



Citation: 473629 *Ontario Inc. v. Canada (Canadian Food Inspection Agency)* 2014 CART 30

Date: 20141024
Docket: CART/CRAC-1735

Between:

473629 Ontario Inc. (dba Little Rock Farm Trucking), Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

**With: Mr. Edward Oldfield, counsel for the applicant; and
Ms. Jacqueline Wilson, counsel for the respondent.**

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

Following an oral hearing and review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines that the applicant, 473629 Ontario Inc. (dba Little Rock Farm Trucking), committed the violation set out in Notice of Violation #12130N0388, dated June 19, 2013, concerning events that took place on October 29, 2012, and is liable for payment of the penalty in the amount of \$6,000 to the respondent, the Canadian Food Inspection Agency, within thirty (30) days after the day on which this decision is served.

The hearing was held in Kitchener, ON,
Monday, May 5 to Wednesday, May 7, 2014.

REASONS

1. Alleged Incidents and Issues

[1] This case, one in a series of three cases between the parties heard by the Tribunal in May of 2014, is about the life and death of spent hens on their way to a Canadian slaughter house. The present case arises from the discovery of 537 dead chickens on October 30, 2012, aboard a trailer driven by personnel of 473629 Ontario Inc., a company doing business as Little Rock Farm Trucking (LRFT). The discovery was made by employees of Maple Lodge Farms (MLF), a slaughter house and processor of chickens, and by Canadian Food Inspection Agency (Agency) officials, as the trailer was being unloaded. As a result of this incident, the Agency, on June 19, 2013, issued Notice of Violation #1213ON0388 to LRFT, alleging that LRFT had transported or caused to be transported an animal in a manner that injury or undue suffering was likely to be caused to the animal by reason of undue exposure to the weather.

[2] Paragraph 143(1)(d) of the *Health of Animals Regulations* (HA Regulations) states:

No person shall transport or cause to be transported any animal in a railway car, motor vehicle, aircraft, 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.

[3] The role of the Tribunal is to determine whether the Agency has established all of the elements required to support the impugned Notice of Violation, specifically if LRFT as a poultry transporter:

- transported or caused the transport of the poultry in question; and
- is responsible for the poultry's injury or undue suffering by reason of undue exposure to the weather (or the likelihood thereof), by virtue of the way it handled the poultry while in its care and control.

[4] Furthermore, if the Tribunal finds that the Agency has established all of 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 as authorized under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act) and the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations).

2. Procedural History

[5] The Tribunal heard three cases between the parties in May of 2014. While each case arose from its own request for review and will result in its own decision, the Tribunal

ordered, with the parties' consent, that the cases be heard together. Below, the procedural history for each case is reproduced individually and also, where appropriate, collectively.

2.1 Case #1 - The September Incident (CART/CRAC-1734)

[6] The first "sister" case arises from Notice of Violation #1213ON0370, dated June 19, 2013, alleging on September 30, 2012, between Lacolle, Quebec and Brampton, Ontario, LRFT [verbatim] "committed a violation, namely: Transport or cause to be transported an animal with undue exposure to weather; to wit - 6720 fowl transported to Maple Lodge Farms on trailer D-73, including 425 birds found dead on arrival contrary to section 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*." This matter is referred to throughout these reasons as "the September Incident."

2.2 Case #2 - The October Incident (CART/CRAC-1735)

[7] This present case arises from Notice of Violation #1213ON0388, dated June 19, 2013, which alleges that on October 29, 2012, between Fort Erie and Brampton, Ontario, LRFT [verbatim] "committed a violation, namely: Transport or cause to be transported an animal with undue exposure to weather; to wit - 7680 fowl transported to Maple Lodge Farms on trailer DEL-64, including 537 birds found dead on arrival contrary to section 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*." This matter is referred to throughout these reasons as "the October Incident."

2.3 Case #3 - The January Incident (CART/CRAC-1737)

[8] The third "sister" case comes from Notice of Violation #1314ON0509, dated June 19, 2013, which alleges that on January 30, 2013, between Lacolle, Quebec and Brampton, Ontario, LRFT [verbatim] "committed a violation, namely: Transport or cause to be transported an animal with inadequate ventilation: to wit - 7680 fowl transported to Maple Lodge Farms on trailer DEL-62, including 583 birds found dead on arrival contrary to section 143.(1)(e) 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*." This matter is referred to throughout these reasons as "the January Incident."

2.4 Common Procedural History of All Three Cases

[9] Each of the three Notices of Violation was deemed to have been served on LRFT by the Agency on June 19, 2013. Pursuant to section 4 of the AMP Regulations, each violation was classified as a “serious violation” carrying an assessed penalty of \$7,800 each.

[10] In three letters, each dated June 21, 2013, sent by fax and registered mail to the Tribunal, LRFT, through its owner and secretary treasurer, Mr. Mark Reuber (Reuber), requested a review by the Tribunal of the facts of each of the three violations in accordance with paragraph 9(2)(c) of the AMP Act.

[11] By letter dated August 2, 2013, Mr. Edward Oldfield (Oldfield), legal counsel for LRFT set out reasons for his client’s requests for review. Tribunal staff confirmed with Oldfield that LRFT wanted the Tribunal to review its files in English via an oral hearing at a location in Southwestern Ontario. On August 19, 2013, the Agency sent a copy of the report (Report) for each Notice of Violation to LRFT and to the Tribunal. The Tribunal received the Reports on August 20, 2013.

[12] In a letter dated August 20, 2013, the Tribunal invited LRFT and the Agency to file any additional submissions by September 19, 2013. In a letter dated September 18, 2013, Ms. Jacqueline Wilson (Wilson), legal counsel for the Agency, filed one document (a generic version of the Maple Lodge Farms’ Load Condition Report) as evidence to be considered in each case. The oral hearing was held on May 5, 6 and 7, 2014, in Kitchener, Ontario.

3. Evidence

[13] At the start of the hearing, the Tribunal ordered (with the consent of all parties) the three cases be heard together, with the common understanding that, where necessary, parties would indicate to which case (or combination of cases) evidence applied.

[14] In each case, the Agency written record included the relevant Notice of Violation, a generic version of the Maple Lodge Farms’ Load Condition Report, and the relevant Agency Report dated August 19, 2013. The LRFT Poultry written record in each case included the relevant Request for Review dated June 21, 2013, and a further explanation of the fact and arguments relating to each incident.

[15] The Tribunal heard *viva voce* evidence from witnesses as summarized in Table 1:

Table 1 WITNESSES				
Witness Name	Job Title	Area of Expertise	Evidence Applicable To	Party Calling Witness
Dr. Anco Farenhorst	Doctor of Veterinary Medicine	Chicken Pathology	All Incidents	the Agency
Dr. Andrew Gomulka			September and January Incidents	
Dr. Gurcharan Sandhu			October Incident	
Mr. Bruce Freiburger	Agency Inspector	-	September Incident	
Mr. Johnny Vavala			October Incident	
Mr. Peter Devellis			January Incident	
Mr. Mark Reuber	Owner & Secretary Treasurer of LRFT	-	All Incidents	LRFT

[16] Exhibits in Table 2 below were tendered as evidence during the hearing:

Table 2 EXHIBITS			
Exhibit Number	Exhibit Title	Evidence Applicable To	Party Tendering Exhibit
1	Legible Copy of Tab 4 of Agency Report	October Incident	the Agency
3	Canadian Agri-Food Research Council "Recommended Code of Practice for the Care & Handling of Farm Animals-Transportation"	All Incidents	
4	Crate Configuration in a Trailer For Fowls	September and January Incidents	
2	MLF Load Condition Report	October Incident	LRFT

3.1 Evidence Common to All Three Incidents – General

[17] Common to all three incidents was the type of animal and general process by which they were transported. Each witness contributed evidence informing the transportation of hens from American farms to the MLF slaughter house during the relevant period.

