Court File No. T-2293-12

FEDERAL COURT

BETWEEN:

PARADIS HONEY LTD., HONEYBEE ENTERPRISES LTD.,

and ROCKLAKE APIARIES LTD.

Plaintiffs

-and-

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

Defendants

DEFENDANTS' REPLY WRITTEN REPRESENTATIONS

(DEFENDANTS' MOTION TO STRIKE THE CLAIM WITHOUT LEAVE TO AMEND)

Introduction

1. These are the Defendants' written representations in reply to the Plaintiffs' response submissions filed on November 29, 2013.

2. The pleadings in this case have long since closed and the Plaintiffs cannot amend as of right. In addition, "no amendment shall be allowed...during a hearing". The Plaintiffs' Proposed Amended Statement of Claim is improper and it, and any paragraphs referring to it in the Plaintiffs' response written representations, should be struck or wholly disregarded.

3. In the alternative, the Plaintiffs' pleading in negligence is not cured by their Proposed Amended Statement of Claim because the proper statutory construction and interpretation of the *Health of Animals Act* and *Regulations* – which are questions of law - do not create a private law duty of care to the individual Plaintiffs.

PART I FACTS AND PROCEDURAL HISTORY

4. The Defendants submit that the following are the relevant facts and procedural history to this Reply.

5. The Plaintiffs filed their Statement of Claim (the "Claim") on December 28, 2012. The Defendants filed their Statement of Defence on February 8, 2013. The pleadings in this action have been closed for about 10 months: Rule 202 of the *Federal Courts Rules* ("FCR")[1].

6. On August 13, 2013, the Plaintiffs wrote the Court seeking a case management conference with the Honourable Mr. Justice Scott. At the case management conference held on October 1, 2013, Mr. Justice Scott directed that the Defendants' motion to strike the claim would be heard and determined prior to the Plaintiffs' motion for certification.

7. In addition to that issue, the Plaintiffs' "Meeting Agenda" (which was attached to their August 13, 2013 letter) also addressed the issue of "setting a schedule for any other interlocutory motions intended to be brought prior to or concurrently with the certification motion"[2]. The only interlocutory motion put forward was the Defendants' motion to strike. The Plaintiffs did not put forward or otherwise mention a motion to amend their pleadings.

8. In response to paragraph 25 of the Plaintiffs' response submission, to be clear, the Defendants did not receive the Proposed Amended Claim on September 25, 2013. The Defendants first saw the Proposed Amended Claim on November 29, 2013, when they received the Plaintiffs' motion record in response to the Defendants' motion to strike without leave to amend.

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[1] Rule 202 of the *Federal Courts Rules*, Tab 1 of Defendants' Reply Authorities
[2] Letter from Daniel P. Carroll, QC (Plaintiffs' counsel) to the Federal Court dated August 13, 2013, with attached "Meeting Agenda", Tab 2 of Defendants' Reply Authorities

PART II POINTS IN ISSUE

9. The Defendants' respectfully submit that the issues on this Reply are:

(a) Whether the Plaintiffs' Proposed Amended Statement of Claim and the submissions referring to it should be struck or otherwise disregarded?

(b) In the alternative, does the Plaintiffs' Proposed Amended Statement of Claim cure the defects of the claim?

(c) What are the other issues in Reply?

PART III SUBMISSIONS

(a) Plaintiffs' Proposed Amended Statement of Claim should be struck or wholly disregarded

10. The Plaintiffs tender a Proposed Amended Statement of Claim (the "Proposed Amended Claim") in response to the Defendants' Motion to Strike their Statement of Claim (the "Claim") without leave to amend. The Defendants submit that the Plaintiffs' Proposed Amended Claim, and the paragraphs in their response submissions referring to it, ought to be struck or wholly disregarded in this Court's adjudication of the Defendants' Motion to Strike the Claim without leave to amend. In this regard, the Defendants have identified the following paragraphs of the Plaintiffs' response submissions which, they submit, ought to be struck or disregarded: paragraphs 5, 14, 15, 16, 23, 24, 25, 49, 50, 72 -86.

11. The pleadings in this case have long since closed and the Plaintiffs cannot amend as of right: Rules 200 and 202 of the *Federal Courts Rules* ("FCR").[3] The Plaintiffs are required to seek leave of this Court, by way of motion, in order to amend their Claim. They have not done so and cannot purport to do so by tendering the Proposed Amended Claim in response to the Defendants' strike motion.

