Federal Court of Appeal Cour d'appel fédérale

Date: 20170307

Docket: A-113-16

Citation: 2017 FCA 45

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
BOIVIN J.A.

BETWEEN:

MAPLE LODGE FARMS LTD.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

Heard at Toronto, Ontario, on February 23, 2017.

Judgment delivered at Ottawa, Ontario, on March 7, 2017.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Maple Lodge Farms applies for an order quashing the decision dated March 14, 2016 of the Canadian Agricultural Review Tribunal: 2016 CART 8.

[2] The Tribunal decided that Maple Lodge Farms "transport[ed] or cause[d] to be transported…animal[s]," namely spent hens, in circumstances where "undue suffering [was]

likely to be caused to the animal[s]" by reason of "undue exposure to the weather," contrary to paragraph 143(1)(*d*) of the *Health of Animals Regulations*, C.R.C., c, 296. It imposed an administrative monetary penalty of $6,000.

[3] For the following reasons, I would dismiss Maple Lodge Farms' application with costs.

A. The basic facts

[4] Egg farmers collect and sell eggs laid by hens. At the end of the hens' laying life, the hens—known as spent hens—have only one value to the farmers: the sale of their meat to meat processors.

[5] In this case, an egg farmer in Chazny, New York transferred 7,680 spent hens to Maple Lodge Farms, a meat processor. On a cold and windy January morning, a trailer showed up at the farm at 7:30 a.m. to transport the spent hens to Maple Lodge Farms' facility in Brampton, Ontario. Maple Lodge Farms did not have control over the transportation or the spent hens until they arrived in Brampton roughly at midnight the same day.

[6] Due to the spent hens' age and their tendency to peck each other in close quarters, they have missing feathers, perhaps even few feathers. Due to their egg-laying careers, many have calcium and muscle loss and are fragile. Thus, they are vulnerable to environmental changes and the cold.

[7] And it was really cold. While the spent hens were at the farm, the temperature ranged from minus 7 to minus 14 degrees Celsius, and it was windy too. When the trailer entered Quebec, the temperature was minus 18.1, minus 27 with windchill. Upon arrival at midnight at Brampton, it was minus 5.9, minus 8 with windchill. The trailer was taken to an unheated barn at Maple Lodge Farms' Brampton facility and the temperature in that barn was between minus 2 and minus 4. Staff regularly took external temperatures of the crates on the trailer where the spent hens sat—only at some places, not all—and the temperatures ranged from just above freezing (2.0 degrees) to 12.4 degrees; further in, the temperature was thought to be warmer.

[8] At the farm, the spent hens spent hours in the extreme cold. It took roughly four hours in the extreme cold to round up and catch the spent hens, place them in drawers, and load them. Due to mechanical problems with closing the tailgate on the trailer, the spent hens stayed in the trailer—an unheated trailer—and were stationary for another four hours. A number of spent hens would have been warmed by being close to each other, but a number, particularly near the outside, would not.

[9] Once the trailer got going, it took twelve hours to get to Brampton. The unheated trailer, owned by Maple Lodge Farms, uses passive ventilation: very cold outside air infiltrates the trailer through gaps in the tarp as the trailer moves. As a result, some spent hens were exposed to cold temperatures in the trailer over a long time. The driver reported a strong headwind all the way in and an expert relied upon by the Tribunal, Dr. Appelt, testified that this would have pushed even more cold air into the trailer.

[10] When the trailer arrived at Maple Lodge Farms' Brampton facility, the facility was going through a required sanitation process. That process takes much time. As a result, the spent hens could not be slaughtered right away. Instead, they were kept in an unheated barn for twelve hours. This time is known as "lairage." The parties agree that this is a stage in the transportation process and so it is part of the "transportation" to be considered under paragraph 143(1)(*d*) of the *Regulations*.

[11] Upon arrival at Maple Lodge Farms' facility, the driver reported that there were 100 dead spent hens in the load. Maple Lodge Farms' staff noticed only twelve dead. Twelve hours later, when the trailer was finally unloaded, 863 birds, roughly 12% of the load, were found dead. As it is required to do, Maple Lodge Farms reported this to the Canadian Food Inspection Agency.

