

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: 9020-2516 Québec inc. v. Canada (CFIA), 2011 CART 007

Date: 20110331
Docket: RTA-60396;
RT-1551

2011 CART 7 (CanLII)

Between:

9020-2516 Québec inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

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

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable for payment of the penalty in the amount of \$1,800.00 to the respondent within 30 days after the day on which this decision is served.

Hearing held in Montreal, QC,
February 17, 2011.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, 9020-2516 Québec inc. (Marvid Poultry), on November 26, 2008, at Montréal-Nord, Quebec, transported or caused to be transported chickens with undue exposure to weather, contrary to paragraph 143(1)(d) of the *Health of Animals Regulations*.

[3] The Tribunal must decide whether the Agency has established all the elements required to support the impugned Notice of Violation in question, particularly:

- if Marvid Poultry, as a poultry processor, transported or caused to be transported the chickens in question, and
- if, by not proceeding to process the chickens with due dispatch, Marvid Poultry was responsible for their injury or undue suffering likely caused by continuing exposure to cold temperatures.

Record and procedural history

[4] Notice of Violation #0910QC0105, dated July 7, 2010, alleges that, on the 26th day of November 2008 at Montréal-Nord, in the province of Quebec, Marvid Poultry committed a violation, namely: to have caused the transportation of poultry, by means of a motor vehicle, which suffered unduly after undue exposure to weather while waiting at the slaughterhouse, contrary to paragraph 143(1)(d) of the *Health of Animals Regulations*, which is a violation of section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[5] The Agency served the above Notice of Violation on Marvid Poultry on July 19, 2010. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, this is a serious violation for which the penalty assessed was \$2,200.

[6] Paragraph 143(1)(d) of the *Health of Animals Regulations* reads as follows:

143. (1) *No person shall transport or cause to be transported any animal in a railway car, motor vehicle, aircraft, vessel, crate or container if injury or undue suffering is likely to be caused to the animal by reason of*

...

(d) undue exposure to the weather;

...

[7] In a letter dated August 18, 2010, which was received by the Tribunal on August 19, 2010, Marvid Poultry, through its Controller Tony Palladino, requested a review by the Tribunal of the facts of the violation, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. By way of a telephone conversation with Tribunal staff, Marvid Poultry requested that the review be oral, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and that the review hearing be conducted in English.

[8] On September 2, 2010, the Agency contacted the Tribunal to request permission to submit its Agency report (Report) concerning the Notice of Violation to Marvid Poultry and to the Tribunal in French. When contacted by Tribunal staff as to whether it would accept such a request, Marvid Poultry agreed. On September 7, 2010, the Agency provided to Marvid Poultry and to the Tribunal its Report in French, with the Tribunal receiving its copy of the Report on September 8, 2010.

[9] In a letter dated September 9, 2010, the Tribunal invited Marvid Poultry to file with it any additional submissions in this matter, no later than October 11, 2010. However, no further written submissions were received from Marvid Poultry or from the Agency.

[10] The oral hearing requested by Marvid Poultry was held in Montreal, in the province of Quebec, on February 17, 2011, with Marvid Poultry represented by its employees, Tony Palladino (Palladino) and Zakaria Tahiri (Tahiri) and the Agency represented by its counsel, Ms. Marie-Claude Couture.

[11] This case truly reflects the linguistic duality of Canada. By consent of the parties, written and oral evidence, as well as submissions and arguments, were presented to the Tribunal in both official languages. However, keeping with the practice of the Tribunal, since the applicant Marvid Poultry elected at the outset that the case be conducted in English, the official version of the decision will be rendered in English, despite the fact that certain elements of the parties' evidence and argument came to the Tribunal in French. The translation of that evidence and argument has been undertaken by the Chairperson in the preparation of this decision.

Evidence

[12] The evidence before the Tribunal in this case consists of written submissions from both the Agency (specifically, the Notice of Violation and Agency Report) and from Marvid Poultry (specifically, its request for review with attachments). As well, both parties presented witnesses who tendered evidence at the hearing on February 17, 2011. The Agency presented Dr. Renée Létourneau (Létourneau) while Marvid Poultry called Palladino and Tahiri. During the hearing, the Agency witness tendered one exhibit—a drawing of the unloading area of Marvid Poultry—for consideration by the Tribunal.

