Court File No. A-169-14

APPEAL

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)

APPELLANTS' MEMORANDUM OF FACT AND LAW

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PART I: STATEMENT OF FACTS

A. Overview

[1] The Appellants appeal from the Motions Judge's March 5, 2014 order ("Order")[1] to strike the Appellants' proposed class proceeding and negligence claim without leave to amend, and with costs against the Appellants.

[2] The Appellants claim that the Respondents negligently failed to implement their importation scheme pertaining to live honeybee packages from the continental United States after December 31, 2006, when the Respondents by law and representations to the Appellants were supposed to open the border to packages.[2]

[3] Instead of opening the border, the Respondents abdicated their regulatory authority to a faction of the beekeeping industry, and in effect permitted this faction to maintain the border closure indefinitely for purposes outside of the regulatory scheme, namely, retention of market share, maintenance of a monopoly over the provision of honeybee packages and reduction of cross-border competition, to the detriment of other commercial beekeepers.[3]

[4] The Appellants set out their claim of negligence based on misuse of discretion and abdication of authority in a proposed class proceeding and statement of claim ("Statement of Claim") filed December 28, 2012.[4] The Appellants did not at that time provide particulars of the abdication, including the third party to whom authority was abdicated, and how the abdication occurred.

[5] In the Appellants' written representations to the Strike Motion ("Strike Representations"), the Appellants provided these particulars in an appendix titled "Appendix A: Proposed Amended Statement of Claim" ("Appendix A"), with the stated intention of addressing concern about lack of particulars.[5]

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[1] Reasons & Order of Scott J ["Reasons & Order"], Appeal Book ["AB"] 0055 **[TAB 2]**

[2] Statement of Claim, para 1(c)(i), AB 0059 **[TAB 3]**

[3] Statement of Claim, paras 28(g) and (h), AB 0066 **[TAB 3]**; Extracts of the Appellants' Written Representations, Appendix A ["Appendix A"], paras. 28(g) and (h), AB 0107 **[TAB 6C]**

[4] Statement of Claim, paras 28(g) and (h), AB 0066 **[TAB 3]**

[5] Extracts of the Appellants' Written Representations ["Strike Representations"], para. 25, AB 0087 **[TAB 6B]**; Appendix A, AB 0095 **[TAB 6C]**

[6] In the reasons ("Reasons") for the Order, the Motions Judge held that the Appellants' provision of Appendix A was an impermissible breach of procedure that demonstrated that the Appellants were not "forthright." He struck Appendix A and approximately ¼ of the Strike Representations, found beyond a doubt that there was no duty of care, and awarded costs on the basis that the "no-costs" regime for class actions set out in Rule 334.39 of the *Federal Courts Rules* ("FCR")[6] did not apply until certification was granted.[7]

[7] At issue in this Appeal is whether the Motions Judge erred by not considering the particulars provided in Appendix A. Also at issue is whether this error led him to misapprehend the facts on the test for a Crown duty of care, and whether the Motions Judge misapprehended legal principles of that test. Finally, this Appeal raises the question of the correct interpretation of Rule 334.39 of the *FCR* and when it applies.

B. Background

[8] The Appellants are three commercial beekeepers variously based in Alberta, B.C. and Manitoba. The Appellants seek to represent a class made up of commercial beekeepers in Canada who rely on the importation of honeybee packages to replace colonies lost to winter-kill and other factors.[8]

[9] The Respondents are Crown entities who collectively are charged with administering the *Health of Animals Act* ("*HAA*")[9] and associated regulation, including the regulation of honeybee importation into Canada.[10]

[10] The importation of live honeybees into Canada generally takes one of two forms: as a "package," which is a cereal-box-sized container holding a small colony, or as a "queen," which is a matchbox-sized box containing a honeybee queen and a few attendant bees.[11]

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[6] *Federal Courts Rules*, SOR/98-106, s 334.39

[7] Reasons & Order, paras 83, 114, 115-20 and 122, AB 0038 and 0051-0054 **[TAB 2]**

[8] Statement of Claim, paras. 2, 3, 4, 8 and 10, AB 0059 to 0061 **[TAB 3]**

[9] *Health of Animals Act*, SC 1990, c 21 ["*HAA*"]

[10] Statement of Claim, paras 5-7, AB 0060 **[TAB 3]**

[11] Statement of Claim, para 11, AB 0061 **[TAB 3]**

[11] Although commercial beekeepers look to both queens and packages to replace lost colonies or obtain new ones, it is far more efficient to replace a colony with an existing colony. By contrast, use of a queen requires high inputs to develop into a colony, and carries significant risk of loss of the growing colony before it reaches peak productivity.[12]

C. Current legislation

[12] The honeybee is a "regulated animal" under the *HAA* and *Health of Animals Regulation* ("*HAR*"), along with all mammals, birds, hatching eggs, turtles and tortoises, with a few express exceptions.[13] Under s. 12 of the *HAR*, anyone seeking to import a regulated animal is required to obtain a federal import permit.[14]

[13] Under s. 160(1.1) of the *HAR*, the Minister is required to issue ("shall issue") a federal import permit if he is satisfied "to the best of the Minister's knowledge and belief," that the activity for which the permit is sought is unlikely to "result in the introduction into Canada, the introduction into another country from Canada or the spread within Canada of a vector, disease, or toxic substance."[15] Prior to an amendment effective December 14, 2012,[16] the Minister had discretionary authority to issue ("may issue") the permit if the conditions were met. [17]

[14] Under s. 14 of the *HAA*, the Minister also has the authority to make regulations prohibiting the importation of any animal into Canada or any part of Canada. However, the Minister may make such prohibition only for "such period as the Minister considers necessary for the purpose of preventing a disease or toxic substance from being introduced into or spread within Canada."[18]

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[12] Statement of Claim, paras 12-13, AB 0061 **[TAB 3]**

[13] *Health of Animals Regulation*, CRC c 296, s. 10 ["*HAR*"]

[14] *HAR*, s. 12

[15] *HAR*, s. 160(1.1)

[16] *Regulations Amending and Repealing Certain Canadian Food Inspection Agency Regulations (Miscellaneous Program)*, SOR/2012-286, s. 60 ["*2012 Amendment*"]

[17] *Regulations Amending and Repealing Certain Regulations Administered and Enforced by the Canadian Food Inspection Agency*, SOR/2006-147, s. 19

[18] *HAA*, s. 14

[15] In 2004, the Minister exercised his authority under s. 14, enacting the *Honeybee Importation Prohibition Regulation, 2004* ("*HIPR-2004*"),[19] which created a prohibition on U.S. packages for the period of May 19, 2004 to December 31, 2006, but permitted the importation of U.S. queens by exemption.

[16] *HIPR-2004* remains in force. However, the prohibition period in *HIPR-2004* has not been renewed since it expired on December 31, 2006. The importation of U.S. packages, as with all regulated animals, now falls to be determined under ss. 12 and 160 of the *HAR*.

D. Legislative History of Honeybee Importation Prohibition

[17] The importation of queens and packages from the continental United States ("U.S.") was initially prohibited in the mid- to late-1980s, with the prohibition being instituted first in provinces in Eastern and Central Canada, followed by the Western provinces.[20]

[18] The prohibition on both queens and packages was enacted through ministerial order, and maintained throughout the 1990s and into the early 2000s, either by a series of ministerial orders[21] enacted under s. 16 of the *Animal Disease and Protection Act*,[22] or by regulations[23] enacted under s. 14 of the successor act, the *HAA*.[24]

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[19] *Honeybee Importation Prohibition Regulation, 2004*, SOR/2004-136 ["*HIPR-2004*"]

[20] See *Bee Prohibition Order, 1986, amendment*, SOR/87-39 & Regulatory Impact Analysis Statement ["RIAS"], Canada Gazette Part II, Vol. 121, No. 2 ["*BPO-1986*"]; *Honeybee Prohibition Order, 1987*, SOR/87-607 & RIAS, Canada Gazette Part II, Vol. 121, No. 22 ["*HPO-1987*"].

