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**** HIGHLIGHTS ****

- * The Ontario Court of Appeal has ruled that the CFIA does not owe a duty of care to farmers with respect to the manner in which it conducts investigations under the Health of Animals Act. The Court held that CFIA inspectors are not obliged to be "mindful of the economic interests of individual farmers". The Court observed that compensation to farmers under the Act is limited to the value of animals which the CFIA directs to be destroyed. In this case, the CFIA did not make a destruction order with respect to the Plaintiff's flock of 84,000 chickens. It prohibited the sale of eggs from these chickens to the table market, and recommended they be sold as pasteurizing eggs in the industrial market. The flock was destroyed on the recommendation of the Ontario Egg Producers Marketing Board because there was no market for eggs from a flock under investigation for a potentially dangerous strain of salmonella. The Court distinguished the recent decision of the New Brunswick Court of Appeal in *Adams v. Borrel*, [2008] N.B.J. No. 327, 336 N.B.R. (2d) 223, in which the New Brunswick Court of Appeal held that the federal government owed a prima facie duty of care to conduct a timely investigation with respect to identifying the source of potato viruses, because the purpose of the legislative scheme under the Plant Protection Act was to protect the interest of the agricultural sector of the economy by protecting the interests of farmers. Leave to appeal refused [2009] S.C.C.A. No. 209. (*River Valley Poultry Farm Ltd. v. Canada* (Attorney General), [CALN/2009-003](#), [2009] O.J. No. 1605, Ontario Court of Appeal)

**** NEW CASE LAW ****

River Valley Poultry Farm Ltd. v. Canada (Attorney General); [CALN/2009-003](#), Full text: [2009] O.J. No. 1605; 2009 ONCA 326, Ontario Court of Appeal, J.I. Laskin, S. Borins and K.N. Feldman JJ.A., April 22, 2009.

Canadian Food Inspection Agency -- Health of Animals Act -- Liability for negligent inspection.

Summary of Facts: River Valley Poultry Farm Ltd. ("River Valley") sued the Canadian Food Inspection Agency ("CFIA") and Health Canada for damages for negligently investigating whether River Valley's flock of chickens were infected by a potentially dangerous strain of salmonella.

River Valley, in the same action, sued the supplier of the chicks, McKinley Hatchery ("McKinley") and its insurer.

Between July 20 and 24, 2001, McKinley shipped 84,000 one day old chicks to River Valley. The chicks were segregated into two barns. McKinley had sent "fluff test" samples from the chicks to a CFIA approved laboratory under an industry-operated surveillance program which monitors hatcheries and breeder flocks for significant poultry disease.

On August 3, 2001, the laboratory reported that it had found a rare strain of salmonella -- salmonella typhimurium DT104 ("DT104").

DT104 was not a reportable disease under the Health of Animals Act, [S.C. 1990, c. 21](#). The CFIA was aware the strain was potentially dangerous because it was resistant to most common antibiotics. The CFIA was concerned that DT104 might pose a risk to human health if the hatchery chicks were infected by it when they began laying eggs, and the CFIA asked Health Canada to do a risk assessment.

In early October of 2001, Health Canada concluded that there was a higher risk that the eggs from infected chicks would be contaminated with DT104. Health Canada recommended that environmental samples be taken over a 2 week period from River Valley's two barns to confirm the presence of DT104, and that eggs from the chicks not be sold for the table market, but on the industrial market as pasteurized eggs.

On October 18, 2001, the CFIA required McKinley to advise producers to whom it had sold chicks that the chicks may be infected. On October 22, 2001, the CFIA warned River Valley directly of the DT104 risk. River Valley told CFIA that it wanted to move the chickens into production barns by the end of November.

The CFIA started collecting samples from River Valley's two barns in early November. Initial testing detected the presence of DT104. Health Canada wanted further sampling done when the birds started laying eggs. On November 30, 2001, the CFIA sent a letter to River Valley recommending that eggs produced by the chickens not be sold and instead diverted to pasteurization. The chickens could not be moved into production barns. The CFIA did not recommend or order that the eggs or chickens be destroyed.

