



Citation: 473629 *Ontario Inc. v. Canada (Canadian Food Inspection Agency)* 2014 CART 31

Date: 20141029

Docket: CART/CRAC-1737

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)(e) 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), did not commit the violation set out in Notice of Violation #13140N0509, dated June 19, 2013, concerning events that took place on January 30, 2013, and is not liable for payment of the penalty to the respondent, the Canadian Food Inspection Agency.

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 583 dead chickens on January 31, 2013, 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 #1314ON0509 to LRFT alleging that LRFT had transported or caused to be transported an animal with inadequate ventilation.

[2] Paragraph 143(1)(e) of the *Health of Animals Regulations* (HA Regulations) reads as follows :

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 ... (e) inadequate ventilation.

[3] The role of the Tribunal is to determine whether the Agency has established all 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 inadequate ventilation (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] The second “sister” 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] This present 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 set out in Oldfield's August 2, 2013 letter to the Agency.

[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 to the processor, which can be a few kilometres to several hundred kilometres away.

[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), an Agency 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 of, or below, the 13° to 28°C comfort range for chickens); 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 January Incident (CART/CRAC-1737)

3.3.1 Facts Not in Dispute

[38] The producer involved in the January Incident was Maple Meadow Farm located in Salisbury, Vermont. 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 3.85 pounds and the loading density was 16 birds per cage. Trailer DEL-62 was loaded with 480 crates with a total of 7,680 hens. LRFT was the transporter of the

birds and its employee, Mr. Kevin Hollinger (Hollinger), 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 January 30, 2013, at 08:00. Hollinger departed with trailer DEL-62, January 30, 2013, at 11:00, travelled approximately 789 km, and arrived at the processing destination later that day at 22:30.

[40] After delivery, processing of trailer DEL-62 was scheduled for 04:24 on January 31, 2013, and actually began at 04:22. The hens waited 5 hours and 52 minutes at the MLF facility before being unloaded. Unloading of all birds was complete at 04:59. The total length of time from beginning of loading to end of unloading was, therefore, 20 hours and 59 minutes.

[41] In total 583 dead hens were found at the time of unloading trailer DEL-62 at the processing plant. On January 31, 2013, Agency personnel who conducted *ante mortem* and *post mortem* inspections at the processor included Agency Inspector Devellis (Devellis) (*ante mortem* at 04:41), and Agency veterinarian Gomulka (Gomulka) (*ante mortem* at 04:28, and *post mortem* at 05:57). Agency Investigator Michael Cole conducted the January Incident investigation.

3.3.2 Evidence of the Manner of Loading and Transport to MLF

3.3.2.1 Tab 1 of Agency Report - LRFT Live Load Report for Trailer DEL-62

[42] The LRFT Live Load Report for Trailer DEL-62 (LRFT Load Report) is a record by the LRFT driver of the loading and transport conditions of trailer DEL-62 from 8:00 (beginning of loading in Salisbury, Vermont) to 22:30 (arrival of trailer at MLF) on January 30, 2013.

[43] The LRFT Load Report indicates that the loading took three hours and en route travel took another 11 hours and 30 minutes. During that time the outside temperature was between 10 and 3 degrees Celsius (50 and 38 degrees Fahrenheit). The weather conditions varied from "clear" to "rain" with the latter descriptor recorded only upon arrival at the MLF plant that day. The load arrived at 22:30, just slightly later than the expected time of arrival of 22:00 on January 30, 2013.

[44] The LRFT Load Report provides no indication of any tarp, board or vent configurations employed by the driver to protect the birds or to regulate the temperature inside the trailer during the in transit portion of the trailer's journey. Nor is there any indication of the driver's use of ventilation that might have been provided by the front doors of trailer DEL-62 during its voyage on January 30, 2013. The driver answers "Good" to the question asking him to describe the condition of the birds while being loaded. To the question of whether there any issues en route to the processing plant, the driver wrote "Yes

had to stop for ½ hour” but he given no further explanation why he had to stop. He also records that he stopped three times en route to check the birds/adjust the tarps and that during these stops he did notice changes in the condition of the birds en route due to rain. For the questions, “Estimate DOA’s [dead birds on arrival] on load” and “Additional Comments”, both were left blank.

3.3.2.2 *Tab 10 of the Agency Report - MLF Live Transportation Investigation Report for Truck Number D62*

[45] The MLF Transportation Investigation Report for Truck Number D62 (MLF Investigation Report), completed by MLF personnel and recorded on January 31, 2013, indicates the following with respect to loading and en route conditions of trailer DEL-62 *[verbatim]: Start of Loading 08:00; Finish of Loading 11:00; Farm Departure 11:10; Arrival at MLF 23:39; Time of Slaughter 04:22; Travel Time 11 hours 30 mins; Temp. during Loading 8; Temp. Enroute 3-9; Temp. at MLF 10; Crate Time 20.22; # of birds on Truck 2680; % DOAS 7.59%; Grower condemned [chickens] 1.00%.*