[21] *BPO-1986*; *HPO-1987*; *Honeybee Prohibition Order, 1988*, SOR/88-54 & RIAS, Canada Gazette Part II, Vol. 122, No. 2 ["*HPO-1988*"]; *Honeybee Prohibition Order*, 1990, SOR/90-69 & RIAS, Canada Gazette Part II, Vol. 124, No. 2 ["*HPO-1990*"]

[22] *Animal Disease and Protection Act*, RSC 1985, c A-11, as repealed by the *HAA*, s 76 ["*ADPA*"]

[23] *Honeybee Prohibition Regulations, 1991*, SOR/92-24 & RIAS, Canada Gazette Part II, Vol. 126, No. 1 ["*HPR-1991*"]; *Honeybee Prohibition Regulations, 1993*, SOR/94-8 & RIAS, Canada Gazette Part II, Vol. 128, No. 1 ["*HPR-1993*"]; *Honeybee Importation Prohibition Regulations, 1996*, SOR/96-100 & RIAS, Canada Gazette Part II, Vol. 130, No. 3 ["*HIPR-1996*"]; and *Honeybee Importation Prohibition Regulations, 1997*, SOR/98-122 & RIAS, Canada Gazette Part II, Vol. 134, No. 18 ["*HIPR-1997*"]; *Honeybee Importation Prohibition Regulations, 1999*, SOR/2000-323 & RIAS, Canada Gazette Part II, Vol. 134, No. 18 ["*HIPR-1999*"]; *HIPR-2004*

[24] *HAA*, s 14

[19] Each order and regulation created a prohibition period that ranged from a few months to approximately two years, with the exception of the *Honeybee Importation Prohibition Regulation, 1999* ("*HIPR-1999*"), which created a prohibition period of almost 5 years, ending on December 31, 2004.[25] *HIPR-1999* was repealed and superseded by *HIPR-2004*.[26]

[20] Each of the orders and regulations pertaining to honeybee importation prohibition were accompanied by a regulatory impact analysis statement ("RIAS"). The RIASs explained that the initial border closure to U.S. honeybees was an emergency measure to prevent the spread into Canada of the tracheal mite bee pest, which threatened "disastrous effects on Canada's beekeeping industry."[27]

[21] The border closure was then maintained as a result of concerns over the "serious economic impact" of varroa mite to Canada's beekeeping industry, and "serious effect" on the industry and "threat to human health and safety" from varroa mites and other pests.[28] In 2000, when the longest prohibition period of almost 5 years was enacted, the Respondents promised annual review and monitoring of the situation to ensure the border closure continued to be justified and lasted no longer than was necessary.[29]

[22] In 2003, the Respondents' concerns over acute economic hardship suffered by certain commercial beekeepers from the border closure came to the fore.[30] In addition, the efficacy of the border closure had abated, since varroa mite and other pests were now acknowledged to be established and spreading in Canada.[31] Furthermore, as the Respondents noted, each of the provinces had authority to restrict

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[25] *HIPR-1999* ss. 1 and 3

[26] *HIPR-2004*, s. 2

[27] *HPO-1987*, p. 3984; *HPO-1988*, p. 355; *HPO-1990*, p. 332; Appendix A, paras 26(b)(i)-(ii), AB 0102 **[TAB 6C]**

[28] *HPR-1991*, p. 71; *HIPR-1993*, p. 39; *HIPR-1996*, p. 680; *HIPR-1997*, p. 726; *HIPR-1999*, p. 2044; Appendix A, para 26(b)(ii), AB 0102 **[TAB 6C]**

[29] Appendix A, paras 26(c)(ii) to (v), AB 0103-0104 **[TAB 6C]**; see also *HIPR-1999*, p. 2046; *HIPR-2004*, p. 795.

[30] Appendix A, para 26(c)(iii), AB 0103 **[TAB 6C]**; see also *HIPR-2004*, pp 795 and 797.

[31] *HIPR-2004*, p 795; Appendix A, para 26(c)(iii), AB 0103 **[TAB 6C]**

inter-provincial movement of bees to protect their own industries.[32] As a result, the Respondents determined to open the border to U.S. queens immediately.[33]

[23] The CFIA stated that it had conducted a risk assessment in 2003 (the "2003 Risk Assessment"), from which it concluded that the prohibition on U.S. queens should be lifted immediately, but the prohibition on U.S. packages should continue until December 31, 2004.[34]

[24] However, after consultation with provincial apiculturists, beekeepers and beekeeper groups, the CFIA noted divisions within the beekeeping industry over the border closure issue, and concerns continuing to be expressed about package and queen importation. In response to expressed concerns, the Respondents determined to extend the prohibition on U.S. packages for an additional two years as a precautionary measure, to December 31, 2006.[35] The Respondents enacted and brought into force *HIPR-2004*.

E. The Claim of Regulatory Negligence

[25] After December 31, 2006, U.S. queens remained available as they had been since 2004 under *HIPR-2004*, by beekeepers applying for and being granted a federal import permit.[36]

[26] By contrast, notwithstanding the expiry of the prohibition on packages on December 31, 2006, the Respondents have continued to deny federal import permits for U.S. packages, by widely disseminating that the prohibition on U.S. packages remained in place, informing beekeepers that no federal import permits for U.S. packages would be issued, and rejecting beekeepers' applications for permits for U.S. packages without any consideration.[37]

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[32] *HIPR-2004*, p 796.

[33] *HIPR-2004*, p 796

[34] Appendix A, para 26(b)(iv), AB 0103 **[TAB 6C]**; see also *HIPR-2004*, pp 799-800.

[35] Appendix A, para 26(b)(iv) and 26(c)(iv), AB 0103-0104 **[TAB 6C]**; *HIPR-2004*, p 800.

[36] Statement of Claim, para 21, AB 0063 [TAB 3]

[37] Statement of Claim, paras 28(a) to (f), AB 0065-0066 **[TAB 3]**

[27] Since that time, the Respondents have continued to rely on the 2003 Risk Assessment for their justification in continuing the border closure to packages and have done little or no research, investigation, monitoring or assessment.[38]

[28] The Statement of Claim pleaded that the Respondents, in maintaining the border closure to U.S. packages after December 31, 2006, had misused their discretion and abdicated their regulatory authority.[39]

[29] In Appendix A, the Appellants provided particulars of this misuse of discretion and abdication. They stated that after December 31, 2006, the Respondents in effect turned over decision-making authority to the Canadian Honey Council ("the Council"), the national association of provincial beekeeping associations representing commercial beekeepers. The Respondents did so by taking the position that they would not consider opening the border to U.S. packages until a new risk assessment was conducted to update the 2003 Risk Assessment. However, they would not conduct such a risk assessment until the Council gave its approval to proceed.[40]

[30] The effect of these two combined positions was that the Council became the *de facto* decision-maker regarding the assessment of applications for federal import permits for U.S. packages under ss. 12 and 160 of the *HAR*.

[31] Furthermore, the Respondents closed their mind to any honeybee research that was not endorsed by or did not accord with the prevailing views of the Council, and ceased to consult widely with the commercial beekeeping industry after December 31, 2006. They instead limited all interaction and consultation to the Council, informing other commercial beekeeping groups, regions and individuals that they would not be heard unless they went through the Council.[41]

[32] The Appellants stated that the Respondents took these actions notwithstanding their knowledge that the views of Council members representing specific beekeeping regions were split, and the views of Council as a whole were determined by one dominant voting bloc, representing a specific faction of the commercial beekeeping

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[38] Statement of Claim, paras 15 and 22, AB 0062 and 0063 **[TAB 3]**

[39] Statement of Claim, paras 28(g) and (h), AB 0066 **[TAB 3]**

[40] Appendix A, paras 26(c)(vi)-(vii), 28(g)(i) and 28(h)(i) to (v), AB 0104 and 0107-0108 [TAB 6(c)].

