

Canada Agricultural
Review Tribunal



Tribunal de révision
agricole du Canada

Citation: Poirier-Bérard v. Canada (CFIA), 2012 CART 23

Date: 20121114
Docket: CART/CRAC-1584

Between:

Poirier-Bérard Ltée, Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Tribunal Member Dr. Bruce La Rochelle

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 paragraph 143(1)(d) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following a review of all of the written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable for payment of the penalty in the amount of \$2,000 to the respondent within thirty (30) days after the day on which this decision is served.

By written submissions only.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (the Agency), alleges that on December 18, 2009, in Mirabel, Quebec, the applicant, Poirier-Bérard Ltée (Poirier-Bérard), transported or caused to be transported chickens that were unduly exposed to weather, contrary to paragraph 143(1)(d) of the *Health of Animals Regulations*.

[3] Paragraph 143(1)(d) of the *Health of Animals Regulations* reads 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*

...

(d) *undue exposure to the weather...*

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

- whether Poirier-Bérard, in its capacity as a poultry transporter, transported or caused to be transported the birds in question;
- whether Poirier-Bérard is responsible, directly or indirectly, for their injury or undue suffering, or for the risk of injury or undue suffering, caused by prolonged exposure to cold temperatures.

[5] Furthermore, if the Tribunal finds that the Agency has established 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 *Agriculture and Agri-Food Administrative Monetary Penalties Act* and its Regulations.

Case and procedural history

[6] Notice of Violation No. 0910QC0128 dated June 6, 2011, alleges that on December 18, 2009, in Mirabel, Quebec, Poirier-Bérard [TRANSLATION] “committed a violation, namely, having transported animals, by motor vehicle, that suffered unduly by reason of undue exposure to the weather during transport, contrary to paragraph paragraph 143(1)(d) of the *Health of Animals Regulations*”, which is a violation of section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[7] On June 26, 2011, the Agency served the above-mentioned Notice of Violation on Poirier-Bérard. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, this is a serious violation, for which the penalty assessed is \$2,000.

[8] In a letter dated July 5, 2011, and received by the Tribunal that same day, Poirier-Bérard, through Rachel Bellerose (Ms. Bellerose), the company's poultry transportation supervisor, requested that the Tribunal review the alleged facts, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. The letter dated July 5, 2011, sets out the reasons for its request for a review.

[9] On July 19, 2011, the Agency sent its report (the Report) concerning the Notice of Violation to Poirier-Bérard and the Tribunal, with the Tribunal receiving its copy the following day.

[10] In a letter dated July 20, 2011, the Tribunal invited Poirier-Bérard to file any submissions supporting its request for a review before August 19, 2011.

[11] In a letter dated August 17, 2011, and received by the Tribunal, in part by fax on August 18 and in hard copy format on August 22, 2011, Poirier-Bérard, through Ms. Bellerose, filed a detailed memorandum of argument in support of its review request.

[12] After the parties came to an agreement on a request for an extension of time, in a letter dated December 13, 2011, and received by the Tribunal on December 14, 2011, the Agency, through its counsel, Anne-Marie Lalonde, filed a detailed memorandum of argument in support of the Notice of Violation.

Evidence

[13] The evidence presented to the Tribunal in the present case consists of written submissions made by the Agency (the Notice of Violation and the Report) and by Poirier-Bérard, more specifically, the review request dated July 5, 2011, with reasons, and the detailed memorandum of argument filed on August 17, 2011.

[14] Certain facts are not in dispute:

- A shipment of 7,440 chickens (2.52 kg roosters, declared to be 2.40 kg at departure) were loaded into a cargo truck belonging to Poirier-Bérard early in the morning of December 18, 2009, using trailers also belonging to Poirier-Bérard. The loading at Ferme Andrée Philibert Inc, located in St-Boniface, began at 1:00 a.m. and finished at 3:20 a.m. The truck driver reported to Ferme Andrée Philibert Inc. at 11:00 p.m., on December 17, 2009, for a loading scheduled at 11:30 p.m. The load arrived at the Volailles Mirabel slaughterhouse, located in Mirabel, Quebec, at 5:30 a.m. (Letter dated July 5, 2011, page 1; Memorandum of Argument dated August 17, Tab 5).

