Court File No. T-2293-12

FEDERAL COURT
PROPOSED CLASS ACTION

BETWEEN:

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

Plaintiffs
(Respondent)

-and-

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

Defendants
(Applicants)

DEFENDANTS' WRITTEN REPRESENTATIONS (MOTION TO STRIKE THE STATEMENT OF CLAIM)

Jaxine Oltean / Marlon Miller
Counsel for the Defendants (Applicants)

Department of Justice Canada
Prairie Region, Edmonton Office
300, 10423 – 101 Street
Edmonton, Alberta
T5H 0E7

Telephone: (780) 495-7324 / (306) 975-3003
Facsimile: (780) 495-8491
File No. 2-151501

Jonathan Faulds Q.C. / Lily Nguyen
Counsel for the Plaintiff (Respondents)

Field LLP
Barristers & Solicitors
2000, 10235 – 101 Street
Edmonton, Alberta
T5J 3G1

Telephone: (780) 423-3003
Facsimile: (780) 424-5657
File No. 56452-2

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Introduction

1. CFIA has the mandate and authority under the *Health of Animals Act* ("*HA Act*") and *Health of Animals Regulations* ("*HA Regulations*") to protect animal health in the interests of the public. The regulatory scheme does not impose a private law duty of care on the defendants to consider the plaintiffs' private economic interests in the course of performing its regulatory functions in furtherance of this public mandate.

2. A concurrent duty to be mindful of the plaintiff's economic interests would create a conflict that would preclude the regulator from making decisions relating to the importation of animals purely in the interests of animal health. The general interactions alleged in the Claim with the "industry" at large are not sufficient to create a close and direct relationship with the plaintiffs and, therefore, also do not give rise to a duty of care. Recognition of a private law duty of care to an importer of animals would create indeterminate liability and should be negated for policy reasons.

3. The essence of the plaintiffs' claim is that the defendants acted without lawful authority and were negligent by enforcing a complete prohibition on, and refusing to issue permits for, the importation of live honeybees from the United States. The decisions that are being challenged in the present case represent core policy decisions that are immune from liability. The claims are bound to fail.

4. For these reasons, it is plain and obvious that the plaintiffs' Statement of Claim ("claim") does not disclose a reasonable cause of action and, therefore, should be struck in its entirety without leave to amend.

PART I STATEMENT OF FACTS

5. Evidence is not permitted on motions to strike brought under Rule 221(1)(a) of the *FCR*. The allegations of fact, but not law, in the Claim are generally assumed to be true unless they are based on assumptions, speculation or are incapable of proof.[1] Thus, the following statement of facts is derived solely from the allegations in the plaintiffs' Claim and is not an admission of those facts by the defendants.

6. The defendant Minister of Agriculture and Agri-Food ("Minister") is responsible for and has the overall direction of the defendant Canadian Food Inspection Agency ("CFIA").[2] The Minister is also the responsible Minister under the *Health of Animals Act* ("*HA Act*").[3]

7. The defendant 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*.[4]

8. The plaintiffs are corporate entities who keep bees for commercial purposes. Paradis Honey Ltd. ("Paradis") carries on business in Alberta, Honeybee Enterprises Ltd. ("HB Enterprises") carries on business in British Columbia and Rocklake Apiaries Ltd. ("Rocklake") carries on business in Manitoba.[5]

9. The plaintiffs allege 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 to keep her alive during transport or a "package" which contains a small colony made up of a queen bee and several thousand worker bees transported in

[1] *Imperial Tobacco Inc. v Canada (Attorney General),* 2011 CarswellBC 1968, 2011 SCC 42, at para 22, Book of Authorities ("BOA"), Tab 1
[2] Statement of Claim, para. 6, Motion Record ("MR"), Tab B, *Canadian Food Inspection Agency Act*, SC 1997 c 6, s. 4(1), BOA, Tab 2
[3] *Health of Animals Act*, SC 1990 c 21, s. 2(1) (definition of "Minister"), BOA, Tab3
[4] Statement of Claim, para. 7, MR, Tab B, *Canadian Food Inspection Agency Act, supra*, ss. 3, 11, BOA, Tab 2
[5] Statement of Claim, paras. 2-4, MR, Tab B

a larger box ("Bee Package"). A Bee Package constitutes a ready-made colony and can generate revenue in the year it is purchased.[6]

10. Queens and Bee Packages can 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 at least the last 25 years.[7]

11. The plaintiffs allege 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."[8]

12. 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 *Health of Animals Act*.[9]

13. 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 *Health of Animals 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 *HA Regulations*.[10]

14. From January 1, 2007 to the date the plaintiffs claim was filed on December 28, 2012, the importation of Bee Packages into Canada from the US was, and remains, prohibited and, the plaintiffs allege, there "is no lawful authority" for this prohibition.[11] However, during this time