[12] On these facts, the Canadian Food Inspection Agency issued a notice of violation against Maple Lodge Farms for a violation of paragraph 143(1)(*d*) of the *Regulations*. It assessed an administrative monetary penalty of $7,800.

[13] Maple Lodge Farms requested a review. The matter came before the Tribunal.

[14] The Tribunal's hearing lasted thirteen days. As we shall see, the Tribunal's determination turned very much upon the expert evidence before it. The expert evidence was directed mainly to the issue whether the spent hens would have suffered unduly by reason of undue exposure to the cold.

[15] The Tribunal decided that Maple Lodge Farms was guilty of the violation under paragraph 143(1)(*d*) of the *Regulations* but it reduced the penalty to $6,000.

B. The basic law

[16] Under paragraph 143(1)(*d*) of the *Regulations*, the Minister need only establish on a balance of probabilities that the person named in the notice of violation committed the violation identified in the notice, nothing more. An alleged violator does not have a defence of due diligence or honest belief in exonerating facts. See sections 18-19 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40.

[17] This sort of liability—often imposed by regulatory legislation to ensure compliance by those engaging in activities that, absent regulation, would be socially harmful—is known as absolute liability. Absolute liability requires "proof merely that the defendant committed the prohibited act constituting the actus reus of the offence" with "no relevant mental element": *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at p. 1310. That is exactly what is required for liability under paragraph 143(1)(*d*) of the *Regulations*.

[18] While absolute liability provisions may have their place in ensuring compliance with regulatory legislation, they can operate in draconian ways. For this reason, courts are vigilant in ensuring that procedural and substantive standards are adhered to: *Canada v. Kabul Farms Inc.*, 2016 FCA 143; *Canada v. Guindon*, 2013 FCA 153, 360 D.L.R. (4th) 515 at paras. 54-55; *Doyon v. Canada*, 2009 FCA 152, 312 D.L.R. (4th) 142.

[19] Further, in *Doyon*, this Court held that in administrative proceedings where there is absolute liability, such as the proceedings in this case, an adjudicator must exercise special scrutiny and due care (at paragraphs 27-28):

> 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.
>
> 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.

The case before us very much involves measuring up the Tribunal's decision against this basic law.

C. The issues before us and the standard of review

[20] Maple Lodge Farms advanced several submissions. They can be grouped into two sets of issues:

(1) the fact-finding of the Tribunal, including the explanations it gave; and

(2) the Tribunal's understanding of the concept of absolute liability under paragraph 143(1)(*d*) of the *Regulations*.

[21] On the first set of issues, Maple Lodge Farms accepts that the standard of review is the deferential standard of reasonableness. On the second set of issues, it submits that the standard of review is correctness. The respondent agrees with these submissions.

[22] For the reasons developed below, I agree with the parties' submissions on the standard of review. However, as I shall explain, the outcome of this application does not turn on the standard of review.

D. Assessment of the Tribunal's decision

(1) The Tribunal's fact-finding

[23] Maple Lodge Farms attacks the Tribunal's general fact-finding. In its view, the Tribunal did not consider the evidence as a whole, including some evidence Maple Lodge Farms tendered. In particular, the Tribunal did not consider Maple Lodge Farms' evidence that the spent hens likely recovered during the journey to Maple Lodge Farms' facility in Brampton and this recovery would have continued while the spent hens were held at the facility. It submits that, contrary to *Doyon*, the Tribunal was not sufficiently rigorous when it considered the evidence.

[24] I disagree. The Tribunal had before it thirteen days of evidence offered by both parties, considered that evidence, weighed it, and made findings of fact that were supported by the totality of the evidence. Given the margin of appreciation to which the Tribunal is entitled in circumstances such as these, its factual findings are acceptable and defensible and pass muster

under reasonableness review. In conducting reasonableness review in a case like this, we do not reweigh evidence.

[25] Maple Lodge Farms also submits that the Tribunal's decision cannot stand because it did not explain why it did not give much weight to certain evidence. Maple Lodge Farms also advanced the flip-side to this submission—that the Tribunal ignored certain evidence.