[3] Rules 200 and 202 of the *Federal Courts Rules*, Tab 1 of Defendants' Reply Authorities

12. Moreover, the Defendants' submit that the Plaintiffs are estopped from doing so given that this proceeding is case managed and the issue of the scheduling of "any interlocutory motions" was a matter to be expressly addressed by the parties at the case management conference on October 1, 2013. The issue of the scheduling of "any interlocutory motions", moreover, was put forward at the Plaintiffs' instance. The Plaintiffs, in effect, admit that proposed amendments are not new matters of which the Plaintiffs only just became aware.[4] Yet, the Plaintiffs did not raise even the possibility of a motion to amend their Claim before, during or after the case management conference. Rather, they now attempt to tender a Proposed Amended Claim after receiving the full benefit of the Defendants' argument on its motion to strike the Claim.

13. Moreover, Rule 75(2) of the FCR provides that "no amendment shall be allowed...during a hearing".[5] This is a motion in writing and thus, the parties are in a hearing – the Defendants have put forward its case and given this Court and the Plaintiffs its submissions. This Court has rejected attempts to file amended pleadings in response to motions to strike without leave to amend. In this regard, this Court held that no steps can be taken by a responding party that could affect the rights of a moving party.[6]

14. In tendering the Proposed Amended Claim, the Plaintiffs rely on a statement by the British Columbia Court of Appeal in *Los Angeles Salad Company* at paragraph 24 of their submissions. However, in that case, a formal application for leave to amend was made at the BCSC level and again at the BCCA level.

15. Plaintiffs also rely on *Simon v Canada*, *Collins v Canada* and *Gagne v Canada* in tendering the Proposed Amended Claim in response to the Defendants' motion to strike. However, in each of those cases, the pleadings had not closed. The defendant in those cases had

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[4] See paragraph 25 of Plaintiffs' submission which indicates they could have plead these allegations at least as early as September 25, 2013 before the case management conference on October 1, 2013.

[5] Rule 75(2), *Federal Courts Rules*, Tab 1 of Defendants' Reply Authorities

[6] Direction of Prothonotary Lafrenière in *Simon v. Her Majesty the Queen in right of Canada* T-1029-12 citing *Bruce v. John Northway & Sons Ltd.* [1962] OWN 150, Tabs 3 and 4, respectively, of Defendants' Reply Authorities

not filed a statement of defence prior to bringing its motion to strike.[7] As a result, the plaintiff in each of those cases was entitled to amend as of right. That is not the case here. As noted above, the pleadings in this action closed approximately 10 months ago, when the Defendants filed their Statement of Defence on February 8, 2013. In addition, those cases - *Simon v Canada, Collins v Canada and Gagne v Canada* - do not appear to have been under case management where, as in this case, the parties had committed to expressly addressing the issue of all interlocutory motions to be heard prior to or concurrently with the Plaintiffs' certification motion.

16. For all of the foregoing reasons, the Defendants respectfully submit that the Plaintiffs' Proposed Amended Claim, and their submission which reference or rely on it, ought to be struck or otherwise wholly disregarded.

(b) The Plaintiffs' Proposed Amended Claim does not cure the defects of the pleading

17. Alternatively, if the Court finds that it has jurisdiction and is otherwise prepared to entertain the Plaintiffs' Proposed Amended Claim, the Defendants submit the following reply.

The *HA Act* and *HA Regulations* do not give rise to a private law duty of care

18. The Defendants rely on paragraphs 46 – 80 of their submissions filed on November 8, 2013 which show, the Defendants submit, that the purpose and intent of the legislative scheme makes it plain and obvious that the duties owed by the CFIA are owed to the public as a whole, and not to any specific members of the public such as individual industry participants.

19. Thus, the defects in the Plaintiffs' pleading in negligence are not cured by their Proposed Amended Claim.[8] This is because the proper statutory construction and interpretation of the legislative scheme, which are questions of law, are not affected by the amended allegations. The Defendants submit that, as a matter of law, the statutory regime does not create a private law

[7] See this Court's Recorded entries for each of these court files: *Gagne v Canada* (T-1935-12); *Simon v Her Majesty the Queen in Right of Canada* (T-639-10); *Collins v The Queen* (T-997-09), Tabs 5, 6 and 7 of Defendants' Reply Authorities

[8] *Simon v. Canada*, 2011 FCA 6 at para 8, Tab 16 of Plaintiffs' Authorities

duty of care to protect the Plaintiffs' private economic interests and the proposed amendments do not, and cannot, alter this statutory intent.

