Indexed as:

Kohl v. Canada (Department of Agriculture)

Between
G. Gordon Kohl, personally and carrying on business under the registered name of Swains Farms/Les Fermes Swains, Applicant,
and
Federal Department of Agriculture, Minister of Agriculture and their delegates, servants or agents, Respondents

[1994] F.C.J. No. 1053

[1994] A.C.F. no 1053

81 F.T.R. 35

28 Admin. L.R. (2d) 38

49 A.C.W.S. (3d) 4

Action No. T-133-94

Federal Court of Canada - Trial Division
Montreal, Quebec

Teitelbaum J.

Heard: May 17, 1994
Judgment: July 8, 1994

(35 pp.)

Administrative law -- Administrative powers -- Discretionary powers -- Fettering of discretion -- Notice exercising discretion -- Whether notice having to match wording of statute -- Review of discretionary powers -- Requirement that discretion be exercised reasonably -- Classification of power or function -- Policy directives -- Destruction of diseased animals.

Application for judicial review. The applicant breeder of highland cattle owned a bull born April 1980 in Britain and exported January 31, 1982. A case of BSE disease was found in 1993 in a beef cow in Alberta which entered Canada in 1987. Contaminated feed used in Britain from January 1, 1982 was the suspected cause. By letter the applicant was informed of the respondent government department's policy decision to destroy all cattle imported from Britain between

1982 and 1990. A Notice of Disposal was sent pursuant to section 48 of the Health of Animals Act requiring the destruction of the bull. It was established that the bull in question was never fed the suspected feed and was in excellent health. An interim injunction restraining the Minister from destroying the bull was granted on an application filed after the policy decision was made. An appeal was dismissed. A second application for judicial review was filed after the notice was received. The applicant argued that the discretion had been fettered, the notice fell outside the jurisdiction of the Act and improper matters had been considered.

HELD: Application allowed. The decision was quashed. Judicial review was available. Even though the decision was called a policy decision, it was a definite decision going beyond a mere guideline and thus subject to judicial review. Discretion left to the Minister under section 48(1) of Act was exercised by the policy directive issued. The Notice of Disposal relied on the earlier decision of the Minister. No improper fettering of the discretion arose, even though the notice was signed by a department veterinarian. The notice was not outside the jurisdiction given under the Act, even though it referred to suspected contact with the contaminated feed or suspected contact with the animal, whereas section 48(1) of the Act spoke only of "suspect" in connection with the suspect animal, not the feed. While the double reference to suspect was not found in the section, it would be too literal an interpretation to find that the wording meant that a notice which did not track the statutory language went beyond the jurisdiction given. No improper considerations were made. The decision to destroy was properly made after the department weighed Canada's obligation to the international community as to the spread of disease. However, considering the history of the herd of origin, the lack of exposure to the suspect feed, the age of animal and date of importation as well as its health and the incubation period of the disease, the risk of being affected was virtually zero. The fact that the bull was in Britain for only two weeks at the beginning of the spread of the disease distinguished this case from similar cases. Therefore, the decision of the Minister as it related to this particular bull was patently unreasonable.

Statutes, Regulations and Rules Cited:

Health of Animals Act, S.C. 1990, c. 21, s. 48.

John Henderson, for the Applicant.
Raymond Piché, for the Respondents.

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1 **TEITELBAUM J.** (Reasons for Order):-- This is an application for judicial review of a decision to dispose by the 31st day of January, 1994 of a highland bull known as Gille Buidhe of Benmore ("the subject bull") taken pursuant to section 48 of the Health of Animals Act (the "Act") S.C. 1990, c. 21 by way of a Notice of Requirement to Dispose of Animals dated January 11, 1994. As will be seen, it is not the decision of January 11, 1994 that I am asked to quash but a "policy decision" of December 14, 1993 wherein it was decided to destroy all cattle imported from the United Kingdom from January 1, 1982 to 1990.

2 The Applicant seeks an Order quashing the decision, a declaration that the subject bull is not an animal contaminated or suspected of being contaminated by the disease Bovine Spongiform Encephalopathy ("BSE"), also known as Mad Cow Disease and a permanent injunction restraining the Minister of Agriculture (the "Minister") from destroying the subject bull.

3 The Applicant relies on the affidavit evidence of the following: G. Gordon Kohl, Dr. Julien Rompré, Mrs. Judy Bowser, Mr. Neil McNaughton, Mr. Andrew Smith, Mr. Michael Gibson, Dr. Roy D. Crawford, Mr. Jy Chiperzak, Dr. D. Phillip Sponenberg, Dr. Richard H. Kimberlin (2 affidavits), Dr. Susan Nelson and various reports found in three volumes of documents which contain certified copies of original documents from the Department of Agriculture, Volumes I, II and III and which documents will be referred to as Vol. I, II and III of the "1612 file". The 1612 refers to

Federal Court Rule 1612 which speaks of the desire of an Applicant to use material that was in the possession of the Respondent. I have attempted to review all of the material filed but will only refer to the material which I believe is most relevant.

4 The Applicant, G. Gordon Kohl, Q.C. (Kohl) swore to two affidavits, one on January 21, 1994 and the second on February 16, 1994. Mr. Kohl's affidavits and attached exhibits can be found at Tabs B and C of Vol. I of the Applicant's Application Record.

5 Mr. Kohl, in his first affidavit, states that he is a breeder of Highland cattle at his farm in Georgeville, Quebec. His farm is commonly known as "Swains Farm". He is the owner of the subject bull (Exhibit "A" to Kohl affidavit of January 21, 1994). According to Exhibit "A", the subject bull was born on April 7, 1980, was bred by Mrs. J. Bowser, "Argaty, Doune, Pertshire Scotland" and became the property of the Applicant on January 10, 1982. The subject bull was imported to Canada on January 31, 1982.

6 On December 22, 1993, Kohl was advised, by telephone, by Dr. Claude Pigeon, District Veterinarian for Sherbrooke, Quebec, of Agriculture Canada, that he was under instructions to destroy the subject bull due to the diagnosis of the disease BSE in a beef cow in Alberta.

7 On December 28, 1993, Kohl received a registered letter from Dr. Pigeon dated December 22, 1993 stating:

> Dear Mr Kohl,
>
> As you may be aware, on December 7, 1993, Bovine Spongiform Encephalopathy (BSE) was diagnosed in a beef cow imported into Alberta from the United Kingdom. The animal (born in 1986) entered Canada in 1987. It was the infected feed supply in the United Kingdom which started an epidemic of the disease there in the 1980's and infected, as a calf, the imported animal.
>
> All cattle imported from the United Kingdom from 1982 until Canada banned their entry in 1990 could potentially have eaten contaminated feed. That is why federal veterinarians have monitored them since 1990 in accordance with recommendations from the Office International des Epizooties. This organization commissions scientific experts to advise on such matters for its 131 member nations.
>
> One or more of the remaining 64 imports is believed to be in your herd. The animals are identified in annex I accompanying this letter. Under the provisions of the Health of Animals Act, Agriculture and Agri-Food Canada will be removing them with compensation as one of a series of additional precautions being taken in response to the diagnosis of BSE.
>
> We are currently making arrangements to remove your animal(s). In the interim it/they represent no threat to your herd or your family. Your herd will not be quarantined. We will advise further as details are unveiled.
>
> We regret the disruption to your breeding program. In the interim we thank you for your understanding and cooperation.

Please refer any questions to the bearer of this notice or to: Dr Gilles A. Rivard (514) 283-8888 ext. 205

Yours sincerely,

"Claude Pigeon"

District Veterinarian
Sherbrooke, Quebec.

(Exhibit B, Kohl affidavit, January 21, 1994)

8 It is important to note from this letter that it was on December 7, 1993 that the BSE infection was first diagnosed in Canada in a beef cow imported from the U.K. This animal was born in 1986 and entered Canada in 1987 and that the disease was caused by an infected feed supply in the U.K. which commenced "in the 1980's".

9 As a result, Dr. Pigeon states that "all cattle imported from the U.K. from 1982 until Canada banned entry in 1990" could potentially have eaten contaminated feed.

