



Citation: *Finley Transport Limited v. Canada (Canadian Food Inspection Agency)*, 2013 CART 42

Date: 20131227
Docket: CART/CRAC-1604

BETWEEN:

Finley Transport Limited, Applicant

- and -

Canadian Food Inspection Agency, Respondent

BEFORE: Member Bruce La Rochelle

**WITH: John Finley, representing the Applicant; and
Ayesha Laldin, representating the Agency**

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of subsection 140(2) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following an oral hearing and a 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 committed the violation, as set out in Notice of Violation 11120N4205 dated November 21, 2011, and is liable to pay the respondent, the Canadian Food Inspection Agency, a monetary penalty of \$ 6,000, within thirty (30) days after the day on which this decision is served.

The hearing was held in Sarnia, ON,
On Tuesday, May 07, 2013.

REASONS

Alleged Incident and Issues

[2] This case concerns the general distress of transported hogs, including the deaths of three hogs in a transport vehicle, on a hot day in August 2011. The respondent, the Canadian Food Inspection Agency (Agency), alleges, in Notice of Violation 1112ON4205, that on August 5, 2011, at Petrolia, Ontario, the applicant, Finley Transport Ltd. (Finley Transport) committed a violation, namely (quoted *verbatim*) "Transport or cause to be transported animals in an overcrowded conveyance. To wit: 3 Dead hogs on arrival." This is alleged to be a violation contrary to subsection 140(2) of the *Health of Animals Regulations* (C.R.C., c. 296) (HA Regulations), which 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.*

[3] In the Notice of Violation, the alleged violation is categorized as a serious violation, for which a penalty of \$6,000 is imposed. Such categorization is in accordance with the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187) (Regulations). Under Schedule 1, Division 2, Item 245 of these Regulations, the violation, described as "Transport or cause to be transported animals in an overcrowded conveyance" is legislatively prescribed as "serious". The penalty amount is referenced to subsection 5(3) of these Regulations, which reads as follows:

5. (3) *The amount of the penalty in respect of a violation that is committed by a person in the course of business or in order to obtain a financial benefit is \$6,000 for a serious violation...*

In accordance with section 6 and Schedule 3 of the Regulations, the penalty amount may be adjusted upwards or downwards by up to 50%, depending on the assessment of gravity. In the current case, the gravity assessment, to be later reviewed, did not result in an adjustment to the penalty amount.

[4] The Tribunal must determine whether the Agency has established, on the balance of probabilities, all the elements required to support the impugned Notice of Violation, more specifically:

- (i) Whether Finley Transport transported or caused to be transported the hogs in question and;

- (ii) Whether the vehicle in which the hogs were transported was crowded to such an extent as to be likely to cause injury or undue suffering to any hog transported in that specific vehicle.

[5] Furthermore, if the Tribunal finds that the Agency has established, on the balance of probabilities, all 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 under the Regulations. The Tribunal, if it disagrees with the gravity assessment of the Agency, may, of its own volition, adjust the penalty amount upward or downward, in accordance with the regulations and pursuant to paragraph 14(2)(b) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act) (S.C. 1995, c. 40), which reads as follows:

14. (1) After concluding a review requested under this Act, the Tribunal shall, by order, as the case may be,

...

(b) determine whether or not the person requesting the review committed a violation and, where the Tribunal decides that the person committed a violation but considers that the amount of the penalty for the violation, if any, was not established in accordance with the regulations, the Tribunal shall correct the amount of the penalty,

...

[6] The general legislative schema has been canvassed in other Tribunal decisions, such as *Dykman Farms v. Canada (CFIA)*, 2012 CART 17, at paragraphs 24 to 29, and paragraphs 33 to 35.

Procedural History

[7] Notice of Violation 1112ON4205, alleging the violation previously described, was issued on November 21, 2011, under signature of the Regional Director of the Agency. The Notice of Violation was served on Finley Transport by registered mail on December 1, 2011.

[8] By letter dated December 28, 2011, received by the Tribunal via fax on the same date, Finley Transport requested a review (Request for Review) of the Notice of Violation. The Request for Review was jointly submitted by Ian Finley and John Finley, on behalf of Finley Transport. John Finley is a Director and the President of Finley Transport. Ian Finley

is a Director and the Vice-President of Finley Transport (Corporate Profile of Finley Transport Limited, included as Tab 15 of the Agency Report.).

[9] Under cover of a letter dated January 17, 2012, and received by the Tribunal on January 18, 2012, the Agency filed its Regional Administrative Monetary Penalty Report (Agency Report). In its letter, the Agency advised the Tribunal that a copy of the Agency Report had been concurrently sent to Finley Transport.

[10] By letter sent via email and regular mail on January 18, 2012, the Tribunal advised the Agency and Finley Transport that any additional submissions should be made by February 20, 2012.

[11] Between January 2012 and March 2013, there were further written exchanges between the parties and the Tribunal, including the submission of additional information by the Agency (two academic articles), plus adjournment requests from both parties.

[12] On March 6, 2013, a Notice of Hearing was sent by the Tribunal, via email scan and registered mail, to the Agency and Finley Transport, establishing a hearing date of May 7, 2013, in Sarnia, Ontario. This date was established following the establishment of earlier hearing dates in November 2012 and March 2013, which were changed in response to adjournment requests by the parties. The Tribunal granted the adjournment requests, based on the parties' consent: the November 2012 date, on consent of Finley Transport, at the request of the Agency, and the March 2013 date, on consent of the Agency, at the request of Finley Transport. The hearing was held, as rescheduled, on May 7, 2013.

[13] During the course of the hearing, the Tribunal requested further evidence and submissions from the Agency, with a right of reply accorded to Finley Transport. On May 10, 2013, via letter from Tribunal Member La Rochelle, sent to the parties via email scan and regular mail, the request for further evidence and submissions was particularized. In the letter, that which was required to be submitted by the Agency and that which might be submitted, in the discretion of the Agency, was distinguished. The information was to be submitted by the Agency by June 7, 2013, after which Finley Transport was accorded a thirty-day period, in which to reply. In addition, Finley Transport was requested to clarify the representative role of John Finley, given that the Tribunal's prior person of contact was Ian Finley.

[14] On June 5, 2013, by way of letter to the Tribunal via email scan, Ian Finley clarified the Finley Transport representative role of John Finley.

[15] On June 6, 2013, via email scan, the Agency responded to the Tribunal's request for further information and submissions, which were copied to Finley Transport.

[16] On June 10, 2013, a hard copy of the Agency's further information and submissions, with tabbed appendices, was received by the Tribunal, via courier. Finley Transport made no further submissions in response.

Evidence

a) Written Evidence of the Parties

[17] The written evidence of the parties before the Tribunal is therefore comprised of the following:

- i. The reasons contained in the initial Request for Review by Finley Transport, dated December 28, 2011;
- ii. The evidence contained in the Agency's Report, submitted January 18, 2012;
- iii. Two articles submitted by the Agency and permitted by the Tribunal to be late filed, effective March 15, 2012, being: (a) Sunstrum and Haley, "Clinical Signs of Stress in Finisher Pigs Transported to Market in the Summer" *Swine News* (30: 8, 2007); and (b) Dewey, Haley, Poljak, Friendship and Widowski, "Transport Losses in Finishing Pigs" (2009 Centralia Swine Research Update);
- iv. Letter from Finley Transport of June 5, 2013, in relation to the representative status of John Finley and
- v. Further evidence of the Agency of June 6, 2013 (Further Evidence and Submissions), made in response to the Tribunal's request.

[18] In addition, at the hearing, the following documents were submitted as exhibits by the parties:

- i. Two decisions of the Tribunal (*Wendzina v. Canadian Food Inspection Agency*, RT #60288 [2007] and *Edwards v. Canadian Food Inspection Agency* RT #60250 [2006]), plus a decision of the Federal Court of Appeal (*Fermes G. Godbout & Fils v. Canada (CFIA)*, 2006 FCA 408. The decisions were collectively entered as Exhibit 1, submitted by the Agency. The Tribunal acknowledges that while copies of Tribunal decisions and court jurisprudence were submitted as Exhibit 1, they should not have been accepted or entered by the Tribunal as such, as they are not properly evidence;

- ii. Exhibit 2, being *Recommended code of practice for the care and handling of farm animals: Transportation* (the Code) (Canadian Agri-Food Research Council, 2001), submitted by the Agency and being a duplicate of that contained in Tab 9 of the Agency Report;
- iii. Exhibit 3, being “Livestock Weather Safety Index – Relative Humidity Levels (%): Market Hogs”, Ontario Farm Animal Council and Ontario Pork, undated, submitted by the Agency as a superior quality copy to that found in Tab 11 of the Agency Report;
- iv. Exhibit 4, being Zurbrigg and van Dreumel, “Investigating in-transit losses of market hogs”, a summary of research, published by Ontario Pork as Ontario Port Proposal #12-019, submitted by Finley Transport.

b) Verbal Evidence of the Parties

[19] The verbal evidence of the parties was presented, under oath, at the hearing. This evidence was presented by the following persons:

On behalf of the Agency:

- i. Ms. Binu George, Inspector (Inspector George), Canadian Food Inspection Agency;
- ii. Dr. Izuchukwu Asiegbunan (Dr. Asiegbunan), Canadian Food Inspection Agency Veterinarian, responsible for the Quality Meat Packers plant to which the hogs were delivered;
- iii. Dr. Anco Farenhorst (Dr. Farenhorst), Veterinarian and Program Specialist, Canadian Food Inspection Agency.

