

Court of Appeal File No.
Superior Court File No. 05-CV0287428CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FLYING E RANCHE LTD.

Plaintiff
(Appellant)

and

THE ATTORNEY GENERAL OF CANADA on behalf of HER MAJESTY
THE QUEEN IN RIGHT OF CANADA as represented by THE MINISTER
OF AGRICULTURE

Defendant
(Respondent)

NOTICE OF APPEAL

APPELLANT APPEALS to the Court of Appeal from the Order of the Honourable Mr. Justice Paul B. Schabas (the “**Trial Judge**”) dated 28 January 2022, made at Toronto, Ontario (the “**Order**”), dismissing Appellant’s class proceeding against Respondent, the Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada as represented by the Minister of Agriculture (“**Canada**”).

APPELLANT ASKS that this Honourable Court set aside the Order and grant an order as follows:

1. that the responses to the first and second certified Common Issues are:

1. Does section 9 of the *Crown Liability and Proceedings Act* bar the class member's claim against the government of Canada?

Answer: No.

2. Were the defendants negligent and if so, when and how?

Answer: Yes, by failing, in 1990, to prevent 182 UK imported cattle, identified by Canada as potentially infected, from entering the Canadian cattle feed chain and infecting the Canadian cattle herd. And in 1994, by ignoring the threat posed by 68 of those UK imported cattle, whose remains had been previously rendered, when it became known that there was a statistical certainty that one or more of the animals rendered had BSE.

2. that Appellant's action is granted and \$1.163 billion is awarded to the Class;
3. that the costs of this appeal are awarded to Appellant; and
4. such further or other relief as this Honourable Court permits.

THE GROUNDS OF APPEAL are:

A. Trial Judge's Factual Findings

5. The Trial Judge found that in 1986, Bovine Spongiform Encephalopathy ("**BSE**"), known colloquially as "mad cow disease," emerged as a new disease in cattle in the United Kingdom ("**UK**"). The disease became an epidemic in the UK and spread to other countries.
6. The Trial Judge found that on 9 February 1990, Canada determined that it would no longer issue import permits for cattle from the UK and Ireland. Canada further identified approximately 182 cattle previously imported from the UK since 1982 (the "**UK Imports**") as being potentially infected with BSE. Canada ordered monitoring of

the UK Imports for eight years following entry into Canada (the “**Monitoring Program**”).

7. The Trial Judge found that by 1990 Canada knew:

- (a) no diagnostic test existed to identify BSE in live cattle. BSE could only be diagnosed in post-mortem examinations;
- (b) BSE had a long incubation period, during which cattle existed in a subclinical, or asymptomatic, state for years before showing any signs of having the disease;
- (c) the UK Imports had been exposed to contaminated feed, and were potentially subclinically infected with BSE;
- (d) BSE is spread by the recycling of subclinically infected cattle remains in cattle feed;
- (e) internationally, other countries were closing their borders to cattle imports from any country infected with BSE, and Canada expressly took steps to “protect Canada’s lucrative export markets;” and
- (f) the Canadian cattle industry would suffer serious economic impact if BSE entered the Canadian herd.

8. The Trial Judge found that “there is no question” that Canada was “aware in 1990 of the risk that some of the UK imports might be subclinically infected with BSE, and that this posed a risk to Canadian cattle through recycling.”

9. The Trial Judge found that in 1990 Canada expressly assured Canadian cattle producers that BSE would not enter Canada and would not be permitted to establish itself within Canada's domestic cattle population. The Trial Judge found that Canada intended to reassure cattle producers that Canada "had the disease in hand" and that "there was effectively no risk of BSE coming into Canada because of Agriculture Canada's policies."
10. The Trial Judge found that Canada knew in 1990 that monitoring the UK Imports through the Monitoring Program would not be effective, noting that by the time anything shows up in a monitored animal, the disease is already spread.
11. The Trial Judge found that Canadian cattle producers relied on the Department for information on BSE. The Trial Judge further found that cattle producers relied on the Department to prevent and control diseases.
12. The Trial Judge found that, in its presentations to cattle producers, Canada made no mention of the potential risk of infection from recycled cattle carcasses.
13. The Trial Judge found that damage to the Class was both reasonably foreseeable and foreseen by Canada. The potentially "disastrous" consequences were recognized by Canada in 1990, as other countries were "terrified of getting it primarily as it would shut them down." As found by the Trial Judge, Canada took steps to prevent BSE from entering the country in 1990, including the Monitoring Program, because Canada was fully aware of, and reasonably foresaw, the harm that BSE would, if it entered the Canadian herd, cause to the Canadian cattle industry and the Class.