10 It would appear obvious from this letter that the concern of the Respondent, as it relates to the subject bull, is that the subject bull may have eaten contaminated food, in the U.K., during the month of January 1982.

11 The Applicant filed an Originating Notice of Motion and an ex parte Notice of Motion for an Interim Injunction on December 30, 1993. An interim injunction was granted, first by Madam Justice McGillis and then continued by Mr. Justice Noël. This matter was appealed by the Respondent. The Court of Appeal dismissed the Respondent's appeal.

12 On January 11, 1994, Kohl was served with a Notice of Requirement to Dispose of Animals (the "notice") signed by a Dr. Réjean Tessier, an inspector, pursuant to section 48(1) of the Health of Animals Act.

13 The present application for judicial review was filed on January 25, 1994.

14 According to counsel for the Applicant, the Applicant felt obliged to file two applications for judicial review, in that, he was not sure which decision was to be attacked, that of December 14, 1993 or that of January 11, 1994.

15 At the hearing before me, it was agreed that the "policy decision" of December 14, 1993 taken by Dr. John Kellar and two associates, is the decision that decided that all cattle imported from the U.K. from January 1, 1982 to the date of the ban in 1990 had to be destroyed is the proper decision to be reviewed. All subsequent "decisions" are procedural.

16 In the case of The Queen v. Gingras, A-73-90, unreported, it was decided that although a decision is called a "policy decision" it can still be a decision and be subject to judicial review.

17 I am satisfied that the "policy decision" taken on December 14, 1993, was not a guideline but a definite decision to destroy the 64 cattle imported into Canada from January 1, 1982 to 1990 and thus is subject to judicial review.

18 In addition to the above mentioned documents received by Kohl, he received, on January 19, 1994, a document entitled "Re: Option to export to the United Kingdom, cattle suspected of having been exposed to BSE". Kohl states that he was unable to comply with the conditions set out in this document (Exhibit "F" to Kohl's affidavit) in that he was given one day to find the necessary funds and to cause the animal to be exported.

19 The subject bull was imported by Mr. Kohl from its farm of origin in the U.K. It was quarantined in the U.K. and in Canada. The quarantine period in a government station in the U.K. is approximately ten (10) days. After being imported into Canada, the subject bull remained in quarantine until March 2, 1982. After being released by Agriculture Canada, the subject bull was brought directly to the Applicant's farm and has remained there since.

20 Neither the subject bull nor any other cattle on the Applicant's farm has ever been fed or exposed to any ruminant derived protein feed suspected with being associated with BSE. Furthermore, the subject bull has received an annual checkup by a qualified veterinarian, the last physical examination in October 1993. All these examinations revealed that the bull was in excellent health. Routine examinations by Dr. Pigeon of Agriculture Canada since 1990 up to October 1993 also found the subject bull to be in excellent health.

21 Mr. Kohl states that he has never witnessed any of the symptoms of BSE in the subject bull. Also, he stresses that the Highland breed of cattle is unique, it is rustic, living comfortably out of doors, year round, and is disease resistant to a remarkable degree. He states that the Highland breed is included in the watch lists of great livestock conservancies of the world. The subject bull is recognized as one of the most outstanding of the Highland breed in existence today. His genetic value would be lost if he was destroyed, as recent attempts to draw semen from the bull were unsuccessful for other medical reasons.

22 As I have stated, on January 19, 1994, Agriculture Canada forwarded a Notice to Mr. Kohl informing him that as a result of requests by several owners of cattle subject to the December 14, 1993 policy decision to destroy their animals and who were concerned of the genetic merit of their animals, Agriculture Canada had obtained tentative Agreement from the U.K. to accept the return of the subject bull (Exhibit "F", Kohl affidavit). Mr. Kohl, to the present date, and for his own personal reasons, has refused to return the subject bull to the U.K. Therefore, I conclude from this, that Mr. Kohl may have other reasons for not wanting the bull destroyed. I am satisfied that it is not only to save the genetic line of his bull. Surely, if the bull is so genetically unique, Kohl would want to ensure that the bull would not be destroyed and he would have agreed to return the bull to the U.K.

23 I give little weight to the fact that the subject bull is genetically unique in determining the issue to quash or let stand the Minister's December 14, 1993 decision.

24 Dr. Julien Rompré, a veterinarian of Sherbrooke, Que. confirms what the Applicant had stated as it relates to the examinations by him of the subject bull. Dr. Rompré states that he is the veterinarian who looks after the subject bull and that

> Le taureau, GILLE BUIDHE OF BENMORE, est examiné annuellement depuis 11 ans (le dernier examen était en octobre, 1993), et a toujours été cliniquement en très bonne santé; Le taux de fertilité du taureau en question a toujours été très élevé; (Tab D, Vol. I, Applicant's Record)

25 Mrs. Judy Bowser states in her affidavit (Tab E, Vol. I, Applicant's Record) that she is the breeder of the subject bull; he as well as his mother were born at her farm at Auchlyne, Killin, Pertshire, Scotland; his date of birth is April 7, 1980. She states that the subject bull remained on her farm until his departure for Canada in 1982. She goes on to state, in paragraphs 5, 6 and 7 of her affidavit:

> 5. No foodstuffs linked to the cause of Bovine Spongiform Encephalopathy, that is, feed containing ruminant-derived protein, have ever been used on the farm;
> 6. Neither the said bull's herd of origin, the mother of the said bull, nor the said bull were ever fed or exposed to any feed containing ruminant-derived protein;
> 7. There has never been a case of Bovine Spongiform Encephalopathy, either suspected or confirmed, in the said bull's herd of origin (including the mother of the said bull), or otherwise, at my farm;

26 I have not been given any evidence that the statements of Judy Bowser are incorrect. It has been stated, (Tab 8, Respondent's Book of Authorities) by the Department of Agriculture of the U.K. that they will not and cannot certify that any of the cattle, which would include that of the subject bull, had not eaten any of the contaminated food. This is understandable but does not take anything away from the statement made by Judy Bowser.

27 As will be seen, if the subject bull did have an opportunity to have been fed or has eaten any of the contaminated food, it would be for a very short period of time.

28 In order to corroborate what Mrs. Judy Bowser states, the Applicant has filed the affidavit of Neil McNaughton who was the farm manager at the farm of Mrs. Bowser from November 1981 through to the time of the subject bull's departure for Canada. He confirms that he was responsible for the management of the livestock and for the feed used on the farm. No ruminant derived protein feed was ever kept or used on the farm. He states the cattle were fed hay, straw, silage mash or porridge oats made from hard grains, maize, beet pulp, corn, oats and barley mixed with water. The subject bull was fed only this mixture and was kept in an individual stall on the premises of the farm.

29 Mr. Andrew Smith, in his affidavit, states that he was Mr. McNaughton's predecessor as farm manager on Mrs. Bowser's farm for a period of twelve (12) years up to November 1981. He states that the cows on the farm were fed home grown hay, straw and silage along with a mixture of leftover grains and barley. The bulls were fed hay and straw as well as a mash made from a beet pulp, brewer's grains, cooked flaked barley and dried maize.

30 Mr. Smith goes on to say that for the first year of his life, the subject bull was given specific treatment which consisted in being reared on his mother and grazed on hill land. Following that year, he was isolated in an area designated for bulls. From that time, he was fed only the mash along with hay and straw as well as occasional pellets of grains and oilseed with added cod liver oil and trace elements and minerals.

31 The Applicant filed the affidavit of Mr. Michael Gibson of Scotland who is a past president and a current member of the Highland Cattle Society; he has been involved in the Society for the last twenty-five (25) years and is a member of the Panel of Judges of the Society. He is the current President of the North of Scotland Breeder's Association and a breeder of the Highland breed of cattle. He states that the prime occurrence of BSE in the U.K. is in the dairy herd. The incidence of BSE in the Highland breed generally is almost zero, it is actually zero for the geographical areas involved in the export trade to Canada. Mr. Gibson's opinion is that the risk of infection of BSE posed to the Highland cattle imported into Canada from the U.K. and, in particular, the subject bull is negligible. He relies on the following facts: there is no case of BSE on a farm engaged in the export trade; the herd of origin of the cattle exported to Canada did not have any cases of BSE; the Highland herd has little contact with the dairy herd in the U.K. ; the rearing of the Highland breed is extensive and it is unlikely that the cattle would have been fed suspect feeds. The Highland cattle in Canada has been there longer than the considered mean incubation period of the disease and in particular, the subject bull "has been in Canada for more than double the mean incubation period".