[13] Certain elements of the evidence are not in dispute:

- A load of 3500 Cornish hens (chickens weighing between 1.1 and 1.4 kilograms and under six weeks of age) was loaded on a transport truck from a Quebec farm early on the morning of November 26, 2008 arriving at the Marvid Poultry abattoir in Montreal-Nord, Quebec around 08:45.
- The Cornish hens were slaughtered at around 15:30 and were the last poultry killed that day, as Cornish hens require changes to the processing methods at Marvid Poultry which are best accommodated when regular poultry processing has been completed.
- The loading and transportation of the Cornish hens (including the six hour plus waiting period from the time arrival at Marvid Poultry until their processing) took place while the outside temperature was around 0°C.
- Without the knowledge of Marvid Poultry and before the arrival of the load at Marvid Poultry, the transporter had improperly loaded the Cornish hens by not ensuring that they were part of a mixed load of chickens and Cornish hens and that empty crates were left at the bottom and sides of the load, measures which would have maximized the conservation of warmth of the Cornish hens during the voyage and while waiting at Marvid Poultry.
- As the Cornish hens were being unloaded, Létourneau, the veterinarian-in-charge of Marvid Poultry and an Agency official, found 293 Cornish hens (or 8.4% of the load) dead due to exposure to the cold.

[14] The contested evidence in this matter related to whether Marvid Poultry caused the transportation of the hens, and, more specifically, whether the chickens that were not already dead when the load arrived at Marvid Poultry on November 26, 2008 were caused, or were likely to be caused, injury or undue suffering by reason of undue exposure to the weather from the time of their arrival at 08:45 until Marvid Poultry proceeded to slaughter them, beginning at around 15:30.

[15] Létourneau told the Tribunal that she is a veterinarian and employee of the Agency who, since 2008, has been the veterinarian-in-charge of Marvid Poultry, also known as Establishment #274. She explained that Marvid Poultry is a relatively small abattoir that is primarily set up for processing broilers (chickens weighing 1.4 – 2.7 kilograms), but that also processes Cornish hens and turkeys. When different lots of poultry are presented for slaughter on the same day at Marvid Poultry, it is the management of Marvid Poultry that decides on the priority and timing of the slaughter of each lot. The responsibilities of the

veterinarian-in-charge, on the other hand, is to conduct any required *ante mortem* (before slaughter) and *post mortem* (after slaughter) examinations and inspections to verify fitness of the birds for human consumption. The *ante mortem* inspections, in a plant like Marvid Poultry, can be done at three points in time: while the birds are still in their cages on the truck/transport; as the birds are being unloaded in their cages from the truck/transport; or when the birds are being taken out of their cages and being placed on the processing line.

[16] Létourneau gave evidence that she arrived at Marvid Poultry at 15:30, at which time she completed an *ante mortem* inspection of the load of Cornish hens, as they were about to be unloaded onto the processing line. When she inspected the load, she observed that the birds were loaded on a large truck/transport containing four sections, that only one section contained all the Cornish hens and that the other three sections were empty. She remarked that this was the first load of Cornish hens that she had seen in several months that was not twinned with another load of chickens, such that all the sections of a large truck/transport would be full. As well, during her inspection, Létourneau stated she found several dead Cornish hens along the bottom outside cages in the compartment. There were no dead birds in the top cages. There were no empty cages along the bottom or sides of the section. Létourneau's professional conclusions from her inspection were that the density of the birds was not high enough and there was not proper structuring of cages to permit the birds to maintain sufficient body heat. In her opinion, the 293 birds were not suffering from any disease and died as a result of exposure to cold. Cornish hens, because of their low body weight, their young age and their lack of fully developed plumage, are more susceptible to exposure to cold than broilers. According to Létourneau, Marvid Poultry should have detected this problem before 15:30 and given priority to the load in the slaughter sequence at the plant that day. Létourneau stated that while it was impossible to know exactly when the 293 Cornish hens died, the wait in the yards of Marvid Poultry prior to slaughter did incur, or was likely to incur, injury or undue suffering to the living birds during the time between their arrival at Marvid Poultry and more than six hours later when they were processed at the plant. There was clearly no advantage to the birds to wait this additional time.