[18] Reuber of LRFT explained generally how the entire process unfolds from start to finish. Farenhorst for the Agency explained how the humane transportation of animals was to be carried out according to certain industry/government-developed guides and

standards. The other five witnesses explained the process from the unloading point to the processing of the chickens at the abattoir. The rules set out in Part XII of the HA Regulations require the entire process be completed in a humane way.

[19] All chickens hauled in the September Incident, the October Incident and the January Incident (Incidents) were “spent hens”, which means they were female chickens, approximately 17 months of age, and at the end of their productive lives as egg layers. In each Incident, the layers had been utilized in farming operations in the north-eastern United States (U.S.) and were transported to Canada for slaughter.

[20] General industry evidence demonstrated that U.S. producers keep layers in production for slightly longer than Canadian producers. Due to their continual production of eggs, spent hens often have minimal feathering, depleted calcium reserves, and typically weigh around four pounds. Owners of spent hens often seek out buyers who will slaughter and utilize the hens for any value.

[21] The spent hens in each Incident were being sold to MLF by U.S. operators at a price of one cent per pound. LRFT was hired by MLF to transport the fowl using MLF-owned trailers. All witnesses acknowledged that some hens would die during transport in each Incident, given the stage of hen life, general hen condition, and hauling distances. Testimony revealed that a hen death rate of over four percent was a tipping point where Agency personnel typically initiate an investigation concerning the circumstances of death.

[22] In each of the Incidents, the percentage of dead chickens exceeded four percent. The total of deceased hens found during unloading in each Incident was:

- September Incident 425 deceased of 6,720 (6.3%);
- October Incident 537 deceased of 7,680 (7.0%); and
- January Incident 583 deceased of 7,680 (7.6%).

[23] The evidence also revealed that whether dealing with spent hens or any other type of chicken, the process of taking chickens from their farm of origin to a slaughter house for processing generally follows these steps:

1. Processor and the producer enter into negotiations for the sale and delivery of the birds from the producer’s barns to the processor’s slaughter house.
2. Chickens are collected, caught, placed into cages onto trucks, and transported to the destination.
3. Upon arrival at slaughter house, load is weighed and placed in waiting queue for processing.

4. When processing time comes, chickens are removed from trailer, brought into the slaughter house and then onto the killing floor.

[24] To complete and oversee this transfer, many players are involved. At one end of the process, the producer is typically present when a crew of chicken loaders arrive. The loaders catch and load the chickens into crates. As the crates are filled and loaded onto a trailer, the driver moves his truck ahead until his trailer is completely filled. Once fully loaded, the driver secures the load (usually by tarping it) and drives the chickens, anywhere ranging from a few kilometres to several hundred kilometres, to the processor.

[25] Once at the processor site, the trailer of chickens awaits its turn for processing (up to 12 hours or more in some cases). Then the cages are removed from the trailer and brought inside the abattoir. Once inside, the chickens are removed from cages where they are slaughtered and processed. The chickens are inspected both *ante mortem* and *post mortem* for health and humane transportation concerns. If any dead or infirmed chickens are found, they are counted and documented in a standard report. When necessary, enforcement action is commenced by the Agency against the entity who violated the health or humane transportation regulations during any part of the process.

3.2 Evidence Common to All Three Incidents – Expert Testimony of Farenhorst

[26] Dr. Anco Farenhorst (Farenhorst), a CFIA veterinarian, was qualified as an expert in the application of policies for the humane transportation of animals and in the interpretation of scientific evidence regarding the transportation of fowl. He gave evidence pertinent to all three Incidents.

[27] Farenhorst informed the Tribunal he was not on site for any of the three Incidents, but had reviewed all documentation arising from each case in preparation to give evidence. He told the Tribunal that animal handling and transport codes exist and have been developed by multi-party stakeholders, including regulators, provincial associations, transporters, industry organizations, scientific researchers and educators.

[28] The codes were designed to provide standards for parties participating in the care, handling and transportation of animals. While the codes do not have legal status, they do lay out common standards for all parties. Two codes relevant to this case are the following documents of the Canadian Agri-Food Research Council:

- Recommended Code of Practice for the Care and Handling of Pullets, Layers and Spent Fowl: Poultry - Layers” (Poultry Code); and
- Recommended Code of Practice for the Care and Handling of Farm Animals - Transportation” (Transportation Code).

[29] Farenhorst explained a spent hen is a chicken that has completed its production of laying eggs. Laying hens are brought into the production process at about 19 weeks and remain in production for a full year in Canada (the duration is slightly longer in the U.S.).

[30] In Eastern Canada and the Eastern U.S., after this production period is over, the spent hens are then sent for slaughter while in Western Canada they are simply disposed of. Farenhorst testified that the longer hens remain in production, the more spent they become.

[31] At the end of laying, Canadian birds are very fragile and U.S. birds even more so because they typically use more of their body resources, lose their feathers through molting, and must be handled with special care. Farenhorst told the Tribunal that the older birds will also have bones that are more fragile as their calcium stores have been transferred to egg shells throughout their productive laying lives.

[32] Farenhorst's expert opinion was that such birds are particularly susceptible to transportation stress resulting from:

- missing tarps;
- exposure to wet weather (particularly when there is a cool or cold ambient outside temperature at the bottom range of animal comfort for the birds in question); and
- poor feathering.

[33] Transportation of hens under those conditions would be, in his opinion, contrary to the standards set out in the Poultry Code, paragraph 7.2.2 and Transportation Code, paragraph 2.2.1, which state:

7.2.2 The driver of the vehicle is responsible for the care and welfare of all birds during transport. The driver should take into consideration climatic conditions and adjust coverings to allow birds to warm up or cool off, as required.

2.2.1 The following factors are associated with increased risk for animals in transit: (a) long-distance transportation, from loading at the place of origin, including poultry catching, to unloading at final destination; (b) low economic value of animals being transported; (c) adverse weather conditions; and, (d) other factors that compromise the ability of animals to be transported without suffering – e.g., pregnant, very young or old animals.

[34] Farenhorst agreed that:

- MLF was a major processor of spent fowl;

- the two referenced codes permitted transport of spent hens and birds for up to 36 consecutive hours;
- as the duration of transportation gets longer and/or the birds get older, there is an expectation that the death rate of birds in transit will increase;
- there will always be some deaths on such loads; and
- while loads with a 4% loss or higher would result in automatic inspection by the Agency, 4% was not an acceptable loss and decisions by the veterinarian-in-charge for inspection could be initiated at any rate of loss.

[35] When asked why birds in a load might die, Farenhorst told the Tribunal that a number of factors can be responsible, including disease, transportation factors, injury, overheating, freezing or a combination thereof.

[36] Farenhorst also testified that catchers and their handling of chickens could contribute to injury and death of birds during transport. He stated that this cause is set out in the Transportation Code, which identifies that:

8.7.2 Careless catching of birds is a common source of injury. Injured birds are particularly susceptible to transportation stress. This is inhumane and increases the loss of marketable product.

[37] Farenhorst agreed that although a processor may be held responsible for the condition of birds once a load arrives, pursuant to the Transportation Code, the driver of a load is responsible for animals during transport:

8.7.23 The driver of the vehicle is responsible for the care and welfare of all birds during transport. The driver should take into consideration climatic conditions and should adjust coverings to allow birds to warm up or cool off, as required.

3.3 Evidence Specific to the October Incident (CART/CRAC-1735)

3.3.1 Facts Not In Dispute

[38] The producer involved in the October Incident was Hillandale Farms located in Gettysburg, Pennsylvania. The crew who caught the birds were from Brian's Poultry Services Ltd. of Mildmay, Ontario and were hired directly by MLF. The average size of each hen transported was 3.15 lbs and the loading density was 16 birds per cage. Trailer DEL-64 was loaded with 480 crates with a total of 7,680 hens. LRFT was the transporter of the

birds and its employee, Mr. Tim Francis, was the driver responsible for delivery of the load to MLF, the processor.