[41] Appendix A, paras 28(h)(i) to (v), AB 0107-0108 [TAB 6(c)]

industry. This faction was interested in perpetuating the prohibition on packages for reasons outside the regulatory scheme, namely retaining market share, maintaining monopolies, reducing cross-border competition and obtaining higher profits at the expense of the Appellants and other commercial beekeepers.[42]

[33] The Appellants added in Appendix A that the Respondents had denied import permits for U.S. packages for an improper purpose, and illegally maintained the border closure.[43]

PART II: POINTS IN ISSUE

[34] The following points are in issue:

1. Did the Motions Judge misapprehend the test to strike a claim by failing to consider whether the Statement of Claim could be saved by amendment and failing to consider the Appellants' proposed amendments, instead treating the Appellants' proposed amendments as an improper breach of procedure?
2. Did the Motions Judge err in finding there was no relationship of proximity by considering the wrong statutory scheme, ignoring material facts, and engaging in circular reasoning?
3. Did the Motions Judge err in finding that any *prima facie* duty of care was negated by policy considerations by considering the wrong statutory scheme, ignoring material facts and misdirecting himself as to the test of a "good faith" true policy exemption?
4. Did the Motions Judge err in his interpretation of Rule 334.39 of the *FCR* as not applying until a class proceeding is certified?

PART III: SUBMISSIONS

A. Standards of review

[35] A decision to grant or refuse a motion to strike is considered a discretionary decision, generally entitled to deference by the appellate court. However, where the appellate court "clearly determines that the lower court judge has given insufficient weight to relevant factors or proceeded on a wrong principle of law," the standard of correctness applies.[44]

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[42] Appendix A, paras 26(d.1) and 26(d.2), AB 0104 [TAB 6(c)]

[43] Appendix A, paras 28(i) and (j), AB 0108 [TAB 6(c)]

[44] *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374, 2007 CarswellNat 4130, para. 15

[36] A discretionary decision on a motion to strike may also be overturned where this Court is satisfied that the Motions Judge "seriously misapprehended the facts, or where an obvious injustice would otherwise result."[45]

[37] With respect to the question of whether a Crown duty of care is made out for the purposes of the Strike Motion, questions of pure law attract a standard of review of correctness, questions of fact and inferences of fact attract a standard of review of "palpable and overriding error" and questions of mixed law and fact where there is an extricable error of law are reviewable on the standard of correctness.[46]

[38] The question of whether the Motions Judge properly cited and applied the legal principles of the Crown duty of care test is a question of pure law or extricable law subject to correctness. The question of whether the Motions Judge properly considered Appendix A or misapprehended the facts in failing to consider Appendix A is an issue *de novo* not subject to a standard of review. As the test on a motion to strike requires the Motions Judge to assume all facts as pleaded are true and no evidence is permitted,[47] the Appellants submit that there is no issue as to fact, only whether Motions Judge considered the proper facts.

[39] The question of at what stage the Rule 334.39 "no costs" regime applies is a question of law subject to a standard of correctness.[48]

B. Did the Motions Judge misapprehend the test to strike a claim?

1. The test on a strike motion required consideration of Appendix A

[40] The Respondents brought the Strike Motion under Rule 221(1)(a) of the *FCR*, which permits a claim to be struck if it discloses no reasonable cause of action.[49] No evidence is permitted, and the facts as pleaded are assumed to be true.[50]

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[45] *Apotex Inc v Canada (Governor in Council)*, para. 15

[46] *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, paras 8, 10, 25, 36-37

[47] *FCR*, Rule 221(2); *Knight v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, 2011 SCC 42, 2011 CarswellBC 1968, para 22

[48] *Housen v Nikolaisen,* para 8.

[49] *FCR*, Rule 221(1)(a).

[50] *FCR*, Rule 221(2); *Knight v Imperial Tobacco*, para. 22

[41] As stated by this Court in *Simon v Canada*, "For such a motion to succeed it must be plain and obvious or beyond reasonable doubt that the action cannot succeed." In addition, this Court stated that where the motion is granted without leave to amend, "any defect in the statement must be one that is not curable by amendment."[51]

[42] Because a motion to strike has the potential, as in this case, of finally ending the lawsuit, Courts are required to read the claim "as generously as possible and to accommodate any inadequacies in the form of the allegations which are a result of mere drafting deficiencies."[52]

[43] In *Collins v Canada*, this Court made clear that the Court may consider an "amended draft statement of claim" provided as part of a plaintiff's response to the motion to strike in assessing whether a defect in a claim is curable. No limitation was placed on whether the pleadings had closed or remained open, and the implication was that it was not restricted to instances where a party could amend as of right without leave. Notably in *Collins v Canada*, this Court approached the offered amendments as evidence or an illustration of whether the claim was curable on a prospective basis, and not as a formal motion to amend in accordance with the "amended draft statement of claim." As this Court stated:

> I conclude that with appropriate amendments a cause of action could properly be pleaded alleging the Crown to be vicariously liable ... It follows that I would clarify the Judge's order by specifying that Ms Collins is given leave to re-amend her pleading so as to allege the tort of misfeasance in public office.[53] [Emphases added]

[44] In *Gagne v. Canada*, the Federal Court on appeal from the decision of a prothonotary went so far as to find that a plaintiff who seeks to rely on curative amendments is obligated to "produce an amended draft statement of claim in support of his response to the motion ... or indicate how he could amend his statement of claim to correct the deficiencies"[54] (which is what the Appellants did at the proper

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[51] *Simon v Canada*, 2011 FCA 6, 2011 CarswellNat 38, para 8

[52] *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441, 1985 CarswellNat 151, para 14

[53] *Collins v R*, 2011 FCA 140, 2011 CarswellNat 1234, para 30

[54] *Gagne c Canada*, 2013 FC 331, 2013 CarswellNat 1446, paras 22, 27

time by way of Appendix A) or lose the ability to rely on curative amendments on appeal.

[45] Similarly, in *Los Angeles Salad Company*, the British Columbia Court of Appeal held that in assessing a motion strike, a Court may consider the motion "as if the statement of claim had been amended" in accordance with the proposed amendments, even when formal leave to amend had not yet been granted.[55]

2. The Motions Judge did not consider Appendix A and instead treated it as an improper breach of procedure

[46] In the Reasons, the Motions Judge held that the Appellants failed to adhere to a number of required procedural steps before providing Appendix A. For example, the Motions Judge held that Appendix A could only be provided after the Appellants sought and obtained leave to amend on a motion under Rule 75 of the *FCR*. As the Motions Judge stated:

> Rule 75 of the *FCR* is clear; the Plaintiffs should have proceeded with a motion seeking the Court's permission to amend as the Defendant had already filed his statement of defence on February 8, 2013. [56]

[47] In addition, the Motions Judge implied that where proceedings are specially managed, a motion may be brought only within a timetable set by the Case Management Judge, and therefore the party seeking to bring such a motion must seek and obtain direction about the timing of such a motion before bringing it:

> The case being specially managed, it was incumbent on the Plaintiffs to advise the Court of their intention to amend their pleadings. During the case management conference held on October 1, 2013, which led to the Court setting a timetable for the filing of the Defendant's motion based on both parties' representations, the Plaintiffs never mentioned their intention to amend their statement of claim. Since the case was being specially managed, upon being served with the Defendant's motion to strike, the Plaintiffs could still have asked the Court to amend the time table in order to comply with the court rules and file a motion to amend.[57]

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[55] *Los Angeles Salad Company Inc v Canadian Food Inspection Agency* (2013), 40 BCLR (5th) 213, 2013 BCCA 34, 2013 CarswellBC 197, paras 10-11

[56] Reasons & Order, para 82-83, AB 0037-0038 **[TAB 2]**

[57] Reasons & Order, para 82-83, AB 0037-0038 **[TAB 2]**

[48] The Motions Judge characterized the Appellants' failure to follow the above steps as proof that the Appellants had failed to be "forthright" with their attempts to submit amendments and had impliedly abused the process, citing this Court's decision in *Bristol-Myers Squibb Co.*[58] This was notwithstanding the Appellants' efforts in their Strike Representations and their letter to the Registry to clarify that they were not seeking formal leave to amend but were providing Appendix A for illustrative purposes to assist with the application of the strike test.[59]

[49] The Motions Judge held that as a consequence of this lack of forthrightness, he was striking Appendix A, as well as 24 paragraphs from the Strike Representations. These 24 paragraphs represent approximately ¼ of the Appellants' submissions on the Strike Motion, including the Appellants' submissions on case authority supporting the provision of proposed amendments, references to the facts set out in Appendix A, and case law relevant to those facts.[60]

