T-140-97

BETWEEN:

MR. JEAN-LUC BÉDARD, domiciled and residing at 555 rue Saguenay, St-Raymond, County of Portneuf, District of Québec, in the Province of Quebec, G0A 4G0;

Applicant;

AND:

HER MAJESTY THE QUEEN, duly represented by the Attorney General of Canada;

- and -

THE HONOURABLE RALPH GOODALE, in his capacity as Minister of Agriculture of Canada, having his office at the Sir John Carling Building, 930 Carling Avenue, in Ottawa, Province of Ontario, K1A 0C5;

- and -

DR. MICHEL LANDRY, in his capacity as a veterinary inspector in the Animal Health Division of the Food Production and Inspection Branch, Agriculture and Agri-Food Canada, having his offices at 901, Cap-Diamant, Suite 391, Québec, District of Québec, Province of Quebec, G1K 4K1;

- and -

DR. WILLIAM R. ANDERSON, in his capacity as manager, Animal Health Division, Quebec region, Food Production and Inspection Branch, Agriculture and Agri-Food Canada, having his offices at Place London Life, 2001 rue Université, 7th Floor, Room 746-S, in Montréal, District of Montréal, Province of Quebec, H3A 3N2

Respondents.

REASONS FOR ORDER

JOYAL J.

On January 29, 1997, in Québec, I dismissed the applicant's motion for an interim injunction to prevent the execution of an order to destroy certain animals by the following January 31. Following the hearing of this motion, I undertook to give the parties some brief written reasons.

Facts

The destruction order was issued to the applicant by the respondents under the aegis of the *Health of Animals Act*, R.S.C. c. H-3.3 (hereinafter "the Act"). The purpose of this Act, *inter alia*, is to control the presence and spread of contagious diseases among animals.

To this effect, Parliament has given the Minister of Agriculture some unusual rights and obligations. For example, under paragraph 48(1)(a) of the Act, the Minister may dispose of any animal that is, or is suspected of being, contaminated by a disease or toxic substance. Under paragraph 48(1)(b) of the Act, the same power may be exercised in regard to animals that have been in contact with or in close proximity to the animals referred to in the preceding paragraph.

In addition to the provisions of section 48 of the Act, section 50 exempts the Crown from liability. It states:

> **50.** Where a person must, by or under this Act or the regulations, do anything, including provide and maintain any area, office, laboratory or other facility under section 31, or permit an inspector or officer to do anything, Her Majesty is not liable
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> (a) for any costs, loss or damage resulting from the compliance; or
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> (b) to pay any fee, rent or other charge for what is done, provided, maintained or permitted.

On January 6, 1997 a veterinary inspector acting on behalf of Agriculture and Agri-Food Canada signed an order to destroy a herd of about fifteen "wapiti" belonging to the applicant on the ground that the animals were afflicted or suspected of being afflicted with the infectious or contagious disease known as "tuberculosis". In accordance with the Act, the applicant was granted compensation based on a value of $2,000 per animal.

Following this order, the applicant's solicitor compiled a very impressive record which he filed with the Court on January 28, 1997, seeking an injunction. The parties agreed that the motion would be heard by way of a telephone conference call. The Crown attorney also agreed to release the applicant from the requirements of Rule 320 of the *Federal Court Rules*.

Authorities

In interim or interlocutory injunction matters the authorities are quite clear. Whether relying on the House of Lords judgment in *American Cyanamid v. Ethicon Ltd.*[1] or the Supreme Court of Canada judgment in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*,[2] a court must refer to three tests:

(1)that there be an arguable case on the merits;

(2)that the applicant would suffer irreparable harm if the interim measure were not granted; and

(3)that the balance of convenience favours the applicant.

Applicant's argument

The applicant's argument rests essentially on his claim that the Crown's decision is thoroughly arbitrary, is not supported by material evidence or justified by any fact, and is completely inconsistent with the spirit of the Act. The circumstances that would support such a finding are ably explored in the applicant's affidavit, which takes up 89 paragraphs over a dozen or so pages. The applicant's counsel also produced in support some 19 items of documentary evidence.

Crown's argument

The Crown attorney, who has handled such cases in the past, emphasized that the Minister's authority under section 48 of the Act is much more intransigent and unassailable than the applicant thinks. The provision allows drastic measures in relation to not only contaminated animals but those *suspected* of being contaminated. Counsel cited in support the Federal Court of Appeal judgment in *Kohl v. Canada*

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[1][1975] 1 All E.R. 504.

[2][1987] 1 S.C.R. 110.

(Minister of Agriculture)[3] in which Marceau J.A., overturning a previous decision of the Trial Division, clearly and categorically pointed out how difficult, if not impossible it is, to challenge a ministerial decision of this kind.

Observations

In the course of the argument, my preliminary findings tended to focus on the irreparable harm test. If, in pursuing his case, the applicant were to have the Court ultimately find in his favour, he would be entitled to damages for the actual value of his herd. But on this point counsel for the applicant drew my attention to the provisions of section 50 of the Act which *prima facie* acquit the Crown of any error committed in the exercise of its statutory powers. The result would be to bar any future claim by the applicant.