[46] The MLF Investigation Report ends with two additional sections. The first is entitled “Investigation Findings” and contains the following commentary *[verbatim]: “8 degrees and clear during loading. Bird’s looked good according to the driver. Catchers took 3 hours to load D62 and humane handling was in use during the loading process. There is no input on tarp configuration. Driver had to stop for 30 minutes enroute to adjust the tarps because of rain. There was no time input for when he stopped or what he did with the tarps. Driver reported 5 visible DOA’s on arrival. Yard personnel reported the same.”* The second section entitled “Corrective Actions” contains the following commentary *[verbatim]: “None at this time.”*

3.3.2.3 *Tab 12 of the Agency Report - Flock Information Reporting Form*

[47] The Flock Information Reporting Form, completed by the producer Maple Meadow Farm, also provides relevant evidence as to the condition of the chickens being loaded. This document indicates that the mortality rate of the flock at the time of loading of the birds in question was already estimated to be 3%.

[48] The Agency tendered no oral direct evidence concerning the loading and transportation conditions of trailer DEL-62, prior to its arrival at MLF on January 30, 2013.

3.3.2.4 *Testimony of Reuber*

[49] Mr. Mark Reuber (Reuber), owner and secretary treasurer of LRFT testified that on January 30, 2013, LRFT followed the same process that it had used for approximately a decade during which LRFT transported 16,203 loads of spent hens.

[50] He testified that LRFT's involvement with the load transported on the January 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.

[51] 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.

[52] 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.

[53] Reuber agreed that the LRFT Live Load Report (Tab 1 of the Agency Report) had been completed by LRFT personnel and provides no indication of the tarp configuration of the load at any time during transportation. Reuber agreed that the driver did report that in

transit, the outside ambient temperature on the day in question was between 3 and 10 degrees Celsius, which is cooler than the recommended comfort zone for spent hens.

[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-62. 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. Reuber also told the Tribunal that in the situation of a driver experiencing a tarping or other problem, the driver would have called MLF to report it and/or to seek advice.

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

[55] There was no evidence put before the Tribunal by the Agency or by LRFT that the LRFT driver of load in question, or any other LRFT personnel, remained on the premise of MLF after the deposit by LRFT driver Hollinger of MLF's trailer DEL-62 at 22:30 on January 30, 2013.

3.3.3.1 Tab 5 of the Agency Report - Maple Lodge Farms Load Condition Reports for D-62

[56] The MLF Load Condition Report for D-62 (MLF Load Condition Report), a document completed by MLF personnel, records the condition of the load while it waited for processing at MLF. The document, while difficult to decipher due to the poor quality of the copy, appears to indicate that the load was inspected five times between 22:48 and 03:04 (inspection times recorded where 22:48, 00:01, 01:11, 02:00, and 03:04) during the time it was being held for processing at MLF.

[57] During these inspections, the temperature in the holding area varied from 14 to 8 degrees Celsius. The load temperature varied as follows, with the temperature dropping to the lower end of the scale as the load sat waiting in the MLF facility:

- front of load from 13.1 to 4.5 degrees Celsius;
- middle of load from 12.6 to 4.2 degrees Celsius; and
- rear of load from 12.5 to 4.2 degrees Celsius.

[58] The MLF Load Condition Report indicates that the side exhaust fans in the holding area were on throughout the holding time at MLF. Throughout the entire time in the

holding area, the report indicates that no tarps were on the load. With respect to bird condition, the report indicates that the birds were “alert/vigorous”, that they had “Good feathering” and had no obvious signs of disease.

3.3.3.2 Tab 4 of the Agency Report - Maple Lodge Farms Ante Mortem Record

[59] The MLF Flocks to be Killed / *Ante mortem* Record (MLF *Ante mortem* Record), completed by MLF personnel and Agency personnel, contains a notation that the load contained “some dead fowls” on load DEL-62 at 04:28, with the initials “AG” beside the notation.

3.3.3.3 Tab 6 of the Agency Report - Maple Lodge Farms Kill Sheet

[60] The MLF Kill Sheet for January 31, 2013 (MLF Kill Sheet), a document completed by MLF personnel, indicates that processing of load DEL-62 load started at 04:22 and that it had 583 DOAs and another 1,007 birds condemned at processing.

3.3.3.4 Tab 7 of the Agency Report - Maple Lodge Farms Live Receiving Report

[61] The MLF Live Receiving Trailer Report for D-62, completed by MLF employee Vargas on January 31, 2013, states that the trailer *[verbatim]*: “... had 583 dead birds in it all over the trailer more inside the trailer. I separated a pile of the dead birds for the inspector”. The report also contains drawings indicating the dead birds were found throughout the trailer.