[17] During cross-examination, Létourneau told the Tribunal that she was aware that Marvid Poultry processed several millions of birds in 2008 and that this was the only incident that year where Marvid Poultry had a raised incident of mortality. She also testified that when she met with staff of Marvid Poultry on November 27, 2008 to discuss the incident, they had a good meeting and discussed the responsibility of Marvid Poultry and ways to improve operations. Finally, she re-iterated to the Tribunal that she could not verify with any certainty whether the birds died in transit to, or while waiting at Marvid Poultry.

[18] Marvid Poultry's first witness was Tahiri, the HACCP (Hazard Analysis Critical Control Point) Coordinator and food hygiene engineer at Marvid Poultry since 2004. Tahiri told the Tribunal that Marvid Poultry takes very seriously its obligations with respect to the prevention of animal cruelty in order to obey the law and prevent financial losses. Tahiri testified that on November 26, 2008, while the load

manifest stated that the Cornish hens were expected to be slaughtered around 11:00, that was not possible and had never been the plan. Several loads of regular broiler chickens had been scheduled for slaughter that day and the Cornish hens were to be slaughtered at the end of the day, as the last lot; this was always the case with Cornish hens, as slaughtering processes at the plant would have to be changed to accommodate their smaller size.

[19] Tahiri shared with the Tribunal that whenever Cornish hens were delivered to the plant, Marvid Poultry had four rules they required of transporters: (1) lots should come in on small rather than large trucks; (2) if the lots came in on large trucks, loaders would have to leave empty cages on the bottom and top of the load to better protect the birds from intemperate weather conditions; (3) if lots came in on large trucks, lots of Cornish hens should be paired with lots of ordinary chickens to better protect the birds from intemperate weather conditions; and (4) whatever type of truck was used, extra tarps would have to be used to shield the birds from intemperate weather conditions. In 2008, Marvid Poultry received only three lots of Cornish hens for slaughter. The first lot contained 3000 birds and was hauled on a small truck on February 14 in -13°C weather. This load had zero empty cages, had to wait 9 hours and 50 minutes from its arrival at the plant till the time of slaughter and only 28 Cornish hens were found dead on the load at the moment of slaughter. The second lot contained 3337 birds and was hauled on a small truck on April 3 in -2°C weather. This load had zero empty cages, had to wait 6 hours and 5 minutes from its arrival at the plant till the time of slaughter and only 10 Cornish hens were found dead on the load at the moment of slaughter. By contrast, the third lot, which was the one in question, contained 3500 birds and was hauled on a large truck on November 26 in -2°C weather. This load had 537 empty cages, none of which was located directly below or above the Cornish hens, and had to wait 6 hours and 25 minutes from its arrival at the plant till the time of slaughter. That lot had 293 Cornish hens dead at the moment of slaughter, many of which were in the very bottom cages of the load.

[20] During cross-examination, Tahiri told the Tribunal that he was not aware of the Canadian Agri-food Research Council's "*Code de pratiques recommandées pour le soin et la manipulation des animaux de ferme – Poulet, dindons et reproducteurs du couvoir à l'abattage [sic]*" (Tab 10 of the Report) which was issued in 2003 and contains recommended principles for the transportation and slaughter of poultry. He also told the Tribunal that prior to 2009, while Marvid Poultry tried to insist on transporters following their four "rules" for the transport of Cornish hens, if they did not, they would call the transporters to find out why they had not. In those cases where Marvid Poultry realized the birds were in peril, the plant would try to get them into the slaughter process as quickly as possible. It was not until September 2009, Tahiri told the Tribunal, that the plant knew it was obliged to give any fragile birds priority in the slaughter process. Knowledge of this obligation came from meetings with Agency officials and so, prior to September 2009, the plant followed commercial considerations primarily.

[21] Marvid Poultry's final witness was Palladino, the Controller at Marvid Poultry. Palladino explained that Marvid Poultry is very sensitive to the issue of preventing animal cruelty as it is not only an obligation under Canadian law but also under Jewish food laws that are in place at the slaughterhouse. Preventing cruelty is not only a matter of economics. Marvid Poultry has a number of protocols in place to prevent cruelty in the slaughter of the over 20 million birds processed yearly at the plant. Where instances of birds suffering or dying are discovered, the plant has mechanisms in place to determine how the losses happened and how they can be prevented in the future. Marvid Poultry, therefore, has had only two or three such cases in the past several years, even when the weather has been very hot or very cold. Palladino told the Tribunal that he is responsible for the planning for delivery of the lots of birds that are to be delivered to the plant. He plans out on Wednesday or Thursday of the preceeding week which birds from which farms will be accepted for delivery to the plant for the next week. He calls the transporters, bird-catchers and farmers to arrange pick-up times and locations to minimize wait times of the birds arriving at the plant.