[6] Statement of Claim, paras. 10 – 12, MR, Tab B
[7] Statement of Claim, paras. 13-14, MR, Tab B
[8] Statement of Claim, para. 13, MR, Tab B
[9] Statement of Claim, para. 14, MR, Tab B
[10] Statement of Claim, para. 16, MR, Tab B, *Health of Animals Act, supra*, ss. 14, 64 BOA, Tab 3, *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136, BOA, Tab 4; *Health of Animals Regulations*, CRC c 296, ss. 12, 160, BOA, Tab 5
[11] Statement of Claim, para. 20, MR, Tab B

period, permits continue to be granted to import queens into Canada from the US "pursuant to the Minister's discretion under s. 160(1.1)" of the *HA Regulations*.[12]

15. The plaintiffs seek damages on the basis of two alleged causes of action: "negligence" and "acting without lawful authority" for imposing or enforcing "a prohibition on, or denying import permits for, the importation into Canada of live honeybee packages from the continental United States after 2006 to the present day".[13]

16. The Claim in negligence alleges that the defendants (hereafter "CFIA")[14] owed the plaintiffs a duty of care "with respect to restrictions on the importation of honeybees from the United States".[15] More particularly, the Claim alleges that the CFIA owed the plaintiffs a duty of care to "take reasonable steps to avoid causing foreseeable economic" loss to the plaintiffs when prohibiting and denying permits for the importation of US Bee Packages after 2006.[16]

17. The allegation that the CFIA acted "without lawful authority" appears to be both a stand-alone claim and also a part of the negligence claim as the plaintiffs further allege that the CFIA is obligated to:

- not prohibit the importation of US Bee Packages after 2006 without lawful authority
- not unreasonably, or without lawful authority, deny import permits for US Bee Packages
- act on timely and proper information in deciding whether or not to prohibit or grant permits for the importation of US Bee Packages
- monitor, investigate, research and assess the beekeeping industry in Canada in deciding whether or not to prohibit or grant permits for the importation of US Bee Packages

[12] Statement of Claim, paras. 19-21, MR, Tab B
[13] Statement of Claim, para. 1(c)(i) and (ii), MR, Tab B
[14] The plaintiffs' Statement of Claim (para. 5) does not distinguish the defendants and rather refers to all defendants as "the Crown" or "the defendants". Under section 15 of the *Canadian Food Inspection Agency Act, supra*, BOA, Tab 2, and sections 3, 10 and 23 of the *Crown Liability and Proceedings Act*, RSC 1985 c C-50, BOA, Tab 6 proceedings may be taken in the name of the CFIA. In addition, the Minister is not a suable entity: *Robichaud v Canada*, 1991 CarswellNat 234, 44 FTR 172, at paras. 12-13, BOA, Tab 7
[15] Statement of Claim, para. 26, MR, Tab B
[16] Statement of Claim, para 27(a), MR, Tab B

- not fetter its discretion by generally prohibiting or denying permits for the importation of US Bee Packages.[17]

18. The Claim alleges that since January 1, 2007, the CFIA has breached its duty of care to the plaintiffs, in part, by "improperly, and without lawful authority" prohibiting, and denying the plaintiffs an opportunity to obtain permits for, the importation of US Bee Packages.[18]

19. The Claim alleges that the CFIA further breached its duty of care to the plaintiffs by:

- representing to the plaintiffs that applications for import permits for US Bee Packages would not be considered or would be automatically denied
- continuing to prohibit the import of US Bee Packages based on outdated and inaccurate information including the 2003 Risk Assessment
- failing to monitor, research, investigate, assess or consult, in a timely way, with respect to the need to prohibit the import of US Bee Packages
- failing to conduct and obtain a current Risk Assessment with respect to the importation of US Bee Packages
- misusing or failing to exercise discretion under the regulatory regime to grant or refuse permits for the importation of US Bee Packages.[19]

PART II POINTS IN ISSUE

20. The defendants' motion to strike the Claim raises the following issues:

A. What are the relevant principles on a motion to strike under Rule 221 of the FCR?

B. Is it plain and obvious that the plaintiffs' Claim for acting without lawful authority is bound to fail?

C. Is it plain and obvious that the plaintiffs' Claim in negligence is bound to fail?

[17] Statement of Claim, para.27(a), (c), (d), (e), (f) and (g), MR, Tab B
[18] Statement of Claim, para. 28(a)-(b), MR, Tab B
[19] Statement of Claim, para. 28(c)-(h), MR, Tab B

PART III SUBMISSIONS

A. Principles on a motion to strike under Rule 221 of the FCR

21. Under Rule 221(1)(a) of the FCR, the test to strike out a Claim 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. The court assumes that the facts pleaded, but not the law, are true, unless they are manifestly incapable of being proven.[20]

B. Claim for "acting without lawful authority" is bound to fail

22. The plaintiffs' Claim that the defendants acted without lawful authority is bound to fail for several reasons. First, contrary to the plaintiffs' assertions, there is statutory authority to prohibit, or refuse to grant a permit for, the importation of US Bee Packages since January 1, 2007 to the present day. The *HA Act* and *HA Regulations* expressly confer authority on the CFIA to make decisions on whether any "regulated animal" can be imported to Canada. Indeed, the legislative scheme discussed below generally prohibits the importation of animals unless certain conditions are met.