- While the chickens were being loaded and during transport, the temperature was extremely cold: -23 °C to -24 °C (Agency's Report, Tab 6, page 1) or less (-29 °C, Letter dated July 5, 2011, page 2; -22 °C to -29 °C, Agency's Report, Tab 6, page 3).
- When the load arrived at the Volailles Mirabel slaughterhouse, the trailer was parked under the shelter, and the tarpaulin overhead was removed. At that time, there was no one on watch at the slaughterhouse (Letter dated July 5, 2011, page 1).
- During an *ante-mortem* inspection around 8:30 a.m., Dr. Marc Bertrand (Dr. Bertrand), a veterinarian who works for the Agency, noticed that many of the chickens had died. Dr. Bertrand supervised the end of the unloading of one of the two trailers used by Poirier-Bérard and counted 171 dead chickens in a lot of 7,440, or 2.3% (Agency's Report, page 9, [TRANSLATION] "Summary of the Violation").

Disputed evidence

[15] In the present case, the disputed evidence relates to the issue of whether Poirier-Bérard transported chickens in a manner such that, on a balance of probabilities, the chickens suffered unduly by reason of exposure to the weather. The issue applies to both the dead chickens and those that were still alive when the slaughtering began. It is impossible to determine whether the dead chickens perished during the trip or between their arrival at 5:30 a.m. and when Volailles Mirabel began slaughter operations, at 8:30 a.m., on December 18, 2009.

[16] During his *ante-mortem* inspection around 8:30 a.m., Dr. Bertrand supervised the end of the unloading of one of the two trailers used by Poirier-Bérard. In the Inspector's Non-Compliance Report relating the events of December 18, 2009, Dr. Bertrand stated that most of the dead chickens came from the first row and that there were patches of ice about 2 cm thick on the trailer's floor. There were 171 dead birds in the lot of 7,440 shipped in two trailers, which represents a cage mortality rate of 2.3%. After carrying out necropsies on a dozen chickens, Dr. Bertrand concluded that the chickens had died from [TRANSLATION] "exposure to intense cold" (Agency's Report, page 9, [TRANSLATION] "Summary of the Violation"; Tab 7). In Poirier-Bérard's arguments, Ms. Bellerose states that, according to the driver, the birds were dry when they arrived at the slaughterhouse (Letter dated July 5, 2011, page 1).

[17] In the letter dated April 4, 2011, that he sent to Véronique Dumontier, an Agency investigator, Dr. Bertrand states that necropsies were performed on a dozen birds. The necropsies revealed [TRANSLATION] "nothing significant apart from the fact that the carcasses were frozen, with ice crystals in the muscular tissue. On the basis of these

necropsy results, I can conclude that the cause of death was intense cold” (Tab 7, Agency’s Report).

[18] Poirier-Bérard states that a number of other intervening parties can affect the percentage of in-cage deaths, whatever the temperature and the measures taken by the transporter: the producer, the catchers and the slaughterhouse. Moreover, industry practices and the genetic make-up of the birds should be taken into account. There will always be a percentage of birds that will die after transport (pages 9 and 10, Arguments of Poirier-Bérard, “Conclusion”).

[19] Poirier-Bérard states that it must comply with the contracts with the slaughterhouse. It was the slaughterhouse that asked for the shipment, despite the temperature: [TRANSLATION] “... we must load despite any storm, sleet, rain or extreme heat, so we have no alternative but to comply” (page 4, Arguments of Poirier-Bérard, Part 1: [TRANSLATION] “Slaughterhouse”). Furthermore, [TRANSLATION] “slaughterhouses have their own loading and catching policies, and we must comply with them” (page 9, Arguments of Poirier-Bérard: “Conclusion”).

[20] Poirier-Bérard states that the Flock Information Reporting Form is not representative of reality. Without details, it is impossible for Poirier-Bérard to ensure the ongoing well-being of the chickens when necessary (page 4, Arguments of Poirier-Bérard, Part 2: [TRANSLATION] “Producer”).

[21] Poirier-Bérard raises the climactic changes that have occurred in Quebec: [TRANSLATION] “[For] many years, there has been less snow, higher humidity and more rain and wind” (page 9, Arguments of Poirier-Bérard: “Conclusion”).

[22] Poirier-Bérard admits that the load consisted of 50% broiler roosters and 50% female chickens. It adds that [TRANSLATION] “it has been proved that broiler roosters are genetically more fragile than female chickens and that they are less feathered. Studies have shown that broiler roosters die more easily in cages (sudden death, less developed organs, heart attack, more rapid weight gain). We cannot exclude broiler roosters from shipment or from the industry: the genetics are 50-50 (male to female). Therefore, 50% of the birds are more at risk during periods of so-called inclement weather” (page 6, Arguments of Poirier-Bérard, Part 4: [TRANSLATION] “Birds’ sex and genetics”).