[22] Palladino explained to the Tribunal that, in the case of the lot of Cornish hens delivered to Marvid Poultry on November 26, 2008, weather conditions for transport were ideal. The parties were notified of delivery dates and times and the transporter notified to use normal procedures (the same four rules identified by Tahiri) and the load arrived at the plant as expected with nothing to alarm Marvid Poultry personnel to alert them to check on the load when it arrived at the plant. As the weather conditions were not extreme and plant personnel had no reason to believe that the transporter had not followed the "rules", personnel did not complete an inspection of the birds when they arrived at the plant. Unfortunately, the transporter did not execute orders for delivery given to him from Marvid Poultry. The transporter had used a large truck, had not twinned the load with other chickens, had not put empty cages above and below the cages of Cornish hens and as a result there was a high mortality rate. Palladino told the Tribunal that, if a load arrives and the birds are not in a healthy state, Marvid Poultry does not hesitate to bring that load in on a priority basis. Such a state of events has occurred in the past at Marvid. Unfortunately, on November 26, 2008, the load of Cornish hens was tarped while they awaited slaughter and Marvid Poultry staff did not notice any dead birds on the load before the load was brought in for slaughter. As a result, Marvid Poultry did not take any priority action for the load.

Analysis and Applicable Law

[23] This Tribunal's mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (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.*

[24] Section 2 of the Act defines “agri-food Act”:

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;*

[25] 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:

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,*

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

[27] The Act’s system of monetary penalties (AMP), as set out by Parliament is, however, very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes the AMP system as follows, at paragraphs 27 and 28:

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

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

[28] However, the Federal Court of Appeal in *Doyon*, also points out that the Act imposes an important burden on the Agency. At paragraph 20, the Court states:

[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.

[29] 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.*

[30] Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities. For there to be a violation of paragraph 143(1)(d), the Agency must establish the following elements:

1. that the animal in question was transported (or caused to be transported);
2. that the animal in question was transported on a railway car, motor vehicle, aircraft, vessel, crate or container;
3. that the cargo loaded or transported was an animal;
4. that the animal transported incurred injury or undue suffering likely to be caused by undue exposure to the weather; and
5. that there was a causal link between the transportation, the injury or undue suffering and the undue exposure to the weather.

[31] Put another way, the Tribunal must decide whether the Agency has established that Marvid Poultry transported or caused to be transported the Cornish hens in question (elements 1, 2, and 3) and, if so, whether the Agency has also established that, by not proceeding to process the Cornish hens with due dispatch, Marvid Poultry caused injury or undue suffering to the chickens which was likely caused by their continuing exposure to cold temperatures (elements 4 and 5).

[32] In some cases that have come before the Tribunal where a violation of paragraph 143(1)(d) of the Health of Animals Regulations has been alleged, the applicant has been the transporter of the animals (e.g. *Glenview Livestock Ltd. v. Canadian Food Inspection Agency* RTA 60162 (2005)). In such cases, the burden on the Agency to prove that the applicant “transported” the animals in question is easily met. Here, however, the applicant is not a transporter in the conventional sense but rather the slaughtering plant which processes the chickens once they are offloaded from the transport truck that brought them to the plant. The Tribunal is guided by two of its own decisions, *Volailles Grenville Inc. v. Canadian Food Inspection Agency* RTA 60277 (2007) and *Sure Fresh Foods Inc. v. Canada (CFIA)*, 2010 CART 016, both of which share some similar facts with the present case. In each case, the Tribunal was tasked with determining whether a slaughter house could “transport or cause to be transported chickens” while they were being held at the slaughter house awaiting slaughter. In *Volailles*, the Tribunal found that the slaughter house in that case “had no control or influence over the manner in which the birds were caged, loaded into the truck or transported. The Applicant had no control over the actions of the transporter” (paragraph 19) and as a result, dismissed the Notice of Violation against the slaughter house.