[50] With respect, the Appellants submit that *Bristol-Myers Squibb Co* is distinguishable on the facts and has no application here. In that case, one of the litigants sought to amend for the fourth time to radically change the claim on the eve of trial. The parties in this case are at a preliminary stage of proceedings prior to any discovery, the proposed amendments particularize and do not radically change the claim, and amendment at this stage would assist in determining the "real questions in controversy," which this Court recognized as a legitimate goal.[61]

[51] The Motions Judge's finding that formal leave to amend must be obtained *before* curative amendments may be considered runs contrary to this Court's decisions in *Collins* and *Simon* that the Court must ask itself if the defects are curable and should consider proposed amendments. If, as the Motions Judge indicated, proposed amendments may be submitted only once leave to amend is granted and the

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[58] Reasons & Order, para 83, AB 0038 **[TAB 2]**, citing *Bristol-Myers Squibb Co. v Apotex Inc*, 2011 FCA 34, 2011 CarswellNat 1002, para 28

[59] Strike Representations, paras 23-24, AB 0087 **[TAB 6B]**; Letter to Federal Court Registry dated December 6, 2013, AB 0210 **[TAB 9A]**

[60] Reasons & Order, paras 82-83, AB 0037-0038 **[TAB 2]**; Strike Representations, AB 0078-0094 **[TAB 6, 6A and 6B]**

[61] *Bristol-Myers Squibb Co*, at para 4

claim is actually amended, the need to consider prospective curability as per *Collins* and *Simon* is redundant.

[52] Furthermore, the Appellants submit that the Motions Judge's requirement that the Appellants go through the procedural steps he cited is contrary to law.

[53] The Appellants are unaware of any rule that prohibits a party in specially managed proceedings from taking a step without first obtaining leave and timing directions from a case management judge. This runs counter to this Court's approach in *Merck & Co v Apotex Inc.* where it was held that the mere fact that a proceeding is under case management does not override other rights provided for in the *FCR*.[62] The Appellants submit that the approach of the Federal Court in *Viacom Ha! Holding Co.* is the correct one, where the Court commented:

> there is no reason to believe that the appointment of a case management judge puts matters on hold till the case management judge issues a decree as to the steps to be taken. ... once a case management order is signed, the parties are free to proceed subject only to some order to the contrary by the case management judge.[63]

[54] To the extent the Motions Judge was implying that the Appellants were estopped by "representations" in the form of failure to notify of their intentions in case management,[64] the Appellants submit that silence should not be converted into a positive representation that they would not provide particulars or seek to amend.

[55] Furthermore, while it is correct that the Appellants proposed that the Certification Motion be heard first and all interlocutory motions including the Strike Motion be heard concurrently with it,[65] the Appellants note that the Motions Judge rejected this proposal and instead adopted the Respondents' proposed timeline. The Appellants submit that it is unfair to hold them to one aspect of a proposal that was rejected. In any case, the proposal was made and decided upon in an entirely different context from the question of whether the Appellants could provide further particulars or seek leave to amend.

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[62] *Merck & Co v Apotex Inc*, 2003 FCA 438, 2003 CarswellNat 3738, para 13

[63] *Viacom Ha! Holding Co v Doe*, 2002 FCT 13, 2002 CarswellNat 4873, para 32

[64] Reasons & Order, para 82, AB 0037-0038 **[TAB 2]**

[65] Letter from Appellants' Counsel, September 6, 2013, AB 0217-0219 **[TAB 9D]**

[56] The Appellants submit that the Motions Judge's insistence on strict compliance with unrecognized procedural elements resulted in the Appellants' lawsuit being ended for incorrectly perceived technical breaches, contrary to the "generous approach" required on the Strike Motion.

[57] The Appellants also submit that the Motions Judge erred in his test for a Rule 75 motion.

[58] The Motions Judge implied that Rule 75 did not permit amendments to accord with facts that were "known to the plaintiffs" prior to the first case management meeting on October 1, 2013.[66] The Appellants are unaware of statutory or case authority that states that parties may amend pleadings only for new facts. Rule 75(1) permits amendment with leave "at any time" absent prejudice to the other party. Rule 75(2) permits amendments to "accord with the issues at the hearing."[67] The proposition advanced defeats the purpose of permitting amendment to clarify the "real questions in controversy,"[68] since any clarification that was previously known to the amending party would not be permitted.

[59] Furthermore, while this Court has recognized that delays in motions to amend may be a factor in the issue of prejudice to the other party, such prejudice generally arises only at a late stage of the proceedings, such as during trial after witnesses had testified.[69] The Appellants submit that contrary to the Motions Judge's finding of "injustice" to the Respondents without further explanation of what injustice was suffered,[70] no such prejudice is apparent at this early stage of proceedings.

[60] Appendix A did not change the nature of the claim, but only particularized it. The Respondents had a right of reply to the Appellants' proffered amendments, which they exercised in a lengthy Reply Motion Record.[71] The Strike Motion took place at an early stage of the proceedings, before the hearing of the Certification Motion, discovery and trial.

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[66] Reasons & Order, para 83, AB 0038 **[TAB 2]**

[67] *FCR*, Rule 75(2)(a)

[68] *Bristol-Myers Squibb Co*, para 4.

[69] *Canderel Ltd v R* (1993), [1994] 1 FC 3, 1993 CarswellNat 1337 (Fed CA) at paras 7 and 15

[70] Reasons & Order, para 83, AB0038 **[TAB 2]**

[71] Extracts of the Respondents' Reply Motion Record, AB 0149 to 0209 **[TABS 8A-8E]**

[61] Furthermore, as the Appellants took pains to bring to the attention of the Motions Judge, the additional particulars should have come as no surprise to the Respondents. As noted in the Strike Representations,[72] they were fully set out in the affidavit of Jean Paradis, which the Appellants served on the Respondents on September 25, 2013, 1½ months prior to the Respondents' Strike Motion.[73]

[62] Unfortunately, the Respondents read the Appellants' meaning in this paragraph ungrammatically, construing it as meaning that the Appellants incorrectly claimed Appendix A had been provided on September 25, 2013, which the Motions Judge appeared to accept as fact.[74] This may have added to his perception that the Appellants were not "forthright."

[63] The Appellants submit that the Motions Judge erred by failing to consider if the claim, if deficient, was curable by amendment and failing to consider the proffered amendments set out in Appendix A. The Appellants further submit that the Motions Judge's view of the Appellants' conduct as not "forthright" and impliedly an abuse of process was an error that any reasonable person could conclude to have coloured his assessment of the Appellants' claim. These errors were not inconsequential, but rather, as further argued under Grounds of Appeal #2 and #3 below, had profound effect on the analysis.

[64] The Motions Judge went on to say that notwithstanding his determination, he would "nonetheless consider the arguments therein."[75] There is little or no indication in the Reasons that he did so. In setting out the claim, the Motions Judge cited only facts in the Statement of Claim.[76] The Motions Judge made no reference to misuse of discretion and abdication to the Council, stating "there is no specific allegation that the Defendant was not the one who took the decision to prohibit import permits."[77]

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[72] Strike Representations, para 25, AB 0087 **[TAB 6B]**

[73] Proceedings Queries: Recorded entries for T-2293-12

[74] Reasons & Order, para 14, AB 0012 **[TAB 2]**

[75] Reasons & Order, para 84, AB 0038 **[TAB 2]**

[76] Reasons & Order, para 88, AB 0040-0042 **[TAB 2]**

[77] Reasons & Order, para 120, AB 0053 **[TAB 2]**

C. Did the Motions Judge err in finding no relationship of proximity?

1. The test of proximity

[65] The question of whether the Respondents owe a duty of care asks firstly whether there is a relationship of proximity such that failure to take reasonable care might foreseeably cause loss or harm to the plaintiffs. If so, a *prima facie* duty of care is established and the analysis moves to the second stage, which asks whether this *prima facie* duty of care is negated by policy considerations. If the answer at the second stage is no, a duty of care is established.[78]

[66] The SCC held that where the parties' relationship falls into a settled category recognized by prior jurisprudence, a *prima facie* duty of care can be presumed without embarking on Stage 1 of the analysis.[79] The Appellants accept that there is no such settled category on the facts here.

