SCC File No. 36471

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF APPEAL)

BETWEEN:

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

Applicants
(Respondents)

And

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

Respondents
(Appellants)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL (PARADIS HONEY LTD., HONEYBEE ENTERPRISES LTD., and ROCKLAKE APIARIES LTD., RESPONDENTS)

(Pursuant to s. Rule 27 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The main issue in this application is whether the Court should grant the Applicants/Defendants (Canada) leave to appeal when the proposed grounds of appeal primarily concern not the actual decision of the Federal Court of Appeal or any issue of public importance, but rather its *obiter* musings on future directions in which the law might evolve.

2. The Respondents/Plaintiffs (the Beekeepers), a group of western Canadian beekeepers, commenced this proposed class action alleging Canada has wrongfully banned the importation of honeybee packages from the United States from 2006 to the present. Canada sought to strike the claim as disclosing no cause of action.

3. Both the Federal Court and the Federal Court of Appeal applied the well-established *Cooper/Anns* test to the strike motion. Both courts found the claim should not be struck for want of proximity at the first stage of the test. However, while the Federal Court motion judge held the claim should be barred for over-riding policy reasons at the second stage and struck it out, the majority (Majority) of the Federal Court of Appeal concluded it was not "plain and obvious" that policy considerations doomed the Beekeepers' claim. Accordingly the Majority restored it.

4. Having so held, the Majority said it "need not go further," but went on to consider a potential alternate basis of Crown liability, which it said warranted examination "for the benefit of future cases."[1] Canada's leave application primarily concerns this *obiter dicta*. Of Canada's three proposed issues of public importance, the first two concern this aspect of the decision.

5. The Beekeepers submit leave should not be granted for the purpose of allowing Canada to attack the *obiter* discussion of a potential novel cause of action that was not the actual basis of the FCA decision and which remains speculative only. Such discussion is one of the means by which the law evolves. Canada's attempt to stifle it is premature and unnecessary, and not a matter of public importance.

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[1] FCA Reasons, para 112 – **Application for Leave to Appeal (Application), Tab 2C**

6. Only Canada's third proposed issue concerns the actual basis for the decision, and it is premised on an inaccurate characterization both of the Beekeepers' pleadings and the FCA reasons. The Beekeepers submit the actual basis of the Majority decision involved the proper application of the accepted legal tests for striking a claim and for Crown liability, which does not in itself give rise to any issue of public importance warranting the intervention of the Court.

B. Statement of Facts

The Claim

7. The Beekeepers carry on commercial beekeeping operations and routinely suffer substantial loss of bees. They import bees to replenish those losses. The most economic and convenient source of imported bees is the United States.[2]

8. Live honeybees are generally imported in one of two forms, as a "package" or a "queen." A "package" is a cereal box-sized frame containing a queen and several thousand honeybees. A "queen" refers to a matchbox-sized frame that contains a queen and several attendant bees. A package will replace or replenish a colony far more quickly than a queen.[3]

9. The essence of the Beekeepers' claim is that Canada, without lawful authority and in breach of its duty to the Beekeepers, has maintained a blanket ban on the importation of honeybee packages from the United States since 2006. In maintaining this ban Canada has followed the dictates of rival commercial beekeepers who oppose the importation of bee packages for their own commercial reasons.[4]

10. This conduct by Canada is an abdication and breach of Canada's statutory and regulatory duties, as well as a breach of its duties to the Beekeepers, to consider the importation of bee packages on the merits, and has resulted in loss and damage to the Beekeepers.[5]

11. Prior to 2006, the importation of bees from the United States was governed for many years by specific regulations under the governing legislation, s. 14 of the *Health of Animals Act* ("*HAA*") (previously s. 16 of the *Animal Disease and Protection Act*), which authorizes the

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[2] Proposed Amended Statement of Claim (Claim), paras 2-4, 8-10 – **Application TAB 4A**
[3] Claim, paras 11-13 – **TAB 4A**
[4] Claim, paras 26-28 – **Application TAB 4A**
[5] Claim, paras 26-30 – **Application TAB 4A**

Minister to enact regulation to prohibit the importation of an animal into Canada 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."[6]