23. Second, even if the allegation that the CFIA "acted without lawful authority" is charitably construed as an allegation that by prohibiting, or refusing to grant permits for, the importation of US bee Packages, the CFIA failed to act in accordance with the authorizing act and regulations, this amounts to a claim of breach of statutory duty. In *Holland v Saskatchewan*, the Supreme Court of Canada confirmed that such a claim is not a cause of action recognized in law and ought to be struck.[21] In *Holland*, the Supreme Court of Canada further stated that

> The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence...The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity...No parallel action lies in tort.[22]
>
> [citations omitted]

[20] *Federal Courts Rules*, Rule 221, BOA, Tab 8, *Knight v Imperial Tobacco Canada Ltd.*, 2011 CarswellBC 1968, 2011 SCC 42, at paras 17, 22-24, BOA, Tab 1, *Hunt v Carey* [1990] 2 S.C.R. 959 at para 36, BOA, Tab 9; *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 15, BOA, Tab 10
[21] *Holland v Saskatchewan*, 2008 CarswellSask 431, 2008 SCC 42, at paras 7-9, 11, BOA, Tab 11
[22] *Holland, supra*, at para. 9, BOA, Tab 11

24. Thus, it is settled law that there is no nominate tort of statutory breach.[23] To the extent the plaintiffs advance this allegation as a separate cause of action, the Supreme Court of Canada's decision in *Holland* is a complete answer to it and it ought to be struck in its entirety.

25. As the civil consequences of breach of statute have been subsumed under the law of negligence,[24] this aspect of the plaintiffs' Claim is properly addressed in the context of the duty of care analysis below.

C. Claim in negligence is bound to fail

26. The *HA Act* and *HA Regulations*[25] do not impose on the CFIA a *prima facie* duty of care to protect the plaintiffs from economic loss when performing their statutory duties or exercising their statutory powers related to the importation of animals into Canada. There are no cases analogous to the present case where the courts have found any such private law duty of care. The purpose of the legislative scheme is to protect animal health. This public purpose is inconsistent with, and precludes, a private law duty to any individual to protect their private economic and commercial interests. Moreover, the conduct alleged in the Claim does not rise to the level or type of interaction where the courts have found a close and direct relationship to exist between a regulator and a claimant. Even assuming a *prima facie* duty of care, the policy concerns about encroaching on core government policy decisions and the prospect of indeterminate liability negate that duty. For these reasons, it is plain and obvious that the Claim in negligence is bound to fail.

a. Framework of the duty of care analysis

27. The framework for determining government liability in negligence is grounded in the House of Lords decision in *Anns v Merton London Borough Council*[26] ("*Anns*"). The Supreme

[23] *R. v Saskatchewan Wheat Pool*, 1983 CarswellNat 92, [1983] 1 SCR 205, at para 37, BOA, Tab 12; *Holland, supra,* at para 9, BOA, Tab11

[24] *Saskatchewan Wheat Pool, supra*, at para 37, BOA, Tab 12, *Holland, supra*, at paras 8-9, BOA, Tab11

[25] The material time in the claim is from January 1, 2007 to the date the claim was filed on December 28, 2012. Thus the relevant Act is the *Health of Animals Act*, SC 1990 c 21 and the relevant Regulation is the *Health of Animals Regulation*, CRC c 296, BOA, Tabs 3 and 5, respectively

[26] *Anns v Merton London Borough Council,* [1978] A.C. 728 (H.L.), BOA, Tab 13

Court of Canada has applied the *Anns* framework in such cases as *Kamloops (City) v Nielsen et al*[27] and *Just v British Columbia*[28] and more recently has reformulated the *Anns* framework in *Cooper v Hobart*[29] and *Edwards v Law Society of Upper Canada*[30] which has since been consistently applied in numerous cases.

28. The starting point for the analysis is to determine whether there are analogous categories of cases in which a duty of care has been previously identified.[31] If the facts bring a claim within a category that has already been recognized, a duty of care is thereby established and it is unnecessary to engage in further analysis. If no analogous cases exist, the question becomes whether a new duty of care should be recognized in the circumstances. This question is resolved by applying the two stages of the *Anns* test.

29. The first stage of the *Anns* test asks whether a *prima facie* private law duty of care is established through an analysis of foreseeability and proximity. If a *prima facie* duty of care is found, then the second stage of the test asks whether there are any countervailing policy considerations that would negate that duty.[32]

b. No analogous cases

30. No analogous cases have previously recognized that the government owes a private law duty of care to be mindful of an individual's private economic interests when making a core policy decision to prohibit the importation of animals into Canada under the *HA Act* and *HA Regulations*. Similarly, no analogous cases have previously recognized that the CFIA owes such a duty when deciding whether or not to grant permits for the importation of animals under the *HA Act* and *HA Regulations*.