[67] In *Cooper v Hobart*, the SCC held that a relationship of proximity is based on, among other things, "expectations, representations, reliance and the property or other interests involved." However, the factors are diverse, and cannot be exhaustively pre-determined.[80]

[68] In *Knight v Imperial Tobacco*, the SCC dispelled the notion that a Crown duty of care *must* arise from within the statutory scheme. As it stated, a relationship of proximity *may* arise expressly or by necessary implication from within the statute itself, but such an instance would be rare since most statutes are "aimed at public goods, like regulating an industry."[81]

[69] As the SCC explained, another scenario that could ground a Crown duty of care is primarily as a result of interactions between the Crown and the plaintiffs. Where this is the case, legislation continues to be relevant, but only for the purpose of ruling out a duty of care because of conflict with the legislative scheme. As the SCC stated:

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[78] *Knight v Imperial Tobacco*, para 39; *Cooper v Hobart*, [2001] 3 SCR 537, 2001 SCC 79, 2001 CarswellBC 2502, paras 30-31

[79] *Knight v Imperial Tobacco*, para 37

[80] *Cooper v Hobart*, paras 32 and 34-35

[81] *Knight v Imperial Tobacco*, para 44

> The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises.... However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.[82]

[70] Finally, the SCC envisioned a third scenario, where the relationship of proximity arises as a result of a combination of the statutory scheme and the interactions of the parties.[83]

[71] In *Knight v Imperial Tobacco*, the SCC found the Crown had a *prima facie* duty of care to tobacco companies based primarily on interactions under the second scenario. The tobacco companies, which had been sued for marketing light cigarettes as a safe alternative, launched a third-party claim on the Crown for negligent misrepresentation in advising and assisting in this endeavour. As the SCC stated:

> Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did. ... What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute ... [84]

[72] In *Fullowka v Pinkerton's of Canada*,[85] the SCC appeared to invoke the first or third scenario, when it unanimously found a Crown duty of care to the victims of a mine blast based on provisions in the *Mining Safety Act*. The case involved the murder of nine miners by an angry striking worker who had set a bomb in the mine. The miners' families sued the Northwest Territories government, among others, for failing to shut down the mine when it knew that the mine was unsafe due to a hostile labour environment. The Court stated:

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[82] *Knight v Imperial Tobacco,* para 45

[83] *Knight v Imperial Tobacco*, para 46

[84] *Knight v Imperial Tobacco*, paras 51 and 53

[85] *Fullowka v Pinkerton's of Canada*, [2010] 1 SCR 132, 2010 SCC 5, 2010 CarswellNWT 9

> To sum up, the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. In exercising this statutory power, the inspectors had been physically present in the mine on many occasions, had identified specific and serious risks to an identified group of workers and knew that the steps being taken by management and Pinkerton's to maintain safe working conditions were wholly ineffectual.[86]

[73] Notably, in *Fullowka*, the SCC found that the duty of care arose as a result of frequent inspections of the mine and regulatory authority over the conduct of miners, even though there was no apparent personal contact with individual miners.[87]

2. The Motions Judge failed to consider relevant regulations, statutory and regulatory provisions, and interactions between the parties.

[74] In this case, the Motions Judge held that no duty of care could be found on the statutory scheme, the interactions between the parties, or any combination of the two.

[75] The Appellants submit that the Motions Judge's conclusions with regard to the statutory scheme are tainted by the following errors:

1. The Motions Judge focused on the wrong statutory scheme, namely the general scheme of the *HAA*, and not the particular importation permit scheme governed by ss. 12 and 160(1.1) of the *HAR* and the *HIPR-2004*;
2. The Motions Judge reversed the order of analysis and engaged in circular reasoning by considering if the *HAA* could support a theoretical public interest, and finding that since it could, there could be no relationship of proximity on the actual statutory scheme that applied here; and
3. The Motions Judge selectively considered a few narrow statements in the RIASs he deemed unsupportive of a relationship of proximity, while ignoring other statements that contradicted his conclusions, as well as the vast majority of the background and context provided in the RIASs.

[76] The Appellants submit that the Motions Judge's conclusions on the interactions between the parties was tainted by his failure to consider Appendix A, resulting in misapprehension of the claim as "purely based on the consultations that took place … and are very general."

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[86] *Fullowka*, para 55

[87] *Fullowka,* paras 44-45

a. The Motions Judge misconstrued the statutory scheme

[77] In dealing with the statutory scheme, the Motions Judge considered the title of the *HAA*[88] and ss. 5-21, 27(3) and 33 of the *HAA*.[89] Sections 5 to 13 deal with diseased animals and issues such as required notice, quarantine, prohibition on concealment, and improper sale and disposal of diseased animals and carcasses. Sections 14 to 21 deal with importation and exportation, including rules governing forfeiture and certification requirements, as well as the s. 14 authority to impose prohibition on imports for specified periods of time. Section 27(3)[90] permits the Minister to establish control zones to contain animal disease outbreaks. Section 33 deals with delegation of the Minister's powers to an inspector.

[78] The Motions Judge also considered two provisions in the *HAR*, namely s. 10 defining "regulated animals" to include honeybees, and s. 12 requiring permits for the importation of regulated animals.[91]

[79] However, the Motions Judge made no mention of s. 160(1.1) of the *HAR*, which sets out the conditions for issuance of import permits, and mandates the issuance of a permit when the conditions are met. The Motions Judge also did not refer to *HIPR-2004*, under which the prohibition on packages was to expire on December 31, 2006. Although he referred to the orders and regulations on honeybee importation in the general sense, he stated they were part of "legislative history,"[92] implying either that this consideration did not include *HIPR-2004*, or that he did not recognize that *HIPR-2004* remained in force.

[80] The Appellants submit that s. 160 of the *HAR* and *HIPR-2004* are the key provision and regulation in this case. Disposal of carcasses or control zones to contain disease outbreak have little bearing on the matter of importation of U.S. packages. Although the *HAA* as a whole may form part of the background in construing s. 160 and *HIPR-2004*, the focus should have been on the relevant provision and regulation.

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[88] Reasons & Order, para 97, AB 0045 **[TAB 2]**

[89] Reasons & Order, para 97-99, AB 0045-0047 **[TAB 2]**

[90] Reasons & Order, para 99, AB 0047 **[TAB 2]**

[91] Reasons & Order, para 101, AB 0047 **[TAB 2]**

[92] Reasons & Order, para 106, AB 0048 **[TAB 2]**

[81] The Motions Judge further misconstrued the statutory scheme in equating or confusing s. 14 of the *HAA* with s. 12 of the *HAR*:

> This prohibition has been imposed since the 1980s and is permitted by section 12 of the *HAR* which prohibits the import of regulated animals, unless a permit is issued by the Minister.[93]

[82] The Motions Judge's statement discloses a fundamental misapprehension of the statutory scheme. The prohibition first imposed in the 1980s did not take place under s. 12 of the *HAR*. Rather, it was imposed under s. 16 of the *ADPA* and subsequently s. 14 of the *HAA* authorizing the Minister to impose a prohibition by order or regulation.[94] The Minister last invoked this power when he enacted *HIPR-2004*, which created a prohibition on packages that expired on December 31, 2006. Thereafter, U.S. package imports were to be governed by ss. 12 and 160 of the *HAR*.

[83] As a result of this error, the Motions Judge failed to consider the effect of the Minister's duty to accept and consider applications for package import permits under s. 160 of the *HAR*, his duty to consider such applications in light of disease and pest risk as set out under s. 160(1.1), and the requirement that the Minister refuse permits for proper statutory considerations, and not for improper considerations such as perpetuating one beekeeping faction's commercial advantages.

[84] By equating s. 12 of the *HAR* with s. 14 of the *HAA*, the Motions Judge also denied would-be importers the protections afforded by s. 14. Under s. 14, a prohibition must be enacted for a specific period of time with an end date. Under the various orders and regulations, these periods ranged from months to a couple of years, with the exception of *HIPR-1999*, which lasted 5 years. Even so, however, the Respondents in *HIPR-1999* committed to annual review of the import policy, and one of these reviews triggered truncation of the wholesale prohibition, leading to the enactment of *HIPR-2004*. Thus, the scheme of s. 14, where it applied, guaranteed regular review and reconsideration of the policy to see if it remained appropriate.