3.3.3.5 Tab 8 of the Agency Report - Notes of Inspector Devellis

[62] The notes of Agency Inspector Peter Devellis (Devellis) detail his involvement in his inspection of trailer DEL-62 as follows: *[verbatim]*:

Jan 31, 2013 D62, 4:41 A.M. Viewed trailer from passenger side. – Birds poorly feathered – Birds showed little movement. – Birds looked wet in a huddled and sitting position – Viewed the dead birds on the bottom outside rows. – Birds cold to the touch. – Crates in good condition, trailer in good condition – Pictures taken – 10 Bird sample taken for vet. – Final unloading time 4:52 A.M. – Outside temp 1°C. – Bird type Fowl Mixed – 583 DOA.

3.3.3.6 Tab 13 of the Agency Report - Poultry Vehicle Transportation Inspection Report

[63] Devellis, in his Poultry Vehicle Transportation Inspection Report records the following information *[verbatim]*:

[Box] 41. Section - 143(1)(d)

[Box] 42. Description of non-compliance – Conveyance does not properly protect the animals from undue exposure to the weather hot or cold (e.g., boarded, tarped) and animals suffered, were injured or died

[Box] 43. Comments – On Thursday, January 31, 2013 I performed an inspection and observation on D-62. ... The Load Condition Report indicates trailer was in the barn for 5 hours with temperatures fluctuating from 8C-14C before going to slaughter. Photos and a 10 bird sample was taken and a Necropsy was performed by Dr. Gomulka, and from his professional opinion high mortality in this lot is due to overheating the fowls in this load,(Please see Necropsy Report). Upon my Inspection, I viewed the trailer from the passenger side on trailer D-62. The birds showed little movement, poorly feathered, wet to the touch, in a huddled and sitting position. The deads viewed mostly on the bottom and outside rows,(Please see Inspectors notes). Final unloading time was 4:59A.M, with 583(7.59%) D.O.A. In my professional opinion D-62 had a high mortality due to weather conditions, unprotected. Please find INCR [Inspector's Non-compliance Report] attached for further processing."

3.3.3.7 Tab 14 of the Agency Report - Inspector's Non-Compliance Report

[64] Devellis, in his Inspector's Non-compliance Report, states that the non-compliance in question relates to alleged non-compliance by both MLF and LRFT with section 143(1)(d) of the HA Regulations for the stated reason *[verbatim]*: "*Conveyance does not properly protect the animals from undue exposure to the weather hot or cold (e.g., boarded, tarped) and animals suffered, were injured or died.*"

3.3.3.8 Testimony of Agency Witness Devellis

[65] Devellis also gave oral evidence. In direct examination, Devellis told the Tribunal that he has been the federal government inspector at MLF for 17 years. He makes weekly inspections of incoming loads for violations and was on duty starting at 04:00 on January 31, 2013. He testified that he inspected load DEL-62 at 04:41 and viewed the load from the passenger side noting that birds looked wet and cold to the touch. He told the Tribunal that he found the birds generally poorly feathered and a little wet. He collected 10 dead birds from the load to be examined by the Agency veterinarian but he does not know from exactly where on the load these 10 birds originated. When questioned by Agency counsel as the potential inconsistency of his conclusion in his reports at Tabs 13 and 14, that the high mortality of the load was due to exposure to weather conditions and the eventual charge relating to "undue injury due to inadequate ventilation", Devellis told the

Tribunal that both were consistent with weather conditions to which the birds were exposed.

[66] In cross-examination, Devellis told the Tribunal that he had no independent recollection of load DEL-62 and that his evidence was based on his notes and the documents in the Agency Report. He testified that he saw about one third of the trailer unloaded with the rest already unloaded when he arrived at the trailer about 04:41. He observed during the time from 04:41 to 04:51, that there were dead birds located on the outside bottom rows but none that he could see in the middle of the load as the birds were coming off the trailer for processing. He told the Tribunal that he did not select the 10 dead birds for the necropsy but that a MLF employee brought them to him out of the dead bird bin that was being used to collect the dead chickens from the load. It was Devellis' evidence that he believed the dead birds were collected about 04:50 and that the Agency veterinarian Gomulka started his necropsy of the birds around an hour later. Devellis agreed that even though the driver did not report that he had deployed tarps on this load, he was satisfied that some tarping had occurred and he noted this in his report at Tab 13.

3.3.3.9 Tab 9 of the Agency Report - Report of Inspector by Gomulka

[67] In his Report of Inspector, Dr. Andrew Gomulka (Gomulka) indicates that he completed an *ante mortem* inspection of the load at 04:28, which revealed some dead birds in the outer crates at the beginning of the unloading which began at 04:22. His report also indicates that he completed a *post mortem* necropsy of 10 dead fowl from the load at 05:57 that same day on January 31, 2013. He found the dead fowl were all cold with body temperatures ranging from 22.3 degrees to 29.1 degrees Celsius with the ambient outside temperature at that hour only 1 degree Celsius and the temperature of the necropsy room 21.2 degrees Celsius. Gomulka notes in his report that the average live body temperature of a chicken is 40.6 degrees to 41.7 degrees Celsius. He further notes that the sample presents dead fowls in good flesh, severely cyanotic [bluish in colour due to oxygen depletion in animal] and missing feathers. The following are among the conclusion Gomulka draws and records in his necropsy report *[verbatim]*:

...

