COURT OF APPEAL FOR ONTARIO

CITATION: Flying E Ranche Ltd. v. Canada (Agriculture), 2024 ONCA 72
DATE: 20240131
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Hourigan, Miller and Nordheimer JJ.A.

BETWEEN

Flying E Ranche Ltd.

Plaintiff (Appellant)

and

The Attorney General of Canada on behalf of His Majesty the King in Right of Canada as represented by the Minister of Agriculture

Defendant (Respondent)

Duncan C. Boswell, Malcolm N. Ruby and Rachel McMillan, for the appellant

Victor J. Paolone, Adam Gilani and Matthew Sullivan, for the respondent

Heard: December 12-13, 2023

On appeal from the judgment of Justice Paul B. Schabas of the Superior Court of Justice, dated January 28, 2022, with reasons reported at 2022 ONSC 601.

Nordheimer J.A.:

[1] This appeal arises from the dismissal, after trial, of a class proceeding involving claims by the appellant as representative plaintiff for damages sustained by Canadian farmers, between 2003 and 2008, arising out of the presence in Canada of Bovine Spongiform Encephalopathy ("BSE"), often referred to as mad cow disease. The appellant claims that the respondent was negligent in failing to

ensure that BSE did not enter Canada. The damages claimed exceed $8 billion, although the trial judge ultimately assessed the damages at $1.163 billion.

[2] In dismissing the claim, the trial judge found that s. 9 of the *Crown Liability and Proceedings Act,* R.S.C, 1985, c. C-50 barred the appellant's claim. He also found that the respondent did not owe a duty of care to the members of the class and further, even if a duty of care was owed, the respondent was not negligent as claimed by the appellant. In my view, it is only necessary to deal with the first finding to dispose of the appeal.

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Background

[3] This was a lengthy trial with a number of witnesses and a large number of documents. The background to the claim can be conveniently summarized from the extensive reasons of the trial judge.

[4] In 1986, animal health experts in the United Kingdom ("U.K.") identified BSE as a novel neurological disease that was afflicting cattle in that country. The disease was invariably fatal within weeks or a few months of symptoms emerging in animals.

[5] The incidence of BSE grew quickly in the U.K. By 1988, when it was formally brought to the attention of L'Office International des Epizooties, now known as the World Animal Health Organization, over 2,000 cattle in the U.K. had been diagnosed with BSE. Although investigation of the cause of BSE was at an early

stage, it was suspected that it may have originated from the scrapie agent in sheep which had been transmitted to cattle through feedstuffs containing ruminant-derived protein that were fed to calves beginning in about 1981 or 1982. As a result, in 1988, the U.K. prohibited the inclusion of ruminant-derived protein in feed for ruminant animals such as cattle.

[6] BSE affects the central nervous system of cattle. It has a lengthy incubation period. Cattle afflicted with BSE become symptomatic, on average, at about five years of age. The number of cattle diagnosed with BSE continued to grow in the U.K., peaking in 1992 when over 37,000 cases were confirmed. Animal health experts in the U.K. and elsewhere conducted extensive research into the causes of BSE and its transmissibility. By 1990 it was suspected that the rapid increase in cases was due to the slaughtering and rendering of infected but non-symptomatic, or subclinical cattle whose protein was also included in feed supplements provided to calves prior to the implementation of the U.K. ruminant-to-ruminant feed ban in 1988.

[7] Like other countries, Canada took steps to prevent BSE from entering its cattle population. In 1989, the federal Department of Agriculture imposed restrictions on cattle being imported from the U.K., and, in 1990, Canada banned all further imports of cattle and other ruminants from the U.K. and the Republic of Ireland. BSE was made a reportable disease. Canada identified that approximately 182 cattle had been imported from the U.K. and Ireland during the 1980s, and

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placed them in a Monitoring Program. Later, in 1994, following confirmation of BSE in one of the imported cattle, Canada ordered that the imported animals still alive and present in Canada – approximately 67 – should be returned to the U.K. or be destroyed.

[8] Unlike Britain, but like the United States, Canada did not prohibit the inclusion of ruminant protein in feedstuffs for cattle until 1997, following a recommendation from the World Health Organization made in 1996. Of the approximately 182 cattle imported into Canada between 1982 and 1990, it was determined in 1994 that approximately 68 had been slaughtered for consumption and rendering. Aside from the 67 still alive in Canada which were ordered destroyed, the balance had been exported to the United States or had died and been destroyed.