On behalf of Finley Transport:

- i. Dr. Tony van Dreumel (Dr. van Dreumel), Veterinarian

Preliminary Issues Arising at the Hearing

[20] At the hearing, Finley Transport wished to introduce evidence and argument from Dr. van Dreumel, in relation to research into microscopic heart lesions in pigs. No notice of this argument or of Dr. van Dreumel as a witness had been provided to the Agency. The

Tribunal has expressed reservations with respect to any element of surprise being introduced into a hearing, by any party, particularly as referenced to attempts to introduce new evidence at the time of the hearing. See, as examples, *K & R Poultry Ltd. v. Canada (CFIA)*, RTA-60048 (2002), at page 2; *Gray v. Canada (PMRA)*, RTA-60247 (2006), at page 4; *Abdul-Aziz v. Canada (Minister of Agriculture and Agri-Food)*, 2012 CART 24, at paragraph 19 and *Yan v. Canada (CBSA)*, 2013 CART 26, at paragraphs 32 to 36. At paragraph 35 of *Yan*, the Tribunal expressed its sentiments as follows:

[35] Both parties—Mr. Yan, as well as the Agency—have a right to receive particulars in advance of a hearing, as to the nature of the case to be argued. Considerations of fairness are not well served, through elements of surprise. It is for this reason that both parties were invited by the Tribunal to make additional submissions, following receipt of the Agency Report, or to request additional time by which to make such submissions. The invitation to Mr. Yan to make additional submissions was clear, and was not responded to. Therefore, the Tribunal's position, particularly in the face of Agency objections, was that Mr. Yan's evidence at the hearing could not be entertained.

The Agency consented to the introduction of evidence of Dr. van Dreumel's written research, as well as his testimony, subject to being accorded the right to present reply evidence from its own witnesses, as well as later written submissions in response. The Tribunal agreed with the Agency's conditions of acceptance of the introduction of written evidence and testimony by Dr. van Dreumel.

[21] Similarly, the Agency wished to incorporate jurisprudence and previous Tribunal decisions as components of its arguments, without having first informed Finley Transport of the cases to be relied upon. The Agency was permitted to make such arguments, based on the consent of Finley Transport, which did not request a delay or adjournment to review the decisions or jurisprudence.

Additional Evidence and Submissions Requested or Permitted by the Tribunal

[22] As has been noted, based on considerations of fairness, the Agency was permitted by the Tribunal to both present rebuttal witness evidence at the hearing, in response to the testimony of Dr. van Dreumel, in addition to being permitted to make further written arguments in relation to such testimony. Based on matters that arose at the hearing, the Tribunal also invited the parties to make additional submissions in the interest of clarifying specific points of evidence. The Tribunal also asked the Agency to clarify how the wording in the Notice of Violation related to the specific violation particulars found in subsection 140(2) of the HA Regulations, since the Notice of Violation, as worded, made no reference to the violation specifics of "crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein".

Wording of the Notice of Violation

[23] The wording of the Notice of Violation is taken from the summary of the legislative violation, as found in Schedule 1, Division 2, Item 245: “Transport or cause to be transported animals in an overcrowded conveyance.” There is no mention of the crowding being “likely to cause injury or undue suffering”, as is specified in subsection 140(2). Given that most applicants before the Tribunal are self-represented, as was the case with Finley Transport, represented by John Finley Sr., the Tribunal questioned whether an applicant was disadvantaged through essential elements of the violation not being particularized in the Notice of Violation. For example, Finley Transport’s Request for Review was based on asserted compliance with loading densities, without reference to harm or undue suffering. Those dimensions of Finley Transport’s defence only became evident at the hearing, with the initial surprise of Dr. van Dreumel’s presence as a witness.

[24] The Agency’s response was to rely on section 3 of the Regulations, which provides as follows:

3. The short-form descriptions that are set out in column 2 of Schedule 1 are established to be used in notices of violations in respect of violations of the corresponding provisions that are set out in column 1 of Schedule 1.

The Agency, in its response, misquoted the section, whereby the Agency asserted that the section contained the words “As established by the Minister under paragraph 6(b) of the Act”, prior to the wording quoted. The section contains no such additional wording, though the reference to paragraph 6(b) of the Act is apposite. Paragraph 6(b) provides as follows:

6. The Minister may

...

(b) establish, in respect of each violation, a short-form description to be used in notices of violation.

The Agency interprets these two provisions as permitting the Agency to use short-form descriptions. On the Tribunal’s reading of the sections, the use of such short-form descriptions would appear to be mandatory, rather than permissive. In the Tribunal’s view, it is still open to an applicant to raise concerns that an applicant’s initial defence has been prejudiced, through the omission of essential elements of the violation in the short-form description. It is to be hoped that the wording of some of the short-form descriptions, in Schedule 1, will be revisited.

Facts of the Case

a) Facts not in Dispute

[25] The facts of the case that are not in dispute are as follows:

- i. On August 5, 2011, at approximately 2:00 p.m., in the afternoon, three dead hogs were discovered by two Agency inspectors, Binu George and Predrag Milovic, in a trailer transported by Finley Transport to the Quality Meat Packers plant, located at 2 Tecumseth Street, Toronto. Tecumseth Street is located in downtown Toronto. This particular plant of Quality Meat Packers processes between 4,000 and 5,000 hogs per week (Agency Report, Tab 8, Ontario Pork Producers Marketing Board Loss Report; Tab 3 - Notes of Inspector George; Tab 4 - Report of Inspector, signed by Inspector George; Testimony of Inspector George; Testimony of Dr. Asiegbunan).
- ii. The transport was driven by John Finley Jr. (Agency Report, Tab 3 - Notes of Inspector George; Tab 4 - Report of Inspector, signed by Inspector George; Testimony of Inspector George. Identification of John Finley Jr., as distinct from John Finley Sr., explained at hearing by John Finley Sr. John Finley Jr. was not at the hearing).
- iii. The three dead hogs were part of a group of 205 hogs in the transport (Agency Report, Tab 6 - Ontario Pork Hog Manifest; Tab 7 - Quality Meat Packers Limited - Hog Receiving Record). The hogs were owned by Field Farms Ltd., located in Petrolia, Ontario (Agency Report, Tab 13 - Response by Quality Meats to Trace Back Information Request by Dr. Asiegbunan).
- iv. The hogs were scheduled to arrive at Quality Meat Packers at 2:00 p.m., on August 5, 2011. That actual time of unloading was 1:54 p.m. (Agency Report, Tab 7—Quality Meat Packers Limited - Hog Receiving Record). Prior to unloading, the transport had arrived early, and needed to wait for approximately 20 to 30 minutes in the alley beside the receiving docks of Quality Meat Packers (Agency Report, Tab 4 - Report of Inspector George, as to time of commencement of observations of truck and as to statements of John Finley Jr.; Agency Report, Tab 3 - Notes of Inspector George, with first entry at 1:41 p.m.). Testimony of Inspector George, as to statements by John Finley Jr., not disputed by John Finley Sr.; Tab 7 - Quality Meat Packers Limited - Hog Receiving Record).
- v. Pictures of the hogs were taken by the inspectors prior to being unloaded, and the dead hogs remaining in the transport, following the unloading (Agency Report, Tab 4 - Report of Inspector, signed by Inspector George; Agency Report,

Tab 2 - various pictures of hogs in transport compartments, plus pictures of dead hogs).

- vi. The three dead hogs were found in different compartments of the transport. One was found in the upper front compartment. One was found in a lower compartment at the center of the transport truck. The third dead hog was found in a lower compartment at the rear of the transport truck (Agency Report, Tab 1 - Humane Transportation Inspection Report, signed by Inspector George).
- vii. In addition, there was a fourth hog who couldn't get up from the transport, and who had to be shot on site (Testimony of Inspector George; Agency Report, Tab 1 - Humane Transportation Inspection Report, signed by Inspector George; Agency Report, Tab 4 - Report of Inspector, signed by Inspector George; Agency Report, Tab 6 - Ontario Pork Hog Manifest; Tab 12 - Dead List for the Barn - Quality Meats).
- viii. On August 5, 2011, at approximately 2:15 p.m., Dr. Asiegbunan, Agency Veterinarian responsible for the Quality Meat Packers plant to which the hogs were delivered, completed a necropsy report on two of the hogs.

b) Facts in Dispute

[26] The facts in dispute relate to the following:

- i. State of hogs at the time of loading;
- ii. State of the hogs at the time of unloading;
- iii. Internal and external temperatures at the time of unloading;
- iv. Whether the transport was overcrowded; and
- v. Cause of death of the three hogs.