12. From 1987 to 2004, based on concern about the importation of disease and parasites, the Minister enforced a complete prohibition on the importation of live honeybees ("Honeybee Prohibition") from the continental United States by a series of ministerial orders and regulations.[7] This was relaxed in 2004 with a prohibition on U.S. packages only ("Package Prohibition"), which lasted from May 19, 2004 to December 31, 2006, as set out in the *Honeybee Importation Prohibition Regulation, 2004* ("*HIPR-2004*").[8]

13. The Beekeepers' Statement of Claim alleges that throughout the period of the Honeybee Prohibition, Canada consulted and co-operated with stakeholders in the commercial beekeeping industry including the Beekeepers to craft bee import policy.[9]

14. In the course of this consultation and cooperation the Beekeepers say Canada made specific representations and assurances to commercial beekeepers to the effect that while it knew a prohibition would cause them economic harm, their economic sacrifice was required to prevent economic disaster to the industry from certain honeybee pests. However, this sacrifice would be imposed no longer than necessary. As stated in the Claim, Canada represented to commercial beekeepers that:

> the immediate economic impact to them of closing the border to U.S. honeybee imports in 1987 was justified by the threat posed by honeybee pests to the long-term survival of the commercial beekeeping sector;[10]
>
> [Canada] would continue the border closure in the face of their economic hardship only for so long as justified by the risks posed by the honeybee pest situation to the commercial beekeeping industry; [11]
>
> [Canada] would continuously monitor and update its information with respect to the honeybee pest situation to determine when the border closure was no longer necessary and justified.[12]

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[6] *Health of Animals Act*, SC 1990, c 21 (*HAA*), s 14 – **Application TAB 3C**
[7] Canada's Memorandum of Argument (MOA), para 3 – **Application TAB 3**
[8] *Honeybee Importation Prohibition Regulation, 2004*, SOR/2004-136 and accompanying RIAS – **Application TAB 3E**
[9] Claim, paras 26(f) – **Application TAB 4A**
[10] Claim, para 26(b)(i) – **Application TAB 4A**
[11] Claim, para 26(b)(ii) – **Application TAB 4A**

15. In keeping with its assurances and representations, Canada initially conducted continuous monitoring and assessment and concluded on the basis of a 2003 assessment that the risk of importation had declined and the full prohibition was no longer justified in the face of economic hardship suffered by certain beekeepers. As a result, it decided to allow U.S. queen imports starting in 2004, while extending the prohibition on U.S. packages a further two years as a precautionary measure under *HIPR-2004*.[13]

16. The Package Prohibition expired at the end of 2006 and was not renewed. Since that time the importation of bees from the United States has been governed by the general import provisions concerning all regulated animals under the *HAA* and ss. 12 and 160 of its general regulation, the *Health of Animals Regulation* ("*HAR*").[14] These require the relevant Minister to issue an import permit if satisfied that importation would not likely result in the introduction or spread in Canada of a "vector, disease or toxic substance."[15]

17. Notwithstanding the foregoing, Canada continued to impose a complete ban on U.S. packages, refusing to accept or consider commercial beekeepers' applications for U.S. package permits, and informing beekeepers that this state of affairs would continue until it had opportunity to update its last risk assessment.[16]

18. In addition, contrary to Canada's earlier representations and the statutory requirement under s. 160 of the *HAR* to act on information of pest or disease risk, Canada refused to conduct a risk assessment on the importation of bee packages without the permission of an industry association named the Canadian Honey Council ("Council"). This was despite the fact that Canada knew or ought to have known that the Council would never provide such permission since it was dominated by a rival faction of commercial beekeepers that wanted to keep the complete ban in place.[17]

19. Based on the foregoing, the Beekeepers respectfully do not accept paragraph 8 of Canada's Memorandum of Argument to the effect that the Claim does not allege "any specific

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[12] Claim, para 26(b)(iii) – **Application TAB 4A**
[13] Claim, para 26(c) and (f) – **Application TAB 4A**
[14] *Health of Animals Regulations*, CRC c 296 (*HAR*), ss 12 and 160 – **Application TAB 3D**
[15] *HAR*, s 160(1.1) – **Application TAB 3D**
[16] Claim, para 26(c)(vi) and 28(a) to (c) – **Application TAB 4A**
[17] Claim, para 26(c) to (f) and 28 – **Application TAB 4A**

interactions between Canada and the Respondents."[18] The Beekeepers also respectfully reject the suggestion at paragraphs 52-57 of Canada's Memorandum of Argument that the alleged interactions consisted of nothing more than general public consultation and Canada publishing Regulatory Impact Analysis Statements ("RIASs") "about the intended scope and operation of regulations."[19]

20. These are mischaracterizations of the Claim, which are not supported by the actual pleadings.

21. In response to the Claim, Canada applied to strike it out on the ground that the Beekeepers could not establish that Canada owed them a duty of care.