On December 4, 2001, Health Canada issued a report indicating DT104 was found in samples from one barn, but not the other barn. Health Canada also said it had not finalized its testing of all samples from the other barn.

Although the CFIA and Health Canada recommended that River Valley's eggs be sold as pasteurized eggs, the Ontario Egg Producers Marketing Board ordered River Valley not to do so and River Valley's main customer indicated it could not take the risk of buying the eggs. The eggs were all destroyed and on December 19 and 20, 2001, River Valley destroyed the entire flock it had purchased from McKinley.

On January 22, 2002, Health Canada's final report concluded that 4 samples of the 25 samples from one barn tested positive for DT104. All samples from the other barn tested negative.

River Valley resolved its claim against its own insurer. Before proceeding to trial with its claim against McKinley, the parties agreed on a pre-trial motion to determine four questions of law concerning the allegation of negligent investigation against the CFIA and Health Canada. The four questions of law were:

- Did CFIA owe a duty of care to River Valley?
- Did Health Canada owe a duty of care to River Valley?
- If so, when did the duty arise?
- If so, what was the standard of care?

In an order made February 1, 2008, Justice Kenneth E. Pedlar of the Superior Court of Justice answered "yes" to the first two questions. He concluded that the duty arose when River Valley was "targeted" for an investigation on October 18, 2001 and that the standard of care was how a reasonable investigator with like skills and expertise would have acted in the circumstances.

The Attorney General of Canada appealed on the following grounds:

- River Valley must successfully challenge the actions of CFIA and Health Canada by judicial review in the Federal Court before maintaining an action for damages in the Ontario Superior Court.
- Neither Health Canada nor CFIA owed a duty of care to River Valley. This ground of appeal rests mainly on the submission that the relationship between River Valley and the government authorities lacked sufficient "proximity" or was not sufficiently close and direct to make it fair and just to impose a private duty of care.
- The standard immunity clause in s. 50 of the Health of Animals Act bars any action against CFIA.

Decision: Laskin, J.A. (Borins, J.A. and Feldman, J.A. concurring) allowed the appeal on the second ground. He concluded that neither the CFIA nor Health Canada owed a duty of care to River Valley to conduct a timely and competent investigation. [para. 7].

Laskin, J.A. considered the following issues:

(a) Must River Valley successfully challenge the actions of the CFIA and Health Canada by judicial review in the Federal Court before suing for damages in the Superior Court?

The Attorney General of Canada relied upon the decision of the Federal Court of Appeal in *Grenier v. Canada (Attorney General)* (2005), 262 C.L.R. (4th) 337, in which Letourneau J.A. concluded that an action for damages against a federal agency in a provincial superior court could not proceed until the Agency's decision has been successfully judicially reviewed in the Federal Court [para. 29].

Laskin, J.A. rejected this submission based on a recent series of cases in the Ontario Court of Appeal: *TeleZone Inc. v. Canada (Attorney General)*; *G-Civil Inc. v. Her Majesty the Queen in Right of Canada*; *Fielding Chemical Technologies Inc. v. The Attorney General of Canada*; *Michiel McArthur v. The Attorney General of Canada*, [2008] O.J. No. 5291, 2008 ONCA 892, in which Borins, J.A. disagreed with Grenier and concluded that the Ontario Superior Court has jurisdiction to adjudicate a claim for damages for negligence against a federal agency, and that a successful judicial review application is not a condition precedent to the exercise of this jurisdiction.

(b) Did Health Canada and CFIA owe a duty of care to River Valley?