The Agency contends that the hogs died from heat stress, as a result of overcrowding and due to the transport truck remaining parked in an alley beside the slaughterhouse, on a hot summer day in downtown Toronto, for approximately 20 to 30 minutes. Finley Transport contends that the hogs likely died from a pre-existing heart conditions. There is also a dispute between the parties as to the physical state of the hogs, both at the time of loading and prior to being unloaded, as well as whether the transport compartments were overcrowded. The case is particularly notable for the quality of veterinary evidence presented by both parties.

Evidence at the Hearing Relating to Facts in Dispute

a) State of Hogs at the Time of Loading

[27] According to the testimony of Inspector George, the driver of the transport, John Finley Jr., advised her that there was nothing wrong with any of the hogs when they were loaded for transport, including the dead hogs and the hog that had to be shot shortly upon arrival. John Finley further advised her that, with respect to the hog that could not get up on arrival, and had to be shot, something must have happened to it during transport, since there was nothing wrong with it at the time of loading. In addition to inclusion in direct testimony, Inspector George referenced the statements of John Finley Jr. in the Report of Inspector, though the statement attributed to John Finley Jr. that nothing was wrong with the hogs, at the time of loading, was not supported by Inspector George's notes. What was referenced in her notes was that, at the time of loading, John Finley Jr. had not seen the hog that had to be shot, but surmised that something must have happened during transport. Finley Transport did not object to the account of statements asserted by the Agency to have been made by the Finley Transport driver, nor was the driver called as a witness to rebut any assertions as to what he had said.

[28] Dr. Tony van Dreumel was called as a witness by Finley Transport. His evidence relates to the condition of the hogs, both at the time of loading and at the time of unloading; in particular, the state of their hearts. Concurrently with calling Dr. van Dreumel to testify, Finley Transport introduced a document, entered at the hearing as Exhibit 4. This document, "Ontario Pork Proposal #12-019" was a summary of research findings by Dr. van Dreumel and Ms. Kathy Zurbrigg of the Ontario Ministry of Agriculture, Food and Rural Affairs. The primary conclusion of this study was that (quoted *verbatim*, with authors' emphasis) "For the majority of hogs that die in transit, the cause of death is NOT heat stress, as previously thought. 81% of the 75 in-transit death hogs examined at two federally inspected slaughter plants in Ontario died from heart failure, due to pre-existing heart lesions."

[29] Dr. van Dreumel graduated as a veterinarian in 1963, and has had a long association with the Ontario Veterinary college, as a faculty member and adjunct professor. For 27 years, Dr. van Dreumel was a veterinary diagnostic pathologist with the Ontario Ministry of Agriculture, which was also located at the Ontario Veterinary College. During this period, Dr. van Dreumel performed many *post mortem* examinations of swine. Dr. van Dreumel has published over 100 refereed articles, plus as acted as a journal referee. He continues to work as a veterinary pathologist at the University of Guelph, following his 2005 retirement. Dr. van Dreumel is involved in an ongoing research program, sponsored by Ontario Pork, relating to the causes of death of hogs.

[30] In the study co-authored by Dr. van Dreumel, the hearts of hogs that did not die during transit were compared to the hearts of hogs that did die in transit. The hearts were significantly enlarged in the hogs that died in transit. The hearts were then dissected and the dissected components microscopically examined. This is because, similar to humans, all heart lesions in hogs will not be detected without microscopic examination. Of the hearts of hogs that did not die during transit, 45% had microscopic lesions. Of 50% of the hogs that did die in transit, 12% had multiple lesions, consistent with young athletes who suddenly drop dead. On the other hand, the hearts of 45% of those hogs who survived the transit also had heart lesions. Dr. van Dreumel's work is relevant as showing that, at the time they were loaded, it is likely that at least some of the hogs had heart lesions. Whether such heart lesions were the primary cause of death during transit is a separate issue.

[31] Accordingly, the Tribunal has no evidence that the hogs, at the time of loading, were other than healthy, despite the fact that within the loaded population of hogs, there were likely some with heart lesions.

b) State of Hogs at the Time of Unloading

[32] Inspector George testified that both she and her fellow inspector observed that the hogs were in a generally aggravated state, both prior to and at the time of unloading, panting heavily and fast, with some observed to be frothing at the mouth. She further testified that the belly of the trailer appeared to be packed to maximum capacity, with no visible space anywhere. She testified that, as the hogs were being unloaded, they became more noisy. In her notes taken at the time, she stated that "The hogs are very noisy and they sound disturbed and stressed. Some of the hogs are panting heavily and some of them are frothing at the mouth. It looks like there is a dead hog in the trailer and other hogs are trampling on it." The observations in the Report of Inspector are largely consistent with Inspector George's testimony. Some additional observations in the Report of Inspector are that "The hogs are very noisy and tried to move anywhere they could, because they were uncomfortable. The hogs looked as if they were piled over each other." In addition, it is stated in the Report of Inspector that the heavy and fast panting, plus frothing at the mouth, were observed of hogs in both the belly and middle deck of the trailer.

[33] In the Report of Inspector, it is noted that Inspectors George and Milovic took pictures of the hogs, prior to unloading. These pictures are asserted to demonstrate overcrowding, as well as physical discomfort, represented by frothing at the mouth. One picture (photograph 13) was considered by Agency veterinarian, Dr. Farhenhorst, to demonstrate panting. Finley Transport contended that the photographs were consistent with observations that the hogs were not stressed and that there was no frothing at the mouth. The Tribunal's impression of the photographs submitted of the hogs, prior to being unloaded (Agency Report, Tab 2, photographs 1 to 5 and 11 to 13), is that such photographs demonstrate that the hogs were in crowded circumstances prior to being

unloaded. In the impression of the Tribunal, the photographs do not demonstrate a distressed state or frothing at the mouth on the part of the hogs photographed.

[34] The Tribunal finds, based on the evidence of Inspector George, that the Agency has established, on the balance of probabilities, that the hogs were panting and behaving in a manner consistent with being stressed, prior to being unloaded, and at the time of unloading, even if the photographs do not so indicate.

[35] The Tribunal further finds, based on the evidence of Inspector George and supporting photographic evidence, that the Agency has established, on the balance of probabilities, that the hogs were in a crowded state, prior to unloading, and at the time of unloading. Whether the hogs were in an overcrowded state will be discussed, *post*.

c) Internal and External Temperatures at the Time of Unloading

[36] According to the testimony of Inspector George, the external temperature at the time of unloading was over 30 degrees Celsius. She based her statement on having inspected the outdoor thermometer at Quality Meat Packers, plus comparing Environment Canada Temperature Reports at Lester B. Pearson International Airport, on August 5, 2011, which included relative humidity information, hour by hour. This information is included as Tab 18 of the Agency Report. At 1:00 p.m., on August 5, 2011, the temperature at the airport was 26.2 degrees Celsius, with a relative humidity of 52%. At 2:00 p.m., on August 5, 2011, the temperature at the airport was 26.7 degrees Celsius, with a relative humidity of 47%. Relative humidity affects humans in terms of impeding sweating, as a natural cooling mechanism, with the result that humans feel hotter than the actual temperature, when it is humid. No evidence was presented as to how relative humidity would affect an animal that does not sweat in any event, such as a hog. Inspector George further stated that, as a matter of course, the temperatures would be higher in downtown Toronto than at the airport, due to increased population density and related temperature enhancement activities, such as traffic congestion.

[37] In the necropsy report of Agency, Veterinarian in charge of Quality Meat Packers, Dr. Asiegbunan noted the transport ambient temperature as being 33 degrees Celsius. Agency veterinarian Dr. Farenhorst, citing Dr. Temple Grandin (Dr. Grandin) as an authority, testified that any temperature above 27 degrees Celsius is considered "hot". Dr. Grandin is regarded as having a particular expertise in the care and handling of animals, including transport. According to Dr. Farenhorst, the Agency accepts this definition of "hot", though Dr. Grandin's views have not been formally adopted. Apart from establishing a specific temperature, Dr. Farenhorst testified that it was definitely a hot day, particularly if relative humidity, which ranged between 50% and 60%, were to be included in the temperature calculation.

[38] Finley Transport contended that the slaughterhouse was located no more than 600 feet from Lake Ontario, which would have countered any undue heat. In addition, given the location of the slaughterhouse, Finley Transport contended that circumstances of undue heat at the slaughterhouse would have been largely unpredictable at the time of loading. Finley Transport also contended that the reading of the external thermometer would have been affected by the number of trucks and animals being unloaded near the thermometer. Inspector George disagreed with this latter contention.

[39] The Tribunal finds that the Agency has established, on the balance of probabilities, that the external temperature on the day in question was at least 30 degrees Celsius. The Tribunal also finds that the temperature would likely have been higher for the hogs in the transport, due to crowding and the fact that the transport remained stationary for at least 20 minutes, prior to unloading.

d) Whether the Transport was Overcrowded

[40] In assessing whether the transport was overcrowded, a primary issue concerns the nature and legal effect of two Codes of recommended practice in relation to animal transportation: the *Recommended code of practice for the care and handling of farm animals: Transportation*, published by the Canadian Agri-Food Research Council in 2001, and “Recommended Maximum Loading Densities for Market Hogs” (applicable to weather above 24 degrees Celsius), co-published by the Ontario Farm Animal Council and Ontario Pork. This issue arises based on it being the sole reason provided by Finley Transport in its Request for Review (reproduced *verbatim*):

We are challenging the charge of overcrowding hogs based on the loading density charts we have been given from the Ontario Pork Marketing Board which came from the OFAC—Recommended code of practise for the care and handling of farm animals—Transportation (2001).

