AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE MONETARY PENALTIES ACT

DECISION

In the matter of an application for a review of the facts of a violation of provision 143(1)(d) of the *Health of Animals Regulations*, alleged by the Respondent, and requested by the Applicant pursuant to paragraph 9(2)c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act.*

Maple Lodge Farms Ltd., Applicant

-and-

Canadian Food Inspection Agency, Respondent

CHAIRMAN BARTON

Decision

Following an oral hearing and a review of all oral and written submissions, the Tribunal, by order, determines the Applicant did not commit the violation and is not liable for payment of the penalty.

…/2

REASONS

The Applicant requested an oral hearing pursuant to subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations.* The oral hearing was held in Brampton, Ontario, from the 21st of November to the 23rd of November, 2007.

The Applicant was represented by its solicitor, Mr. Ron E. Folkes.

Evidence for the Applicant was given by Mr. Kevin Donaldson, Mr. Ben Durose, Mr. Chris Chiasson and Dr. Rachel Ouckama.

The Respondent was represented by its co-solicitors, Ms. Louise Pampalon and Mr. Samson Wong.

Evidence for the Respondent was given by Mr. Albert Witteveen and Dr. Gordon Doonan.

It was agreed that the Review Tribunal files #1399, 1400, 1401 and 1402 would be heard together.

The Notice of Violation #0607ON0083 dated March 22, 2007 alleges that the Applicant, on the 29th day of May, 2006, on or between 10:30 and 17:49 hours, at Brampton, in the province of Ontario, committed a violation, namely: "Transport or cause to be transported an animal, to with: 8544 chickens, with undue exposure to weather" contrary to provision 143(1)d) of the *Health of Animals Regulations*. Subsection 143(1) states as follows:

> 143.(1) No person shall transport or cause to be transported any animal in a railway car, motor vehicle, aircraft, vessel, crate or container if injury or undue suffering is likely to be caused to the animal by reason of
>
> (a) inadequate construction of the railway car, motor vehicle, aircraft, vessel, container or any part thereof;
>
> (b) insecure fittings, the presence of bolt-heads, angles or other projections;
>
> (c) the fittings or other parts of the railway car, motor vehicle, aircraft, vessel or container being inadequately padded, fenced off or otherwise obstructed;
>
> (d) undue exposure to the weather; or
>
> (e) inadequate ventilation.

…/3

Provision 143(1)d) of the *Health of Animals Regulations* is a separate violation pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations.*

On consent, I allowed an amendment to the Notice of Violation to amend the location to read "at or near or between Grassie and Brampton".

Counsel for both parties earlier agreed to admit the qualifications of each other's expert witness, being Dr. Rachel Ouckama and Dr. Gordon Doonan.

Having confirmed that both parties had copies, the following documentation was put on the record for the purpose of the hearing:

1. Notice of the Violation dated March 22, 2007.

2. Request for a review of the facts by the Applicant's Solicitor dated April 5, 2007.

3. Respondent's Report in binder received by the Tribunal on May 1, 2007.

4. Letter from the Applicant's Solicitor dated May 30, 2007, with submissions (in two black binders).

5. Letter from the Applicant's Solicitor dated September 13, 2007, enclosing Notices of Intention to produce business records.

6. Letter from Respondent's Solicitor dated October 29, 2007, enclosing further submissions.

7. Letter from Respondent's Solicitor dated November 9, 2007, enclosing unsigned Agreed Statement of Facts.

8. Letter from Applicant's Solicitor dated November 12, 2007, enclosing additional submissions.

9. Letter from Respondent's Solicitor dated November 13, 2007, with list of witnesses.

10. Letter from Respondent's Solicitor dated November 16, 2007, enclosing a copy of the Willsay Statement of Dr. Gordon Doonan and a signed Agreed Statement of Facts.

…/4

11. Letter from Respondent's Solicitor dated November 19, 2007, enclosing a copy of Dr. Gordon Doonan's curriculum vitae.

12. Letter from Applicant's Solicitor dated November 19, 2007, enclosing a supplementary report by Dr. Rachel Ouckama.

When referring to specific documents, counsel were requested to refer to this numbering.