[39] Catching of the hens and loading of the trailer began on October 29, 2012 at 11:30. One hour after the loading began, Mr. Francis departed with trailer DEL-64 at 12:30, travelled approximately 678 km, and arrived at the processing destination later that day at 23:15.

[40] Processing of trailer DEL-64's load was scheduled to commence the next morning on October 1, 2012, and actually began at 06:33. The hens waited 7 hours and 18 minutes at the MLF facility before the first bird was unloaded. Unloading of all birds was complete at 07:12 and the total length of time from beginning of loading to the end of unloading was 19 hours and 42 minutes.

[41] In total, 537 dead hens were found at the time of unloading trailer DEL-64 at the processing plant. On October 30, 2012, it is alleged that Agency personnel who conducted *ante mortem* inspections at the processing site included Agency Inspector Johnny Vavala, and Agency veterinarian, Dr. Dalbir Malik. The same day, the Agency's Dr. Gurcharan Sandu conducted a *post mortem* inspection of 10 dead birds from this load. Agency Investigator, Michael Cole, conducted the October Incident investigation.

3.3.2 Evidence of the Manner of Loading and Transport of MLF

3.3.2.1 Tab 1 of the Agency Report - LRFT Live Load Report for Trailer DEL-64

[42] The Little Rock Farm Trucking Live Load Report for Trailer DEL-64 (LRFT Load Report) is a record by the LRFT driver of the loading and transport conditions of trailer DEL-64 from 11:30 (loading in Gettysburg, Pennsylvania) to 23:15 (arrival of trailer at MLF) on October 29, 2012.

[43] The LRFT Load Report indicates that loading took one hour and that en route travel took another 10 hours and 45 minutes. From the beginning of and throughout the loading period, weather conditions were recorded as "rain". Weather conditions worsened with the temperature steadily dropping from 10°C at the start of loading to only 3°C at the time of arrival at the MLF facility. As well, weather conditions went from "rain" to "horrible" at 15:30 and then returned to "rain" at 21:30 and remained as such until the arrival of the trailer at the MLF facility. Even in such weather, the load arrived slightly before the expected time of arrival of 23:45 on October 29, 2012.

[44] The LRFT Load Report also indicates that from the commencement of travel to the time of arrival the driver had applied both the left and right side tarps, and from 15:30 onwards, had closed the left side, right side and centre front doors on trailer DEL-64. The driver also records that upon leaving the trailer at the MLF facility, he had taken both the

left and right side tarps off, and opened the top vent but had left the left, right and centre doors closed on trailer DEL-64.

[45] The driver answered “good” to the question of asking him to describe the condition of the birds while being loaded and then answered “no” to whether there were any issues loading the birds; and, whether there were any issues en route to the processing plant. He adds in this report that he stopped five times en route to check the birds/adjust the tarps and that during these stops he did not notice any changes in the condition of the birds en route. However, the driver added a notation that he *[verbatim]* “Ran through major rain storm & strong wind”.

3.3.2.2 Tab 11 of the Agency Report – LRFT High D.O.A. Driver’s Report

[46] Little Rock Farm Trucking High D.O.A. Driver’s Report Trailer Unit # & Plate # D64 (LRFT D.O.A. Report), completed by LRFT personnel and recorded on either November 12, 2012, lists several questions which are revelatory concerning conditions at the loading and transport of load DEL-64 on October 29 and October 30, 2012, *[verbatim]*:

[Question] 1. Description of Grower Conditions (accessibility, well maintained, cleanliness, barn layout) [Answer] no concerns

[Question] 2. In your opinion describe the conditions of the birds prior to loading? (be as descriptive as possible) [Answer] good condition

[Question] 3. What was the weather and temperature like while loading? [Answer] windy and wet

[Question] 4. If wind and/or wet while loading, was there any shelter or protection at farm from these elements? [Answer] trailer tarps and roof

[Question] 5. How was trailer being managed as loading progressed, (side tarp on, load side being pulled, top tarp being pulled etc) [Answer] tarps on through loading, vent doors open for air flow

[Question] 6. In your opinion, how were catchers handling birds? [Answer] no concerns

...

[Question] 9. Describe how trailer was managed throughout trip. (top tarp, sides, tarp configuration, boards etc) [Answer] tarps on and front vent open throughout trip

...

[Question] 11. Were there any major temperature\weather changes throughout the trip? [Answer] temperature change of about 6c from farm to Lodge

[Question] 12. Were there any other events encountered during your trip that may have affected the health of the birds? [Answer] hurricane Sandy. very heavy winds and rain. driver said impossible to keep rain off birds. also mentioned there is a gap at the top of the tarps that will allow rain in

[Question] 13. Did you make any stops en route? if so, for how long...and for what reason? [Answer] several stops to check temperature and try to get air flow. wind made tarps difficult to manage

[Question] 14. On arrival at processing plant, was there any concern as to the condition of the load? If so describe. [Answer] some DoA's noted. driver commented today that most birds were likely wet due to weather conditions

[47] The Agency tendered no oral direct evidence concerning the loading and transportation conditions of trailer DEL-64, prior to its arrival at MLF on late on October 29, 2012.

3.3.2.3 Testimony of Reuber

[48] Mr. Mark Reuber (Reuber), owner and secretary treasurer of LRFT testified that on October 29, 2012, LRFT followed the same process that it had used for approximately a decade during which LRFT transported 16,203 loads of spent hens.

[49] He testified that LRFT's involvement with the load transported on the October Incident (and other like loads) included the following steps:

- MLF faxes LRFT a list of fowl pick-ups;
- MLF instructs LRFT how many loads there are at each pick-up, the date to arrive at pick-up location, and the date to have fowl back at MLF for kill;
- LRFT schedules trucks for the required capacities;
- LRFT driver goes and picks up required trailers from MLF, which are owned and cleaned by MLF;
- LRFT driver takes LRFT tractor truck and MLF trailer and proceeds to each pick-up location;
- Third-party catchers at pick-up location instruct LRFT driver exactly when and where the catching is to take place;

- Catchers catch fowl and place them in crates loaded on trailer dollies;
- LRFT driver loads dollies onto trailer;
- When driver has finished loading trailer, he is responsible for tarping load, as required by prevailing conditions; and
- LRFT responsible for fowl from loading at pick-up location to arrival at MLF.

[50] Reuber agreed that spent fowl must be handled with special care because they are older, have poor feathering, and have depleted energy reserves. Despite being in this state, Reuber explained it is not necessarily harder to keep the birds warm during transit. Proper tarping, he explained, will provide adequate temperature control for a load.

[51] Reuber indicated he was familiar with the Canadian Agri-Food Research Council's Poultry Code but had not seen its Transportation Code. Reuber testified however, that all LRFT's drivers receive training on how to care for their loads and record load reports. Reuber clarified that stages of training in the humane transport of animals for LRFT drivers included a one-day training orientation covering various aspects of humane transport. The remainder of the training including proper tarping practices, shadowing another driver for a period of a couple weeks, and the opportunity to talk to a dispatcher if something went wrong en route after initial training had been completed.

[52] Reuber agreed that the LRFT D.O.A. Report, located at Tab 11 of the Agency Report had been completed by LRFT personnel and that this Report indicated that the driver reported that he had to drive through hurricane Sandy, that there were very heavy winds and rain and that it was impossible to keep the rain off the birds. Reuber agreed that the driver did report that in transit, the outside ambient temperature dropped about 6 degrees Celsius and that the ambient temperature on the day in question was between 3 and 10 degrees Celsius during transit, which is definitely cooler than the recommended comfort zone for spent hens.

