

COURT FILE NO.: 05-CV-287428CP [Toronto]

DATE: 20080903

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

BILL SAUER

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA on behalf of
HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by
THE MINISTER OF AGRICULTURE, JOHN DOE, JANE ROE
and RIDLEY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Cameron Pallett, Reynold Robertson, Q.C. and Clint Docken, Q.C. for the Plaintiff
Dale Yurka and Roslyn Mounsey for the Defendant, The Attorney General of Canada
Tim Buckley, Robert B. Bell, Barry Glaspell and Mélanie de Wit for the Defendant, Ridley Inc.

HEARD: June 5, 6, 9, 2008

LAXJ.

[1] This is an intended class proceeding brought on behalf of all Canadian cattle farmers (except in the province of Quebec) against the government of Canada and Ridley Inc. The claims asserted in this action arise from the closure of international borders to Canadian cattle and beef products following the May 20, 2003 diagnosis of a single case of bovine spongiform encephalopathy ("BSE") or 'madcow disease' in an Alberta cow. BSE is a fatal neurological disease of cattle that is transmitted when healthy cattle, particularly calves, eat food rations

containing the rendered remains of infected cattle, referred to as ruminant meat and bone meal or RMBM. This was routinely added to calf starter feed rations in order to boost the protein content of the feed and enhance growth until the Canadian government prohibited this practice in October 1997.

[2] Ridley is alleged to have manufactured the BSE-contaminated feed that was consumed by the Alberta cow and to have been negligent in using ruminant meat and bone meal as an ingredient in its feed products. Her Majesty the Queen (“HMQ”) is alleged to have been negligent as regulator of the cattle industry in Canada, such that BSE entered the feed system and infected the Alberta cow, which led to the border closures and disrupted the whole of the cattle industry in Canada.

[3] There are two motions before the court. In the first motion, the plaintiff moves to certify this action against Her Majesty the Queen in Right of Canada (“HMQ”) under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”). This motion raises the difficult issue of the relationship between class proceedings and losses that rise to the level of industrial sector economics. The Crown vigorously contested this motion on a number of grounds, including that there is no commonality among class members, that loss and causation are individual issues that would overwhelm the litigation of any common issues, and that industry concerns are more appropriately addressed, and have already been addressed, through government BSE-specific compensation programs and other aid programs such as the Canadian Agricultural Income Stabilization Program (“CAIS”).

[4] In the second motion, which proceeded on consent and in respect of which HMQ took no position, the plaintiff moves to certify this action against Ridley for the purposes of settlement. The plaintiff also seeks the court’s approval of a Settlement Agreement of February 5, 2008, between Ridley and the class representatives in this action and in related actions in Quebec, Alberta and Saskatchewan. These reasons will address both motions which I will refer to as the “HMQ Certification Motion” and the “Ridley Certification and Settlement Motion.” I will first address the HMQ Certification Motion, but the background is common to both motions.

Background

[5] The story of BSE in Canada, as alleged in the Fresh as Amended Statement of Claim, begins with the serious outbreak of 'mad cow disease' that occurred in the United Kingdom in the 1980s. This caused the Canadian government in 1987 to require that all cattle imported from the UK be from herds certified to be free of BSE. In 1988, as part of a concerted effort to halt the spread of BSE, the UK banned the feeding of the rendered remains of cattle and other ruminant to cattle. In 1990, the Canadian government re-enacted a regulation to the *Feeds Act*, but it specifically permitted the continued incorporation of RMBM into cattle feed.

[6] In 1990, Canada banned the importation of live cattle from the UK and Ireland and placed 198 cattle that had been imported between 1982 and 1990 into a monitoring program. At least ten of these animals were from farms in the UK where cattle had been diagnosed with BSE. In December 1993, one of the monitored cattle tested positive for BSE. HMQ instituted a trace at that time of the remaining 197 British imported cattle. The remains of at least eighty of these cattle had been rendered and could have entered the Canadian animal food chain by December 1993, although the monitoring program was supposed to prevent this.

[7] In April 1996, the World Health Organization called for a world-wide ban on the use of ruminant tissues in ruminant feed. In May 1996, the animal feed industry in Australia, including Ridley Australia, a corporation related to Ridley, participated in a voluntary ban in Australia. Despite the voluntary ban there, Ridley did not cease their incorporation of RMBM into their calf starter rations in Canada until the Canadian government banned this by a regulation enacted in August 1997 that became effective in October 1997.

[8] There were no further cases of BSE in Canada until 2003 when the first case of BSE in a Canadian-born cow was diagnosed. This cow was born on the McCrea farm near Baldwinton, Saskatchewan in March 1997 and was fed calf starter containing meat and bonemeal from rendered cattle that had been manufactured at Ridley's Feed-Rite mill in St. Paul, Alberta. Initially, the Canadian Food Inspection Agency ("CFIA") identified this product as the likely source of BSE for the infected cow. Later, it withdrew this comment and said that it could not

definitively identify which source of exposure infected the McCrea cow. This is discussed further in the Ridley Certification and Settlement Motion.

[9] In January 2003, this calf, now a heifer with a new owner in northern Alberta, was identified at slaughter as a 'downer' or diseased cow. The head was removed and sent to the Alberta provincial laboratory for testing. On May 20, 2003, the Central Veterinary Laboratory ("CVL") in Weymouth, England (the international gold standard for BSE testing) confirmed that this heifer had BSE. The closure of international borders to Canadian cattle and beef products immediately followed the CVL announcement.

[10] Bill Sauer is an Ontario cattle farmer. He seeks to represent a class of approximately 115,000 cattle farmers and claims damages on their behalf in excess of ten billion dollars. The class members' alleged damages include past, present and future losses of income, loss of business opportunities, diminution in value of livestock and cattle business, and diminution in value of real property.

[11] A companion action in Quebec was authorized as a class action on June 15, 2007. On May 28, 2008, Wagner J. of the Quebec Superior Court approved the Settlement Agreement between the Quebec representative plaintiff and Ridley on behalf of the Quebec class. Actions that were commenced in Alberta and Saskatchewan have been postponed. The Statement of Claim has been amended to include class members in these provinces. If this action is certified, class representatives in Alberta and Saskatchewan will seek a stay of those actions so that the four actions become two: the Quebec action and an Ontario action in which Sauer will represent all cattle farmers in Canada, except Quebec.

Certification Requirements

[12] On a certification motion, the question that underlies each of the statutory requirements is whether the claims in the action can be appropriately prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16. Under s. 5(1) of the *CPA*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff

who would adequately represent the class without conflict of interest and who has produced a workable litigation plan. The plaintiff must show some basis in fact for each of the certification requirements, other than the requirement that the pleading discloses a cause of action. However, the purpose of a certification motion is not to determine whether the litigation can succeed, but how the litigation is to proceed: *Hollick*, at paras. 25, 28-29.