[41] The loading density chart referred to by Finley Transport was provided by Finley Transport to the Agency and is included in Tab 19 of the Agency’s Report. From its heading, the loading density chart appears to be co-published by the Ontario Farm Animal Council (OFAC) and Ontario Pork (the Ontario Pork Producers Marketing Board). According to later information submitted to the Tribunal by the Agency (Further Evidence and Submissions, page 2), in response to a Tribunal inquiry at the hearing, the history and distribution of this document is as follows:

The Agency is advised by Farm and Food Care (previously known as Ontario Farm Animal Council) that this document was distributed to the 300 drivers who enrolled in the Animal Transport training course with them, conducted for about two years. Farm and Food Care also advised that Ontario Pork

distributed this document to all the transporters which were on their distribution list in their annual mailing to members, which would be in May of each year. The date on the bottom of the chart is November 2010, so the first distribution would be May 2011. Please note that the Extreme Hot Weather section of this chart indicates a reduction of 25%.

The loading density chart was acknowledged by the parties to have been created by and for industry participants. Its relationship to the 2001 Code will be discussed, *post*.

[42] Inspector George testified that two of the hogs died in compartments that were calculated by her to be overcrowded, while one of the hogs died in a compartment that was not determined to be overcrowded. Inspector George based her calculations, found at Tab 10 of the Agency Report, on the 2001 Code and, in particular, the Density Charts found in Appendix 2. The Density Charts are described (at page 36 of the 2001 Code) as being “based on the best information and opinion at the time of publication and will be updated as new information becomes available”. The 2001 Code has not been updated, in whole or in part, since its 2001 publication. How Inspector George obtained the specific numbers from the Density Chart “Pigs Maximum Loading Density Imperial” in order to calculate crowding levels was neither explained by her nor challenged by Finley Transport. It appeared that her density calculations were without reference to humidity levels which, if incorporated, would have resulted in a more acute determination of overcrowding. This is because in the Density Chart, it is recommended that the load be reduced by 25% in hot, humid weather, though such weather conditions are not further particularized. In addition, the recommended density load reduction is not referenced to any particular section of the 2001 Code.

[43] The transport contained 10 compartments. A representative photographic illustration of a comparable transport was submitted by the Agency (Further Evidence and Submissions, Tab C). All of the compartments were 8.3 feet wide. Two compartments, which were 10 feet long, contained 15 hogs in each compartment. Two other compartments, which were 13 feet long, contained 10 and 15 hogs, respectively. All of these compartments were determined by Inspector George to provide adequate transport space for the hogs. The difficulties with crowding occurred in relation to six compartments in the middle of the transport, all of which were 14 feet long and all of which contained 25 hogs per compartment. Inspector George determined that there was approximately 13% overcrowding, which meant that each compartment should have contained 21 hogs.

[44] The Agency called Dr. Farenhorst, Veterinarian and Program Specialist, as a witness. Dr. Farenhorst has been a veterinarian since 1974, and was in private practice until 1985, when he joined Health Canada. Dr. Farenhorst is the program officer in charge of animal transport for Ontario, having previously worked as a Health Canada veterinarian in various slaughterhouses. His current role is informational and advisory. Dr. Farenhorst testified in relation to the authority of the 2001 Code He described the Code as being a

consensual document, agreed to by various stakeholders, including government representatives. At the time of its formulation in 2001, the 2001 Code was considered to be the generally standard for transport. The 2001 Code has not been revised since that time, despite the original intent that the 2001 Code be subject to revision every ten years. The 2001 Code's standard is still accepted today, in Dr. Farenhorst's view, as a best practices standard, since this remains the only national code in existence. The Canadian Agri-Food Research Council, which authored the 2001 Code, had at the time input from such representative bodies as the National Farm Animal Council, the Ontario Farm Animal Council and corresponding organizations in British Columbia, Saskatchewan and Alberta. Currently, according to Dr. Farenhorst, the National Farm Animal Council, now known as the National Farm Animal Care Council, has "custody" of the 2001 Code and is responsible for its revision. The Ontario Farm Animal Council, via its successor organization Farm & Food Care Ontario, is represented on the National Farm Animal Care Council. According to Dr. Farenhorst, several other transportation codes have been formulated, primarily if not exclusively involving industry participants, to the exclusion of other stakeholders, such as government. The 2001 Code remains the only nationally-recognized code.

[45] Dr. Farenhorst's testimony on the authority of the 2001 Code was a necessary component to the assessment of the relative authority of a document jointly produced by the Ontario Farm Animal Council and Ontario Pork, entitled "Recommended maximum Loading Densities for Market Hogs" (Recommended Densities). This document was provided by Finley Transport to the Agency, and thereafter included as Tab 19 of the Agency Report. Under this document, a trailer that was 14 feet long could contain 25 hogs with an average weight of 230 pounds per hog. However, this document was referenced to "Hot Weather" above 24 degrees Celsius, with no gradation to reflect higher degrees Celsius. According to Dr. Farenhorst, another chart, addressing "Very Hot Weather" had been produced, but was not entered into evidence by either the Agency or Finley Transport.

[46] The Tribunal favours the 2001 Code over the Recommended Densities document. While it is stated in the Recommended Densities document that it is based on the 2001 Code, the recommended numbers of pigs per compartment appear to be at variance from those calculated using the Density Charts in the 2001 Code. In addition, it is acknowledged in the Recommended Densities document that the code-recommended maximum number of pigs per compartment is 30 (2001 Code, paragraph 8.6.16), irrespective of weight or size of the animal, or size of the transport. In the Recommended Densities document, the loading of up to 60 pigs per compartment is recommended, depending on the weight or size of the animal, or size of the transport.

[47] To the extent that there are several transportation codes in existence, as Dr. Farenhorst testified, including the Recommended Densities document for the transportation of market hogs in Ontario, a question arises as to why none of these codes has been formally adopted by the National Farm Animal Care Council. In addition, a

question arises as to whether provincially-referenced transportation codes are redundant, given the existence of a national code. There was no evidence presented by Finley Transport to demonstrate that the 2001 national Code is somehow out of date, or that there are unique circumstances in Ontario such that the provisions in the Recommended Densities document should be preferred over the national Code. The Tribunal prefers the guidance of the federal Code, particularly given that the federal Code involves the input of the federal and provincial governments, as well as industry, while the Recommended Densities document is solely an industry-generated document.

[48] Counsel for the Agency cited that Tribunal decision in *Wendzina*, a case involving an alleged violation of subsection 140(2) of the HA Regulations. In that case, the Tribunal, via then Chairperson Barton, held as follows (at page 4):

...

The determination as to whether the animals were crowded during transport to such an extent as to be likely to cause injury or undue suffering is not a simple matter of applying the actual weights of the animals and the dimensions of the trailer to the loading density chart.

Assessing the weight of the animals without a weigh scale at the time of loading is not an exact science and the loading density chart is only a guideline based on loading average healthy cattle.

...

The Tribunal has therefore previously recognized that overcrowding is a question of fact, with respect to which a loading density chart is a guideline, rather than a legally determinative threshold of acceptable behaviors. The Tribunal continues to adopt this position. Recognition and countering of a situation of overcrowding becomes a matter of judgement, rather than strict compliance with a recommended code of practice, irrespective of its source.

[49] In addition, good faith attempts to address any “code” conflicts in relation to crowding, or otherwise, would not be a defence in any event. Counsel for the Agency cited the decision of the Federal Court of Appeal in *Godbout*, previously cited. This case involved applications for judicial review by five animal farmers. All had been held by the Tribunal to have committed violations in relation to the transportation of sick or injured animals, contrary to paragraph 138(2)(a) of the HA Regulations. Their principal argument in support of judicial review, as particularized in paragraph 6 of the Federal Court judgement, was that the Tribunal had failed “to take into account the prevailing practices at the time of the alleged offences, as well as the ambiguities and inconsistencies which characterized the transportation of animals at that time.” Writing for the Court, Mr. Justice Létourneau

viewed these arguments as being equivalent to a defence of good faith and due diligence, which are not recognized defences in relation to violations of absolute liability.