[23] In its arguments, Poirier-Bérard submits that unless the mortality rate occurred by chance, it is the result of the slaughterhouse staff’s inaction between 5:30 a.m. and 8:30 a.m.: [TRANSLATION] “The wait in the yard and the lack of any monitoring of the birds contributed to the higher mortality rate in the lower part of the trailer” (page 8, Arguments of Poirier-Bérard, Part 5, [TRANSLATION] “Transport to the slaughterhouse”). In its conclusions, Poirier-Bérard asks the following questions: [TRANSLATION] “At -30 °C, should the slaughterhouse decide not to have the birds loaded? At -30 °C, should the slaughterhouse increase monitoring in the slaughterhouse yard?” (Page 9, Arguments of Poirier-Bérard, “Conclusion”).

[24] Dr. Marie-Claude Simard (Dr. Simard), a veterinarian, prepared a report dated December 9, 2011 ("Simard Report"). She said that, since 2004, she has held a position as a veterinarian specializing in humane transportation and handling at the Agency's Animal Health Division, Quebec Area. She read the Agency's non-compliance report, particularly the veterinarian's comments, including the appended necropsy report by Dr. Bertrand. Dr. Simard, who has been giving her opinion as a specialist in humane transportation since 2004, worked five years (1996-2001) as a veterinarian in poultry slaughterhouses (Simard Report, page 1). In her opinion, [TRANSLATION] "Dr. Bertrand's finding is accurate and is consistent with the observations made during inspection of the unloading of Trailer #372, the location of the deaths in this trailer and the birds' necropsies. These birds were exposed to intense cold, incompatible with life, and therefore suffered unduly during transport" (Simard Report, page 2).

[25] Dr. Simard remarked that [TRANSLATION] "[t]he birds would maintain their body temperature adequately in conditions where the temperature and ventilation in the trailer are controlled, which is currently not the case for trailers transporting poultry in Canada" [emphasis added]. In Canada, passive ventilation is used when transporting poultry (Simard Report, page 2). However, Dr. Simard notes that day-old chicks are usually transported to poultry barns [TRANSLATION] "in ventilated, temperature-controlled vehicles, which results in negligible mortality rates" (Simard Report, page 2).

[26] Passive ventilation may make the truck colder when it is moving. According to Dr. Simard, [TRANSLATION] "[w]e know that temperatures that day were between -21 and -29 °C and could have reached -58 °C with the wind chill factor when the vehicle was moving" (Simard Report, page 4).

[27] Dr. Simard is aware that it is [TRANSLATION] "difficult to establish the exact time of death of the birds in question (i.e. during loading or transportation, or while waiting at the slaughterhouse)". Nevertheless, she is of the opinion that [TRANSLATION] "only undue exposure to the weather can explain the vast majority of the bird deaths" (Simard Report, page 5).

[28] Ms. Bellerose made the following points on behalf of Poirier-Bérard (Letter dated July 5, 2011 and Memorandum of Argument dated August 17, 2011):

- (a) Loading was scheduled for 11:30 p.m., on December 17, 2009; the driver reported to Ferme Andrée Philibert Inc. at 11:00 p.m., on December 17, 2009.
- (b) The truck was fully covered on the road and maintained an average speed of 80 km/h.
- (c) The roosters weighed 2.52 kg, but they had been listed at 2.4 kg on departure. Furthermore, broiler roosters are genetically fragile and poorly feathered. Poultry mortality rates in cold weather are the product of chance. The mortality rates are inevitable, no matter what the transporter does.

- (d) Therefore, despite the protective measures taken by the transporter, these birds are at higher risk during periods of inclement weather. Poirier-Bérard raises a defence of due diligence. Due diligence, argues Poirier-Bérard, is limited by the slaughterhouses' policies on loading and catching. Poirier-Bérard says that it has no choice but to comply with these policies.
- (e) Poirier-Bérard argues that the facts support a defence of necessity, namely, that it was [TRANSLATION] "impossible to suspend the transportation of the birds during the period of 'so-called inclement weather' because of the impact that the resulting economic losses would have had" (Arguments of Poirier-Bérard, "Conclusion", page 9, second paragraph).