20. The Plaintiffs' submissions that the industry's economic interests are of primary concern under the legislative scheme and that "any interest of the public in factors relating to bees are [sic] secondary in nature"[9] is short-sighted and flawed. Not all insects are regulated under the *HA Act*; honeybees are. Honeybees are regulated, in part, because they generate a product for consumption, the distribution of which may or may not result in economic gain.[10] The regulator does not guarantee or insure revenues from the use of animals. Rather, the regulator must balance a myriad of interests in performing its regulatory functions, the primary interest being the public concern for the health of animals and the prevention of animal disease in Canada.

21. The Plaintiffs' exclusive reliance on the Regulatory Impact Analysis Statements (RIAS) for specific regulations to support their view of the intent of the legislative scheme as a whole is problematic for several reasons.

22. First, the RIAS cited by the Plaintiffs are associated with specific regulations which were no longer in force during the material time the Plaintiffs complain of - that is, January 1, 2007 to the date the Claim was filed on December 28, 2012. As a result, none of the RIAS cited by the Plaintiffs can assist in determining the legislative intent during the material time.

23. Second, although courts have received RIAS's 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*. In *Bristol-Myers Squibb Co. v. Canada (Attorney General)*[11], after citing the modern principle of statutory interpretation, Binnie J. stated at paragraph 38:

> The same edition of Driedger adds that in the case of regulations, attention must be paid to the terms of any enabling statute:

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[9] Para 2, 64 and 90 of Plaintiffs' Submissions

[10] Honeybees are also regulated because of the impact they have on the whole of the agriculture sector in addition to human health concerns.

[11] *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, 2005 CarswellNat 2619 (SCC), at para 38, Tab 8 of Defendants' Reply Authorities

> It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

(Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 247)

> This point is significant. The scope of the regulation is constrained by its enabling legislation. Thus, one cannot simply interpret a regulation the same way one would a statutory provision.

24. The Plaintiffs' exclusive reliance on the RIAS, without any regard to "the whole context" of the *HA Act,* or the words of the *HA Regulations* itself, is not a proper approach for determining whether or not the statutory regime intends or does not intend to create a private law duty of care.

25. Moreover, the plain words contained in the RIAS cited by the Plaintiffs at paragraph 2 of their response submission do not support the meaning the Plaintiffs attribute to them (at paragraph 39 of their response submission) that "the purpose of the importation provisions of the *Act* and *Regulations* is the protection of the economic interests of industry". Rather, the RIAS they cite at paragraph 2 of their submission (dated December 12, 1991) discloses a public interest which goes well beyond the beekeeping industry and concerns the whole of Canada's animal agriculture industry:

> The *Health of Animals Regulations* control the importation of animals into Canada in order to prevent the introduction of diseases which could have a serious economic impact on Canada's animal agricultural industry.

26. Properly interpreted the RIAS statements cited by the Plaintiffs show that the intent is to prevent disease introduction by prohibiting imports where there is a disease outbreak or an acknowledged risk in the area of origin. This is consistent with the overall intent of the *HA Act.*

27. For example, the wording in the 2001 *Regulations Amending the Health of Animals Regulations*, SOR/ 2001-210 resulted in the implementation of a modernized animal import system in Canada. In relation to purpose, its RIAS states at pages 1185-1186:

> **The purposes of the *Health of Animals Act* and Regulations are: to prevent the introduction of animal diseases into Canada; to control and eliminate diseases in animals that either affect human health or could significantly affect the Canadian economy; and, to provide for the humane treatment of animals during transport.**
>
> This regulatory amendment makes significant changes to the provisions of *the Health of Animals Regulations* that govern the importation of live animals...
>
> ...
>
> The regulatory amendment establishes a new approach to the importation of regulated live animals and their germplasm. This allows the government to respond more efficiently to requests to recognize areas of distinct animal health status in all countries, or to respond to changes in production and disease control practices in specific sectors. The amendment achieves several major goals including the development of risk categories for areas of origin, equitable application of import requirements to all countries, and use of information technology. **The end result is an approach to importation that meets the need to protect the health status of Canadian livestock but is more timely and effective.** [12]
>
> (Emphasis added)

No interactions between the CFIA and the Plaintiffs

28. The interactions between the parties alleged in the Proposed Amended Claim do not rise to the level or type of conduct sufficient to establish a "close and direct" relationship of proximity with these individual Plaintiffs necessary to ground a private law duty of care. The Defendants commend the Court to paragraphs 81 – 90 of its submission filed on November 8, 2013 and make further reply below.

