

“Clearly a Subjective Determination”: Interpretations of “Undue Suffering” at the Canada Agricultural Review Tribunal (2000–2019)

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Article abstract

How much suffering does our legal system tolerate? This paper focuses on Canada's federal *Health of Animals Regulations*, which purport to provide a measure of protection to farmed animals, notably during their transit to slaughterhouses. More specifically, this paper interrogates how the concept of “undue suffering” is interpreted by the Canada Agricultural Review Tribunal (CART) and Federal Court of Appeal (FCA) between 2000 and 2019. During this period, a total of 157 CART decisions applied the “undue suffering” standard with respect to provisions of the federal *Health of Animals Regulations*, guided in part by three significant FCA decisions. These cases allow us to conduct a longitudinal study of the standard of “undue suffering,” to see how it is interpreted and evolves over time. A core implication is that some degree of suffering was deemed reasonable, though the contours of this permissible suffering remained ambiguous. I argue that twenty years of CART cases demonstrate the shortcomings of regulations which are premised on a standard as vague as “undue suffering.”

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HOW MUCH SUFFERING does our legal system tolerate? This paper focuses on Canada’s federal *Health of Animals Regulations*, which purport to provide a measure of protection to farmed animals, notably during their transit to slaughterhouses. More specifically, this paper interrogates how the concept of “undue suffering” is interpreted by the Canada Agricultural Review Tribunal (CART) and Federal Court of Appeal (FCA) between 2000 and 2019. During this period, a total of 157 CART decisions applied the “undue suffering” standard with respect to provisions of the federal *Health of Animals Regulations*, guided in part by three significant FCA decisions. These cases allow us to conduct a longitudinal study of the standard of “undue suffering,” to see how it is interpreted and evolves over time. A core implication is that some degree of suffering was deemed reasonable, though the contours of this permissible suffering remained ambiguous. I argue that twenty years of CART cases demonstrate the shortcomings of regulations which are premised on a standard as vague as “undue suffering.”

JUSQU’À QUEL POINT notre système juridique tolère-t-il la souffrance? Cet article se concentre sur le *Règlement sur la santé des animaux* du gouvernement fédéral du Canada, qui vise à assurer une certaine protection aux animaux d’élevage, notamment pendant leur transport vers les abattoirs. Plus précisément, cet article examine comment la Commission de révision agricole du Canada (CRAC) et la Cour d’appel fédérale (CAF) ont interprété le concept de «souffrance indue» entre 2000 et 2019. Au cours de cette période, un total de 157 décisions rendues par la CRAC ont appliqué les critères de «souffrance indue» à l’égard des dispositions du *Règlement sur la santé des animaux* du gouvernement fédéral, guidées en partie par trois décisions importantes de la CAF. Ces causes nous permettent de mener une étude longitudinale des critères de la «souffrance indue», afin de voir comment elle est interprétée et évolue au fil du temps. Une implication essentielle souligne qu’un certain degré de souffrance a été jugé raisonnable, bien que les limites de cette souffrance admissible demeurent ambiguës. Je soutiens que vingt ans de causes rendues par la CRAC démontrent les lacunes de la réglementation fondées sur des critères aussi vagues que la «souffrance indue».

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INTRODUCTION

Animal welfare laws, like the laws of war, take for granted that the killing will continue—and so, while we’re at it, we should take measures to reduce suffering.¹ But when it comes to farmed animals,² how much suffering does our legal system actually tolerate? Canada is not known for exemplary harm reduction during meat production. “To put the matter as charitably as possible,” writes Peter Sankoff, “Canada has never been considered a world leader where animal protection law is concerned, especially insofar as farm animals are concerned.”³ Lesli Bisgould is rather less charitable: “[f]or a country that prides itself on its peaceful ways, Canadians cause a lot of animals a lot of pain and suffering.”⁴

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1 In international humanitarian law, the principle of unnecessary suffering is a common fixture. To pick just one example, Article 35(2) of the 1977 *Protocol I Additional to the Geneva Conventions* reads as follows: “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1)*, 8 June 1977, 1125 UNTS 3, art 35(2) (entered into force 7 December 1978).

2 In this article, I will use the term “farmed animals,” rather than “farm animals,” in a modest attempt to use more animal-centric terms.

3 Peter Sankoff, “Canada’s Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?” (2019) 5:1 *Can J of Comparative & Contemporary L* 299 at 300.

4 Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 7.

This paper focuses on Canada's federal *Health of Animals Regulations*, which purport to provide a measure of protection to farmed animals, notably during their transit to slaughterhouses.⁵ More specifically, this paper interrogates how the concept of undue suffering was interpreted by the Canada Agricultural Review Tribunal (CART) and Federal Court of Appeal (FCA) between 2000 and 2019. During this period, a total of 159 CART decisions applied the undue suffering standard with respect to provisions of the federal *Health of Animals Regulations*, guided in part by three significant FCA decisions.⁶ These cases allow us to conduct a longitudinal study of the standard of "undue suffering," to see how it is interpreted and evolves over time. A core implication is that some degree of suffering was deemed reasonable, or "due," although the contours of this permissible suffering remained ambiguous.

This paper seeks to make three main contributions. First, it provides the first sustained analysis of the jurisprudence of the CART, an administrative tribunal that has received scant scrutiny, scholarly or otherwise.⁷ Second, this article offers a case study of how a vague standard is interpreted and enforced by a particular administrative agency and a reviewing tribunal, with possible lessons for administrative law as a whole. I argue that 20 years of CART cases demonstrate the shortcomings of regulations that define acceptable outcomes in terms of a standard as vague as undue suffering. Finally, this study reveals little discernible progress, from an animal welfare point of view, in the way the standard of "undue suffering" was interpreted and enforced over the course of two decades.

I. 2020 CHANGES AND OTHER REASONS TO CARE ABOUT THE CART

CART decisions about animal suffering warrant our careful scrutiny for at least three reasons. First, the decisions can help us assess the significance of recent amendments to the *Health of Animals Regulations*. In 2020, the regulations underwent revisions to "better reflect current animal welfare

5 *Health of Animals Regulations*, CRC, c 296 (2021) [HAR].

6 See *Canada (AG) v Porcherie des Cèdres Inc*, 2005 FCA 59 [*Porcherie des Cèdres*]; *Canadian Food Inspection Agency v Samson*, 2005 FCA 235 [*Samson*]; *Doyon v Canada (AG)*, 2009 FCA 152 [*Doyon*].

7 In this regard, Vaughan Black's article provides a notable exception. See Vaughan Black, "Traffic Tickets on the Last Ride", in Peter Sankoff, Vaughan Black, and Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 57 at 58.

science” and “societal expectations,” according to the federal government.⁸ In particular, the phrase “undue suffering” has been largely excised. Whereas before it was only impermissible to cause suffering to an animal if it was *undue*, government analysis now boldly claims that proper transportation of animals “should not lead to *any* degree of suffering.”⁹ On their face, the 2020 changes reflect important advancements for animal welfare. To better understand and evaluate their significance, however, it helps to explore the prior approach to animal suffering, as evidenced by CART decisions.

Second, the CART is one of the few public arenas where animal suffering is taken seriously.¹⁰ The Tribunal has had to determine, case by case, the contours of what is deemed permissible with respect to the treatment of animals. In so doing, the CART guides the enforcement of legal duties towards farmed animals. With its reasoned decisions, the Tribunal makes explicit and specific that which regulations often state vaguely and generally. What constitutes undue suffering? How can it be identified? These are hard questions that the CART has done its best to answer.

Third and finally, beyond questions about what and how the CART decides, the Tribunal’s judgments document a veritable litany of horrors.¹¹ To read CART decisions is to peer at the underbelly of our meat supply chains. Unresponsive heifers are jabbed in the face with electric prods to

8 See Regulatory Impact Analysis Statement, (2019) C Gaz II, 285 at 286 (accompanying *Regulations Amending the Health of Animals Regulations*, SOR/2019-38) [Impact Analysis]. See also Canada Agricultural Review Tribunal, *Canada Agricultural Review Tribunal 2019-2020 Annual Report* (Ottawa: CART) at 13. Further research could explore what exactly drove this regulatory change.