[29] Ms. Lalonde made the following points (Letter from the CFIA dated July 20, 2011, and Memorandum of Argument dated December 13, 2011):

- (a) The poultry mortality rates in cold weather are not the product of chance or inevitable, whatever the transporter may do, because most of the chickens found dead were from the crate row, which was in direct contact with the trailer's icy floor.
- (b) Even though each party involved may be partly to blame, paragraph 143(1)(a) of the *Health of Animals Regulations* authorizes the Minister to impose an administrative penalty on anyone who commits a prohibited act. If there are several parties involved, the Minister may choose to impose a single administrative penalty. None of the parties involved may argue that other parties share liability for the mortality rate observed at the destination. An intervening cause introduced by another party does not absolve an offender of its liability for transporting animals or causing them to be transported in a manner that causes them undue suffering.
- (c) The defence of due diligence is not available under the regime established by the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. This is an absolute liability regime. If the roosters had weak constitutions, Poirier-Bérard should have taken special precautions to avoid causing them undue suffering.
- (d) The regime does allow a defence of necessity—or, to be more precise, the defence of necessity is not inconsistent with the regime. The Agency submits that this defence does not apply in the circumstances of the present case, since the so-called necessity described by Poirier-Bérard was avoiding the economic losses that it would incur if it broke the transportation contract. The Agency submits that the course of action to be taken is to not transport the birds in question, or to transport them during the day.

Analysis and applicable law

[30] The Tribunal's role is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act). The purpose of the Act is set out in section 3:

3. The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.

[31] Section 2 of the Act defines "agri-food act" as follows:

2. . . . "agri-food Act" means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act.

[32] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health depending on the circumstances, may make regulations to designate violations that may be proceeded with:

4. (1) The Minister may make regulations

(a) designating as a violation that may be proceeded with in accordance with this Act:

(i) the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act. . . .

[33] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (SOR/2000-187, hereafter "AMPs Regulations"), which designates as violations several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 to the AMPs Regulations, which includes a reference to paragraph 143(1)(d) of the *Health of Animals Regulations*.

[34] The Tribunal's jurisdiction is set out in subsection 11(2) of the Regulations:

11. (2) Where a person named in a notice of violation that contains a penalty requests ...a review of the facts of the violation by the Minister or the Tribunal...

[35] The applicant may either have the Minister review the facts or first request that the Tribunal review them. Furthermore, if the penalty is \$2,000 or more, the applicant may request to enter into a compliance agreement with the Minister, and such a request shall be made in writing within 30 days after the day on which the notice is served and shall include a proposal outlining in detail the corrective action that will be taken to ensure future compliance: see subsection 11(3) and paragraphs 12(b) and 13(a) of the Regulations.

11. (1) Where a person named in a notice of violation that contains a warning requests, pursuant to subsection 8(1) of the Act, a review of the facts of the violation by the Minister or the Tribunal, the request shall be made in writing within 30 days after the day on which the notice is served.

(2) Where a person named in a notice of violation that contains a penalty requests, pursuant to subsection 9(2) of the Act, a review of the facts of the violation by the Minister or the Tribunal or, if the penalty is \$2,000 or more, to enter into a compliance agreement with the Minister, the request shall be made in writing within 30 days after the day on which the notice is served.

(3) For the purposes of subsection (2), a request to enter into a compliance agreement shall include a proposal outlining in detail the corrective action that will be taken to ensure future compliance.

12. Where a person is notified that the Minister refuses to enter into a compliance agreement, that person may, within 15 days after the day on which the notice is served

(a) pay the amount of penalty set out in the notice of violation; or

(b) request, in writing, a review by the Tribunal of the facts of the violation referred to in the notice of violation

13. Where, after concluding a review requested pursuant to subsection 8(1) or 9(2) of the Act, the Minister notifies a person that it is the Minister's decision that the person committed the violation, the person may

(a) request, in writing, within 15 days after the day on which the notice is served, a review of the Minister's decision by the Tribunal; or

(b) where the review is in respect of a penalty, and the decision maintains the penalty or corrects the amount of the penalty, pay the penalty or the corrected amount, within 15 days after the day on which the notice is served.

