Court File No. A-169-14

FEDERAL COURT OF APPEAL

BETWEEN:

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

Appellants

-and-

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

Respondents

RESPONDENTS' MEMORANDUM OF FACT AND LAW

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Overview

1. The Motion Judge did not err in law, misapprehend the pleaded facts, or fail to give appropriate weight to all relevant factors. He properly struck the appellants' Statement of Claim in negligence without leave to amend.

2. Regulating the importation of animals is an important public interest. The Motion Judge correctly interpreted the *Health of Animals Act* and the *Health of Animals Regulations* to find that the purpose and intent of the statutory scheme is a public one only: to protect the health of animals in Canada. The statutory scheme does not create any private law duty of care to protect and advance the appellants' private commercial interests.

3. The Motions Judge considered both the appellants' Statement of Claim and their proposed amendments and rightly found that their pleading in negligence could not be cured. This is because the appellants' proposed new allegations of fact were not capable of altering the construction of the statutory scheme.

4. The Motion Judge properly concluded that the interactions between the respondents and the beekeeping industry at large alleged in the Statement of Claim and proposed amendments did not establish a relationship of proximity between the respondents and these appellants which is necessary in order to give rise to a private law duty of care.

5. The Motion Judge's conclusion, that any *prima facie* duty of care is negated by overriding policy considerations, is unassailable. There is no principled basis to apply a duty of care to some commercial beekeepers but not others. While the appellants claim to suffer economic loss because the respondents prohibit the importation of US bees, other commercial beekeepers could equally claim that they would suffer economic loss if the respondents permitted the importation of US bees. There is also no principled reason to limit a duty of care to only some participants in the agriculture industry, who import one kind of animal, but not others, who import another kind of animal for commercial purposes. Given the number and diversity of participants in the agriculture industry who could advance similar but conflicting claims for economic loss, a finding that the respondents owed the appellants a duty of care to protect their private economic interests would put the regulator in an untenable position.

6. The Motion Judge also properly found that the decision not to grant anyone import permits for US bees was a true policy decision immune from suit. The appellants' proposed amendments could not remove this immunity because they did not change the nature of the decision, as a policy decision, to an operational decision and, moreover, did not raise a plea of bad faith.

7. The Motion Judge did not err by awarding the successful respondents their costs. This was a stand-alone motion to strike a Statement of Claim directed to be decided before the parties or the court were even to contemplate certification. As such, properly applied, Rule 334.39 of the *Federal Court Rules* was not engaged and could not operate to preclude an award of costs.

PART I STATEMENT OF FACTS

Procedural history leading up to the strike motion

8. On December 28, 2012, the appellants filed a proposed class action Statement of Claim (the "Claim"). On February 8, 2013, the respondents served and filed their Statement of Defence. Pleadings closed on February 18, 2013.[1] The proposed class action continued as a specially managed proceeding[2] and on May 3, 2013, Mr. Justice Scott was appointed as the Case Management Judge[3] (the "Motion Judge" or "Scott J").

9. On August 13, 2013, the appellants sought a case management conference with Scott J to provide directions on several items set out in a "Meeting Agenda".[4] The first item related to the timing of the respondents' intended motion to strike the Claim and the appellants' intended certification motion (the "Timing Issue") and the procedure (motion or letter submission) for adjudicating the Timing Issue.

10. The second item on the Meeting Agenda was scheduling "any other interlocutory motions intended to be brought prior to or concurrently with the certification motion". The third item

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[1] Rule 202, *Federal Courts Rules*, SOR/98-106 as am
[2] Order per Snider J dated March 3, 2013, T-2293-12
[3] Order per Crampton CJ dated May 3, 2013, T-2293-12
[4] August 13, 2013 letter from Appellants' counsel to the Federal Court with attached Meeting Agenda, Appeal Book ("AB"), Tab 8-A at 149-150

was to set a "schedule for the certification motion". The only interlocutory motion put forward was the respondents' motion to strike.

11. On August 29, 2013, Scott J advised the parties that a case management conference could be held the week of September 30th and asked for a "definitive agenda" and each party's positions, with the "first item on the agenda being" the Timing Issue.[5]

12. On September 6, 2013, the appellants provided an agenda and set out their position on the Timing Issue. Their timetable proposed that their certification motion would be served and filed on October 15, 2013, two weeks after the case management conference on October 1, 2013.[6] However, the appellants filed a certification motion on September 12, 2013.[7]

13. At the case management conference on October 1, 2013, Scott J directed that the respondents' motion to strike the Claim without leave to amend would be heard and determined before the appellants' certification motion.

14. On November 8, 2013, the respondents filed their motion record to strike the Claim without leave to amend.[8] On November 29, 2013, the appellants filed their motion record in response which included, as an "Appendix" to their written representations, a Proposed Amended Statement of Claim ("Proposed Amended Claim"). The respondents filed their reply motion record on December 5, 2013.[9]

15. The alleged facts before the Motion Judge were derived solely from the appellants' Claim and from their Proposed Amended Claim, each of which are set out below separately.

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[5] August 29, 2013 email from FC Registry Officer Bonnie Suter, AB, Tab 9-C at 216
[6] September 6, 2013 letter from Appellants' counsel to Federal Court, AB, Tab 9-D at 217-219
[7] Notice of Motion for Certification dated September 12, 2013, AB, Tab 4 at 68-72
[8] Notice of Motion to Strike the Claim, AB, Tab 5 at 74-77 and extracts of Respondents' (Defendants') Written Representations, AB, Tab 7 at 110-132
[9] See extracts of Respondents' (Defendants') Reply Written Representations, AB, Tab 7 at 136-148

Objections to the appellants' characterization of the facts alleged in their pleadings

16. The respondents take issue with the characterization of the facts alleged in the Claim and Proposed Amended Claim in the appellants' memorandum of fact and law ("MFL"). With respect, the respondents submit that at times the nature of the complaints in the Claim and Proposed Amended Claim are extended beyond what the alleged facts in those pleadings can reasonably support. As one example, at paragraph 26 of their MFL the appellants' submit that the respondents rejected "beekeepers' applications for permits for U.S. packages without any consideration" and cite to paragraph 28(a) to (f) of their Claim. However, as noted below, neither the Claim nor the Proposed Amended Claim alleges that the appellants, or anyone else, applied for a permit to import US Bee Packages or, consequently, that the regulator refused any one of them a permit.

17. As another example, the statement set out at paragraph 94 of their MFL, in subparagraph 4, that 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" is said to be an allegation of fact in paragraph 26(b)(iv) of the Proposed Amended Claim. Whereas paragraph 26(b)(iv) of the Proposed Amended Claim provides "The Crown's representations to commercial beekeepers that the 2003 Risk Assessment justified lifting the border closure to U.S. queen imports in 2004, but continuing the border closure to U.S. package imports until December 31, 2006 as a precautionary measure".

18. In addition, while the appellants may, for limited purposes, refer the court to Regulatory Impact Analysis Statements ("RIAS") on the question of statutory construction, they cannot rely on statements contained in the RIAS as though they are part of the facts alleged in their Claim or Proposed Amended Claim. As one example, excerpts from various RIAS are summarized under the appellants' statement of facts at paragraphs 20 – 24 of their MFL.

19. For the foregoing reasons, the respondents respectfully submit that on this appeal, the appellants' Claim and Proposed Amended Claim should be assessed independently of the appellants' characterization of the facts alleged and assessed by reference only to the facts alleged in those pleadings.