[26] Based on the Supreme Court's decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, this submission cannot succeed. The Tribunal's reasons for decision are found in its written reasons as exemplified by the record, here voluminous. In *Newfoundland Nurses* itself, reasons that showed that the administrative decision-maker was "alive to the question at issue" and permitted the reviewing court to assess reasonableness was sufficient: at para. 26. This Court has held that overly sparse reasons for an administrative decision on a record that sheds no light on a key matter can prevent reasonableness review, resulting in the quashing of the decision: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766; *Kabul Farms*, above at para. 33-35 citing Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 C.J.A.L.P. 87 at p. 113. Here, that concern is not present.

[27] Further, an administrative decision-maker that does not refer to evidence cannot be taken to have ignored that evidence. Any decision-maker in a long complex case, such as the long, thirteen-day hearing here, is entitled to synthesize and distill, and of necessity much detail may

be left out: *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 48-51. In the context of reasons rendered by administrative decision-makers, *Newfoundland Nurses* put it this way (at paragraph 16):

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn*., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, [reasonableness under] *Dunsmuir* [is present].

[28] In saying this, it is important to emphasize that the foregoing discussion only concerns the minimum requirements that will still pass muster under reasonableness review in accordance with *Newfoundland Nurses*. The best administrative decision-makers—the ones that have the strongest reputations and command public confidence—go beyond the minimum. They strive to fulfil the many important substantive and procedural purposes of reasons for decision: *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158; [2011] 4 F.C.R. 425. They do so without any sacrifice of timeliness, efficiency, brevity, and practicality.

[29] While the Tribunal's reasons on some issues are not a model of clarity, precision or concision, they do not run afoul of the principles in *Newfoundland Nurses.* Indeed, at various places the Tribunal does refer to evidence offered by Maple Lodge Farms, explaining it away: see the Tribunal's reasons at paras. 20 and 23.

[30] Maple Lodge Farms also attacks the Tribunal's treatment of the expert evidence adduced before it. It focuses upon the testimony of the expert tendered by the Agency, Dr. Appelt. It submits that the factual bases for Dr. Appelt were too thin, indeed in some cases non-existent, and so his expert testimony should have been dismissed as irrelevant. Instead, the Tribunal accepted Dr. Appelt's testimony and preferred it over the testimony of Maple Lodge Farms' expert, Dr. Ouckama.

[31] Here again, I disagree. Under the reasonableness standard, the Tribunal was entitled to regard Dr. Appelt's testimony as relevant and attach significant weight to it.

[32] Dr. Appelt is a veterinarian, whose postgraduate training concerned animal welfare and husbandry, specializing in livestock transportation. In his work, he specializes in the humane transportation of animals. In that capacity he develops policies and procedures for animal transportation, including transportation by trailer. His publications include studies on the transportation of compromised food animals such as spent hens, and the challenges posed by the transportation of those animals.

[33] Dr. Appelt had evidence of the temperature at all material times, from the hours of extreme cold at the farm in New York through to the hours at the barn at Maple Lodge Farms' Brampton facility. He also had evidence of the duration of exposure of the spent hens to that temperature, understanding that some spent hens, particularly those further into the trailer, would be warm. He also had some evidence of the wind conditions. He had before him the nature and condition of the trailer and he understood that there would be an incursion of wind into the

trailer, particularly during the period it was moving. He also had access to a necropsy report detailing the state of a sample of the spent hens found dead on arrival.

[34] With these factual bases and drawing upon his expertise and available literature (see, *e.g.*, the study and his discussion of it at pp. 321 and 1123-1126 of the application record), Dr. Appelt gave expert opinion evidence about the likely impact on the spent hens due to the conditions they encountered at various times.