[33] In *Sure Fresh*, the Tribunal’s finding on this point is set out at paragraph 34:

[34] The Tribunal finds that there is sufficient evidence to determine that Sure Fresh did have sufficient control and influence to “transport or cause to be transported” the chickens on load C150, even though it did so only at the end of the voyage of the chickens. The Health of Animals Act and Regulations provide rules for the humane transport of animals. To this end, the rules that provide for the safe “transport” of an animal must encompass the activities involving the movement of animals which will, unless special circumstances exist, include the loading, moving in the transporting vehicle, and unloading of an animal. With such an expansive definition of “transport or cause to be transported” a number of parties -- producers, transporters and even auction marts and slaughter houses -- can conceivably “transport or cause the transport of an animal”.

Moreover, the Federal Court of Appeal recently endorsed a similar expansive definition for “au cours de transport” [while being transported] in the case of *Canada (Attorney General) v. Ouellet* 2010 FCA 268.

[34] In the recent Federal Court of Appeal case of *Canada (Attorney General) v. Denfield Livestock Sales Limited* 2010 FCA 36, the Court commented on the meaning of the words “move, or cause the movement of an animal” in the context of section 176 of the *Health of Animals Regulations*. While not the section in question in this case, the Court’s discussion of the meaning of words that are similar to the ones found in paragraph 143(1)(d) are instructive. The Court in *Denfield* held that an auction mart exercised sufficient power and control over the movement of an animal so as to cause the movement of an animal for the purposes of section 176 (paragraphs 18, 29, and 31). The same logic can be applied in this case where Marvid Poultry, by the decision of its employees not to examine the load of Cornish hens when it arrived at their plant and therefore wait for the ordinary sequencing for the slaughter of the load, exercised sufficient power and control over the load of Cornish hens to cause the transport of, or more correctly, to continue the transport of the Cornish hens for several additional hours.

[35] Moreover, given the evidence of the witnesses for Marvid Poultry, it was clear that Marvid Poultry exercises a high degree of control over the selection of, and timing for, delivery of loads of poultry to its plant. As such, the Tribunal makes the factual finding that Marvid Poultry did exercise sufficient power and control over the Cornish hens waiting in its yard on November 26, 2008 and therefore, for the purposes of the definitions found in the *Health of Animals Regulations* did cause the load of Cornish hens to be transported. As such, elements 1, 2, and 3 have been made out by the Agency.

[36] With respect to elements 4 and 5, the Agency’s evidence is convincing and suffices to prove each of these two remaining elements, each on a balance of probabilities. While there was no evidence presented during the hearing that the ambient temperature inside the load of Cornish hens actually increased or decreased during the several hours that the load waited for processing, the Tribunal finds as fact that, given the ordinarily fragile nature of Cornish hens, they would have suffered less, or would likely have suffered less, if they had proceeded directly to processing on a priority basis. From the evidence, it is clear that, from the time that the Cornish hens arrived at the plant, Marvid Poultry exercised sufficient power and control to examine the birds and to take all necessary steps that could have prevented any undue suffering that the birds either suffered or would likely suffer by having to wait several hours before slaughter on that chilly day in November.

[37] The test set out in paragraph 143(1)(d) of the *Health of Animals Regulations* requires that injury or undue suffering to the animals need only be “likely” to be caused by undue exposure to weather. The Tribunal accepts that that test, on the balance of probabilities, has been met in this case. Given the cold temperatures of that day, the fragile nature of Cornish hens, and the suboptimal transport conditions that the Cornish hens had already endured in getting to the plant, not inspecting these delicate birds on their arrival and holding them for several additional hours did cause, or did likely cause, any surviving chickens injury, undue suffering or perhaps even death.

[38] Moreover, industry practices, as set out in the Canadian Agri-food Research Council's "*Code de pratiques recommandées pour le soin et la manipulation des animaux de ferme – Poulet, dindons et reproducteurs du couvoir à l'abattage [sic]*" (Tab 10 of the Report) ["Recommended code of practice for the care and handling of farm animals – Chickens, Turkeys and Breeders from Hatchery to Processing Plant (Code)"], which were presented as evidence by the Agency, recommends the immediate processing of stressed loads, of which the load of Cornish hens would have been recognized as one if Marvid Poultry had inspected it at the time of its arrival. The Code sets out the following guideline at paragraph 6.1.6: "Les oiseaux qui proviennent de chargements ayant été soumis à un stress, doivent, dans la mesure du possible, être abattus en priorité. En outre, les troupeaux qui semblent en détresse durant le transport ou pendant la période d'attente une fois à l'abattoir devraient être abattus en premier. Habituellement, l'abattage est planifié en fonction de l'heure de mise en caisse ». ["Stressed loads must, if at all possible, take precedence in the slaughter schedule. Flocks observed to be in distress during the transport or while awaiting slaughter at the abattoir should be slaughtered on a priority basis. Generally, it is accepted practice to schedule slaughter based on time crated".]