If we adopt the opinion of applicant's counsel, an opinion that I do not necessarily share, this would mean recognizing that Parliament was indeed referring to extraordinary measures to protect Canadian livestock against contagious diseases and accordingly gave the Minister a complete release in the event of error. Parliament, in the public interest and basing itself on the scientific data in relation to such diseases, wished to safeguard at any cost the reputation of Canadian livestock and consequently allowed the ministerial decision to be exercised upon the least suspicion of a disease, no matter what the possible harm to the owners.

This line of thinking indicates that the first criterion enunciated earlier, an arguable case, merits much closer attention. It should also be kept in mind that the statutory scheme affects economic interests and not the individual rights of a citizen. In the latter case I dare to say that judicial intervention must be even more discriminating than in the other categories of review.

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[3](1994), 28 Admin. L.R. (2d) 38.

In this regard, I take the liberty of adopting certain passages from the judgment of Marceau J.A. in *Kohl*, *supra*. In particular, I cite the following passage, in which the Court of Appeal upheld the position taken by the motions judge:

> Finally, the motions judge did not accept that those considerations relating to foreign trade which had so much influence on the Minister's decision were irrelevant considerations. In his view, once the existence of a communicable disease has been established or is suspected, the concerns of all those potentially affected by its possible spread become relevant in deciding upon a course of action under subsection 48(1) of the Act and, in particular, in assessing the tolerance level of the acceptable risk. Thus, the decision to destroy the animal came after weighing Canada's obligation to the international community. Such concerns were therefore justifiably taken into account.

Later in Marceau J.A.'s judgment, we find the following comments:

> The impugned decision is that of a Minister of the Crown made pursuant to a special statutory authority entrusted to him by Parliament to be exercised in certain specific circumstances if viewed necessary for the public good. It is an administrative decision of an executive nature, a policy decision obviously not subject to the requirements of the rules of natural justice or procedural fairness as affirmed by this Court in the *Hunt Farms*[4] case. A threat to public health and safety has to be dealt with promptly. As I understand it, such a decision is subject to review by the Courts on the sole basis of abuse or misuse of power which may result from different wrongful attitudes on the part of the decision-maker. The decision may have been made in bad faith, i.e. for a purpose other than the one for which the power was conferred; it may have been made without due respect for some precise legal conditions or qualifications imposed on the exercise of the power; or it may have been made recklessly without verification of the existence of the factual circumstances that it was meant to deal with. This principle was reiterated recently, in very instructive words, by the House of Lords in *Puhlhofer and another v. Hillingdon London Borough Council*, [1986] 1 All E.R. 467 at page 474:
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> > The ground on which the courts will review the exercise of an administrative discretion is an abuse of power, e.g. bad faith, a mistake in construing the limits of the power, a procedural irregularity or unreasonableness in the *Wednesbury* sense (see *Associated Provincial Picturer Houses Ltd. v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), i.e. unreasonableness verging on absurdity: see the speech of Lord Scarman in *Nottinghamshire CC v Secretary of State for Environment* [1986] 1 All ER 199 at 202, [1986] 2 WLR 1 at 5. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are

[4] *Hunt (David) Farms Ltd. v. Canada (Minister of Agriculture)* (1994), 74 F.T.R. 270 (T.D.); 170 N.R. 75 (C.A.); leave to appeal to the Supreme Court of Canada refused.

> acting perversely.

[My underlining]

Finally, the Court adds:

> In any event, if the principles applicable to the judicial review of an administrative decision like the one involved here provide for a certain verification by the Court of the basis on which the suspicion required for the exercise of the power arose, that verification ought to be quite deferential. The Court is not called upon to say if it agrees with the decision-maker's appreciation of the facts he had before him, its role is not to make sure that this appreciation was correct. The power to make the decision is not the power of the Court but of the decision-maker. The Court is simply called upon to verify if the decision-maker's suspicion can find some support in the evidence since it is only when such support does not exist and the suspicion appears irrational that there will be an abuse of power. This is clearly not the approach adopted by the motions judge who simply substituted his own opinion for that of the Minister. The Act requires the Minister to exercise considerable expertise with regards to the health of Canadian livestock and the risks imposed by potential parasites, and directs him to act on the basis of mere suspicion.

Conclusions

I conclude that the observations of the Federal Court of Appeal allow us to consider not only the irreparable harm test but even more the first test, to determine whether the applicant is able to establish a sufficient colour of right or an arguable case.

Accordingly, with all due respect to the applicant and to his learned counsel, I had to announce to them, at the end of the inquiry, on January 29, 1997, that the motion was dismissed. In view of all the circumstances of the case, and the singular provisions of the Act and the analysis of the scheme of this Act by the Federal Court of Appeal, I was not persuaded that the applicant could overcome the tests that the cases impose in such matters.

"L. Marcel Joyal"

J.

O T T A W A, Ontario

February 12, 1997

Certified true translation

Christiane Delon

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO. T-140-97

STYLE:MR. JEAN-LUC BÉDARD v.
HER MAJESTY THE QUEEN ET AL.

PLACE OF HEARING:QUÉBEC, QUEBEC

DATE OF HEARING:JANUARY 29, 1997

REASONS FOR JUDGMENT OF JOYAL J.

DATED:FEBRUARY 12, 1997

APPEARANCES:

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RAYMOND PICHÉ	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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