14. The Trial Judge found that Canada knew it was necessary to pursue a conservative, precautionary approach to BSE. The precautionary principle permitted Canada to take steps even beyond those for which there was clear scientific justification.

15. The Trial Judge found that Canada took a “zero-risk approach” and exercised the “precautionary principle” in dealing with BSE. In particular:

- (a) in March 1990, Canada refused to allow 14 UK cattle at Mirabel quarantine station, a portion of the 182 UK Imports, to enter Canada because BSE was diagnosed on a UK farm from which one of the 14 cattle had originated. While none of those 14 Mirabel cattle displayed any clinical symptoms, Canada ordered incineration of all 14 cattle on the basis of mere suspicion of infection to eliminate any risk of transmission of BSE;
- (b) on 24 May 1990, Canada extended the import ban to all ruminants (i.e. sheep, goats, deer) from the UK and Ireland;
- (c) in June 1990, Canada banned importation of bovine serum from the UK;
- (d) in April 1993, Canada refused importation of a concentrated milk product from the UK as there was no “conclusive proof” the product was free of BSE;
- (e) in December 1993, after one of the UK Imports was diagnosed with BSE, Canada ordered destruction of all remaining UK Imports and the herdmates of the infected UK Import. Canada admitted that it did not consider dilution to be a sufficient defence against infectivity of the Canadian cattle herd for the remaining UK Imports; and

(f) in January 1994, Canada learned that one of the UK Imports had recently died and been sent for rendering. The rendered material became part of the 20 tonnes of meat and bone meal that had been produced, but not yet shipped. Canada ordered destruction and burial of the entire shipment because Canada suspected the by-products were contaminated by BSE or were in contact or in close proximity to other animal products or animal by-products that were or were suspected of being contaminated by BSE.

16. The Trial Judge found that by 1994, approximately 68 of the UK Imports had been slaughtered for consumption and rendering. The Trial Judge further found that protein from those 68 slaughtered UK Imports entered the animal feed chain, creating a risk of transmission of BSE to Canadian cattle.

17. The Trial Judge found that a risk assessment prepared in 1994 concluded that the statistical probability of BSE occurring in the UK Imports was 100%, or “certainty that they bore infection walking off the boat into Canada.”

18. The Trial Judge found that one or more of those slaughtered and rendered UK Imports infected the Canadian feed supply, and caused infection of the Canadian cattle herd.

19. On 20 May 2003, Canada diagnosed the first Canadian-born animal with BSE, resulting in at least 34 countries immediately closing their borders to Canadian cattle. The Trial Judge found that the Class suffered \$1.163 billion in damages as a result.

B. Trial Judge Erred

20. In light of the Trial Judge's factual findings and the record before the Trial Judge, the Trial Judge erred in law and made errors of mixed fact and law:

- (a) by failing to conclude that Canada assumed a duty of care to cattle producers, either by statute/regulation, active steps taken by Canada, interactions with cattle producers, or a combination thereof, to prevent the UK Imports from contaminating cattle feed and infecting the Canadian cattle herd thereby;
- (b) by misapprehending the evidence regarding the decision to monitor the UK Imports as being a core policy decision;
- (c) by failing to conclude that, if the decision to monitor was a core policy decision, it was irrational in light of Canada's knowledge of the science and risks of BSE, and the statutory purposes of the *Feeds Act*, R.S.C. 1985, c. F-9, and its regulations, and the *Animal Disease and Protection Act*, R.S.C. 1985, c. A-13, and its regulations;
- (d) by failing to conclude that Canada, upon discovering that 68 of the UK Imports had been rendered, had a duty to act and failed to act;
- (e) by misconstruing the standard of care applicable to Canada and by failing to find that Canada breached the standard of care; and
- (f) by finding that section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 ("**CLPA**"), bars this action.

21. Such further grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

22. The Order appealed from is final within the meaning of section 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c. C.43. The Order finally and conclusively determines both the question of Canada's liability to the Class for negligence and whether the action is barred by section 9 of the *CLPA*. Accordingly, Appellant does not require leave to appeal.

28 February 2022

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