[27] *Kamloops (City) v Nielsen et al,* 1984 CarswellBC 476, [1984] 2 S.C.R. 2, BOA, Tab 14
[28] *Just v British Columbia,* 1989 CarswellBC 234, [1989] 2 S.C.R. 1228, BOA, Tab 15
[29] *Cooper v Hobart,* 2001 CarswellBC 2502, 2001 SCC 79, [2001] 3 S.C.R. 537, BOA, Tab 16
[30] *Edwards v Law Society of Upper Canada,* 2001 Carswell 3962, 2001 SCC 80, [2001] 3 S.C.R. 562, BOA, Tab 17
[31] *Childs v Desormeaux*, 2006 CarswellOnt 2710, 2006 SCC 18, [2006] 1 S.C.R. 643 at para 15, BOA, Tab 18
[32] See *Childs, supra,* at para 13, BOA, Tab 18 and *Imperial Tobacco, supra,* at para 39, BOA, Tab 1

31. However, a highly analogous case of "no proximity", which is persuasive authority in the present matter, is *Berg v Saskatchewan.*[33] In *Berg*, the Saskatchewan Department of Environment and Resource Management refused to issue any permits to import elk into the province from eastern Canada and the United States due to concerns that such imports would result in the introduction of disease into Saskatchewan.[34] Similar to the Claim here, the claim in *Berg* alleged that the government's ban on the importation of elk and how that decision was arrived at was, *inter alia*, negligent. In particular, the claim alleged that the defendants were negligent in deciding to ban the importation of elk because they made it without verifying "the factual circumstances" and thus, "had no reasonable grounds for believing" the animals were or could be infected with disease.[35] The plaintiffs alleged they suffered resulting economic losses.

32. The relevant statute in *Berg*, *The Wildlife Act, 1997*, has substantive similarities with the *HA Act* and *HA Regulations* relevant in this case. Both legislative schemes implement high level policy decisions prohibiting or regulating the importation of animals to prevent the entry or spread of diseases within their respective territorial areas. The Act in *Berg* provides that "no person shall" import into the province any wildlife unless they first obtain an import licence from the Minister.[36] Section 12 of the *HA Regulations* similarly provides that "no person shall" import a regulated animal into Canada unless they first obtain an import permit or meet other conditions.[37]

33. In *Berg*, the Saskatchewan Court of Queen's Bench struck the negligence claim finding at paragraph 76 that

> ...there was no indication in the Act that the legislature intended to impose a private law duty of care on the minister responsible for issuing import permits. The statute is aimed at protecting wildlife and other species at risk. To accomplish this aim, a permit system was enacted to monitor and regulate wildlife being imported into the province. The statute is not concerned with the economic impact of the permit system. Its primary aim is to protect the species already within the province. The statute was enacted to address environmental concerns, for the benefit of all residents of the province. The economic

[33] *Berg v. Saskatchewan,* 2003 CarswellSask 731, 2003 SKQB 456 (negligence claim struck), 2004 CarswellSask 682, 2004 SKCA 136 (claim struck in its entirety), BOA, Tabs 19 and 20 respectively
[34] *Berg* (SKQB), *supra,* at para 6, BOA, Tab 19
[35] *Berg* (SKQB), *supra,* at paras 71-72, BOA, Tab 19
[36] *Berg* (SKQB), *supra,* at para 8, BOA, Tab 19
[37] *Health of Animals Regulations, supra,* s. 12, BOA, Tab 5

> interests of a small group of people who may have been incidentally affected by the operation of the Act must be subordinated to the greater purpose of that Act, which benefits the public as a whole.[38]

34. Other cases involve a duty of care analysis in the specific context of the CFIA performing its regulatory functions. For example, the appellate courts in *River Valley Poultry* (salmonella in poultry and eggs) and *Los Angeles Salad* (shigella in carrots) did not find that the statutory scheme imposed a private law duty of care on the CFIA.

35. In *River Valley Poultry Farm Ltd. v Canada (Attorney General)*[39], an egg producer alleged that the regulators failed to promptly, reasonably and competently investigate the risk of a potentially dangerous strain of salmonella on the producer's poultry and eggs. The producer claimed economic losses. On a motion for the determination of a question of law raised by the pleadings, the Ontario Court of Appeal reviewed the purpose and intent of the *Health of Animals Act* and found that it did not create a private law duty of care to protect the plaintiff producer's economic interests.[40]

36. In *Los Angeles Salad Company Inc v Canadian Food Inspection Agency et al*[41] the CFIA had issued a health hazard alert to consumers warning that the plaintiffs' carrot product may be contaminated with bacteria. The plaintiffs alleged that the CFIA negligently investigated the source of the consumer illnesses, negligently tested the product, and negligently misrepresented to consumers, a distributor and the USFDA, that its carrot product may be the source of the contamination and, as a result, suffered economic loss. The British Columbia Court of Appeal affirmed the lower court's decision striking the plaintiffs' claim as disclosing no cause of action in negligence on the ground that the regulatory scheme did not give rise to a private law duty of care to be mindful of the producer's economic interests when investigating, testing or communicating about food safety.[42]