The decisions of the Federal Court and the Federal Court of Appeal

22. In considering the Strike Motion, the Federal Court and the FCA accepted that on such a motion the allegations in the Claim must be taken as true, and may be struck only where it is plain and obvious the Claim will fail.[20]

23. The judges of the Federal Court and FCA also unanimously agreed that the law governing Crown liability and a duty of care is as set out by this Court in *Imperial Tobacco*,[21] which summarizes and restates a long line of authority beginning with the House of Lords' 1978 decision in *Anns v Merton London Borough Council*,[22] adopted by this Court in *Cooper v Hobart*[23] and *Kamloops v Nielson*.[24]

24. The "well-established approach"[25] has a two-stage test. At the first stage, the question is whether there is a relationship of proximity between the parties 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.

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[18] Canada's MOA, para 8 – **Application TAB 3**
[19] Canada's MOA, paras 52-57, **Application TAB 3**
[20] FC Reasons, para 76 – **Application TAB 2A**; FCA Reasons, para 76 and FCA Dissenting Reasons, para 37 – **Application TAB 2C**
[21] FC Reasons, para 95 – **Application TAB 2A**; FCA Reasons, paras 89, 95, 116-117 and FCA Dissenting Reasons, para 47 – **Application TAB 2C**
[22] *Anns v Merton London Borough Council*, [1978] A.C. 729 (HL)
[23] *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537
[24] *Kamloops City of) v Nielsen*, [1984] 2 SCR 2
[25] FCA Reasons, para 88 – **Application TAB 2C**

25. At the second stage, the question is whether this *prima facie* duty of care is negated by residual policy considerations. Possible policy considerations include: that a private duty of care conflicts with a public duty, a duty of care raises the spectre of indeterminate liability, or the decision or action is immune from suit because it is a "core policy" decision that was taken by the Crown in good faith. If a *prima facie* duty of care is not negated for residual policy reasons, a duty of care is established.[26]

Federal Court decision

26. The Motion Judge considered the first stage of the *Cooper/Anns* test and found that he "is not convinced that this allegation of proximity is certain to fail." Accordingly, he held that it was "preferable to apply the second stage of the *Anns* test."[27]

27. The Motion Judge then went on to find that a *prima facie* duty of care was negated at the policy stage for reasons of indeterminate liability and "core policy" immunity as set out in *Imperial Tobacco*. He dismissed the bad faith exception to such immunity, holding the Beekeepers' allegations of bad faith were not "convincing".

Federal Court of Appeal decision

28. In reasons written by Stratas JA, the Majority agreed with the Motion Judge that based on the Claim as pleaded, a relationship of proximity could not be ruled out at this early stage on the traditional framework established by the Court. As it stated:

> ... where there are "specific conduct and interactions" supporting proximity and the legislation does not foreclose a finding of proximity, it "may be difficult" to find lack of proximity: *Imperial Tobacco*, above at paragraph 47; see also *Cooper*, above at paragraphs 34-35 and *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at paragraphs 29-30. This is the situation here. The beekeepers plead that in specific interactions, Canada assured them that imports affecting their economic interests would be banned only as long as there was scientific evidence of risk ... Absent that evidence of risk and but for the blanket guideline, Canada had to issue importation permits under section 160 of the *Health of Animals Regulations,* above. In light of these considerations, the relationship between Canada and the beekeepers is sufficiently close and direct to make it fair and reasonable that Canada be subject to a duty to

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[26] *R v Imperial Tobacco*, [2011] 3 SCR 45, 2011 SCC 42, paras 39-41
[27] FC Reasons, para 114 – **Application TAB 2A**

> respect the beekeepers' interests, at least to the extent of making rational, evidence-based decisions following proper legislative criteria.[28]

The Majority then moved onto the second stage of the test and concluded that there was no policy bar.[29]

29. Firstly, the Majority noted that the alleged private duty to receive and consider permit applications from commercial beekeepers on proper considerations of disease and pest risk was not inconsistent with its broader public duty. As it stated:

> Section 160 says that permits "shall" be granted on a case-by-case basis where the importation will not bring a "vector, disease or toxic substance" to Canada. In other words, the public policy established by the law on the books favours importation in appropriate circumstances. According to the beekeepers, those circumstances existed, and importation should have been allowed. Thus, in this case, there is no inconsistency between the existence of a private law duty of care to the beekeepers and the public duty Canada owed. This case is on all fours with *Hill*, above, where the Supreme Court found (at paragraphs 36-41) that the imposition upon the police of a private duty of care to an individual suspect in the circumstances of the case before it was consistent with the broader public duty upon the police to investigate criminal activity effectively and fairly.[30]

30. Secondly, it found there was no issue of indeterminate liability because the class was limited, the circumstances were unusual and the damages were capped based on whether causation could be proven and to what extent.[31]

31. Finally, it held that even if Canada's alleged refusal to receive and assess permit applications under s. 160 of the *HAR* could be described as a core policy decision within the meaning of *Imperial Tobacco* attracting immunity (which it did not decide), the "bad faith" exception noted in that case applied because "the beekeepers have been victims of abusive administrative action" by Canada amounting to bad faith.[32]

32. Having concluded the claim should not be struck for these reasons, the Majority went on to consider "for the benefit of future cases" an alternative basis for the potential tort liability of the Crown, grounded in public law principles including those relating to judicial review. The

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[28] FCA Reasons, para 90 – **Application TAB 2C**
[29] FCA Reasons, para 94 – **Application TAB 2C**
[30] FCA Reasons, para 95 – **Application TAB 2C**
[31] FCA Reasons, paras 100-101– **Application TAB 2C**
[32] FCA Reasons, paras 76-77 – **Application TAB 2C**

Majority noted that Canada's alleged conduct might well be characterized as improper administrative action. The Majority also found there to be precedent supporting the possibility of an award of damages for administrative breaches and suggested that approaching the liability of public bodies for damages on this basis might resolve some of the uncertainties that have beset the law of Crown liability under the traditional private law approach.[33]

PART II – QUESTIONS IN ISSUE

33. The Beekeepers submit that the following questions are in issue:

    a. Does the Federal Court of Appeal's *obiter* discussion regarding a proposed novel tort give rise to a matter of public importance and warrant the Court's intervention at this time?

    b. Does the actual basis of the Federal Court of Appeal decision give rise to a matter of public importance and warrant the Court's intervention?

PART III – STATEMENT OF ARGUMENT

A. The proposed novel tort is not ripe for review by the Court

34. Canada's first two grounds for seeking leave to appeal attack the Majority's speculative discussion on a proposed novel tort, which followed the Majority's disposition of the Strike Motion on an uncontroversial application of facts to well-established principles of law.[34]

35. The Beekeepers recognize the potential benefit of the alternative framework proposed by the Majority. However, the time to hear an appeal of such a tort is when the Beekeepers or another claimant actually pursue such a claim and judgment is issued allowing or denying it.

36. Here, the Beekeepers did not advance the novel tort as part of the Claim, and the FCA did not hear any argument alleging or denying the existence of such a cause of action. The novel tort was raised for the first time in the Majority's *obiter* discussion of the possibility of an alternative way to consider Crown liability.

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[33] FCA Reasons, paras. 129-140 – **Application TAB 2C**
[34] FCA Reasons, paras 111-112 – **Application TAB 2C**

37. The rationale for declining leave to appeal on an *obiter* discussion is well-recognized in law. It has no binding precedential value.[35] Pursuing it wastes scarce judicial resources,[36] distracts from the real points in issue[37] and undermines the gatekeeping function of a leave to appeal stage.[38] Simply put, it does not create an issue of public importance.

38. The Court regularly declines to consider *obiter* of other courts, especially when the issues raised were not fully argued in those courts.[39]

39. In this case, the proposed novel tort was not only *obiter* and not argued, but it is also exploratory. Essentially, the Majority planted a seed "for the benefit of future cases" to water and grow if they wish to.[40] It suggested that Crown liability should be considered through the lens of public law, but the basic framework is still lacking. What are the elements of the test? Who may advance it and against whom can it be claimed? When can it be advanced? How does it differ or mesh with existing bases for liability? Further development is required before it becomes a matter of public importance.

