

Former Agriculture Minister Not Required to Testify

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Despite courts moving to electronic hearings whereby theoretically a witness could appear virtually from anywhere in the world, provincial statutes still have rules that protect out of provinces witnesses from being required to testify in a domestic action even though their evidence might be relevant.

In *Flying E Ranch Ltd. v. Canada (Attorney General)*, 2020 ONSC 8095 (CanLII), the inability to comply with the requirements of section 5(1) of the *Interprovincial Summonses Act* ("ISA") protected former Minister of Agriculture Ralph Goodale, a resident of Saskatchewan, from being summonsed as a witness by the plaintiff in a class action proceeding. At issue in the case was a claim for damages arising out of the transmission of "Mad Cow Disease".

Mad Cow Disease was first diagnosed in the United Kingdom in 1986. After some study, it was discovered that the agent which transmitted the disease was found within certain parts of cattle and sheep. The transmission of the disease would then occur when infected parts of these animals were converted into Rendered Beef Meat and Bone Meal ("RMBM") that was fed to calves as protein supplements. While the UK banned the feeding of RMBM to calves as protein supplements in 1988, cases of Mad Cow Disease were seen in the early 1990s.

In response to what had been discovered in the UK, the Canadian government in 1990 introduced a monitoring program in 1990 for those cattle that had been imported from the UK between 1982 and 1990, refused imports permits for UK cattle and other ruminants and ordered the destruction of some UK imports at points of entry into the country. However, no feed ban was implemented until seven years later.

In 2003, a Canadian-born cow was diagnosed with Mad Cow Disease and the value of Canadian cattle crashed.

The ranchers brought a class action against the federal government for negligence. They contended that Mad Cow Disease had been introduced into Canada and the market was negatively impacted because the Federal Government had failed to properly assess the risk of the disease and to act accordingly.

During the relevant period, Mr. Goodale was a Minister of Agriculture. He served in that portfolio from 1993 to 1996 and accordingly the ranchers wanted to examine him as a witness at a trial scheduled to start in February 2021. Since Mr. Goodale was not a resident of Ontario, the ranchers needed the court to sign a certificate for a summons under s. 5(1) of the ISA.

Justice Perell explained at paragraph 5 that before a court could order the attendance of an out-of-province witness in Ontario two requirements had to be satisfied. First, the attendance of the witness had to be necessary for the due adjudication of the action. Second, the attendance of the witness had to be reasonable and essential to the administration of justice in the province. With respect to the second requirement, the court was required to consider if there were other sources for the evidence rather than the out-of-province witness.

In this case, extensive examinations for discovery had already taken place and it was expected that over a course of a scheduled 77 day trial, more than a dozen civil servants who were employed by Agriculture Canada would be called to testify. Expert witnesses were also expected to testify.

In order to determine whether the federal government had breached the applicable standard of care, the ranchers also wanted Mr. Goodale to testify about the following:

- (a) the Federal Government's assessment of the risk of Mad Cow Disease in Canada;
- (b) the Federal Government's acts or omissions in response to the threat of Mad Cow Disease in Canada; and

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

(c) the implementation of an RMBM feed ban shortly before Mr. Goodale left his position as Minister of Agriculture.

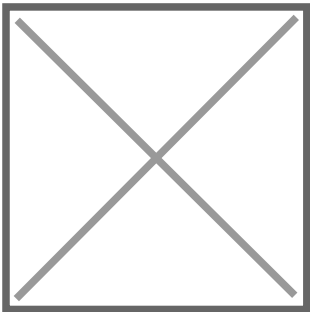
Justice Perell found that Mr. Goodale would be able to provide relevant evidence and there was no suggestion that the ranchers' request to summons him was an abuse of process. However, His Honour also found that the former Minister's evidence was neither necessary nor essential to the administration of justice because the ranchers already had a lot of documentary evidence, there would be sixteen other witnesses from Agriculture Canada who would be testifying at trial, and had had extensive oral discovery about Agriculture Canada's acts and omissions. Accordingly, the test under s. 5(1) of the ISA was not met.

Although Mr. Goodale is likely relieved of the need to testify in this important case, given that courts have moved to electronic hearings and that there has been widespread acceptance of the examination of witnesses virtually, it must be questioned whether the test for the examination of an out-of-province witness should be modified and the legislation amended. Hypothetically, if trials in future months and years will be conducted with witnesses providing evidence from remote locations, should it really matter whether the witness is in, say, Kenora, Ontario, or Winnipeg, Manitoba? In the case at hand, Justice Perell found that Mr. Goodale's evidence would be relevant to the action and that the plaintiffs were not seeking to examine him due to an abuse of process. A litigant should not easily be denied of the ability to introduce relevant evidence in an action. Simply because a person is an out-of-province resident should no longer be a factor in determining whether the witness can be summonsed because of the present capability of hearing from the witness remotely. Accordingly while Mr. Goodale was the benefactor of the current legislation based on its two-part test, given the migration of the justice system to virtual hearings, potential reform to this kind of legislation may be part of the future and may produce a different result.

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **Stephen Thiele** at 416.865.6651.

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Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com