32 It is interesting to note that Mr. Gibson, who, I assume from a reading of his affidavit is not an expert on BSE, speaks of a "mean incubation period" without mentioning what is to be considered as the "mean incubation period" nor on what basis he determined what the "mean incubation period" is. I also find it difficult to understand Mr. Gibson's statement that the subject bull has been in Canada "for more than double the mean incubation period".

33 It is a fact that the subject bull was imported into Canada on January 31, 1982. Mr. Gibson swore to his affidavit on January 19, 1994, almost twelve (12) years after the subject bull was imported into Canada. Am I now able to say that the "mean incubation period" for the BSE disease is somewhat less than six (6) years because of the fact that Mr. Gibson states that the subject bull has been in Canada "for more than double the mean incubation period".

34 As I have stated, I am satisfied that Mr. Gibson is not an expert with regard to BSE. Furthermore, he does not state upon what evidence he relied to conclude that there exists a "mean incubation period" for BSE. I am also satisfied from a reading of Mr. Gibson's affidavit that he may have a biased viewpoint. His livelihood depends on being able to export

Highland cattle to Canada and, as a result, would have a strong interest in attempting to show that the Highland breed was not fed contaminated feed and that their risk of infection is "negligible".

35 Nevertheless, the evidence of a number of other experts, as will be shown, clearly, and I believe conclusively, shows that the incubation period would be no longer than 10 years.

36 Dr. Roy D. Crawford of Saskatoon, Saskatchewan, is a Professor Emeritus of Animal and Poultry Genetics and the Chairman of Rare Breeds International "a registered international livestock conservation organization dedicated to the conservation of worldwide farm animal genetic resources ... ". He states that the Highland breed of cattle is considered to be a primitive breed which does not require hi-technology rations and therefore would not be susceptible to BSE through feeds.

37 Dr. Crawford also states in his affidavit evidence (Tab "I" Applicant's Record) that the Highland breed has been placed on the watch category, for conservation purposes, by his organization. The subject bull is considered to be a leading sire in the Highland breed; his destruction would entail a devastating loss of genetic material; a consequence which Dr. Crawford states, and one that I totally disagree with, is more far reaching than the insurance of the eradication of BSE in Canada. Obviously, in making this statement, Dr. Crawford did not take into account the many billions of dollars that could be lost to the Canadian cattle industry if Canada's trading partners refused to buy Canadian cattle. Dr. Crawford is also of the belief that the loss of genetic material would be contrary to the Biodiversity Convention ratified by Canada and in effect since the fall of 1993.

38 Mr. Jy Chiperzak of Marmora, Ontario, in his affidavit of January 19, 1994 states he is the founder and current Executive Director of Rare Breeds Conservancy, Canada (Tab "J", Applicant's Record). He states that the Biodiversity Convention requires all signatories, including Canada, to develop a plan and implement measures for the protection of biodiversity including genetic resources, which include farm animals. He is of the opinion that the destruction of the subject bull would have a disastrous effect on the genetic base of the Highland breed.

39 The Applicant filed the affidavit of Dr. D. Phillip Sponenberg, sworn to on January 20, 1994. Dr. Sponenberg states that he is a veterinarian (Doctor of Veterinary Medicine) and that he has a Doctor of Philosophy degree in Veterinary Pathology. His current position (as of January 20, 1994) is Professor of Pathology and Genetics at the Virginia-Maryland Regional College of Veterinary Medicine located at Virginia Tech. He states, in paragraph 4 of his affidavit (Tab "K", Applicant's Record):

> 4. I have professional qualifications to render opinions on the matters stated hereafter;

40 I have no reason to doubt this statement by Dr. Sponenberg. The "matters" mentioned by Dr. Sponenberg are found in paragraphs 5, 6, 8, 9, 10, 11, 12, 13 and 14 of his affidavit.

> 5. The incidence of Bovine Spongiform Encephalopathy, hereinafter referred to as "BSE", in the United States of America, and, indeed, in North America, to this date, has been negligible and extremely limited in nature;
> 6. The major pool of expertise related to the cause and risk associated with BSE can be found in the United Kingdom;
> 8. BSE is a progressive, fatal, nervous system disease of adult domestic cattle, which closely resembles scrapie of sheep, and which was first diagnosed in Britain in 1986;
> 9. It is the considered opinion of experts on BSE, based on epidemiological research, and I share this opinion, that the origin of BSE is from infected feed comprising animal protein; that is, a food-borne exposure to a scrapie-like agent by contamination of concentrate feeds;

10. Epidemiological evidence indicates that there is no transmission of BSE from cattle to cattle, nor maternal transmission of BSE from cows to their offspring, nor transmission of the disease to cows from the semen of bulls;
11. It has been documented in the studies on BSE that the incubation period is from three to eight years following exposure to BSE, that is, to animal protein infected with BSE;
12. In order to evaluate the risk of an animal being affected by BSE, one should consider the history of the herd of origin, exposure to suspect feeds, the age of the animal, and its date of importation into Canada;
13. In my opinion, if a review of a specific case shows that the animal's herd of origin were not exposed to feed infected with the suspect animal protein, the animal in question was not exposed to that type of feed, and the herd of origin has never had a case of suspected or confirmed BSE, then the risk of being affected by or developing BSE is negligible;
14. In addition, in the case of a 13 year 9 month old Highland bull showing no clinical signs of the disease after 12 years in Canada, it is my opinion that there could be no reasonable basis for suspecting that the bull is affected by or will develop BSE.

41 From this evidence, one can conclude that the incidence of BSE in North America is negligible, epidemiological evidence indicates that there is no transmission of BSE from cattle to cattle (horizontal transmission) or from mother to offspring (vertical transmission). One may also conclude that the incubation period of BSE is from three (3) to eight (8) years from exposure. The factors to consider in evaluating risk of infection by BSE are listed as:

1) the history of the herd of origin
2) exposure to suspect feeds
3) the age of the animal
4) the date of importation to Canada

42 Dr. Sponenberg is of the opinion that because there are no signs of BSE in the herd of origin and the herd was not exposed to suspect feed, risk of infection is negligible. He states that, in the case of the subject bull, a thirteen (13) year nine (9) months old Highland bull with no clinical signs of BSE, there could not be a reasonable basis to suspect it of being affected or of developing BSE.

43 Dr. Sponenberg, I assume, because there is nothing to state otherwise, makes the above mentioned statements based on facts given to him. I assume he, himself, did not verify the history of the herd of origin, nor did he obtain from the U.K. Ministry of Agriculture a certification that the subject bull had never been exposed to suspect feeds.

44 Nevertheless, the Court is of the belief that Dr. Sponenberg, because of his qualifications, can be considered an expert or at least a person very knowledgeable as it relates to the BSE disease and his statements must be given considerable weight.

45 Two affidavits were obtained and filed from Dr. Richard H. Kimberlin. After reading Dr. Kimberlin's curriculum vitae and some of his writing, I am prepared to state that he is an expert on the disease known as BSE. I am prepared to give his evidence a great deal of weight. Dr. Kimberlin was not cross-examined by the Respondent.

46 In his affidavit, sworn to on January 21, 1994 (Tab "L", Applicant's Record), he indicates that he has two university degrees, Bsc and PhD, is of the Scrapie and Related Diseases Advisory Service (SARDAS) in Edinburgh, Scotland and is a scientist who has specialized in researching scrapie and related diseases for over thirty-one (31) years and has extensive experience related to BSE.