[13] The *CPA* is a procedural statute that provides a mechanism for the resolution of mass claims. Although each of the five requirements for certification is commonly addressed separately by counsel and by the court, Winkler J. (as he then was) captured the first three criteria for certification in a single sentence: “There must be a cause of action, shared by an identifiable class, from which common issues arise”: *Frohlinger v. Nortel Networks Group*, [2007] O.J. No. 148 at para. 25. As he helpfully observed, at the core of a class proceeding is the element of commonality and implicit in that concept is that the cause of action, the scope of the class and the common issues are inextricably linked.

[14] The remaining two requirements for certification are linked to the first three and the single sentence proposed by Chief Justice Winkler can be expanded to incorporate them in this way: “There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers.” I find it helpful to keep this linkage in mind in considering the individual criteria for certification. In view of this linkage, it is not always easy to separate the certification analysis into distinct components and overlap is unavoidable.

HMQ Certification Motion

Section 5(1)(a) – a cause of action

[15] The four main allegations of negligence against HMQ are:

- (a) negligently designing, crafting and promulgating *Feeds Regulations, 1983* amendment SOR/90-73;

- (b) negligently allowing 80 of 198 cattle imported from the United Kingdom between 1982 and 1990 into the animal food chain while they were being ‘monitored’ by HMQ to prevent the spread of BSE into Canada;
- (c) negligently failing to warn the plaintiff and the class members of the risk of BSE entering the Canadian herd as a result of these same 80 animals entering the animal food chain; and
- (d) negligently failing to take adequate action, if any, following the discovery that the remains of these 80 cattle had entered the animal food chain in Canada including, *inter alia*, requiring that calf starter rations be labelled to indicate whether they contained RMBM and promulgating an effective RMBM feed ban in a timely manner.

[16] Issues (a) and (d) (as well as allegations against Ridley) were the subject of motions by the defendants under Rule 21.01(1)(b) of the *Rules of Civil Procedure*. Both the Superior Court and the Court of Appeal for Ontario declined to strike these claims. The Supreme Court of Canada has dismissed applications by HMQ and Ridley for leave to appeal: *Sauer v Canada (Attorney General)* (2006), 79 O.R. (3d) 19 (S.C.J.), [2006] O.J. No. 26; *aff'd* (2007), 225 O.A.C. 143 (C.A.), [2007] O.J. No. 2443 (C.A.), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 454.

[17] The “plain and obvious” test that is used on a Rule 21 motion as enunciated in *Hunt v. Carey*, [1990] 2 S.C.R. 959, is also used to determine whether the proposed class proceeding discloses a cause of action: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 679. As it has been conclusively and finally determined that the allegations in negligence against the federal government disclose a cause of action, this satisfies the first requirement for certification.

Section 5(1)(b) – an identifiable class

[18] The amended class definition proposed by the plaintiff is:

All persons who as at May 20, 2003 were resident in Canada (except the province of Quebec) and farmed cattle including, but not limited to, cow-calf, backgrounder, purebred, veal, feedlot and dairy producers.

In this class definition 'person' means any individual, partnership, corporation, cooperative, communal organization, trust, band farm or other association who as at May 20, 2003 was farming cattle within the meaning of the *Income Tax Act*.

[19] In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.) at para. 10, the three purposes of a class definition were described as: (a) to identify the persons who have a potential claim for relief against the defendants; (b) to define the parameters of the lawsuit so as to identify those persons who are bound by its result; and (c) to describe who is entitled to notice pursuant to the Act. It is well-established that a claimant's probability of success cannot be a factor in determining whether a class has been adequately defined. This would offend the rule against merit-based criteria and require the court to determine the outcome of the litigation on the merits prior to class membership being ascertained. *Hollick* requires only that class members have a common interest in the resolution of the common issues.

[20] In determining whether a putative class action meets the statutory definition of an identifiable class consisting of two or more persons who would be represented by the representative plaintiff in the action, Ontario courts have been guided by two principles: (1) the need to identify the class by objective criteria, and (2) a rational connection between the class definition and the common issues to be decided in the action.

Objective Criteria

[21] HMQ submits that the class definition provides no guidance as to what criteria must be met to satisfy the class definition of "cattle farmer" and that it is subjective and unworkable. It submits that the class definition leaves "a whole host of questions unanswered" and provides examples to illustrate this. The plaintiff's submission is that the proposed class definition constitutes a properly and easily identifiable class, and that while the individual specifics of the farming operations among the intended class members may vary, cattle farmers and HMQ know who they are and can self-identify.

[22] The affidavit of John Ross, filed by HMQ in response to the motion, describes the distinct sectors within the Canadian beef and cattle industry as (a) the beef sector (b) the dairy sector (c) the veal sector and (d) the breeding sector.

[23] According to Mr. Ross, the beef sector is involved in raising cattle which become Canadian beef and beef products consumed domestically and internationally. He describes the four main stages of beef production as (i) cow-calf operations; (ii) backgrounding operations; (iii) feedlot operations; and (iv) packers. Cow-calf operations breed and raise beef cattle until they attain an appropriate weight. They are then sold to backgrounders and/or feedlot operators where they are “finished” or fed to their slaughter weight. Fed cattle that have reached slaughter weight and cull animals (older, non-productive breeding cattle) are sold to abattoirs and the resulting beef and beef products are sold by packers into domestic and international markets.

[24] Within the dairy and veal sectors, cows may be culled for slaughter or sold for beef production to backgrounders or feedlot operators. Within the breeding sector, seedstock suppliers sell animals with elite genetics to farmers and these animals may be part of the dairy or beef sectors. Seedstock beef producers also commonly sell a portion of their calf crop to backgrounders and/or feedlot operators. As well, many livestock operations (beef/veal/dairy/breeding) grow crops for sale. One or more of the businesses (cow-calf/backgrounder/feedlot) may be integrated into one farming operation. Mr. Sauer is an example. In May 2003, he owned dairy, cow-calf and backgrounder cattle.

[25] What emerges from this evidence is that cattle farming can take different forms, that cattle farmers may be involved in one or more sectors of the cattle industry that may overlap, that their operations may be large or small, and that some may also be involved in other farming activities. However, the common defining characteristic of intended class members is that they all have a relationship to the farming of cattle from which they earn their livelihood in whole or in part. This is the fundamental defining characteristic and represents the commonality of interest among the class members in this action. If it weren't already self-evident, Mr. Ross' evidence confirms that cattle are not bred and raised as pets, but for sale.