[50] The Tribunal finds that the Agency has established, on the balance of probabilities, that two of the three dead hogs were in compartments of the transport that were overcrowded, based on national code-referenced calculations, considered to provide *indicia* of overcrowding. Overcrowding remains a question of fact, to which various codes or standards may be referred to in support, but which ultimately becomes a determination based on the particular circumstances.

e) Cause of Death of the Three Hogs

[51] Through the testimony of Inspector George, supported by her notes and the report of inspector, there is uncontradicted evidence that the transport driver, John Finley Jr., believed that the three hogs had died from heat exhaustion, following an approximate 20-minute wait in the loading alley of Quality Meat Packers. According to Inspector George, John Finley Jr. described himself as having 30 years of experience as a driver. In the Tribunal's view, the relevant testimony is that which is based on the direct observations of Inspector George, rather than the statements attributed to John Finley Jr. The Agency chose not subpoena John Finley Jr., to ensure his attendance at the hearing for the purpose of obtaining oral testimony, and he was not presented as a witness by Finley Transport. Therefore, there is no corroboration of what John Finley Jr. said, beyond that recounted by Inspector George. In addition, the Tribunal has expressed its reluctance to accord significant weight to statements made by an applicant—or, in this case, an employee of the applicant, for whose actions the applicant is vicariously responsible—unless the applicant has been cautioned by the Agency that any statements made may be used against the applicant in later proceedings. John Finley Jr. was speaking to Inspector George without apparent appreciation, as to how any such statements might be used. Fairness therefore requires that John Finley Jr. be cautioned, in order to enable him to consider the advisability of obtaining legal counsel, in circumstances where the applicant is not legally obliged to say anything to Agency representatives. These views have been expressed by the Tribunal in such cases as *Tao v. Canada* (CBSA) 2013 CART 16, at paragraph 31; *Yan* (previously cited), at paragraph 51 and *Lemotomo v. Canada* (CBSA), 2013 CART 30, at paragraph 38. In the *Tao* case, at paragraph 31, the Tribunal expressed its sentiments as follows:

[31] ...The Agency asserts that Mr. Tao acknowledged that the product was beef; Mr. Tao denies having done so. In the Tribunal's view, even if it were to be accepted that Mr. Tao acknowledged that the product was beef, that acknowledgement would not, by itself, establish proof of that element of the Agency's case. This is because Mr. Tao would be making assertions that are contrary to his interest, in circumstances where he is not obliged to say

anything, and has not been so cautioned. It is the Tribunal's view that a warning by the Agency to Mr. Tao that any statements made by an alleged violator may be used against him, is very important to the acceptance or the weight accorded by the Tribunal to such evidence.

Therefore, in the Tribunal's view, the Agency must establish the cause of death of the hogs, on the balance of probabilities, based on evidence other than that associated with statements allegedly made by John Finley Jr.

[52] In the opinion of Inspector George, all of the hogs were being overheated for the 20 plus minutes that the trailer was parked. Once a truck was in the slaughterhouse loading alley, which was very narrow, there was no ability for the transporter to back up, turn around or otherwise move. If the transporter arrived early, it was compelled therefore to wait behind another transport in the midst of unloading. The circumstances of the loading alley were illustrated by the Agency in photographs submitted subsequent to the hearing, with the consent of the Tribunal (Further Evidence and Submissions, Tabs D and E). These two photographs, which show a transport trailer in the loading alley, demonstrate that it is clearly impossible for the transporter to turn around, though it would appear to be possible for the transporter to back up and out of the alley, if no other transporter were behind it.

[53] In the view of Inspector George, Finley Transport was, at the time, boxed in, with nowhere to move in the alley, and with no ability to cool down the animals. The photographic evidence submitted by the Agency also appears to the Tribunal to be consistent with Finley Transport having the ability to back up and out of the loading alley, in circumstances where there is no evidence that it attempted to do so.

[54] Therefore, according to Inspector George, it is important for a transporter to arrive on time in the loading area, and not earlier. Inspector George also mentioned that, based on ongoing discussions with Quality Meat Packers on this issue of overheating of animals, fans were installed by Quality Meat Packers in the alley, after August 5, 2011. These fans are illustrated in a photograph contained in Tab F of the Agency's Further Evidence and Submissions, which shows a group of four mounted industrial fans, located to one side of the loading alley.

[55] Dr. Asiegbunan was then called as a witness by the Agency. He testified that he has been the Veterinarian in charge of Quality Meat Packers since 2007, with 15 inspectors and three veterinarians reporting to him. He has been associated with the Agency since 2001 and has been qualified as a veterinarian since 1991. The Agency wished to qualify Dr. Asiegbunan as an expert, which the Tribunal accepted, as did John Finley, on behalf of Finley Transport. The Tribunal noted at the time that it was, strictly speaking, not necessary for Dr. Asiegbunan to be qualified as an expert, since the Tribunal was not subject to strict rules of evidence and the weight accorded to Dr. Asiegbunan's testimony

was therefore more a matter of an assessment of overall credibility, rather than formal qualification as an expert. Neither Dr. Farenhorst nor Dr. van Dreumel, who testified subsequent to Dr. Asiegbunan, were formally qualified as experts by the Tribunal, nor was such qualification requested by the Agency or Finley Transport.

[56] Dr. Asiegbunan reviewed a necropsy report that he had prepared following a *post mortem* examination of two of the dead hogs (Tab 5 of the Agency Report). At the hearing, Dr. Asiegbunan identified a number of errors in his necropsy report, which were manually corrected by the Tribunal on the document submitted, concurrently with Dr. Asiegbunan's testimony as to the errors contained therein. Such corrections were made with the consent of Finley Transport. The Tribunal requested that a revised copy of the necropsy report be submitted to both the Tribunal and Finley Transport, which was later included as Tab H of the Further Evidence and Submissions of the Agency.

[57] Dr. Asiegbunan stated that the necropsy report should apply to the necropsy of a second hog. In the necropsy report, Dr. Asiegbunan stated that (quoted *verbatim*) "A second male carcass with the same tattoo was necropsied. The findings were similar to the findings mentioned in this report." Dr. Asiegbunan stated that the report was to apply to the third dead hog, even though it was not necropsied. It was also not clear from which compartment the necropsied hogs were found. According to Dr. Asiegbunan, the choice of the two hogs to be necropsied was based on their relative "freshness" after death.

[58] With respect to the specific hog reported on in the necropsy report, Dr. Asiegbunan found, in virtually all respects, that there were no significant abnormalities, including in relation to the heart, which he dissected. One area where he did find a significant abnormality was under the category of "joints/bones/muscles", where Dr. Asiegbunan found "Pale coloration of gluteal muscles". Dr. Asiegbunan found this observation to be consistent with stress, because pigs do not have sweat glands. He was unable to say that the discoloration was due exclusively to heat stress, as opposed to general stress, though he was able to conclude from his examination that the animals were not predisposed to stress. In his experience, an animal with a predisposition to stress would be one with a heart condition, peritonitis or pneumonia, where "stress" is considered to be a physiological condition that impedes blood flow.

[59] Dr. van Dreumel's background and research into microscopic heart lesions in pigs has been previously discussed, in support of a Tribunal conclusion that in a normal population of pigs, microscopic heart lesions would be present, at the time of loading. Dr. van Dreumel's research was relied upon by Finley Transport to establish an alternate cause of death to that of death from heat exhaustion. In Dr. van Dreumel's view, it is not possible to come to a definitive conclusion that death has been caused by heat stress, particularly when such conclusion is based on a process of elimination. Dr. Asiegbunan's conclusion is based on the fact that if everything else about the dead hog appears to be

normal, including the heart, and where there is evidence of oxygen deprivation in the state of the gluteal muscles, the death can only have occurred due to heat stress.

[60] Called by the Agency to present rebuttal evidence, Dr. Asiegbunan testified that he had undertaken microscopic examinations of the hearts of swine similar to those undertaken by Dr. van Dreumel. Dr. Asiegbunan found that those hogs with heart problems had next to normal gluteal muscles. Dr. Asiegbunan conjectured that, hogs with healthy hearts fight longer for their lives, in circumstances of stress, and hence have pale gluteal muscles at death. In addition, unlike the samples used by Dr. van Dreumel, Dr. Asiegbunan compared results from the same lot, or transport.

[61] Based on Dr. van Dreumel's research, it was the contention of Finley Transport that transport alone, however compliant with recommended practices, would cause stress in the hogs transported and some hogs would die as a matter of course. The Agency countered through arguing that slow, low-stress handling, plus keeping hogs cool during loading and transport, continues to be the most practical means to reduce transport deaths. In particular, when called by the Agency to present rebuttal evidence, Dr. Farenhorst noted there will always be a number of animals with compromised conditions. That is what the 2001 Code aims to address. Compromised animals would more likely arrive alive, if the stressors were lessened. Given that mortality rates are three times higher in summer than in winter, the issue, in Dr. Farenhorst's view, concerns the means by which the transporter has acted to minimize stressors.

[62] Dr. van Dreumel's research was acknowledged to be at a preliminary stage, with one study involving a comparatively small sample of 75 hogs, as pointed out by Dr. Farenhorst. Dr. van Dreumel acknowledged that further research is needed, and that he is engaged in same. In addition, Dr. van Dreumel agreed on cross-examination that, as waiting times increased, the rate of deaths also increased. Dr. van Dreumel also acknowledged that there was a need to examine other possible stressors, in addition to heat.

[63] Agency witness Dr. Farenhorst made reference to page 22 of the 2001 Code, paragraphs 8.6.24-8.6.29 (Care and Protection During Hot Weather Transit), with reference in particular to paragraphs 8.6.27 and 8.6.28. Those paragraphs read as follows:

8.6.27 Load and unload promptly. Make as few stops as possible. Heat builds up rapidly inside a loaded vehicle that is standing still. If an unavoidable delay occurs, run water on the floor, look for a shaded area, or drive the truck around slowly until you can unload the pigs.

