

***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 139(2) 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

CHAIRPERSON BARTON

Decision

Following an oral hearing and a review of all oral and written submissions, the Tribunal, by order, determines that the Applicant committed the violation and is liable for payment of the penalty in the amount of \$2,000.00 to the Respondent within 30 days after the day on which this decision is served.

REASONS

The Applicant requested an oral hearing pursuant to subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

The hearing was held on February 9th, 2009, in Brampton, Ontario.

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

Evidence for the Applicant was given by Mr. John Hilario, Mr. Carlos Moreira, Ms. Rosa Vieira, and Mr. Bill Van Heeswyk.

The Respondent was represented by its counsel, Mr. Samson Wong.

Evidence for the Respondent was given via teleconference by Mr. Gilbert Asmus.

Having ascertained that each party had copies of the following key documents, I entered them on the record as evidence for the purpose of the hearing:

- Notice of Violation dated June 7th, 2007;
- Request for a review dated June 26th, 2007, from the Applicant's solicitor;
- Report of the Respondent received by the Tribunal on July 31, 2007;
- Letter dated August 29, 2007, from the Applicant's solicitor with his reply to the report of the Respondent;
- Letter dated September 13, 2007, from the Applicant's solicitor with Notices of Intention to produce business records;
- Letter dated January 16, 2009, from the Applicant's solicitor enclosing Maple Lodge Live Bird Receiving Welfare Program and Training Record;

During the course of the hearing, I entered the following exhibits as evidence:

- Applicant's Exhibit #1 being two chicken transportation crates of the type used in this case;
- Applicant's Exhibit #2 being two compact disks entitled "Nadeau Live Receiving" and "Maple Lodge Live Receiving".

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The Notice of Violation #0708ON0006 dated June 7, 2007, alleges that the Applicant, on or about 4:53 hrs, on the 8th day of May, 2007, at Brampton, in the province of Ontario, committed a violation, namely: "Load, unload or cause to be loaded or unloaded an animal, to wit: chickens, in a way likely to cause suffering", contrary to provision 139(2) of the *Health of Animals Regulations*, which states:

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

General Facts

The unloading of the chickens in question took place on the morning of May 8th, 2007, at the unloading facilities of the Applicant in Brampton, Ontario.

There are two unloading areas; one upper area called the broiler bay, and the lower area called the fowl bay. The better quality birds are unloaded in the broiler area, and the older birds and spent hens are unloaded in the fowl area.

Crates from the parked trailers are unloaded by hand onto moving conveyors which move from the unloading area into the live hanging and slaughter areas.

At the same time that crates are being unloaded, empty crates are being loaded back onto the same trailer.

During the unloading process, the noise level in these areas exceeds 80 decibels and employees of the Applicant are required to wear earplugs.

The documentation also identifies the load in question to have contained 8,832 light birds from a truck identified by licence DEL-62D (not a truck belonging to the Applicant).

Each crate of light birds weighs between 22 and 25 kilograms.

Direct Evidence

The only direct evidence of the incident in question was given by Mr. Gilbert Asmus, who was the Respondent's inspector on duty on the morning of May 8th, 2007.

He testified he entered the broiler bay mezzanine area at 4:53 a.m. The documented evidence establishes the kill time of this load to be between 4:37 and 5:32 a.m. so that the slaughter had commenced and unloading was well under way.

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On entering the mezzanine of the broiler bay area, the inspector testified he heard the sound of crates being dropped hard. He then testified he saw an employee of the Applicant drop three crates from the trailer on to the moving conveyor belt. Two of the crates were dropped from approximately shoulder height of the person unloading, and the third from chest height.

Mr. Asmus recalled he saw birds escape from a crate after it hit the conveyor and one bird fell through the crack between the trailer and the walkway. He also said he saw birds on the floor level underneath the conveyor belt.

After being in the broiler bay area, he said he went down to the fowl bay area where he saw other crates being unloaded hard. There, he testified he saw several birds on the walkway and on the conveyor belt.

He also indicated he took the pictures at Tab #1 of the Respondent's report showing one of the birds caught in the rollers.

It was not established however, that any of the loose birds in the fowl bay area came from the load in question.

Unloading Procedure

The operating procedure for the unloading of crates and bird handling of the Applicant is set out on page 29 of Tab #6 of the Applicant's reply document. The purpose of the procedure is to ensure that all crates of birds and birds are removed from trailers and crates with all possible care to avoid injury. In particular, the procedure states that "containers with birds are to be moved as much as possible in a horizontal position. Crates with birds are to be moved smoothly and never to be thrown or dropped".

Mr. Asmus testified that the crates are perforated, and when dropped can cause broken legs, wings and bruising, and can create a state of shock. Another risk of dropping or throwing is that the top doors to the crates could pop open and birds could escape and be injured in the conveyor, on the floor, or be run over by trucks.

Mr. Moreira testified that a thrown or dropped crate would cause the birds to be shifted in the crate, causing bruising of the affected birds in areas close to their wish bones. He further confirmed that dropping or throwing crates could lead to the danger of birds escaping and being subsequently injured.

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The Applicant's evidence established that, even without being dropped or thrown, it is a common occurrence for crate doors to open and for chickens to escape during the unloading process. This could happen due to faulty crates, chickens pushing the doors open with their heads, or simply by the movement of the conveyor belts. The Applicant actually employs persons at all times in the unloading areas to catch these wayward chickens.

Maple Lodge Farms Ltd. Programs

The Applicant has numerous programs in place to mitigate against injury or loss during its operations, including its Bird Handling and Welfare Program and its Live Bird Receiving Welfare Program and Training Record.

I am satisfied from the Applicant's evidence that it is constantly reviewing its procedures to mitigate against losses, although it indicated a zero loss is virtually impossible in its unloading operations given the existing equipment and technology at its plant. It also gave evidence that it is enhancing its facility to further mitigate risks in this area.

Although a general standard for the mortality level of the size of the load in question is 4%, the mortality level of this load was considerably less than this percentage.

The Applicant submitted that it had done everything it reasonably could have done from a management, handling and monitoring standpoint to minimize the suffering and mortality of live chickens in its live receiving area.

In fact, the main thrust of the Applicant's evidence dealt with its training, operational procedures and future plans to update its facility, all matters relating to due diligence.

Although the steps taken to mitigate against harm are commendable, due diligence is not a defense to a violation by reason of subsection 18(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* which reads as follow:

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.

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Injury or Undue Suffering

I agree with counsel for the Applicant that in this case, there is no direct evidence to link any of the loose or injured birds in the fowl bay area to the trailers Mr. Asmus saw being unloaded.

However, in order to establish a violation under subsection 139(2) of the *Regulations*, it is not necessary to show actual injury or actual undue suffering. The Respondent need only establish that the manner of unloading was likely to cause injury or undue suffering.

I am satisfied that the dropping of crates loaded with birds from shoulder or chest heights by an employee of the Applicant onto the moving conveyor belt was likely to cause the birds injury or undue suffering. I find the Respondent has, accordingly, met its onus on a balance of probabilities.

Gravity Value

The likelihood of injury or undue suffering by the negligent actions of the Applicant's employees has been established by the evidence and I concur with the gravity value calculation of the Respondent set out at page 8 of the Respondent's case report.

Conclusion

Counsel for the Applicant submitted a corporation could not unload chickens.

However, I find the Applicant committed the violation by virtue of its status as employer.

It is vicariously liable for the commission of a violation by its employees by reason of subsection 20(2) of the *Agriculture and Agri-Food Administration Monetary Penalties 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.

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Dated at Ottawa, this 4th day of March, 2009.

Thomas S. Barton, Q.C., Chairperson