[53] Reuber added, however, that one cannot assume that the outside ambient temperatures are the same as they are inside the trailer because of the tarps. Even when the truck is moving, it will become warmer inside the trailer than the outside ambient temperature, because the trailers that LRFT owned and used (prior to using MLF trailers) had interior trailer thermometers that showed this to be the case. Reuber also told the Tribunal that even in the situation of a truck driving through Hurricane Sandy, if there had been a tarp or any other problem, the driver would have called MLF to report it and/or to seek advice.

[54] Reuber told the Tribunal that the photo in Exhibit 4 was the type of trailer that was in use by MLF and LRFT for load DEL-64. This type of trailer has no more than a 1½ to 2-inch gap between the top and the side tarps and so it would be difficult for rain to get

into the load. The trailer has a solid metal top and bottom, front and back and has a vent on the top front and on the back that can be opened or closed. Reuber testified that due to his own personal knowledge of driving loads, it would be warmer inside the trailer than the ambient outside temperature, even with featherless birds because of the trailer's solid front, rear, top and bottom.

3.3.3 Evidence of How the Hens Fared at MLF While Awaiting Processing

[55] There was no evidence put before the Tribunal that the LRFT driver or any other LRFT personnel remained on the premises of MLF after the delivery of the load of trailer DEL-64 at 23:15 on October 29, 2012.

3.3.3.1 Tab 1 of the Agency Report – LRFT Live Load Report for Trailer DEL-64

[56] The LRFT Load Report, the LRFT driver of trailer DEL-64 reported that he estimated about “20” DOA's [dead birds on arrival] when he got to MLF.

3.3.3.2 Tab 11 of the Agency Report - Little Rock Farm Trucking High D.O.A. Driver's Report for Truck Number DEL-64

[57] The LRFT D.O.A. Report, completed by LRFT personnel indicates something of the condition of the trailer and of some of the birds upon arrival at MLF on the evening of October 29, 2012 *[verbatim]*:

[Question] 15. If a receiver checked the load in, were there any comments or notations raising concern of any kind? [Answer] some doa's noted

[Question] 16. At the plant holding facility, describe tarp configurations and if facility fans were on or off. [Answer] tarps open and doors closed

3.3.3.3 Tab 3 of the Agency Report – CFIA Barn/Kill Floor Sheet for October 30, 2012

[58] CFIA Barn/Kill Floor Sheet for October 30, 2012 (CFIA Barn/Kill Floor Sheet), a document signed by Agency Inspector Johnny Vavala (Vavala), shows that at 04:40 on October 30, 2012, an *ante mortem* inspection was done for trailer DEL-64, which indicated that the birds were alert, the fans were off, the trailer's condition was dry, the bird condition was fair, the DOAs were low and that the temperature was 15.4 degrees Celsius.

3.3.3.4 Tab 4 of the Agency Report - Maple Lodge Farms Flocks to be Killed/Ante Mortem Record

[59] The Maple Lodge Farms Flocks to be Killed/*Ante mortem* Record, a document completed by MLF personnel and initialled by Agency personnel, appears to indicate that a second *ante mortem* inspection was completed by Agency personnel on load DEL-64 at 05:35 but no details of this inspection are recorded.

3.3.3.5 Tab 5 - Maple Lodge Farms Kill Sheet for October 30, 2012

[60] The Maple Lodge Farms Kill Sheet for October 30, 2012, a document completed by MLF personnel, indicates that processing of load DEL-64 load started at 06:33 and that it had 537 DOAs and another 807 birds condemned at processing.

3.3.3.6 Tab 8 of the Agency Report - Maple Lodge Farms Live Receiving Trailer Report for D-64

[61] The Maple Lodge Farms Live Receiving Trailer Report for D-64, completed by MLF employee Vargas on October 30, 2012, states that trailer DEL-64 *[verbatim]*: “had 537 dead birds on it more inside the trailer and some on the bottom. I separated a pile of the dead birds for the inspector”. The report also contains drawings indicating the dead birds were found on both sides of the load, more or less evenly along the bottom of the trailer.

3.3.3.7 Tab 7 of the Agency Report - Inspector's Notes for Vavala

[62] Agency witness Vavala provided written evidence by way of inspector notes that the Agency received a call at 06:50 on October 30, 2012, that there was a high D.O.A. on trailer DEL-64 and in response to this call he went to inspect the trailer. He arrived at 06:55 but the trailer was already unloaded, so he just took pictures of some of the dead birds and tagged birds for a necropsy sample.

3.3.3.8 Tab 12 of the Agency Report - Poultry Vehicle Transportation Inspection Report of Vavala

[63] As well, Vavala, in his Poultry Vehicle Transportation Inspection Report states *[verbatim]*:

On October 30, 2012, live receiving department called the CFIA Office at 6:50am about a high DOA, trailer D-64. When i got to live receiving bay 3 at 6:55am, trailer D-64 was already unloaded. I took pictures of the trailer and some of the DOA's. I also tagged the birds for Vetrinary Necropsy. Necropsy was

performed by Dr. Sandhu. Owner of this load was Hillandale, Gettys. Location Gettysburg PA. Driver of this load was Timothy Francis. Little Rock Farms was the transport company. There were 507 DOA's on this trailer.

On the Live Load Report, driver commented that he ran through major rain storm and strong winds.

On the Little Rock Farms High DOA Driver Report, driver commented weather condition during loading was windy and wet. Also driver commented on question 12- other events encountered during his trip, driver reported Hurricane Sandy. Very heavy winds and rain. Driver reported impossible to keep rain off birds. Also driver mentioned there is a gap at the top tarps that will allow rain in.

3.3.3.9 Exhibit 2 - MLF Load Condition Reports for DEL-64

[64] A copy of the MLF Load Condition Report for DEL-64 (MLF Load Report) was tendered as Exhibit 2 at the hearing of the three cases, but it was applicable to only the October Incident. the MLF Load Report was completed by MLF personnel, and indicates the load was inspected five times between 01:15 and 05:04 while the load was held for processing at MLF. Inspection times recorded are difficult to decipher but appear to be at 01:15; 02:36; 03:04; 04:05; and 5:04.

[65] During these inspections, the temperature in the holding area varied from 5 to 6 degrees Celsius. The internal load temperature varied as follows:

- front of load – 4.6 to 15.8 degrees Celsius;
- middle of load – 4.8 to 14.2 degrees Celsius; and
- rear of load – 6.3 to 10.8 degrees Celsius.

[66] The MLF Load Report indicates the side and rear fans in the holding area were off, but the exhaust fans were on from arrival until the time of processing. The MLF Load Report indicates only the driver side tarps were on the load and that they were so for the entire time in the holding area.

[67] With respect to bird condition, the MFL Load Report indicates that the birds were “alert/vigorous”, had good feathering, and displayed no obvious signs of disease observed during any of the inspections.

[68] The MLF Load Report included a row of data entitled DOAS. Recorded in row is a notation “40” at the 04:05 inspection and that at 04:38 a notation is also included that a “Hasan” reported this result to dispatch.

3.3.3.10 Testimony of Johnny Vavala

[69] Vavala also gave oral evidence. In direct examination, Vavala told the Tribunal that he has been the government inspector at MLF for 14 years. He makes weekly inspections of incoming loads for violations and was on duty starting at 04:00 on October 30, 2012. At one point, he testified that he never saw the birds of load DEL-64 on the trailer, as when he arrived at 06:55, the entire load had already been unloaded. He had received a call from MLF employee Vargas at 06:50 that he, Vavala, should come down and see a load with high DOAs. Vavala started by taking pictures of some of the dead birds and collected the sample of dead birds that had been put aside by MLF personnel for necropsy by the Agency veterinarian. He testified that the birds in the sample were wet and cold to the touch.