The facts as alleged in the appellants' Claim

20. The respondent Minister of Agriculture and Agri-Food ("Minister") is responsible for and has the overall direction of the respondent Canadian Food Inspection Agency ("CFIA").[10] The Minister is also the responsible Minister under the *Health of Animals Act* ("*HA Act*").[11]

21. The respondent CFIA is established under the *Canadian Food Inspection Agency Act* ("*CFIA Act*") and under section 11 of the *CFIA Act*, is responsible for the "administration and enforcement" of the *HA Act*.[12]

22. The appellants are corporate entities who keep bees for commercial purposes.[13]

23. The Claim alleged that Canadian beekeepers lose a number of bee colonies each winter and, therefore, rely on imports of live bees to sustain, replenish or increase their bee colonies. Live bee imports take two forms: a "queen" transported in a small box which contains a queen bee and about a dozen bee attendants or a "package" which contains a small colony made up of a queen bee and several thousand worker bees transported in a larger box ("Bee Package"). A Bee Package constitutes a ready-made colony and can generate revenue in the year it is purchased.[14]

24. Queens and Bee Packages may be imported from a variety of countries. However, pursuant to federal statutes and regulations, the importation of live bees into Canada from the US has been restricted since the late 1980s or for over the last 25 years.[15]

25. The appellants alleged that importing bees from countries other than the US is more expensive and such bees are subject to higher losses. By contrast, the US is the "least expensive and most productive source of live bee imports into Canada" by a "significant margin."[16]

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[10] Statement of Claim at para 6, AB, Tab 3 at 60; *Canadian Food Inspection Agency Act*, SC 1997 c 6, s. 4(1)
[11] *Health of Animals Act*, SC 1990 c 21, s. 2(1) (definition of "Minister"),
[12] Statement of Claim at para 7, AB, Tab 3 at 60; *CFIA Act,* ss. 3, 11
[13] Statement of Claim at paras 2-4, AB, Tab 3 at 59-60
[14] Statement of Claim at paras 10-12, AB, Tab 3 at 61
[15] Statement of Claim at paras 13-14, Tab 3 at 61-62
[16] Statement of Claim at para 13, AB, Tab 3 at 61

26. From 1987 to 2004, the importation of both queens and Bee Packages into Canada from the US was prohibited by various Orders and Regulations enacted pursuant to the *Animal Disease and Protection Act* and the *HA Act*.[17]

27. From 2004 to December 31, 2006, the importation of Bee Packages into Canada from the US (except Hawaii) was prohibited by the *Honeybee Importation Prohibition Regulation, 2004* enacted pursuant to section 14 of the *HA Act*. During this time, queens could be imported into Canada from the US, but only if a permit to do so was issued under section 160(1.1) of the *Health of Animals Regulations ("HA Regulations")*.[18]

28. The Claim alleged that the importation of Bee Packages into Canada from the US was, and remains, prohibited and there "is no lawful authority" for this prohibition.[19] In particular, the Claim alleged that after the *Honeybee Importation Prohibition Regulation, 2004* expired, the respondents continued, from January 1, 2007 to the date the appellants' Claim was filed on December 28, 2012,

> ... to enforce a complete prohibition on the import of bee packages from the United States and have communicated to the beekeeping industry that no permits will be granted for the importation of packages from the US. A total prohibition ("the Prohibition") on such packages remains in place and constitutes a *de facto* ministerial order or directive for which there is no lawful authority.[20]

29. During this time period, however, permits were granted to import queens into Canada from the US "pursuant to the Minister's discretion under s. 160(1.1)" of the *HA Regulations*.[21]

30. The appellants sought damages on the basis of two alleged causes of action: "negligence" and "acting without lawful authority" for imposing or enforcing "a prohibition on,

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[17] Statement of Claim at para 14, AB, Tab 3 at 61-62
[18] Statement of Claim at para 16, AB, Tab 3 at 62; *HA Act*, ss. 14, 64; *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136; *Health of Animals Regulations*, CRC c 296, ss. 12, 160
[19] Statement of Claim at para 20, AB, Tab 3 at 63
[20] Statement of Claim at para 20, AB, Tab 3 at 63
[21] Statement of Claim at paras 19-21, AB, Tab 3 at 63

or denying import permits for, the importation into Canada of live honeybee packages from the continental United States after 2006 to the present day."[22]

31. The Claim in negligence alleged that the respondents[23] owed the appellants a duty of care "with respect to restrictions on the importation of honeybees from the United States".[24] More particularly, the Claim alleged that the respondents owed the appellants a duty of care to "take reasonable steps to avoid causing foreseeable economic" loss to them when prohibiting and denying permits for the importation of US Bee Packages after 2006.[25]

32. The allegation that the respondents acted "without lawful authority" was both a stand-alone claim and also a part of the negligence claim. As a stand-alone claim, the appellants alleged that, since January 1, 2007, the respondents had no lawful authority to prohibit or refuse permits for the importation of US Bee Packages. [26] As part of their negligence claim, the allegation was that since January 1, 2007, the respondents had breached a duty of care to them, in part, by "improperly, and without lawful authority" prohibiting and denying the appellants an opportunity to obtain permits for the importation of US Bee Packages.[27]

33. The Claim also alleged that the respondents had breached a duty of care to the appellants by making representations that permit applications would not be considered or would be denied, using outdated and inaccurate information to maintain the prohibition, by failing to perform regulatory functions (i.e. monitor, research, investigate, assess and consult) in a timely manner and by failing to properly exercise discretion.[28]

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[22] Statement of Claim at para 1(c)(i) and (ii), AB, Tab 3 at 59
[23] The Appellants refer to both "the Crown" and "CFIA" in the claim, hereinafter referred to as "the respondents", unless otherwise specified.
[24] Statement of Claim at para 26, AB, Tab 3 at 64-65
[25] Statement of Claim at para 27(a), AB, Tab 3 at 65
[26] Statement of Claim at para 1(c)(i) and (ii), AB, Tab 3 at 59
[27] Statement of Claim at para 28(a)-(b), AB, Tab 3 at 65-66
[28] Statement of Claim at para 28(c)-(h), AB, Tab 3 at 66

The facts alleged in the appellants' Proposed Amended Claim

34. The appellants' Proposed Amended Claim:

- deleted the allegation that the respondents acted without lawful authority as a stand-alone basis for damages;[29]

- added allegations about the nature of the respondents' representations, however, these representations were still made only to the beekeeping industry at large;[30]

- added allegations about the bases for the respondents' decisions regarding the importation of bees from the US;[31]

- added allegations about the respondents' consultation and cooperation with the beekeeping industry;[32] and

- added allegations that the respondents submitted its "regulatory authority with regard to the regulation of U.S. package imports to the Canadian Honey Council" when it "knew or ought to have known" that the Council did not represent the interests of the beekeeping industry as a whole, that the Council was influenced by a "Faction" whose position on the "issue of U.S. package imports" was different from that of the appellants' and which had the effect of furthering the Faction's "preservation of market share, reduction of cross-border competition, monopoly over the market … and higher profits".[33]

35. Neither the appellants' Claim nor their Proposed Amended Claim alleged any facts that:

- any of the appellants ever applied for a permit to import Bee Packages from the US or, consequently, that the regulator refused any one of them a permit;

- the respondents had any direct interactions with any of the appellants; or that

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[29] Proposed Amended Statement of Claim at (deleted) para 9(c)(ii), AB, Tab 6-C at 34
[30] Proposed Amended Statement of Claim at para 26(b)(i)-(iv), AB Tab 6-C at 39-40
[31] Proposed Amended Statement of Claim at para 26(c)(i)-(iv), AB, Tab 6-C at 40-41
[32] Proposed Amended Statement of Claim at para 26(f)(i)-(ii), AB, Tab 6-C at 42
[33] Proposed Amended Statement of Claim at paras 26(c)(vii), 26(d.1), 26 (d.2), AB, Tab 6-C at 41

- the health status of US bees has improved since the 2003 Risk Assessment or that the regulator's concerns about the risks associated with importing US Bee Packages into Canada are unfounded or have changed.