29. The Plaintiffs contrast "the beekeeping industry" with "the public at large" and contend that by having regard to the interests of the beekeeping industry as a whole, the Defendants have thereby entered into a close and direct relationship with the Plaintiffs.[13] This distinction is not sufficient to establish a close and direct relationship with the Plaintiffs. There are no specific interactions alleged in the pleadings between the Defendants and Paradis, HB Enterprises or Rocklake.

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[12] *Regulations Amending the Health of Animals Regulations*, SOR/2001-210 and RIAS at pp. 1185-1186, Canada Gazette Part II, Vol. 132, No. 17, Tab 23 of Plaintiffs' Authorities

[13] Paragraphs 39 – 47 of Plaintiffs' Submission

30. The alleged interactions in the Proposed Amended Claim about consultation with the whole industry do not create a level of proximity sufficient to create a duty of care to the individual Plaintiffs or any other individual participant in that industry. As submitted in paragraph 86 of the Defendants' submissions filed on November 8, 2013, the Supreme Court of Canada in *Imperial Tobacco* stated that the test for proximity requires a series of specific interactions between the regulator and the individual claimant. These specific interactions must show that the regulator "through it conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care".[14]

Immunity of government's core policy decisions

31. Contrary to the Plaintiffs' contention at paragraph 79 of their submissions, the Minister's decision to maintain the importation ban for Bee Packages after the legislative instrument expired involves matters of policy. The issues of animal health and the prevention of disease are matters of both social and economic policy. The Plaintiffs do not allege that animal health and the prevention of disease did not factor into the Minister's decision to maintain the importation ban. Instead, they allege that the decision was also influenced by other factors. This does not change the nature of the decision or the purpose of the scheme. Animal health and the prevention of disease are public concerns and any potential duty owed to the Plaintiffs is overridden by these broader policy considerations.

32. The Plaintiffs submit that their Proposed Amended Claim contains a plea that the Crown's regulatory decisions were not made in good faith.[15] Such allegations amount to a claim of misfeasance in public office or abuse of public office. The failure to identify the public officer allegedly responsible for the conduct for which the Crown may be vicariously liable is fatal to the claim. [16]

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[14] *Imperial Tobacco v Canada (Attorney General),* 2011 SCC 42 at para 45, Tab 1 of Defendants' Authorities filed on November 8, 2013

[15] Paragraph 83 of the Plaintiffs' Submissions

[16] *St. John's Port Authority v. Adventure Tours Inc.* 2011 FCA 198, Tab 9 of Defendants' Reply Authorities; *Merchant Law Group v. Canada Revenue Agency*, 2009 FC 755 at paras 18 – 23 (aff'd 2010 FCA 184), Tab 10 of Defendants' Reply Authorities; *Collins v. Canada* 2011 FCA 140 at para 33, Tab 17 of Plaintiffs' Authorities

33. The Proposed Amended Claim alleges that the regulator would not update its honeybee pest information without the approval of the Canadian Honey Council, which was dominated by certain commercial beekeeping "factions", at the alleged exclusion of the Plaintiffs.[17] Hugesson J. of the Federal Court in *A.O. Farms Inc. v. Canada*, at paragraph 11 provides a complete answer to these types of allegations, which has been cited with approval in numerous cases:

> ... The relationship between the government and the governed is not one of individual proximity. Any, perhaps most, government actions are likely to cause harm to some members of the public. That is why government is not an easy matter. Of course, the government owes a duty to the public but it is a duty owed to the public collectively and not individually. The remedy for those who think that duty has not been fulfilled is at the polls and not before the Courts.[18]

34. In the Proposed Amended Claim, the Plaintiffs state that there are other "factions" in the beekeeping industry that have an interest in the importation ban which is different than the Plaintiffs' interest.[19] In so stating, the Plaintiffs support the Defendants' argument that the recognition of a private law duty of care to protect the private economic interests of each and every participant in the beekeeping industry would create an untenable and irreconcilable conflict of duties (which would come at the expense of animal health). As McLachlin J. noted in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* at paragraph 64 there must be a principled basis to apply the duty of care to some and not to others:

> ...There must be something which, for policy reasons, permits the court to say this category of person can recover and that category cannot, something which justifies the line being drawn at one point rather than another.[20]

35. The Defendants submit no such principled basis is disclosed in the Plaintiffs' Proposed Amended Claim or otherwise.

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[17] Paragraphs 26 c.(vi), 26 d.1, and 26 d.2 of the Proposed Amended Claim
[18] *A. O. Farms Inc v Canada*, 2000 CarswellNat 2619 (FC), Tab 35 of Defendants' Authorities filed on November 8, 2013
[19] Paragraph 26 d.1 of the Proposed Amended Claim
[20] *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, 1997 CarswellNfld 207, [1997] 3 SCR 1210 at para 64, Tab 34 of Defendants' Authorities filed on November 8, 2013