9 *Impact Analysis*, *ibid* at 315.

10 Of course, Superior Courts deal with section 445 *Criminal Code* offenses dealing with harm and cruelty to animals. However, as Katie Sykes notes: “[i]t is a widely shared and largely unexamined assumption that substantially anything done to animals, no matter how great the degree of pain or suffering involved, is not subject to section 445.1(a) [of the *Criminal Code*] if it is done in the context of an economically productive enterprise or for a socially accepted purpose.” Katie Sykes, “Rethinking the Application of Canadian Criminal Law to Factory Farming” in Sankoff, Black & Sykes, *supra* note 7, 33 at 38. See also *Criminal Code*, RSC 1985, C-46, s 445. There are also occasional prosecutions stemming from *Health of Animals Regulations*. See e.g. *R v Maple Lodge Farms*, 2013 ONCJ 535.

11 Occasionally, the decisions even rise to the level of lyricism. See e.g. 473629 *Ontario Inc v Canada (Canadian Food Inspection Agency)*, 2014 CART 30, Chairperson Buckingham (“[t]his case...is about the life and death of spent hens on their way to a Canadian slaughter house” at para 1). See also *Transport Robert Laplante & Fils Inc v Canada (Canadian Food Inspection Agency)*, 2016 CART 29, Chairperson Buckingham (“[t]his case is about a ‘flying pig.’ It didn’t really fly, but it did jump and what caused it to jump is at the heart of this case” at para 1).

get them to unload more speedily.¹² Three thousand chickens stuffed into crates perish in transit to the slaughterhouse.¹³ Hogs suffocate during a three-hour journey in an overcrowded trailer.¹⁴ Sheep freeze to death in sub-zero temperatures during a 46-hour journey in the back of a truck, without food or water.¹⁵ A hog strains on the tips of its hooves to reduce the extent to which its massive hernia drags painfully on the ground—still, the animal is deemed fit for transit.¹⁶ And so on. Though such stories typically result in legal liability for those responsible, CART decisions provide more than enough ghastly details to shock vegetarians and meat consumers alike. Generations hence, one suspects that readers will look back and wonder how such negligence and cruelty was penalized so lightly.¹⁷ Moreover, in assessing that which is “undue,” the Tribunal offers revealing glimpses into what actors in the supply chain consider “normal,” as we shall see further below.

II. OVERVIEW OF DATA AND REGULATIONS

This study analyzes a total of 159 CART decisions issued between 2000 and 2019, all of which invoke the concept “undue suffering.”¹⁸ Of these, 110 resulted in a finding of liability and imposition of a fine, and 49 did not. The cases concern hogs, sheep, chickens, horses, and cows, including various

12 See *Bill Toll v Canada* (CFIA) (20 July 2004), RTA 60130 at 2, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7456/index.do?q=bill+toll+v+Canada> [*Bill Toll*].

13 See *Sure Fresh Foods v Canada* (CFIA), 2010 CART 16 at para 14.

14 See *Transport Robert Laplante & Fils Inc v Canada* (Canadian Food Inspection Agency), 2016 CART 27 at paras 30–31.

15 See *Luckhart Transport Ltd v Canada* (CFIA) (24 March 2005), RTA 60161 at 2, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7419/index.do?q=luckhart+transport>.

16 See *Transport Eugène Nadeau Inc v Canada* (CFIA) (15 August 2005), RTA 60173 at 3, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7467/index.do?q=nadeau>. There are also similar facts in *L'Oiselier de St-Bernard Inc v Canada* (CFIA) (8 November 2005), RTA 60203, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7566/index.do?q=l%27oiselier>.

17 See Yuval Noah Harari, “Industrial farming is one of the worst crimes in history” (25 September 2015), online: *The Guardian* <www.theguardian.com/books/2015/sep/25/industrial-farming-one-worst-crimes-history-ethical-question> (“the treatment of domesticated animals in industrial farms is perhaps the worst crime in history”).

18 CART decisions are available at decisions.cart-crac.gc.ca/cart-crac/en/nav.do. I employed the search term “undue suffering” in an advanced search, with the time range of January 1, 2000 to December 31, 2019. This search yields 167 results. Of these, eight decisions were omitted on the basis that “undue suffering” performs no significant function in the reasoning.

kinds thereof—spent hens,¹⁹ broiler birds,²⁰ cornish hens,²¹ cockerel chickens,²² bovine calves,²³ veal calves,²⁴ heifers,²⁵ sows,²⁶ dairy cows,²⁷ a Holstein cow,²⁸ and a Charolais bull²⁹—all on their way to becoming meat products. Each case is the result of “a system that permits the issuing of tickets for causing animal suffering on the last ride,” as Vaughan Black puts it.³⁰

Why focus on decisions between 2000 and 2019? Though the *Health of Animals Regulations* have existed since 1977, and the CART has existed since 1983, the system of administrative penalties that undergirds these cases only came into force in 2000. The end date of 2019 reflects the fact that significant revisions were made in 2020 to the provisions that deal with animal suffering. During the two decades between 2000 and 2019, the relevant statutory language dealing with animal suffering was remarkably constant, although interpretations evolved.

The *Health of Animals Regulations* is one of 11 sets of federal regulations pursuant to the federal *Health of Animals Act*. These regulations are primarily directed at the export, import, and transport of farmed animals, and compliance is overseen by the Canadian Food Inspection Agency.³¹ Prior to 2000, the regulations were enforced by criminal prosecution, but as of

19 See 473629 *Ontario Inc v Canada* (Canadian Food Inspection Agency), 2014 CART 30.

20 See *Prairie Pride Natural Foods Ltd v Canada* (Canadian Food Inspection Agency), 2016 CART 4.

21 See 9020-2516 *Québec inc v Canada* (CFIA), 2011 CART 007.

22 See *Maple Lodge Farms Ltd v Canada* (CFIA) (12 February 2008), RTA 60296, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7457/index.do?q=maple+lodge+farms>.

23 See *Christensen v Canada* (Canadian Food Inspection Agency), 2016 CART 23 [Christensen].

24 See *Glenview Livestock Ltd v Canada* (CFIA) (24 March 2005), RTA 60162, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7423/index.do?q=glenview+livestock>.

25 *Bill Toll*, *supra* note 12.

26 See *Les Élevages Nyco Inc v Canada* (Canadian Food Inspection Agency), 2014 CART 27.

27 See *Réseau Encans Québec Inc v Canada* (CFIA) (22 August 2005), RTA 60179, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7491/index.do?q=encans>.

28 See *Ferme Lancjeu Inc v Canada* (CBSA) (1 November 2005), RTA 60200, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7557/index.do?q=ferme>.

29 See *Longhorn Farms Ltd v Canada* (CFIA) (5 March 2001), RTA 60010, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7531/index.do?q=longhorn> [Longhorn Farms].

30 Black, *supra* note 7 at 79.

31 These regulations supplement provincial animal welfare regulations, as well as *Criminal Code* provisions dealing with animal cruelty. For a discussion of provincial animal welfare legislation, see Sankoff, *supra* note 3; Bisgould, *supra* note 4 at Chapter 4. See also *Criminal Code*, *supra* note 10 (defines animal cruelty in terms of “unnecessary suffering”, s 445.1). For an overview of how this phrase is (and could be) interpreted in Canadian criminal law, see Sykes, *supra* note 10 (“an interpretation of the animal cruelty offence has...become entrenched whereby almost anything done to animals as part of the business of producing animal food is exempt from the *Code*’s application” at 33).

May 2000, monetary fines have been administered as part of an administrative penalty system where liability is determined based on a balance of probabilities.

The 159 cases concern nine kinds of violations, all of which invoke the “undue suffering” of animals. These provisions of the *Health of Animals Regulations* are worth citing in full (as they read prior to the 2020 revisions).