47 In paragraph 5 of his affidavit, Dr. Kimberlin states his experience as it relates to the BSE disease.

5. I have extensive experience related to the implications of bovine spongiform encephalopathy (hereinafter referred to as "BSE") to animal and human health; in addition to private clients concerned with such implications, particularly in the food and pharmaceutical industries, I have served or do serve (as indicated) in the following official capacities:

1989-1990 Member of the "Consultative Committee on Research in Spongiform Encepha-lopathy" advising the U.K. Ministry of Agriculture, Fisheries and Food, and the Department of Health;

1989 - Advisor on scrapie and BSE to the following committees serving the European Commission, Brussels:
- The Scientific Veterinary Committee
- The Committee for Proprietary Medicinal Products;

1990 - Member of the "Spongiform Encepha-lopathy Advisory Committee" advising the U.K. Ministry of Agriculture, Fisheries and Food, and the Department of Health;

1990 - Member of the Expert Consultation on BSE, Office International des Epizooties (OIE), Paris,
- Rapporteur for the 14th Conference of the OIE, Regional Commission for Europe, Sofia, October 1990,
- Rapporteur for the 60th General Session of OIE, Paris, 1992;

1991 - Consultant to the Food and Agriculture Organization of the United Nations (FAO), Rome;

1991 - Advisor to the World Health Organization (WHO)
- Rapporteur for the WHO Consultation

> on Public Health Issues Related to
> the Human and Animal Spongiform
> Encephalopathies, Geneva, November,
> 1991;

48 Paragraphs 1 to 9 of his January 21, 1994 affidavit contain Dr. Kimberlin's curriculum vitae. Suffice it to say that I am satisfied that he has a great deal of expertise as it relates to the diseases of scrapie and BSE.

49 Dr. Kimberlin states that BSE is a progressive, fatal, neurological disease of cattle, caused by a scrapie-like infectious agent, first recognized in the U.K. in 1986. Infected animal protein feed is recognized to be at the origin of BSE. That is, "the vehicle of infection was meat and bone meal that had been incorporated into concentrated foodstuffs as a protein rich supplement". The U.K. government banned the use of such supplements in July 1988.

50 Epidemiological research shows that the contamination of meat and bone meal sufficient to initiate the BSE epidemic began around the winter of 1981-82. This date of the commencement of the use of contaminated food appears to have been accepted by the Government of Canada as the policy decision of December 14, 1993 only applies to cattle imported from the U.K. as of January 1, 1982.

51 The incidence of BSE has been far greater in the dairy herds than in the beef herds as a result of different feeding practices. The incidence of BSE is greater in the South of England and lower Scotland. The total number of confirmed BSE cases in the U.K. now exceeds 115,000; 9 of them were in purebred Highland cattle.

52 Dr. Kimberlin states that there is no epidemiological evidence to indicate a transmission of BSE either horizontally or vertically. Furthermore, there is no evidence to suggest the disease can be transmitted through semen, in fact, the importation of semen from the U.K. into Canada is still allowed even though the importation of cattle was banned in 1990.

53 The modal incubation period for BSE in cattle is four (4) to five (5) years; the incidence of the disease decreases substantially as age increases. The probability of a case of BSE occurring after an incubation period of twelve (12) years is extremely low. Also, in the general case of a purebred made from a slowly maturing beef herd such as the Highland breed, the risk of disease would be close to zero if ruminant-derived protein was excluded from its diet and that of its mother.

54 Dr. Kimberlin lists the following factors in assessing the level of risk of BSE:

> 20. In assessing the specific level of risk of BSE associated with a given situation, one must consider a number of factors, including: (1) the nature of the originating herd (i.e: breed, location, etc.), (2) the incidence of BSE in the originating herd, (3) the BSE status of the mother of the animal in question, (4) the exposure of the animal in question, the mother of that animal, and the originating herd to feed suspected of contamination, (5) the age of the animal in question, (6) the date of export from the United Kingdom to Canada and (7) the date of the animal at that time;

55 In light of the situation of the subject bull, Dr. Kimberlin states that the risk of the animal developing BSE is virtually zero and there is no reasonable basis to suspect otherwise. In addition, Dr. Kimberlin states that if, as a precautionary measure, the subject bull was confined to his home farm in Canada with adequate monitoring so that, at the end of its natural life, it would be incinerated and its remains not used for feed or for any other purposes, then there could be no reasonable basis to indicate that such an animal could pose any risk with respect to BSE.

56 In response to Dr. Kellar's affidavit (Dr. Kellar acting for and on behalf of the Canadian Minister of Agriculture and is one of three persons who made the policy decision of December 14, 1993), Dr. Kimberlin further states (Tab "A"

Supplementary Applicant's Record) that there is no evidence to support the claim that vitamins and minerals including vitamin/mineral blocks and salt licks could have contained contaminated meat and bone meal and thereby be an effective vehicle for the BSE agent. The oral ingestion of the BSE disease agent is a comparatively inefficient means of transmission and therefore the probability of infection of an animal at the beginning of an epidemic would depend on the period of potential exposure being many months rather than a few days.

57 Ms. Susan Nelson, a veterinarian of the United States of America (U.S.A.) states that she has verified the U.S. protocol with respect to cattle imported from the U.K. specifically as a result of the recent reporting of one case of BSE in Canada. She states that the U.S. placed a moratorium on the importation of cattle from the U.K. for approximately three (3) years. The location of cattle imported to the U.S. from the U.K. prior to the moratorium is monitored and the health of the animals is regularly checked. The U.S. has not taken any action to eradicate the imported cattle.

58 In addition to the affidavit evidence of the above mentioned persons, the Applicant also relied on documents given to him by the Respondent. There are three volumes of documents and are, for the purposes of this case, referred to as the "1612 file". In addition, the Applicant relies on part of a cross-examination of Dr. Kellar on the evidence Dr. Kellar provided in an affidavit originally sworn on February 22, 1994 and re-sworn on March 1, 1994 and is to be found at Tab "S" of Vol. II of the Applicant's Application Record. Dr. Kellar's cross-examination is found at pages 73 to 206 of Vol. II of the Applicant's Application Record.

59 The affidavit of Dr. John A. Kellar (Kellar) was prepared, as a reply to the Applicant's motion now before me. Dr. Kellar is a public servant, is currently the Associate Director, Disease Control Section, Animal Health Division, Food Production and Inspection Branch of the Department of Agriculture and Agri-Food Canada. Although I accept Dr. Kellar to be well learned with regard to BSE, I do not give his evidence the same weight as that of Dr. Sponenberg or of that of Dr. Kimberlin, both of whom I consider experts in the field of BSE.

60 Agriculture Canada's Food Production and Inspection Branch is headed by Dr. A. Olson, the Assistant Deputy Minister. Dr. N. Willis, Director General of the Animal and Plant Health Directorate, is the Chief Veterinary Officer in charge of the establishment of policies pursuant to the Health of Animals Act; the National Animal Health Program aims to prevent, control and eradicate animal diseases with economic and human health consequences.

61 Dr. Kellar's curriculum vitae can be found in paragraphs 2, 3, 4, 5, 6 and 7 of his affidavit. Since 1988, Dr. Kellar has monitored the development of BSE in the U.K. Canada's policy, with respect to animal health and its purposes are detailed in his affidavit evidence. Dr. Kellar compares scrapie and BSE and their relative histories. The origins of BSE are linked to contaminated ruminant protein; the disease was reported to have started in the winter of 1981-82.

62 The effect of BSE on the U.K. cattle industry is related by Dr. Kellar in his affidavit evidence. The development and spread of the disease outside the U.K. led Agriculture Canada to ban all importation of cattle, semen and embryos as of February 9, 1990. In the summer of 1990, Canada resumed its importation of semen and embryos from the U.K.

63 Recent developments in Agriculture Canada's policy are summarized by Mr. Justice Noël in Jerram v. Canada, T-132-94, March 18, 1994 (F.C.T.D.) [Please see [1994] F.C.J. No. 348] at pages 6, 7 and 8:

> As of September 1993, Dr. Kellar and his colleagues from the Animal Health Division requested additional information from the U.K. This information led them to believe that the cattle imported from the U.K. between 1982 and 1990 posed a greater risk than initially thought. Dr. Kellar states that based on his epidemiological knowledge and experience, he was convinced that the distribution of infection with BSE was not fully reflected by the number of animals showing clinical symptoms of BSE. He further points out that the post mortem analysis of animals did not disclose the presence of BSE in cattle before the onset of overt clinical symptoms. In the absence of a method to diagnose BSE prior to the onset of the disease symptoms, Dr. Kellar assumed that the rate of actual

infection may be many times higher than which had been evidenced by those animals which actually exhibited the symptoms of BSE.