8.6.28 Schedule evening transport of pigs during hot weather to avoid traveling during the hottest hours or during rush hour traffic.

Dr. Farenhorst summarized the points in this Code section, as referenced to the statement that “Pigs have a low tolerance for hot temperatures and high humidity” (paragraph 8.6.24). He testified that it is much more difficult for pigs to cool down on a humid day. Pigs do not sweat, so they cannot lose heat, other than through panting or being cooled down with water.

[64] Dr. Farenhorst was referred by Agency counsel to a document produced by the Ontario Farm Animal Council and Ontario Pork (an organization of Ontario pork producers): “Livestock Weather Safety Index - Relative Humidity Levels’ (Agency Report, Tab 11). A colour version of this document was separately entered by the Agency at the hearing, as Exhibit 3. The document presents a matrix of temperature and relative humidity levels, which are then categorized in terms of relative implications for the transportation of hogs. For a temperature of 33 degrees Celcius and a relative humidity of 50% to 60%, the situation is categorized in the document as very close to being an “Emergency Zone” situation, where the recommendation is that the hogs not be transported. In the lesser “Danger” zone, which is reflected in the relative humidity and temperature levels of the current case, the recommendation is that 20% fewer hogs be loaded and the hogs should be transported at night. This is the standard that the Ontario Farm Animal Council established jointly with Ontario Pork. These are industry-generated documents; there is no comparable document published by the Ontario government. It is also at variance with the 2001 Code, which recommends, as commentary in relation to the Density Charts, a load reduction of 25% in “hot humid weather”, not otherwise particularized. (2001 Code, page 42).

[65] In his testimony, Dr. Farenhorst referred to heat-accumulation effects, as discussed in the 2001 Code. Dr. Farenhorst discussed the two studies submitted by the Agency, being: (a) Sunstrum, Dewey and Haley, “Clinical Signs of Stress in Finisher Pigs Transported to Market in the Summer” *Swine News* (30: 8, 2007); and (b) Dewey, Haley, Poljak, Friendship and Widowski, “Transport Losses in Finishing Pigs” (2009 Centralia Swine Research Update). Both studies, according to Dr. Farenhorst, were commissioned by Ontario Pork, and both studies demonstrate, in Dr. Farenhorst’s opinion, where most stress-related losses occur. In terms of the “Clinical Signs of Stress” study, Dr. Farenhorst noted the finding that, in a stationary vehicle, heat can increase by as much as 25 degrees Celsius increase within approximately 55 minutes. With respect to the “Transport Losses” paper, Dr. Farenhorst noted that most deaths of pigs during transport occurred between June and August, and were due to hot weather. The general conclusion from the studies is that the number of pigs in each compartment should be reduced in circumstances of hot weather, and that is what appears to occur in many transport. In the studies, the average death losses in summer was 3.6 pigs per 1,000. In the current case, the death rate is 3, from a transport population of 205.

[66] In its Further Evidence and Submissions, the Agency submitted an additional academic study by Haley, Dewey, Widowski, Poljak and Friendship, “Factors associated

with in-transit losses of market hogs in Ontario in 2001". This is a paper published in the *Canadian Journal of Veterinary Research* 72 (2008), 377-384 ("Further Evidence and Submissions", Tab J). The paper was submitted by the Agency as further rebuttal evidence to that of Dr. van Dreumel, as permitted by the Tribunal, given the initial element of surprise associated with Dr. van Dreumel's presence at the hearing. As noted in the abstract to the paper, the study was a large scale study of the deaths of market hogs in Ontario in 2001:

In-transit losses and stage of transport when deaths occurred were determined for 4,760,213 market-weight pigs produced in 2001 by 4,159 Ontario producers and marketed through 117 transport companies in 33 packers located in Canada (96%) and the United States.

[67] The Tribunal notes that the 2008 paper is also relevant as being confirmatory of some of the evidence of Dr. Farenhorst. For example, at page 381, the authors point out that "at a relative humidity of 60%, the incidence rate of predicted deaths in-transit was 5.9 times higher at 26°C to 31°C than at 16°C to 18°C." The paper, also at page 381, contradicts Dr. Farenhorst's statement that pigs are particularly affected by humidity. Humidity affects humans by inhibiting the sweat function, causing humans and other mammals that sweat to become internally hotter than the actual temperature, due to humidity impairing their natural cooling mechanisms. The actual external temperature is not changed by the humidity. Since pigs do not sweat, they are less affected by humidity. One must instead look to the absolute temperature and other circumstances, such as crowding or the stationary nature of a vehicle in hot weather, in terms of assessing the likely temperature to which the pigs were subject. As the authors note (at page 381) "...in contrast to humans, pigs are more sensitive to high, dry temperature than high humidity...".

[68] The Tribunal finds that the Agency has established, on the balance of probabilities, that the three hogs in question died from heat exhaustion. Given that two hogs were subject to necropsies, the Tribunal also finds that the Agency has established, on the balance of probabilities, that at least one of the hogs died in compartment that the Agency has established, on the balance of probabilities, was overcrowded.

Applicable Law and Analysis

[69] In the Tribunal's view, it is important to carefully examine the section of the HA Regulations, which is the subject of the violation. Subsection 140(2) 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.*

[70] What must be noted is that the animal need not die for there to be a violation of this regulation. This is an important point to keep in mind, given that Dr. Asiegbunan testified that, in his role as Chief Veterinarian on behalf of the Agency in relation to Quality Meat Packers, he has a general responsibility to ensure the safe arrival of animals. It was for this reason that he had co-signed the Inspector Non Compliance Report. In Dr. Asiegbunan's view, if any dead pigs were found on a truck, there must be something wrong with the transport. He further testified that he would not have been concerned about waiting times if all the animals in the transport had arrived alive. The Tribunal pointed out that the distinction as to whether there are, or are not, any dead hogs on the transport is not determinative of whether a violation has occurred, due to the legislative reference to "injury or undue suffering" in the specific violation. Furthermore, the section does not require that injury or undue suffering be established in fact, but that injury or undue suffering is likely to be a consequence of the extent of crowding. The section also does not make reference to "overcrowding" as a discrete concept. The point of reference concerns a particular degree of crowding, in a particular context that is likely to cause injury or undue suffering. As an example, 10 hogs in a container travelling along a rocky road could be crowded to an extent as to cause injury or undue suffering, where circumstances might well be different if they are travelling on a paved highway. Similarly, the transport of hogs transported directly to slaughter may be viewed differently from the transport of hogs where the transport remains idle for 20 minutes prior to unloading, as occurred in the present case.

[71] The Agency submitted at the hearing and in its Further Evidence and Submissions that the Agency need only establish, on the balance of probabilities, that one of the three hogs was, in crowded circumstances to the extent as to be likely to cause injury or undue suffering. In this regard, in terms of the Tribunal's conclusions, the Tribunal has found that the Agency has established, on the balance of probabilities, the following:

- i. The hogs were healthy at the time of loading;
- ii. The hogs were panting and stressed, both prior to, and the time of unloading;
- iii. The temperature at the time was in excess of 30 degrees Celsius;
- iv. Certain compartments in the transport were overcrowded, as referenced to a national code so particularizing the term;
- v. Three hogs, two in overcrowded compartments, died of heat exhaustion.

[72] Given that all the hogs died of heat exhaustion and one was not in an overcrowded compartment, is the Tribunal in a position to hold that overcrowding was relevant to the cause of death? In particular, may the Tribunal hold that the crowding was "likely to cause

injury or undue suffering”, if the hogs were considered to have suffered unduly, independent of the crowding?

[73] As Dr. Farenhorst testified, in reviewing the empirical research submitted by the Agency, heat can increase dramatically and quickly in a stationary vehicle on a hot day. In addition, there is testimony from Inspector George when observing the load, shortly after arrival, that the hogs were already in distressed state, at the commencement of the approximately 20 minute waiting period. The issue is whether the state of distress of the hogs can be associated with crowding in particular, or whether the state of distress was due to the fact that the vehicle was stationary for an extended period, thus increasing the heat for hogs in all compartments, irrespective of overcrowding.

[74] The Tribunal considers the necropsy report of Dr. Asiegbunan to be somewhat problematic, in terms of its evidentiary value as to the effects of overcrowding. The Tribunal has found that it has been established by the Agency, on the balance of probabilities, through Dr. Asiegbunan’s necropsy report, that the hogs died from heat exhaustion. Given the finding that one hog who died from heat exhaustion was in a compartment that was not overcrowded, at issue is whether all three hogs would have died anyway, irrespective of the degree of overcrowding in particular compartments. Dr. Asiegbunan testified that he performed necropsies on two hogs, and that the results were identical for both hogs, resulting in no need to complete a separate report. He further testified that he did not perform a necropsy on the third dead hog because he assumed that the conclusions relating to the first two hogs would apply to the third. In addition, there is no identification as to which compartments the hogs subject to necropsies were found in, though it may be concluded that one of the necropsied hogs was found in an overcrowded compartment. There is, however, no evidence as to any differences in necropsy results for the two hogs. How may it be said that overcrowding played a part in any of these deaths?