Paragraph 138(2)(a) related to suffering during transport:

138 (2) ...no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal

(a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey.

Subsection 139(2) related to the loading and unloading of animals:

139 (2) No person shall load or unload, or cause to be loaded or unloaded, an animal in a way likely to cause injury or undue suffering to it.

Subsections 140(1) and 140(2) related to overcrowding during loading and transport:

140 (1) No person shall load or cause to be loaded any animal in any railway car, motor vehicle, aircraft, vessel, crate or container if, by so loading, that railway car, motor vehicle, aircraft, vessel, crate or container is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.

(2) No person shall transport or cause to be transported any animal in any railway car, motor vehicle, aircraft, vessel, crate or container that is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.

Finally, paragraphs 143(1)(a)–(e) concerned suffering during transport due to inadequate or faulty construction, exposure to weather, or inadequate ventilation:

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

(a) inadequate construction of the railway car, motor vehicle, aircraft, vessel, container or any part thereof;

- (b) insecure fittings, the presence of bolt-heads, angles or other projections;
- (c) the fittings or other parts of the railway car, motor vehicle, aircraft, vessel or container being inadequately padded, fenced off or otherwise obstructed;
- (d) undue exposure to the weather;
- (e) inadequate ventilation.³²

The presence of the word "undue" before "suffering" is the common denominator of this collection of provisions. On its face, this wording implies that mere suffering is not sufficient to attract legal liability. As Elaine Hughes and Christiane Meyer write, this "reflects the utilitarian calculus that some suffering is acceptable if the (human) end justifies the means."³³

Nowhere in the regulations is the phrase "undue suffering" defined. Neither is each individual word, "undue" or "suffering."³⁴ The regulations only offered one clear clue of what amounts to "undue suffering." In relation to suffering during transport, it was specified that "a non-ambulatory animal is an animal that cannot be transported without undue suffering during the expected journey."³⁵ Beyond this example, the unwieldy work of interpreting what "undue suffering" means is left to the CART and Federal Courts.

The cases primarily concern violations connected to suffering related to transport (paragraph 138(2)(a)), loading and unloading (subsection 139(2)), and exposure to weather (paragraph 143(1)(d)). More specifically, cases broke down as follows:

32 *Health of Animals Regulations*, CRC, c 296 (2006), ss 138(2)(a), 139(2), 140(1)–(2), 143(1) [HAR 2006].

33 Elaine L Hughes & Christiane Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6:23 *Animal L* 23 at 38.

34 Of course, the word "undue" has been used in sundry other legal contexts, notably in the phrase "undue burden" with respect to abortion in the United States. See *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992) ("[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" at 878). In Canadian law, the term "undue hardship" recurs in the context of reasonable accommodation of employers. See *Ontario (Human Rights Commission) v Simpsons-Sears*, [1985] 2 SCR 536, 23 DLR (4th) 321 ("[t]he duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer" at 555).

35 HAR 2006, *supra* note 32, s 138(2.1).

Provision	Issue	Number of Cases
138(2)(a)	transport	91
139(2)	loading/unloading	17
140(1)	overcrowding	6
140(2)	overcrowding	9
143(1)(a)	inadequate construction	2
143(1)(b) ³⁶	insecure/dangerous parts	4
143(1)(c)	inadequate fittings/parts	1
143(1)(d)	exposure to the weather	27
143(1)(e)	ventilation	3

It is worth emphasizing that we cannot necessarily infer that these cases present a representative sample of what is occurring on a daily basis in our meat supply chains; these are simply cases that arose because a party sought to contest a fine levied by the Canadian Food Inspection Agency.³⁷ It is far more common for fines to be levied and paid without further contestation before the CART (or beyond, before a federal court). And, of course, animal suffering that was simply deemed “due” triggered no administrative sanction at all. According to onetime CART Chair Don Buckingham, “[i]n the vast majority of cases, food industry companies and their employees succeed in taking care of animals without incurring their liability under the [Health of Animals] Regulations.”³⁸ In order for a case to reach the CART, something has to go wrong, someone has to be held responsible, and then that someone has to contest their liability.³⁹ Before turning our focus to patterns and implications of CART decisions, however, we should begin by reviewing three important FCA decisions with respect to the meaning of “undue suffering.”

III. FCA DECISIONS: PORCHERIE DES CÈDRES, SAMSON & DOYON

The CART approach to “undue suffering” was significantly influenced by three key decisions of the FCA. In 2005, in the case of *Canada (AG) v*

36 In one case, penalties were levied under paragraphs 143(1)(a) and 143(1)(b). *Christensen*, *supra* note 23.

37 Canadian Food Inspection Agency sometimes imposes a warning, not a fine.

38 *Réseau Encans Québec inc v Canada (Canadian Food Inspection Agency)*, 2015 CART 16 at para 62 [*Réseau*].

39 If the fine is *not* contested, then the amount payable is reduced by half.

Porcherie des Cèdres, the FCA sought to define the term "undue suffering" for the first time. The case was about a hog that was transported despite a prior injury. On arrival at the slaughterhouse, a veterinarian inspected the hog and found it laying on its right side, "panting and shivering a lot."⁴⁰ The hog was unable to stand, and it had an open fracture of its hind leg, "with a lot of necrosis of the skin, muscle, and bone tissue."⁴¹ The veterinarian concluded that the injury had been present "for at least 10 days" prior to transportation.⁴²

The FCA was reviewing an earlier decision by the CART, which had ruled that there had been no violation because it had *not* been established, "on a balance of probabilities that the pig could not be transported without undue suffering," as outlined in paragraph 138(2)(a) of the *Health of Animals Regulations*.⁴³ The Tribunal reached this conclusion by interpreting "undue" to mean "excessive." In turn, the Tribunal applied this conception of undue suffering as excessive suffering to conclude that, since the hog's existing injury had not been "exacerbated" by transportation, excessive suffering had not occurred. The implication was that merely continued suffering, which was not aggravated by transportation, was legally permissible.⁴⁴ Additional suffering, which would not occur but for the transportation, was required to render the resultant suffering "undue."

Justice Nadon, writing for the FCA, rejected this approach.⁴⁵ Justice Nadon thought it was wrong for the Tribunal to "allow the loading and transportation of suffering animals."⁴⁶ Rather, Justice Nadon wrote:

It does not seem reasonable to me to interpret the words "undue" and "indu[e]" as meaning "excessive" and "excessif". In my opinion, a reasonable interpretation of "undue" and "indu[e]", in the context of the relevant legislation, can only lead to the conclusion that these words mean instead "undeserved", "unwarranted", "unjustified", "unmerited" or "inapproprié", "inopportune", "injustifié", "déraisonnable". This interpretation ensures that a suffering animal cannot be loaded and transported, since any such

⁴⁰ *Porcherie des Cèdres*, *supra* note 6 at para 6.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Porcherie des Cèdres Inc v Canada (CFIA)* (22 September 2003), RTA 60080, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7670/index.do>. See also *HAR* 2006, *supra* note 32.

⁴⁴ *Porcherie des Cèdres*, *supra* note 6 at para 16.

⁴⁵ *Ibid* at para 37, Desjardins and Pelletier JJ concurring.

⁴⁶ *Ibid* at para 21.

loading or transportation will cause “unjustified” and “unreasonable” suffering to the animal.

I conclude, therefore, that the transportation of an injured (and therefore suffering) animal could only cause unjustifiable or inappropriate suffering to that animal.⁴⁷

As Justice Nadon noted, this was largely the approach that had been adopted by the CART prior to this appeal. Proof that an animal was suffering when loaded had led the CART to conclude in numerous other decisions that the animal could not be transported without undue suffering. The decision of Justice Nadon reinforced the trend.