[35] Dr. Appelt testified that the spent hens would have been shocked from the extreme cold at the outset of the transport from the four hour process of rounding up and catching the spent hens and the further multi-hour wait at the farm. They would never have fully recovered during the drive from New York to Brampton: Tribunal reasons, para. 23. In fact, the temperature and strong headwinds during the drive and problems with the trailer's tailgate would have forced more air into the trailer, making it worse for the spent hens: application record at pp. 206 and 1203-1204. Dr. Appelt also testified that the spent hens could never recover from their initial shock until they were in heated facilities: Tribunal reasons, para. 20; application record, pp. 808-809.

[36] From this, the Tribunal concluded that the spent hens, under these particular circumstances, should never have been subject to further unheated transport once they were shocked by the cold: Tribunal reasons, para. 23. But they were. Further, Dr. Appelt testified that after the spent hens arrived in Brampton, many would continue in a suffering state while they sat in the unheated barn at Maple Lodge Farms' facility. He considered the long waiting period in

Maple Lodge Farms' barn and the drop in internal load temperature while they were there to be "significant": application record at pp. 206-207. In his view, this long waiting time "increases the risk of a negative outcome for insults that have already occurred": application record at p. 1183; see also pp. 1268-1271.

[37] Dr. Appelt was cross-examined on this testimony and the factual bases for it. In the end, having heard all the evidence and the cross-examination, the Tribunal accepted Dr. Appelt's testimony. At paragraph 47, the Tribunal, relying upon Dr. Appelt's opinion, made key findings of fact:

> The evidence of Dr. Appelt is that, similar to humans, once there is a shock to the system, as a result of cold, there may be some degree of improvement, but not full recovery. Applied to this transport, the Tribunal holds that, on the balance of probabilities, the birds were subject to undue suffering, or likely to be subject to undue suffering, as a result of undue exposure to the weather, during the stationary period following loading. On the balance of probabilities, their compromised state could not have improved to a state of no undue suffering during the course of transport or during the period of lairage at Maple Lodge Farms. The load should not have been transported, given the four hours of stationary exposure in sub-zero weather.

[38] In my view, the Tribunal's acceptance of Dr. Appelt's testimony was supportable on this evidentiary record and, thus, was within the range of acceptability and defensibility.

(2) The Tribunal's misunderstanding of the concept of absolute liability

[39] Maple Lodge Farms submits that the Tribunal erred in finding a violation of paragraph 143(1)(*d*) of the *Regulations* despite the absence of any culpability on its part. In effect, Maple Lodge Farms alleges that the Tribunal misinterpreted paragraph 143(1)(*d*), transforming it into

an automatic liability provision, not an absolute liability provision. It submits that the Tribunal made it automatically or vicariously liable for the acts of the driver whom it did not control. Instead, the Tribunal should have required the Agency to prove that Maple Lodge Farms itself committed the *actus reus* constituting the violation—here, causing animals to be transported in circumstances where "undue suffering is likely to be caused to the animal[s]" by reason of "undue exposure to the weather."

[40] In support of its submission, Maple Lodge Farms draws our attention to paragraphs 48 and 49 of the Tribunal's decision:

> Does the fact of arrival of a compromised load, irrespective of the knowledge of Maple Lodge Farms as to the state of compromise, mean that a violation has thereby been committed by Maple Lodge Farms? The answer is yes.
>
> Maple Lodge Farms is in the unenviable position of not being able to avoid a violation, once it is in control of a compromised load, where "compromised" refers to a load associated with actual or potential injury or undue suffering, due to undue exposure to the weather. Even slaughtering the load immediately may not be adequate to avoid the commission of an absolute liability violation.

[41] It also takes issue with paragraph 56 of the Tribunal's decision:

> In the present case, the Tribunal has determined that the Agency has established, on the balance of probabilities, that injury or undue suffering was likely from the time the birds were originally loaded. This means that Maple Lodge Farms, from the time of assumption of control, is responsible for any condition of the load existing at that time.

[42] As mentioned above, I agree with the parties that the standard of review of the Tribunal's decision on this issue is correctness. Here, we are dealing with the Tribunal's understanding of the meaning and effect of paragraph 143(1)(*d*) of the *Regulations*. At its heart, this is an issue of statutory interpretation.