[38] *Berg, supra*, at para 76, BOA, Tab 19
[39] *River Valley Poultry Farm Ltd. v Canada (Attorney General),* 2009 CarswellOnt 2053, 2009 ONCA 326 (leave to appeal to SCC dismissed 2009 CanLII 61385), BOA, Tab 21
[40] *River Valley Poultry, supra*, at paras 66-83, BOA, Tab 21
[41] *Los Angeles Salad Company Inc. v Canadian Food Inspection Agency et al,* 2013 CarswellBC 197, 2013 BCCA 34 (leave to appeal to SCC dismissed 2013 CanLii 51857), BOA, Tab 22
[42] *Los Angeles Salad Company Inc v Canadian Food Inspection Agency et al,* 2011 CarswellBC 1489, 2011 BCSC 779, at paras 119-120, 126, BOA, Tab 23 aff'd *Los Angeles Salad, supra*

37. By contrast, in *Adams v Borrel* (involving PVYN in potatoes) the Court found that the CFIA owed a private law duty of care and in *Sauer v Canada (Attorney General)* (involving BSE in cattle) the Court found that it was not plain and obvious that the CFIA did not owe a private law duty of care. However, the legislative schemes, the regulator's impugned actions and the relationship between the regulator and the claimants in these cases are not analogous to those alleged in the present Claim. A review of these cases is helpful.

38. In *Adams v Borrel*[43], the New Brunswick Court of Appeal affirmed the decision below which found that the government owed a private law duty to potato farmers under the *Plant Protection Act*. The *Plant Protection Act* granted Agriculture Canada (now CFIA) the power to investigate, detect, control and eradicate outbreaks of pests that affect certain crops of a select group of entrepreneurs. In that case, the Court found that the scheme was intended to minimize damage to property of the limited class of producers that expected to be protected, rather than to protect the public at large.

39. In *Sauer v Canada (Attorney General)*[44] cattle producers commenced a proposed class action against the Canada (CFIA) for damages arising out of an outbreak of bovine spongiform encephalopathy ("BSE"). The producers alleged that Canada failed to take appropriate measures to prevent the transmission of BSE through contaminated feed. The Ontario Court of Appeal affirmed the lower court's decision that it was not plain and obvious that there was no duty of care owed to the farmer.

40. *Berg* is persuasive as an analogous case of "no proximity" given the similarity of the legislative schemes and the similarity of the allegations in the claim in *Berg* and the present Claim. However, as no courts have previously recognized a duty of care in a case analogous to this Claim, it is necessary to consider the two part test first established in *Anns*.

[43] *Adams v Borrel,* 2008 CarswellNB 424, 2008 NBCA 62 (leave to appeal to SCC dismissed 2009 CanLII 6796), BOA, Tab 24

[44] *Sauer v Canada (Attorney General),* 2007 CarswellOnt 3996, 2007 ONCA 454 (leave to appeal to SCC dismissed [2007] S.C.C.A. No. 454), BOA, Tab 25

c. First Stage of *Anns*: Insufficient proximity to establish a private law duty of care

41. On a motion to strike, the issue at the first stage of the *Anns* test is whether the facts as pleaded disclose a sufficiently close and direct relationship between the parties such that it is just and reasonable to obligate one party to take reasonable care to prevent foreseeable losses to the other party. Not every foreseeable loss will attract a duty of care. Rather, any such foreseeable loss must be grounded in a sufficiently close and direct or proximate relationship.[45]

42. For the purpose of this motion only, the defendants assume that the economic losses alleged by the plaintiffs are a foreseeable outcome of the impugned regulatory scheme. Accordingly, these submissions focus on the issue of proximity.

43. McLachlin C.J.C. and Major J. in *Cooper* defined sufficient proximity as a "close and direct relationship" between the plaintiff and the defendant.[46]

44. In *Imperial Tobacco*, McLachlin C.J.C. noted that proximity may be established either through statutory intent or through specific interactions between the regulator and the claimant.[47] However, the governing statutes are still relevant to the latter. The Chief Justice provided guidance on the proximity analysis as follows:

> The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*).... In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public.... As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (citations omitted)
>
> The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into

[45] *Imperial Tobacco, supra,* at para 41, BOA, Tab 1
[46] *Cooper, supra,* at para 32, BOA, Tab 16
[47] *Imperial Tobacco, supra,* at para 43, BOA, Tab 1

> a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises...However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.[48] (underlining added, citations omitted)

45. Where, as here, there are no allegations that fall outside the regulator's role, if proximity exists it must arise from the governing statutes.[49]

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

46. The *HA Act* and *HA Regulations* impose on the CFIA only duties to the public as a whole when carrying out or exercising its regulatory functions and authority. Under this legislative scheme, it is clear that Parliament did not intend the CFIA to be charged with a duty to safeguard the economic interests of any individual who wishes to use imported animals in their commercial ventures or otherwise. [50] Indeed, positing such a duty runs directly counter to Parliament's clear intention to entrust the CFIA with broad regulatory authority to protect animal health for the public good. The legislative scheme underpinning the CFIA's authority to regulate the importation of animals into Canada demands regulatory independence from all individual stakeholders.