That same year, another decision by the FCA, *Canadian Food Inspection Agency v Samson*, reaffirmed the view articulated in *Porcherie des Cèdres*, with Justice Noël adding:

What the provision [138(2)(a)] 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.⁴⁸

On this view, in cases of suffering animals being transported, the word “undue” does not seem to be doing much work. Indeed, one can imagine a version of the *Regulations* in which the word does not appear, and which would have the exact same effect. If any suffering during transportation is undue, then all suffering is undue. Which is to say that the presence of suffering seemed to become the legal threshold, beyond which liability follows.

This approach to undue suffering was followed by the CART until 2009,⁴⁹ at which point the approach was significantly narrowed by the FCA in *Doyon*

⁴⁷ *Ibid* at paras 26-27.

⁴⁸ *Samson*, *supra* note 6 at para 12, Sexton and Sharlow JJ concurring [emphasis added].

⁴⁹ See e.g. *Les fermes G Godbout & fils inc v Canada (Canadian Food Inspection Agency)*, 2006 FCA 408 (the FCA held that “economic considerations cannot in themselves warrant the infliction of undue suffering” at para 11). This approach arguably contrasts with how animal cruelty provisions of the *Criminal Code* are interpreted and applied. See also Sykes, *supra* note 10 (as Sykes notes, “[c]onventional wisdom has it that [standard practices involving severe animal suffering] are justified because their purpose is to produce food (and other useful things, such as wool, leather, and feathers) cheaply and efficiently, rather than inflicting pain just for the sake of it” at 35).

v Canada (AG).⁵⁰ Once again, the Court was reviewing a finding by the CART about a paragraph 138(2)(a) violation. In this case, a hog was transported and, on arrival, a veterinarian noted that the animal was "very pale and very emaciated."⁵¹ On inspection, the animal was found to have arthritis, with "compensatory swelling of the right carpus and tarsus."⁵² In light of the hog's condition, the veterinarian opted to "euthanise it immediately."⁵³ The hog's owner disputed that the animal was suffering before it was shipped, though the Tribunal found that "[i]t is uncontested that hog S20 was compromised at the time of transport and that the producer and carrier were aware of this."⁵⁴ Ultimately, the Tribunal concluded that the animal could not be transported without undue suffering, and imposed a fine of \$2,000.

On appeal, the FCA reached a different result, and, in so doing, the Court established a new, authoritative interpretation of how the "undue suffering" standard should be applied. Writing for the Court, Justice Létourneau concluded that "paragraph 138(2)(a) does not prohibit the transportation of a suffering animal to the slaughterhouse, nor does it permit the transportation of a healthy animal in conditions that would cause it undue suffering."⁵⁵ Justice Létourneau reached these conclusions by breathing new life into the word "undue." On his view, "the slightest suffering"⁵⁶ present before transport is not a bar to any kind of transport: "the fact that an animal is compromised and suffering does not necessarily mean that it cannot be transported, especially if it remains ambulatory."⁵⁷ In such cases, accommodations could and must be made to transport such animal in an acceptable manner. On this view, "undue suffering" seems to occur in the presence of suffering *and* the absence of any particular accommodations during transport.

Justice Létourneau did not formulate a legal test to determine where "undue suffering" had occurred or seek to redefine "undue." Rather, new guidance was offered to apply the existing, vague definition first offered in *Porcherie des Cèdres*. Justice Létourneau was guided by the assessment that the administrative monetary penalty system being applied by the Canadian

⁵⁰ Doyon, *supra* note 6.

⁵¹ Michel Doyon *v Canada* (CFIA) (26 August 2008), RTA 60323 at 4, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7550/index.do?q=Doyon>.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid* at 5.

⁵⁵ Doyon, *supra* note 6 at para 47.

⁵⁶ *Ibid* at para 46.

⁵⁷ *Ibid* at para 36.

Food Inspection Agency was “draconian.”⁵⁸ The system, which operates on the basis of absolute liability, was viewed as “highly punitive” in nature:⁵⁹ “[t]he 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.”⁶⁰ Notably, due diligence was not an acceptable defence in this context.⁶¹

Given their skepticism of such a system, Justice Létourneau concluded that “we must guard against a liberal interpretation”⁶² of what constitutes a violation. Indeed, the Court urged the CART, going forward, to “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.”⁶³ The Court wanted to correct the view that “if suffering at the time of loading is proven, the result of transportation is necessarily greater and hence undue suffering. Such a conclusion is neither automatic nor inevitable. The prosecutor must prove the causal link between the undue suffering and transportation.”⁶⁴ On the facts of the case before it, the Court found that there had not been sufficient evidence for the Tribunal “to establish the necessary causal link between transportation and the suffering it deemed undue.”⁶⁵ It is worth recalling that the animal in question had been euthanized after its transit, on the basis of its obvious suffering. Yet the Court was not satisfied that the Canadian Food Inspection Agency had led sufficient evidence to connect this suffering with transport. Going forward, the CART would cast a far more exacting eye on evidence with respect to causality.

On a conceptual level, the main import of the *Doyon* decision is that it highlights the distinction between “suffering,” which is acceptable, and

58 *Ibid* at para 21. Were we to consider this monetary penalty system from the perspective of a suffering hog or chicken or cow, born and bred for industrial slaughter, the word “draconian” might also seem appropriate, but for entirely different reasons. Federal court judges cannot be expected to take such ironies into account, but for the reader they are inescapable.

59 *Doyon*, *supra* note 6, at para 21.

60 *Ibid* at para 27.

61 *Ibid* at para 24.

62 *Ibid* at para 49.

63 *Ibid* at para 28.

64 *Ibid* at para 53. In the case at hand, one issue that gave the FCA pause was that the journey took longer than expected, through no fault of the transporter.

65 *Doyon*, *supra* note 6 at para 61.

“undue suffering,” which is not. Mere suffering is within the bounds of the reasonable, but causing undue suffering attracts legal liability.⁶⁶

Beyond the guidance provided by these three FCA decisions, the CART was largely left to its own devices.⁶⁷ At this point, it makes sense to plunge into the details of the Tribunal’s far more numerous decisions. Three questions in particular will be explored: how does the Tribunal identify undue suffering? What does the Tribunal qualify as undue suffering? And what core insights do CART decisions about undue suffering reveal?

IV. IDENTIFYING UNDUE SUFFERING

Had the utilitarian Jeremy Bentham been in charge of enforcing the *Health of Animal Regulations*, perhaps some quantitative scheme that purported to measure pain and thereby identify suffering might have been invented. As it happened, members of the CART had no such utilitarian method at their disposal. In deciding whether a given situation involved undue suffering, many Tribunal decisions noted, “[t]his is clearly a subjective determination.”⁶⁸

As we saw above, the FCA sought, in three decisions (two in 2005 and one in 2009), to provide some guidance about what “undue suffering” meant. Following *Porcherie des Cèdres* and *Samson*, all the Tribunal needed to identify undue suffering during transport was to assess whether a given animal was suffering prior to loading. This begged the question of what constituted suffering, of course, but otherwise the Tribunal had a rule that was relatively straightforward to apply. After *Doyon* effectively scrambled this rule by re-emphasizing the necessity of distinguishing between “suffering” and “undue suffering,” however, the Tribunal had almost no fixed principles to ground their decision-making. The most practical advice the FCA offered in *Doyon* was the identification of a list of factors associated with “undue suffering” during transport: “suffocating, unsuitable, gruelling and intolerable transport conditions caused by, for example, cramped space, overcrowding, temperature, the length of the journey or a combination of such factors.”⁶⁹

66 *Ibid* at paras 33–35. In more mundane terms, the *Doyon* decision led to an explosion in the length of CART decisions. Prior to *Doyon*, CART decisions rarely exceeded five pages. Now they regularly exceed one hundred paragraphs.

67 There were other appeals of CART decisions that reached the FCA, but none that deal as squarely with the concept of “undue suffering.”

68 *Richard Samson v Canada* (CFIA) (29 September 2004), RTA 60140 at 4, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7496/index.do>.

69 *Doyon*, *supra* note 6 at para 34.