In November 1993, a beef cow imported from Great Britain in January 1987 and residing in Alberta was euthanized after showing symptoms of BSE. These symptoms were confirmed. Further to this occurrence, Dr. Kellar and his colleagues set out to develop appropriate measures to deal with BSE. They outlined the following control measures by 8 December 1993:

(a) The carcass of the diseased cow had been disposed of by incineration.
(b) The herd in which the diseased cow was residing had been quarantined.
(c) The five cattle remaining in Canada which originated from the same herd in the United Kingdom as the diseased cow and which were imported with that cow in the same shipment were to be destroyed and incinerated.
(d) All remaining cattle imported from the U.K. since 1982 were to be monitored further.

On 10 December 1993, Agriculture Canada contacted its trading partners to explain the measures taken. The Animal Health Division further held consultations between 8 December 1993 and 16 December 1993 to address the issue of the remaining cattle imported from the U.K. between 1982 and 1990. Scientists from Agriculture Canada, Canada's key trading partners including the United States, New Zealand, Mexico, Australia and Japan, as well as the animal health authorities in the U.K. were contacted.

The inquiries in the U.K. revealed the following information: prior to June 1988 cases of suspected or confirmed BSE were not required to be reported to animal health authorities; the reporting of such cases since 1988 is purely on a voluntary basis; prior to July 1988 there were no controls on the movement of contaminated feedstuffs; the animal health authorities found that declarations by owners to the effect that contaminated feedstuffs were not consumed by their animals proved inaccurate for a variety of reasons: improper labelling, the lack of awareness of minor ingredients such as vitamin/mineral supplements, memory lapses. Furthermore, ongoing research seemed to indicate a possibility that BSE was a disease transmissible between cattle.

On or about 14 December 1993 (sic), Dr. Kellar and his colleagues established policy guidelines which provided for, inter alia, the destruction of all cattle imported from the U.K. since 1982. Dr. Z. Petran, an inspector under the Health of Animals Act, and the Animal Health Program Manager of the Alberta Regional Office was advised of these policy decisions on 17 December 1993. On 20 December 1993, the managers of the regional offices, including Dr. Petran, were provided with a form letter for distribution to the owners of U.K. imported cattle. This letter notified the owners of the pending implementation of the control measures to eliminate BSE. All of the cattle in question were to be exterminated by 31 January 1994.

Dr. Kellar states that he and his colleagues at the Animal Health Division

> concluded prior to 16 December 1993, based on the information obtained that the cattle population imported from the U.K. from 1982 onwards formed a homogeneous group in terms of their suspected exposure to BSE, regardless of their individual circumstances.

64 On December 17, 1993, Dr. Kellar spoke with Dr. W. Anderson, Animal Health Program Manager of the Quebec Regional Office and his counterparts from the five other Regional Offices of the Food Production and Inspection Branch of Agriculture Canada. He advised them of the policy decision to destroy the remaining cattle imported from the U.K. since 1982. In turn, it was decided that the affected owners would be advised as quickly as possible.

65 A form letter, prepared by Dr. Kellar, advising the affected owners was distributed on December 20, 1993 to Managers of the regional offices. This letter was to be customized for each owner, forwarded to the local field staff and delivered to the affected owners. Dr. Pigeon of the Sherbrooke District Office of Agriculture Canada was informed of the policy decision to destroy the cattle in question on December 20, 1993. Dr. Pigeon then informed the Applicant on December 22, 1993.

66 On December 31, 1993, Dr. Kellar contacted the Animal Health Program Managers in each Regional Office and January 31, 1994 was set as the uniform date to destroy the animals. Dr. Tessier of the Sherbrooke District Office delivered an order on January 11, 1994 to the Applicant for the disposal of the subject bull by January 31, 1994. The option to dispose of the animals by exporting them to the U.K. was communicated to the affected owners about mid-January.

67 The Respondent's documents reveal that on December 12, 1993, Agriculture Canada made inquiries in the U.K. on the herd or origins in the United Kingdom for cattle imported into Canada between 1982 and 1990. On December 15, 1993, Dr. Taylor of the U.K. Ministry responded to the request for background information on the herds or origin; the subject bull's herd of origin was not listed as having had a case of BSE. Dr. Taylor states in his letter dated December 15, 1993:

> We are conscious of the fact that our ruminant feed ban was not absolutely effective from the first day it was imposed, and some potentially infected material continued to be fed on some farms for a few months at least.
> (...) We have carried out a preliminary search of BSE database.
>
> It may be necessary to send a supplementary report later.

68 This information contained in the database is, therefore, according to Dr. Kellar, not without limitations.

69 Pursuant to the Applicant's contention that his bull is not part of the homogeneous cattle population in the U.K., Dr. Kellar collected information on the subject bull's history. As a result of his inquiries, Dr. Kellar confirmed that there exists a possibility that the subject bull was exposed to BSE. The basis for the conclusion is:

i) The bull was resident in the U.K. from its birth in 1980 until 1982.
ii) The evidence of Mrs. Bowser stating that the subject bull was not fed any ruminant protein feed cannot be verified. Furthermore, her evidence does not preclude the possibility that the subject bull was exposed to contaminated feed materials, in the form of other minor ingredients such as minerals and vitamins.
iii) It is not possible to ascertain what feedstuff were fed to the subject bull during quarantine.
iv) Findings indicate that Highland cattle can pose just as high a risk of being exposed and developing BSE as another breed.

70 Dr. Kellar further outlined the importance of a BSE-free status for Canada, the trade implications and the consequences of the spread of BSE. He asserts that the actions of Agriculture Canada and its assurances to trading partners have averted a number of negative trade restrictions after the discovery of BSE in an Alberta cow.

71 Before I discuss the above-mentioned submissions of the Applicant and of the Respondent, I would discuss a judgment of Mr. Justice Cullen in the case of David Hunt Farms Ltd. and Minister of Agriculture, T-153-94, March 10, 1994 (F.C.T.D.) [Please see [1994] F.C.J. No. 314] (Hunt) confirmed by the Federal Court of Appeal on May 12, 1994, A-120-94 [Please see [1994] F.C.J. No. 677]. This case is on all fours with the case before me except for certain specific facts relating to the subject bull of the Applicant. The Hunt judgment is important for the legal principles enunciated.

72 In the Hunt case, the Applicant imported two cows from the U.K. in 1988. These cattle were purchased from a C.L. Bembridge who maintains a herd of Lincoln Red cattle at Anwick House in London. C.L. Bembridge has never had a confirmed case of BSE within its herd. The cattle purchased by Hunt have not manifested any signs of BSE to date (at least to March 10, 1994) nor has any other animal within Hunt's herd (pages 3 and 4).

73 As in the case before me, on January 11, 1994, the Minister of Agriculture delivered a Notice of Requirement to Dispose of Animals purporting to compel Hunt to deliver the cattle for destruction on January 31, 1994. In the case of Hunt, the notice was signed by a Dr. Tattersall. Dr. Tattersall states, in his letter to Hunt:

> (the)...animal(s) is/are suspected of
>
> being affected or contaminated by the disease Bovine Spongiform Encephalopathy, or
>
> having been in contact with or in close proximity to another animal or thing that was or is suspected of having been affected or contaminated by the disease Bovine Spongiform Encephalopathy at the time of being in contact or close proximity,

74 The Notice of Requirement sent to Hunt is, for all intents and purposes, the same as was sent to Kohl on January 11, 1994 except that the "Notice" sent to Kohl was signed by Dr. Réjean Tessier.

75 In the Hunt case, the following three issues were submitted by Hunt for decision:

> The Applicant submits that there are three issues to be decided in this case:
>
> 1. Did Dr. Tattersall have the jurisdiction under section 48(1) of the Act to decide to dispose of the cattle?
> 2. Did Dr. Tattersall fail to properly exercise his discretion because he was fettered by Agriculture Canada's "commitment" to foreign countries to destroy the cattle?
> 3. Did Dr. Tattersall fail, as obliged under s. 18.1 of the FCA and the Rule of Law, to take into account relevant circumstances in reaching his decision, or did he take into account irrelevant matters thus poisoning his decision?

