

**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)(b) of the *Health of Animals Regulations* alleged by the Respondent, and requested by the Applicant pursuant to subsection 8(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

Brian Whitta, carrying on business as B & B Whitta, Applicant

-and-

Canadian Food Inspection Agency, Respondent

[Please note that an erratum released on November 15, 2006, is appended at the end of these reasons.]

CHAIRMAN BARTON

Decision

Following an oral hearing and a review of the written submissions of the parties, including the report of the Respondent, the Tribunal, by order, determines the Applicant did not commit the violation.

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 Vancouver on October 4, 2006.

The Applicant was represented by its solicitor, Mr. John J.L. Hunter, Q.C.

The Applicant gave evidence, as did Mr. Bill Vanderspek, General Manager of the British Columbia Chicken Marketing Board (Board).

The Respondent was represented by its solicitor, Mr. Réal Doutre.

Evidence for the Respondent was given by Ms. Pamela Davies, CFIA investigator.

Prior to the hearing, I met with counsel for both parties in an attempt to obtain some agreement on the main issues to be addressed at the hearing.

It was agreed that the two main issues were whether there were insecure fittings, the presence of bolt-heads, angles or other projections in the cages that were likely to cause injury or undue suffering to the chickens. And if so, the second issue was whether the Applicant caused the chickens to be transported under those conditions.

Counsel for the Applicant further conceded that the condition of the cages might have been a contributing factor to the injury of the chickens, but said he wished to mainly address the issue of the responsibilities among those involved in the caging, loading and transporting of the chickens from the grower to the processor.

The Notice of Violation dated August 23, 2005, alleges that the Applicant, on or about 19:00 hours on the 9th day of June, 2005, at Nanoose Bay, in the province of British Columbia, committed a violation, namely: "Transport or cause to be transported an animal where insecure fittings or projections could cause injury", contrary to provision 143(1)(b) 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.

Provision 143(1)(b) is a separate violation pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*

Prior to the *viva voce* evidence I ascertained whether each party had copies of the following key documents in this file:

- Notice of Violation dated August 23, 2005.
- Letter dated September 6, 2005, from the Applicant requesting a review.
- Letter dated September 14, 2005, from the Respondent enclosing its report.

Having confirmed both parties had copies, these documents were entered on the record as evidence for the purpose of the hearing.

It is undisputed that on June 9th and 10th, 2005, a number of truckloads of chickens were transported from the Applicant's premises to processing plants on the mainland. The shipment by Pollon Express on June 9th contained 2,160 chickens.

On inspection after arrival at the processing plant, United Poultry Co Ltd., 584 of these chickens were found to be dead. Other shipments left the Applicant's premises on June 10th, 2005, and did not have this unusual high dead count.

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CAGES

Regarding the shipment on June 9th, 2005, overcrowding of the cages appears to have been the major cause of the injuries suffered and of an inordinate number of chickens dead on arrival (DOA). And although other possible contributing factors were not investigated by the Respondent, I am satisfied from the evidence, and in particular from the pictures set out in tab 3 of the Respondent's report, that some of the metal racks in the plastic cages were insecure, causing them to fall during the transportation and to crush the birds below. Further, some of the cages had bent frames and projections which also could have caused some of the injuries.

As such, I am satisfied the Respondent has established, on a balance of probabilities, that the chickens were transported in a condition where insecure fittings and projections could have caused injury.

CAUSATION

Did the Applicant cause the chickens to be transported under those conditions?

The evidence of Mr. Bill Vanderspeck was very helpful in explaining the process for the marketing of chicken in the province of British Columbia.

In general terms, the Applicant receives a quota from the Board, which sets out the number of chickens the Applicant can produce and sell to registered processors at the Board's established price from time to time.

The hatchery, grower and processor enter into a contract known in the industry as a "BC 101 contract" to regulate their affairs. The parties are further subject to the *General Orders* of the Board which are passed by the Board pursuant to provincial Regulations.