Comments: The sample presents dead fowl in good flesh, severely cyanotic with missing feathers over the ventral side of the thoraco-abdomen. These birds are in active egg laying cycle.

1) Severe cyanosis is consistent with early death during the transport since depletion of oxygen follows autolysis (catabolic) changes. Also putrefaction/advanced autolysis seen in some fowls in the sample (fowl #1, #4, #5, #8, #9) is consistent with early death during the transport. From my experience I see putrefaction in birds which died more than 12 hours earlier (with body temp. 20°C/68°F to 35°C/95°F at necropsy). MLF data shows total

crate time (the loading & transport & storage at MLF) of the fowls in D-62 is 19.5 hours, which is sufficient for putrefaction to take place.

2) Warm body temperatures of dead fowls in the sample ranges from. 22.3°C/72.14°F to 29.1°C/84.38°F (see bar graph #1). This is too warm temperature for birds which died early in the transport during winter time. ... However, this warm temperature with signs of putrefaction and early death indicates overheating of the load. Also the location of the dead birds in the trailer D-62: most if dead fowls are in the middle of the trailer (this is the warmest part) see Live Receiving Trailer Report signed by a forman Miguel Vargas is consistent with overheating and warm body temperature of the dead fowls at necropsy time.

3) No infectious cause of death was found on the necropsy.

4) The farmer did not report any health problem or disease of the flock (see Flock Information Report)

5) Weather condition during the loading at 8:00 AM on 30 Jan., was mild: +7.8°C/46°F (see Live Load Report filled by a driver) and even warmer weather was at arrival D-62 at MLF at 10:30 PM +10°C/50°F. With this moderate weather temperature overheating is possible.

6) 9 fowls out of 10 in the sample have a broken leg ((fowl #1, #2, #3, #5, #6, #7, #8, #9 & #10) This is 90% of all birds in the sample. These fractures are due to catching the birds while alive. Catchers grab a fowl by a leg in femur location. I have reviewed MLF condemn data for D62 and out of 7097 love fowl in this lot total of 44 birds have bruised/broken leg or wing which gives prevalence of 0.62% (see attached MLF Poultry Rejection Report for D62). When I compared this prevalence in live fowls to prevalence of broken legs in the sample of dead fowls 90% it is clear that there is no positive correlation between these numbers. This lack of positive correlation is very common that I see through many necropsies. This might be explained by the fact that a fracture adds extra stress to a bird and decreases a chance of survive a transport. If calcium deficiency in bones (similar to osteoporosis) was an underlying factor I expect more live birds having broken legs and wings (higher prevalence than 0.62%) and random location of dead fowls throughout the trailer D-62.

Conclusion: In my professional opinion high mortality in this lot is due to overheating the fowls inn this load.

3.3.3.10 Expert Testimony of Agency Witness Gomulka

[68] For the purposes of this hearing, Gomulka was, on the basis of his education and experience, qualified as an expert on the pathology of chickens. In direct examination, Gomulka told the Tribunal he has been the Agency veterinarian officer at MLF since 2001 and performs *ante mortem* and *post mortem* inspections on loads arriving at MLF. *Ante-mortem* inspections are conducted twice per his working shift while *post mortem* inspections are conducted by Gomulka only when there are high D.O.A. counts which is usually anything over 4% of the load.

[69] With respect to load DEL-62, Gomulka confirmed to the Tribunal that he completed an *ante mortem* inspection of the load only once at 04:28, and that there were some dead fowls, but not many, that he could see the trailer. He told the Tribunal that he could not see into the middle of the trailer where MLF personnel said the majority of the dead birds were located. Gomulka told the Tribunal that he then proceeded to do the *post mortem* and while he did not know from where on the load the dead birds came, he was convinced that the severe cyanosis of many of the birds was consistent with their early death during transport. Gomulka testified that birds that suffered broken bones—and his conclusion was that the bones had been broken in the birds of the sample during the catching processes—would add extra stress and pain to the birds even if the broken bones would not by themselves kill the birds. Gomulka testified that the warm temperatures of the dead birds, with signs of putrefaction that he recorded during the necropsy, indicated an early death during transport from overheating of the load.

[70] Under cross-examination, Gomulka agreed that stress on spent hens in this case could be related to many factors including: (1) the catching of the hens; (2) the loading of the hens into crates; (3) the long duration that hens are in their crates; (4) the length of the haul; (5) the withdrawal of the hens from their feed; (6) weather conditions during loading, travel, and waiting at the processor prior to processing; (7) the poor feathering of the birds; and (8) any broken bones suffered by hens during the whole process from loading to unloading.

[71] Referring to the MLF *Ante mortem* Record (Tab 4 of the Agency Report), Gomulka told the Tribunal that he added his notation to this document “some dead birds” but he was only at the trailer for two to three minutes and did not see anything dramatic while there that would have made him stay for the duration of the unloading of the trailer.

