

**FEDERAL COURT OF APPEAL**

**BETWEEN:**

**PARADIS HONEY LTD., HONEYBEE ENTERPRISES LTD.,  
and ROCKLAKE APIARIES LTD.**

**Appellants  
(Plaintiffs)**

**and**

**HER MAJESTY THE QUEEN, THE MINISTER OF AGRICULTURE  
AND AGRI-FOOD and THE CANADIAN FOOD INSPECTION AGENCY**

**Respondents  
(Defendants)**

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**MOTION RECORD OF THE APPELLANTS  
TO DETERMINE CONTENT OF APPEAL BOOK**

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Court File No. A-169-14

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**AFFIDAVIT OF ARIEL OOSTENBRINK**  
Sworn on May 21, 2014

I, Ariel Oostenbrink, Legal Assistant, of the City of Edmonton, in the Province of Alberta,  
SWEAR THAT:

1. I am employed as a Legal Assistant in the Edmonton office of Field LLP. I provide legal assistance to Jon Faulds, QC, Dan Carroll, QC, and Lily L.H. Nguyen, counsel for the Appellants, in the conduct of this proceeding. As such, I have personal knowledge of the matters hereinafter deposed to except where stated to be based on information and belief, and where so stated, I believe the same to be true.
2. I am advised by Appellants' counsel that the underlying claim in this matter concerns a proposed class action, Federal Court file no. T-2293-12, to which the Appellants are proposed class plaintiffs and the Respondents are proposed class defendants. A copy of the first page of the Proposed Class Action and Statement of Claim ("Statement of Claim") filed by the Appellants on December 28, 2012 and served on the Respondents is attached at **Exhibit A**.

3. I am advised by Appellants' counsel that pursuant to consent Orders of the Federal Court, the matter proceeded by way of specially managed proceeding under the Honourable Mr. Justice Scott. Copies of the consent Orders dated April 3, 2013 and May 3, 2013 are attached at **Exhibit B**.
4. On September 12, 2013, I caused the Notice of Motion for Certification of the Statement of Claim as a class action ("Certification Motion") to be served on the Respondents via facsimile and filed with the Federal Court Registry in Edmonton by hand delivery. A copy of the first page of the Certification Motion and solicitor's certificate of service signed by Lily L.H. Nguyen is attached at **Exhibit C**.
5. I am advised by Appellants' Counsel that on October 1, 2013, Justice Scott directed that the Certification Motion be suspended to allow the Respondents to file a motion to strike the Statement of Claim as disclosing no cause of action. Justice Scott rejected the Appellants' submission that their Certification Motion and the Respondents' proposed motion be heard together. A copy of the Recorded Entries Query to that effect is attached at **Exhibit D**.
6. On November 8, 2013, our office received a copy of the Respondents' Notice of Motion to Strike the Statement of Claim without leave to amend ("Strike Motion") and motion record pertaining to the Strike Motion. A copy of the Strike Motion is attached at **Exhibit E**.
7. On November 29, 2013, I caused the Appellants' motion record including written representations ("Written Representations") to be served on the Respondents and hand delivered to the Federal Court Registry in Edmonton, where it was subsequently accepted for filing. A copy of the relevant portions of the Written Representations is attached at **Exhibit F**.
8. On March 5, 2014, our office received by way of facsimile from the Federal Court Registry a copy of the Order and Reasons for Order ("the Order") of the Honourable Mr. Justice Scott granting the Strike Motion to strike the Statement of Claim in its entirety

without leave to amend. A copy of the relevant portions of the Order are attached at **Exhibit G**.

9. Paragraph 83 of the Order states that the Court strikes 24 paragraphs (“the Struck Paragraphs”) of the 105 paragraphs in the Written Representations, being “paragraphs 5, 14, 15, 16, 23, 24, 25, 49, 50 and 72 to 86.”
10. Paragraph 84 of the Order states that “the amendments must be struck out.” I am advised by Appellants’ Counsel that “amendments” refers to the material provided at Appendix A of the Written Representations (“Appendix A”) [**Exhibit G**].
11. On March 28, 2014, I caused a Notice of Appeal (“Notice of Appeal”) of the Order to be filed with the Federal Court of Appeal Registry in Edmonton and served on the Respondents by hand delivery of the requisite number of copies to the Federal Court of Appeal Registry in Edmonton. A copy of the Notice of Appeal is attached at **Exhibit H**.
12. I am informed by Appellants’ Counsel and my review of correspondence in this matter that between April 11, 2014 and May 8, 2014, the parties attempted to reach agreement on the contents of the Appeal Book.
13. On April 29, 2014, I caused to be filed with the Federal Court of Appeal – Edmonton Registry a Consent to an Extension of Time by sending the same via facsimile. A copy of the Consent to an Extension of Time dated April 29, 2014 is attached at **Exhibit I**.
14. I am informed by Appellants’ Counsel that as part of the proposal as to the contents of the Appeal Book, Appellants’ Counsel sought the inclusion of certain extracts (“the Disputed Materials”) from the main body of the Written Representations, namely paragraphs 1-16, 19-26, 48-50 and 68-86, being Parts I, II, IV(A), IV(B)(1)(iii) and excerpts from IV(B)(2), as set out in paragraph 5(a) and (b) of the Appellants’ draft form of agreement (“Draft Agreement”) as to the contents of the Appeal Book. Appellants’ Counsel also sought the inclusion of Appendix A. A copy of the Draft Agreement is attached at **Exhibit J**.