[26] The self-evident nature of the phrase “farming cattle” or “farmed cattle” is highlighted by HMQ’s factum at para. 12, which identifies with clarity persons intended to be captured by the class definition:

12. Cow-calf, backgrounding, and feedlot operations are highly varied. Cow-calf operations may range from a small hobby farmer who raises one or two calves a year to much larger operations that produce up to a thousand head of cattle per year. Some operators are large, full-time producers, while others are smaller, part-time producers with more diversified farming or other income sources. Backgrounding operations may stand alone as a business or be combined with cow-calf, feedlot, or other farming operations. Feedlots can range from a few hundred head up to tens of thousands of cattle. Some feedlot operators are also involved in custom-feeding arrangements on a fee for service basis.

[27] Cattle farming is a centuries old activity, which is distinct in the public eye. Cattle farmers as a group share a commonality of political and economic interest and have had no difficulty self-identifying through membership in organizations such as the Canadian Cattlemen’s Association, a national federation representing the interests of more than 90,000 beef producers encompassing eight provincial organizations. The federal government has had no difficulty identifying cattle farms or cattle farmers. The individual farms of intended class members and the number and kind of cattle on these farms have been identified with precision by Statistics Canada. This is clear from the 2001 Census of Agriculture, filed as an exhibit to Sauer’s affidavit.

[28] At the margins, there may be some questions about class membership, but the *CPA* permits the Court to enter upon a “relatively elaborate factual investigation in order to determine class membership”: *Serhan v. Johnson and Johnson*, [2004] O.J. No. 2904 (S.C.J.) at para. 52. As Cullity J. said, “The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable”: *Risorto v. Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 (S.C.J.) at para. 31. I think it very unlikely that a process to determine class membership will be required for the overwhelming majority of class members as most, if not all, will know whether they farmed cattle as at May 20, 2003. The definition of “person” will assist those in doubt. It clarifies that employees and family members of cattle

members and cattle agents, brokers or shippers are not included as they do not farm cattle within the meaning of the *Income Tax Act*. The “host of unanswered questions” is addressed by the amendment.

[29] With one exception, the non-exhaustive categories of cattle farmers listed in the class definition is on all fours with the evidence of Mr. Ross and provide a useful context for self-identification of class members. That exception is packers. It is the plaintiff’s position that the operators of meat packing plants, abattoirs or slaughterhouses are not class members as they do not farm cattle, but purchase cattle from cattle farmers for sale as beef. To the extent that packers also farmed cattle as at May 20, 2003, they are caught by the class definition. I do not regard this or the fact that packer operations may be vertically integrated into cattle farming operations as a reason to reject the class definition.

[30] The *CPA* is a procedural statute and a rigid approach would defeat its purpose: *Hollick* at para. 21. The class here is defined with reference to a particular activity (cattle farming) at a particular place (Canada, but not Quebec) at a particular time (May 20, 2003). I have explained that cattle farming may have diverse characteristics, but the diversity of cattle farming operations does not negate the commonality shared by proposed class members as they are all cattle farmers. I am satisfied that the class cannot be defined more narrowly without arbitrarily excluding some members. In *Hollick*, the court accepted a class definition of ‘persons who owned or occupied property,’ although occupation can be a difficult concept legally and factually. In *Bywater*, the court accepted a class definition of ‘persons exposed to smoke.’ The proposed class definition here is at least as objective, and arguably more so, than in those cases.

Rational Connection

[31] The core common issue to be decided in this action is whether the defendants were negligent. The plaintiff claims that the closing of the borders damaged all cattle farmers and has produced evidence to support this. As part of its materials, the Crown filed evidence from Professor Kurt Klein of the University of Lethbridge to demonstrate that the cattle industry has been fully compensated for its losses through various federal and provincial programs that were implemented soon after the borders closed. Essentially, HMQ submits that the plaintiff has not

shown that harm has been suffered on a class-wide basis, and as a result, the class definition bears no rational connection to the class claim in negligence, a component of which is proof that the defendant's conduct caused damage.

[32] Class membership identification is not commensurate with the elements of the cause of action. There simply must be a rational connection between the class member and the common issue. In the very recent case of *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), Cullity J. accepted a class definition of all persons in Canada (except certain provinces) who were prescribed and ingested Vioxx in the face of defendants' evidence that of the estimated 350,000 class members, those who suffered problems from taking the drug would be about 2000 people. He pointed out that in any class action involving claims in tort for personal injury or economic loss, it is possible that the claims of some class members will be unsuccessful. As he said at para. 78, "This is virtually ordained by the authorities that preclude merits-based class definitions". He reminded us that in *Hollick*, the plaintiff satisfied the commonality requirement by providing evidence that complaints of harm had been received from 950 of the approximately 30,000 putative class members.

[33] The class representative has done this. He produced evidence attesting to his personal losses as a result of the BSE crisis and the experience of others in his community. He has produced evidence from Allan Bonnett, a very large and profitable Alberta cattle producer whose business was bankrupted by BSE. The impact of BSE has been the subject of numerous studies and reports that are public or government documents and form part of the plaintiff's Request to Admit. Their admissibility is not in issue. HMQ has known for some time that the plaintiff would be relying on them and is not prejudiced. They speak to the enormity of the economic consequences to cattle farmers from the discovery of BSE. Whether or not all class members were harmed by this, all class members share a common interest in ascertaining whether HMQ caused or contributed to this. This is sufficient to show a rational connection between the class definition and the proposed common issues.

[34] On the Rule 21 motions, the court accepted the plaintiff's submission for the purposes of the motions that the defendants were in a relationship of proximity to the plaintiff so as to give rise to a duty of care. The Court of Appeal described it in this way at para. 39 of the Reasons:

must be necessary to the resolution of each class member's claim, although not necessarily to the same extent: *Hollick* at para. 18; *Western Canadian Shopping Centres* at para. 40.

[38] The plaintiff proposes the following common issues:

1. Does section 9 of the *Crown Liability and Proceedings Act* bar the Class Members' claims against the federal government of Canada?
2. Were the defendants negligent and if so when and how?
3. What is the appropriate apportionment of fault, if any, between the defendants?
4. Can the amount of compensatory damages, if any, be reasonably determined on an individual basis? If so, how should individual damages be determined?
5. If the answer to question 4 is no, can the amount of compensatory damages, if any, be determined on an aggregate basis? If so, what is the amount of damages and how should they be distributed?

Common Issue 1

[39] Section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("CLPA") provides that:

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.

[40] It is common ground that the federal government provided financial assistance to cattle farmers through various programs soon after May 20, 2003. The record does not fully disclose what these programs were, how the payments were made and who received them. There is evidence that some class members received payments from the CAIS Program. It is a matter of dispute whether CAIS payments are caught by this section or whether they would be taken into account in assessing damages.