[72] In preparing his report, Gomulka told the Tribunal that he had the MLF Live Receiving Report (Tab 7 of the Agency Report) that said that most of the dead birds were in the middle of the load but Gomulka testified that he, himself, did not know where the dead birds for the necropsy came from in the load and that he had never actually seen dead birds in the middle of the load. He agreed that it was his theory that the dead birds died because of overheating, but that the ones on the outside of the load probably didn’t die from overheating.

[73] When referred the MLF Load Condition Report (Tab 5 of the Agency Report), Gomulka agreed that the load temperatures upon arrival were lower than the minimum comfort zone temperatures for fowl and stayed that way until processing. Gomulka agreed

that the load had a high DOA count and a very high “condemned” count. Gomulka opined that a condemned status is attributed to birds arriving at the facility which exhibit: high cyanosis, poor body condition, persistent egg counts, identifiable diseases, malignancies and disfigurement due to improper processing techniques. Gomulka told the Tribunal that loads with high rejection rates (DOAs and condemned birds) are loads under stress.

[74] Gomulka testified that even if the load came into the MLF facility at cooler than normal temperatures, the load could have overheated if tarps had been on the load and the driver stopped in transit. Gomulka admitted after questioning from LRFT counsel, that he should have specified in the conclusion of his Inspector’s report that “high mortality is due to possible overheating of load” rather than the categorical “high mortality is due to overheating of load” because there was evidence that some of the birds did die from other causes than overheating. Gomulka informed the Tribunal that he could not remember if he had discussed this case with Devellis. Gomulka agreed, however, that Agency practice was that when 4% of the load dies, the Agency does a *post mortem* necropsy, which supports an assumption that up to 4% of the load can die through nobody’s fault.

[75] In re-examination, Gomulka testified that the *ante mortem* inspection that he completed revealed just a few dead birds on the side of the trailer and that the MLF employee, Vargas, would have had a better view of where the dead birds were located in the load. Gomulka stated that Vargas indicated that the birds came from the middle of the load and this finding would be consistent with overheating being the cause of death. Gomulka testified that the warm birds with putrefaction that he found during his necropsy were also consistent with the theory of overheating of the birds in trailer DEL-62.

3.3.3.11 Expert Testimony of Agency Witness Farenhorst Specific to the January Incident

[76] The Agency’s third witness, Dr. Anco Farenhorst (Farenhorst) testified that in his opinion the birds of load DEL-62 were particularly susceptible to transportation stress because of: not having adequate ventilation (causing the birds in the centre of the trailer to encounter difficulties dissipating heat even where the ambient outside temperatures were between 3 and 10 degrees Celsius), being exposed to the effects of the wind and rain (depending on how the tarps were deployed as there is no clear evidence as to how they were deployed in this case); and being poorly feathered.

[77] 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 is an expectation that the death rate of birds in transit will increase. Farenhorst agreed that on the day that load DEL-62 was slaughtered, the MLF Load Condition Report (Tab 5 of the Agency Report) indicates that the load temperatures were alarmingly cold and at all times while at MLF, the load temperatures were below 13 degrees Celsius. Farenhorst told the Tribunal that while these cold temperatures might seem inconsistent with the theory that the birds were too hot, it is possible to have birds that freeze and overheat on the same load in certain conditions.

[78] Farenhorst agreed that all loads killed by MLF had DOAs and furthermore that there will always be some deaths on such loads. He indicated however that while loads with a four percent loss or higher would result in an automatic inspection by the Agency, four percent was not an acceptable loss and that decisions by the veterinarian-in-charge for inspection could be initiated at any level of loss. When asked why birds might dead 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

[79] 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 AMP Act. The purpose of the AMP 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.

[80] Section 2 of the AMP 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.

[81] Pursuant to section 4 of the AMP 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...

[82] The Minister of Agriculture and Agri-Food has made one such regulation, the AMP Regulations, which designates as violations several specific provisions of the *Health of Animals Act* and the HA Regulations, as well as the *Plant Protection Act* and the *Plant*

Protection Regulations. These violations are listed in Schedule 1 to the AMP Regulations, which includes a reference to subsection 143(1)(e) of the HA Regulations.

[83] The courts have examined this regime with a certain scrutiny, especially because the violations 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.*

[84] 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.*

[85] 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.*

[86] 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 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 paragraph. This approach is in keeping with more recent dicta from the Federal Court of Appeal in the 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, again in the context of determining the appropriate interpretation of the AMP Act and AMP Regulations:

[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).*

[87] 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)(e) of the HA Regulations? As it pertains to this case 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... inadequate ventilation”.

[88] 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), (OCJ 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.

[89] The Tribunal has, in the past, already applied the *Doyon* approach of parsing out the elements of a paragraph 143(1)(e) violation. At paragraph [26] of its decision in *Exceldor Coopérative v. Canada (CFIA)*, 2013 CART 10 (*Exceldor*, 2013 CART 10), the Tribunal states that to uphold a violation brought under s. 143(1)(e) of the HA Regulations, the Agency must establish, on the balance of probabilities, each of the following elements:

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

4.1 Findings Concerning Elements 1 and 2

[90] The Tribunal finds that the Agency has established elements 1 and 2. The evidence demonstrates that the chickens were transported in trailer DEL-62 on January 30, 2013.