15. I am informed by Appellants' Counsel that the Appellants intend to rely on the Disputed Materials and Appendix A as necessary and relevant to Grounds of Appeal #1, #2 and #3.

16. I am informed by Appellants' Counsel and my review of correspondence that as of May 8, 2014, that the Respondent consented to all items in the Draft Agreement, including Appendix A, with the exception of the Disputed Materials set out at paragraph 5(a) and (b) of the Draft Agreement. Copies of Respondents' Counsel's letter dated May 5, 2014 and Appellants' Counsel's letter dated May 8, 2014 are attached at **Exhibit K**.

17. I swear this Affidavit in support of the Appellants' motion for:

- c. An Order determining the contents of the Appeal Book;
- d. An Order that the Disputed Materials shall be included in the Appeal Book; and
- e. An Order that no costs shall be payable to any party.

SWORN before me at the City of  
Edmonton in the Province of Alberta on  
this 21<sup>st</sup> day of May, 2014.

  
\_\_\_\_\_  
Commissioner for Oaths in and for  
the Province of Alberta

  
\_\_\_\_\_  
Ariel Oostenbrink

Kaitland Chantelle Goulet  
My Commission Expires  
December 3, 20 14

Court File No. A-169-14

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**WRITTEN REPRESENTATIONS**

**INTRODUCTION**

1. The Appellants move for an Order to determine the contents of the Appeal Book; and an Order that certain disputed materials ("the Disputed Materials") shall be included in the Appeal Book.
2. In addition, the Appellants seek an Order that no costs shall be payable in this motion, regardless of the outcome, pursuant to Rule 334.39 of the *Federal Courts Rules* ("Rules").

**PART 1 – FACTS AND PROCEDURAL HISTORY**

3. The Appellants commenced an action in Federal Court against the Respondents for regulatory negligence for refusing to accept, consider or grant any applications for import permits on U.S. honeybee packages after December 31, 2006, when the regulatory prohibition on such imports expired.

**Oostenbrink Affidavit, Exhibit A, Statement of Claim,  
Appellants' Motion Record ("AMR"), TAB 2**

4. The Appellants filed and served the Proposed Class Action and Statement of Claim ("Statement of Claim") on December 28, 2012 and the matter has proceeded as a specially managed proceeding under the direction of Justice Scott.

**Oostenbrink Affidavit, Exhibit A,  
Statement of Claim, AMR, TAB 2**

5. On September 12, 2013, the Appellants served and filed a Notice of Motion for Certification of the Statement of Claim as a class proceeding ("Certification Motion"). On October 1, 2013, Justice Scott directed that the Certification Motion be suspended to allow the Respondents to file a motion to strike the Statement of Claim as disclosing no cause of action. Justice Scott rejected the Plaintiffs' submission that their Certification Motion and the Respondents' proposed motion be heard together.

**Oostenbrink Affidavit, para. 5, and Exhibit C,  
Certification Motion, AMR, TAB 2**

6. On November 8, 2013, the Respondents filed their motion to strike ("Strike Motion") the Statement of Claim in its entirety.

**Oostenbrink Affidavit, Exhibit E,  
Strike Motion, AMR, TAB 2**

7. Justice Scott heard the Strike Motion by way of written representations. On March 5, 2014, he issued his Order and Reasons for Order ("Order") In the Order Justice Scott:
- i. struck 24 paragraphs from the Appellants' 104-paragraph Written Representations, being paragraphs 5, 14, 15, 16, 23, 24, 25, 49, 50 and 72-86 ("the Struck Paragraphs"), as well as Appendix A to the Written Representations, which was titled "Appendix A: Proposed Amended Statement of Claim"; and,
  - ii. granted the Strike Motion, striking the Statement of Claim in its entirety without leave to amend.

**Oostenbrink Affidavit, Exhibit G, Order, AMR, TAB 2**

**Oostenbrink Affidavit, Exhibit F, Written Representations,  
AMR, TAB 2**

8. On March 28, 2014, the Appellants filed a notice of appeal ("Notice of Appeal") appealing the Order on four grounds.

**Oostenbrink Affidavit, Exhibit H, Notice of Appeal, AMR, TAB 2**

9. In April 2014, the parties attempted to reach an agreement on the contents of the Appeal Book but were unable to do so within the 30-day timeline. Accordingly, the parties agreed to a one-time extension by consent pursuant to Rule 7 of the *Rules*.