As of 2005, in *Porcherie des Cèdres* and beyond, the FCA maintained that “undue” could be interpreted to mean “undeserved,” “unwarranted,” “unjustified,” “unmerited,” and “unreasonable.”⁷⁰ Unsurprisingly, such vague terms did not provide particularly useful guidance for the CART in trying to rule on particular facts. On more than a few occasions, the Tribunal noted: “such categorizations would appear to involve difficulties in application, being associated with varying degrees of subjective review.”⁷¹ In the absence of clear guidance, the Tribunal made use of three principal methods to determine whether undue suffering had occurred on a given set of facts: industry guidelines, observable signs of pain, and expert opinion.

First, the Tribunal refers to various non-binding codes of conduct, guidelines, and conventions that existed at the time of the incident in question.⁷² As in tort law analyses that seek to determine a standard of care, the CART sought some kind of objectivity in its analysis by reference to existing standards. Industry groups and government regulators continually produce and update norms to assist actors in going about their everyday business. For example, in the case of *F Ménard Inc v Canada (CFIA)*, the CART referred to industry guidelines to determine whether there was likely to have been excessive crowding of hogs that caused undue suffering.⁷³ Twelve hogs had suffocated from heat stress during transport. The load density exceeded recommended limits for hot and humid conditions such as those obtained on this particular day. The Tribunal pointed out that guidelines “were not, in themselves, determinative of whether a violation has been committed. There could very well be circumstances under which recommended limits are met but a violation is committed,⁷⁴ or in the alternative, where the recommendations are not met and there is no violation.”⁷⁵ Such reasoning is typical of the common law analysis of negligence, and it recurs in a great number of CART cases. The point

70 *Porcherie des Cèdres*, *supra* note 6 at para 26.

71 *E Grof Livestock Ltd v Canada (Canadian Food Inspection Agency)*, 2014 CART 11 [E Grof].

72 See e.g. *Bates v Canada (Canadian Food Inspection Agency)*, 2017 CART 18 at para 18 [Bates] (the Tribunal refers to the Humane Handling Guidelines for Horses, prepared by Alberta Farm Animal Care and the Alberta Equestrian Federation).

73 (26 August 2004), RTA 60126 at 3, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7440/index.do> [Ménard] (the Tribunal considered the *Codes of Recommended Practices for the Care and Handling of Farm Animals*, prepared by the National Farm Animal Care Council (NFACC)). See also Sankoff, *supra* note 3 for a discussion of the problematic nature of NFACC guidelines.

74 Sankoff, *ibid* at 317 (by contrast, per provincial animal welfare legislation, respect for animal codes produced by the NFACC constitutes a defense against liability).

75 *Ménard*, *supra* note 73 at 4.

is to make subjective judgments more objective by referencing external standards that provide a context within which a given actor is scrutinized.

In *Bates v Canada* (*Canadian Food Inspection Agency*), the Tribunal noted that guidelines about what constituted "acceptable conduct" would be considered "influential," but "in no way determinative as to whether the absolute liability violation under consideration has been committed."⁷⁶ The Tribunal remained alive to the possibility that common usages and customs could very well be mistaken.⁷⁷ However, in cases where, for example, "no industry standards would have considered the loading density to be acceptable," such baselines provided a particularly compelling reference point for a finding of liability.⁷⁸

Beyond industry codes of conduct, the Tribunal sought observable signs that animals were suffering or had suffered.⁷⁹ Animals cannot talk (or, at least, speak our language), but there are certainly many ways that animals can directly communicate their pain. For example, in the case of *Ferme Horégam inc v Canada* (CFIA), a "distressed pig" was said to have "evidenced suffering" on inspection: "[i]t could not walk or place weight on the injured leg, and appeared lethargic, maintained a rounded back position and did not move away from humans approaching it, as would normally be the case."⁸⁰ Furthermore, the animal "groaned throughout" the inspection. Such telltale "signs of suffering," as the Tribunal put it in the case of *Paré v Canada* (CFIA), helped provide an evidentiary basis on which to identify undue suffering.⁸¹ Other signs, to pick merely a few, included:

76 *Bates*, *supra* note 72 at para 18.

77 See *Transport MJ Marcoux Inc v Canada* (CFIA) (8 November 2005), RTA 60201, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7560/index.do> [*Marcoux*] (the Tribunal noted: "the Tribunal does not agree with the Applicant's submission that the determination as to whether an animal may be transported without undue suffering should be based upon usage or custom in the industry" at 5).

78 See *Transport Eugène Nadeau inc v Canada* (*Canadian Food Inspection Agency*), 2017 CART 16 at para 38.

79 See *Parent v Canada* (CFIA) (14 November 2005), RTA 60199, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7554/index.do> [*Parent*] ("[t]he Tribunal considers the state of undue suffering, as defined in the *Regulations*, to require some manifestation of comportment by the animal which forms a basis that the animal is in distress and that this distress meet a certain threshold to make it undue" at 8).

80 (5 August 2005), RTA 60170 at 4, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7455/index.do>.

81 (15 August 2005), RTA 60174 at 3, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7471/index.do?q=RTA+60174>.

laboured breathing,⁸² visible wounds, and inability to move. Evidence about the state of animals at loading, during transport, and at unloading was seen to be particularly valuable, as was information gleaned from ante- and post-mortem exams.⁸³ The more that time passed after an animal disembarked and before it was medically examined, the less probative that information would be with respect to suffering during transit.

Finally, the CART relied to a considerable degree on expert opinion to determine when animals were suffering unduly, notably the opinions of veterinarians and other highly experienced observers. As the Tribunal noted in *Transport MJ Marcoux Inc v Canada (CFIA)*, “[t]he matter of undue suffering is to be determined based primarily upon common sense experiences of what would constitute suffering in an animal in relation to clinical observations of the animal’s infirmities and its related manifestation of distress as described by professional veterinarians and other persons experienced in the field of animal agri-food production.”⁸⁴ When the opinion of an expert contradicted the judgment of an experienced farmer, as occurred in the case of *Trépanier v Canada (CFIA)*, the Tribunal tended to side with the expert.⁸⁵ (Perhaps for this reason, the spectacle of dueling experts has become more common.)

Sometimes expert opinions prevailed even when a reasonable and experienced farmer would *not* have noticed that an animal had a health issue. In *Réseau Encans Québec Inc v Canada (Canadian Food Inspection Agency)*, experienced farmers missed what a true medical expert would have caught. The Tribunal noted:

[a]lthough some technical expertise is necessary to distinguish between a thin and normal dairy cow which is fit enough to travel to an auction and then to a slaughterhouse from a cow that is too thin and which, when transported, will unduly suffer, the facts in this case show that the two cows were overly thin and would have suffered unduly during their transportation.⁸⁶

82. See *Transport Eugène Nadeau Inc v Canada (CFIA)*, (15 August 2005) RTA 60173 at 4, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7467/index.do?q=RTA+60173>. See also *Michaud v Canada (CFIA)* (19 August 2005), RTA 60181, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7500/index.do?q=RTA+60181> (“the animal laid down on its side and began breathing very rapidly, an indication of intense suffering” at 2).

83. See *473629 Ontario Inc v Canada (CFIA)* (5 December 2006), RTA 60258 at 3, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7478/index.do?q=RTA+60258>.

84. *Marcoux*, *supra* note 77 at 5.

85. (16 August 2005), RTA 60178, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7487/index.do>.

86. *Réseau*, *supra* note 38 at para 59.