4.2 Findings Concerning Element 4

[91] With respect to element 4, the evidence is clear that LRFT transported 7,680 spent hens from Vermont to Southern Ontario on January 30, 2013. 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 ...

[92] 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.

[93] In the present case, a similar definition of the breadth of transportation would apply, even though the alleged violation is under section 143(1)(e), 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 Vermont 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 its eventual unloading for slaughter by MLF personnel.

[94] Much evidence was tendered concerning each of the stages of the transport of the chickens on trailer DEL-62. The evidence showed that the transportation of the load took a considerable amount of time to complete, starting at 08:00 on January 30, 2013, in Vermont and ending at 04:59 on January 31, 2013, in Brampton, Ontario, a period of just under 21 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-62. 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.

[95] This case differs, however, 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.

[96] In this case, there was no evidence to suggest that MLF had any expectation of involvement by LRFT after the MLF trailer was dropped off at the MLF facility. In fact, the evidence was clear that no LRFT personnel was present at MLF during the entire period that load DEL-62 waited for processing in the late evening of January 30 through to the morning of January 31, 2013. It is also clear that this was the accepted industry practice.

[97] The Tribunal, therefore, finds that LRFT's participation in the transportation of the chickens ceased at 22:30 on January 30, 2013, 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 the 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-62, as of 22:30 on January 30, 2013.

4.3 Findings Concerning Element 3

[98] The Tribunal has completed a careful review of its own jurisprudence concerning cases where a violation of section 143(1)(e) of the HA Regulations has been the basis of an alleged AMP violation. Surprisingly, the Tribunal has been asked only twice to rule on the validity of a Notice of Violation issued under this paragraph, upholding the violation in *L. Bilodeau et Fils Ltée. V. Canada (CFIA)*, RTA #60290 decided on January 28, 2008 (*Bilodeau*) and dismissing the violation in *Exceldor*, 2013 CART 10.

[99] In *Bilodeau*, the evidence was that 50 of 306 hogs were found dead in the “belly” of a transport trailer at the processing facility on a day in June. The dead hogs were found by processor staff “immediately” upon the arrival of the trailer at the processing facility. Moreover, the temperature during the time and day of transport was noted in evidence to be between 27° and 29.5°C with a humidex factor between 36° and 38°C. In this case, the Agency veterinarian identified the probable cause of death of the hogs to be heat stress. Moreover, the driver of the load testified that just three hours into the nine hours of transport, he noticed three hogs were already dead in the centre of the load. Given this evidence, the Tribunal found that the applicant committed the violation of transporting animals when injury or undue suffering was likely to be caused to an animal by reason of inadequate ventilation.

[100] In *Exceldor*, 2013 CART 10 there was clear evidence, on the balance of probabilities, that a transporter’s driver failure to remove tarps while he took frequent and lengthy rest breaks caused a load of turkeys to suffer and several to die due to inadequate ventilation. Ultimately, the applicant, a processor, was not found to have committed the violation, because it had not caused the undue suffering to the animals by reason of undue ventilation—another actor had done that.

[101] These cases demonstrate that there are two distinct aspects in element 3. The first is a factual determination of whether or not an animal has been transported under conditions where there was inadequate ventilation, and second, whether from the facts, it was, more likely than not, the inadequate ventilation that was the cause of the birds’ likely or actual undue suffering.

4.3.1 Was There Inadequate Ventilation of Load DEL-62?

[102] On the balance of probabilities, the evidence presented and reviewed below fails to prove that load DEL-62 was subjected to inadequate ventilation. The Federal Court of Appeal in *Doyon* stated the following:

[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.

...

b) *Analysis and management of the evidence*

[54] The main function of a tribunal of first instance is to receive and analyse the evidence. In carrying out this important function, it may reject relevant evidence, but it cannot disregard it, especially if it contradicts other evidence of an essential element of the case: see Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General), 2008 FCA 13; Parks v. Canada (Attorney General), [1998] F.C.J. No. 770 (QL); Canada (Attorney General) v. Renaud, 2007 FCA 328; and Maher v. Canada (Attorney General), 2006 FCA 223. If it decides to reject the evidence, it must explain why: ibidem.

[103] The uncontradicted evidence presented shows that there was a death toll of 583 birds on load DEL-62 at the time of processing at 04:59 on January 31, 2013. The Agency expert witnesses Gomulka and Farenhorst presented professional opinion that these deaths were due to, or consistent with at the very least, the overheating of the birds in the load. On the other hand, based on his observations, Devellis prepared his reports and document on the basis that the undue suffering and death of the birds was by reason of undue exposure to weather. Are these positions reconcilable?