40. Canada itself acknowledges the uncertainty of what the Majority proposed. As Canada says: "The majority judgment [regarding the proposed novel tort] is … uncertain in its application."[41]

41. Canada follows this acknowledgment with a series of assertions based mainly on speculation and presumptions about the proposed tort, some of which openly contradict what the Majority actually said. For example, Canada says that the proposed tort "would apparently not take into account any analysis of the nature of the relationship between the parties,"[42] and "damages can be awarded for nothing more than a breach of statutory duty."[43]

42. This ignores Stratas JA's statement, and his reliance on the Court's authoritative direction, that

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[35] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 168
[36] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at para 31
[37] *Hightime Investments Property Ltd v Bromley*, 2009 BCCA 194 at para 11
[38] *Hightime* at para 11
[39] See for example, *Eurig Estate (Re)*, [1998] 2 SCR 565 para 39; *R v Loewen*, [2011] 2 SCR 167, 2011 SCC 21 at para 9
[40] FCA Reasons, para 112 – **Application TAB 2C**
[41] Canada's MOA, para 29 – **Application TAB 3**
[42] Canada's MOA, para 35 – **Application TAB 3**
[43] Canada's MOA, para 36 – **Application TAB 3**

> In public law, monetary relief has never been automatic upon a finding that governmental action is invalid or … outside the range of acceptability or defensibility: *Wellbridge Holdings Ltd. v Greater Winnipeg*, [1983] 1 SCR 205, 143 D.L.R. (3d) 9; *Holland v Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551 at paragraph 9. "Invalidity is not the test of fault and it should not be the test of liability"; K.C. Davis, *Administrative Law Treatise* (1958), vol. 3 (st. Paul, MN: West Publishing, 1958) at page 487. There must be additional circumstances to support an exercise of discretion in favour of monetary relief.44

43. Thus, Canada not only seeks leave to appeal *obiter dicta* that had no bearing on the decision, but also misunderstands the nature of the proposed novel tort, for the purpose of choking off a potential new development in law.

44. As the Court has noted, and the Majority alluded to,[45] such new developments are frequently the target of strike motions. However, courts must be careful not to unduly constrain the development of law at such an early stage. As the Court stated in *Imperial Tobacco*:

> The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial [46]

45. In sum the proposed novel tort is not ripe for consideration by the Court. The proper time for its assessment by the Court may come when and if it is taken up by litigants and tested at trial and in the appellate courts. Until then, Canada's desire to "correct" the Majority's *obiter dicta* is a waste of scarce judicial resources and not a matter of any public importance.

B. The actual basis of the decision does not warrant intervention

46. Canada's only attack of the actual decision is focused on the Federal Court and the FCA's findings that proximity could not be ruled out on the facts as pleaded. Canada argues that both the Federal Court and the Federal Court of Appeal were wrong on this point and the facts alleged in the pleadings are so inadequate that proximity should be ruled out.

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[44] FCA Reasons, para 142 – **Application TAB 2C**
[45] FCA Reasons, para 119, citing *Donoghue v Stevenson*, [1932] UKHL 100, [1932] AC 562 – **Application TAB 2C**
[46] *Imperial Tobacco*, para 21

47. The Beekeepers submit that the correctness of the FCA decision does not give rise to a matter of public importance. Furthermore, this argument is based on Canada's mischaracterization of both the pleadings and the FCA decision, as well as its misunderstanding of what amounts to a matter of public importance.

48. Canada suggests the Majority's finding of proximity is based on the "thinnest of factual foundations," which Canada characterizes as consisting of public consultation and "general public representations" in the form of statements made in RIASs about the "intended scope and operation of regulations."[47] Canada argues that allowing liability on this basis will open the floodgates to the government being held "liable simply for governing."[48]

49. With respect, this characterization of the Majority's factual foundation is not accurate. The alleged interactions in the pleadings do not consist of "general public representations" about the "intended scope and operation of regulations." Rather, they consist of specific representations to commercial beekeepers that they were required to make an economic sacrifice to protect the industry as a whole, but that sacrifice would not be demanded any longer than necessary, and Canada would conduct continuous monitoring and assessment and lift the prohibition on honeybee imports as soon as the risk was acceptable.