Agreed Statement of Facts

Prior to the hearing, the solicitors for both parties agreed to and signed the following verbatim statement of facts, as set out in document #10:

1. *On May 29, 2006, four truck loads of chickens were transported from a farm owned by Albert and Elizabeth Witteveen in Grassie, Ontario ("Witteveen Farm") to Maple Lodge Farms Ltd., establishment 285, in Brampton, Ontario ("Maple Lodge"). The shipments were identified by numbers T-19-1 (subject of RT 1399), T-15-1 (subject of RT 1400), T-18 (subject of RT 1401), and T-13-1 (subject of RT 1402).*

2. *All four trucks, identified by T-13, T-19, T-15, and T-18, are Commercial Class, 2002 Conventional Tractors that were registered to Maple Lodge Farms Ltd., as lessee on May 29, 2006.*

3. *All four shipments of chickens (identified by numbers T-19-1, T-13-1, T18, and T15-1) were cockerels.*

4. *Transport T19-1 arrived at the Witteveen Farm at 10:15 am, and was loaded between 10:30 am and 12:25 pm with 8544 cockerels, at a crate density of 12 birds per crate. T19-1 left the Witteveen Farm at 12:30 pm, and arrived at Maple Lodge at 1:48 pm*

5. *The cockerels were unloaded from T19-1 and slaughtered between approximately 4:30 pm and 5:50 pm. Upon unloading by Maple Lodge employees, it was discovered that 1997 cockerels were dead. The dead birds had been crated mostly in the middle of the trailer.*

6. *Transport T13-1 arrived at the Witteveen Farm at 10:25 am. Transport T13-1 was loaded between 11:00 am and 12:25 pm. with 9360 cockerels, crated at a density of 12 birds per crate, and left the Witteveen Farm at 12:35 pm. The cockerels were transported to Maple Lodge where they arrived at approximately 2:00 pm.*

…/5

7. *The birds were unloaded between at approximately 5:50 pm and 6:40 pm. Upon unloading by Maple Lodge employees, it was discovered that 2663 birds were dead. The dead birds had been crated mostly in the top and middle of the trailer.*

8. *Transport T15-1 arrived at the Witteveen Farm at 12:45 am. Transport T15-1 was loaded between 1:01 pm and 3:20 pm with 8592 cockerels, crated at a density of 12 birds per crate, and left the Witteveen Farm at 3:25 pm. The cockerels were transported to Maple Lodge where they arrived at approximately 4:50 pm.*

9. *The birds were unloaded between at approximately 7:50 pm and 9:00 pm. Upon unloading by Maple Lodge employees, it was discovered that 5612 birds were dead. The dead birds had been crated mostly in the top and middle of the trailer.*

10. *Transport T-18 arrived at the Witteveen Farm at 12:45 am. Transport T13-1 was loaded between 1:00 pm and 3:45 pm with 8940 cockerels, crated at a density of 12 birds per crate, and left the Witteveen Farm at 4:00 pm. The cockerels were transported to Maple Lodge where they arrived at approximately 5:40 pm.*

11. *The birds were unloaded between approximately 6:40 pm and 7:50 pm. Upon unloading by Maple Lodge employees, it was discovered that 5434 birds were dead. The dead birds had been crated mostly in the top and middle of the trailer.*

12. *The temperatures at the time that loading started for all four loads were at or above 28 degrees Celcius, with the humidex at or above 36 . The temperature and humidex increased during the period of loading. Temperatures between 31 and as 36 degrees Celcius were recorded at the Witteveen Farm during the loading periods.*

13. *In the Hamilton area, the weather for the days preceding the day of transportation of these four loads, May 29, 2006, had seen temperature highs of 17.6 (May 26, 2006), 24.8 (May 27, 2006), and 26.6 (May 28, 2006 degrees Celcius). Humidex highs in Hamilton were 29 for May 27, 2006, and 33 for May 28, 2006. The high temperature for the Hamilton area, according to Environment Canada, on May 29, 2006 was 32.9 degrees Celcius, while the humidex high was 40.*

14. *During the time that the transports travelled from Grassie, Ontario to Brampton, Ontario, between 1 hour 20 minutes to 1 hour 40 minutes, the temperature and humidex remained in excess of 30 degrees and 40, respectively.*

15. *Upon arriving at Maple Lodge, the loads were held in receiving barns for periods ranging from 1 hr to nearly 4 hours before they were unloaded and slaughtered. During this period, bird temperatures between 31 and 37 degrees Celcius were recorded. The following comments were made on the Load Condition Reports: "Birds don't look good very hot," with respect to T13-1: "Birds are hot and gasping for air," with respect to T15-1: and "Birds very hot and gasping for air," with respect to T19-1. (There is no Load Condition Report in evidence for T18-1).*