[41] The Crown submits that this issue will not be common to each member of the class as it is relevant only to putative class members who received compensation for losses suffered as a result of BSE. Those who did not suffer a loss or those who did not apply for or receive compensation would not have this issue in common. This is only partially correct. The statutory bar applies in respect of compensation that has been paid out of the funds defined in the section, but it also applies in respect of compensation that *is payable* from these funds. Every class member is at least potentially impacted by the statutory bar.

[42] The issue of whether s. 9 of the *CLPA* bars the claims of intended class members can only be properly determined with the benefit of a complete evidentiary record. HMQ acknowledges that this common issue anticipates the Crown's defence. The plaintiff offered to withdraw this as a common issue if the Crown consented to an order that s. 9 only applies, if at all, to class members who received compensation for losses suffered as a result of BSE. Until HMQ makes its position known, this should remain as a common issue.

Common Issue 2

[43] The second proposed common issue is the composite question of whether the defendant was negligent. This is a composite question because it presupposes that all of the elements of negligence, including damages and causation, can be formulated into a common issue. This is contentious and underlies many of the defendant's arguments in opposition to certification.

[44] In most cases certified under the *CPA*, a determination of whether each class member has suffered damages and the quantum of damages will not be made at a trial of common issues. The plaintiff agrees that unless the requirements for aggregate assessment are met, the quantum of damages cannot be determined at a trial of common issues. In most negligence cases, causation is an individual issue, but where there is evidence of causation of harm to the class, a generic negligence question such as the one proposed is appropriate. A similar question was accepted in *Taylor v. Canada (Minister of Health)* (2007), 285 D.L.R. (4th) 296 on the basis of evidence that TMJ implants were harmful to all recipients who comprised the class.

[45] HMQ submits that this is a case where each class member will have to prove the nature and extent of the losses caused by the border closures and therefore, causation is an individual

rather than a common issue. The Crown also argues that it is not possible to resolve this common issue without first examining the individual circumstances of each class member and that the macro-level data with respect to the overall economic effect of BSE on the beef and cattle industry in Canada cannot be used to determine damage on a class-wide basis. I do not agree. For certification purposes, the fact of universal damage has been shown.

[46] The April 2004 Report of the Parliamentary Standing Committee on Agriculture and Agri-Food states that BSE “devastated Canadian cattlemen and other livestock producers, ... sent cattle prices spiralling downward, led to the building of record levels of cattle inventories, dramatically raised feed costs, drained cattlemen’s cash positions and completely eliminated any chance for profitability in 2003, with little prospects for recovery in the immediate and foreseeable future”. A June 2004 research paper prepared by two researchers within the Agricultural Division of Statistics Canada states that the economic impact on the Canadian livestock industry was in the billions of dollars. Between July and December 2003, farm cash receipts for cattle and calves fell 48 per cent compared with the same period in 2002. This was the largest percentage decline in a decade. While government program payments partially offset the economic impact from the BSE-related ban, these authors found that there was still a 25 per cent decline in cattle and calf revenues in 2003 compared to 2002. In a 2006 paper prepared by Professor Klein and others commissioned by the Canadian Agricultural Trade Policy Research Network, the authors say that “the consequences of the BSE discovery in Canada hurt all aspects of the domestic beef sector.”

[47] In his 2008 report on which HMQ relies, Professor Klein expresses the opinion that based on more current information, the damages suffered by the beef industry as a whole is at least equivalent to the value of the compensation received from federal and provincial governments. He says that the Canadian cattle industry was fully compensated for the losses incurred, that a large proportion of Canadian beef producers received compensation from government programs that mitigated any losses and that while some Canadian cattle producers may have suffered losses even accounting for compensation, others “possibly gained as a result of the closure”. I can find no evidence to support this last statement.

[48] Throughout the submissions of HMQ, I was urged to give minimal weight to the plaintiff's evidence or asked to conclude that the evidence was not credible. In effect, I was asked to assess the relative merits of the evidence proffered by the plaintiff and HMQ. A certification motion is not an inquiry into the merits and the *CPA* does not require a preliminary merits showing. The plaintiff is not required to put forward the evidence of an expert, although this is commonly done. Neither is he required to cross-examine the expert put forward by the defendant, although this is commonly done. The adequacy of the record will vary, but perhaps the time has come to be reminded that the Report of the Attorney General's Committee on Class Action Reform contemplated that "evidence on the motion for certification should be confined to the [certification] criteria". (at 31, referred to in *Hollick* at para. 25).

[49] In *Tiboni*, Cullity J. discusses the distinction between the evidence required for a certification motion and that on a motion for summary judgment. After stating that only a minimum evidential basis needs to be established by evidence for the existence of common issues (*Hollick*), he said at para. 52:

Once provided, the question whether the defendants could obtain summary judgment by providing additional conflicting evidence that demonstrates that there are no genuine issues for trial will not arise and evidence directed at the question is irrelevant and inadmissible. If this were not correct, every opposed certification motion would be likely to involve, in effect, the same test of the merits as on a motion for summary judgment, and the evidential burden on plaintiffs would be increased enormously.

[50] Professor Klein does not dispute that harm was widespread and significant and that all farms suffered reduced returns as a result of BSE. He estimated losses to the beef industry from BSE to be up to four billion dollars. Professor Klein did not investigate individual losses to beef or dairy farmers, but in explaining the difficulty of accurately calculating individual losses, he provided this example in his 2008 report:

... While many cattle producers delayed marketing of their animals following the confirmation of BSE on May 20, 2003, others took advantage of what they thought were excellent buying opportunities and purchased additional animals at the depressed prices. When the border did not open promptly (as many had hoped and expected), some of these decisions resulted in greater losses for these cattle businesses. Some cattle businesses bought high priced feed (the result of a serious drought in some parts of the country) to sustain their herd until the prices

improved. Many of those who made this decision also increased the losses to their cattle businesses when the border did not re-open promptly.

[51] HMQ agrees that in some cases, the fact that each and every class member suffered at least some loss or injury may be determined on a class-wide basis and suggests that an obvious example would be a common disaster such as a plane crash. BSE was a common disaster for cattle farmers. Immediately following May 20, 2003, the livestock of all cattle farmers was worth significantly less. Cattle and calf receipts were cut in half. Foreign sales were eliminated for all. The plaintiff produced evidence to show that when the borders closed, all farmers were forced to sell their cattle at depressed prices and all suffered damage from BSE. Professor Klein's example illustrates this. Individual circumstances will determine how extensive the losses were, but I believe that the question of causation could be dealt with in respect of the class as a whole. Although it is not necessary for certification to show that all class members suffered harm, it is my view that the plaintiff satisfied any evidentiary burden to show that there is some basis in fact to believe that all cattle farmers suffered harm from BSE, making the proposed question a common issue.