[104] The evidence tendered in the case shows little in the actual conditions of transportation on January 30, 2013, to suggest that load DEL-62 was inadequately ventilated. Unlike in the *Bilodeau* case, here, the day of transport was not unusually hot. Nor did the driver notice any dead animals while in transit. Nor did the driver or the MLF receiving staff find a more than a few dead birds "immediately" on arrival. Unlike in the *Exceldor*, 2013 CART 10 case, there was no evidence here of driver error in tarping practices or unusual delays that might have caused overheating of the load.

[105] The evidence presented was that there was humane handling in use throughout the loading. The in transit journey was quite unexceptional other than the driver had to stop for one-half hour and that at some time in the last four hours of the journey, it rained. Indeed, as the temperature on the day in question was mild (3°-10°C) for a January day in Southern Ontario, it would have been a prime winter day for moving fragile birds from a producer farm to the processor.

[106] Upon arrival at the MLF facility, the driver and the receiving staff of MLF observed five dead birds out of the load of 7,680 birds. Considering that the producer noted that the ongoing estimated mortality of his flock was 3%, this was a small number of dead birds indeed. Thereafter the care and control of trailer DEL-62 fell to MLF. If there was any deterioration in the weather, it was in the six hours while the load was waiting for processing when the ambient and load temperatures continued to drop. However, evidence recorded by MLF staff prior to 04:00 continued to report no problems with the load.

[107] It is not until after 04:00 that Gomulka, Devellis and the MLF employee Vargas reported increasing numbers of dead fowls. At 04:28, that Gomulka observes “some dead fowls” in the outer crates. At 04:41, Devellis notes “dead birds on the bottom outside rows”. It is only the report of MLF’s Vargas (MLF Live Receiving Report – Tab 7 of Agency Report), who was not called as a witness in the case, that makes the broad and sweeping statements that the 583 dead birds were found all over the inside of the trailer. No evidence was adduced to determine at what time Vargas made his observations. Gomulka admitted on questioning from LRFT counsel that sometimes Vargas’s observations are “pretty vague”.

[108] However, it is upon the basis of the evidence of Gomulka with respect to what he observed during the two to three minutes he spent conducting a general *ante mortem* examination of the whole load as it was coming off the trailer at 04:28 (six hours after the arrival of the load at the MLF facility), and what he recorded in his *post mortem* necropsy report, that the Agency seeks to prove that the load in question was inadequately ventilated. Gomulka’s evidence from the very rapid general *ante mortem* examination he completed did not reveal anything that would lead one to the conclusion that the load was inadequately ventilated. Gomulka’s conclusions in his necropsy report, as explained in his oral testimony, relied on a MLF employee’s report (MLF Live Receiving Report - Tab 7 of the Agency Report) that the dead birds were found in the middle of the load. Gomulka admitted had only ever observed dead birds in the outer crates where he admitted death would not be caused by inadequate ventilation. Yet his analysis of the dead birds led him to another conclusion. Gomulka was not a convincing witness.

[109] Gomulka and the Agency appear to have built the case almost exclusively on a professional opinion arrived at after a brief *ante mortem* examination coupled with the vague assertions of a MLF employee whose observations came at the end of unloading that the dead birds, more than six hours after the load arrived at the MLF facility. It is noteworthy that when pressed by LRFT’s counsel, Gomulka stated that he had been too strong in his conclusion that the high mortality was due to overheating but rather should have stated that the high mortality was due “possibly” to overheating. Furthermore, Gomulka in his testimony made no reference to what actions on the part of the transporter or the processor could have accounted for the overheating and inadequate ventilation. For all of these reasons, the Tribunal attaches very little weight to Gomulka’s professional opinion.

[110] The expert witness Farenhorst did not see the load in question and relies on the evidence and opinion of Gomulka, whose opinion is of limited weight. Farenhorst suggested that the LRFT driver had failed to meet the standards set out in the Transportation Code and the Poultry Code, partly due to the cool temperatures during transport. The evidence of Reuber suggested that while the outside temperature on the day in question was in the 3° to 10°C range, it is reasonable to expect that the temperature inside trailer DEL-62, with the heat generated by 7,680 chickens, would be several degrees warmer and would have easily fall into the animal comfort range for spent hens. Given this fact, there is little basis to prove that the load either overheated or was subject to temperatures that were too cold for the hens. Farenhorst’s opinions added little to bolster the paucity of evidence that was

presented to convince the Tribunal, that the LRFT driver on January 30, 2013, did not meet the responsibilities set out for him in both the Transportation Code and the Poultry Code.

[111] Devellis' testimony was also of limited value because his observations of the load came during the very last few moments of the unloading of trailer DEL-62. He testified that he observed the dead birds on the bottom outside rows of the load and that they were cold to the touch. The location and characteristics of these dead birds would have been sufficient for his preparation of documents that were alleging a violation due to undue exposure to the weather, but not to overheating.