**Oostenbrink Affidavit, Exhibit I,  
Consent to an Extension of Time, AMR, TAB 2**

10. By May 8, 2014, it was clear that although the parties had reached agreement on the majority of the contents of the Appeal Book, the parties were at an impasse with respect to the Disputed Materials, which the Appellants sought to have included and the Respondents opposed.

**Oostenbrink Affidavit, Exhibit K, Letters of May 5, 2014  
and May 8, 2014, AMR, TAB 2**

11. The Disputed Materials consist of the Struck Paragraphs, as well as 22 additional paragraphs provided to make sense of the Struck Paragraphs and place them in context.

**Oostenbrink Affidavit, paras. 9 and 14 and Exhibit F,  
Written Representations, AMR, TAB 2**

12. The Appellants seek the inclusion of the Disputed Materials on the basis that they are necessary and relevant to their first, second and third grounds of appeal.

**PART 2 – ISSUES**

13. The Motion raises two issues, as follows:

- i. Should the Disputed Materials be included in the Appeal Book?



- ii. Should this Honourable Court apply the no-costs rule in Rule 334.39 of the *Rules* and direct that neither party shall pay costs of this Motion, regardless of the outcome?

### PART 3 – ARGUMENT

#### A. The Disputed Materials should be included in the Appeal Book

14. The contents of the Appeal Book are determined by Rule 344(1) of the *Rules*, which states as follows:

344. (1) An appeal book shall have a grey cover and contain, on consecutively numbered pages and in the following order,

...

(g) any other document relevant to the appeal;

*Federal Courts Rules*, SOR/98-106, Rule 344(1),  
List of Authorities (“LA”), TAB 4(A)

15. The general rule is that written submissions or other legal argument do not form part of the Appeal Book. This is because legal argument before the Motions Judge is generally not relevant to the issues on appeal, which depend “entirely on the evidence and the applicable legal principles.”

*Canada (Attorney General) v. Almallki*, 2011 FCA 54  
at para. 26, LA, TAB 4(B)  
*McBride v. Canada (National Defence)*, 2008 FCA 111  
at para. 3, LA, TAB 4(C)

16. As this Court has repeatedly recognized, however, the general rule is subject to exceptional circumstances, where it is “relevant on an appeal to know what was argued by the parties in the court below.” Accordingly, the determining factor for whether written representations properly form part of the Appeal Record is relevance to the appeal.

*Canada (Attorney General) v. Almalki*,  
at para. 26, LA, TAB 4(B)  
*McBride v. Canada (National Defence)*,  
at para. 3 LA, TAB 4(C)

17. This Court has also repeatedly stated that where the relevance of a document is in doubt, the proper approach is to allow its inclusion in the appeal book out of an “abundance of caution” and leave it to the panel hearing the appeal to determine relevance.

*Deigan v. Canada (Attorney General)*, 2000 CanLII 14739 (Fed. CA)  
at para. 5, LA, TAB 4(D)  
*McBride v. Canada (National Defence)*, at para. 4, LA, TAB 4(C)  
*Loba Limited v. Minister of National Revenue*, 2007 FCA 317  
at para. 5, LA, TAB 4(E)

18. In *McBride*, this Court held that exceptional circumstances required memoranda of fact and law to be included in the appeal book. The appellant in that case had argued that the respondent Minister had made incorrect factual statements that may have influenced the judge. In such circumstances, the Court of Appeal held that the memoranda of fact and law were potentially relevant and directed that they be included on a provisional basis so that the panel hearing the appeal could make a final determination on their relevance.

*McBride v. Canada (National Defence)*,  
at para. 4, LA, TAB 4(C)

19. In *Trevor Nicholas Construction Company Ltd. v. Canada*, the Federal Court, sitting as an appellate court from an order of a prothonotary, held that written submissions should be included in the appeal book where the appellant intended to argue on appeal that the prothonotary’s criticism of the appellant’s written submissions raised an apprehension of bias. In such case, the Court held that the content of the written submissions “would assist the Court in understanding what issues were before the Court below” and were therefore relevant and should be included in the appeal book. Furthermore, it noted, “This argument [of bias] cannot be addressed, except by reference to those submissions.”

*Trevor Nicholas Construction Company Ltd. v. Canada*,  
2008 FC 306 (Fed. Ct.) at paras. 13-14, LA, TAB 4(F)

20. The Appellants acknowledge that in the usual course legal arguments as set out in written representations are not properly a part of the Appeal Book. However, in this case the disputed portion of the submissions are the specific subject of the Motion Judge's Order. The content of the Written Representations have been placed in issue by the Order of the Motions Judge purporting to strike significant portions out.