[9] When cattle and other ruminants such as sheep are slaughtered, portions of the animal not fit for human consumption, such as the brain, spinal cord, certain organs and other elements of the central nervous system, are sent to rendering plants where they are heated and ground into meat and bone meal, which is then used in a number of products, including fertilizer and animal feedstuffs. Consequently, prior to 1994, protein from the approximately 68 U.K. cattle imported between 1982 and 1990 that had been slaughtered in Canada entered the animal feed chain, creating a risk of transmission of BSE to Canadian cattle

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born prior to the ruminant-to-ruminant feed ban implemented in Canada in 1997 (the "Feed Ban").

[10] No Canadian animal was diagnosed with BSE in the 1990s. Indeed, it seemed that Canada had been successful in its efforts to keep BSE from entering the Canadian cattle herd following the import ban in 1990. But in May 2003, almost a decade after the last of the U.K. imports was destroyed, a cow which had died earlier that year on a farm in Saskatchewan was found to have had BSE. It was later determined that this cow was fed a "calf-starter" feed containing ruminant protein when it was a calf in 1997, just prior to the enactment of the Feed Ban, and that this was the likely source of BSE in the cow.

[11] After the May 2003 diagnosis, a small number of other Canadian cattle were diagnosed with BSE. But it is the consequences of the confirmation of BSE in a Canadian cow in May 2003 that are relevant to this action. The United States, which provided over 50 percent of the market for Canadian cattle and cattle products, immediately closed the border to Canadian cattle and beef products. Many other countries followed. Although over time the borders gradually reopened and trade resumed, the economic impact on Canadian cattle producers and related industries was enormous. The total cost of the trade embargo between 2003 and 2008 has been estimated to exceed $8 billion.

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[12] In 1991, Parliament passed the *Farm Income Protection Act*, S.C. 1991, c. 22. The legislation allowed for the implementation of a new series of generally available safety-net programs in collaboration with the provinces. These included revenue and crop insurance, as well as net income stabilization programs. Section 12 of *FIPA* provided specific legislative authority for special measures by which the Minister of Agriculture may offer special assistance when producers face unforeseen circumstances.

[13] *FIPA* also authorized the establishment of the Net Income Stabilization Accounts Program ("NISA") which was set up in the early 1990s. Two funds were created. Fund 1 consisted of the producer's deposits. Fund 2 contained matching funds from the federal and provincial governments up to three percent of eligible net sales of the producer. Farmers could withdraw funds, if they wished, when their annual net income was below the preceding five-year average, or if household income was below $35,000, subject to prescribed limits. Funds withdrawn from Fund 1 were not subject to tax, as the deposits were made in after-tax dollars. However, withdrawals from Fund 2 were taxable, although they were treated as investment income, not farm income. The NISA program was discontinued at the end of 2002.

[14] In 2003, the Canadian Agricultural Industry Support Program ("CAIS") was established. Funded by the federal government and the provinces, its objective was to help protect producers against income losses, regardless of the cause.

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Although initially it required a deposit by farmers, that was replaced by a small fee to enroll in the program. In this sense it differed from NISA which had required deposits by farmers in order to qualify for matching funds. Under CAIS, if a producer had a loss, or margin decline, of 15 percent or less, the government would pay for half the loss. For any loss between 15 percent and 30 percent, the government would pay 70 percent of the loss, and for losses above 30 percent, the government would cover 80 percent of the loss. As a whole-farm program, payments were based solely on income and did not relate to a particular commodity or volume of production. The AgriStability program replaced CAIS in 2007.

[15] In addition to these programs, Canada implemented a number of direct programs to address the impacts of BSE on cattle producers and cattle production ("the BSE-specific programs"). These included the BSE Recovery Program Phases 1, 2, 3 and 4; Transitional Industry Support Programs ("TISP"); Farm Income Payment Programs ("FIP"); and the Milk Price Increase.

[16] The BSE Recovery Program was intended to encourage the Canadian slaughter of existing cattle for consumption in Canada by providing cattle producers with a price deficiency payment for cattle owned prior to May 20, 2003

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and sold for slaughter in Canada between June 1, 2003 and August 31, 2003.[1] Under Phase 1 of this program, the federal government paid out more than $266 million to cattle producers from the Consolidated Revenue Fund. The provinces contributed more than $177 million.