[43] Both criminal courts and the Tribunal interpret paragraph 143(1)(*d*): while, as here, paragraph 143(1)(*d*) can be the subject of administrative monetary proceedings brought by notice of violation and adjudicated by the Tribunal, paragraph 143(1)(*d*) also can be the subject of criminal proceedings brought by criminal charges and adjudicated by criminal courts.

[44] Where both administrative decision-makers and courts interpret a statutory provision, interpretations by the former are subject to correctness review: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 at para. 15; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615.

[45] In this case, the Tribunal adopted and applied a standard of automatic or vicarious liability, not absolute liability. In the above passages, it decided that at the instant the suffering spent hens arrived at Maple Lodge Farms' facility, Maple Lodge Farms was liable for causing undue suffering. But at that instant, the suffering was caused by others, not Maple Lodge Farms. The Tribunal made Maple Lodge Farms automatically liable without considering its culpability for the *actus reus* of paragraph 143(1)(*d*). Or, alternatively, it made Maple Lodge Farms vicariously liable for the acts or omissions of others, not for its own acts or omissions.

[46] The Tribunal erred. But that is not the end of the matter.

E. This Court's remedial discretion on judicial review

[47] A reviewing court's consideration of a judicial review consists of up to three analytical stages: resolving any preliminary and procedural issues, reviewing the substantive and procedural merits of the administrator's decision and finally, if necessary, considering whether remedies should be granted and, if so, which ones: *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283 at paras. 28-30.

[48] In this case, at the remedial stage, Maple Lodge Farms asks us to quash the Tribunal's decision and remit it to the Tribunal for determination. However, in judicial reviews, remedies are discretionary: see, most recently, the Supreme Court's decision in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

[49] If the circumstances in this case are such that we should exercise our discretion against quashing the Tribunal's decision and remitting it to the Tribunal for redetermination, then the Tribunal's decision will stand and the application for judicial review will be dismissed.

[50] In my view, for the following reasons, these circumstances are present here.

[51] *MiningWatch Canada* encourages reviewing courts at the remedial stage, among other things, to consider whether quashing the administrative decision-maker's decision and remitting it to the administrative decision-maker for redetermination would serve any practical or legal purpose. Where the reviewing court concludes that in any redetermination the administrative

decision-maker could not reasonably reach a different outcome on the facts and the law, the decision should not be quashed: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710; *Robbins v. Canada (Attorney General)*, 2017 FCA 24. This well-established principle resonates well with the modern-day need that pointless proceedings be avoided and decision-making resources be allocated to where they serve some use: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[52] In considering this, reviewing courts must exercise caution and should resolve any doubt in favour of quashing the decision and sending the matter back for redetermination: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326 at 361. This is because in applications for judicial review, the job of the reviewing court normally is not to delve into the merits, *i.e.*, find the facts, find the law and apply the law to the facts. Instead, this is the job of the administrative decision-maker, here the Tribunal: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at para. 23; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paras. 16-19.

[53] In my view, this is a case where no purpose would be served by quashing the Tribunal's decision and having it redetermine the matter.

[54] In any redetermination, the Tribunal would have the proper concept of absolute liability and the elements of paragraph 143(1)(*d*) front of mind. It would also have before it the evidence in the record and the findings of fact it has previously made.

[55] Here I note that the Tribunal's previous findings of fact are separate from and unaffected by the legal error it made earlier, namely its misunderstanding of the requirement that absolute liability be proven. They are unsullied by that misunderstanding, and in any redetermination it would be unreasonable for the Tribunal to depart from those findings on the same evidentiary record: *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281.

[56] Applying the law to the facts, the Tribunal could only reasonably reach one conclusion in a redetermination: Maple Lodge Farms is liable for a violation of paragraph 143(1)(*d*) of the *Regulations*.

(1) Interpreting paragraph 143(1)(*d*) of the *Regulations*

[57] As mentioned above, paragraph 143(1)(*d*) of the *Regulations* prohibits "transport[ing] or caus[ing] to be transported…animal[s]," namely spent hens, in circumstances where "undue suffering is likely to be caused to the animal[s]" by reason of "undue exposure to the weather."