[75] There are other violations which may be applicable to the current facts, as found in paragraphs 143(1)(d) and (e):

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

...

(d) undue exposure to the weather; or

(e) inadequate ventilation

The Agency chose not to issue a Notice of Violation under either paragraph 143(1)(d) or 143(1)(e).

[76] In contrast to the elements of a violation under either paragraphs 143(1)(d) or 143(1)(e), a violation under subsection 140(2) may be independent of weather or ventilation conditions. The violation under subsection 140(2) relates to circumstances of crowded transport “to such an extent as to be likely to cause injury or undue suffering to any animal”. For example, irrespective of weather conditions, animals could be crowded to such an extent that they are likely to injure one another, through jostling one another during transport. Depending on the length of the transport and irrespective of otherwise adequate ventilation, animals not able to stand for the length of a journey could end up being suffocated by other animals. An example of this circumstance is found in *Edwards*, cited by counsel for the Agency, involving the transport of cows. At page 3 of that decision, then Tribunal Chairperson Barton, commented as follows:

In accordance with the Recommended Code of Practice for the Care and Handling of Farm Animals/Transportation published by the Canadian Agri-Food Research Council, the belly of the trailer contained one animal over the maximum recommended limit, and the back compartment contained 2 animals over the maximum recommended limit. High loading density may cause a loss of balance and animals may involuntary go down and be trapped underfoot.

[77] The fact that a violation under subsection 140(2) may be independent of weather or ventilation conditions does not mean that it *must* be so independent. In the *Wendzina* decision, previously cited, then Chairperson Barton, commented as follows, at page 4:

In determining whether there is overloading to such an extent as to be likely to cause injury or undue suffering, the type, age and condition of the animals at the time of loading, the number of walls in the trailer, the type and extent of floor covering in the trailer and the weather conditions at the time of loading and during transport are all significant factors to be weighed.

Thus, in assessing whether there is overcrowding, the Tribunal has previously considered subsection 140(2) as encompassing elements of other violation sections, such as the weather. The Tribunal continues to adopt this position.

[78] In the recent case of *Stanford v. Canada (CFIA)*, 2013 CART 38, the Tribunal held, at paragraph 32, that there is no concept of “included violation”, similar to an “included offence”, as explicitly recognized under the *Criminal Code*. However, such a conclusion does not mean that every violation need be elementally or factually distinct. The same facts can be associated with different violations. In the present case, it is the Tribunal’s view that the facts of the case are such that Finley Transport could have been issued a Notice of Violation under either subsection 140(2) or paragraph 143(1)(d). In the circumstances of either alleged violation, weather conditions are relevant.

[79] In arriving at this conclusion as to the complementary interrelationship among sections of the HA Regulations, the Tribunal is mindful of the caution in relation to statutory interpretation expressed by the Federal Court of Appeal in *Doyon*, at paragraphs 48 and 49. The Court is speaking in relation to paragraph 138(2)(a) of the HA Regulations, relating to the transport of injured animals, but the caution is considered by the Tribunal to apply to the interpretation of any legislative provision associated with administrative monetary penalties:

[48] One must refer to the essential elements of the offence and, especially, not lose sight of the causal link that must exist between the transportation, the undue suffering and the reasons listed in the provision. These range from infirmity to any other cause, including fatigue.

[49] As this provision triggers a substantial monetary penalty, we must guard against a liberal interpretation that extends the scope of the essential elements, which are already quite broad, given the fact that the person who has committed the violation has absolute liability, that the prosecutor has a considerably reduced burden of proof and that the person who has committed a violation risks higher penalties in the event of a subsequent violation (see sections 5 and 6 and Schedule 3 of the AMPs Regulations).

[80] Counsel for the Agency argued that *Doyon* is limited in application to the specific section of the HA Regulations to which it relates, that being paragraph 138(2)(a), which provides, in part, as follows:

138. (2) *...no person shall load or cause to be loaded on any...motor vehicle...and no one shall transport or cause to be transported an animal*

(a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey;

The Tribunal disagrees with any such limitation of the principles of *Doyon*. In the Tribunal's view, the sentiments and principles of *Doyon* apply to any administrative monetary penalty regime, including those over which the Tribunal has jurisdiction.

[81] In the Tribunal's view, there is a decidedly aggravated and separate degree of injury or undue suffering when a hog is in an overcrowded compartment in very hot weather. This is particularly so when load reductions are recommended in such weather, but do not occur. In coming to this conclusion, the Tribunal does not view itself as having adopted an interpretation that "extends the scope of the essential elements", contrary to the cautions expressed in *Doyon*. The Tribunal is of the view that the deaths from heat stress in an overcrowded compartment would likely be more aggravated than in a compartment that

was not overcrowded. Furthermore, since the Tribunal need only find that any one animal in a crowded compartment is in circumstances that are “likely to cause injury or undue suffering”, evidence has been established by the Agency as to the general distress of such animals who were so crowded, plus evidence of a fourth hog in such distress that the animal could not lift itself at the end of the journey, and had to be shot on site. All of these circumstances, taken together, establish to the Tribunal’s satisfaction that, on the balance of probabilities, the transport was “crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein”. A violation by Finley Transport of subsection 140(2) of the HA Regulations has therefore been established.

[82] The Tribunal also holds that the purported defence of Finley Transport, specifically that the cause of death of the hogs was due to pre-existing heart conditions resulting from microscopic lesions, is not a recognized defence in relation to animal transport. Thus, even on a “beyond reasonable doubt” standard of proof, let alone the current “balance of probabilities” standard of proof, Finley Transport could not have succeeded. As the Tribunal noted in *Poirier-Bérard Ltd. v. Canada (CFIA)*, 2012 CART 23, the fact that an animal has an enhanced physical possibility of dying in transit means that additional transport safety measures should be taken, or the animal should not be transported at all. There are no legislatively-sanctioned death rates in animal transport. In *Poirier-Bérard*, one of several defences advanced was that male chickens were particularly fragile, and hence, did not die from exposure to the cold, but rather due to general physical frailty. In addition, evidence was presented as to acceptable death rates in the industry, relating to the transport of poultry. As the Tribunal noted in *Poirier-Bérard*, at paragraph 61:

[61] In the present case, Poirier-Bérard admitted that a certain mortality rate is always to be expected after live poultry is transported. The Agency must address the following question, which the Agency says provides evidence of negligence: Is the mortality rate higher than normal? In the Tribunal’s opinion, the mortality rate is not relevant. If a single rooster, among all the others, is found frozen to death, the connection with negligence is that it is up to Poirier-Bérard to decide whether or not to transport the birds in extreme cold. Even if transporting live poultry in extreme cold is industry practice, the practice itself could be considered to amount to negligence. A chicken must be treated in the same manner as a cow. If Parliament wanted to make an exception based on the type of animal, it could have done so...

[83] The Tribunal therefore concludes that the Agency has established, on the balance of probabilities, all of the essential elements of the violation.

Gravity Value

[84] The only issue that remains to be determined by the Tribunal is whether the Agency has proved that a penalty of \$6,000 is justified under the Act and the Regulations.

[85] 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 to the Regulations. According to Schedule 1, item 245 of the Regulations, a violation of subsection 140(2) of the HA Regulations is categorized as “serious”, with a short-form description of “Transport or cause to be transported animals in an overcrowded conveyance”. Under paragraph 4(2)(b) of the Act, the maximum penalty for a serious violation, committed in the course of business, is \$10,000. Under subsection 5(3) of the Regulations, the basic penalty for a serious violation, committed in the course of business is \$6,000. In the present case, the Agency did not consider that there was a gravity value associated with the violation that would merit increasing the basic penalty amount.

[86] The basic penalty amount may be either increased or decreased, as referenced to consideration of three factors: prior violations, degree of intentionality and harm done. Values between 0 and 5 are assessed by the Agency for each of the three factors and then totaled to determine the final amount of the penalty. If the total is between 6 and 10, the base penalty amount is not adjusted. If the total is below 6, the base penalty amount is reduced; if it is above 10, the amount is increased. As a practical matter, a penalty cannot be increased unless a violator has committed a prior violation, since the maximum points in the “Intent or Negligence” and “Harm” factors are 5 for each factor. A review of the Agency assessments in the present case follows.

[87] **History** - According to Schedule 3, Part 1, Item 1 of the Regulations, if “[n]o previous violation or offence has been committed under the Act or Regulation under which the particular penalty is being assessed in the three years preceding the day on which the violation subject to the assessment is committed” (five years, since March 2012), 0 points are assessed.

[88] **Intent or Negligence** - According to Part 3, Schedule 3 of the Regulations, the Agency must assess whether the violation was committed with intent or negligence. A value of 3 points is assigned where “[t]he violation subject to the assessment is committed through a negligent act” (Item 3), and 5 points are ascribed where “[t]he violation subject to the assessment is committed through an intentional act” (Item 4). The Agency determined that the violation was committed through a negligent act and accordingly assigned a gravity value of 3. The reasoning of the Agency is not particularized. Reference is made on page 10 of the Agency Report, where the gravity value calculations are made, to “See Intent page”. No such page is evident in the material submitted by the Agency.