[52] In *Chadha v. Bayer Inc.*, [2003] O.J. No. 27 (C.A.), on which HMQ relies, certification was denied because the plaintiff had adduced *no* evidence that the result of the defendant's allegedly illegal acts were passed through to the consumers who made up the class. In *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), leave to appeal to the S.C.C. dismissed, [2007] S.C.C.A. No. 346, a class proceeding was found appropriate where a finding on the common issue would establish some liability to all class members. In that case, all were at risk of being harmed and thus beneficiaries of declarative and injunctive relief, but only some class members had entitlement to a monetary remedy. Here, there is potential liability to all class members for damage if the plaintiff can establish the elements of duty and breach. On the authority of *Markson*, this is sufficient to trigger the application of s. 24 of the *CPA*. The plaintiff takes issue with Professor Klein's central thesis that the losses suffered were mitigated by the compensation payments received and points to flaws in his analysis, but I agree with the plaintiff that his analysis shows that damage can potentially be assessed on an aggregate basis.

[53] If the common issue relating to negligence were to be determined in the plaintiff's favour, the trial court will have found that the defendant caused or contributed to the finding of BSE in the index cow. If my analysis is correct, liability will be established for the class. This presents no unfairness to the defendant who may dispute liability when it delivers a Statement of Defence. The Crown may of course rely on Professor Klein's opinion as to mitigation of losses, but this raises an issue to be tried and not one to be resolved on this motion. The resolution of either common issue 1 or 2 in the defendant's favour will terminate the proceeding for all class members. Their resolution in the plaintiff's favour will advance the litigation for all class members to a damages assessment as proposed in common issues 4 and 5.

Common Issues 3, 4 and 5

[54] Common issue 3 was not commented on by the defendant and is acceptable for now. The Crown indicated on the hearing of the Ridley Settlement Motion that it does not intend to cross-claim against Ridley in which case, this issue may disappear. Issues 4 and 5 raise common issues as to the method of assessing damages. Aggregate damages have been included as a common issue in economic loss claims: *Markson*; *Cassano v. Toronto Dominion Bank*, [2007] O.J. No. 4406 (C.A.), leave to appeal to the S.C.C. dismissed, [2008] S.C.C.A. No. 15, as well as in cases involving personal injury claims in negligence such as *Cloud* and *Tiboni*. In *Tiboni*, Cullity J. expressed the view at para. 94 that while "it may seem unlikely that general compensatory damages for physical injury could be assessed on an aggregate basis, the position might be different in respect of claims for disgorgement and pecuniary losses". This is a claim for pecuniary losses. I am satisfied that this is a case where there is a reasonable likelihood that the pre-conditions for an aggregate assessment could be satisfied and, while not strictly necessary, should be included among the issues to be tried. It is for the common issues trial judge to assess whether and in what manner an aggregate damages award is to be made or whether an individual damages assessment protocol is fairer and preferable.

Section 5(1)(d) – preferable procedure

[55] In *Hollick*, Chief Justice McLachlin, said that the *CPA* is to be construed generously and directed lower courts to avoid taking an overly restrictive approach to its interpretation at the

certification stage. The court found that the preferability requirement can be met even where there are substantial individual issues. At least since the 2004 decision of the Ontario Court of Appeal in *Cloud*, it has been recognized that this is a qualitative and not quantitative inquiry and that it is essential to assess the importance of the common issues in relation to the claim as a whole. The *Hollick* principles were summarized by Rosenberg J.A. in *Markson* in this way at para. 69:

- a) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
- b) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
- c) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[56] HMQ argues that there is too much variation in the individual circumstances of putative class members to meaningfully or fairly assess damages on a class wide-basis and that the individual issues of loss and causation that will remain after resolution of the common issues will dwarf the common issues. I do not agree. The common issues are fundamental to this action. A decision on common issue 1 would potentially terminate the litigation in favour of the defendant. As counsel for the plaintiff said, it is the 'sword of Damocles' hanging over the head of class members. A decision on common issue 2 is the heart of this litigation.

[57] Even on the Crown's view of this case, the nature of the legal duties owed to class members, and whether those duties were breached, are of primary importance in the action as framed. For any class member to recover, they must first succeed on this issue. A single trial on this issue would make it unnecessary to adduce evidence more than once of the Crown's conduct in relation to the finding of BSE in Mr. McCrea's cow. As in *Cloud*, the resolution of the debate about the essential legal duties on which the claim is founded (a debate that made its way to the Supreme Court of Canada) and whether these duties were breached, would significantly advance

the action to the point where, on my view of the case, only an assessment of damages would remain.

[58] I am not persuaded that the individual issues will overwhelm this proceeding to make it unsuitable for certification. That the assessment of individual damage from BSE may be more difficult because losses are variable and other factors may have contributed to the losses of class members is not a compelling reason. Idiosyncratic causation and damages issues did not prevent certification in *Bywater*, *Cloud*, *Tiboni*, or in other negligence cases, where disparate harm to class members required individual assessments of both causation and damage. Moreover, I believe that there is the prospect in this case for aggregate assessment. If damages can be determined in whole, or part, on an aggregate basis, the Crown would only need to adduce evidence once that the losses to the class were mitigated by the compensation payments received. There may never need to be individual damage assessments if the defendant succeeds on this issue.

[59] While pursuant to s. 25 of the *CPA* it is for the trial judge to determine the procedures that are to be followed, I must be satisfied that there is a realistic possibility that acceptable procedures can be found. The plaintiff produced evidence from Kerry Eaton, the Vice-President of Crawford Class Action Services, which has successfully administered some of the largest and most complex class action settlements in Canada. He proposes that damages can be assessed in the aggregate by a payout that is calculated based upon a dollar value per head of cattle owned by each individual class member as at May 20, 2003 or by a more complex system akin to the CAIS Program to assess individual damages. The federal government has used both methods to make payments to cattle farmers. Mr. Eaton prepared an Assessment of Damages Plan and provided evidence that the CAIS Program claim form and assessment protocol could be adapted to a fair, workable and cost-effective loss of individual income assessment. Alternatively, an aggregate assessment calculation could be done utilizing the farm cash receipts reports for cattle from Statistics Canada and applying an algorithm developed by an agricultural economist.