(i) The Anns Test:

Laskin, J.A. observed [at para. 31] that this issue could be resolved by applying the test derived from the House of Lords decision in *Anns v. Merton London Borough Council*, [1978] A.C. 728, as modified by the recent decisions in the Supreme Court of Canada including *Cooper v. Hobart*, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562; and *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263. Laskin, J.A. summarized the requirements of the Anns test, in its present Canadian form, as follows at para. 32:

* Reasonable foreseeability: Was it reasonably foreseeable that the actions of either Health Canada or CFIA would harm the economic interests of River Valley?

* Proximity: Was the relationship between either Health Canada or CFIA and River Valley sufficiently close and direct that it would be fair and just to impose a duty of care?

Put differently, in conducting their investigations, were Health Canada and CFIA obliged to be mindful of River Valley's legitimate economic interests?

* Absence of overriding policy considerations negating a duty of care: Although imposing a duty may be just, are there nonetheless broad policy considerations transcending the relationship between the parties that would

make the imposition of a duty unwise?

The onus of establishing reasonable foreseeability and proximity rests with the party seeking to establish the duty -- River Valley. If River Valley could do so, it would have established a prima facie duty of care [para. 33]. The requirement to show the absence of overriding policy considerations negating a prima facie duty of care would fall upon the Defendant [para. 34].

(ii) Health Canada -- proximity

Laskin, J.A. concluded [at para. 36-42] that Health Canada did not owe a duty of care to River Valley. He held [at para. 40 and 41] that:

[40] ...There was no close and direct relationship between the two that would make it fair and just to impose a duty of care on Health Canada.

[41] CFIA brought Health Canada into the investigation for its scientific expertise in testing for salmonella and assessing the risk of contamination. Health Canada took on this role not because of any concern for River Valley's economic interests but because of its overriding public health mandate to prevent the spread of potentially contaminated food. And when it tested the samples from River Valley's pullet barns and did its risk assessment, Health Canada reported not to River Valley but to CFIA, the agency that had engaged its expertise.

(iii) CFIA - proximity

Laskin, J.A. also rejected the motion Judge's conclusion that River Valley had established a proximity with respect to CFIA [at para. 36-83].

A. Case Law -- Negligent Police Investigations

Laskin, J.A. rejected the argument that the decision of the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board* (2007), 285 C.L.R. (4th) 620, supported River Valley's position. He distinguished *Hill* on the grounds that it was limited to the relationship of proximity in the context of a criminal investigation where the accused's liberty interests and charter rights were at stake. River Valley's proximity claim was made in a non-criminal investigation where only economic interests were at stake [at para. 49-51]. In *Hill*, the police were investigating harm that had already occurred. In this case, the CFIA was conducting an investigation to deal with a potential future threat of harm to Ontario consumers from the spread of contaminated eggs [at para. 51-52]. Laskin also rejected the conclusion that proximity could be established because River Valley had been "targeted" for investigation. He distinguished the case from cases in which a specific person had been targeted, stating, at para. 59:

[59] I accept that when a government agency targets an enterprise for investigation that might suggest some relationship between the two. But proximity under the *Anns* test requires something more: it requires a sufficiently close and direct relationship making the imposition of a private

duty of care fair and just. Mere targeting in the context of a statutory regime under which a government agency is responsible for preventing and controlling the spread of disease in the interest of animal and public health is not enough to establish proximity.

B. Not Compelled to Rely on CFIA

Laskin, J.A. also rejected the motion Judge's finding that River Valley was compelled to rely on CFIA's investigation. He held that River Valley ignored the CFIA's recommendation that the eggs be diverted to pasteurization and relied on the Ontario Board's recommendation that its flock be destroyed.

C. No Legislative Intent to Impose Duty of Care

Finally, Laskin, J.A. rejected the motion Judge's conclusion that the governmental powers and obligations of the CFIA in s. 27 of the Canada Agricultural Products Act, [R.S.C. 1985, c. 20\(4th Supp.\), s. 23](#) of the Food and Drugs Act, and s. 45 of the Health of Animals Act demonstrate a legislative intent to impose upon the CFIA an obligation, and duty of care, not only to the public at large, but also to individual farmers.