[70] However, at another point in his testimony, Vavala told the Tribunal that he had completed an *ante mortem* inspection of the load at 04:40 (Tab 3 of the Agency Report) and that he didn't see anything abnormal looking from the outside of the trailer. With respect to Exhibit 2 - "MLF Load Condition Report", Vavala testified that he had indicated at 04:40 that there were two or three dead birds on the load, while someone else marked that there were 40 dead birds at either 04:05 or at 04:38.

[71] In cross-examination, Vavala told the Tribunal that he had some independent recollection of load DEF-64 and some recollection based on his notes. He remembered that he did an *ante mortem* inspection at 04:40 and recorded his findings on the CFIA Barn/Kill Floor Sheet. He noted in that document that the interior of the trailer was dry and the temperature in the middle of the trailer was 15.4 degrees Celsius. He told the Tribunal that he had no independent recollection that the birds were wet at this time but did note that the DOAs were low. His conclusion was that the load appeared normal.

[72] Vavala then told the Tribunal that he did have an independent recollection of when he arrived back to inspect the load at 06:55. Relying on his notes, he stated that by then the load had already been unloaded and that he had been called by MLF personnel because of a high DOA count, that is, a number beyond the trigger point of four percent for fowl (spent hens). He told the Tribunal that he gave instructions to do a 10 dead bird sample put into two bags and then he walked the two bags over to the Agency necropsy room. He testified that he did not know from which part of the trailer the dead birds came.

3.3.3.11 Written Evidence of Agency Witness Sandhu

[73] The Agency's Dr. Gurcharan Sandhu (Sandhu) reports in his Report of Inspector (Tab 10 of the Agency Report) that he completed a *post mortem* necropsy of 10 dead fowl from load DEL-64 on October 30, 2012. He found the dead fowl in the sample to have good flesh, cyanotic [bluish in colour due to oxygen depletion in animal] and good to poorly feathered. Of the 10 fowl, he made a specific notation for each bird examined that it was wet. Sandhu drew and recorded his conclusions in his necropsy report as follows [verbatim]:

...

Comments: The sample presents the dead fowls in good flesh and cyanotic. The fowls are in active eggs laying cycle. Birds were wet and weather was rainy and windy. According to my professional judgement there was no evidence of any infectious disease present in dead birds. So death of birds could be rainy stormy weather.

3.3.3.12 Expert Testimony of Agency Witness Sandhu

[74] For the purposes of this hearing, Sandhu was, on the basis of his education and experience, qualified as an expert on the pathology of chickens. In direct examination, Sandhu told the Tribunal he has been the veterinarian officer at MLF for the last nine years and performs *ante mortem* and *post mortem* inspections on loads arriving at MLF. *Ante mortem* inspections are conducted on every truck while *post mortem* inspections are conducted only when there are high DOA counts. With respect to load DEL-64, Sandhu confirmed to the Tribunal that he had not completed an *ante mortem* inspection of the load but that he had completed the *post mortem* necropsy on 10 chickens from this load but added that he did not know from where on the load these 10 birds came.

[75] Under cross-examination, Sandhu agreed that, in preparing his report, he reviewed the notes of another Agency veterinarian who had completed an ante mortem inspection of the load and who had not noticed anything wrong with the load earlier that morning. Sandhu told the Tribunal that from his necropsy of the 10 birds, some may have died on the truck or while waiting in the MLF facility for processing. Based on the amount of food the birds had in their intestines, Sandhu opined that at least five of the birds probably died while waiting at MLF facility and four probably died while in transit.

[76] Sandhu explained that the Agency usually will get involved when the four percent fatality rate is exceeded. Sandhu told the Tribunal that when dealing with the hauling and processing of spent fowl, the Agency and MLF will always find some dead birds. Sandhu agreed that there are several stressors on spent hens coming to the processing facility, including: broken legs; being moved from barn to truck; withdrawal of food; long transport times; lack of feathering; and disease in the flock.

[77] However, when pressed by LRFT counsel to respond to the fact that spent hens die because they are old, stressed birds, Sandhu responded that they die usually when there is bad weather. Sandhu told the Tribunal that his conclusion was that the death of the birds could be due to rainy stormy weather, as he found during his necropsy that all 10 birds were wet suggesting exposure to the rain.

3.3.3.13 Expert Testimony of Agency Witness Farenhorst Specific to the October Incident

[78] The Agency's third witness, Dr. Anco Farenhorst (Farenhorst) testified that in his opinion the birds of load DEL-64 were particularly susceptible to transportation stress including being exposed to very wet weather, being exposed to an outside temperature of 3 to 10 degrees Celsius, a temperature well below the bottom range of animal comfort; and being poorly feathered.

[79] Farenhorst opined that transportation under these conditions would be contrary to the standards set out in the Poultry Code, paragraph 7.2.2 and in the Transportation Code, paragraph 2.2.1.

[80] Under cross-examination, Farenhorst told the Tribunal that he agreed that, as the duration of transportation gets longer and/or the birds get older, there would be an expectation that the death rate of the birds in transit would increase. Farenhorst agreed that on the day that load DEL-64 was slaughtered, the MLF Kill Sheet (Tab 5 of the Agency Report) indicated that all loads killed by MLF had DOAs, and furthermore, that there would always be some deaths on such loads. When asked why birds might die on a load, Farenhorst told the Tribunal that any number of things can be responsible, including diseases, transportation factors, injury, overheating, freezing or a combination of these issues. Farenhorst agreed that catchers and their handling of chickens could contribute to injury and death of birds during transport.

4. Applicable Law and Analysis

[81] The Tribunal's role is to determine the validity of any agriculture and agri-food administrative monetary penalty or warning issued under the authority of the 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.

[82] 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.

[83] 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...

[84] The Minister of Agriculture and Agri-Food has made one such regulation, the Regulations, which designates as violations several specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, as well as 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 subsection 143(1)(d) of the *Health of Animals Regulations*.

[85] The courts have examined this regime with a certain degree of scrutiny, especially given that the violations entail absolute liability. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, Létourneau JA, 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.

[86] 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.

[87] 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.*

[88] In *Doyon*, the Federal Court of Appeal, in order to determine if an applicant had committed a violation of the HA Regulations, was tasked with interpreting the meaning of “no person shall...transport...an animal that by reason of infirmity, illness, injury, fatigue or

any other cause cannot be transported without undue suffering during the expected journey” as that phrase is found in paragraph 138(2)(a) of the HA Regulations. In doing so, it developed an interpretation of that parsed out “elements” of a violation that the Agency must prove in order to uphold a Notice of Violation, seven in the case of an alleged violation of that particular section. This approach is in keeping with more recent dicta from the Federal Court of Appeal in a recent case of *Canada (ACG) v. Stanford*, 2014 FCA 234 (*Stanford*), where, at paragraphs 41-44, Dawson JA comments on how the exercise of statutory interpretation is to be done:

[41] The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court in Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, 1998 CanLII 837 at paragraph 21:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

[42] The Supreme Court restated this principle in Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [underlining added]

[43] This formulation of the proper approach to statutory interpretation was repeated in Celgene Corp. v. Canada (Attorney General), 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

[44] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not

determinative of its meaning. A court must consider the total context of the provision to be interpreted “no matter how plain the disposition may seem upon initial reading” (ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context, including the apparent purpose, the interpreting court aims to ascertain legislative intent, “[t]he most significant element of this analysis” (R. v. Monney, [1999] 1 S.C.R. 652, 1999 CanLII 678 at paragraph 26).

[89] Therefore, in keeping with an interpretation where the alleged violation is “read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”, how is one to interpret the violation enumerated in paragraph 143(1)(d) of the HA Regulations? It reads: “No person shall transport ... any animal in a ... motor vehicle ... if injury or undue suffering is likely to be caused to the animal by reason of... undue exposure to the weather”.