Outline of Motion Judge's Reasons for Order

36. On March 5, 2014, the Motion Judge issued his Reasons for Order and Order granting the respondents' motion to strike the Claim without leave to amend and for costs.[34]

37. Scott J considered the appellants' Proposed Amended Claim and argument related to it but found that even if the proposed amendments were accepted, the claim would still be dismissed.[35]

38. Citing *Holland v Saskatchewan,*[36] the Motion Judge found that the appellants' claim that the respondents acted without lawful authority did not disclose a reasonable cause of action.[37] He also noted that the appellants withdrew this claim in their Proposed Amended Claim.[38]

39. The Motion Judge stated and applied the framework for determining government liability in negligence as set out by the Supreme Court of Canada in *Imperial Tobacco Inc v Canada (Attorney General).*[39]

40. Scott J conducted an overview of the *HA Act* and the *HA Regulations* and found that their objective is to protect animal health and public safety and that the statutory scheme did not create a duty of care to protect the appellants' private economic interests.[40]

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[34] Reasons for Order and Order, AB, Tab 2
[35] Reasons for Order at para 84, AB, Tab 2 at 38
[36] *Holland v Saskatchewan*, 2008 SCC 42, 2008 CarswellSask 431 at paras 7-9, 11
[37] Reasons for Order at para 17 (reciting the respondents' position) and para 86, AB, Tab 2 at 13 and 39, respectively
[38] Reasons for Order at para 87, AB, Tab 2 at 39, see also Proposed Amended Statement of Claim, AB, Tab 6-C at 97
[39] *Imperial Tobacco Inc v Canada (Attorney General),* 2011 SCC 42, 2011 CarswellBC 1968 at para 37
[40] Reasons for Order at paras 103 and 109 AB, Tab 2 at 47 and 49

41. The Motion Judge further found that the general representations and consultations alleged in the Claim and Proposed Amended Claim[41] with "the industry" at large were not sufficient to create the required close and direct relationship with the appellants themselves and, therefore, did not give rise to a duty of care to them.[42] Nevertheless, Scott J found it preferable to consider the second stage of the *Anns* test.[43]

42. In applying stage two of *Anns*, the Motion Judge found that "the number of participants in the agricultural sector that could possibly entertain claims, as a result of the Act, is indeterminate and surely diverse and conflicting within segments of the same agricultural sector, as in the present case."[44] As a result, he held that any *prima face* duty of case must be negated because it places the respondents in an "untenable position, that of indeterminate liability".[45]

43. Further the Motion Judge found that the impugned decision enforce a complete prohibition on the import of US Bee Packages after December 31, 2006 was a core policy decision immune from suit.[46] In this regard, he also found that the appellants' allegations in the Claim and Proposed Amended Claim were not sufficient to give rise to a plea of bad faith such that the core policy decision was negated.[47] Moreover, neither the Claim nor the Proposed Amended Claim alleged that someone other than the respondents "took the decision to prohibit import permits for honey bee packages".[48]

44. The Motion Judge assumed that all of the facts pleaded in the Claim and Proposed Amended Claim were true and concluded that the pleadings did not disclose a reasonable cause of action.[49]

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[41] Statement of Claim at paras 23, 25 and 26, AB, Tab 3 at 63-65; and Proposed Amended Statement of Claim at paras 25-26, AB, Tab 6-C at 102-105
[42] Reasons for Order at paras 110-114, AB, Tab 2 at 49-51
[43] Reasons for Order at para 114, AB, Tab 2 at 51
[44] Reasons for Order at para 116, AB, Tab 2 at 52
[45] Reasons for Order at para 116, AB, Tab 2 at 52
[46] Reasons for Order at paras 117-118, AB, Tab 2 at 52-53
[47] Reasons for Order at paras 117-120, AB, Tab 2 at 52-53
[48] Reasons for Order at para 120, AB, Tab 2 at 53
[49] Reasons for Order at para 121, AB, Tab 2 at 53-54

PART II POINTS IN ISSUE

45. The respondents submit that the within appeal raises the following issues:

(a) Did the Motion Judge err by striking out the appellants' Claim without leave to amend?

(b) Should the Motion Judge's Order be upheld because there are no alleged facts to establish the essential element of causation?

(c) Did the Motion Judge err by awarding costs to the respondents?

PART III ARGUMENT

Standard of appellate review

46. Decisions granting or refusing a motion to strike and awarding costs are discretionary. As such, they are entitled to deference on appeal in the absence of an error of law, a misapprehension of the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice.[50] There is no *de novo* issue to which no standard of review applies. The Motion Judge's findings of fact are subject to the palpable and overriding error standard.[51]

(a) Motion Judge properly struck the Claim without leave to amend

Motion Judge correctly stated the test to strike a claim under Rule 221(1)(a) of the *Rules*

47. At paragraphs 79, 80 and 84 of his Reasons, Scott J correctly stated the test and applicable principles on a motion to strike under Rule 221(1)(a) of the *Rules*.

48. The test to strike out a claim under Rule 221(1)(a) of the *Rules* is whether it is plain and obvious that the claim discloses no reasonable cause of action or that the claim has no reasonable prospect of success. [52] The facts, but not the law, pleaded in the claim are assumed to be true

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[50] *Bauer Hockey Corp. v Sport Maska Inc,* 2014 FCA 158, 2014 CarswellNat 2210 at para 12; *Campbell v Canada (Attorney General),* 2012 FCA 45, 2012 CarswellNat 3856 at para 20

[51] *Contra* the appellants' submission at para 38 of their memorandum of fact and law

[52] Rule 221 of the *Federal Courts Rules; Imperial Tobacco, supra* note 40 at paras 17, 22-24; *Hunt v Carey* [1990] 2 SCR 959 at para 36, *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263, 2003 SCC 69 at para 15, *Bauer Hockey Corp, supra* note 51 at para 13

unless they are manifestly incapable of being proven.[53] However, while the facts alleged are assumed to be true, the court is not bound by the legal characterization of those facts.[54]

49. A claim is properly struck without leave to amend if the defect in the claim is one that is not curable by amendment. [55] In this regard, the court is "obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies."[56] However, it is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim.[57]

50. The appellants contend that Scott J misapprehended the test to strike a claim because the test required him to consider the appellants' Proposed Amended Claim and he failed to do so. This contention must fail given the Motion Judge's express statements in his Reasons that he considered the appellants' Proposed Amended Claim and their related arguments. It is also evident, throughout his Reasons, that he in fact considered the appellants' Proposed Amended Claim and related arguments[58] but found they did not, in any event, save the claim.[59]

51. The Motion Judge would not have erred even if he had not considered the Proposed Amended Claim, for several reasons. First, the appellants contend that the Motion Judge was required to consider the new allegations of substantive fact in their Proposed Amended Claim on the authority of cases such as *Operation Dismantle Inc.* However, the requirement set out in *Operation Dismantle Inc.* is to read the claim "as generously as possible ... to accommodate any inadequacies in the form of the allegations which are a result of mere drafting deficiencies."[60] The court is not, however, required to see if the Claim can be saved by curing defects in the

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[53] *Imperial Tobacco, supra* note 40 at paras 17, 22-24, *Hunt v Carey, supra* note 52 at para 36, *Odhavji Estate, supra* note 52 at para 15

[54] *CSN v Canada (Procureur général)*, 2014 SCC 49, 2014 CarswellQue 6646 at para 20

[55] *Simon v Canada,* 2011 FCA 6, 2011 CarwellNat 38 at para 8, see also Appellants' MFL at para 41

[56] *Operation Dismantle Inc. v R,* [1985] 1 SCR 441, 1985 CarswellNat 151 (SCC) at para 14

[57] *Imperial Tobacco* at para 22.