[39] In this case, Marvid Poultry had an obligation to ensure that the load of Cornish hens was not injured or suffering, knowing that it would have a significant wait till slaughter. If Marvid Poultry had carried out such an inspection, it then would have been able to give the load priority processing. As it was, the load suffered unduly during its additional hours wait. By the time the Agency inspector and Marvid Poultry personnel found the dead birds, injury and suffering was clearly evident and no preventative steps could be taken.

[40] In *Canada (Attorney General) v. Porcherie des Cèdres Inc.*, 2005 FCA 59, the Federal Court of Appeal indicates that undue suffering is unwarranted, unjustified or undeserved suffering (paragraph 26). In *Doyon*, the Federal Court of Appeal indicates that undue suffering can be imposed even on healthy animals if they are exposed to risks during transportation (paragraph 34). In this case, the Cornish hens were likely to incur injury or undue suffering because, on top of their fragile nature state, their improper loading and inadequate protection during their transport from farm to slaughter house, they also had to endure several additional hours of waiting time in the cold, because of a decision of Marvid Poultry employees not to inspect the load and to continue with the ordinary commercial practice for processing all other chickens before turning to the Cornish hens.

[41] The Tribunal is satisfied that the evidence demonstrates that there is a clear causal link between the transportation and the undue suffering and undue exposure to the weather of the Cornish hens in this case.

Defences Available Under the Law

[42] The Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the Act states:

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.

[43] When an AMP provision has been enacted for a particular violation, as is the case for paragraph 143(1)(d) *Health of Animals Regulations*, Marvid Poultry has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that the company might raise, including Marvid Poultry's belief that it was doing the right thing by requiring transporters of Cornish hens to follow its "four rules" and then expecting that those transporters will have followed those rules. Even if, with respect to the two prior loads of Cornish hens delivered to the plant in February and April of 2008, transporters had complied with Marvid Poultry's direction, this will not be a valid defence for their failing to inspect the load that came to them on November 26, 2008. Given Parliament's clear statement on the issue, the Tribunal accepts that such statements by Marvid Poultry are not to be permitted defences under section 18.

Penalty, Quantum and Removal of All Record of the Penalty After Five Years

[44] Consequently, the Tribunal concludes that the Agency has, on a balance of probabilities, proven all the essential elements of the violation and, therefore, the notice of violation with penalty is upheld. The only issue that remains to be determined by the Tribunal is whether the Agency has proven that a penalty of \$2,200 is justified under the Act and *Agriculture and Agri-Food Administrative Monetary Regulations*.

[45] The Tribunal finds that a penalty of \$1800 can be justified under the Act and *Agriculture and Agri-Food Administrative Monetary Regulations*, but one for \$2200 cannot, for the following reasons. Calculation of the appropriate penalty begins with a determination of the status of the violation being minor, serious or very serious as per Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Regulations*. A violation of s. 143(1)(d) carries with it the tag of being a serious violation. Section 5 of the *Agriculture and Agri-Food Administrative Monetary Regulations*, at the time of the violation, stated that a serious violation carried with it a penalty of \$2000 (higher amounts for violations came into force in October 2010). From the base amount of, in this case \$2000, the penalty can either be increased or decreased based on three factors: prior violations, degree of intentionality, and harm done. Values between 0 and 5 are assessed by the Agency for each of the three factors and then totalled to determine the final amount of the penalty. If the total is between 6 and 10, the base penalty amount is not adjusted. If the total is below 6, the penalty is reduced and if it is above 10, the penalty is increased.

[46] In the present case, the Agency has assessed Marvid Poultry with a total of 11 and therefore increased the penalty by 10% as per Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations*. The Agency has arrived at the total of 11 by assessing Marvid Poultry with: (1) a 3 for prior violations, because it has issued a prior serious violation to Marvid Poultry on September 17, 2007 for an incident alleged to have occurred on August 2, 2007; (2) a 3 for degree of intentionality, because it alleges that Marvid Poultry committed the present violation through its own negligence; and (3) a 5 for harm done, because Marvid Poultry ignored its responsibility with the result that animals suffered unduly and the violation thus caused serious harm to animal health.