[90] During her closing argument, counsel for the Agency pointed the Tribunal to several authorities to assist the Tribunal in its interpretation including: *Les Fermes G. Godbout & Fils Inc. v. Canada (CFIA)*, 2006 FCA 408 (*Godbout*); *R. v. Maple Lodge Farms* (2013), (OC) Court File No. Brampton 10-1160 (*Maple Lodge Farms*); *Poirier-Bérard v. Canada (CFIA)*, 2012 CART 23 (*Poirier-Bérard*), *Exceldor Coopérative v. Canada (CFIA)*, 2013 CART 9 (*Exceldor*, 2013 CART 9); *0830079 B.C. Ltd. v. Canada (CFIA)*, 2013 CART 34 (*S&S Transport*); *Finley Transport Ltd. v. Canada (CFIA)*, 2013 CART 42; and *E. Grof Livestock Ltd. v. Canada (CFIA)*, 2014 CART 11.

[91] Also as indicated by counsel for the Agency in her closing argument, the Tribunal has, in the past, already applied the *Doyon* approach of parse out elements of a paragraph 143(1)(d) violation, at paragraph 24 of its decision in *Exceldor*, 2013 CART 9. There, the Tribunal sets out the five elements that the Agency must establish to sustain as valid a violation of section 143(1)(d) of the HA Regulations. These five elements, also set out in paragraph 28 of the Tribunal’s decision in *Exceldor Coopérative v. Canada (CFIA)*, 2014 CART 8 are as follows:

1. an animal was transported;
2. the animal in question was transported in a railway car, motor vehicle, aircraft, vessel, crate or container;
3. the animal transported was likely to incur injury or suffer unduly by reason of undue exposure to the weather;
4. the alleged violator transported, or caused to be transported, the animal in question; and
5. there was a causal link between the transportation carried out by or on behalf of the violator, in which the animal was likely to incur injury or suffer unduly by

reason of undue exposure to the weather, and the undue exposure to the weather.

4.1 Findings Concerning Elements 1 and 2

[92] Elements 1 and 2 require no further interpretation. Either an animal was transported in a motor vehicle in this case or it was not. The Tribunal finds that the Agency has established elements 1 and 2. The evidence demonstrates that the chickens were transported in trailer DEL-64 on October 29, 2012.

4.2 Findings Concerning Element 4

[93] Likewise, an interpretation of whether the alleged violator transported the birds on the day in question does not require further interpretation. Already, this Tribunal and the Federal Court of Appeal, have ruled on a purposive interpretation of what constitutes “transportation” in the context of the HA Regulations. In *S&S Transport*, at paragraph 45, the Tribunal set out the following:

Counsel for the Agency cited a number Tribunal decisions where the definition of “transportation” or “transport” under the Health of Animals Regulations have been considered, including Sure Fresh Foods v. Canada(CFIA), 2010 CART 16; Ménard v. Canada(CFIA), RTA 60126; and, Glenview Livestock Ltd. v. Canada(CFIA), RTA 60162. The Tribunal is also mindful of guidance from the Federal Court of Appeal in Canada (A.G.) v. Ouellet, 2010 FCA 268, which dealt with the judicial review of a Tribunal decision considering a violation under subsection 141(1) of the Health of Animals Regulations, which reads “...no person shall load on any railway car, motor vehicle, aircraft or vessel and no carrier shall transport animals of different species or of substantially different weight or age unless those animals are segregated...”. In that case, the Federal Court of Appeal specifically rejected a Tribunal finding that “transport” ceases when the animals are in their conveyance awaiting their imminent unloading at an abattoir. Therefore, it appears that the definition of “transportation” under the Health of Animals Regulations is now quite settled law. While “transportation” obviously includes the actual time “on the road”, it has several stages, including the physical actions of loading, hauling and the unloading of animals. Without a doubt, the causal link in Ouellet, was temporally close and very direct. In that case, the transporter was the actor that performed the prohibited act as it was the transport driver who, while the load was waiting for unloading at the abattoir, allowed a cow and the calves which had been separated to co-mingle contrary to subsection 141(1). In that case, the waiting time to be unloaded was a mere 10 minutes. However, even in the present case, where each of the actors actively contributed to the one or more of the loading, hauling and unloading of the animals, a causal link, albeit less direct than the one noted in Ouellet, is still present ...

[94] The *S&S Transport* case dealt with a violation of section 140(2) of the HA Regulations, which required the Agency to prove that birds in that case, during their transport, were overcrowded to the extent that it was likely to cause injury or undue suffering. In that case, the Tribunal found that the birds were loaded by the catchers in an overcrowded manner and they continued to be overcrowded at each stage including: (1) the loading, (2) the in transit voyage, (3) the arrival and drop-off of the loaded trailer at the processing facility; and (4) the holding period until slaughter at the processing facility. During each phase of the “transportation”, the alleged violation of overcrowding during transport was ongoing and was found likely to cause or did cause injury to the birds.

[95] In the present case, a similar definition of the breadth of transportation would apply, even though the alleged violation is under section 143(1)(d), rather than section 140(2) of the HA Regulations. Applying this definition in the case at hand, the transportation of the birds began with loading by the catchers employed by MLF (Brian’s Poultry Services Ltd.), continued with the actual in transit voyage of the chickens by LRFT in an MLF trailer between Pennsylvania and Southern Ontario, continued still with the drop-off of the trailer by the LRFT driver into the MLF holding facility, and did not terminate until after the holding period of the load at MLF until their eventual unloading for slaughter by MLF personnel. There is no doubt that with respect to element 4, the evidence is clear that LRFT transported 7,680 spent hens from Pennsylvania to Southern Ontario on October 29, 2012.

[96] Much evidence was tendered concerning each of the stages of the transport of the chickens on trailer DEL-64. The evidence showed that the transportation of the load took a considerable amount of time to complete, starting at 011:30 on October 29, 2012, in Pennsylvania and ending at 07:12 on October 30, 2012, in Brampton, Ontario, a period of just under 20 hours. It is clear from the evidence that LRFT never had ownership of the chickens. It is further unlikely that, given the evidence, a reasonable interpretation would suggest that LRFT had care and control of either the loading (the first stage of transportation) or the holding at the MLF facility (the final stages of transportation) of the 7,680 chickens on trailer DEL-64. What is clear was that LRFT was the transporter of the birds during the second and third stages of transportation—the in-transit voyage and the drop-off of the loaded trailer at MLF. As a result, with respect to element 4, the Tribunal finds, as fact, that LRFT transported the chickens.

[97] In making this finding, it is important to note that the evidence was clear that no LRFT personnel was present at MLF during the entire period that load DEL-64 waited for processing in the evening of October 29, and in the morning of October 30, 2012. It is also clear that this was the accepted industry practice. Reuber testified that MLF arranged which loads needed to be picked up, supplied LRFT with the trailers to pick up the chickens, and expected the delivery of those trailers back to the MLF facilities at a specified time. In reality, from the evidence presented, LRFT exercised no, or practically no, control over the chickens during their catching and loading on the MLF trailer or after the deposit of the trailer at the MLF processing facility.

[98] This case differs, therefore, in an important aspect from both of those at the centre of *Maple Lodge Farms* decided recently by the Ontario Court of Justice. In those cases, the accused, MLF, had a clear and continuous connection to the care and control of the birds throughout every aspect of the transportation—it hired the catchers and then had its employees drive its trailers to its processing facilities where MLF employees unloaded the birds. Moreover, it owned the chickens. There was, in those cases, no need to parse out the different roles and responsibilities for different persons involved in the transportation of the birds as they appeared to be all under the care and control of MLF.