[58] For some examples see Reasons for Order at paras 50, 53, 56, 61, 64, 66, 67, 68, 70, 73, 74, 75, 78, 84, 87, 105, 114, 119, 120, 121, AB, Tab 2

[59] Reasons for Order at para 121, AB, Tab 2 at 53-54

[60] *Operation Dismantle, supra* note 56 at para 14 (underlining added)

content or substance of the allegations or, put another way, to consider what new allegations of substantive fact might enable a cause of action to be disclosed. [61]

52. Second, the pleadings had been closed for 10 months and, therefore, the appellants could not amend as of right when they tendered the Proposed Amended Claim in their response record.[62] Thus, as noted by the Motion Judge, before they could amend their Claim to add new allegations of substantive fact, the appellants were required to seek leave of the Court.[63] They did not do so (and the respondents did not seek particulars). The Motion Judge appropriately distinguished the cases upon which the appellants relied to tender the Proposed Amended Claim.

53. Third, Rule 75(2) provides that "no amendment shall be allowed... during a hearing."[64] The respondents' strike motion was in writing and thus, the parties were in a hearing when the appellants tendered their Proposed Amended Claim after the respondents had submitted their case to the Court and the appellants.

54. Fourth, with the appellants' consent, this matter had been under case management since May 3, 2013 and, under the "definitive agenda" which had been established, both parties were obliged to address the issue of any "interlocutory motions" at the case management conference. The appellants did not raise or mention a motion to amend their Claim then or at any time thereafter. The Motion Judge properly found that, in these circumstances, "it was incumbent on the Plaintiffs to advise the Court of their intention to amend their pleadings."[65] Instead, the appellants appended a Proposed Amended Claim to their response record. The amendments were not new matters of which the appellants had just become aware.[66]

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[61] *Imperial Tobacco, supra* note 40 at para 22; *Simon v Canada*, supra note 55 at para 8; *Collins v R*, 2011 FCA 140, 2011 CarswellNat 1234 at para 30
[62] Rules 200 and 202 of the *Federal Courts Rules*
[63] Reasons for Order at para 82, AB, Tab 2 at 37-38; Rule 75 of the *Federal Courts Rules*
[64] Rule 75(2) of the *Federal Courts Rules*
[65] Reasons for Order at para 82, AB, Tab 2 at 37-38; *Always Travel Inc v Air Canada*, 2003 FCT 212 (FC) at para 2
[66] Reasons for Order at para 83, AB, Tab 2 at 38

Motion Judge correctly set out the framework for determining government liability in negligence

55. The appellants challenge only the Motion Judge's finding that their Claim and proposed amendments do not disclose a cause of action in negligence.[67]

56. The Motion Judge's analysis followed the framework for determining government liability in negligence as grounded in *Anns v Merton London Borough Council* (*Anns*)[68], reformulated by the Supreme Court of Canada in *Cooper v Hobart* [69]and *Edwards v Law Society of Upper Canada*[70] and confirmed in *Imperial Tobacco Inc.*[71]

57. Under the framework, the court first asks if there are analogous cases where a duty of care has been found. If there are no analogous cases, then a full analysis of foreseeability and proximity will be undertaken to determine if a *prima facie* duty of care is owed. Lastly, even if a *prima facie* duty of care is owed, the court must consider whether there are any overriding policy considerations that negate that duty.[72]

58. The Motion Judge noted that there are other cases that involve similar statutory provisions and objectives related to the protection of animals in the public interest which are instructive[73], but recognized that there are no cases that directly address the respondents' importation authority under the *HA Act* and *HA Regulations.* As a result, the Motion Judge properly undertook the analysis in accordance with the two-part *Anns* test.

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[67] Notice of Appeal, AB, Tab 1 (i.e. the appellants do not challenge the Motion Judge's finding that the stand-alone claim that the respondents acted without lawful authority does not disclose a cause of action recognized in law)

[68] *Anns v Merton London Borough Council*, [1978] AC 728 (HL)

[69] *Cooper v Hobart*, [2001] 3 SCR 537, 2001 SCC 79

[70] *Edwards v Law Society of Upper Canada*, [2001] 3 SCR 562, 2001 SCC 80

[71] *Imperial Tobacco, supra* note 40 at para 37

[72] *Childs v Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 at paras 13, 15; *Imperial Tobacco, supra* note 40 at para 39

[73]Reasons for Order at paras 90-92, AB, Tab 2 at 43-44 referencing *Berg v Saskatchewan 2003 SKQB 456;* struck in its entirety 2004 SKCA 136 and *River Valley Poultry Farm Ltd. v Canada (Attorney General)*, 2009 ONCA 326; leave to SCC dismissed 2009 CanLII 61385; Reasons for Order at paras 91-92, AB, Tab 2 at 43-44 referencing *Los Angeles Salad Company Inc. v Canadian Food Inspection Agency,* 2013 BCCA 34; leave to SCC dismissed 2013 CanLII 51857

Motion Judge correctly found that, properly construed, the statutory scheme does not create a *prima facie* duty of care

59. Scott J correctly interpreted the *HA Act* and *HA Regulations* and found that the statutory objective is to "protect animal health and public safety".[74] The Motion Judge held that to recognize a private duty of care to participants in the beekeeping industry to protect their private economic interests would conflict with this public purpose.[75] Thus, he correctly concluded that proximity could not be based on statutory intent.[76]

60. The Motion Judge correctly summarized the principles of proximity with a government regulator.[77] In *Imperial Tobacco*, McLachlin CJC noted that proximity may be established either through statutory intent or through specific interactions between the regulator and the claimant.[78] However, the governing statutes are still relevant to the latter.[79] Construction of the statutory scheme is then central to the question of whether there is sufficient proximity between a plaintiff and a statutory public authority.

61. Unlike some of the allegations in *Imperial Tobacco*, in this case, there are no allegations of conduct that go beyond the CFIA's regulatory role and, therefore, if proximity exists it must arise from the governing statute.[80]

62. The modern view of statutory interpretation requires an analysis of the broad context of the scheme to give effect to the legislator's intent.[81] Economic loss is only recoverable if it is the type of loss the statute intended to guard against.[82]

63. A contextual review of the provisions in the *HA Act* that govern the CFIA's broad regulatory authority to control disease and toxic substances through restrictions and limitations on importation and other measures, confirms that the scheme is aimed primarily at protecting

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[74] Reasons for Order at para 103, AB, Tab 2 at 47
[75] Reasons for Order at para 103, AB, Tab 2 at 47
[76] Reasons for Order at para 109, AB, Tab 2 at 49
[77] Reasons for Order at para 95, AB, Tab 2 at 45
[78] *Imperial Tobacco, supra* note 40 at para 43
[79] *Imperial Tobacco, supra* note 40 at paras 44-45
[80] *Imperial Tobacco, supra* note 40 at para 49
[81] *Sullivan & Driedger on the Construction of Statutes* 4th (Butterworths Canada Ltd. 2002) at pages 1, 284 and 285; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27 at para 21
[82] *Kamloops (City) v Nielsen et al,* [1984] 2 SCR 2, 1984 CarswellBC 476 (SCC) at p. 35

animal health for the public good. Properly construed, the statutory scheme is incompatible with a duty to safeguard the private economic interests of individuals who wish to use imported animals to further their commercial ventures.[83]

64. The *HA Act* is entitled:

> An Act respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals.