[112] The Notice of Violation in this case notes that 583 birds were dead on arrival. This was not the evidence presented. The evidence was that there were about five birds observed to be dead when the trailer arrived at MLF at 22:30 on January 30, 2013. While there was little evidence offered by LRFT's driver Hollinger as to what steps he took, on the one hand, to protect the birds from any rain or weather encountered en route, and on the other hand to protect them from overheating, there is no convincing evidence that he failed to adequately maintain this balance. The driver records that he stopped three times to check his load and while it is unclear exactly what his tarping practices were that day, it is clear that the longest time he was stopped was 30 minutes. For a pleasant winter day in January, the load travelled in moderate conditions which do not lead one to an easily-reached conclusion that dead birds died due to overheating. The evidence shows that the load arrived at the MLF facility cool and it remained cool and got even cooler while waiting untarped, as the night temperatures dropped to around 1°C. This again does not point to conditions for overheating and inadequate ventilation.

[113] Without there being sufficient evidence to prove that the birds were exposed to inadequate ventilation, the Tribunal, finds, on the balance of probabilities, that the chickens transported on trailer DEL-62 were not subjected to inadequate ventilation.

4.3.2 Was There Undue Suffering by Reason of Inadequate Ventilation or for Other Reasons?

[114] However, even if the Tribunal is wrong in its finding that the birds on load DEL-62 were not subjected to inadequate ventilation, the evidence suggests there were several other potential causes of undue suffering to the birds that day. As a result, the Tribunal is not convinced that the Agency has proven, on the balance of probabilities that the birds "unduly suffered by reason of inadequate ventilation" rather than due to some other cause.

[115] What evidence is there that another cause or several causes might have been responsible for the high mortality? There is the written evidence in the form of the Flock Information Reporting Form from the original producer (Tab 12 of the Agency Report) that the "estimated morality rate" of the birds at the time they were leaving the producer's farm was 3%. Although these causes are not listed, this mortality rate was clearly not due to inadequate ventilation during transport. Gomulka's evidence on this point was to agree with counsel for LRFT that stress on spent hens in the circumstances of this Incident could

be related to many factors including: (1) catching of the hens; (2) loading of the hens into crates; (3) long-time hens are in their crates; (4) length of the haul; (5) withdrawal of the hens from their feed; (6) weather conditions during loading, travel, waiting at the processor prior to processing; (7) poor feathering of the birds; and (8) any broken bones suffered by hens during the whole process from loading to unloading.

[116] The Tribunal is not convinced, therefore, on the balance of probabilities, that the Agency has made its case, on the balance of probabilities, for the undue suffering of the birds being by reason of inadequate ventilation.

4.4 Findings Concerning Element 5

[117] 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 from inadequate ventilation—the Tribunal does not find, on the balance of probabilities, LRFT committed actions in their portion of the transportation of the chickens in question that caused any chickens to be unduly suffer by reason of inadequate ventilation.

[118] With the finding of 583 dead chickens at unloading at around 05:00 on January 31, 2013, it is apparent that something went wrong with load DEL-62. The temporal sequence of the transportation of load DEL-62 shows that LRFT had care and control of the load from 08:00 (or more likely 11:00) until 22:30 on January 30, 2013. The Tribunal has considered the evidence that recounts the loading and in transit portions of transport, as well as the holding and unloading portions of transport and has not been presented with evidence sufficient, on the balance of probabilities, to prove that the actions of LRFT caused the deaths or suffering of the birds.

[119] Industry is presented with difficult conditions to haul livestock given the seasonal weather in Canada. The AMP regime establishes absolute liability when industry players are found, on the balance of probabilities, to have violated a provision of the HA Act and HA Regulations. Particularly when weather becomes extreme or precautions in transportation are shunned, animals will suffer. Hens at the end of their productive cycles are subject to a variety of dangers. However, to conclude on the balance of probabilities, in this case that the suffering of the birds was by reason of inadequate ventilation during the time that they were under the care and control of LRFT would be conjecture.

[120] The Tribunal is alert to conflicting evidence in this case concerning when and how the chickens died. Even 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. There is little evidence to indicate that he did anything other than carry out that responsibility in this case. In this case the evidence is insufficient to prove either a breach of the moral and industry obligation of the two Codes or of the obligation set out in the HA Regulations in section 143(1)(e).

5. Defences Available Under the Law

[121] The Tribunal is also aware that the Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Subsection 18(1) of the Act reads 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.

[122] The findings by the Tribunal above, however, do not relate to a defence of due diligence or mistake of fact by LRFT. Clearly, had LRFT raised such arguments, Parliament's unequivocal statement on the issue in subsection 18(1) would have disallowed them.

6. Conclusion

[123] Accordingly, the Tribunal concludes that, on a balance of probabilities, the Agency has failed to prove all of the essential elements of the violation, and that LRFT, therefore, did not commit the alleged violation. Consequently, LRFT is not liable for payment of the monetary penalty. Furthermore, because the Tribunal concludes that the Agency has failed to establish all of the required elements in support of the impugned Notice of Violation, it is not necessary to consider whether the Agency has proven that the amount of the penalty is justified under the AMP Act and AMP Regulations.

Dated at Ottawa, Ontario, this 29th day of October, 2014.

Dr. Don Buckingham, Chairperson