[58] This provision is to be interpreted in light of its text, context and purpose: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. It is to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

[59] When considering the purpose of a provision in a regulation, it is often very useful to examine the statutory provision that authorizes the making of the regulation.

[60] Here, the *Regulations* were made under subsection 64(1) of the *Health of Animals Act*, S.C. 1990, c. 21. Paragraph 64(1)(*i*) specifically permits regulations to be made "for the humane treatment of animals" including "the care, handling and disposition of animals," "the manner in which animals are transported within, into or out of Canada," and "the treatment or disposal of animals that are not cared for, handled or transported in a humane manner." The preamble to the Act tells us that the Act has been enacted, among other things, for the "protection of animals."

[61] One element of context in which paragraph 143(1)(*d*) of the *Regulations* should be viewed is that the humane slaughter of animals is, as Maple Lodge Farms urged upon us, a legal activity. Thus, paragraph 143(1)(*d*) refers to "undue" suffering, not any suffering.

[62] This Court has found that "undue" in a substantially-similar predecessor to paragraph 143(1)(*d*) means suffering that is "undeserved," "unwarranted," "unjustified," "unmerited": *Canada (Attorney General) v. Porcherie des Cèdres Inc.*, 2005 FCA 59, [2005] 3 F.C.R. 539.

[63] As mentioned near the start of these reasons, the parties agree that the time the spent hens were in Maple Lodge Farms' barn (*i.e.*, in lairage) was part of the "transportation" for the purposes of paragraph 143(1)(*d*).

[64] Counsel for Maple Lodge Farms also fairly conceded that the prolongation or extension of undue suffering during lairage can fall within paragraph 143(1)(*d*) of the *Regulations*. This is consistent with the express wording and the underlying purposes of paragraph 143(1)(*d*). It is also consistent with the observations of this Court in an earlier case involving a substantially-similar predecessor to paragraph 143(1)(*d*) in the *Regulations*:

> What the provision contemplates is that no animal be transported where having regard to its condition, undue suffering will be caused by the projected transport. Put another way, wounded animals should not be subjected to greater pain by being transported. So understood, any further suffering resulting from the transport is undue. This reading is in harmony with the enabling legislation which has as an objective the promotion of the humane treatment of animals.

(*Canadian Food Inspection Agency v. Samson*, 2005 FCA 235, 339 N.R. 264 at para. 12; see also *Exceldor Coopérative v. Canada (Canadian Food Inspection Agency)*, 2014 CART 8 at para. 38-40.)

[65] Another question of interpretation is whether the prolongation of undue suffering by itself is enough to trigger liability or whether the prolongation itself must also involve "undue exposure to the weather." Suppose that spent hens are suffering unduly as a result of undue exposure to the weather and the animals are conveyed to a person who, rather than putting the spent hens out of their misery, takes them into a warm shelter which does not improve the situation and only prolongs their suffering. Does that person escape liability because it put them in a warm shelter? Given the purposes of paragraph 143(1)(*d*), I think not.

[66] In any event, on the facts of this case, this issue does not arise. Maple Lodge Farms placed the hens in an unheated barn where the temperature was below freezing. In fact, there was

evidence that internal load temperature while the spent hens were there was dropping and Dr. Appelt considered this to be "significant": application record at pp. 206-207. The Tribunal has accepted Dr. Appelt's evidence that the continued exposure to below-freezing weather in the barn would have continued the "shock."

[67] Does paragraph 143(1)(*d*) attach liability only to positive acts or does it also cover omissions and failures to act? In my view, the purpose, context and text of paragraph 143(1)(*d*) supports the latter view. If a party has control over animals that, as a result of the conduct of others, have suffered unduly by reason of undue exposure to the weather and will continue to suffer unduly unless something is done, and if that party has the ability to prevent further undue suffering but does nothing, it extends or prolongs undue suffering and can be liable under paragraph 143(1)(*d*).

(2) Is Maple Lodge Farms liable under paragraph 143(1)(*d*)?