47. The plaintiffs' Claim sets out the legislative history of the regulation of the importation of live honeybees into Canada. However, as the material time in the Claim is from 2007 to the date the Claim was filed, the construction and interpretation of only the *HA Act* and *HA Regulations* in effect during this material time need be addressed and is set out below.[51]

48. Construction of the statutory scheme is central to the question of whether or not there is sufficient proximity between a plaintiff and a statutory public authority. The modern view of statutory interpretation requires an analysis of the broad context of the scheme to give effect to

[48] *Imperial Tobacco, supra,* at paras 44-45, BOA, Tab 1
[49] *Imperial Tobacco, supra,* at para. 49, BOA, Tab 1; *Cooper, supra*, at para. 43, BOA, Tab 16; see also *Los Angeles Salad Company, supra,* at para. 55, BOA, Tab 22
[50] *Klein v American Medical Systems Inc.*, 2006 CarswellOnt 8372, 80 OR (3d) 217 (Ont. Div. Ct.), at para 24, BOA, Tab 26
[51] *Health of Animals Act*, SC 1990 c 21, *Health of Animals Regulations*, CRC c 296, BOA, Tabs 3 and 5, respectively

the legislator's intent.[52] As Wilson J. put it in *Kamloops*, "economic loss will only be recoverable if, as a matter of statutory interpretation, it is the type of loss the statute intended to guard against."[53]

49. As a starting point, the long title of the *HA Act* is "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".[54]

50. The defendant Minister is the responsible Minister under the *HA Act.*[55] Under the *CFIA Act*, the Minister is also responsible for and has the overall direction of CFIA and its operations, including inspections of animals and investigations into the risk of animal disease.[56]

51. The CFIA is established under the *CFIA Act* and its mandate is, among other things, to safeguard the health of animals under the *HA Act.*[57] With some limitations, the *HA Act* empowers CFIA inspectors and officers to exercise any of the powers and to perform any of the duties or functions of the Minister, including decisions as to whether or not to issue permits to import animals into Canada.[58]

52. The *HA Act* imposes obligations and prohibitions on persons in situations where animals are known or suspected of being infected with disease.[59] The *HA Act* grants authority to the regulator to take measures to remedy or mitigate concerns consistent with public safety, life, health, property or the environment.[60] Owners are obligated to give an inspector "all reasonable assistance" to enable the inspector to perform his or her regulatory duties. CFIA inspectors have powers to enter any place, examine any animal or inspect any record for the administrative purpose of ensuring compliance.[61]

[52] See *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, BOA, Tabs 27 and 28, respectively
[53] *Kamloops, supra*, at p. 35, BOA, Tab 14
[54] *Health of Animals Act, supra*, BOA, Tab 3
[55] *Health of Animals Act, supra,* s. 2(1) (definition of "Minister"), BOA, Tab 3
[56] *Canadian Food Inspection Agency Act, supra*, s. 4(1), BOA, Tab 2
[57] *Canadian Food Inspection Agency Act, supra*, s. 11, BOA, Tab 2
[58] *Health of Animals Act, supra,* s. 33, BOA, Tab 3
[59] *Health of Animals Act, supra*, ss. 5-21, BOA, Tab 3
[60] *Health of Animals Act, supra*, ss. 22-28, BOA, Tab 3
[61] *Health of Animals Act, supra*, ss. 29-47, BOA, Tab 3

53. Inspectors have powers to search, seize, detain and powers of disposal where they believe on reasonable grounds "that a violation, or an offence under this Act, has been committed".[62] The Minister may dispose of or treat any animal, or require its owner to do so, where the animal is suspected to have been contaminated by, or in contact with another animal suspected of being contaminated by, a disease or toxic substance. [63]

54. Where a person contravenes the *HA Act* or *HA Regulations* or "refuses or neglects to perform any duty" imposed, they may be subject to prosecution, conviction, fine and imprisonment. [64]

55. All of these general provisions under the *HA Act* and *HA Regulations* are directed to the mandate of protecting animal health.

56. More specifically, the authority for prohibiting or otherwise regulating the importation of Bee Packages is found in the *HA Act*, the *HA Regulations* and the *Import Reference Document.* The defendants submit that these more specific provisions also do not disclose a legislative intent to create a private law duty of care as alleged by the plaintiffs.