[60] Mr. Eaton's proposed individual damages assessment is necessarily broad and preliminary, but I am satisfied that it is a starting point that will permit the trial judge to fashion manageable procedures for resolving the individual issues, given the extensive powers and

discretion conferred by s. 25 of the *CPA*. At this stage, I am not prepared to conclude that individual damage assessment cannot be achieved as the plaintiff has shown that there is some basis in fact to believe that it can. If the trial judge concludes that compensatory damages can be reasonably determined on an individual basis, the defendant will have ample opportunity to participate in the formulation of a fair procedure for the determination of individual claims.

[61] If the trial judge is satisfied that the requirements of s. 24 are met, there is the potential for an aggregate assessment of damages using the method proposed by Mr. Eaton in its present or an amended form. Professor Klein's analysis also shows that aggregate assessment is possible. It is true, as the Crown points out, that Mr. Eaton's proposed aggregate assessment approach would take no account of individual circumstances and "there will be some winners and some losers," but this is contemplated by s. 24(2) and (3) of the *CPA* and was approved in *Markson*. It is also no objection that the plaintiff has not yet produced evidence from an expert that an algorithm can be developed: *Lee Valley Tools Limited v. Canada Post Corporation*, [2007] O.J. No. 4942 (S.C.J.) at paras. 32-35.

[62] The *CPA* provides a procedural mechanism in s. 26 to require the defendant to distribute amounts awarded under either s. 24 or s. 25 directly to class members and in making an order under this section can take into account the fact that the amount of monetary relief to which a class member is entitled can be determined from the records of the defendant: *Cassano* at para. 67. The government of Canada has such records.

[63] The only alternative to a class action proposed by the defendant is that class members avail themselves of the provincial and federal compensation programs that are already in place. This will not provide class members with the remedies they seek. Those class members who did not apply to CAIS have no means of doing so retroactively. Reimbursement through CAIS is not full compensation. Mr. Bonnett's circumstances illustrate this. He (or more accurately, the Receiver) received payments through CAIS and other subsidy programs in 2003 of 2.8 million dollars on losses of 12.8 million dollars as calculated under the CAIS Program. The CAIS Program and other government programs compensate past losses and class members would receive no compensation for future losses attributable to BSE, although there is evidence that before the BSE event, farm cash receipts from the sale of cattle were increasing annually.

Importantly, the plaintiff asserts that the CAIS Program is an insurance program and not a compensation program and contests Professor Klein's inclusion of these payments in his analysis.

[64] In my view, the direction from the Ontario Court of Appeal since *Cloud*, and in particular in the recent cases of *Markson* and *Cassano*, is that the court should strive to find ways to use the powerful tools of the *CPA* to meet the preferability requirement. Even on the Crown's view of this case, which I do not share, the determination of negligent conduct in this action at a trial estimated to be between eight and twelve weeks will achieve considerable judicial economy. The Crown does not allege that cattle farmers will bring individual actions and no class member has the resources to prosecute this action individually against the federal government. The access to justice objective is clearly met.

[65] With respect to the third objective of class proceedings – behaviour modification – the defendant submits that the Crown is not subject to deterrence. The plaintiff has pleaded that the federal government knew that there were cattle in the monitoring program from herds infected with BSE, but failed to warn cattle farmers of this or take reasonable steps to avoid disease in the Canadian herd. On this point, I adopt the following comments of Cullity J. in *Taylor* at para. 83:

... To the extent that it is suggested ... that behavioural modification will not be served by successful class proceedings against government regulators, such as Health Canada, no authority was cited for that submission. I see no reason why it should be assumed that governmental bodies, their officials and employees are impervious to judicial findings, and damages awards, for negligent conduct relating to the manner in which they perform their public responsibilities and, in that respect, are to be distinguished from profit-making entities.

[66] BSE was a catastrophic event for Canadian cattle farmers. The defendant has remedies if its dire forecast of unmanageability is borne out, but refusing certification denies class members any opportunity to pursue claims for their losses. The assessment of individual damages is not an easy issue and the aggregate assessment plan needs work, but at this point, I consider that the ghostly spectre of unmanageability underlying the arguments presented against certification is unconvincing. As with most ghosts, it will either vanish in the daylight of case management, the direction of the trial judge, or agreement of the parties or it will return in the night to haunt this

proceeding, in which case the defendant may move under section 10 of the *CPA* for decertification: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.) at para. 70.

Section 5(1)(e) – a representative plaintiff with a workable litigation plan

[67] The defendant's criticisms of the plaintiff's litigation plan essentially repeat the same arguments relating to the individual nature of causation. The litigation plan may need work, but it is workable. It is to be reviewed again at a case conference once pleadings are complete. Mr. Sauer is an appropriate representative plaintiff and has no interest in conflict with class members.

[68] The defendant argues that certifying this proceeding will conflict with and harm the long-term economic interest of the beef and cattle industry because it will lend unwarranted credence to the arguments of individuals and groups such as R-CALF (a lobby group representing the interests of the U.S. cattle industry) who have lobbied and commenced legal action aimed at preventing the U.S. border being re-opened to Canadian cattle and beef products. This may be a difficult political issue, but it is not a reason to deny certification.

[69] I find that the plaintiff has satisfied the requirements for certification against HMQ and there will be an order certifying the proceeding with Bill Sauer as representative plaintiff. I will review the draft order at a case conference and submissions as to the disposition of costs can be made at that time.

Ridley Certification and Settlement Motion

Certification Requirements for Settlement

[70] Where certification is sought for the purposes of settlement, all the criteria for certification must be met, but may be applied less stringently: *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.* [2004] O.J. No. 908 (S.C.J.) at paras. 14-20; *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16. The manageability aspect of whether class proceedings is the preferred procedure moves from whether the litigation would be manageable to whether the implementation of the settlement is manageable: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at paras. 24-26. Having found that the certification requirements as against

HMQ have been met, it is only necessary to briefly address these requirements as they apply to Ridley.

5(1)(a) - cause of action

[71] There is one primary allegation of negligence against Ridley in this action, namely that Ridley continued to incorporate RMBM into their calf starter rations when they knew of the risk of transmission of BSE. Both the Superior Court and the Court of Appeal for Ontario declined to strike the claim against Ridley when framed as raising a duty of care, but struck the claim when framed as raising a duty to warn. Ridley's application for leave to appeal to the Supreme Court of Canada in respect of the permitted negligence claim has been dismissed. The Statement of Claim discloses a cause of action in negligence and satisfies the first requirement.

5(1)(b) – an identifiable class

[72] Ridley accepts the amended class definition as:

All persons who as at May 20, 2003 were resident in Canada (except the province of Quebec) and farmed cattle including, but not limited to, cow-calf, backgrounder, purebred, veal, feedlot and dairy producers.

In this class definition 'person' means any individual, partnership, corporation, cooperative, communal organization, trust, band farm or other association who as at May 20, 2003 was farming cattle within the meaning of the *Income Tax Act*.