65. The CFIA's mandate is, among other things, to safeguard the health of animals under the *HA Act*.[84] Toward this end, the Minister or his delegate have the authority to prohibit or otherwise regulate the importation of "regulated animals" as found in the *HA Act*, the *HA Regulations* and the *Import Reference Document*.[85]

66. Section 14 of the *HA Act* provides that the Minister may make regulations prohibiting the importation of any animal into Canada for such period as the Minister considers necessary for the purpose of preventing a disease from being introduced into or spread within Canada.[86]

67. Section 64(1) of the *HA Act*, grants the Governor in Council the power to make regulations generally respecting the importation of animals for the purpose of protecting human and animal health through the control or elimination of disease and toxic substances.[87]

68. The objective of animal health is reflected in numerous regulatory powers concerning the importation of "regulated animals" throughout the *HA Act*.[88]

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[83] Reasons for Order at paras 102 and 103, AB, Tab 2 at 47; *River Valley Poultry, supra* note 73 at para 66, *Los Angeles Salad, supra* note 73 at para 55
[84] *CFIA Act*, s. 11
[85] Section 10 of the HA Regulations defines "import reference document" as the "document prepared by the Agency and entitled *Import Reference Document*, bearing the date January 25, 2007 and policy number AHPD-DSAE-IE-2002-3-4".
[86] *HA Act*, s. 14
[87] *HA Act,* s. 64
[88] *HA Act,* sections 15 and 17 as examples

69. Section 12 of the *HA Regulations* enacts a general prohibition that no person shall import a regulated animal unless certain conditions are met:

> 12(1) Subject to section 51, **no person shall import** a **regulated animal** except
>
> > (a) in accordance with a permit issued by the Minister under section 160; or
> > (b) in accordance with subsections (2) to (6) and all applicable provisions of the import reference document.
> >
> > [emphasis and underlining added]

70. Section 10 of the *HA Regulations* defines certain terms that relate to the importation of animals including, "import reference document" and "regulated animals" [89]:

> **"import reference document"** means the document prepared by the Agency and entitled *Import Reference Document*, bearing the date January 25, 2007 and policy number AHPD-DSAE-IE-2002-3-4.
> ...
>
> **"regulated animal" means a...honeybee...**
>
> [emphasis and underlining added].

71. The "Introduction" of the *Import Reference Document* provides as follows:

> **Introduction**
> Sections 11 and 12 of the *Health of Animals Regulations* **prohibit the importation of regulated animals**...from any country except in accordance with either **(a)** a permit issued by the Minister, or **(b)** the provisions set out in section 12 of the *Regulations* and in this document.
>
> [emphasis and underlining added]

72. Section 24.1 of the *Import Reference Document* deals specifically with honeybees and states that honeybees "may only be imported into Canada in accordance with paragraph 12(1)(a) of the *HA Regulations*. That is, honeybees may only be imported into Canada "in accordance with a permit issued by the Minister under section 160" of the *HA Regulations*.[90]

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[89] *HA Regulations,* s. 10

73. In turn, section 160 of the *HA Regulations,* which was in force from January 1, 2007 to December 13, 2012, provides:

> 160(1) Any application for a permit or licence required under these *Regulations* shall be in a form approved by the Minister.
>
> (1.1) The Minister **may**, subject to paragraph 37(1)(b) of the *Canadian Environmental Assessment Act*, issue a permit or licence required under these Regulations **if the Minister is satisfied that, to the best of the Minister's knowledge and belief**, the activity for which the permit or licence is issued would not, or would not be likely to, result in the introduction into Canada…or the spread within Canada, of a vector, disease or toxic substance.
>
> [emphasis and underlining added]

74. Under subsection 160(1.1) of the *HA Regulations*, it follows that if the Minister or his delegate are not "satisfied" to the best of their "knowledge and belief", then they are not authorized to issue a permit to import animals into Canada.

75. Under section 160 of the *HA Regulations,* the Minister's discretion to issue a permit (or not) to import animals is broad. Parliament deliberately chose such language to give effect to a public duty to protect animal health in Canada.

76. There is no language in subsection 160(1.1) that directs the Minister or the CFIA to consider the private economic interests of individual industry participants, like the appellants, when exercising this discretion.

77. On December 14, 2012, s. 160 of the *HA Regulations* was amended and now provides that "...the Minister shall issue a permit..." [91] However, this change from "may" to "shall" does not, contrary to the appellants' assertions, alter the interpretation of the statutory scheme. It remains that the statutory scheme still does not intend to protect private economic interests.

78. There is also no indication in the *HA Act* or *HA Regulations* generally that, in performing its regulatory duties and exercising its regulatory authority related to the importation of animals

[91] See *HA Regulations,* s. 160(1.1) as amended by SOR/2012-28. This amendment came into force two weeks before the appellants filed their Claim. As noted in the Statement of Claim, the material time is January 1, 2007 to the date they filed their Claim on December 28, 2012.

into Canada, the regulator is to consider the private economic interests of individual industry participants such as the appellants.

79. In *River Valley Poultry* the Ontario Court of Appeal considered the overall statutory scheme under the *HA Act* in the context of a negligence claim against the CFIA. The court concluded that the purpose of the statute is to enable the Crown to protect the health of people and animals and not to protect the economic interests of individual producers.[92] Similarly, in *Berg*, the Saskatchewan Court of Queen's Bench considered the provincial importation scheme under the *Wildlife Act* in a negligence action against the provincial authority respecting the movement of elk between provinces. In that case, the court concluded that the purpose of the scheme was animal protection in the interests of the public.[93]

80. The appellants argue that the Motion Judge focused on the wrong statutory scheme. They appear to argue that under section 14 of the *HA Act*, the Minister should have implemented further specific regulations governing the importation of honeybee packages if he wanted to confer power on the CFIA to broadly restrict such importation. They allege that the failure of the Minister to extend or re-implement the *Honeybee Importation Prohibition Regulations*, results in a duty on the Minister to "accept and consider" applications for package import permits under section 12 and 160 of the *HA Regulations*.[94]

81. The appellants' analysis should not be accepted for several reasons. First, creating a specific regulation in response to a specific concern for a defined period of time (or the absence of one) does not alter the public purposes of the statutory scheme or displace the general regulatory scheme or undermine policy-making power. The *HA Regulations* prohibits the importation of honeybees without a permit.