50. The Majority relied on such specific representations, stating that they based proximity on the facts pleaded in the claim[49] of "specific interactions and assurance" between the parties, alongside the Beekeepers' "well-defined rights and entitlements based on specific legislative criteria."[50] As it noted:

> This is the situation here. The beekeepers plead that in specific interactions, Canada assured them that imports affecting their economic interests would be banned only as long as there was scientific evidence of risk … Absent that evidence of risk and but for the blanket guideline, Canada had to issue importation permits under section 160 of the *Health of Animals Regulations*, above.[51]

At no time did the Majority or the pleadings limit interactions to general public statements made in the RIASs about the "intended scope and operation of regulations."

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[47] Canada's MOA, para 52 and 54 – **Application TAB 3**
[48] Canada's MOA, para 52 – **Application TAB 3**
[49] FCA Reasons, para 77 – **Application TAB 2C**
[50] FCA Reasons, para 91 – **Application TAB 2C**
[51] FCA Reasons, para 90 – **Application TAB 2C**

51. Moreover, contrary to Canada's assertion that these circumstances are "likely present in a very wide range of regulatory contexts,"[52] the Majority in fact found the circumstances set out in the claim to be "most uncommon."[53] With respect, Canada's floodgates argument does not hold water.

52. The Majority decision, properly characterized, is based squarely within the framework established by the Court in *Imperial Tobacco*, *Hill* and *Cooper*,[54] which has been applied by the Court[55] and other courts[56] across Canada with regularity. As such, no matter of public importance arises from the Majority decision, and no review of that decision by the Court is warranted.

PART IV – COSTS

53. The Beekeepers ask the Court to exercise its wide discretion in the matter of costs[57] to order solicitor/client costs against Canada in any event of the cause for both the leave application and, if granted, the appeal stage. Alternatively, the Beekeepers ask that the Federal Courts' costs immunity regime be extended to the Supreme Court proceedings in any event of the cause.

54. In *Rogers v Bolduc*, the Court granted leave to appeal conditional upon Canada's undertaking to pay the costs of the appeal in any event of the cause, with costs fixed on a solicitor/client basis at the appeal itself. As the Court noted, the matter, while raising issues of public importance, "was of no such importance to the respondents."[58]

55. The same principle applies here. Canada seeks leave mainly to attack the correctness of *obiter* discussion on a proposed novel tort. However, this has no bearing on the actual

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[52] Canada's MOA, para 54 – **Application TAB 3**
[53] FCA Reasons, para 100 – **Application TAB 2C**
[54] FCA Reasons, para 90-91 – **Application TAB 2C**
[55] See for example *Imperial Tobacco* at paras 38-39, *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261 at para 66; *Fullowka v Pinkerton's of Canada Ltd.*, [2010] 1 SCR 132, 2010 SCC 5 at para 18
[56] Examples in recent months include *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para 50-51; *Walsh v Coady Estate*, 2015 NSSC 175 at paras 195-197; *Butler v Ma-Me-O Beach (Summer Village)*, 2015 ABQB 364 at para 18(d)
[57] As set out in the *Supreme Court Act*, RSC 1985, c S-26, s. 47
[58] *Rogers v Bolduc*, [1991] 1 SCR 374 at 445-446

decision under appeal. If leave were to be granted on this basis, it would be appropriate that Canada bear the Beekeepers' costs on a solicitor/client basis of any such appeal.

56. Alternatively, the Beekeepers ask that the Supreme Court extend the costs immunity regime pertaining to a Federal class action proceeding set out at s. 334.39 of the *Federal Courts Rules*[59] to this matter.

57. The Court has recognized the policy rationale for costs immunity provisions, which "protect … legitimate lawsuits from the disincentive of potentially onerous costs awards against them."[60] The Beekeepers have proceeded on the basis of costs immunity absent exceptional circumstances, which the judges of the Federal Court of Appeal unanimously confirmed as the proper approach in this case.[61]

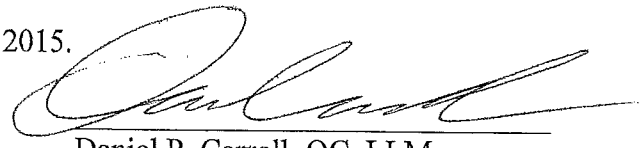
58. The Beekeepers submit that to change course on costs at this stage would undermine the purpose of costs immunity in the Federal Courts.