76 In the case at bar, I believe I can summarize Applicant's submissions as follows:

> A. The decision to destroy the bull misapplied the provisions of the Health of Animals Act, and was made without or in excess of jurisdiction;
> B. The decision was based on improper considerations and its international obligations;
> C. The decision failed to consider relevant evidence;

D. The discretion in making the decision was fettered by an earlier policy decision.

77 In looking at the issues in both the Hunt case and the case at bar, I am satisfied that one can conclude that the issues are similar if not identical.

78 As I have stated, the Federal Court of Appeal, on May 12, 1994, confirmed the judgment of Mr. Justice Cullen. The Court of Appeal, in a judgment rendered from the Bench by Mr. Justice Mahoney, states, in part:

> We are in agreement with the decision of the learned trial judge and his reasons therefore and find it necessary to deal with only one matter raised in argument.
>
> The application to the trial judge had been instituted by an Originating Notice of Motion. There were no pleadings nor agreed facts. The matter nevertheless has proceeded on the premise, accepted by both parties, that the decision had been made by Dr. John B. Tattersall, an officer authorized to make it by section 33 of the Act. In issue was whether his discretion had been fettered.
>
> A number of countries had either banned or threatened to ban imports of live ruminants and meat from Canada as a result of the presence in Canada of cattle imported from the United Kingdom where over 112,000 cases of Bovine Spongiform Encephalopathy, commonly known as Mad Cow Disease, have been found. As a result a decision had been taken by Agriculture Canada to destroy all cattle imported from the U.K. before 1990, when imports were banned.
>
> The learned trial judge disposed of the issue of fettered discretion in the following terms:
>
> > What is crucial in deciding this issue, in my opinion, is to decide who is the decision maker as regards these cattle. Counsel for the applicant urges that it was Dr. Tattersall, but that in so doing he was practically fettered in the exercise of his discretion by a policy decision of Agriculture Canada. Counsel for the respondent disputes this and submits that Dr. Tattersall was not fettered and points to his evidence in paragraphs 22 to 24 of his affidavit as support for the proposition that Dr. Tattersall considered all the relevant factors, including representations by Mrs. Hunt in reaching his decision.
> >
> > Based on my above review of the evidence, I conclude that Dr. Tattersall had no decision to make when he purported to sign the Notice of Disposal on January 10, 1994. While I acknowledge that the policy bureau and Dr. Tattersall are within different branches of Agriculture Canada and not within the same hierarchy, it is clear to me that Agriculture Canada, on the basis of a decision made at least as early as December 17, 1993, committed to killing all the cattle imported from the U.K. prior to 1990. This is the decision which affects the applicant's cattle, not the actions taken by Dr. Tattersall, and his representative, Dr. Utpott, who were simply doing what was required to be done by the District Veterinarian to implement the decision. The nature of Dr. Tattersall's role in the

> decision with respect to the cattle is evinced by the memo to the District Veterinarians of January 4, 1994, found at page 1460, Part 2, Volume 2 of the department material. In referring to the Notice to Dispose to be provided to the vets, the memo states:
>
> > NOTE: If you do not believe that these animals are "suspected of being contaminated" with this disease do not sign this Notice" but inform your supervisor. The document will be endorsed in these cases regionally or in headquarters. We are informed that this may be a necessary precaution to prevent misunderstandings if the case(s) proceeds to litigation.
> >
> > (bold in original, emphasis added)
>
> This contingency plan devised by the department shows me that Dr. Tattersall's role was only to implement the decision. Even in the event that he did not feel that these cattle should be destroyed, and for the record he states that he agrees with the decision, his opinion was essentially meaningless in the plan to deal with the U.K. imports and respond to the BSE threat. These cattle were slated for destruction regardless of Dr. Tattersall's conclusion about their condition.
>
> Thus, I have reached the conclusion that Dr. Tattersall was not fettered in the exercise of his discretion because he had no decision left to make. It was already made for him. This is what the department prescribed and I believe what the legislation requires.
>
> As set out above, section 48(1) allows for "the Minister" to make a decision to destroy animals in a case such as this. In section 2, "Minister" is defined as the Minister of Agriculture, and in my opinion, Agriculture Canada (namely the Minister) was the decision maker in this case, and as stated that decision was made long before the Notice to Dispose addressed to the applicant was ever signed.
>
> The conclusion that, as a matter of fact, Dr. Tattersall had no relevant discretion is, in our opinion, unassailable. He could sign and deliver the Notice or refuse to sign and return it for someone else to sign and deliver. We do not question that he deposed to his discretion and its exercise in good faith but, having regard to all the evidence, the trial judge was correct to find he had none.

79 I will now deal with the issues as submitted to me by the Applicant.

A. The discretion in making the decision was fettered by an earlier policy decision

80 As I have stated, the decision under review is not the decision of Dr. Réjean Tessier of January 11, 1994, but the decision (policy decision) of Dr. Kellar of December 14, 1993. As a result, I do not have to decide, as in the Hunt case, whether Dr. Tessier fettered his discretion when he sent the Notice of Requirement on January 11, 1994.

81 As to who made the decision, I can do no better than to quote my brother, Mr. Justice Cullen, in the Hunt case:

> As set out above, section 48(1) allows for "the Minister" to make a decision to destroy animals in a case such as this. In section 2, "Minister" is defined as the Minister of Agriculture, and in my opinion, Agriculture Canada (namely the Minister) was the decision maker in this case, and as stated that decision was made long before the Notice to Dispose addressed to the applicant was ever signed.
>
> Section 48(1) vests the discretion to require the disposal of animals in the Minister, not in a person such as an inspector, or a District Veterinarian such as Dr. Tattersall. That discretion is left to the Minister and the decision can take many forms, including a policy directive such as the one here. Although there is provision in the Health of Animal Regulations, C.R.C., c. 296 ("the Regulations") for a veterinary inspector to make such a decision, the Notice of Disposal in this case clearly relies on the Minister's discretion in section 48(1). Section 5(1)(a) of the Regulations is only relied upon for the temporary quarantine of the applicant's cattle until delivery for destruction (see Notice, Applicant's Application Record, Tab 2,A). The fact that the Notice was signed by Dr. Tattersall cannot change the reality that the decision to destroy the cattle was made by the Minister, on the recommendation and acceptance of the proposed policy developed by Dr. Kellar and his group. Further, in my opinion, the so-called policy directive from Agriculture Canada, or its commitment to foreign trading partners was much more than a mere general policy to be followed in individual cases. As expressed above, it was the decision to be implemented in each case.
>
> However, the Minister's policy, being the decision itself, can have no such fettering effect on the Minister as the decision maker.

82 Therefore, as in the Hunt case, the discretion in making the decision was not fettered.

B. The decision to destroy the bull misapplied the provisions of the Health of Animals Act and was made without or in excess of jurisdiction

83 This issue raises a jurisdictional question in the context of section 48 of the Act. The Notice of Requirement to Dispose of Animals under section 48(1) of the Act dated January 11, 1994 was signed and delivered to the Applicant by Dr. Réjean Tessier; it states that the subject bull is:

> ... suspected of
>
> being affected or contaminated by the disease Bovine Spongiform Encephalopathy, or having been in contact with or in close proximity to another animal or thing that was or is suspected of having been affected or contaminated by the disease Bovine Spongiform Encephalopathy at the time of being in contact or close proximity.

The relevant section of the Act reads as follows:

> 48(1) The Minister may dispose of an animal or thing, or require its owner or any person having the possession, care or control of it to dispose of it, where the animal or thing
>
> (a) is, or is suspected of being, affected or contaminated by a disease or toxic substance;
> (b) has been in contact with or in close proximity to another animal or thing that was, or is

suspected of having been, affected or contaminated by a disease or toxic substance at the time of contact or close proximity; or

(c) is, or is suspected of being, a vector, the causative agent of a disease or a toxic substance.