57. 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.[65] Section 15 prohibits any person from possessing or disposing of any animal "that the person knows was imported in contravention" of the *HA Act.* Section 17 provides that animals imported or attempted to be imported in contravention of the *HA Act* "shall be forfeited to Her Majesty in right of Canada and may be disposed of as the Minister may direct".[66]

[62] *Health of Animals Act, supra*, ss. 40-43, BOA, Tab 3
[63] *Health of Animals Act, supra*, s. 48, BOA, Tab 3
[64] *Health of Animals Act, supra*, ss. 65-73, BOA, Tab 3
[65] *Health of Animals Act, supra*, s. 14, BOA, Tab 3
[66] *Health of Animals Act, supra*, ss. 5-21, BOA, Tab 3

58. Section 10 of the *HA Regulations* defines certain terms that relate to the importation of animals including, "import reference document" and "regulated animals" [67]:

> **"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].

59. 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]

60. Section 24.1 of the *Import Reference Document* deals specifically with honeybees and states:

> **24.1 Honeybees**
> Honeybees may only be imported into Canada in accordance with Paragraph 12(1)(a) of the *Regulations*.

61. Section 12 of the *Health of Animals Regulations* enacts a general prohibition on the importation of regulated animals 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]

[67] *Health of Animals Regulations, supra*, s. 10, BOA, Tab 5

62. In turn, section 160 of the *HA Regulations* 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]

63. It follows that, under subsection 160(1.1) of the *HA Regulations*, if the Minister or the CFIA 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.

64. 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.[68] In this regard, the Ontario Court of Appeal in *Wellington v Ontario* stated at paragraph 44:

> There is now a well-established line of cases standing for the general proposition that public authorities, charged with making decisions in the general public interest, ought to be free to make those decisions without being subjected to a private law duty of care to specific members of the general public. Discretionary public duties of this nature are "not aimed at or geared to the protection of the private interests of specific individuals" and do not "give rise to a private law duty sufficient to ground an action in negligence"...[69]
>
> [underlining added, citations omitted]

65. Contrary to the plaintiffs Claim, subsection 160(1.1) of the *HA Regulations* does not require the discretionary decision to issue, or not issue, a permit to be based formal risk assessments conducted by the CFIA. Indeed, the *HA Act* and *HA Regulations* place no duty

[68] In 2013, s. 160(1.1) of the *Health of Animals Regulations* was amended and now provides that "...the Minister shall issue a permit or licence...". See s. 160(1.1) of the Health of Animals Regulations (as am . SOR/2012-28).
[69] *Wellington v Ontario*, 2011 CarswellOnt 2334, 2011 ONCA 274, at para 44, BOA, Tab 29

whatsoever on the CFIA to conduct risk assessments on the importation of "regulated animals" such as honeybees. Indeed, subsection 160(1.1) of the *HA Regulations* does not restrict or otherwise prescribe the kind of information upon which the Minister's or the CFIA's "knowledge and belief" is to be based when exercising the discretionary authority to issue, or not issue, import permits.

66. Nor does subsection 160(1.1) direct the Minister or the CFIA to consider the private commercial or economic interests of individual industry participants, like the plaintiffs, when exercising this discretion.

67. There is also no indication in the *HA Act* or *HA Regulations* generally that, in performing their regulatory duties and exercising their regulatory authority related to the importation of animals into Canada, the Minister or the CFIA are to consider the private commercial or economic interests of individual industry participants such as the plaintiffs.

68. Indeed, the *HA Act* contemplates that individual industry participants may suffer economic loss as result of the enforcement of or their duty to comply with, the *HA Act* and *HA Regulations*. For example, section 51 provides statutory compensation to owners of animals in certain circumstances (e.g. where animals are required to be destroyed under the *HA Act* or are injured by anyone performing their duties under the *HA Act*). Where compensation has been paid under section 51, the owner is barred from any further recovery against the Crown for that loss by operation of section 9 of the *Crown Liability and Proceedings Act.*[70] This statutory compensation scheme and bar to civil proceedings further indicates that there is no legislative intent to create a private law duty of care to individual industry participants.

69. In addition, section 50 of the *HA Act*, entitled "Limitation on Liability" provides an immunity and limits the Crown's liability for any "loss or damage" suffered by persons as a result of complying with their obligations under the *HA Act* or *HA Regulations*. The Ontario Court of Appeal relied on this provision in *Vona v. Her Majesty the Queen*[71] to affirm a decision

[70] *Crown Liability and Proceedings Act*, RSC 1985 c C-50, s. 9, BOA, Tab 6
[71] *Vona v Her Majesty the Queen*, 1996 CarswellOnt 3769, 4 C.P.C. (4th) 23, BOA, Tab 30

to strike a negligence claim against the Crown in relation to conduct under the *Health of Animals Act.*

70. Laskin J.A. in *River Valley Poultry* reviewed the construction of the *Health of Animals Act* and found that when the provisions were read together, the regulator's overriding concern in exercising its regulatory functions is the protection and promotion of human and animal health.[72] He concluded at paragraph 83:

> I conclude that the legislative purpose of the *Health of Animals Act*, together with the provisions for statutory compensation in s. 51 and statutory immunity in s. 50, in combination, show an absence of proximity. Thus, CFIA did not owe a *prima facie* duty of care to River Valley.