[85] In finding that s. 12 of the *HAR* permits the Respondents to maintain an indefinite prohibition, the Motions Judge not only applied the wrong scheme, but denied commercial beekeepers the relief built into s. 14 of the *HAA*, of timely review

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[93] Reasons & Order, para 118, AB 0053 **[TAB 2]**

[94] *ADPA*, s 16; *HAA*, s 14

and reconsideration of the policy, and updated science and research on the bee pest situation. In addition, the Respondents' action in abdicating their authority to a faction of beekeepers with interests inimical to the Appellants' interests suggests this state of affairs would continue into perpetuity.

[86] Furthermore, the Appellants submit that the Motions Judge's analysis of the statutory scheme took place in the wrong order. The proper order for analyzing the statutory scheme was to 1) identify the scheme and the relevant provisions, i.e., ss. 12 and 160 of the *HAR* and the *HIPR-2004*; and 2) determine whether the scheme was aimed mainly at the Appellants' welfare or the public welfare.

[87] Instead of doing this, the Motions Judge approached the analysis as a search for a public interest component. He asked himself whether the *HAA* was capable of supporting a public interest aim and found that the long title of the *HAA* was general enough to include the public interest.[95] He then scanned the *HAA* and *HAR* for provisions that suggested the Respondents could act in the public interest.[96]

[88] Turning to the honeybee orders and prohibitions, he zeroed in on one paragraph in select RIASs that suggested the *HAA* and *HAR* included a public interest component.[97] The Motions Judge ignored paragraphs in other RIASs that indicated that the *HAA* and *HAR* were aimed at the Appellants' interests. For example:

> "The *Health of Animals Regulations* control the importation of animals into Canada in order to prevent the introduction of diseases which could have a serious economic impact on Canada's animal agricultural industry.[98]
>
> The *Health of Animals Act* controls the importation of animals into Canada in order to prevent the introduction of disease which could have a serious effect on Canada's agricultural industry.[99]

[89] The Motions Judge also ignored the comprehensive background and context of the Respondents' honeybee import policy as set out in the RIASs. These parts of the RIASs established, for example, that:

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[95] Reasons & Order, para 97, AB 0045-0046 **[TAB 2]**

[96] Reasons & Order, paras 97-101, AB 0045-0047 **[TAB 2]**

[97] Reasons & Order, para 108, AB 0049 **[TAB 2]**

[98] *HPR-1991*, p 71

[99] *HPR-1993*, p 39

1. The initial border closure was adopted for the sole purpose of preventing "disastrous effects on Canada's beekeeping industry."[100]
2. The honeybee import policy "would have negligible impact on Canadians who are not involved in the beekeeping industry"[101]
3. The border closure was justified by protection of beekeepers' interests such as: 1) preventing "decreased honey production from mites, and an increased requirement to import honeybees"[102]; 2) minimizing the cost to commercial beekeepers of having to use "chemical controls" on mites of $4 to $6 or $10 per colony up to an amount of $2-3 million a year[103]; and 3) minimizing the cost of having to replace colonies that die of mites[104];
4. The policy was justified by ongoing consultation, direct discussion, in-person meetings[105] and written solicitation of responses from the commercial beekeeping industry, including the Council, provincial beekeeping associations and individual beekeepers[106]; and
5. The Respondents had carefully weighed the relative costs and benefits to different commercial beekeeper groups and concluded that overall, the import measures benefited commercial beekeepers.[107]

[90] As a result of this approach, the Motions Judge guaranteed the conclusion that the statutory scheme was aimed at the public interest in general. As the SCC noted, it is the rare statute that does not include the public interest[108] and it is difficult to envision legislation that excludes any component of public interest. The theoretical public interest of government legislation should not be sufficient to exclude a relationship of proximity to a particular group based on a particular statutory scheme.

[91] Had the Motions Judge focused on the correct statutory scheme, the Appellants submit that the reasonable and correct conclusion was that the scheme was

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[100] *HPR-1987*, p 3984; see also *HPR-1988*, p 356; *HPR-1990*, p 332

[101] *HPR-1991*, p 72, *HPR-1993*, p 40; see also *HIPR-1994*, p 683; *HIPR-1998*, p 729

[102] *HPR-1991*, p 72

[103] *HPR-1993*, p 40; *HIPR-1996*, p 683; *HIPR-1997*, p 729; *HIPR-1999*, p 2047

[104] *HIPR-1994*, p 683; *HIPR-1997*, p 729; *HIPR-1999*, p 2047

[105] *HPR-1993*, p 41

[106] *HPR-1991*, p 73; *HPR-1993*, p 39; *HIPR*-1996, p 682; *HIPR-1997*, p 728 and 730; *HIPR-1999*, pp 2047-48; *HIPR-2004*, pp 798-800

[107] *HIPR-2004*, pp 797-800

[108] *Knight v Imperial Tobacco*, para 44.

aimed at the interests of the Appellants and other commercial beekeepers. The purpose of s. 160(1.1) of the *HAR* and *HIPR-2004* was to open the border to packages after December 31, 2006 and ensure that would-be package importers could seek and obtain permits within the framework of s. 160(1.1), and not have them in effect denied by other commercial beekeepers seeking to maintain commercial advantages.

b. The Motions Judge misapprehended the pleaded interactions

[92] The Motions Judge found that the interactions were:

> ... purely based on the consultations that took place in assessing the need to prolong or not the prohibition and are very general. These alleged interactions were not with the individual Plaintiffs. As in *Berg*, the Plaintiffs did not attempt to apply for a permit to import honeybee packages, let alone denied a permit (*sic*).[109]

[93] With respect, the Appellants submit that the Motions Judge's Reasons reveal a material misapprehension of the nature and facts of the claim and demonstrate that he did not consider Appendix A. For example, they disregard the Respondents' repeated representations to the commercial beekeeping industry that it was acting to protect the economic viability of the industry, and their conduct in crafting the border policy to help commercial beekeepers.[110]

[94] The Motions Judge's Reasons also failed to take into account the more detailed particulars of interactions set out in Appendix A, namely:

1. The Respondents' representations that the border closure was an emergency measure to protect beekeepers' long-term economic interests, and would last only as long as the economic benefits outweighed the costs, as determined by continued monitoring;[111]
2. The representations that the Respondents' information justified opening the border to packages as early as December 31, 2004, but at the latest at December 31, 2006;[112]
3. The Respondents' decision after December 31, 2006 to renege on its earlier representations and instead abdicate its regulatory authority to a faction of

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[109] Reasons & Order, para 114, AB 0051 **[TAB 2]**

[110] Statement of Claim, para 26, AB 0064-0065 **[TAB 3]**

[111] Appendix A, para 26(b)(ii) and (iii), AB 0102-0103 **[TAB 6C]**

[112] Appendix A, para 26(b)(iv), AB 0103 **[TAB 6C]**

commercial beekeepers, despite knowing that this faction would deny federal import permits for improper purposes;[113] and

4. The Respondents' decision after December 31, 2006 to close their mind to the Appellants' and other commercial beekeepers' plight, by consulting only with this faction of beekeepers, refusing to hear from any other beekeepers and informing beekeepers of this fact.[114]

[95] The Appellants submit that had the crucial interactions been considered, the proper conclusion was that the relationship went far beyond the Respondents' relationship with the general public and supported a finding of proximity.

D. Did the Motions Judge err in finding that any *prima facie* duty of care was negated by policy considerations?

[96] The test for a Crown duty of care at this stage moves from the consideration of the specific relationship between the parties, and considers the effect of finding of such a relationship on the Respondents' other legal obligations, the legal system and society in general.[115] Where the effect of such relationship conflicts with other obligations, or is contrary to the public interest, it may be negated for policy reasons.

[97] However, as noted in *Fullowka*, such policy reasons cannot be based on the Respondents' general or "speculative" potential conflict in its duty to act in the public interest. Rather, the policy reasons must be "compelling" and disclose "a real potential for negative policy consequences arising from conflicting duties."[116]

[98] In this case, the Motions Judge held that in the event that there was a *prima facie* duty of care, it was negated on the basis that 1) the Crown's actions amount to good-faith "true" policymaking or 2) a finding would result in indeterminate liability on the Crown.[117]

[99] The Appellants submit that the Motions Judge's conclusions on both policy reasons were tainted by the same errors that affected his analysis of proximity, namely that he focused on the wrong statutory scheme and misapprehended the facts.