16. *The Maple Lodge drivers for these transports have made the following statements to the CFIA regarding any dead birds observed on the loads prior to being taken into the Maple Lodge holding barns: "Some dead on outside rows," with respect to T13-1; "After, some were dead," with respect to T15-1; "Birds looked good," with respect to T19-1; and "Yes, called in and told them the situation – noticed alot dead."*

17. *Upon unloading, the number of birds counted as Dead on Arrival (DOA) were 2663 dead for T13-1, 28% of the load; 1997 dead for T19-1, 23% of the load; 5612 dead for T15-1, 65% of the load; and 5434 dead for T18, 61% of the load. Thus, the total DOA count for the four loads was 15706 out of 35436 birds transported, or 44%.*

18. *A necropsy on 10 birds from each of T13-1, T18, and T-15-1 was performed by Dr. Brian Binnington, of the University of Guelph, on June 6, 2006. Dr. Binnington's examination of these 30 cockerels found no suggestion of an infectious disease in these birds. Dr. Binnington's necropsy findings are consistent with heat prostration.*

19. *A necropsy on 10 birds from T-19-1 was performed on May 29, 2006 by Dr. Manmohan Multani, CFIA Veterinarian Dr. Multani's examination of these cockerels found no suggestion of an infectious disease in these birds. Dr. Multani's necropsy findings are consistent with heat prostration. In Dr. Multani's opinion, the birds died as a result of high ambient temperatures and high humidity.*

I wish to thank both counsel for their efforts to reduce the length of the hearing by agreeing on many of the pertinent facts, and by admitting the qualifications of each other's expert witness.

Further findings of fact

Based on the evidence, I make the following further findings of fact:

1. According to the various weather forecasts for the area, the Applicant could not have foreseen the temperature would spike to 36 ^{o}C with a humidex of 40 ^{o}C on May 29, 2006. It was not until 10:45 a.m. that a problem surfaced. Prior to that time, the conditions in the barns were normal and the catching and loading were proceeding in a normal manner without incident.

2. To the extent possible, at all material times the Applicant was in substantial compliance with the applicable provisions of the Canadian Agri-Food Research Council's Recommended Code of Practice for the Care and Handling of Farm Animals entitled, "Transportation" and its code entitled "Chickens, Turkeys and Breeders from Hatchery to Processing Plant."

3. The Applicant was in compliance with the applicable provisions of its Humane Poultry Handling Program set out in document #4.

4. Following the loading of the cockerels on the Applicant's trucks, the number of dead birds, crippled birds and runts found remaining in the barns, was not abnormally high. Mr. Witteveen testified he counted between 25 and 30 in one barn. Deducting the number of birds loaded plus those that had died prior to May 29 from the number estimated to have been placed, the total birds remaining in the barns appears to be somewhat higher than this estimate. However, there is no evidence as to the breakdown of those left which were dead, were crippled or were runts.

5. The majority of the deaths occurred at the time of loading, although some cockerels would have expired during the trip from the Witteveen's barns to the Applicant's processing facility, or while waiting for slaughter. Deaths resulted from the cumulative effects of the stresses occasioned by being taken off feed and water, being condensed in the already crowded barns for catching, being caught and carried upside down, being confined in crates, and the spike in heat and humidity.

6. Both parties agreed that the Applicant's responsibility as transporter commenced when the first bird was loaded on the first truck.

…/8

7. At 10:45 am, the first dead birds were discovered on the top layer of the load on truck T-19 1. At this time, the temperature was close to 30 ^{o}C. This is the first indication of undue suffering.

8. From this time until the time of unloading for slaughter, neither the catchers, the drivers, nor the personnel at the Applicant's processing plant had any knowledge, nor could they see by a visual inspection of the truck, that the loads contained such an excessive number of deads on arrival.

Violation

I find the Respondent has established, on a balance of probabilities, that the Applicant unduly exposed the chickens to the weather during the loading process. The question then becomes whether the Applicant had a valid defence to its actions.

Subsection 18(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* states as follows:

> 18. (1) A person named in a notice of violation does not have a defence by reason that the person
>
> (*a*) exercised due diligence to prevent the violation; or
>
> (*b*) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.