[17] Phase 2 of the BSE Recovery Program was designed to delay the marketing of older animals that would ordinarily have been exported and/or sent for slaughter in the fall of 2003 until there was sufficient slaughter capacity to process these animals in Canada. The federal government paid out more than $104 million to cattle producers from the Consolidated Revenue Fund under this Phase.

[18] Phase 3 also addressed the need to delay the slaughter of animals until sufficient slaughter capacity was created. The federal government paid out more than $25 million from the Consolidated Revenue Fund under one program under this Phase, and more than $112 million under another program under this Phase.

[19] Only the province of Quebec participated in Phase 4. The objective of this program was to ensure that older animals could be marketed and disposed of properly and herds could be rejuvenated. Payments were only made to producers in Quebec. The federal government paid $9 million under this Phase.

[1] A price deficiency payment is defined by the World Trade Organization as “[a] type of agricultural domestic support, paid by governments to producers of certain commodities and based on the difference between a target price and the domestic market price or loan rate, whichever is the less”.

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[20] TISP was created in 2003 when the federal government identified a need for interim support programs to get cash to cattle farmers. It was also intended to help producers keep their herds together and to prevent cows from being culled and put into waste dumps. The TISP-Direct Program was funded solely by the federal government and involved a direct payment to cattle producers based on the number of cattle owned by them as of December 23, 2003. The federal government made payments under this program to cattle producers for cattle across Canada in excess of $579 million.

[21] FIP was essentially a continuation of the TISP programs for the year 2005, to assist producers during this period of historically low incomes. The federal government made payments under this program to cattle producers for cattle across Canada in excess of $333 million.

[22] The Milk Price Increase was administered in 2005 and 2006. To offset a price decrease resulting from the fall in price of culled cattle that was affecting dairy farmers, the Canadian Dairy Commission raised the price of industrial milk by $1.66 per hectolitre for 12 months. Dairy producers were paid more than $96 million under this program.

[23] Canada also established other BSE-specific programs that provided benefits to cattle producers. They are not set out here as the respondent was not relying on these programs in support of its s. 9 argument.

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Analysis

[24] I begin by setting out the provision contained in s. 9 of the *CLPA*. It reads:

> No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

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[25] Section 9 has been considered in many cases, the leading one of which is *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921 in which Iacobucci J. considered the scope of the section. In that case, an inmate in a federal penitentiary had sustained serious personal injuries. As a result, he qualified for Canada Pension Plan disability benefits. The inmate sued the Crown in tort soon after suffering his injuries. The Crown moved for summary judgment claiming that the action was statute-barred by s. 9 because the plaintiff was receiving Canada Pension Plan disability benefits.

[26] The Supreme Court of Canada found that s. 9 did not bar the plaintiff's action. In his reasons, Iacobucci J. began by noting that the words "in respect of" are of the widest possible scope. He also noted, though, that the words are not "of infinite reach": at para. 22. Iacobucci J. then set out the proper approach to the interpretation and application of s. 9. He said, at para. 24:

> In both cases, we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found. Indeed, the proper

> approach to statutory interpretation requires that we more carefully examine the wider context of s. 9 before settling on the correct view of its reach.

[27] Iacobucci J. reviewed the specific facts of the case that was before the court and concluded that s. 9 did not apply in the circumstances. In making that determination, Iacobucci J. set out a form of test for the application of s. 9. He said, at para. 28, that for s. 9 to apply, the pension or compensation paid or payable "must be made on the same factual basis as the action" that would be barred against the Crown. Iacobucci J. reiterated that the purpose of s. 9 was to bar double recovery "for the same claim where the government is liable for misconduct but has already made a payment in respect thereof".

[28] The appellant resists the application of s. 9 to this case largely based on its argument that the various programs referred to above were designed to provide "financial assistance" to the class members but were not for the purpose of providing "compensation". It points to the fact that none of the programs use the term "compensation" in describing its purpose.