[73] Class members share a common interest in ascertaining whether Ridley was negligent and this provides a rational connection between the class definition and the common issue. The second criterion for certification is met.

5(1)(c) – common issue

[74] The plaintiff proposes with respect to Ridley, the following common issue for determination: "Whether Ridley was negligent and if so, when and how." Ridley concedes that for settlement purposes, the determination of this issue is a substantial ingredient of each class member's claim against Ridley, and is necessary to the resolution of each class member's claim. For reasons already given, this is an acceptable formulation of the common issue.

5(1)(d) – preferable procedure

[75] So long as Ridley remains a defendant, the Court must determine whether the plaintiff has the requisite proximity to Ridley to substantiate a duty of care and whether such duty is overwhelmed by policy considerations. This issue can be approached collectively and its resolution will significantly advance the action and promote the three objectives of the *CPA*.

5(1)(e) – a representative plaintiff with a workable litigation plan

[76] For settlement purposes, Mr. Sauer is a suitable representative plaintiff who has no conflict with other class members and who can fairly and adequately represent the class for settlement purposes. The Notice Plan is acceptable. In my consideration of the settlement agreement, I will address the proposed distribution plan which may require modification. Subject to this, I am satisfied that the requirements of certification for settlement purposes are met.

Settlement Approval

[77] The test for settlement approval in class proceedings is whether the settlement is “fair, reasonable and in the best interests of the class as a whole”: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9, *aff’d* [1998] O.J. No. 3622 (C.A.), leave to appeal dismissed, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 69. These cases have developed a list of factors which are to be used as a guide in deciding this, although some will have greater significance than others. They are:

1. Likelihood of recovery, or likelihood of success.
2. Amount and nature of discovery, evidence or investigation.
3. Settlement terms and conditions.
4. Recommendation and experience of counsel.
5. Future expense and likely duration of litigation and risk.
6. Recommendation of neutral parties, if any.
7. Number of objectors and nature of objections.
8. The presence of good faith, arms’ length bargaining and the absence of collusion.
9. The degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.
10. Information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation.

Terms of the Settlement

[78] The proposed settlement is in the form of an agreement between the representative plaintiffs in the actions and Ridley and is a modified form of 'Mary Carter' agreement. In consideration of the payment of six million dollars and release of claims against it, Ridley will remain in the actions to defend claims against it for contribution and indemnity, or any claim to apportion liability against Ridley on the grounds that HMQ was wholly responsible for the BSE crisis. Under the proposed Settlement Agreement, the plaintiffs will not seek to apportion liability against Ridley and Ridley will not contest the class members' damages claims against HMQ. Whether or not Ridley remains in the action, the settlement funds will be paid and will be used to fund the litigation against HMQ.

[79] Ridley will remain in the action if HMQ, or any party added to the action, advances a claim for contribution or indemnity with respect to class members' losses or damages, or seeks to apportion any negligence, fault, liability, responsibility or wrongdoing against Ridley with respect to those losses or damages to defend these claims. If such claims are not advanced, Ridley will leave the action. Whether or not Ridley remains in the action, Ridley will provide documentary production. The plaintiffs will have access to Ridley's North American employees and Ridley will produce them at its own expense, as required as witnesses at the common issues trial of any of the actions.

[80] Ridley will cap its exposure by paying the settlement amount into a trust fund that will be used to fund disbursements and counsel fees at significantly reduced rates in order to prosecute the actions against HMQ. The fund will be administered through a trust. The Settlor of the trust is the BSE Class Action Association, whose current members are the representative plaintiffs in the actions. The Administrator is Crawford Class Action Services and the Trustee is Royal Trust. After final judgment or settlement, the balance of the remaining capital and income in the trust will be distributed equally to the five Canadian veterinary Colleges. I have been provided with the RBC Dominion Securities Investment Policy Statement and am satisfied that investment returns are likely to offset fees of the Trustee so that the corpus of the trust will remain intact for its intended use.

[81] Settlements of this kind are not *per se* objectionable: *Petty v. Avis Car Inc.*, [1993] O.J. No. 1454 (Gen. Div.); *M. (J.) v. B. (W.)* (2004), 71 O.R. (3d) 171 (C.A.) and there is some precedent for the payment of settlement funds to class counsel and for the payment of class counsel fees where indirect benefits are conferred upon class members: *Currie v. McDonald's Restaurants of Canada Ltd.*, [2006] O.J. No. 813 (S.C.J.), [2007] No. 3622 (S.C.J.); *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *K. Field Resources Ltd. v. Bell Canada International Inc.*, [2005] O.J. No. 3935 (S.C.J.).

[82] I propose to first review the usual factors that are considered in determining the fairness of a settlement and then turn to some concerns I have about the administration of the trust. Justice Wagner considered these same factors and found the proposed agreement met the test for approval. He briefly considered the concerns I will raise, but did not find them to be an obstacle to approval.

Likelihood of Success

[83] The claim against Ridley raises a novel question of law: does Canadian negligence law contemplate a claim against a product manufacturer in respect of pure economic losses suffered by persons who neither purchased nor used the product? On Ridley's Rule 21 motion, the plaintiff conceded that Canadian courts had not yet recognized the duty of care alleged. Winkler J. (as he then was) acknowledged that the claim raised policy considerations that had 'manifest' implications for the law of tort.

[84] The plaintiff's claim against Ridley is based on a single source of infection that links Ridley, the manufacturer of the feed, to the cow born on the McCrea farm. The reports of the CFIA initially supported this theory when it identified Ridley feed as the source of contamination to the McCrea calf. In early 2006, Mr. McCrea disclosed for the first time that in addition to the Calf-Glow product he says he fed to the index cow, he had also purchased another feed product in the spring of 1997 and fed it to cattle on his property. This raised an issue of cross-contamination. Also, it appears that Calf-Glow is manufactured by a different feed company not named as a defendant and Ridley never manufactured this product. There have been eleven other cows diagnosed in Canada with BSE since May 2003 and according to CFIA investigators, many

of these were born after the feed ban. CFIA now says that it can no longer definitively identify which source of exposure infected the index cow. CFIA's change in position presents a real and serious risk that the plaintiff will be unable to establish at trial that the source of contamination originated with a product manufactured by Ridley.

[85] Ridley will plead that the border did not shut in May 2003 because of a concern that the McCrea cow, or its remains, would be imported into the United States, but that the international border closure actions were caused by the infection of the Canadian herd and that the U.S. border would have reopened in whole or in part later in 2003, but for the diagnosis of BSE in a Canadian bred cow diagnosed with BSE in Washington State in December 2003. Ridley intends to vigorously defend the action in light of significant duty, foreseeability, identification, causation, and remoteness issues. The claim against Ridley has been placed in jeopardy by the withdrawal of the CFIA report, the misidentification of Ridley as the manufacturer of Calf-Glow and the identification of Ridley as the sole manufacturer of feed containing RMBM.