The processor indicates to the grower the size and number of chickens it requires. The grower then forwards a flock information reporting form indicating the number of live birds, the estimated mortality rate and estimated live weight per bird. This form is submitted to the transporter several days in advance, to enable the transporter to determine the date of shipment, the number of trucks and number of cages required per truck.

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In this case, although birds are usually transported at 38 days, the processor wanted 42

day chickens. The Applicant estimated their average weight on the flock information reporting form at 2.35 kg. This was done several days before shipment. In his interview with Ms. Davies, Mr. Peter Volk said this process is not an exact science, and that the farmers only "eyeball" the chickens. I would surmise that the transporters would not rely entirely on the farmer's estimate but would have a wealth of their own experience to help them determine how many cages and trucks to send for a load of 42 day chickens.

When the trucks arrive at the growers' premises on the arranged day of shipment, the cages are removed from the trucks and the catchers (arranged by the transporter) load the chickens into the cages, and then the cages onto the truck. In some cases, the birds are loaded directly into cages on the truck.

When interviewed by Ms. Davies on July 12th, 2005, the Applicant indicated it was the truck driver in this case who gave instructions to the catching crew and that the Applicant had no idea of the formula used for bird weights per cage. The Applicant further testified he did not inspect the cages prior to the caging.

In Ms. Davies' interview with Mr. Peter Volk of Volk Transport Ltd., which hired the catching crew, Mr. Volk stated the number of birds per cage was determined between the forklift operator and the foreman of the catching crew.

Needless to say, on the day of shipment, the Applicant had no input in determining the number of cages, number of birds per cage, or condition of the cages. The cages were owned by the transporter and arrived as scheduled.

The Board's General Orders provide that all chicken shall be purchased and sold F.O.B. (freight on board) at the grower's premises. Title to the chickens passes from the grower at the time the chickens are loaded into the cages for loading onto the vehicle.

Evidence at the hearing further established that although dead chickens cannot be loaded, should a chicken die once loaded, it is still transported.

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Pursuant to the Board's General Orders, the processor must pay to the grower the Board price for all chickens received, other than those condemned at the processor's plant by

reason of disease, emaciation, or other deductions that have been agreed upon between the grower and the processor. In this case, all chickens shipped, including the DOA's were paid for.

The cost of transportation is borne by the processor, while the pre-determined cost of the catching crew is deducted from the ultimate payment by the processor to the grower.

FINDING

The *Dictionary of Canadian Law*, 3rd edition, 2004, defines "cause" as a transitive verb, which in its ordinary usage contemplates that someone or something brings about an effect.

Mariam Webster's Collegiate Dictionary, 10th edition, defines "cause" as follows: "to effect by command, authority, or force."

In order to cause an effect, it is my view there must be some degree of authority or control over the subject matter. In this case the Applicant must have authority or control over the transportation of the chickens.

In an earlier decision, *Maple Lodge Farms Ltd.*, file RTA No. 60245, I decided there was no ownership in the birds and no authority or control over the transportation, and hence the Applicant did not "cause" the transportation.

In this case, the Applicant had no ownership in the birds once loaded into the cages, had no ownership interest in the cages or trucks, had no control over the catching, caging or transportation of the birds, and was obligated to send the number of chickens he had contracted to ship pursuant to his BC 101 contract and the *General Orders* of the Board.

It was also established that the Applicant had no ownership interest in the Pollon Group of companies, which included the transporter and processor, and hence had no indirect means of control over them or their operations.

Having no authority or control over the caging or transportation of the chickens, I find that the Applicant could not have "caused" the chickens to be transported under the conditions they were.

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Accordingly, since the Applicant did not "cause" these chickens to be transported, the Respondent did not commit the violation.

Dated at Ottawa this 2nd day of November 2006.

Thomas S. Barton, Q.C., Chairman

November 15th, 2006

ERRATUM

Please note that the last paragraph of decision # RTA 60254 reads as follows:

Accordingly, since the Applicant did not “cause” these chickens to be transported, the Respondent did not commit the violation.

It should read:

Accordingly, since the Applicant did not “cause” these chickens to be transported, the Applicant did not commit the violation.

Attached is the corrected version.

Thomas S. Barton, Q.C., Chairperson