(2) The Minister may treat any animal or thing described in subsection (1), or require its owner or the person having the possession, care or control of it to treat it or to have it treated, where the Minister considers that the treatment will be effective in eliminating or preventing the spread of the disease or toxic substance.

(3) A requirement under this section shall be communicated by personal delivery of a notice to the owner or person having the possession, care or control of the thing or by sending a notice to the owner or person, and the notice may specify the period within which and the manner in which the requirement is to be met.

84 The basis for the issuance of the notice was that the animal was suspected of having been in contact with either feed suspected of contamination or another animal suspected of being infected (Cross-examination of Dr. Kellar, Application Record Vol. II, Tab "T", p. 168). This double suspicion is not found in the wording of the section. Cullen J., faced with a similar situation, held in the Hunt case at p. 7 that:

> I agree that in issues of jurisdiction, the standard of review of this Court is whether the jurisdiction was correctly exercised. (...) In fact, the very wording of the section leads me to believe that the Minister is afforded a great deal of discretion upon which to base the decision to require the destruction of animals. In my opinion, the language of the notice is meant to track the language of the section. A common sense reading of the two leads me to no other conclusion, nor does the evidence of the case. That being the case, I do not agree that basing the decision, in part, on the suspicion of contact amounts to a jurisdictional error. It would be too literal an interpretation of the statute to hold otherwise and I do not think that Parliament intended such an interpretation. As stated in Maple Lodge Farms v. Canada, [1982] 2 S.C.R. 2 at 7, the court should avoid a narrow, technical construction of the statute and endeavour to give effect to the legislative intent.

85 The wording of the Notice cannot be interpreted as outside the jurisdiction of the statute.

C. The decision was based on improper consideration

86 The Applicant submits that the decision to dispose of the subject bull is based on irrelevant considerations; specifically, he states that foreign trade considerations do not fall within the ambit of section 48. It is submitted that the wording of section 48 must be contrasted to that of section 27:

(2) The Minister may take all reasonable measures consistent with public safety to remedy any dangerous condition or mitigate any danger to life, health, property or the environment that results, or may reasonably be expected to result, from the existence of a disease or toxic

substance in a control area.

87 The Applicant argues that Parliament would have specified such considerations under section 48 if they were relevant to the exercise of the power therein granted. The Respondent argues that one of the general purposes of the Act is to ensure that animals bred for the export market are healthy.

88 Noël J. dealt with similar arguments in Jerram v. Canada, supra; at p. 10 he states:

> Subsection 48(1) is aimed at the prevention of the spread of disease. It follows that any action taken thereunder must be based on a belief or a suspicion that an animal has been contaminated by a disease or has been exposed to contamination, and must be aimed at the prevention of the spread of the disease. That being said, the fact that the concerns of Canada's trading partners were taken into account in the decision to eradicate the possible spread of BSE in Canada is no less consistent with the statutory goal contemplated by subsection 48(1) than would be, for instance, the consideration of concerns regarding the preservation of human life. 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), and in particular in assessing the tolerance level of the acceptable risk.

89 The case of Jerram v. Canada (supra) is pending before the Federal Court of Appeal.

90 The decision to destroy the animal came after weighing Canada's obligation to the international community. Such concerns were therefore justifiably taken into account.

D. The decision failed to consider relevant evidence

91 The Applicant submits that the decision to destroy the subject bull failed to take into account relevant evidence such as the actual risk presented by his bull; the evidence it submitted that the subject bull does not actually suffer from BSE; the subject bull's financial value and his contribution to global biological diversity.

92 The Respondent states that there is no duty to consult persons affected by an order aimed at protecting public health, when the order is made in good faith and in the proper exercise of statutory discretion. He further states that the Act does not require actual proof that the animal is contaminated and that the financial value of the animal in question is irrelevant.

93 The test imposed under section 48 merely requires a suspicion that an animal is contaminated or has been in contact or in close proximity with animals or things actually contaminated or suspected of being contaminated, for the Minister to order the animal's destruction. The Minister is given the responsibility under the Act to decide whether the destruction of an animal is necessary.

94 The Respondent characterises the Minister's decision as prudent in light of the lack of definite proof that the bull in question never consumed the type of feed that is linked to BSE. It is submitted that this decision as in Hunt (supra), merely erred on the side of caution where public health is at stake.

95 The Minister concluded, after analyzing the scientific evidence, the incertitude and the controversies concerning BSE and the cattle imported from the U.K., that the imported cattle formed a homogeneous group and that he had grounds to suspect that all such bovines were contaminated by the BSE agent or had been in contact with animals or things actually contaminated or suspected of being contaminated.

96 The Respondent submits that the legality of an administrative decision must be assessed with regard to the evidence available at the time it was made. The Applicant's evidence, indicating that the subject bull is BSE free, was

presented to the Minister after the decision was taken to destroy the animals imported from the U.K.

97 The Health of Animals Act focuses on the protection against disease and does not consider the value of the animal in question when deciding to dispose of it. The animal's value, as stated by the Minister, is only relevant in a claim for indemnification and not in a quest to obtain an exemption from the application of an administrative decision.

98 In addition, the Applicant submits that the decision to destroy the bull is in contravention of Canada's obligation under international law with respect to preservation and conservation of rare genetic resources.

99 The Respondent states that the Applicant does not have standing to represent the interest of the Highland breed. In addition, he states that the Convention on Biological Diversity only came into force on December 22, 1993 after the date of the decision to destroy the cattle.

100 The legislature has specifically provided for the protection of the health of animals and, in that context, this portion of the Applicant's argument is not convincing.

101 In the Hunt case, Mr. Justice Cullen, when faced with similar submissions as are being made to me, states at pages 17 and 18:

> There can be little disputing the fact that as of mid-December, when the decision was made to destroy all the U.K. imports, without exception, little or nothing was done specifically about the applicant's cattle. True, the Department had information from MAFF, from the O.I.E. and from the scientific literature concerning BSE which provide a solid basis for the decision to destroy all the U.K. imports. However, the applicant contends that it knew nothing of the decision, and that when concerns were raised, those concerns were ignored.
>
> In my opinion, as can be seen from my conclusion above with respect to issue #1, I do not believe that the suspicion of these cows being in contact with an animal or thing affected with or suspected to be affected with BSE is an irrelevant consideration for the decision maker to take into account. There is some scientific evidence, although by no means conclusive to suggest that BSE like sheep scrapie (another member of the encephalopathy family of diseases) is horizontally transmitted from animal to animal. Further, the refusal of MAFF to certify that any declaration by an owner of the herd of origin in the U.K. that there was no contaminated feed given to the cattle leads to the very relevant consideration that the cattle may have been in contact with contaminated feed or animals.
>
> As for the trade impact of another confirmed case of BSE in Canada, the applicant did not dispute that such a factor is a relevant one for the government to take into account in reaching its decision. Thus, it cannot be said that trade concerns are an irrelevant factor to consider in reaching the decision.
>
> It can be seen from the evidence that general information was known by Agriculture Canada or acquired in consultations with MAFF, which addressed each of the concerns raised by the applicant, including the declaration as to feeding practices from Bembridge. In circumstances of normal administrative decisions, I think that the lack of consideration of relevant circumstances (such as counsel for the applicant points to in this case) would have the effect of vitiating the decision. However, as I believe the evidence

shows, this is not a normal administrative decision.

102 Mr. Justice Cullen goes on to state, at pages 19 and 20:

> Therefore, I conclude that although it may have been preferable to gather specific information about each individual cattle imported from the U.K., this is a situation which allowed for the approach taken by the department. The decision taken to destroy all the cattle imported from the U.K. was made in good faith and in the interest of the public at large. In my opinion, this factor outweighs the property rights of the applicant and the decision is one which should not be interfered with. The requirements of procedural fairness must be determined in the context of a given decision and having regard to the circumstances surrounding that decision. Although it is now well-settled that procedural requirements do attach to administrative decisions that would not otherwise be classed as judicial or quasi-judicial, a Court in reviewing a Ministerial or policy decision should be reluctant to impose strict standards of procedural fairness. As Dickson J. (as he then was) stated in Martineau v. Matsqui Disciplinary Board, [1980] 1 S.C.R. 602 at 628-629:
>
> > The authorities, in my view, support the following conclusions
> >
> > ...
> >
> > 2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum. That is what emerges from the decision of this Court in Nicholson. In these cases, an applicant may obtain certiorari to enforce a breach of the duty of procedural fairness.
>
> Thus, as we have here a Ministerial decision, based on grounds of public interest and policy, I believe the decision is not one which warrants the intervention of this Court on the ground of procedural fairness.