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[113] Appendix A, paras 26(d), (d.1) and (d.2), AB 0104 **[TAB 6C]**

[114] Appendix A, paras 26(f), AB 0105 **[TAB 6C]**

[115] *Cooper v Hobart*, para 37

[116] *Fullowka*, paras 57-58

[117] Reasons & Order, paras 115 and 117, AB 0051-0052 **[TAB 2]**

In addition, the Motions Judge erred in law in his test of good faith true policy making.

1. The Motions Judge erred in finding that the Respondents were immune from liability on the basis of "good faith" true policy immunity

[100] As noted in *Knight v Imperial Tobacco*, the test for immunity under the good faith "true policy" exemption is also known as the policy/operational distinction. It recognizes that the Crown must be free to govern and make policy without becoming subject to tort liability, even if such policy creates winners and losers or results in detriment to a specific group.[118]

[101] However, the "good faith" policy exemption also recognizes that where the Crown has already committed to a course of action, it is required to carry out that course of action with due diligence or face potential tort liability.[119] Such "operational" or implementational decisions are not granted immunity.

[102] The SCC in *Knight v Imperial Tobacco* cautioned against equating a discretionary decision with a "true policy" decision. As it noted, all policy decisions are discretionary decisions, but only a small subset of discretionary decisions are true policy decisions.[120]

[103] Finally, because the immunity granted to "true policy" decisions applies only where those decisions are taken in good faith, a true policy decision taken in bad faith, or for an improper purpose, does not attract immunity. This was recognized in the seminal case of *Roncarelli v Duplessis*:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; … "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.[121]

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[118] *Knight v Imperial Tobacco*, paras 74-76

[119] *Knight v Imperial Tobacco*, paras 74-76

[120] *Knight v Imperial Tobacco*, paras 84 and 88.

[121] *Roncarelli v Duplessis*, [1959] SCR 121 at 140

[104] In this case, the Motions Judge held that the Respondents' denial of federal import permits for U.S. packages after December 31, 2006 was a "true policy" decision because it "represents a course or principle of action based on a balancing of public policy considerations, such as social and economic considerations."[122]

[105] The Appellants submit that the Motions Judge's conclusion in this respect rested on his error that s. 12 of the *HAR* governed the prohibition both prior to December 31, 2006 and after that time.

[106] This was not an inconsequential error. As must be emphasized, the regulation-making power under s. 14 of the *HAA* cannot be equated to the administrative responsibilities set out under s. 160 of the *HAR*. The s. 14 *HAA* power requires weighing of social, economic or political considerations, while the s. 160 *HAR* power requires receipt and assessment of permit applications to see if conditions are met mandating issuance of the permit. As per *Knight v Imperial Tobacco*, the fact that decisions under s. 160(1.1) are discretionary is not determinative.

[107] Moreover, there are important public policy reasons why the administrative responsibilities set out under ss. 12 and 160 of the *HAR* should not be equated with the regulation-making power of s. 14.

[108] Section 14 of the *HAA* authorizes the Minister to prohibit importation of a certain live animal, but *only for a specific time period* and *only by regulation*. These two requirements mean that a prohibition is enacted only with the procedural protections built into regulation-making, such as examination, vetting, scrutiny by elected or appointed representatives, inspection, pre-publication, opportunity for comment, consultation and regulatory impact analysis.[123] The required time limitation engages these procedural protections at timely intervals. By equating the *de facto* prohibition in effect maintained by a faction of beekeepers after December 31, 2006 with the regulatory prohibition prior to December 31, 2006, the Motions Judge denies the Appellants the procedural protections afforded by s. 14 of the *HAA*.

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[122] Reasons & Order, para 118, AB 0053 **[TAB 2]**

[123] See *Statutory Instruments Act*, RSC 1985, c S-22, ss 3, 11, 19, 19.1; *Statutory Instruments Regulation*, CRC, c 1509, s. 11; Cabinet Directive on Regulatory Management (online at http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgr01-eng.asp, accessed August 20, 2014).

[109] Alternatively, the Appellants submit that it was a material error to conclude that the claim did not disclose bad faith policy making because the Appellants "did not identify a Crown servant; therefore their claim cannot amount to a claim of misfeasance in public office or abuse of public office."[124]

[110] With respect, the Motions Judge erred in law in equating the test for the tort of misfeasance in a public office with the test for good faith true policymaking under the test for a Crown duty of care. The two are doctrinally distinct.

[111] As noted by the SCC in *Brown v British Columbia*, the test for bad faith policy-making does not require intentional misfeasance by any individual. Rather, bad faith policy-making is merely an absence of policy-making in good faith, that is, "inaction for no reason or inaction for an improper reason." As the SCC noted:

> Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.[125]

[112] Here, the Appellants were not required to establish that an individual Crown employee fraudulently denied them federal import permits for U.S. packages. Rather, it was sufficient to establish that the Respondents' conduct in denying federal import permits, if true policy decisions, were not made in good faith for the purposes contemplated by the statutory scheme, namely pest and disease risk. As a result, the Respondents did not have the right to claim good faith true policy immunity.

[113] The Appellants submit that the claim discloses such an absence of good faith, in that the Respondents ultimately allowed the decision to be made by a faction of beekeepers, when they knew or ought to have known it was to retain a commercial advantage, and not for a purpose contemplated by the statutory scheme. The Appellants submit that the Motions Judge's conclusion that "there is no specific allegation that the Defendant was not the one who took the decision to prohibit import permits for honeybee packages"[126] is a material misapprehension of fact.

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[124] Reasons & Order, para 119, AB 0053 **[TAB 2]**

[125] *Brown v British Columbia*, [1994] 1 SCR 420, 1994 CarswellBC 128 at para 23

[126] Reasons & Order, para 120, AB 0053 **[TAB 2]**

2. The Motions Judge erred in finding that there were no special factors of relationship to limit liability

[114] The Motions Judge held that finding a duty of care to the Appellants "would lead to an exposure of indeterminate liability."[127] As he implied, there was nothing in the facts to enable the Court to draw a line "between those to whom the duty is owed and those to whom it is not." As a result, finding liability to the Appellants would result in liability to "the vast majority of players in the agricultural industry."[128]

[115] Again, the Appellants' submit that the Motions Judge's conclusion was tainted by misapprehension of the applicable statutory scheme and the facts.

[116] The applicable statutory scheme was not the Respondents' authority to take measures to protect public health and safety, such as disposal of diseased carcasses or control zones for outbreaks, as implied by the Motions Judge. Nor was it the authority to close the border for a specified time period to deal with pest and disease risk under s. 14 of the *HAA*.[129] Rather, the applicable scheme was the administration of the federal import permit system under ss. 12 and 160 of the *HAR*, and the Respondents' duty to receive and fairly assess applications for permits from beekeepers.

[117] This scheme required the Respondents to have direct, personal interaction with an individual applicant. Imposing a duty of care on the Respondents not to refuse the application for an improper purpose such as to perpetuate a third-party beekeeping faction's commercial advantage over the applicant beekeeper would not lead to indeterminate liability.

[118] Furthermore, the Motions Judge erroneously concluded that all of the pleaded interactions in the claim amounted to nothing more than general consultation of the kind routinely engaged in with the entire agricultural industry.[130] This conclusion could only be reached by a material misapprehension of the facts as pled of extensive consultation, co-operation and representations to the Appellants and other commercial beekeepers, and abdication to a faction of beekeepers.

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[127] Reasons & Order, para 115, AB 0051 **[TAB 2]**

[128] Reasons & Order, para 116, AB 0051-0052 **[TAB 2]**

[129] Reasons & Order, paras 96-100, AB 0045-0047 **[TAB 2]**

[130] Reasons & Order, para 114, AB 0051 **[TAB 2]**

E. Did the Motions Judge err in awarding costs against the Appellant?

[119] Rule 334.39 of the *FCR* displaces the default rules in Rules 400 and 401 by prohibiting costs in class proceedings absent exceptional circumstances.[131]

[120] In *Campbell v Canada*, this Court canvassed various interpretations of Rule 334.39, including the approach taken by the Federal Court in *Pearson v Canada*, which found that Rule 334.39 does not apply until certification is granted. This Court rejected the *Pearson* approach as failing to give "fullest effect" to the rationale for adopting a "no costs" regime in class proceedings, which is "to limit the role of costs as a disincentive to class action plaintiffs."[132]

[121] Similarly, in *Prebushewski v Dodge City Auto (1984) Ltd.*,[133] the SCC endorsed an expansive interpretation of no-costs rules in class proceedings to "protect consumers who start legitimate lawsuits from the disincentive of potentially onerous costs awards against them."