**Oostenbrink Affidavit, Exhibit G, Order, para. 83, AMR, TAB 2**

21. Furthermore, the content of the Struck Paragraphs are highly material to the first three grounds of appeal and can only be understood in the context of the Disputed Materials as a whole. For example, the Struck Paragraphs set out, among other things:
- i. The Appellants' explanation of their intent and purpose in providing Appendix A, which was also struck, and the case authority under which they provide it; and
  - ii. The Appellants' statements of law on the test to strike a claim and the test of whether the policy exception applies and, in particular, the "bad faith" exception to the policy exception;
  - iii. Facts and argument regarding the application of the above tests to matters pleaded or touched on in possible amendments set out in Appendix A.

**Oostenbrink Affidavit, Exhibit F, Written Representations,  
paras. 5, 14-16, 23-25, 49-50 and 72-86, AMR, TAB 2**

22. The Grounds of Appeal deal with the same matters as those set out in the Struck Paragraphs. For example, they plead that the Motions Judge erred in his application of the tests to strike a claim, proximity, policy exceptions and bad faith policy exceptions. As such, the content of the Struck Paragraphs, demonstrating that the Motions Judge struck or disregarded statements of law and case authority on these tests, are material and relevant evidence of whether the Motions Judge properly applied the tests.

**Oostenbrink Affidavit, Exhibit F, Written Representations,  
AMR, TAB 2  
Oostenbrink Affidavit, Exhibit H, Notice of Appeal, AMR, TAB 2**

23. The first ground of appeal pleads that the Motions Judge erred in treating Appendix A as an improper breach of procedure. Thus, the nature of Appendix A, and whether it was an improper breach of procedure and should be struck on that basis, is a live issue. The Struck Paragraphs, setting out the Appellants' case authority and purpose and intent for providing Appendix A, is thus highly relevant to the issues on appeal.

**Oostenbrink Affidavit, Exhibit F, Written Representations,  
AMR, TAB 2  
Oostenbrink Affidavit, Exhibit H, Notice of Appeal, AMR, TAB 2**

24. The Grounds of Appeal also plead that the Motions Judge disregarded the potential amendments set out in Appendix A, notwithstanding his statement at para. 84 of the Order that he would consider both the potential amendments and the legal arguments thereto set out in the Struck Paragraphs. Thus, the question of whether the Motions Judge in fact considered the potential amendments and the Struck Paragraphs is a live issue. This can be determined only with reference to the content of the Struck Paragraphs.

**Oostenbrink Affidavit, Notice of Appeal, Exhibit H, AMR, TAB 2  
Oostenbrink Affidavit, Order, Exhibit G, AMR, TAB 2**

25. Accordingly, the Appellants submit that this is an exceptional case in which the Struck Paragraphs, despite being legal argument, are relevant to the Appeal. In addition, contextual paragraphs around the Struck Paragraphs, which form the remainder of the Disputed Materials, are needed to make sense of the Struck Paragraphs. Accordingly, the Disputed Materials should be included in the Appeal Book.

**B. The "No-costs" rule applies and neither party should receive costs of this motion**

26. Where an action relates to a class proceeding, Rule 334.39(1) potentially applies. It states:

334.39 (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless

- (a) the conduct of the party unnecessarily lengthened the duration of the proceeding;
- (b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or
- (c) exceptional circumstances make it unjust to deprive the successful party of costs.

***Federal Courts Rules, Rule 334.39(1), LA, TAB 4(G)***

27. In *Campbell v. Canada (Attorney General)*, this Court established that the “no costs” regime of Rule 334.39(1) applies “as soon as the parties to the action are made parties to the certification motion.” This applies to costs associated with any steps taken after that date.

***Campbell v. Canada (Attorney General)*, 2012 FCA 45  
at paras. 45-47, LA, TAB 4(H)**

28. The Appellants filed the Certification Motion naming all of the Appellants and Respondents as parties on September 12, 2013. Accordingly, no costs can be granted against the parties, absent exceptional circumstances set out at Rule 334.39(1)(a), (b) and (c).
29. The Appellants submit that there are no exceptional circumstances in this case, and therefore no costs should be awarded to any party on this motion.

**PART 4 – RELIEF SOUGHT**

30. The Appellants seek an Order determining the contents of the Appeal Book and directing the inclusion of the Disputed Materials in the Appeal Book, with no costs to any party.

DATED at the City of Edmonton, in the Province of Alberta, this 21<sup>st</sup> day of May, 2014.

Field LLP

Per: 

Jonathan Faulds, LLM, QC  
Daniel P. Carroll, LLM, QC  
Lily L.H. Nguyen

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