[89] **Harm** - According to Part 3, Schedule 3 of the Regulations (“Harm”), a gravity value of 5 is assigned when “[t]he violation subject to the assessment causes (a) serious or widespread harm to animal or plant health or the environment” (Item 3). The Agency,

having made this determination, accordingly assigned a gravity value of 5. The reasoning of the Agency is not particularized. Reference is made on page 10 of the Agency Report, where the gravity value calculations are made, to “See Harm page”. No such page is evident in the material submitted by the Agency.

[90] As a result of the Agency’s assessment, a gravity value of 8 (0 + 3 + 5) was assigned to the violation. According to Schedule 2 of the Regulations, there is no adjustment to the penalty where the gravity value is determined to be from 6 to 10, inclusive.

[91] Given that the Agency did not provide explicit reasons for the gravity value calculations, may the gravity values be considered to have been improperly calculated? In the Tribunal’s view, it is obliged to review the gravity calculations, independent of whether the Agency has provided reasons for such calculations.

Compliance History

[92] With respect to the assertion that there is no previous compliance history, the Tribunal has no evidence to conclude otherwise. This, with respect to Finley Transport, there were no violations in the three years preceding the current violation, and the correct gravity assessment is therefore “0”.

Whether the Violation was Committed Through a Negligent or an Intentional Act

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

may be considered in assessing intent under the Regulations and related gravity value calculations.

[94] In assessing whether there is negligence in the current case, the Tribunal refers to a statutorily imposed duty of care, as referenced to the wording of the prohibition in subsection 140(2) of the HA Regulations. The duty of care is to ensure that animals are not transported where crowding is likely to cause injury or undue suffering. The circumstances of any breach of that duty of care occurs during the transportation of the hogs, as well as when the hogs are left in the trailer for some 20 minutes, in what has been established to have been a very hot day, prior to the commencement of unloading.

[95] Whether the transport was, in fact, overcrowded has earlier been assessed by the Tribunal, favoring the national Code as opposed to the Recommended Densities document prepared by Ontario Farm Animal Council (as it then was) and Ontario Pork. The Tribunal concluded that the Agency had established, on the balance of probabilities, that the transport was in fact overcrowded in certain compartments. The fact that the driver may not have known that the transport was overcrowded is irrelevant to the violation having been committed by the driver. The violation committed by a Finley Transport employee is attributed to Finley Transport, by virtue of a statutorily mandated vicarious liability in section 20 of the Act, which reads as follows:

20. (2) A person is liable for a violation that is committed by any employee or agent of the person acting in the course of the employee's employment or the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.

[96] Given that Finley Transport followed the Recommended Densities document, which permitted the number of hogs that were loaded in the various compartments, may Finley Transport, via its employee who effected the transport, nonetheless be considered to be negligent? In the Tribunal's view, both the national Code and the Recommended Densities document do not create bright lines, or absolute demarcations as to what is acceptable and what is not acceptable, in any absolute sense. Judgement must be exercised in the particular context, as noted by then Tribunal Chairperson Barton in the *Wendzina* case, previously discussed. The Supreme Court of Canada has held that compliance with a "recognized and respectable practice of a profession" will generally be inconsistent with negligence: *Ter Neuzen v. Korn* [1995] 3 S.C.R. 674 at paragraph 38. However, the Court is still at liberty to challenge a standard practice as being "fraught with obvious risks" or ignoring the "elementary dictates of caution" (paragraphs 39 to 42, citing *Fleming on Torts* [1987] and *Roberge v. Bolduc* [1991] 1 S.C.R. 374.). Industry standards are often considered to be "highly probative when defining a standard of care": Biddle, Green, Mannix and Winkelman, "Industry Standards As a Source of Liability for Trade Associations and Association Members" (2002, at page 3; Crowell and Moring LLP).

[97] Based on the foregoing, the Tribunal considers Finley Transport to have been initially negligent in the transport of the hogs, given the statutory duty to not transport such hogs in such crowded circumstances as to be likely to cause injury or undue suffering. This conclusion is based on the general state of distress of the hogs at the time of their arrival at the slaughterhouse. This conclusion is arrived at without reference to the fact that loading densities are recommended to be reduced in hot weather, where such recommendation is found under both the national Code (with a recommended loading density reduction of 25%) and under the “Livestock Weather Safety Index—Market Hogs”, produced by the Ontario Farm Animal Council, as it then was, and Ontario Pork (recommended load reduction of 20%, when in the “Danger Zone”). On the evidence, there were no reductions in loading densities by Finley Transport. The lack of reduction in density, contrary to both industry-based recommendations and national Code recommendations, is considered by the Tribunal to amount to gross negligence, quite apart from general deficiencies in judgement in the transportation of the hogs on that particular day.

[98] The degree of gross negligence is further aggravated by the conduct of Finley Transport at the slaughterhouse, where the hogs were left stationary for at least 20 minutes, in hot weather, and in circumstances where, on the evidence, the heat inside the compartments would be likely to quickly elevate from what were harmful levels to begin with. The Tribunal does not have the benefit of testimony from the driver, John Finley Jr., from the perspective of defending or demonstrating the reasonableness of his actions. In the Tribunal’s view, in the absence of such evidence, the actions of the driver would appear to be patently unreasonable. Evidence from Inspector George and Dr. Asiegbunan is that, when anticipating arriving at a slaughterhouse at a time different from that scheduled, the driver should call ahead to make arrangements. If the slaughterhouse cannot commence the unloading at a time other than that scheduled, one recommended practice in the industry is to drive around the area, until the scheduling unloading time.

[99] On the evidence, the transporter did nothing to alleviate the hogs’ distressed circumstances, having arrived early at the slaughterhouse, despite the animals literally suffering before his eyes. They were simply left, unaided for up to half an hour, on the evidence, until unloaded and slaughtered. While there were no fans in the loading alley at the time, there was also no attempt to cool down the hogs through watering them, or seeking to determine whether water was obtainable. High degrees of distress on the part of the hogs, including death from heat exhaustion, are significantly foreseeable. The level of gross negligence of the transporter during the period when the animals are suffering, to a significant and aggravating extent, in a stationary transport, approaches the equivalent to intentional harm. The Tribunal therefore holds that the violation is the result of an intentional act, in substance, and that the gravity value should therefore be 5.

Whether the Violation Causes Serious or Widespread Harm to Animal Health

[100] In terms of the assessment of “Harm”, the Tribunal is in agreement with the Agency’s assessment and the consequent assignment of a gravity value of 5. The facts demonstrate that both serious harm to animal health, as well as widespread harm to animal health, occurred in relation to this particular transport.

[101] The total gravity value of the violation is therefore increased from 8 to 10, but has no effect on the penalty amount.

Conclusion

[102] Consequently, the Tribunal, by order, determines that Finley Transport committed the violation and orders it to pay the Agency a monetary penalty of \$6,000 within thirty (30) days after this decision is served.

[103] The Tribunal wishes to inform Finley Transport that a determination that Finley Transport has committed the violation is not the same as being convicted of a criminal offence. After five years, Finley Transport will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the Act, unless, according to paragraph 23(1)(b), the Minister determines that it is not in the public interest to do so, or there has been another violation committed.

[104] The Tribunal also wishes to inform Finley Transport, and any other interested party, that the decision herein should not be taken to impugn the general reputation of Finley Transport. Finley Transport is responsible for the actions of its employees. As the Tribunal noted in *Dykman Farms*, previously cited:

[54] ...Dykman Farm was the identified violator, rather than Collin Dykman personally or anyone else associated with Dykman Farms. The Tribunal notes that a potential difficulty with issuing a Notice of Violation against Dykman Farms, without also issuing a Notice of Violation to the related individual actors, is that there results in no violation history against individual actors, even though involved with the same fact situations. If a primary objective of the legislative régime is to encourage compliance by individuals as well as corporations, a later Notice of Violation issued to an individual actor in this case could have a lesser effect: a first violation for an individual compared to a second violation for the corporation, on the same set of facts.

The violation history, if any, of the Finley Transport's driver, John Finley Jr., is not known. As in the Dykman Farms case, the Tribunal expresses its concern as to the effective establishment of violation histories, when individual actors are not subject to a Notice of Violation, and all fault ends up being attributed to an employer.

[105] The Tribunal is convinced that management of Finley Transport, represented by John Finley Sr. and Ian Finley, was seriously concerned about this particular Notice of Violation. Such concern was evidenced through the engagement by Finley Transport of expert testimony, via Dr. van Dreumel, plus the approaches by John Finley Sr. to the examination in chief of Dr. van Dreumel and the cross-examination of Agency witnesses. Mr. Finley evidenced extensive knowledge of and association with the industry, plus concern for industry standards. The regrettable circumstances of the present case should not be taken to impugn the general integrity and expertise of Finley Transport.

Dated at Ottawa, Ontario, this 27th day of December, 2013.

Dr. Bruce La Rochelle, Member