[36] Although the Act has been in force since 1995, the Tribunal still does not have jurisdiction over matters concerning the *Farm Debt Mediation Act*, the *Feeds Act*, the *Fertilizers Act*, the *Meat Inspection Act*, the *Plant Protection Act* or the *Seeds Act*. For example, the Tribunal has jurisdiction over the transportation of animals (which falls within the “health of animals”), but for the moment, it does not have jurisdiction over slaughter plant activities.

[37] The system of administrative monetary penalties, as set out by Parliament, is very strict in its application. The Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the Act states 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.

(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.

[38] When an administrative monetary penalty provision has been enacted for a particular violation, as is the case for paragraph 143(1)(d) of the *Health of Animals Regulations*, Poirier-Bérard has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that the company might raise, including Poirier-Bérard’s belief that it was acting properly, in accordance with industry policy. Parliament’s intention was stated clearly.

[39] The courts do not look very favourably on this regime, especially because the violations (not “offences”) entail absolute liability. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, Justice Létourneau, writing on behalf of the Federal Court of Appeal, describes the regime as follows:

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor’s burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him - or herself.

[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

[40] Moreover, the Federal Court of Appeal, in *Doyon*, points out that the Act imposes a heavy burden on the Agency:

[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation, and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.

[41] Section 19 of the Act reads as follows:

19. *In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.*

[42] Therefore, it is incumbent on the Agency to prove, on the balance of probabilities, all the elements of the violation. In the case of a violation of paragraph 143(1)(d), the Agency must prove elements similar to those listed by Justice Létourneau, at paragraph 41 of *Doyon*, for a violation of paragraph 138(2)(a), namely, the following:

- 1. that the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);*
- 2. that the animal in question was loaded onto or transported on a railway car, motor vehicle, aircraft or vessel;*
- 3. that the cargo loaded or transported was an animal;*
- 4. that the animal could not be transported without undue suffering;*
- 5. that the animal suffered unduly during the expected journey ("voyage prévu" in French);*
- 6. that the animal could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause; and*
- 7. that there was a causal link between the transportation, the undue suffering and the animal's infirmity, illness, injury or fatigue, or any other cause.*

[43] There are differences between the two paragraphs. Here is the full text of each:

Paragraph 138(2)(a):

138. (2) . . . *no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel 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;

Paragraph 143(1)(d):

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

[44] Because of the differences between paragraph 138(2)(a) and paragraph 143(1)(d), the elements of the violation are different. Following *Doyon, mutatis mutandis*, the Tribunal finds that the elements of the violation for paragraph 143(1)(d) are the following:

1. *that the animal in question was transported (or caused to be transported);*
2. *that the animal in question was transported in a railway car, motor vehicle, aircraft, vessel, crate or container;*
3. *that the cargo transported was an animal;*
4. *that the animal could not be transported without risk of injury or undue suffering by reason of undue exposure to weather;*
5. *that there was a causal link between the transportation, the undue suffering and the animal's infirmity, illness, injury or fatigue, or any other cause.*

[45] In other words, the Tribunal must determine whether the Agency has proved that Poirier-Bérard transported the chickens in question or caused them to be transported (Elements 1, 2 and 3) and, if so, whether the Agency has also proved that, by not handling the birds with due diligence, Poirier-Bérard caused injury or undue suffering to the birds by reason of prolonged exposure to cold temperatures (Elements 4 and 5).

[46] In some cases that have come before the Tribunal where a violation of paragraph 143(1)(d) of the *Health of Animals Regulations* has been alleged, the applicant

was the transporter of the animals (e.g., *Glenview Livestock v. Canadian Food Inspection Agency*, RTA-60162 (2005)). In such cases, the burden on the Agency to prove that the applicant “transported” the animals in question is easily met.

[47] The Tribunal finds that Elements (1), (2) and (3) have been proved by the facts described (and admitted) by Poirier-Bérard. Regarding Elements (4) and (5), Poirier-Bérard admitted that the roosters were dry when they were loaded. If any suffering, or undue suffering, was caused to them, it happened during transportation or before unloading. For Elements (4) and (5), it is mainly a question of determining whether the animals could be transported without causing them injury or undue suffering. If Element (4) can be proved, as well as Elements (1), (2) and (3), which were admitted in the present case, it appears that transporting the animals would be prohibited. If the animals are in fact transported, injury or undue suffering is almost inevitable.