PART V – NATURE OF ORDER SOUGHT

59. The Beekeepers request that the application for leave to appeal be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Dated at the City of Edmonton this 10th day of August, 2015.



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[59] SOR/98-106, s. 334.39, **Response TAB 1A**
[60] *Prebushewski v. Dodge City Auto (1984) Ltd.*, [2005] 1 SCR 649, 2005 SCC 28 at para 43
[61] FCA Reasons, para 154 – **Application TAB 2C**

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTORY PROVISIONS

A. ***Federal Courts Rules*****, SOR/1998-106, s. 334.39**

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

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Application of subsections 334.32(3) and (4)

(2) Subsections 334.32(3) and (4) apply to a notice given under this rule.

SOR/2007-301, s. 7.

Application des paragraphes 334.32(3) et (4)

(2) Les paragraphes 334.32(3) et (4) s'appliquent à l'avis donné conformément à la présente règle.

DORS/2007-301, art. 7.

Order

334.36 A judge may order any party to give a notice under rules 334.32 to 334.35.

SOR/2007-301, s. 7.

Ordonnance

334.36 Le juge peut ordonner à toute partie de donner tout avis prévu aux règles 334.32 à 334.35.

DORS/2007-301, art. 7.

Prior approval of notices

334.37 Notices referred to in rules 334.32 to 334.35 shall not be given unless they have been approved by a judge.

SOR/2007-301, s. 7.

Approbation préalable de l'avis

334.37 Tout avis prévu aux règles 334.32 à 334.35 doit être approuvé par un juge avant d'être communiqué.

DORS/2007-301, art. 7.

Expenses

334.38 The judge has full discretion over the amount and allocation of expenses in respect of notices and may determine who is to pay those expenses.

SOR/2007-301, s. 7.

Coût

334.38 Le juge a le pouvoir discrétionnaire de fixer les coûts liés à la communication des avis, de les répartir et de désigner les personnes qui doivent les payer.

DORS/2007-301, art. 7.

COSTS

DÉPENS

No costs

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

(*a*) the conduct of the party unnecessarily lengthened the duration of the proceeding;

(*b*) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or

(*c*) exceptional circumstances make it unjust to deprive the successful party of costs.

Sans dépens

334.39 (1) Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :

a) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;

b) une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par erreur ou avec trop de circonspection;

c) des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.

Individual claims

(2) The Court has full discretion to award costs with respect to the determina-

Réclamations individuelles

(2) La Cour a le pouvoir discrétionnaire d'adjuger les dépens qui sont liés aux déci-

tion of the individual claims of a class member.

SOR/2007-301, s. 7.

Approval of payments

334.4 No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.

SOR/2007-301, s. 7.

sions portant sur les réclamations individuelles de membres du groupe.

DORS/2007-301, art. 7.

Approbation des paiements

334.4 Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

DORS/2007-301, art. 7.

PART 6

APPEALS

Application of this Part

Application

335. This Part applies to

(*a*) appeals to the Federal Court of Appeal from the Federal Court, including appeals from interlocutory orders;

(*b*) appeals to the Federal Court of Appeal from the Tax Court of Canada under subsections 27(1.1) and (1.2) of the Act; and

(*c*) appeals to the Court under an Act of Parliament, unless otherwise indicated in that Act or these Rules.

SOR/2004-283, s. 17.

PARTIE 6

APPELS

Champ d'application

Application

335. La présente partie s'applique aux appels suivants :

a) les appels des ordonnances de la Cour fédérale interjetés devant la Cour d'appel fédérale, y compris les appels d'ordonnances interlocutoires;

b) les appels des décisions de la Cour canadienne de l'impôt interjetés devant la Cour d'appel fédérale en vertu des paragraphes 27(1.1) et (1.2) de la Loi;

c) les appels interjetés devant la Cour en vertu d'une loi fédérale, sauf disposition contraire des présentes règles ou de cette loi.

DORS/2004-283, art. 17.

General

Interpretation

Definition of "first instance"

336. In this Part, "first instance" means a proceeding in the Federal Court, the Tax Court of Canada or the tribunal whose order is being appealed.

SOR/2004-283, s. 33.

Dispositions générales

Définition

Définition

336. Dans la présente partie, «première instance» s'entend de l'instance devant la Cour fédérale, la Cour canadienne de l'impôt ou l'office fédéral dont l'ordonnance est portée en appel.

DORS/2004-283, art. 33.