36. The Plaintiffs submit that the Minister does not have any discretion to refuse import permits if the Minister is satisfied with the conditions in subsection 160(1.1) of the *HA Regulations* as amended in 2012. They claim that to make decisions influenced by other factions of the beekeeping industry and based on other purposes outside the regulatory scheme is negligent.[21]

37. As stated in paragraph 23 of the Defendants' written submissions filed on November 8, 2013 such allegations amount to a claim of breach of statutory duty. As confirmed by the Supreme Court of Canada in *Holland* and *Saskatchewan Wheat Pool*[22] such claims do not disclose a cause of action recognized in law and ought to be struck.[23] Rather, allegations that the Minister breached his statutory duty to exercise his discretion within the boundaries of subsection 160(1.1) of the *HA Regulations* are to be pursued through judicial review.

(c) Defendants' reply on other issues

38. In reply to paragraph 30 of the Plaintiffs' submission, the existence of a duty of care is a question of law appropriately decided on an interlocutory motion to strike.

39. In response to paragraph 96 of the Plaintiffs' written submission to the effect that the Defendants have "not elaborated" on the "spectre of indeterminate liability", the Defendants commend the Court to paragraphs 95 – 99 of the Defendants' written submissions filed on November 8, 2013.

40. In response to the Plaintiffs' submissions on costs (at paragraphs 101 – 104 of their written submissions), the Defendants submit that the within motion is not a motion for certification. The heading to Rules 334.12(1) – 334.2 is entitled "Proceedings That May Be Certified as Class Proceedings". The within action is not a yet a "class proceeding".

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[21] Paras 13-16 and 82 of the Plaintiffs' Submissions

[22] *Holland v Saskatchewan*, 2008 SCC 42, 2008 CarswellSask 431, Tab 11 of Defendants' Authorities filed November 8, 2013; *R v Saskatchewan Wheat Pool*, 1983 CarswellNat 92, [1983] 1 SCR 205, Tab 12 of Defendants' Authorities filed on November 8, 2013

[23] *Holland v Saskatchewan, supra* at paras 7-9, 11, Tab 11 of the Defendants' Authorities filed November 8, 2013

41. The Plaintiffs filed their Motion for Certification on September 12, 2013, **after** the parties applied to Mr. Justice Scott, for a direction on the very issue of whether the Defendants' strike motion would be heard and determined before the Plaintiffs' certification motion and **before** Mr. Justice Scott rendered his direction on that issue at the case management conference on October 1, 2013. In view of this, the Defendants submit that the Plaintiffs cannot rely on improperly filing their certification motion to attempt to fall within the no costs provision for certification motions under Rule 334.39(1) of the FCR.

42. In the alternative, the Defendants note that Rule 334.39(1) of the FCR provides exceptions to the "no costs" provision. In particular, Rule 334.39(1) provides that "no costs may be awarded...unless (b) any step in the proceeding by the party was improper, vexatious or unnecessary...". In this regard, the Defendants respectfully submit that the Plaintiffs' attempt to tender the Proposed Amended Claim in response to the Defendants' motion to strike and the filing of their certification motion before the case management judge determined the issue of which motion would proceed first, falls into this exception.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF DECEMBER, 2013.

DATED at the City of Edmonton, in the Province of Alberta, this 4th day of December, 2013.

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PART V LIST OF MATERIALS AND AUTHORITIES

TAB

1	Rules 75(2), 200, 202, *Federal Courts Rules*
2	Letter from Daniel P. Carroll, QC (Plaintiffs' counsel) to the Federal Court dated August 13, 2013, with attached "Meeting Agenda"
3	Direction of Prothonotary Lafrenière in *Simon v Her Majesty the Queen in Right of Canada* (T-1029-12)
4	*Bruce v John Northway & Sons Ltd* [1962] OWN 150
5	Federal Court Recorded Entries for *Gagne v Canada* (T-1935-12)
6	Federal Court Recorded Entries for *Simon v Her Majesty the Queen in Right of Canada* (T-639-10)
7	Federal Court Recorded Entries for *Collins v The Queen* (T-997-09)
8	*Bristol-Myers Squibb Co. v. Canada (Attorney General),* 2005 SCC 26, 2005 CarswellNat 2619 (SCC)
9	*St. John's Port Authority v. Adventure Tours Inc.* 2011 FCA 198
10	*Merchant Law Group v. Canada Revenue Agency*, 2009 FC 755