[122] This Court concluded that contrary to *Pearson*, Rule 334.39 applies "as soon as the parties to the action are made parties to the certification motion," and its effect is to render both parties immune from costs in any part of the proceeding, absent special circumstances.[134] This Court noted that the rule should limit costs risk to the narrow time period between the filing of a statement of claim and the bringing of a certification motion, which should be "minimal."[135]

[123] In this case, the Appellants filed their Certification Motion on September 12, 2013 and filed or attempted to file supporting affidavits shortly thereafter, on September 25 and 27, 2013.[136] Accordingly, Rule 334.39 should have applied to grant the Appellants costs immunity from September 12, 2013, or September 27, 2013 at the latest, well before the Strike Motion.

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[131] *FCR*, s 334.39

[132] *Campbell v Canada*, 2012 FCA 45, 2012 CarswellNat 3856, paras 44-45

[133] *Prebushewski v Dodge City Auto (1984) Ltd*, [2005] 1 SCR 469, 2005 SCC 28, 2005 CarswellSask 332, paras 43-44

[134] *Campbell v Canada*, paras 45-47

[135] *Campbell v Canada*, para 45

[136] Proceedings Queries: Recorded entries for T-2293-12. Contrary to the Sept. 27, 2013 entry, the Appellants understand that the Affidavit of John Gibeau was stamped "received," but not filed.

[124] In granting costs against the Appellants, the Motions Judge made no reference to *Campbell*. Instead, the Motions Judge held that *Pearson* continued to apply, rendering Rule 334.39 of no application until certification was granted.[137]

[125] Had the Motions Judge applied Rule 334.39 as required by *Campbell*, the Appellants would have been immune from costs under Rule 334.39(1). The Motions Judge made no finding that the Appellants had engaged in improper conduct under Rule 334.39. If the implication was that costs were awarded because the Motions Judge found the Appellants were not "forthright," the Appellants submit that this finding was based on errors of law and misapprehension of fact.

[126] This is not a case akin to *Always Travel*, in which the Federal Court held that Rule 334.39(2) applied because the plaintiffs had brought the same issue before a motions judge 3 times, and before a court 5 times, accompanied by voluminous material, which consumed precious court time for no good reason.[138]

PART IV: ORDER REQUESTED

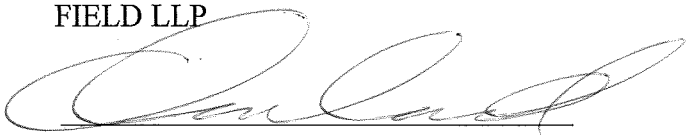
[127] The Appellants respectfully request that the Order be set aside in its entirety, and the Strike Motion dismissed with no costs to any party.

[128] Assuming Rule 334.39 applies, the Appellants seek no costs. Alternatively, if Rule 334.39 is not found to apply, the Appellants seek costs against the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Edmonton, Alberta, this 20th Day of August, 2014.

Time Estimate: 45 minutes

FIELD LLP



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Lily L.H. Nguyen
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[137] Reasons & Order, para 122, AB 0054 **[TAB 2]**

[138] *Always Travel v Air Canada*, 2004 FC 675, 2004 CarswellNat 1362, paras 9-10

PART V: LIST OF AUTHORITIES

All authorities are cited to the Joint Book of Authorities, which will be prepared and filed by the parties hereafter in accordance with Rule 348.

A. Statutes and Regulations

1. *Animal Disease and Protection Act*, RSC 1985, c A-11 , as repealed by the *Health of Animals Act*, SC 1990, c 21, s 76
2. *Bee Prohibition Order, 1986, amendment, SOR/87-39* & Regulatory Impact Analysis Statement ("RIAS"), Canada Gazette Part II, Vol. 121, No. 2
3. *Federal Courts Rules*, SOR/98-106
4. *Health of Animals Act*, SC 1990, c 21
5. *Health of Animals Regulation*, CRC c 296
6. *Honeybee Importation Prohibition Regulation*, 2004, SOR/2004-136
7. *Honeybee Importation Prohibition Regulations, 1996*, SOR/96-100 & RIAS, Canada Gazette Part II, Vol. 130, No. 3
8. *Honeybee Importation Prohibition Regulations, 1997*, SOR/98-122 & RIAS, Canada Gazette Part II, Vol. 134, No. 18
9. *Honeybee Importation Prohibition Regulations, 1999*, SOR/2000-323 & RIAS, Canada Gazette Part II, Vol. 134, No. 18
10. *Honeybee Prohibition Order, 1987*, SOR/87-607 & RIAS, Canada Gazette Part II, Vol. 121, No. 22
11. *Honeybee Prohibition Order, 1988*, SOR/88-54 & RIAS, Canada Gazette Part II, Vol. 122, No. 2
12. *Honeybee Prohibition Order, 1990*, SOR/90-69 & RIAS, Canada Gazette Part II, Vol. 124, No. 2
13. *Honeybee Prohibition Regulations, 1991*, SOR/92-24 & RIAS, Canada Gazette Part II, Vol. 126, No. 1
14. *Honeybee Prohibition Regulations, 1993*, SOR/94-8 & RIAS, Canada Gazette Part II, Vol. 128, No. 1
15. *Regulations Amending and Repealing Certain Regulations Administered and Enforced by the Canadian Food Inspection Agency*, SOR/2006-147
16. *Regulations Amending and Repealing Certain Canadian Food Inspection Agency Regulations (Miscellaneous Program)*, SOR/2012-286,
17. *Statutory Instruments Act*, RSC 1985, c S-22

18. *Statutory Instruments Regulation*, CRC, c 1509

B. Case Authorities

1. *Always Travel v Air Canada*, 2004 FC 675, 2004 CarswellNat 1362
2. Apotex Inc v Canada (Governor in Council), 2007 FCA 374, 2007 CarswellNat 4130
3. *Bristol-Myers Squibb Co. v Apotex Inc*, 2011 FCA 34, 2011 CarswellNat 1002
4. *Brown v British Columbia*, [1994] 1 SCR 420, 1994 CarswellBC 128
5. *Campbell v Canada*, 2012 FCA 45, 2012 CarswellNat 3856
6. *Canderel Ltd v R* (1993), [1994] 1 FC 3, 1993 CarswellNat 1337 (Fed CA)
7. *Collins v R*, 2011 FCA 140, 2011 CarswellNat 1234
8. *Cooper v Hobart*, [2001] 3 SCR 537, 2001 SCC 79, 2001 CarswellBC 2502
9. *Fullowka v Pinkerton's of Canada*, [2010] 1 SCR 132, 2010 SCC 5, 2010 CarswellNWT 9
10. *Gagne c Canada*, 2013 FC 331, 2013 CarswellNat 1446
11. *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33
12. *Knight v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, 2011 SCC 42, 2011 CarswellBC 1968
13. *Los Angeles Salad Company Inc v Canadian Food Inspection Agency* (2013), 40 BCLR (5th) 213, 2013 BCCA 34, 2013 CarswellBC 197
14. *Merck & Co v Apotex Inc*, 2003 FCA 438, 2003 CarswellNat 3738
15. *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441, 1985 CarswellNat 151
16. *Prebushewski v Dodge City Auto (1984) Ltd*, [2005] 1 SCR 469, 2005 SCC 28, 2005 CarswellSask 332
17. *Roncarelli v Duplessis*, [1959] SCR 121 at 140
18. *Simon v Canada*, 2011 FCA 6, 2011 CarswellNat 38
19. *Viacom Ha! Holding Co v Doe*, 2002 FCT 13, 2002 CarswellNat 4873

C. Other

1. Cabinet Directive on Regulatory Management (published online at the Treasury Board of Canada Secretariat website, http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgr01-eng.asp, accessed August 20, 2014)
2. Proceedings Queries: Recorded entries for T-2293-12