Accordingly, these violations are in nature of strict liability provisions and the exercise of good faith, acting reasonably, or exercising due care cannot negate the commission of a violation. These factors can only be considered, where applicable, in the calculation of the gravity value of a penalty.

In determining what was meant by "undue suffering", the Federal Court of Appeal in the case of *Porcherie des Cèdres*, 2005 FCA 59 decided that one of the meanings for "undue" was "unreasonable". Counsel for the Applicant used this reasoning to argue that the test as to whether or not his client committed a violation was whether or not it acted reasonably in all of the circumstances or conversely, whether it did not act unreasonably. In view of the provisions of subsection 18(1), I disagree with the Applicant's conclusions from the *Porcherie des Cèdres* case.

The other proposition counsel for the Applicant argued was that the Respondent fell into the "post hoc fallacy trap". He argued that the Respondent's position was that since a considerable number of chickens died, the Applicant must have been negligent, and accordingly must have committed a violation. I do not consider that the Respondent took that approach. Further, negligence is not a prerequisite to a violation being committed.

However, counsel for the Applicant argued consistently in its pleadings and at the hearing that when the emergency was first discovered at 10:45 am, there was no option but to continue loading and to transport the birds to the processing facility as quickly as possible. In other words, despite the knowledge that the birds were unduly suffering, the Applicant considered it necessary to continue the loading and transportation of the birds to its slaughtering facility as quickly as possible. This was the only way it felt it could avoid an inevitable disaster.

Although counsel for the Applicant did not specifically plead the common law defence of necessity, he consistently raised all the essential elements of this defence in his written and oral submissions.

> Subsection 18(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* states as follows:
>
> > 18.(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*.

Subsection 65(1) of the *Health of Animals Act* provides that a contravention of the *Health of Animals Regulations* is an offence.

With regard to subsection 18(2), in this case I do not consider the defence of necessity as an excuse for the commission of the violation, to be inconsistent with the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

Common Law Defence of Necessity

The leading case on necessity as a defence and its applicability is the case of *R v. Perka* [1984] 2 S.C.R. 232. The tests for the applicability of this defence are further discussed and amplified in the cases of *R. v. Hibbert* [1995] 2 S.C.R. 973, and *R v. Latimer* [2001] 1 S.C.R. 3.

There are three tests to be met to ascertain if this defence is applicable. First, there is the requirement of imminent peril or danger. Second, the Applicant must have no reasonable legal alternative to the course of action that was undertaken. Third, there must be proportionality between the harm inflicted and the harm avoided.

1) Imminent Peril or Danger

At 10:45 a.m., upon hearing that chickens were dying during loading, Mr. Ben Durose, with his many years of experience working for the Applicant, made a judgment that the entire flock was at peril should they not continue, as quickly as possible, with the scheduled transportation and slaughter. At the time, he so instructed the drivers and catchers, and also told them to leave the top layer of the crates empty as some protection for the birds in the crates underneath.

The leading cases also point out that it is not enough that the peril is foreseeable or likely, but that it must be on the verge of transpiring and virtually certain to occur. For this test, and for the test of "no reasonable legal alternative", the court has adopted a modified objective test. It involves an objective evaluation, however, one must take into account the situation and characteristics of the particular accused person (in this case, Mr. Ben Durose). Mr. Durose was the live haul quality control manager for the Applicant, having worked for the Applicant for 33 years, always involved with bird loading and haulage.

Further, the *Perka* case also notes that where the situation of peril clearly should have been foreseen and avoided, immediate peril cannot reasonably be claimed. In this case, I have already determined that the spike in temperature and humidity, the main cause of the problem, was not foreseeable.

2) No Reasonable Legal Alternative

In applying this requirement, the *Perka* case posed these questions. Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? Was there a legal way out? If there was a reasonable legal alternative to breaking the law, there is no necessity.

This involves a realistic appreciation of the alternatives open to the Applicant, once again using the modified objective test.

In the words of the *Perka* decision; "*was this truly the only realistic action open to the actor, as, if the actor was in fact making what in fairness could be called a choice, then there was a reasonable legal alternative to disobeying the law.*"

According to the testimony of Mr. Ben Durose, I do not consider that he made a choice among options. He made a reasoned decision based on his past knowledge and experience to avoid an inevitable disaster.

Dr. Doonan raised a number of options that the Applicant might have considered, which options were replied to in evidence given by Mr. Durose and Dr. Ouckama.