[68] On this record, as the Tribunal found, there can be no doubt there was prolonged undue suffering. The Tribunal found that the spent hens' "compromised state could not have improved to a state of no undue suffering…during the period of lairage at Maple Lodge Farms": Tribunal's reasons at para. 47. While the spent hens were under the control of Maple Lodge Farms, the undue suffering continued.

[69] However, Maple Lodge Farms maintains that it "committed no act which could constitute a violation": memorandum of fact and law at para. 3. It had no control over the spent hens or the

transportation until arrival at its facility in Brampton. The cause of the suffering of the spent hens occurred before Maple Lodge Farms assumed control over them in Brampton. When the spent hens arrived, it could not do anything except keep them in the unheated barn until after the sanitization process was completed, a process that necessarily took hours. Thus, there was nothing that Maple Lodge Farms could have done to avoid violating the Regulation. See memorandum of fact and law, paras. 3-5.

[70] This submission overlooks that Maple Lodge Farms could be liable if, while the spent hens were under its control, its own omissions or failures to act were likely to cause prolonged undue suffering.

[71] In this case, when spent hens that were unduly suffering arrived, Maple Lodge Farms' inaction prolonged their undue suffering: Tribunal's reasons at paras. 23 and 47. If there were truly nothing Maple Lodge Farms could do about the prolonging of undue suffering, it would escape liability. But if there were something it could do but failed to do, the necessary element of culpability—the presence of the *actus reus*—would be present. Its inaction—in circumstances where action could have prevented prolonged undue suffering—would be the cause of the prolonged undue suffering.

[72] The practical effect of this is that in some circumstances a party's failure to improve its operations and practices in circumstances where it could do so can result in liability. In response to questioning, counsel for Maple Lodge Farms fairly conceded that paragraph 143(1)(*d*) might require a business to improve its operations and practices to avoid liability.

[73] The evidence shows that from time to time Maple Lodge Farms receives shipments containing some spent hens who are suffering unduly as a result of undue exposure to the weather. To avoid the liability that would result from doing nothing and creating a likelihood of extended or prolonged suffering and consistent with the proper interpretation of paragraph 143(1)(*d*) of the *Regulations*, Maple Lodge Farms must anticipate this circumstance and make protocols or contingency plans to deal with it. The evidence shows that protocols or contingency plans can be made.

[74] The Tribunal observed some specific ways in which Maple Lodge Farms' operations and practices were deficient. First, "[t]here were no contingency processing strategies in place to address compromised loads arriving during the 'sanitizing shift'": Tribunal's reasons, para. 50. Second, had Maple Lodge Farms been advised of the "compromised load" (the presence of suffering spent hens on the load) or the very lengthy time the spent hens spent at the farm in extreme cold it "could have declined the load and suggested to the transporter that the load be transferred to the nearest slaughter location": Tribunal's reasons, para. 51.

[75] On this record, other plans or protocols were available to Maple Lodge Farms. Some include: some heating of the barn during times that the slaughtering facilities are unavailable due to maintenance or sanitizing procedures so that the spent hens are not exposed to "further unheated transport," a circumstance that prolongs undue suffering (Tribunal's reasons at para. 32); the use of better trailers (cross-examination of Dr. Appelt, application record at pp. 1130-31); delaying shipments so that spent hens arrive only when the slaughtering facilities are able to operate and, if necessary, can put unduly suffering spent hens quickly out of their misery;

arranging its contractual affairs so that it has greater control over the loading and transportation of spent hens, thereby preventing the likelihood of undue suffering or the prolonging of undue suffering being caused; requiring better reporting to it during the transportation process so that it learns in advance of problems like the hours at the farm the spent hens were kept stationary in the extreme cold and, if necessary, can instruct the driver to cancel the transportation and keep the spent hens in relative safety at the farm. On this last mentioned item, the Tribunal specifically observed (at para. 56) that "had Maple Lodge Farms, as the receiving slaughterhouse, been informed of the delays in loading and transport in sub-zero weather, it could have informed the chicken farmer and the transporter that the transport should be cancelled."