[99] In this case, there was no evidence to suggest that MLF had any expectation of involvement by LRFT after the MLF trailer it had hauled was dropped off at the MLF facility. The Tribunal, therefore, finds that LRFT's participation in the transportation of the chickens ceased at 23:15 on October 29, 2012, when it dropped off the MLF trailer it was hauling at the MLF processing facility. The Tribunal accepts that it may be possible to prove that actions or inactions of LRFT personnel, that occurred prior to MLF processing facility drop-off, might have had "carry-over" effects after this time. If, however, there were no "carry-over" effects that can be attributed to the prior care and control of the chickens by LRFT personnel, it would defy logic to contend that LRFT continued to transport or was responsible for the transport of the birds when none of its personnel remained with the trailer and that such a presence would not be required or even tolerated once MLF personnel took over all monitoring and control of trailer DEL-64, as of 23:15 on October 29, 2012.

4.3 Findings Concerning Element 3

[100] Concerning element 3, the Tribunal has set out a detailed examination of how this element is to be interpreted at paragraphs [108] to [123] of the September Incident decision, now issued as *473629 Ontario Inc. (LRFT) v. Canada (CFIA)*, 2014 CART 29. It adopts this interpretation for the present case as well.

4.3.1 "By Reason of Undue Exposure to the Weather"

[101] In the analysis set out in *473629 Ontario Inc. (LRFT) v. Canada (CFIA)*, 2014 CART 29, the Tribunal identifies three different sets of circumstances which would expose a person to liability for actions that bring about the undue suffering (or the likelihood thereof) of an animal by reason of undue exposure to the weather. If one of these three different sets of circumstances is proved by the Agency, on the balance of probabilities, then the Agency will have proved this element of the violation.

[102] After a review of the detailed evidence in this case the Tribunal is convinced, on the balance of probabilities, that the birds on trailer DEL-64 did unduly suffered by reason of undue exposure to weather based on the following evidence:

- the birds were loaded in cool, windy and rainy conditions;
- the temperature continued to fall during loading and in transit for Pennsylvania to Brampton from 10°C to 3° C, temperatures which well below the comfort zone for spent hens;
- by the LRFT driver's own report, he encountered "horrible" weather conditions, continuous rain on the day of transport, and could not, at times, keep the rain off the birds because of the effects of Hurricane Sandy;
- the LRFT driver and the MLF dispatcher noticed some 20 or more dead birds upon arrival of the birds on trailer DEL-64 at the MLF facility on the night of October 29, 2012;
- eventually 537 dead birds were found on trailer DEL-64 when trailer was unloaded for processing on the morning of October 30, 2012;
- each of the 10 birds examined by Sandhu was noted to be wet when he completed his necropsy;
- on the basis of his necropsy of 10 birds from trailer DEL-64, Sandhu concluded that in "According to my professional judgement there was no evidence of any infectious disease present in the dead birds . So death of birds could be rainy stormy weather."

[103] Sandhu was a credible, articulate and knowledgeable expert witness. His observations led him to his conclusion that "death of birds could be rainy stormy weather", a conclusion which was honest and credible, particularly when it was made with less than absolute certainty on his part. As well, his conclusions were based on logical inferences which were consistent with other evidence presented in the case.

[104] The events of October 29, 2012, bring the actions of LRFT into either the first or the second set of circumstances, identified in *473629 Ontario Inc. (LRFT) v. Canada (CFIA)*, 2014 CART 29, as particular circumstances where animals may be injured or unduly suffer by reason of undue exposure to the weather. One can imagine that the extreme weather of October 29, 2012 fits the first set of circumstances and should have been foreseeable by LRFT as Hurricane Sandy and its effects would have been predicted on daily weather forecasts.

[105] On the other hand, it might be the case that the weather conditions of October 29, 2012 fit into the second set of circumstances. While the extreme weather of Hurricane Sandy might not have been foreseeable (pouring rain, plummeting temperatures and high winds), the conditions were such that even the best efforts of the LRFT driver could not protect the birds from undue suffering from undue exposure to the weather. The Tribunal

acknowledges that the driver of trailer DEL-64 tarped the load on both sides and closed the vents to undoubtedly try to protect the birds from the weather. However, given the weather conditions on that day, even that was not enough to protect the birds from undue exposure to the weather. While Reuber testified that the driver's tarping practice on that day was a correct and prudent step which protected the birds from the rain, such steps were not enough on October 29, 2012.

[106] Either way, the best approach would have been to cancel the pick-up, however impractical this may be in the spent hen transportation business. Instead LRFT through its driver chose to pick-up in Pennsylvania, drive through the "horrible" conditions and deliver the spent hens to MLF. The chickens suffered and died en route. Dead chickens were already apparent on the load upon their arrival at the MLF facility.

[107] Consequently, the Tribunal finds that the birds were subjected to undue exposure to weather on October 29, 2012, and as a result, the Agency has proved element 3 of the alleged violation.

4.3.1.1 Undue Suffering by Reason of Undue Exposure to the Weather or for Other Reasons

[108] Counsel for LRFT suggests that evidence presented in the case indicates that there could have been many other factors, other than undue exposure to the weather that could have been cause of the death of the chickens including: age of the birds, spent condition of the birds as laying hens, the catching conditions, the long transportation time, the long waiting time for processing, as well as the weather conditions during transportation.

[109] Unlike the evidence presented in the September Incident case, now set out in as 473629 *Ontario Inc. (LRFT) v. Canada (CFIA)*, 2014 CART 29, there is little evidence to suggest that, on the balance of probabilities, the death of the birds was caused by something other than the undue exposure to the weather. In this case there is no evidence from the original producer that was a "morality rate" of the birds at the time they were leaving the producer's farm. Argument from LRFT's counsel is to the effect that on a balance of probabilities, the cause of death of the fowl cannot be proven to be attributable to rainy stormy weather. Any number of factors—broken legs; being moved from barn to truck; withdrawal of food; long transport times; lack of feathering; and disease in the flock could have caused the death of the chickens on this load. While the Tribunal has considered and assessed the weight of this evidence, the Tribunal remains convinced that the most obvious cause of undue suffering and death of the chickens on load DEL-64 was undue exposure to the weather.

[110] The Tribunal is convinced, therefore, on the balance of probabilities, that the Agency has made its case for the undue suffering of the birds being by reason of undue exposure to the weather.

4.4 Element 5

[111] With respect to element 5—that there was a causal link between LRFT, the transportation, and the likely, or actual, injury or undue suffering of the animal resulting by reason of an undue exposure to the weather—on the evidence presented, the Tribunal concludes that, on the balance of probabilities, LRFT committed actions in their portion of the transportation of the chickens in question, that caused some chickens on load DEL-64 to unduly suffer by reason of undue exposure to the weather.

[112] The conditions of transport on October 29, 2012, were extreme. With such conditions, there is a clear cause and effect relationship of moving a large number of poorly feathered wet birds in very cool, wet and windy weather and their death en route to the MLF facility hundreds of kilometres away. When weather threatens the secure and safe delivery of animals to their destination, a driver will clearly run the risk of allowing his animals to be unduly exposed to the weather. On October 29, 2012, the evidence of the case points to a cause-effect relationship that is inescapable. The Tribunal is alert to conflicting evidence in this case concerning exactly when and how the chickens died. The fact remains, however, that there is a preponderance of evidence, which points to the conclusion, on a balance of probabilities, that the undue suffering of the chickens was by reason of undue exposure to the weather caused by the actions of LRFT.

[113] Oldfield, counsel for LRFT, argued that the load in question *[verbatim]*: “*was affected by the horrendous weather conditions resulting from hurricane sandy. While the driver stopped to inspect the health of the birds from time to time, he could not avoid driving through major weather conditions. However, the load still arrived at the Maple Lodge Farms plant in a reasonable condition, but due to an error in communication within Maple Lodge Farms, the load was not slaughtered on a priority basis, which should have occurred due to the weather conditions through which the birds had been driven.*”

[114] These arguments only serve to underscore the Tribunal’s finding, that the birds were subjected, during the time en route from Pennsylvania to Brampton, to continuous exposure to severe wet, rainy and windy conditions. Although the alternatives that the driver had to avoid these extreme conditions, short of refusing to load the 7,680 hens that morning, were limited, the alleged violation is one of absolute liability. After the Agency has made out the necessary elements of the offence, on the balance of probabilities, the alleged violator has few avenues of defence against the charge.