82. Section 12 of the *HA Regulations* establishes a general rule in very clear mandatory language: "**No person shall import**...". The appellants' suggestion, that the absence of a specific regulation prohibiting the importation of US Bee Packages entails a **duty** to consider

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[92] *River Valley Poultry, supra* note 73 at para 68, *Vona v. Canada (Minister of Agriculture)* 1996 CanLII 800 (ONCA), (1996), 30 OR (3d) 687, [1996] O.J. No. 3621 (CA) at p. 691
[93] *Berg, supra* note 73 at paras 76-77
[94] Proposed Amended Claim at para 26(b.1), AB, Tab 6-C at 103

permit applications under section 160 of the *HA Regulations*, ignores the plain language of the general rule contained in this regulatory provision.[95]

83. The appellants' proposed statutory construction has been rejected by the Supreme Court of Canada in *Maple Lodge Farms v. Government of Canada.*[96] In that case, the Supreme Court of Canada considered the permit scheme under the *Export and Import Permits Act* arising from a claimant's mandamus application for an order directing the Minister of Economic Development to issue an import permit. In denying the application, McIntyre J. quoted Le Dain J. from the Federal Court of Appeal:

> The common law right to import goods is to that extent abrogated. It is an implication of section 5(1)(a.1) of the Act that the Minister is to exercise his authority to issue or refuse permits for the purpose specified therein. **It cannot have been intended, in view of this declared purpose, that the power to issue permits should be a mere Ministerial duty imposed for the sole purpose of monitoring the extent to which an unlimited right of importation is in fact exercised**.
>
> The words in section 8, "in such quantity and of such quality, by such persons, from such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations", **do not refer to conditions defining a right or entitlement to a permit but to the terms and conditions to which an issued permit may be subject**.
>
> ...
>
> Further, section 3 of the *Import Permit Regulations,* which prescribes the information to be furnished by applicants for permits, **could not by implication create a right to a permit upon the simple fulfilment of this requirement**. The Regulation imposes a requirement upon an applicant for a permit; **it does not create, expressly or impliedly, a duty to issue a permit upon the fulfillment of this requirement.** The information simply forms part of the basis on which the Minister is to exercise his discretion whether or not to issue a permit, and if so, upon what terms and conditions

84. Second, the Motion Judge correctly noted that there were no allegations in the Claim or proposed amendments that any one of the appellants ever applied for an importation permit or, if they did, that they were (wrongly or otherwise) denied a permit.[97]

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[95] Appellents' MFL at paras 79, 83 and 106
[96] *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2
[97] Reasons for Order at para 114, AB, Tab 2 at 51

85. Third, the appellants rely on their interpretation of the *Honeybee Importation Prohibition Regulations* and Regulatory Impact Analysis Statements ("RIAS") to say that the regulatory features of importation under the *HA Act* were intended to protect the economic interests of the prospective importer. However, the Motion Judge correctly noted that the RIASs and the *Regulations* must be read in the context of the governing statute.[98]

86. Although courts have received RIASs in the context of statutory construction, the delegated legislation must be interpreted in a manner consistent with the overall purpose and intent of the governing statute which, in this case, is the *HA Act*.[99]

87. Indeed, the Motion Judge found that the language in the RIASs actually reinforced the general objective of the *HA Act*, as reflecting the public interest as a whole.[100]

88. Accepting the appellants' construction of the scheme would create an untenable conflict of duties. Decisions regarding regulatory restrictions on importation would almost certainly be influenced by an enforceable private law obligation to be mindful of the economic interests of industry participants contrary to the clear intent of the statute.

89. Both the British Columbia Court of Appeal and the Ontario Court of Appeal have rejected the imposition of concurrent duties to both the public and entrepreneurs in *Los Angeles Salad* and *River Valley Poultry*.[101] Both Courts raised concerns over the chilling impact on the regulator's powers, should a concurrent duty be found.[102]

90. The Motion Judge carefully considered the overall legislative context and correctly concluded that he could not find proximity based on statutory intent.[103]

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[98] Reasons for Order at para 107, AB, Tab 2 at 48-49
[99] *Bristol-Myers Squibb Co. v Canada (Attorney General),* 2005 SCC 26, 2005 CarswellNat 2619 (SCC) at para 38
[100] Reasons for Order at para 108, AB, Tab 2 at 49
[101] *Los Angeles Salad supra* note 73 at para 55; *River Valley Poultry, supra* note 73 at paras 84-86
[102] *Syl Apps Secure Treatment Centre v B.D,* 2007 SCC 38, [2007] 3 SCR 83 at para 43, 50
[103] Reasons for Order at para 109, AB, Tab 2 at 49

Motion Judge properly found that the interactions alleged in the Claim and Proposed Amended Claim were not sufficient to establish proximity

91. The Motion Judge properly concluded that the alleged interactions in the appellants' Claim and proposed amendments did not create a special relationship sufficient to establish proximity.[104]

92. As noted above, the intent of the governing statute is relevant to the analysis of the specific conduct or interaction between the parties.[105] Factors that give rise to proximity must arise from the statute under which the regulator derives its duties, powers, and authority. As stated in *Imperial Tobacco*, a plaintiff's claim in negligence against a public authority based on their interactions can survive a strike motion only

> So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, **and the statute does not exclude that possibility**...[106]
>
> [emphasis added]

93. There are no specific interactions alleged in the appellants' Claim between the respondents and the appellants. There are no allegations that any of the appellants even applied for a permit to import US Bee Packages into Canada.[107]

94. According to the pleadings, the relationship between the appellants and the respondents is limited to the respondents' statements to the "beekeeping industry" generally that "it regulated bee imports for the purpose of protecting the beekeeping industry and, in particular, the economic viability of the beekeeping industry." They allege that the respondents engaged in consultations "with the industry." They state that the respondents undertook to conduct annual reviews of the health of Canadian bees as part of its assessment on whether to maintain the importation prohibition.[108]

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[104] Reasons for Order at para 114, AB, Tab 2 at 51
[105] *Imperial Tobacco, supra* note 40 at paras 44-45
[106] *Imperial Tobacco, supra* note 40 at para 47
[107] Reasons for Order at paras 113 and 114 citing *Berg* for support, AB, Tab 2 at 50-51
[108] Statement of Claim, paras 23, 25, and 26, AB, Tab 3 at 63-65

95. The appellants argue that the Motion Judge did not consider these general representations to industry.[109] However, the Motion Judge did take the industry representations into consideration and found that they did not alter the main purpose of the *HA Act* and as they were not interactions with the appellants, he correctly found they did not create "a special relationship sufficient to establish proximity".[110]

96. In *Imperial Tobacco*, the Supreme Court of Canada held that the test of proximity requires a series of specific interactions between the regulator and the individual claimant. These specific interactions must show that the regulator "through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care."[111]

97. The appellants argue that the allegations, that the respondents only consulted with a "faction" in the industry, to the exclusion of the appellants, in deciding to maintain the importation prohibition on US Bee Packages, is an example of the kind of interactions which gave rise to a special relationship of proximity between the respondents and the appellants.[112] With respect, this is illogical. Interactions between the respondents and others do not constitute conduct, by the respondents, that show that they entered into a special relationship with the appellants sufficient to establish the necessary proximity for a duty of care.

98. The appellants' allegations are too general and are not specifically directed to any one of the individual corporate appellants or, even, to any other individual entrepreneur within the alleged "faction". Consultation with industry is a matter of good governance, but such general conduct does not displace the legislator's intent to protect the health of animals for the broader public good. The Motion Judge was correct to conclude that the alleged consultations do not alter the primary duty under the statutory scheme.[113]

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[109] Appellants' MFL para 94
[110] Reasons for Order at paras 110, 114, AB, Tab 2 at 49, 51
[111] *Imperial Tobacco, supra* note 40 at para 45; *Taylor v Canada (Attorney General)* 2012 CarswellOnt 8820, 2012 ONCA 479 at paras 94-95, 97; and *Attis v Canada (Minister of Health),* 2008 CarswellOnt 5661, 2008 ONCA 660, leave to appeal to SCC dismissed 2009 CanLII 19874 at para 65
[112] Appellants' MFL at para 94, subpara 4
[113] Reasons for Order at para 110, AB, Tab 2 at 49-50

99. The respondents submit that neither the statutory regime, nor the alleged interactions between the respondents and the industry at large or with the "faction" give rise to a relationship of proximity with the appellants such that a *prima facie* duty of care is established. While the Motion Judge found that a relationship of proximity was not established, he was not "certain". As a result, he found it preferable to consider the second stage of the *Anns* test.