[29] I find this submission unpersuasive. The application of s. 9 does not turn on whether the specific word "compensation" is used in relation to the payment made. It is the purpose of the payment, and whether it is "contingent" on an event of death, injury, damage or loss, that is important: *Sarvanis*, at para. 31. If the

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payment is made to a person in recognition of that “death, injury, damage or loss”, then that person has received compensation.[2]

[30] In my view, in the factual circumstances of this case, government’s purpose in paying assistance to the cattle farmers under the BSE-specific programs was clearly to compensate them, in particular, for the economic effects of the border closures that arose from the discovery of BSE in Canada, but also for the impact of BSE generally. It may be that some aspects of the programs were designed to accomplish other goals. It may also be that some payments under the programs were not made directly for losses sustained but in order to pre-empt other pending losses. But those observations do not change the fact that one of the principal purposes of these programs was to compensate farmers for the economic impact of BSE.

[31] This purpose is reflected not only in the programs’ substantive provisions, as described in the facts section above, but also in their surrounding documents provided in the record. For instance, the TISP Direct Payment Form and Guide published by the Ministry states that “The Direct Payment is designed to provide assistance to producers in meeting the financial challenges resulting from the market impacts of Bovine Spongiform Encephalopathy (BSE)” (emphasis added). The Questions and Answers document published with the FIP Program explains

[2] See, for example, the definition of compensation, *Oxford Dictionary of English*, second edition (revised)

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that it “is targeted to producers of animals directly impacted by the BSE outbreak and the resulting border closures.” Additionally, the preambles to the province-Canada agreements establishing the BSE Recovery Program read:

> WHEREAS the federal and provincial and territorial ministers of agriculture, representing their respective governments, recognize the important economic contribution of the beef industry to Canada, <u>and the difficulty facing that industry as a result of the current suspension by the United States of America of imports of Canadian ruminants and ruminant products</u>; [Emphasis added.]

[32] In support of its view that “compensation” is distinct from “assistance”, the appellant submits, based on *Berardinelli v. Ontario Housing Corp.*, [1979] 1 SCR 275, that s. 9 should receive a restrictive meaning because it circumscribes the rights of citizens. This submission is also unpersuasive. I begin by questioning whether it can be properly said that the terms of s. 9 involve an ambiguity, as the appellant contends. The words used in s. 9 each have a clear meaning. Further, no apparent ambiguity arises from the sentence structure. Irresolvable ambiguity obtains only when it is not possible to determine which of two equally plausible meanings were intended by Parliament. The mere fact that a party can conceive of an alternative meaning does not mean there is any ambiguity: an alternative interpretation can simply be wrong. Furthermore, difficulty in applying a provision to a particular set of facts is not necessarily the result of any ambiguity. Meaning

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and application are two different concepts: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 29-30.

[33] In any event, the interpretative approach of treating some statutes as requiring restrictive interpretations was abandoned some time ago. There is now only one interpretive principle or approach, namely, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87.

[34] The conclusion that the absence of the word “compensation” from the BSE-specific schemes does not determine the application of s. 9 is also consistent, either explicitly or implicitly, with various other decisions. One is *North Bank Potato Farms Ltd. v. Canadian Food Inspection Agency*, 2019 ABCA 344. That action arose from a decision by the Canadian Food Inspection Agency to quarantine the plaintiffs’/appellants' lands and destroy their seed potato crops, after it discovered potato cyst nematode spores in soil samples from the appellants' land. As a consequence, both the United States and Mexico had closed their borders to seed potatoes. Potato farmers had received some assistance from the federal and provincial governments arising from these events.

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[35] The issue was whether those payments constituted compensation under s. 9 such that the plaintiffs'/appellants' negligence claim against the federal government was barred. The chambers judge concluded that it was and dismissed the action. The Alberta Court of Appeal upheld that decision. In that case, the appellant had advanced very much the same argument, as the appellant does here, regarding the submitted difference between compensation and assistance and the absence of the word "compensation" from the particular program. Both the chambers judge and the court of appeal rejected the argument.

[36] The case law is clear that s. 9 bars an action for damages for a loss that has already been compensated, even if the action attempts to frame the loss differently. In *Vancise v. Canada (Attorney General),* 2018 ONCA 3, the plaintiff/appellant brought a claim in negligence against the federal government arising out of damages he suffered when his cattle became infected with anaplasmosis – a bacterial infection that was considered to be a foreign animal disease requiring the destruction of any infected animal. His claim was dismissed on a summary judgment motion because s. 9 was found to bar his claim.