However, the Tribunal did not defer to experts in every case. In *Woodrow v Canada (CFIA)*, the Tribunal made allowances for the fact that a non-medical expert could miss certain signs of suffering. In this case, a doctor made an assessment that a cow appeared to be suffering pain.⁸⁷ However, the doctor conceded "that, to a lay person, there would have been nothing to show the animal was in pain," given that "there were no obvious external signs of pain."⁸⁸ For their part, the farmer said that they had seen nothing wrong with the cow: "[h]e said he could not, nor does he know of anybody, who can tell what is inside a cow."⁸⁹ Given that the Tribunal found there was no evidence of "outward signs" of animal suffering, it concluded that the applicants were not liable for transporting the animal.⁹⁰

Twenty years of cases allow us to paint a basic portrait of what the Tribunal determined to constitute undue suffering, or actions that were likely to cause undue suffering. First, though, a disclaimer: the Tribunal makes ample use of terms like "suffering," "pain," and "discomfort" without defining them. Rather, in reaching its conclusions about whether a given violation had occurred, the Tribunal sought out indicators or proxies that it associated with undue suffering.⁹¹

If an animal could not walk before being transported, that was a sure sign that it could not be transported without undue suffering. (Exceptionally, this was a rule written clearly and explicitly into the *Health of Animals Regulations* themselves, as noted above.) However, if the animal could not walk after being transported, that was not necessarily a sign that it had unduly suffered.⁹² Conversely, "[t]he fact that an animal can walk does not necessarily make it fit for transport."⁹³ And if the animal could walk after transportation, that did not preclude a finding of undue suffering.⁹⁴

87 See *Woodrow v Canada (CFIA)* (24 July 2008), RTA 60312 at 12, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7517/index.do?q=undue>.

88 *Ibid* at 7.

89 *Ibid* at 11.

90 *Ibid* at 13.

91 See *Com-Anix Inc v Canada (CFIA)* (5 August 2005), RTA 60166, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7439/index.do?q=Com-Anix+Inc.+v+Canada+%28CFIA> (in case anyone is wondering, the fact that an animal remains edible after transport is not an indication that it did not suffer unduly: "the state of the flesh and the suffering of the animal during transport are not connected" at 3).

92 See *Roelands v Canada (Canadian Food Inspection Agency)*, 2013 CART 8 at para 38.

93 See 9048-7539 *Quebec Inc v Canada (CFIA)* (11 September 2008), RTA 60321 at 3, online: CART <decisions.cart-crac.gc.ca/cart-crac/cart-crac/en/item/7544/index.do>.

94 *Parent*, *supra* note 79. See also *Guy D'Anjou Inc v Canada (Canadian Food Inspection Agency)*, 2015 CART 2 [*Guy D'Anjou*] ([t]he fact that the cows were standing when they

(At times, Tribunal decisions can read like logic problems.) In summary, whether an animal is ambulatory, before and after transportation, is often relevant in the analysis of the Tribunal, but it is only determinative in the case of non-ambulatory animals prior to transit.

Generally, animals with discernible and severe injuries prior to transportation were held to have unduly suffered during transportation. This remained the case after *Doyon*, so long as there was sufficient evidence collected at unloading (or shortly thereafter) that the animal's suffering had a causal connection to transportation. For example, transporting an animal in a state of "chronic wasting" was determined to have caused undue suffering.⁹⁵ With respect to the violation related to unloading (subsection 139(2)), dropping crates of chickens from shoulder or chest height during unloading was found to be likely to cause undue suffering.⁹⁶

In many cases, death was associated with undue suffering. As the Tribunal put it: "[f]reezing to death is more than 'ordinary' suffering."⁹⁷ When animals died in transit due to loading/unloading, this was often grounds for an inference of undue suffering. For example, in *Brian's Poultry Services Ltd v Canada (CFIA)*, the Tribunal wrote, "[t]he fact...that at the time of slaughter, a large number of dead birds were found on the loads means that the birds must have been caused injury or undue suffering at some point."⁹⁸ (Which is not to say that every death was grounds for liability, as we shall see further below.)

Examples of what the Tribunal determined *not* to involve undue suffering are also instructive. Transporting "a blind, or visually-impaired horse," all other things equal, was not found to be a violation.⁹⁹ On its own, the presence of a hernia was not determinative: "[t]here is no question that pigs with hernias are and will continue to be loaded and transported

arrived for unloading is not determinative of whether the cows could have been transported without undue suffering. Conversely, if cows cannot get up, it cannot be concluded, on the basis of that fact alone, and even with the Agency's policy taken into consideration, that the animals were subjected to undue suffering" at para 33).

95 See *Réseau*, *supra* note 38 at para 57.

96 See *Maple Lodge Farms v Canada (CFIA)* (4 March 2009), RTA 60347, online: CART <decisions.cart-crak.gc.ca/cart-crak/cart-crak/en/item/7634/index.do> (a number of birds were found dead and injured following the dropping).

97 See *Poirier-Bérard Ltd v Canada (Canadian Food Inspection Agency)*, 2012 CART 23 at para 53 [*Poirier-Bérard*].

98 (23 April 2008), RTA 60307 at 7, online: CART <decisions.cart-crak.gc.ca/cart-crak/cart-crak/en/item/7501/index.do>.

99 See *Hennen v Canada (Canadian Food Inspection Agency)*, 2011 CART 3 at para 38.

without causing the pigs undue suffering.”¹⁰⁰ Similarly, emaciation itself was not sufficient for a finding of undue suffering: “the Tribunal is of the view that a state of emaciation or other infirmity unless accompanied by some manifestation of undue distress or suffering in the animal, as described by observations or other clinical information, is not in itself sufficient to lead to a conclusion that an animal suffered unduly.”¹⁰¹ (The Tribunal was not consistent on the significance of emaciation, as in another case the transport of an emaciated cow was said to cause undue suffering).¹⁰² The fact that calves were bawling after a 10–12 hour overnight trip was determined not to constitute undue suffering: “[t]his would appear not to be an abnormal situation following a lengthy trip and having been recently removed from their mothers.”¹⁰³ Here, the evident association of *undue* with *abnormal* does not work in the cows’ favour. Together, these examples suggest that the threshold for undue suffering was sufficiently high to insulate from liability a range of practices plainly at odds with animal welfare.

V. THREE IMPLICATIONS

A review of 20 years of CART jurisprudence on animal suffering is more broadly revealing in at least three more ways.

First, adjacent to the Tribunal’s analyses of what constitutes “undue” suffering, there are unsettling revelations about what industry and government actors considered to be *normal* (and therefore tolerable) suffering.¹⁰⁴ For example, the case of *Maple Lodge Farms Ltd v Canada (CFIA)* concerned 35,436 chickens that were transported from a farm to a slaughterhouse.¹⁰⁵ Of these, an astounding 15,706 were dead on arrival. Ultimately, the accused were found liable for having loaded the birds in such a way as to likely cause undue suffering, to borrow the Tribunal’s jargon. For our purposes,

100 *Transport JC Manningham Inc v Canada (CFIA)* (2 May 2006), RTA 60241 at 6, online: CART <decisions.cart-crak.gc.ca/cart-crak/cart-crak/en/item/7410/index.do>.

101 *Parent*, *supra* note 79 at 8.

102 *Guy D’Anjou*, *supra* note 94.

103 *Curtmar Farms Limited v Canada (CFIA)* (11 July 2006), RTA 60246 at 5, online: CART <decisions.cart-crak.gc.ca/cart-crak/cart-crak/en/item/7430/index.do>.

104 See e.g. *Longhorn Farms*, *supra* note 29 (“the Tribunal notes: “the evidence of the Applicant that approximately one quarter of the cows that go to the stock yard where the bull was slaughtered, were lame, had open wounds, infections, foot rot, or are sick, is also not relevant” at 3).

105 (12 February 2002), RTA 60295, online: CART <decisions.cart-crak.gc.ca/cart-crak/cart-crak/en/item/7453/index.do?q=undue>.

however, what is most significant in this case is the evidence submitted by a veterinarian. They observed that 18 to 20% of the chickens had fractured wings,¹⁰⁶ as opposed to “the usual wing fracture rate for such chickens,” which is “3 to 4%.”¹⁰⁷ The defendant, for its part, “gave the usual fracture rate as being approximately 10 to 12%.”¹⁰⁸ The fact that the rate in this case was “considerably higher than the norm,”¹⁰⁹ whichever norm was recognized, assisted the Tribunal in reaching its ultimate conclusion. However, no one pauses to note that hundreds or thousands of chickens fracturing their wings as a matter of course is appalling.