[48] Regarding Elements (4) and (5), the Agency’s evidence is persuasive and sufficient to prove each on a balance of probabilities. Although none of the evidence adduced proves that the ambient temperature inside the vehicle containing the cargo of poultry did in fact rise or fall during the long hours when the cargo was waiting to be processed, the Tribunal accepts that, given the fragile nature of the roosters, the birds would have suffered less, or likely would have suffered less, if the shipment had been given priority and processed immediately. On the whole of the evidence, it is clear that from the time the shipment arrived at the slaughterhouse, Poirier-Bérard had sufficient control and influence to inspect the birds and take the necessary action, thus avoiding the undue suffering caused or likely caused to them by reason of the time spent awaiting slaughter on that cold December day.

[49] The test set out in paragraph 143(1)(d) of the *Health of Animals Regulations* requires that injury or undue suffering to the animals need only be “likely” to be caused by undue exposure to weather. The Tribunal accepts that that test, on the balance of probabilities, has been met in this case. Given the cold temperatures that day, the fragile nature of the roosters and the extremely uncomfortable conditions that the birds had already endured during the trip to the slaughterhouse, the fact that these delicate birds were not inspected upon arrival and had to wait several hours before being processed did cause, or did likely cause, any surviving birds injury, undue suffering or even death.

[50] Industry practices are described in the *Recommended code of practice for the care and handling of farm animals - Chickens, Turkeys and Breeders from Hatchery to Processing Plant* of the Canadian Agri-Food Research Council, published in 2003 (Code, or Recommended code of practice), filed in evidence by the Agency. The Code recommends immediate processing of stressed loads. Shipping roosters would certainly have met this definition if Poirier-Bérard had inspected the shipment upon its arrival at the slaughterhouse. The Code gives the following guideline at paragraph 6.1.6:

6.1.6 *Stressed loads must, if at all possible, take precedence in the slaughter schedule. Flocks observed to be in distress during the*

transport or while awaiting slaughter at the abattoir should be slaughtered on a priority basis. Generally, it is accepted practice to schedule slaughter based on crate time.

[51] Furthermore, paragraph 5.2.13 of the Recommended code of practice states as follows:

5.2.13 *Birds should be protected from becoming wet, in cold conditions during loading. Covers on the trucks should be used to protect birds from adverse weather conditions. Extreme changes in temperature should be minimized to the extent possible.*

[52] In the present case, the fact remains that between 1:00 a.m. and 3:00 a.m., the birds, including the small, featherless, genetically weak roosters, were transported at temperatures ranging from -22 °C to -24 °C. Around midnight, the temperature was -23 °C (Hourly Observations, National Climate Data and Information Archive of Canada, filed by the Agency; page 1, Tab 6 of the Report). It should be noted that the temperature falls when the truck is under way and that the birds were transported without a source of heat, apart from their collective body heat. Regarding the “Handling and Transportation of Live Poultry”, under “Transport”, at paragraph 5.3.4., the Code advises as follows:

5.3.4 *The air temperature in a load of live poultry should be maintained between 5 °C (42 °F) and 30 °C (86 °F). Development and installation of environmental monitoring devices on live haul trailers should be encouraged to provide drivers with continual information on the load. Drivers should use this information in conjunction with his/her experience to respond appropriately.*

[53] To sum up, we have two unheated trailers; a temperature under -20 °C; a trip lasting several hours; small, featherless, genetically weak roosters; and birds found frozen to death. So there is no doubt that this load could not have been transported without causing undue suffering. Freezing to death is more than “ordinary” suffering. Furthermore, the birds were clearly injured if they froze to death.

[54] The Tribunal finds, on a balance of probabilities, that the Agency has proved all the essential elements of the violation and that the Notice of Violation With Penalty should be confirmed.

Penalty, quantum and removal of all record of the penalty after five years

[55] The only issue that remains to be determined by the Tribunal is whether the Agency has proved that a penalty of \$2,000 is justified under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and the AMPs Regulations.

[56] The Tribunal finds that a penalty of \$2,000 is justified under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and the AMPs Regulations for the following reasons. 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 AMPs Regulations. The violation set out at paragraph 143(1)(d) belongs to the category of serious violations. Specifically, Column 3 of Item 252 (Column 1), “Transport or cause to be transported an animal with undue exposure to weather” (Column 2) of Division 2 of Part 1 of Schedule 1 to the AMPs Regulations states that this violation is serious. On the date the violation was committed, section 5 of the AMPs Regulations stated that a serious violation carried a penalty of \$2,000 (higher amounts for violations came into force in October, 2010). In the present case, the base amount of \$2,000 can be either increased or decreased on the basis 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 totalled 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.

