject to the assessment is committed through a negligent act"; (4) or 5 points for "the violation subject to the assessment is committed through an intentional act". The evidence submitted by the Agency does not support a finding by the Tribunal that "the violation subject to the assessment [was] committed through a negligent act". The evidence presented was not that Johnson, the driver for S&S Transport, negligently disregarded the recommendations of Lilydale, but instead believed he was powerless to affect how those recommendations were calculated, communicated and executed by the catching crew. It was the catching crew who decided not to follow the recommendations that led to the overcrowding, and while S&S Transport cannot use this fact as a defence to the alleged violation, the Tribunal finds it would be inappropriate to further penalize S&S Transport to accept that it was negligent in

not intervening to insist upon a certain loading density for the loading of the chickens. The Agency's own witness Cillis sets out in her notes at Tab 13 of the Agency Report that "When the truck driver Mike went to pick up the load he noticed the crates looked overstocked and he told the catchers to put in less birds per crate". Such does not constitute negligence on the part of Johnson. Perhaps if he had done more, he might have prevented S&S Transport from being issued a notice of violation. What the Agency has failed to prove, on the balance of probabilities, is that it was the negligence of Johnson that caused the violation currently under review. As a result, the only remaining option for the second factor is for the Tribunal to hold that proper gravity assessment is that the violation was committed without intention or negligence, and therefore, assign a gravity value of 0.

[56] With violations under the Act already absolute liability offences, the gravity value for the third factor of "harm", requires the party alleging harm to prove that such harm, depending on the value assessed, would have, or did, cause the harm alleged by the breach of the Regulation's provision. With respect to the present case, it would appear that the producer, the transporter and the processor contributed to the untimely demise of 827 birds on trailers #209 and #210. Of these three players, S&S Transport's involvement was the shortest. It is a stretch indeed to attribute the harm ultimately caused to the chickens during a period of under 30 minutes per load, when that segment of the process appeared to go as planned, as what "caused the serious harm to animal health" as alleged by the Agency at page 15 of its Report. The Agency has not led sufficient evidence, in the Tribunal's opinion, to prove on a balance of probabilities, that it was the activities of the S&S Transport driver that lead to "serious harm to animal health". In fact, given the evidence before the Tribunal, it was more likely that it was the activities of the catching crew or of the processor, than that of S&S Transport, that led to the serious harm in this incident. While the driver's failing to adhere to the recommended number of birds per crate during transport is the argument advanced by the Agency to support its gravity value for the third factor, it was clear from the evidence that there was at least a little confusion as to what that "recommended" number should have been (18-22, 24, and 28 were suggested in the evidence by the parties) and even if he knew the "recommended" number, there was the practical improbability that he could have prevailed upon the catching crew to reload the two loads into three trailers. This evidence suggests to the Tribunal that the present assessment for the third gravity factor cannot be sustained at a value of 5. Nor can the third gravity factor be assessed a value of 3 because there is again a lack of evidence to sustain such a finding against S&S Transport. As a result, the only remaining option with respect to the appropriate gravity assessment for the third factor is that the violation, as it relates to the activities of S&S Transport at least, was committed at the lowest level. The Tribunal therefore assigns the third factor a gravity value of 1.

[57] The Tribunal finds that the total gravity value for the penalty adjustment in this case is not equal to 8, as argued by the Agency, but rather is equal to 1, as follows: (1) 0 for prior violations; (2) 0 for degree of intentionality; and (3) 1 for degree of harm done. As the Tribunal assesses the total gravity value for the present violation at 1, Schedule 2 of the Regulations directs that the original penalty amount should be reduced by 50% and the Tribunal so reduces the original penalty established by the Agency.

[58] Consequently, the Tribunal, by order, determines that S&S Transport committed the violation and orders it to pay the Agency a monetary penalty of \$3,000 within 30 days after this decision is served.

[59] The Tribunal wishes to inform S&S Transport that this violation is not a criminal offence. After five years, it will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the Act:

23. (1) Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from

(a) where the notice of violation contained a warning, the date the notice was served, or

(b) in any other case, the payment of any debt referred to in subsection 15(1),

unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.

Dated at Ottawa, Ontario, this 24th day of October, 2013.

Dr. Don Buckingham, Chairperson