The case of 473629 *Ontario Inc v Canada* (*Canadian Food Inspection Agency*), which also involved chickens perishing *en route* to the slaughterhouse, is even more unsettling. In the course of the Tribunal’s analysis, it emerged that the Canadian Food Inspection Agency had a policy whereby it automatically initiated an investigation only if more than four per cent of chickens die in transit. The number of four per cent was the “tipping point where Agency personnel would investigate the circumstances of death in any load where this number was exceeded.”¹¹⁰ The Agency could always opt to use its discretion to investigate if that threshold was not reached. Yet it is strongly implied that vast numbers of chickens regularly die in circumstances that are deemed entirely normal and therefore unworthy of scrutiny.¹¹¹

To its credit, the Tribunal does not endorse such baselines. To the contrary, it affirms in several similar cases that “there is no tolerance threshold to be recognized in relation to absolute liability violations associated with animal transport,”¹¹² and that “the mortality rate is not relevant” in determining liability.¹¹³ Nevertheless, it is abundantly clear that such a tolerance

¹⁰⁶ *Ibid* at 3.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid*.

¹¹⁰ 473629 *Ontario Inc v Canada* (*Canadian Food Inspection Agency*), 2014 CART 29 at para 23.

¹¹¹ See Michael Schulman, “Canada’s livestock transportation rules ‘worst in the Western world’: advocate” (16 March 2016), online: *CTV News* <ctvnews.ca/canada/canada-s-livestock-transportation-rules-worst-in-the-western-world-advocate-1.2820563> (in 2016, the Canadian Food Inspection Agency said that every year between two and three million animals were dying during transport); “Curb the Cruelty Canada’s Farm Animal Transport System in Need of Repair” (2010) at 11, online (pdf): *World Animal Protection* <www.worldanimalprotection.ca/sites/default/files/media/ca_-_en_files/curbthecruelty report.pdf>.

¹¹² *E Grof*, *supra* note 71 at para 69.

¹¹³ *Poirier-Bérard*, *supra* note 97 at para 61.

threshold *did* affect the actions of the agency responsible for imposing fines in the first place. It is well and good for the CART to be alive to the peril of normalizing a four per cent mortality rate, but this could only have a limited practical impact if the agency in charge of enforcing the regulations did that very thing. To its credit once more, the Tribunal insisted that “[i]f a single rooster, among all the others, is found frozen to death,” that single death could result in liability under the regulations.¹¹⁴ *One unduly suffering chicken is too many*, the Tribunal is saying—which is a noble sentiment that might be celebrated, were it not so clearly out of step with the ambient suffering that the people enforcing the rules take for granted.

Second, we see the CART struggling with the distinction between suffering and undue suffering. To be sure, the Tribunal duly affirms this distinction, as it must, given the clear guidance by the FCA in *Doyon*. “The Tribunal wishes to emphasize that evidence of suffering in an animal differs from a conclusion about suffering,”¹¹⁵ the Tribunal notes in a typical passage in *Guy D’Anjou Inc v Canada* (*Canadian Food Inspection Agency*). In another case, *Maple Lodge Farms Inc v Canada* (CFIA), the Tribunal writes, “[i]t is also legally permissible to transport spent hens in circumstances where their suffering during transport is likely or in fact occurs.”¹¹⁶ Such suffering is simply accepted.

And yet the Tribunal makes a habit of avoiding findings that, on the facts before it, mere suffering has occurred, as opposed to undue suffering. Rather, the Tribunal sticks with the more legalistic formulation that undue suffering has not been established. After all, the basis of liability is undue suffering, so it is understandable that this is its focus. In cases where the animals in question clearly suffered to some degree, the usual reason an accused avoids liability is for a want of evidence that the impugned conduct (related to unloading, loading or transport) caused the suffering. Knowing, perhaps, that the line between suffering and undue suffering is indefensibly blurry, the Tribunal relies more on such questions of causation as the basis for determining liability. This strategy conceivably reflects the Tribunal’s discomfort with having to implicitly endorse conduct that had clearly resulted in animal suffering.

In one case, *Maple Lodge Farms Inc v Canada* (CFIA), the Tribunal reflected openly on its unease: “[h]ow an animal could ever ‘deserve,’

¹¹⁴ *Ibid.*

¹¹⁵ *Guy D’Anjou*, *supra* note 94 at para 23.

¹¹⁶ 2016 CART 8 [*Maple Lodge Farms*] at para 61.

‘warrant,’ or ‘merit’ suffering is very difficult to envisage. It is therefore to be hoped that the Federal Court of Appeal will provide clarification.”¹¹⁷

This was not the only time the Tribunal plainly struggled to apply the standard of undue suffering. In *Guy D’Anjou Inc v Canada* (*Canadian Food Inspection Agency*), the CART notes, “[e]ven though defining those words remains the Tribunal’s responsibility, as circumstances require, the Tribunal welcomes more direction from the Federal Court of Appeal, with respect to the definitions, and in general.”¹¹⁸ In a subsequent case, the Tribunal struck an almost pitiful note: “[t]he Tribunal welcomes further judicial guidance in this area, ideally without any significant degree of judicial deference.”¹¹⁹ Such words are all the more remarkable considering the deferential standard of review that Canadian administrative law generally accords administrative tribunals.¹²⁰

The Tribunal’s obvious interpretive difficulties point to a third issue, which is whether a legal standard of “undue suffering” is actually effective at deterring behavior that causes animal suffering. Broadly speaking, there are two types of regulations that seek to improve animal welfare. First, there are *outcome-based requirements*, which determine compliance based on whether an outcome adheres or not with a defined, desired result. These requirements focus on ends, not means. By contrast, *prescriptive requirements* describe in detail the acceptable means to be employed, means that are generally associated with better outcomes. Whether or not these means produce a given end in a situation, liability reflects whether the appropriate means were used. In both instances, with outcome-based and prescriptive requirements, the goal is to improve results.

In general, when it comes to the *Health of Animals Regulations*, regulated parties tend to support outcome-based requirements because they afford maximum flexibility to produce a given result. By contrast, non-regulated parties tend to advocate for more prescriptive requirements as the best way to reduce animal suffering, in part because these requirements can provide clear and sound guidance to avoid bad outcomes from occurring in the first place.¹²¹

117 2016 CART 14 at para 57.

118 *Guy D’Anjou*, *supra* note 94 at para 25.

119 *Maple Lodge Farms*, *supra* note 116 at para 39.

120 See e.g. Mary Liston, “Administering the Canadian Rule of Law” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto, Canada: Emond Montgomery Publications, 2018) 139 at 161; Audrey Macklin, “Standard of Review: Back to the Future?” in Colleen Flood & Lorne Sossin, *ibid.*, 381 at 382.

121 *Impact Analysis*, *supra* note 8 at 316.

The *Health of Animals Regulations*, as they read between 2000 and 2019, contained elements of both kinds of requirements. For example, there were specific prescriptive requirements regarding how long animals could be transported without food and water.¹²² However, an outcome defined in terms of a vague standard like undue suffering invites skepticism about its ability to promote animal welfare. Ironically, the various industry codes of practice, which do not have the force of law yet, have the virtue of specificity and provide far clearer guides of compliance.

Of course, legal standards are often vague, for better and worse.¹²³ A main upside of vague standards is that their interpretation and application can change over time, in harmony with prevailing assumptions and values, as with constitutional texts outlining core rights.¹²⁴ One does not decry the vagueness of the *Charter of Rights and Freedoms*—leaving ample room to manoeuvre is part of the point.¹²⁵ Another upside of vagueness may be that it can garner consensus among various actors who may not agree on anything more specific. As Ward Farnsworth notes, avoiding a clear rule “can be a helpful way of getting through the business of life, and of government, despite deep political conflict.”¹²⁶

A main downside of vague standards is greater uncertainty for parties seeking to follow or apply those standards. Regulations anchored by a nebulous outcome are bound to produce challenges of enforcement and compliance in a regulatory context. One doubts, for example, whether violations for “undue speeding” on the highway would be particularly effective at safely guiding the behaviour of drivers. Standards that invoke reasonableness (in one way or another) seem more likely to be enforced when conduct is clearly, and even dramatically, outside the bounds of reasonableness—thereby leaving a wide margin of error for regulated parties. In the context of farmed animals, a vague standard seems better suited to the interests of farmers than animals.