Laskin, J.A. observed that the sections referred to in the statutes dealt with agricultural products which were seized and detained [at para. 62-64] that the CFIA in this case had not acted under these sections, but under s. 38(1)(d) and (e) which limited its actions to examining and taking samples and tests from River Valley's flock. In this case, the CFIA was exercising a discretionary power [at para. 65-66]. Laskin, J.A. stated at para. 67-69 that in exercising their broad powers under the Health of Animals Act, the CFIA owes a duty to the public at whole and is not obliged to be mindful of the economic interests of individual farmers:

[67] Although the motion judge considered the Health of Animals Act, he erred by not properly taking into account its purpose, its statutory compensation scheme, and its immunity clause. These three compelling factors show the absence of proximity between CFIA and River Valley, and instead show that CFIA's duty is to the public as a whole, not to individual farmers or egg producers.

[68] The purpose of the statute can be gleaned from its long title, an act "respecting the diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals". In *Vona v. Canada (Minister of Agriculture)* (1996), O.R. (3d) 687, at p. 691, this court noted that the purpose of the Health of Animals Act is to enable the Crown to protect the health of people and animals. Nothing in this statute suggests that one of its purposes is to protect the economic interests of individual farmers.

[69] Inspectors charged with tracking the spread of infectious disease inevitably must focus their investigations on persons or sites where exposure or contamination has potentially occurred. In carrying out their

investigations, inspectors appointed by CFIA have broad discretionary powers to inspect enterprises, even seize and detail and quarantine animals. In exercising these broad powers, inspectors are not obliged to be mindful of the economic interests of individual farmers. Their overriding concern is the protection and promotion of human and animal health.

Laskin, J.A. observed that if the CFIA had made an order directing the flock to be destroyed, River Valley's entitlement would have been limited to compensation for the value of its flock under the Act, by virtue of the statutory bar for compensation under s. 51 of the Crown Liability and Proceedings Act, R.S.C. 1985, which provides:

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.

Laskin, J.A. concluded at para. 75:

[75] Thus, River Valley's claim comes down to this proposition: when CFIA takes the drastic action of ordering the destruction of an animal, it owes no private duty of care; yet, when CFIA takes less drastic action, as it did in this case, it then owes a private duty to an individual farmer. That proposition, respectfully, is illogical.

Finally, Laskin, J.A. distinguished the decision of the New Brunswick Court of Appeal in *Adams et al v. Borrel et al* (2008), [336 N.B.R. \(2d\) 223](#). In *Adams*, the New Brunswick Court of Appeal held that the Attorney General of Canada owed provincial potato farmers a "prima facie" duty of care to conduct a timely investigation with respect to identifying the source of [a potato] virus and that that duty was not negated ... by overriding policy considerations...".

Laskin, J.A. observed that there was an important difference between the Health of Animals Act and the Plant Protection Act, [S.C. 1990, c. 22](#), which was at issue in *Adams* [para. 81], being that the Plant Protection Act, the federal government's statutory obligation was "...to protect plant life and the agricultural ... [sector] of the Canadian economy by preventing the ... spread of pests".

Laskin, J.A. also held [para. 84-87] there was at least overriding policy consideration that negates private duty, being the CFIA's obligation to the public to protect human and animal health.

Laskin, J.A. did not consider the issue of whether or not s. 50 of the Health of Animals Act barred any claim against CFIA.

[Editor's note: Some might take issue with the Ontario Court of Appeal's analysis of the purpose and intent of the Health of Animals Act. While it is reasonably clear that the Food and Drugs Act is aimed at the protection of human health, it may reasonably be

argued that preventing the spread of animal diseases, like preventing the spread of plant diseases, is primarily intended to protect the agricultural sector of the economy by protecting the interests of farmers.

As leave to appeal to the Supreme Court of Canada has been denied, it may be many years before this issue can be revisited.]

**** CREDITS ****

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