[76] Maple Lodge Farms submits that it does take steps to minimize the chances of a shipment arriving that contains some spent hens suffering unduly. It pointed out that those transporting spent hens are instructed to follow certain codes of practice issued by the Canadian Agri-Food Research Council. That may be so, but as detailed in the last two paragraphs there are other things Maple Lodge Farms could have done but did not; in other words, there are still culpable omissions on the part of Maple Lodge Farms. These other things would have prevented the prolongation of undue suffering of spent hens while in Maple Lodge Farms' control. As the Research Council's code of practice for the care and handling of spent hens states, "successful humane transportation of birds depends upon good co-ordination among all involved parties" and "[c]onfinement time should be as short as possible, consistent with humane handling and treatment": application record at p. 136.

[77] Maple Lodge Farms draws to our attention the Tribunal's finding (at para. 65) that it exercised reasonable care when the spent hens were under its control. But this takes nothing away from the fact that omissions in its practices and procedures nevertheless prolonged the undue suffering of the spent hens due to undue exposure to the weather. A party whose omissions result in the violation of an absolute liability provision cannot offer the defence that during the violation it acted as best as it could. As paragraph 18(1)(*a*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* makes clear, there is no defence of due diligence for a violation of paragraph 143(1)(*d*) of the *Regulations*. Due diligence is not a defence to an absolute liability violation.

[78] Positive conduct during the violation may go to mitigate the party's penalty, but it cannot exonerate it from its absolute liability. In this case, the Tribunal appropriately used Maple Lodge Farms' positive conduct to reduce the penalty: Tribunal's reasons at paras. 65-67.

[79] In conclusion, on this record, a finding of liability on the part of Maple Lodge Farms is not the imposition of automatic or vicarious liability. On this record, only one reasonable conclusion is possible: Maple Lodge Farms held compromised spent hens in unheated lairage as part of their transportation for twelve hours and while under the control of Maple Lodge Farms the spent hens experienced prolonged undue suffering due to Maple Lodge Farms' omissions in its practices and procedures. This was contrary to paragraph 143(1)(*d*) of the *Regulations*.

[80] The Tribunal assessed the penalty based upon a formula set out in the Regulation: Schedule 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*,

SOR/2000-187. The elements that go into the assessment of the penalty in this case are fixed by the legislation. In this case, although the Tribunal did not accurately identify what parts of Maple Lodge Farms' conduct were culpable, under Schedule 2 its assessment of the penalty would be the same. In other words, there is no discretion as to penalty that has to be re-exercised. Counsel for Maple Lodge Farms agreed that in this scenario, the penalty would remain at $6,000.

F. Postscript

[81] The Supreme Court has recently admitted that its jurisprudence on the standard of review is in a state of uncertainty and some tweaking or revision is probably going to take place: *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, 402 D.L.R. (4th) 236.

[82] Earlier in these reasons, I accepted the parties' submission that the standard of review on the proper interpretation of paragraph 143(1)(*d*) of the *Regulations* is correctness based on *Rogers* and *SODRAC*, both above. If the Supreme Court changes the law and, as a result of that change, the standard of review on this issue is reasonableness, the result of this application remains the same.

[83] Even if we were to find that the Tribunal's decision is unreasonable, we would still have the discretion not to quash the Tribunal's decision and remit the matter to the Tribunal for redetermination.

[84] I would still exercise my remedial discretion against quashing and remitting for determination. There would be no point: for the reasons discussed above, in any redetermination the only reasonable decision available to the Tribunal is a finding that Maple Lodge Farms violated paragraph 143(1)(*d*) of the *Regulations*.

G. Proposed disposition

[85] The parties have agreed that costs should be fixed in the amount of $5,000, all inclusive. Therefore, I would dismiss the application with costs in that amount. I would like to thank counsel for their excellent submissions.

"David Stratas"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-113-16

AN APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE CANADIAN AGRICULTURAL REVIEW TRIBUNAL DATED MARCH 14, 2016, DOCKET NO. CART/CRAC-1728

STYLE OF CAUSE:	MAPLE LODGE FARMS LTD. v. CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 23, 2017
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	GAUTHIER J.A. BOIVIN J.A.
DATED:	MARCH 7, 2017

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