[57] **History** – According to Schedule 3, Part 1, Item 1 of the AMPs 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. In the case of Poirier-Bérard, there were no violations in the three years preceding the violation.

[58] **Intent or negligence** – According to Schedule 3, Part 2 of the AMPs Regulations, the Agency must assess whether the violation was committed with intent or negligence. A value of 0 points is ascribed where “[t]he violation subject to the assessment is committed without intent or negligence” (Item 1). A value of 0 points is also ascribed where “[t]he person who commits the violation subject to the assessment makes a voluntary disclosure of the violation and takes necessary steps to prevent its re-occurrence” (Item 2). A value of 3 points is ascribed where “[t] The 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 ascribed a gravity value of 3. The Tribunal agrees with the Agency’s assessment, but not with the arguments supporting it. In the Tribunal’s view, the Agency seems to think that if Poirier-Bérard committed a violation, this violation must necessarily be the result of negligence. With respect for the Agency, its reasons are very weak. Indeed, the reasons are merely a summary of policies described as being [TRANSLATION] “facts”:

[TRANSLATION]

The Canadian Agri-Food Research Council, with the support of the federal government and provincial governments, has developed national codes of practice for the care and handling of farm animals. The codes cover recommended housing and management practices for animals on farms as well

as transportation and processing. They are intended to encourage high standards of animal husbandry and handling.

Transporters, producers and slaughterhouses should have good knowledge of the statutes and codes of practice regarding the care and handling of farm animals, as well as the basic principles of the humane transportation of animals, to look after the animals' wellbeing.

Part 5.3 of the Recommended code of practice for the care and handling of farm animals - Chickens, Turkeys and Breeders from Hatchery to Processing Plant sets out the precautions to be taken when transporting live poultry.

The violation was committed through an act of negligence.

[59] With respect for the Agency, a statement of the policies is not evidence of negligence. The practices set out in the Code are mere recommendations from the government. The Agency has not proved any connection between the Code and industry practices, particularly whether the industry has adopted the Code's recommendations.

[60] The Tribunal finds that it would be preferable to refer to the courts' well-established principles of negligence. Is there a duty to ensure the wellbeing of the animals? Was there a breach of this duty? Did those breaches cause injury or undue suffering to the birds? Was the birds' injury or undue suffering foreseeable?

[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. Parliament has made no such exception to date. However, the Tribunal notes that Parliament did create an exception for chicks, in subsection 138(3) of section 138:

138. (3) Paragraph (2)(b) does not apply to a chick of any species if the expected duration of the chick's confinement is less than 72 hours from the time of hatching.

There is no similar exception in section 143.

[62] **Harm** – On the third factor, the Agency assessed the gravity value at 5, because [TRANSLATION] "Poirier-Bérard Ltée was responsible for ensuring that the birds did not

suffer unduly by reason of the extremely cold conditions that day. The company breached its duty, which breach resulted in a mortality rate of 2.3% for the birds and caused them undue suffering". According to Item 3, Part 3, Schedule 3 ("Harm"), a gravity value of 5 is ascribed when "[t]he violation subject to the assessment causes (a) serious or widespread harm to animal or plant health or the environment". In a case where the violation could cause similar harm, the gravity value is 3 (Item 2, Part 3, Schedule 3). Again, the Tribunal agrees with the Agency's assessment, but not with the arguments supporting it. With respect for the Agency's opinion, the Tribunal is of the view that the mortality rate is not a fact that indicates a violation causing serious harm to the health of an animal. What does indicate such a violation is the fact that at least one bird froze to death while it was under the care and control of Poirier-Bérard.

[63] As the Agency assessed the total gravity value at 8, no adjustment was made to the administrative monetary penalty of \$2,000. The Tribunal agrees with this assessment, but for reasons different from those of the Agency.

[64] Consequently, the Tribunal, by order, determines that Poirier-Bérard committed the violation and orders it to pay the Agency a monetary penalty of \$2,000 within thirty (30) days after this decision is served.

[65] The Tribunal wishes to inform Poirier-Bérard that this violation is not a criminal offence. After five years, Poirier-Bérard will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, which reads as follows:

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

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

(b) in any other case, the payment of any debt referred to in subsection 15(1), unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.

Dated at Ottawa, this 14th day of November, 2012.

Dr. Bruce La Rochelle, Member