100. The respondents respectfully submit that it is plain and obvious that no relationship of proximity arises either by statutory intent or through the alleged interactions between the parties. If this Court agrees that no *prima facie* duty of care is established at stage one of the *Anns* test, then it would not be necessary to proceed to the second stage of the *Anns* test.

Motion Judge properly found that any *prima facie* duty of care would be negated by countervailing policy reasons

101. The Motion Judge correctly found that if a duty of care was owed to the appellants to protect their economic interests, it would lead to an exposure of indeterminate liability. He also found that decisions on whether to allow importations of honeybees after December 31, 2006 is a true policy decision that is immune from tort liability. He did not err in that assessment.

Policy against indeterminate liability

102. Given the number of regulated animals and industry participants that are subject to importation restrictions, the respondents' risk of liability is expansive.

103. The Supreme Court of Canada has summarized the principles of the policy against indeterminate liability.[114] The policy is "not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally." In addition, there must be a principled basis upon which to apply a duty of care to some but not to others that limits liability.

104. The Motion Judge noted that the *HA Act* and *HA Regulations* apply to "a vast majority" of participants in the agriculture industry. Animals are frequently imported for any number of

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[114] *Cooper, supra* note 69 at para 37, *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5, [2010] 1 SCR 132 at para 70; *Imperial Tobacco, supra* note 40 at para 100, *Design Services Ltd. v. Canada*, [2008] 1 SCR 737, 2008 SCC 22, 2008 CarswellNat 1298

reasons. The agriculture industry is diverse. The list of "regulated animals" that are subject to the same statutory scheme is long.[115]

105. The appellants have not provided any compelling argument to exclude other interested parties involved in the importation of regulated animals from being owed the same duty to protect their economic interests as the appellants allege is owed to them. Conflicts even within the same segment of an agricultural sector could arise if a private law duty of care was recognized. The appellants have not provided a principled basis to "draw the line" from a whole host of others if a duty was imposed.[116]

CFIA's regulatory role in the present case involves true policy decisions

106. The Motion Judge concluded that the respondents' impugned decision is a core policy decision that is based on balancing public policy considerations and, as such, is immune to tort liability.[117] There is no reviewable error in his analysis.

107. The essence of the appellants' claim is that the respondents "have continued to enforce a complete prohibition on the import of bee packages from the United States and have communicated to the beekeeping industry that no permits will be granted for the importation of packages from the US."[118] This is a true policy decision at the highest level that commands deference. Animal health is clearly a public, social concern. Decisions of a political, social or economic nature do not give rise to a private law duty of care.[119] Only acts that are "markedly inconsistent with the relevant legislative context where a court cannot reasonably conclude that they were performed in good faith" are subject to judicial scrutiny.[120]

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[115] *Attis, supra* note 111 at para 74 considering the numerous devices subject to regulatory control under the *Food and Drugs Act*

[116] *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, 1997 CanLII 307 (SCC), [1997] 3 S.C.R. 1210 at paras 62 and 64

[117] Reasons for Order at paras 117- 118, AB, Tab 3 at 53

[118] Statement of Claim at para 20, AB, Tab 3 at 63, Reasons for Order at para 118, AB, Tab 2 at 53

[119] *A.O. Farms Inc. v Canada,* 2000 CarswellNat 2619, [2000] F.C.J. No. 1771 (FC) at para 11; *Imperial Tobacco, supra* note 40 at para 90

[120] *Les Enterprises Sibeca Inc. v. Municipality of Frelighsburg,* 2004 SCC 61 at para 26

108. The appellants rely on *Roncarelli v. Duplessis*[121] where the Supreme Court of Canada considered a claim for damages arising from a specific public official's direction to cancel a liquor license which was made in bad faith. The facts in *Roncarelli* are clearly distinguishable. The decision at issue in that case was not a policy decision but an operational one. Mr. Duplessis directed the liquor commission to revoke Mr. Roncarelli's liquor licence and to advise him that further liquor licence applications from him, but not anyone else, would be denied, forever. The basis for these decisions did not relate to the purpose of the relevant *Liquor Act* statute. Moreover, the Court found that those operational decisions were based on an intent to harm Mr. Roncarrelli for activities that had no bearing on his fitness to hold or be granted a liquor licence under the *Liquor Act*.

109. In this case, there are no allegations in the Claim or Proposed Amended Claim that any one applied for an importation permit which was refused for improper purposes. Rather, the impugned decision in this case – a complete prohibition on the importation of US Bee Packages that applies to everyone – is not an operational decision but a core policy decision that applies to everyone equally.

110. The appellants argue that policy decisions that are cloaked in bad faith, cannot be immune from liability and rely on the new allegations in their Proposed Amended Claim to argue that they have pled the material facts of bad faith. The respondents disagree and submit that the bare allegations in the Claim and Proposed Amended Claim are not sufficient to give rise to a plea of bad faith which must be pled with particularity.[122] The Motion Judge properly found that pleadings did not raise an allegation of bad faith.[123]

111. For example, it is not sufficient to baldly allege that the Crown submitted "its regulatory authority ... to the Canadian Honey Council"[124] or that the Council "was dominated by certain commercial beekeeping factions (the "Faction")[125] or that the Crown abdicated "its

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[121] *Roncarelli v. Duplessis* [1959] SCR 121
[122] Rules 174 and 181, *Federal Courts Rules*, *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at paras 34-35, *St. John's Port Authority v Adventure Tours Inc*, 2011 FCA 198 at paras 49, 63
[123] Reasons for Order at para 119, AB, Tab 2 at 53
[124] Proposed Amended Claim at para 26(c)(vi), AB, Tab 6-C at 104
[125] Proposed Amended Claim at para 26(c)(vi), AB, Tab 6-C at 104

responsibilities"[126] or that the Crown "knew or ought to have known that the Canadian Honey Council did not represent the interests of commercial beekeeping industry as a whole".[127]

112. Moreover, a plea of bad faith is not disclosed by the allegations that respondents' restricted consultation to, and abdicated its regulatory authority, to the Canadian Honey Council when the respondents "knew or ought to have known" that the Council did not represent the interests of the beekeeping industry as a whole, that the Council was influenced by an unidentified "Faction" whose position on the "issue of U.S. package imports" was different from that of the appellants' and which had the effect of furthering the Faction's "preservation of market share, reduction of cross-border competition, monopoly over the market... and higher profits".[128]

113. The Ontario Superior Court struck a similar general pleading of bad faith policy making to the exclusion of an industry participant in *Weninger Farms Ltd. v Canada (Minister of National Revenue)*[129]. In that case, a claimant alleged that a public authority failed in its duty to restrict the importation of tobacco products, which consequently diminished the market for sale of legal tobacco in Canada. The pleading contained allegations that the regulator abdicated its role and preferred one segment of the industry over another. The lack of specificity in the allegations and the failure to plead essential facts, including the name of the specific public servant, was not merely a technical defect, it was fatal to the claim.[130]

114. The complaints of the appellants are focused on conduct and decisions of government that concerns the regulatory oversight of international movement of animals and the protection of animal health. The impugned policy is not directed at any particular individual.[131] The allegations are not actionable at law and the Motion Judge made no error in concluding that the appellants' pleadings do not disclose a reasonable cause of action.