A number of these options relate to "due diligence" and not to available legal alternatives to the Applicant at the critical time.

Option: The trucks and catchers should have arrived at the Witteveen barns earlier in the day. Reply: The pick-up schedule is arranged a few days prior to loading upon notice from Mr. Witteveen as to when his flock size will meet the required weight standard. The Applicant will then schedule pick-up and slaughter. Once established, it is very difficult to change as the trucks are in fairly constant use, and the kill lines at the plant have to be modified to suit two different methods of kill for different kinds of birds. In addition, catchers work shifts, and all this must be taken into account in the scheduling.

Option: There should have been more vehicles. Reply: No more vehicles were available, and even if there were, they would have had to wait until the other vehicles had been loaded. This would have meant loading the later vehicles in the critical heat build-up period of the day, being between 4:00 p.m. and 6:00 p.m.

Option: The trucks should have been only partially loaded, leaving the remaining birds to be picked up at a different time. Reply: When the catching commences, the birds will already have been compromised by stress due to being taken off water and feed, and being corralled into two-thirds of an already cramped barn. It was the Applicant's judgment that this stress, coupled with the heat build-up, would have resulted in all birds remaining in the barn dying. The Applicant stated that in July of 2006, under extremely similar conditions at the Witteveen farm, the Applicant, having received these violations, had ceased loading after loading 10,000 birds, leaving the remaining 25,000 birds in the

barns. All 25,000 birds that remained in the barns died. In the early part of the hearing when this incident was raised, I did not consider it relevant in the context of whether the Applicant exercised due diligence, as due diligence is not a defence. However, I do consider it relevant in the context of considering the modified objective test as to whether there was no legal alternative to the course of action chosen. Dr. Ouckama also testified that partial loads are not recommended due to the bio-hazard. Catchers could infect a remaining bird with a germ which could then be spread throughout the remaining flock.

Option: Pack fewer birds per crate. Reply: More crates would have been required which were not available on site. This would have delayed loading and put more birds at risk. The cages were filled with the recommended number of birds and it is very doubtful fewer birds per cage would have made a difference.

Option: Reschedule the loads. Reply: As indicated, the transportation schedules and slaughter schedules are worked out well in advance, and it was not possible to reschedule at such a late date.

Option: Use more catchers. Reply: As explained by Mr. Kevin Donaldson, there is only room for two persons on the truck while loading, one of the catchers and himself. More catchers would be a hindrance rather than a help.

Option: There should have been portable fans and a portable sprinkler system used on the trucks while they were being loaded at the Witteveen's barns. Reply: None were available, and Dr. Ouckama testified that even if they had been available, there is no evidence these would have assisted to any great extent. There was also a safety issue to be considered in the use of this equipment.

Option: The Applicant should have used climate controlled vehicles. Reply: No such vehicles were in use in North America.

Option: Some of the birds should have been let outside while others were being loaded. Reply: There was no shade or fencing outside.

3) Proportionality

This requirement is measured on an objective standard. Heat continued to build up in the barns throughout the day, and the peak heat and humidity would have been between 4:00 p.m. and 6:00 p.m. During catching and loading, the doors to the barns are left open,

and this compromises the barn's ventilation system. In this case, the ventilation system was an older cross-ventilation system. Although up to the current standards, the system was not state-of-the-art.

Further, the temperature in the barns would not have been lower than the temperature of the air outside the barns. In the Applicant's view, the birds would only start to experience some degree of relief once the trucks started moving and air began circulating. When the trucks would arrive at the Applicant's facilities, they would be under shade, and would have fans and misters operating upon them until close to slaughter time.

Also, as previously indicated, at the same premises and under almost identical circumstances, when a decision was made to stop loading and leave the remaining birds in the barn, they all died.

Commercial considerations did not factor into the decision to continue loading, as the Applicant would not have suffered a financial loss for any birds left in the barn. It took responsibility for the birds upon being loaded and bore the financial loss of all birds dead on arrival at its facilities.

Everything considered, I find that the losses suffered were less than the losses sought to be avoided.

The rational for the common law defence of necessity is set out in the *Perka* decision as follows:

> "At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable".

I find that the Applicant's evidence has met the requirements of the common law defence of necessity, and the Applicant is accordingly excused from unduly exposing the birds to the weather.

Dated at Ottawa this 12th day of February, 2008.

_____

Thomas S. Barton, Q.C., Chairman