[115] Finally, pursuant to industry practices as set out in the Poultry Code, paragraph 7.2.2 and in the Transportation Code, paragraph 2.2.1, as described by the witness Farenhorst, the driver of the load has a responsibility to care for the welfare of all birds during transport, particularly in difficult weather conditions. These industry standards, while not law, instruct the Tribunal as to what might be a basis for understanding the legal obligations set out under the HA Regulations.

5. Defences Available Under the Law

[116] The system of administrative monetary penalties set out by Parliament is very strict in its application. The AMP 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 AMP 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.

[117] When an administrative monetary penalty provision has been enacted for a particular violation, as is the case for paragraph 143(1)(d) of the HA Regulations, LRFT has little room to mount a defence. In this case, section 18 excludes practically any excuse that LRFT may raise, including LRFT's impression that it was acting properly by exercising due diligence and complying with the Poultry Code. The argument raised by Oldfield on behalf of his client that [verbatim]: *"The position of Little Rock Farm Trucking is that it and its drivers acted in accordance with professional standards at all time and exercised due diligence to ensure that the birds would be safely transported"* while perhaps true, is not a permitted defence under the AMP Act. Given Parliament's clear statement on the issue, the Tribunal accepts that such arguments by LRFT and its counsel, are not to be valid defences under section 18.

[118] Consequently, the Tribunal concludes that the Agency has, on a balance of probabilities, proved all the essential elements of the violation and, therefore, the Notice of Violation with Penalty is upheld.

6. Conclusions

[119] The only issue that remains to be determined by the Tribunal is whether the Agency has proven that the penalty of \$7,800 is justified under the AMP Act and the AMP Regulations. The Tribunal finds that this amount is not justified under the AMP Act and the AMP Regulations for the following reasons. The appropriate amount is instead \$6,000.

[120] 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

AMP Regulations. A violation of paragraph 143(1)(d) of the HA Regulations belongs to the category of serious violations. Specifically, the violation in question set out in the HA Regulations, namely, “[t]ransport or cause to be transported an animal with undue exposure to weather”, is called a serious violation in Item 252 of Division 2 of Part 1 of Schedule 1 to the AMP Regulations. On the day on which the violation was committed, section 5 of the AMP Regulations stated that a serious violation carried a penalty of \$6,000. In the present case, the base amount of \$6,000 can be either increased or decreased on the basis of three factors: number of prior violations, degree of intentionality of the violator, and harm done. Values from 0 to 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 to 10, the base penalty amount is not adjusted. If the total is below 6, the base penalty amount is decreased; if the total is above 10, the amount is increased.

6.1 Prior Violations

[121] According to Part 1 of Schedule 3 to the AMP Regulations, if the perpetrator of the alleged violation committed more than one minor or serious violation in the five years preceding, the day on which the violation being assessed was committed, a gravity value of 5 is assessed. In this case, the Agency has alleged, but has presented no formal evidence to establish that LRFT committed at least two violations in the five years preceding the day of the violation. In prior cases before this Tribunal like *Exceldor v. Canada (CFIA)*, 2014 CART 8, the Agency has provided evidence by way of true copies of entries in the Agency database of violations that have been admitted or upheld against the alleged violator. As the AMP Act is an absolute liability regime, the strictness of proving both the elements of the violation and the basis for the penalty calculation fall on the Agency.

[122] In this case, the only proof of the prior violations against LRFT is not part of the tabbed documents in the Agency Report but rather an unnumbered page between pages 13 and 14 in the case summary of the Agency Report. Had it not been that LRFT witness Reuber and its counsel acknowledged the commission of these prior violations, the Tribunal would have been very reluctant to accept as sufficient what the Agency presented by way of summary rather than something more official of proof of the existence of each of these violations. Given the rather informal evidence offered by the Agency along with the acknowledgement of these violations by LRFT and its counsel, the Tribunal concludes that there is sufficient evidence on this point to find that there are more than one prior violation against LRFT in the last five years. As a result, the Tribunal agrees with the Agency’s assessment of a value of 5 for this calculation factor.

6.2 Intent or Negligence

[123] According to Part 2 of Schedule 3 to the AMP Regulations, the Agency must assess whether the violation was committed with intent or negligence. The Agency should have assessed a value of 0, which is to correspond to a situation where “[t]he violation subject to the assessment is committed without intent or negligence” (Item 1). According to the

AMP Regulations, a value of 0 can also be assessed 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 is assessed where “[t]he violation subject to the assessment is committed through a negligent act” (Item 3); and a value of 5 is assessed 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 (Agency Report, page 14).

[124] The evidence submitted in the case does not indicate negligence by the LRFT driver. In fact, the evidence was quite clear that he did everything he could do in hauling the chickens through rains and winds of a hurricane. His actions were not negligent, but despite his best efforts, the Tribunal has found as fact that the chickens were injured or died by reason of their undue exposure to the exceptional weather delivered by Hurricane Sandy. As an absolute liability offence that was enough to prove the violation.

[125] However, the transporter company, or its employee driver, should not be penalized again for the exceptional nature of the weather conditions. One might argue that LRFT should never have sent the truck to pick up the chickens on that day. It appears from the evidence LRFT has little choice in the days, loads and destinations from which it must haul chickens. Those are more likely in the hands of MLF. The evidence shows that the intent of LRFT on the day in question was to make the best of a very bad weather situation, to exercise all care and attention that it could to get the chickens to MLF without injury. In the end, and from a factual perspective, it failed, but it did not in the judgment of the Tribunal, fail because it was reckless or negligent. The Tribunal, therefore, assesses, the value of 0, which is in keeping with what occurred in the present case, where the violation was committed without intent or negligence by LRFT.

6.3 Harm

[126] On the third factor, the Agency assessed a gravity value of 5, because there was serious harm to animal health. As stated above, LRFT was responsible for ensuring that the birds did not suffer unduly by reason of undue exposure to the weather on October 29, 2012. The Tribunal has found as fact that it failed in this regard. According to Item 3 of Part 3 of Schedule 3 (“Harm”), a gravity value of 5 is assessed when “[t]he violation subject to the assessment causes (a) serious or widespread harm to animal or plant health or the environment”. The Tribunal agrees with the Agency that this violation caused serious harm to animal health on October 29, 2012.

6.4 Penalty Amount, Order and Possibility of Removal Order in Five Years

[127] The Tribunal, therefore, on the basis of the evidence presented, finds that a fair total gravity value for the penalty adjustment in this case is not 13, as proposed by the Agency, but rather 10. That value is calculated as follows: 1) a value of 5 for prior violations; 2) a value of 0 for degree of intentionality, given that the violation was committed without

intent or negligence; and 3) a value of 5 for degree of harm done. Because the Tribunal assesses the total gravity value for the present violation at 10, Schedule 2 to the AMP Regulations directs that the base penalty amount not be reduced or increased. The correct assessment of the penalty amount should be \$6,000 rather than the \$7,800 stated in the Notice of Violation.

[128] Consequently, the Tribunal, by order, determines that LRFT 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.

[129] The Tribunal wishes to inform LRFT that this violation is not a criminal offence. After five (5) years, LRFT will be entitled to apply to the Minister to have the violation removed from its record, in accordance with subsection 23(1) of the AMP Act, which provides 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, Ontario, this 24th day of October, 2014.

Donald Buckingham, Chairperson