[37] On appeal, the plaintiff/appellant argued that his claim for negligence was separate and apart from the loss arising from the destruction of his animals, for which he acknowledged he had been compensated by the respondents. This court rejected that argument. In doing so, Paciocco J.A. said that the reach of s. 9 was "settled". He went on to say, at para. 15: "The framing of the appellant's action as

a damage claim for negligence regarding the importation of the cattle and the ensuing quarantine of the herd, as distinct from the destruction of the diseased animals and treatment of the herd, does not place this case outside the restrictive sweep of s. 9 of the *CLPA*."

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[38] Yet another case is *Begg v. Canada (Minister of Agriculture),* 2005 FCA 362, 261 D.L.R. (4th) 36, where the plaintiffs/appellants had brought an action for damages against the Minister for losses suffered as a result of the destruction of their herd of elk by Agriculture Canada. The destruction followed the discovery of tuberculosis in one of the animals. The plaintiffs/appellants had received compensation under a statutory compensation scheme.

[39] The plaintiffs' claim was again dismissed on a summary judgment motion. The dismissal was upheld by the Federal Court of Appeal. In dismissing the appeal, Nadon J.A. said, at para. 32:

> Whether the destruction of the appellants' animals results from the negligence of officials in failing to prevent the entry of tuberculosis into Canada or by reason of any other ground of negligence, is, in my respectful view, irrelevant. The plain fact is that both the compensation received and the recovery sought by way of the appellants' action result from the same occurrence, i.e. the destruction of their herd.

[40] To the same effect is the decision in *Langille v. Canada (Minister of Agriculture) (CA*), [1992] 2 F.C. 208 (C.A.), where the Federal Court of Appeal allowed an appeal from a motion judge and struck out that part of a statement of

claim claiming damages for negligence arising from the destruction of cattle owned by the respondents resulting from the positive presence of brucellosis in some of the animals. The Federal Court of Appeal found that the claim was barred by subsection 4(1) of the *Crown Liability Act*, R.S.C. 1970, c. C-38 – the predecessor section to s. 9.

[41] The plaintiffs/respondents in that case had advanced the same argument regarding the distinction between compensation for the animals destroyed and the losses sustained from the alleged negligence of the appellant. In rejecting that distinction, Stone J.A. said, at para. 12:

> The only difference here is that respondents, by way of this action in tort, are seeking to enhance recovery in respect of that destruction beyond the level of the compensation they were paid in 1978 out of the Consolidated Revenue Fund. In our view, subsection 4(1) of the *Crown Liability Act* bars them from doing so.

[42] In the end result, all of these cases make the same point. Section 9 bars a claim if the plaintiff has received monies by way of compensation for losses arising from the same factual basis that the action is based upon. It is clear that the appellant in this case received payments under various programs that the federal government had set up to address the financial impacts that arose from the presence of BSE in this country. Indeed, the trial judge made that specific finding. He said, at para. 530: “As a practical matter, therefore, whether characterized as incentives, or assistance, or compensation, monetary payments were made to

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farmers that had the effect of compensating them for at least some of their losses, and this was how they were regarded at the time."

[43] The appellant's efforts to draw a distinction between compensation schemes and "stabilization programs" also fails to address the fundamental point that the claims arise from the same factual foundation upon which the payments were made. The appellant's further efforts to draw a distinction between "compensation" and "assistance" does not find any support in the case law nor does the appellant point to any.

[44] I find further support for this conclusion in the decision of *Brownhall v. Canada (Ministry of National Defence)* (2007), 87 O.R. (3d) 130 (Div. Ct.), where Swinton J. restated the test from *Sarvanis*. At para. 37, she said: "Does the same loss or injury underlie both? If it is plain and obvious, on the facts as pleaded, that the same loss underlies both, the action is barred by s. 9 of the *CLPA*."

[45] I would note that, in this case, we are not dealing with a summary dismissal based solely on the pleadings. Rather, we have both the facts as pleaded and the factual findings of the trial judge. The conclusion is made clearer and stronger as a result. The appellant (and the other class members) received monies under the BSE-specific programs for losses arising from the presence of BSE in Canada, which is the same factual basis underlying the class claims. The trial judge's conclusion that the claims are barred by s. 9 is correct.

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Conclusion

[46] The appeal is dismissed. The respondent is entitled to the costs of the appeal fixed in the agreed amount of $50,000, inclusive of disbursements and HST.

Released: January 31, 2024 "C.W.H."

"I.V.B. Nordheimer J.A."
"I agree. C.W. Hourigan J.A."
"I agree. B.W. Miller J.A."

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