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[126] Statement of Claim at para 28(h), AB, Tab 3 at 66, Proposed Amended Claim at para 28(h), AB, Tab 6-C at 107

[127] Proposed Amended Claim at para 26(c)(d.1), AB, Tab 6-C at 104

[128] Proposed Amended Claim at paras 26(c)(vi),(vii), 26(d.1), 26(d.2), 28(h)(iv), AB, Tab 6-C at 104, 106-108

[129] *Weninger Farms Ltd. v Canada (Minister of National Revenue,* 2012 ONSC 4544 (CanLII)

[130] *Weninger, supra* note 129 at paras 31-33 citing *L. (A.) v. Ontario (Ministry of Community and Social Services)* 2006 CanLII 39297 (ONCA)

[131] *Berg* SKQB at para 78 affirmed by Gerwing J.A. in *Berg* SKCA at para 6

(b) Order should be upheld because there are no alleged facts establishing causation

115. The appellants' Claim and proposed amendments do not allege any facts to establish causation, a necessary element of a cause of action in negligence. This is an additional basis upon which the Motion Judge's order can be sustained. [132]

116. The Supreme Court of Canada in *Clements v. Clements*[133] summarized the principles of causation as a necessary element of a negligence action. The traditional "but-for" test applies. Material facts establishing causation must be pleaded.

117. The appellants allege that they suffered monetary damages because, through the respondents' "*de facto*" prohibition, they have been denied an opportunity to apply for import permits. They say that if permits are to be denied, they should be denied in accordance with the terms of sections 12 and 160(1.1) of the *HA Regulations*.[134]

118. However, neither the appellants' Claim nor proposed amendments plead that the health status of US Bee Packages has improved (or is otherwise) such that the conditions for issuing a permit under s. 160 of the *HA Regulations* would be met. That is, there are no allegations that had the respondents received and properly considered importation applications, permits would have been issued.[135] Indeed, as noted earlier, there are no allegations that any of the appellants ever applied for a permit to import US Bee Packages. There are no allegations that "but-for" the respondents' alleged negligence, the appellants' economic position would be different.

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[132] It is open to a respondent on appeal to advance any argument to sustain the decision in the court below, unless it would have been necessary to adduce evidence in the court below. The issue before the Court in the present case is restricted to a review of the pleadings alone see *Athey v. Leonati* [1996] 3 SCR 458 at paras 50-52 and *Perka v R*, [1984] 2 SCR 232, 1984 CarswellBC 2518 (SCC) at para 9

[133] *Clements v Clements,* 2012 SCC 32 at paras 6-8

[134] See Proposed Amended Claim at para 27(i), AB, Tab 6-C at 106

[135] Because the requirements of s. 160 would have been met in that the Minister would have been "satisfied" that the permit would not "result in the introduction into Canada … or the spread within Canada, of a vector, disease or toxic substance".

119. In the absence of any alleged facts to establish causation, it is plain and obvious that the appellants' Claim and proposed amendments do not disclose a cause of action. The Motion Judge's order striking the Claim without leave to amend should also be upheld on this basis.

(c) Motion Judge properly awarded costs to the respondents in the circumstances

120. In the circumstances, the Motion Judge's award of costs is entirely consistent with this Court's decision in *Campbell v Canada (Attorney General).*[136] This was a stand-alone motion to strike a Statement of Claim directed to be decided before the parties or the court were to even contemplate certification. As such, Rule 334.39 of the *Federal Court Rules* was not engaged and could not operate to preclude an award of costs.

121. In *Campbell,* this Court addressed the question of when the "no-costs" rule should apply and found that while it should "apply early enough in the process to give substantial protection to the representative plaintiffs", it should not apply "so early as to shelter plaintiffs whose actions never proceed to certification."[137]

122. On this basis, this Court held that the "no costs" rule applied once a certification motion has been served and filed.[138] However, the respondents respectfully submit, implicit in this Court's decision must be the proviso that the service and filing of the certification motion is, in all the circumstances, appropriate.

123. In this case, both the parties and the court understood that the Timing Issue would be decided at the October 1st case management conference. The parties and the court further understood that if the Timing Issue was decided in the respondents' favour, as it was, then certification would only be contemplated after the strike motion was decided and then, only if the strike motion was dismissed. Despite knowing this, the appellants pre-emptively filed a certification motion before the case management conference, ahead of their own proposed timeline and without Scott J's authorization.

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[136] *Campbell v Canada (Attorney General),* 2012 FCA 45, 2012 CarswellNat 3856
[137] *Campbell,* supra at note 136 at para 30
[138] *Campbell,* supra at note 136 at paras 45, 47

124. In these circumstances, to give effect to this Court's purposive interpretation of Rule 334.39 in *Campbell* and Rule 3, the appellants ought not be permitted to evade costs by the expedient of filing a certification motion to make the technical assertion that, as they are now parties to a certification motion, Rule 334.39 is engaged and they are immune to costs. Accepting the appellants' position that filing a certification motion is sufficient to shelter them from costs, regardless of the circumstances, undermines the ability of the court to control its process and, in this case, the authority of case management judges.

125. The Motion Judge did not err by awarding the successful respondents their costs. Alternatively, his order for costs is sustainable under paragraphs (a), (b) or (c) of Rule 334.39.

PART IV ORDER SOUGHT

126. The respondents respectfully ask that this appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF SEPTEMBER, 2014.

DATED at the City of Edmonton, in the Province of Alberta, this 26th day of September, 2014.

William F. Pentney
Deputy Attorney General of Canada

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PART V LIST OF AUTHORITIES

APPENDIX A - STATUTES AND REGULATIONS

1 *Canadian Food Inspection Agency Act*, SC 1997 c 6

2 *Federal Courts Rules*, SOR/98-106

3 *Health of Animals Act*, SC 1990 c 21

4 *Health of Animals Regulations*, CRC c 296

5 *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136

APPENDIX B - BOOK OF AUTHORITIES

6 *A.O. Farms Inc. v Canada,* 2000 CarswellNat 2619, [2000] F.C.J. No. 1771 (F.C.)

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10 *Attis v Canada (Minister of Health),* 2008 CarswellOnt 5661, 2008 ONCA 660, leave to SCC dismissed 2009 CanLII 19874

11 *Bauer Hockey Corp. v Sport Maska Inc,* 2014 FCA 158, 2014 CarswellNat 2210

12 *Berg v Saskatchewan 2003 SKQB 456*

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17 *Clements v Clements,* 2012 SCC 32, 2012 CarswellBC 1863

18 *Collins v R*, 2011 FCA 140, 2011 CarswellNat 1234

19 *Cooper v Hobart*, [2001] 3 SCR 537, 2001 SCC 79

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22 *Edwards v Law Society of Upper Canada*, [2001] 3 SCR 562, 2001 SCC 80

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24 *Holland v Saskatchewan*, 2008 SCC 42, 2008 CarswellSask 431

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31 *Maple Lodge Farms Ltd. v Canada*, [1982] 2 SCR 2, 1982 CarswellNat 484

32 *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184

33 *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263, 2003 SCC 69

34 *Operation Dismantle Inc. v R*, [1985] 1 SCR 441, 1985 CarswellNat 151 (SCC)

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36 *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27

37 *River Valley Poultry Farm Ltd. v Canada (Attorney General)*, 2009 ONCA 326, leave to SCC dismissed 2009 CanLII 61385

38 *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 1959 CarswellQue 37

39 *Simon v Canada, 2011 FCA 6, 2011 CarwellNat 38*

40 *St. John's Port Authority v Adventure Tours Inc.*, 2011 FCA 198

41 *Sullivan & Driedger on the Construction of Statutes* 4th (Butterworths Canada Ltd.

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42 *Syl Apps Secure Treatment Centre v B.D*, 2007 SCC 38, [2007] 3 S.C.R. 83

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