Amount and Nature of Discovery, Evidence or Investigation

[86] This agreement was reached before the actions had progressed to the certification stage. Ridley has not delivered a defence and documentary production and examinations for discovery have not been held. This is not a bar to settlement approval so long as a serious and diligent effort has been made to determine the facts and the court has been provided with sufficient evidence to allow it to exercise an independent and objective assessment of the fairness of the proposed settlement: *Dabbs* at para. 15; *Ford v. F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 126.

[87] In this case, lengthy investigations were undertaken by plaintiff class counsel as appears from the roughly two hundred documents comprising the two Requests to Admit served on HMQ in January and June 2006. These documents were gathered through extensive research over time including several Access to Information and Privacy ("ATIP") requests to the federal government. It was through the ATIP process that the plaintiff learned that CFIA investigation in 2003 disclosed that the most likely source of BSE for the infected cow was pre-feed ban calf starter manufactured by Ridley.

[88] As a condition to mediation, Ridley required that it be allowed to explore Mr. McCrea's assertions regarding his feeding practices in 1997. It was through this process that the plaintiff became aware of the difficulties to be confronted in the claim against Ridley. Ridley provided the transcript of Mr. McCrea's cross-examination to the relevant authorities and soon after, CFIA changed its position. I am satisfied that the plaintiff had sufficient information to negotiate a settlement with Ridley and has put sufficient evidence before the court to assess it.

Recommendation of Neutral Parties and Arm's Length Negotiations

[89] There is a strong initial presumption of fairness when the settlement is negotiated at arm's length. Mediation between counsel for Ridley and the plaintiffs in each of the BSE actions took place on December 20 and 21, 2006 before Martin Teplitsky, Q.C., a highly experienced mediator in class actions and other complex disputes. Mr. Teplitsky strongly recommended that the plaintiffs accept Ridley's final offer of six million dollars and it was accepted in principle soon after. However, it took more than a year of ongoing negotiations to finalize the other terms of the agreement. Ridley wanted to be let out of the action completely through a 'Peiringer' style settlement, but the plaintiffs were unwilling to settle in a structure that permitted HMQ to attempt to reduce its liability share by arguing that Ridley caused or contributed to the damage. Ridley ultimately agreed to confer additional benefits upon class members through its potential ongoing participation in the litigation and by providing a causation concession. Ridley has agreed that it will not contest that pre-ban feed was the source of the McCrea cow BSE infection.

Recommendation and Experience of Class Counsel

[90] There are five co-counsel involved in these actions: Cameron Pallett in Toronto, Clint Docken, Q.C. in Calgary, Reynold Robertson, Q.C. of Robertson Stromerg Pedersen LLP in Saskatoon and Regina, Gilles Gareau of Adams Gareau in Montreal and James Woods of Woods LLP in Montreal. Collectively, they have considerable class action experience and unanimously recommend the proposed settlement. There are no objectors.

The Future Expense and Likely Duration of Litigation

[91] The proposed settlement converts Ridley from an opponent into an ally. If Ridley were to be held in the actions without settlement, the litigation will be difficult, expensive and protracted with an uncertain outcome that is fraught with risk. The 2006 CFIA report found a common link to an Edmonton renderer among the first three cases of BSE in Canada, including the index cow. It is expected that Ridley will issue third party claims against it and against the manufacturer of Calf-Glow. The settlement significantly streamlines the litigation into an action that will save years in time and expense in legal fees, expert fees and other disbursements, and will achieve a more timely result for the class members. It minimizes delay and avoids exposure to costs. The plaintiffs accept that Ridley's defences are not trivial.

[92] There is evidence that recovery for class members in the event of a judgment against Ridley would not approach their losses. Mr. Docken's affidavit attaches Ridley's 2007 Annual Report which shows that the shareholders' equity is in an amount that would see cattle farmers receive only a small amount before Ridley would be forced into bankruptcy protection. Mr. Docken deposes that "Ridley has publicly stated and, upon investigation, plaintiffs' counsel are satisfied that, there is little prospect of any of Ridley's insurers responding favourably." I am uncertain why this would be the case, but I accept Mr. Docken's evidence. The settlement focuses the litigation on the party that is capable of providing meaningful compensation to class members and on the narrower issue of the Crown's liability. In my view, this is the most important factor in this case and achieves the most significant benefit for the class.

[93] I turn then to my concerns. The trust document and the administration of the trust did not receive a great deal of attention in counsel's submissions, but the document is annexed as a schedule to the Settlement Agreement and I have reviewed it. The Trustee and Administrator will report regularly and the court will maintain supervision of the administration and operation of the distribution of trust property. Class counsel assured me that the court will maintain its usual role in approving class counsel fees and disbursements paid from the trust, but I have a concern that this is not made clear in the trust document and, as a practical matter, I am uncertain how this is intended to work. If paragraph 2.3 of the Settlement Agreement were to be amended by adding the words, "subject to the direction and approval of the court," this concern could be

alleviated. However, doing so raises another concern that this may place an intolerable burden on the court to review and approve counsel fees and disbursements as the litigation proceeds without the benefit of a complete picture as to the risks undertaken and the success achieved. I appreciate that counsel fees are being paid from the trust at significantly reduced rates, but it appears that disbursements can be paid from the trust in any amount with the agreement of counsel and approval of the Administrator.

[94] I need to be satisfied that the court is not relinquishing its approval role to the Trustee and Administrator and that the contemplated distribution from the trust fund is both manageable and consistent with the court's oversight role. A related issue is the language in the proposed form of notice to class members as to the calculation and fixing of class counsel fees and administration expenses to the date of approval of the Settlement Agreement. I appreciate that I approved similar language in the notice given to class members of this hearing to the effect that the court would be asked to fix these fees and expenses in an amount not to exceed 1.5 million dollars as of the date of approval. It may be that counsel intended to defer this request pending a decision on approval of the Settlement Agreement, but as the notice is annexed as a schedule to the Settlement Agreement, I cannot approve this language until I have been provided with the material that will allow me to determine this.

[95] Although the settlement provides no direct benefits to the class, in light of the factors I have reviewed, I am satisfied that class members will receive indirect benefits so as to make this settlement one that is fair, reasonable and in the best interest of the class as a whole. Subject to the concerns I have raised, which I invite counsel to address at a case conference, I am prepared to provisionally certify this action for the purposes of settlement and provisionally approve the settlement.


LAX J.

Released: September 3, 2008