103 Thus, if the factual situation of the case at bar would be similar or identical to those in the Hunt case, I would have to dismiss the present application. The facts and the evidence appear to be very different.

104 The subject bull was born on April 7, 1980 (affidavit of Judy Bowser). I am satisfied from the evidence that the concern of contaminated feed being available first began in the winter of 1981-82 but that the date January 1, 1982 was chosen. In a letter dated March 17, 1994, signed by Dr. Maria A. Koller, Staff veterinarian for Agriculture Canada, it is stated:

> In these reports, the commencement of the critical period of risk is further refined and described as the winter of 1981-82. While the Department of Agriculture recognized that winter officially commences on or about December 21st and climatologically sometimes

> before that date, it decided to remain with January 1, 1982 as the critical date for cattle imported from the United Kingdom as there can be no question but that this date falls within the description of the winter of 1981-82.

105 This being correct, and I must assume it is, that the critical period of risk is the winter of 1981-82, the winter commences on December 21st, the chosen date is January 1, 1982, I can therefore conclude that the subject bull could not have been fed any contaminated food from its date of birth to, at the very earliest, December 21, 1981 (see also cross-examination of Dr. Kellar, question 285, page 169, Vol. II, Applicant's Record).

106 The subject bull was imported into Canada by the Applicant on January 31, 1982 (see Exhibit "D", Kohl affidavit). Counsel for both parties agree that there was no contaminated food in Canada that the subject bull could have been fed to cause it to be affected by BSE.

107 Therefore, it is important to verify what happened to the subject bull from January 1, 1982 to January 31, 1982, that is, to verify if it is possible for the subject bull to have been fed some of the contaminated food so as to be a concern and, as well, could the bull be affected by other modes of transmission of the disease other than just feed.

108 After reading the affidavits of Dr. Sponenberg and Dr. Kimberlin, I am satisfied that the disease BSE cannot be transmitted in any manner other than by contaminated feed. It appears it is not transmitted horizontally nor vertically nor by semen.

109 The subject bull was purchased by Kohl or at least he became the owner of the bull on January 10, 1982 (Exhibit "A", Kohl affidavit). After the purchase, the bull was sent to quarantine in the U.K. and then transported to Canada, the bull arriving in Canada on January 31, 1982. According to Dr. Kimberlin, this period, quarantine and shipment, would be approximately 10 days.

110 I am satisfied from a reading of Dr. Kimberlin's affidavit and the affidavit of Judy Bowser that for the short period of approximately two weeks that this animal was on the farm of Judy Bowser, that is, in January 1982, it was not fed any contaminated food nor could it have been in contact with any contaminated animals.

111 I accept the evidence of Dr. Kimberlin and, in particular, the evidence found in paragraph 21 of his January 21, 1994 affidavit where he states:

> It is my opinion that, in a situation where:
>
> (a) the animal in question is a bull of the Highland breed, the herd of origin being at Perthshire, Scotland,
> (b) the breeder of the herd of origin can verify that
>
> - no case of BSE has ever been suspected or confirmed at any time in the herd of origin,
> - the mother cow of the animal in question has not been suspected of having, or confirmed to have, BSE,
> - neither the animal in question, the mother of that animal, nor the herd of origin were fed or exposed to the type of feed suspected of BSE contamination, that is, ruminant-derived protein,
>
> (c) the animal in question was exported from the herd of origin in Scotland to Canada in January 1982, at the age of 21 months, with a quarantine and transit interval of

> approximately 10 days before its arrival in Canada,
> (d) the animal in question left the United Kingdom at a time 3 years before the first (retrospectively) recorded case of BSE (April 1985), when the feed-borne exposure of cattle to a scrapie-like agent, which led to th epidemic, was only just beginning;
> (e) the animal in question has remained with the same breeder in Canada since arrival and has not been fed or exposed to ruminant-derived protein,
> (f) the animal in question has attained the age of 13 years and nine months, and has been in Canada for 12 years, without manifesting any clinical symptoms of BSE,
>
> then the risk of this animal developing BSE is virtually zero, and there is no reasonable basis to suspect otherwise.

112 As to the issue of the incubation period for BSE, I am satisfied that, based on all the scientific evidence produced, Dr. Kellar's conclusion that the incubation period for the disease is the entire lifetime of the animal is patently unreasonable.

113 The subject bull is now more than 14 years old. The evidence is that the subject bull has not shown any signs of BSE. Dr. Kellar admits, in his affidavit, that the expertise as it relates to BSE is in the U.K.

114 In paragraph 18 of the Kimberlin affidavit, he states that the "modal incubation period of BSE in cattle is four to five years...". He goes on to state:

> ...the incidence of disease decreases substantially as age increases; the probability of a case occurring after an incubation period of 12 years (more than twice the mode) is extremely low.

115 Dr. Kellar, in his cross-examination by counsel for the Applicant, Vol. II, page 129, states that although he believes, and on the whole of the evidence presented, it is only he who believes that the incubation period is the life of the animal, he admits that in the U.K. it is believed that the incubation period is in the range of 2 to 8 years.

116 The document from the United States Department of Agriculture of August 1993 also speaks of a 2 to 8 year incubation period (page 384, 1612 file).

117 A particularly important document, as it relates to the issue of the incubation period, is found in Vol. III of the 1612 file at page 903. This document is of the Agriculture Canada scientific team giving advice on BSE recommended field action based on current scientific evidence dated December 17, 1993. This document gives the maximum incubation period as being, to be on the safe side, 10 years.

> Potential field action relative to current knowledge of BSE:
>
> 1. Cattle imported from the UK prior to the 1990 ban on importation: The incubation period of the disease has been identified as being between 2 and 8 years but may be slightly longer. On that basis, slaughter of cattle imported into Canada from the UK within the past 10 years would eliminate the possibility of long-incubation diseases development.

118 The persons who have signed this document are either research scientists or veterinarians. Dr. Peter Ide is a professor and is Director of the Animal Disease Research Institute for Canada. Yates, Masri and Finlay are Agriculture Canada employees. Dr. Kellar believed their input was important.

119 Dr. Sponenberg gives the incubation period of BSE as between 3 and 8 years.

120 It is virtually impossible for me to review, in this decision, all of the evidence as it relates to the issue of the incubation period of BSE. I do conclude, after a review of all the evidence, that I am satisfied that Dr. Kellar's conclusion that the incubation period is the life of the animal is patently unreasonable and not based on the scientific evidence known to him when he made the decision to destroy the subject bull as he knew that the subject bull was, on December 14, 1993, over 13 years old.

121 The fact that the subject bull was only in the U.K. for a period of approximately 2 weeks at the beginning of the spread of the disease makes this case very different from the Hunt case where the two cows were born at the height of the epidemic in the U.K. (1986) and where they remained in the U.K. for a substantially longer period of time.

122 As to other modes of contracting the disease, as I have stated, I am satisfied, from the evidence and the facts of this case, and, as I have said, the facts in this case are very particular, that the evidence is such that the subject bull could not have contracted the disease except by feed and I believe the evidence shows this not to have occurred.

123 There is no evidence that the subject bull could have contracted the disease from his mother, he was born in 1980, at a time when there was no contaminated feed, and from the evidence of Dr. Kimberlin, there could not be any horizontal transmission.

124 In that I am satisfied, from the evidence and very special facts of this case, that the decision of the Minister was patently unreasonable, I allow the application for judicial review and quash the decision of the Minister dated December 14, 1993 to destroy the Applicant's bull known as Gille Buidhe of Benmore.

125 The Respondent is restrained from destroying the subject bull.

126 Costs in favour of the Applicant.

TEITELBAUM J.