Vagueness increases the discretion of the person who determines whether a standard has been violated. Back when causing “undue suffering” to animals resulted in criminal liability, prior to 2000, perhaps it made

122 HAR 2006, *supra* note 32, s 148.

123 See generally Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (Chicago: University of Chicago Press, 2007) at 163–71.

124 The flipside of this is that specific rules often need more frequent updating, which can be costly and time-consuming.

125 See generally *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819) (as Justice Marshall noted: the nature of a constitution “requires that only its great outlines should be marked” at 407).

126 Farnsworth, *supra* note 123 at 167.

more sense to have a vague standard. With such a severe sanction hanging in the balance, according greater discretion in a judgment of liability facilitated a broader and perhaps fairer consideration of the particular facts of the case. Yet, maintaining the vague standard after the criminal sanction was replaced with monetary fines seems like an error.

VI. LOOKING FORWARD

In 2020, revisions to the *Health of Animals Regulations* removed the word “undue,” the source of so much interpretive work and confusion over the years.¹²⁷ For the most part, no alternative qualifier is used to replace it.¹²⁸ For example, the new section 146, which replaces the former paragraph 143(1)(d), reads as follows:

146 No person shall load, confine or transport an animal in or unload an animal from a conveyance or container, or cause one to be so loaded, confined, transported or unloaded, if the animal is likely to suffer, sustain an injury or die due to inadequate ventilation or by being exposed to meteorological or environmental conditions.¹²⁹

The word “undue” has disappeared as a qualifier in two locations, before “suffering” and with respect to weather “exposure.” According to the “Regulatory Impact Analysis Statement” that accompanied the regulatory amendments, “routine handling of fit animals, when properly conducted, should not lead to any degree of suffering.”¹³⁰ This is a bold position, which the next sentence of the report somewhat qualifies: “[i]t is acknowledged, however, that a certain amount of transport-related adaptive stress can occur.”¹³¹

127 The one exception is a provision about the importation of animals: “A regulated animal may be imported without a permit from an area that is an equivalent risk area for an animal of that species if it is accompanied by a certificate of an official veterinarian from that area that

(a) clearly identifies the animal and its area of origin; and
(b) verifies that a veterinarian inspected the animal within five days before it was exported to Canada and found it to be clinically healthy and fit to travel without undue suffering” (HAR, *supra* note 5, s 12(2)) [emphasis added].

128 See HAR 2006, *supra* note 32, s 138.2 (1) (in several provisions, the phrase “unnecessary suffering” appears, mirroring *Criminal Code* provisions, but these paragraphs in the regulations concern contingency situations where unforeseen events arise, or when an animal unexpectedly becomes compromised during a voyage).

129 HAR, *supra* note 5.

130 Impact Analysis, *supra* note 8 at 320.

131 *Ibid.*

Despite this distinction between suffering and stress, the removal of the word “undue” seems to represent an important shift in the standard to determine legal liability for a violation.

In the years leading up to the recent changes, the CART began to write about the need to maintain a balanced approach to its interpretations of particular provisions. In *Serbo Transport Inc v Canada* (CFIA), the Tribunal notes:

While Parliament has enacted a specific provision to protect animal health for animals during transport from undue suffering, the provision must be interpreted so as to maintain a balance between the regular commercial activities of actors in agricultural and agri-food production systems and the protection of the animals in those systems. The deliberate intention of Parliament to use the phrase “undue suffering” must therefore be read in the context of this balancing in mind, given the scheme and object of the Act and [Health of Animals] Regulations.¹³²

Now that the word “undue” is gone, what is to become of this balancing act? It is conceivable that the balancing will now occur internally within the term “suffering”—which is to say that rather a lot will hinge on how suffering is defined and interpreted.

It is unclear how the Tribunal will address current practices that result in large numbers of animals regularly suffering and dying on their way to slaughter. As the Tribunal notes in *Bates v Canada* (*Canadian Food Inspection Agency*): “[i]t is a business reality that animals may be or in fact are in a state of discomfort, distress or suffering during transport.”¹³³ Or, as the Tribunal puts the matter even more starkly in *Maple Lodge Farms Inc v Canada*:

It is also a fact...that there will always be spent hens that will die during transport. It is for this reason that the violation references “undue” suffering and “undue” exposure to the weather. The majority of these types of transport may continue, without any violation having been committed, in the absence of specific legislative prohibition to the contrary or enhanced legislative requirements as to transport comfort. A legislature is at liberty to require that spent hens be transported in heated trailers, when in sub-zero temperatures, as an example. No legislature has done so.¹³⁴

¹³² 2016 CART 19 at para 27.

¹³³ *Bates*, *supra* note 72 at para 24.

¹³⁴ *Maple Lodge Farms*, *supra* note 116 at para 62.

What will happen now, without the help of “undue” to help justify all these deaths, and in the absence of more prescriptive requirements about transport conditions? If the Tribunal maintains its view that freezing to death amounts to suffering, it will be interesting to see whether enforcement reflects that fact. It seems exceedingly likely that the government and industry players will seek some way to normalize an acceptable rate of death, with some implied requirement to minimize suffering.¹³⁵ To truly end suffering and death from transportation would require a dramatic shift in the methods and technologies currently in use, along with much higher costs to industry (and consumers). Presumably industry players will insist once more on interpretations that seek a “balance” between commercial interests and animal suffering—a balance that historically has tilted heavily away from animal well-being.

One reason to be optimistic about the new regulatory changes is that they offer far more details about which animals are considered “unfit” for transportation, as well as how animals should be loaded and unloaded. For example, the regulations now specify that “[n]o person shall, when an animal is in a container...drop, kick or throw the container.” Previously, the Tribunal had to interpret the more general principle related to undue suffering to reach that same conclusion. By contrast, the concept of an “unfit” animal is defined in detail, which leaves less uncertainty about what kind of animal can be appropriately transported. With few exceptions, animals that exhibit the following conditions can no longer be permissibly transported: “laboured breathing,” “a severe open wound or a severe laceration,” “extremely thin,” or “signs of dehydration.”¹³⁶ (Given that “extremely thin” animals are now deemed unfit for transport, it seems that *Doyon*, which endorsed the transport of an emaciated cow, would be decided differently today.) Such details, spelled out in the regulations themselves and therefore with binding effect, provide much clearer requirements for regulated parties to better understand what is expected of them. This represents a decisive shift toward regulations that are sufficiently precise to actually guide practice.

¹³⁵ See Black, *supra* note 7 (as Vaughan Black has noted, in the agricultural context, we treat animal suffering “as a more or less inevitable consequence of an industrial system, a mere negative externality to be discouraged by minor, non-criminal sanctions” at 79).

¹³⁶ HAR, *supra* note 5 (the definitions of unfitness are read in conjunction with, for example, s 139(1), which specifies that “no person shall load, confine or transport an animal that is unfit, or cause one to be loaded, confined or transported, in a conveyance or container,” s 136(1)).

CONCLUSION

From an animal welfare point of view, 20 years of CART cases between 2000 and 2019 reveal little discernible progress in the way the standard of "undue suffering" was interpreted and enforced. If anything, the 2009 *Doyon* decision represented a regression that broadened the scope for legally sanctioned animal suffering. In the wake of 2020 reforms to the *Health of Animals Regulations*, it remains to be seen how new language will be enforced and interpreted. At least one thing is certain: with the deletion of the word "undue," a powerful tool to legitimize animal suffering is no more.