[47] The Tribunal does not find that the Agency has adduced sufficient evidence, on the balance of probabilities, to support its penalty adjustment calculation. First, with respect to the assessment of the prior violations of Marvid Poultry, while the Agency at Tab 11 of its Report presents the Notice of Violation it issued to Marvid Poultry, it provides no proof of service of that Notice of Violation, nor a photocopy of the reverse side of the Notice of Violation which might assist the Tribunal in determining if Marvid Poultry actually received and/ or acknowledged the Notice of Violation. Moreover, at page 4 of Tab 4 of the Agency Report—Inspector's Non Compliance Report—a report pertaining to the November 26, 2008 incident and completed by Létourneau, she notes that "C'est la première fois qu'un tel incident arrive ici à ma connaissance." [It is the first time that such an incident has occurred here to my knowledge.] Without any proof of Marvid Poultry actually receiving the Notice of Violation, it would be unfair to assume that it had, even though the Agency uses this as the basis to assess a score of 3 on this factor. The Tribunal, having received no evidence to substantiate service of the Notice of Violation by the Agency or to prove any acknowledgement by Marvid Poultry of a prior violation, therefore, assesses a score of 0 on this factor.

[48] Second, with respect to the assessment of intentionality, Schedule 3, Part 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations* outlines four options: 0 points for “the violation subject to the assessment is committed without intention or negligence”; 0 points for “the 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”; 3 points for “the violation subject to the assessment is committed through a negligent act”; or 5 points for “the violation subject to the assessment is committed through an intentional act”. The evidence submitted by the parties clearly does not support a finding by the Tribunal that “the violation subject to the assessment is committed through an intentional act”. The Agency alleges that it was committed through a negligent act. In its written submissions, no more than this is provided as to why it considers the violation arose through negligence, but in oral argument one might surmise that the reason was that Marvid Poultry should have inspected the load when it arrived at the plant. However, Marvid Poultry witnesses explained that they had no reason to suspect any problem with the load, as prior loads had not been inspected and no problems had resulted. It is one thing to find that the lack of an inspection likely resulted in the animals suffering “unduly”. It is quite another to conclude that Marvid Poultry was negligent in not doing an inspection when it had no reason to believe there was a problem. Instead, at the very least, the Tribunal finds that evidence shows that Marvid Poultry personnel and the Agency inspector found the dead poultry at the same time when they were being unloaded at the end of day on November 26, 2008. Evidence also shows that these two parties met later to discuss and implement ways to prevent the re-occurrence of this kind of event. The Tribunal therefore finds that the assessment for degree of intentionality should be 0 points for “the 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”.

[49] On the third factor, degree of harm, the Tribunal agrees with the Agency assessment that the violation subject to the assessment caused serious harm to animal health, as evidenced by the death of 293 Cornish hens.

[50] The Tribunal, therefore, on the basis of the evidence presented, finds that total gravity value for the penalty adjustment in this case is not 11 as alleged by the Agency but rather equals 5, as follows: (1) 0 for prior violations, because lack of proof of service by the Agency or proof of receipt of the violation by Marvid Poultry; (2) a 0 for degree of intentionality, because the Agency failed to prove negligence, on the balance of probabilities, by Marvid Poultry in committing the offence when there was evidence that proved that Marvid Poultry was either without intent in committing the violation or made a voluntary disclosure of the violation with an Agency official present and then the two parties took necessary steps to prevent its re-occurrence; and (3) a 5 for degree of harm done, because Marvid Poultry’s actions or lack thereof caused, or contributed to the undue suffering of Cornish hens, 293 of which died before processing began on November 26, 2008. As the Tribunal assesses the total gravity value for the present violation at 5, Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Regulations*, directs that the original penalty amount be reduced by 10%.

[51] Consequently, the Tribunal, by order, determines that Marvid Poultry committed the violation and orders it to pay the Agency a monetary penalty of \$1,800 within 30 days after this decision is served.

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

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

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

(b) in any other case, the payment of any debt referred to in subsection 15(1),

unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.

Dated at Ottawa, this 31st day of March, 2011.

Dr. Donald Buckingham, Chairperson