71. In *Berg*, Mr. Justice Barclay also referred to the immunity provision in Saskatchewan's *The Wildlife Act, 1997* and noted that "a similar immunity clause" was viewed by the Supreme Court of Canada in *Edwards,* "as precluding any notion of proximity, and therefore of a duty of care." [73]

72. As set out earlier, in *Adams* Robertson J.A. found a *prima facie* duty of care to potato producers under the *Plant Protection Act.*[74] However, Laskin J. A. in *River Valley Poultry* distinguished *Adams* on the basis of the different legislative purposes of the *Health of Animals Act* and the *Plant Protection Act.* In this regard, Laskin J.A. stated:

> [u]nder s. 2 of the *Plant Protection Act*, the federal government's statutory obligation is "... to protect plant life and the agricultural ... [sector] of the Canadian economy by preventing the... spread of pests".
>
> ...
>
> The *Health of Animals Act* shows no legislative purpose to protect the interests of individual farmers. The different legislative purposes of the two statutes alone distinguish the claim in *Adams* from River Valley's claim. [75]
>
> [underlining added]

[72] *River Valley Poultry, supra,* paras 66-73, BOA, Tab 21
[73] *Berg* (SKQB), *supra,* para 77, BOA, Tab 19
[74] *Adams, supra,* at paras 43-44, BOA, Tab 24
[75] *River Valley Poultry, supra,* para. 81, BOA, Tab 21

73. In this case, paragraph 25 of the Claim alleges that the "stated purpose" of the restrictions on importations of bees is and has been "to promote the health and interests of the Canadian bee industry". The Claim also alleges that the "stated purpose" of the exception for queens contained in *HIPR-2004* was to assist the Canadian bee industry and Canadian beekeepers by allowing them to access an enhanced supply of queens to replenish bee stocks after winter losses. Similarly, paragraph 26(a) of the Claim alleges that the implied and express purpose of the *HA Act* and *HA Regulations* are to regulate bee imports for the "good and the economic interests of Canadian beekeepers and the Canadian beekeeping industry."

74. The court is not obligated to assume that allegations of law are true in a motion to strike. There is no indication, express or otherwise, in the legislative scheme of an intention to protect the economic interests of the industry. While decisions on what animals can be imported may have economic effects on industry, any such effects are incidental to the purpose and intent of the regulatory scheme. Creating market conditions that facilitate trade and commerce in the general public interest is but one incidental effect of ensuring animal health.

75. Even if it were accepted, for the sake of argument, that the purpose of the legislative scheme is to protect the economic interests of the Canadian beekeeping industry, the legislative policy choice as to how those interests are to be protected is *via* a power to not allow possibly diseased animals to be imported into Canada, and not *via* a duty to allow possibly diseased animals to be imported into Canada.

76. Further, as found in *River Valley Poultry*[76] and *Berg*[77], even if the legislative scheme could be broadly construed as serving the economic interests of "the Canadian beekeeping industry" generally, this does not disclose a legislative intent to protect the private economic interests of individual industry participants like the plaintiffs.

77. The allegations in the Claim about the purpose and intent of the regulatory scheme – to regulate bee imports to serve the economic interests of individuals involved in the Canadian beekeeping industry – cannot be sustained, having regard to the legislative scheme. Rather, the

[76] *River Valley Poultry, supra,* paras. 66-73, 83, BOA, Tab 21
[77] *Berg, supra*, paras. 76-77, BOA, Tab 19

above review of the legislative scheme discloses that Parliament did not intend to create a "close and direct" relationship with the individual corporate plaintiffs or even "the Canadian beekeeping industry" generally.

78. Indeed, there can be no concurrent duty owed to an individual to protect his or her economic interests in this context. A conflict of duties would arise if the general public interest in animal health had to be weighed against an individual's economic interests.

79. Laskin J.A. in *River Valley Poultry* identified the potential conflicting duties at paragraphs 84-86:

> Although unnecessary to my conclusion that no private duty of care exists, I see at least one overriding policy consideration that also negates a private duty. That consideration is the potential for conflict if CFIA must be mindful not only of the health of animals and the public, but as well the economic interests of individual farmers.
>
> ... Undoubtedly other kinds of conflict may arise if CFIA inspectors have to worry about the economic interests of individual farmers as well as their obligation to the public to protect human and animal health.
>
> [emphasis added]

80. In sum, a review of 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 in the interests of protecting animal health. CFIA may, in its discretion, take a cautious approach in the public interest when assessing risks to animal health. Any assessments as to the advisability of the importation of an animal into Canada should not be influenced by an enforceable private law obligation to individual industry participants to consider their private economic interests. This would directly conflict with the regulator's statutory duty to act in the interest of animal health for the broader public good.

ii. Remote interactions between the CFIA and the plaintiffs

81. The interactions between the parties alleged in the 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.

82. Chief Justice McLachlin in *Imperial Tobacco* stated at paragraph 45 that the governing statutes are relevant to the analysis of the specific conduct or interaction between the parties.[78] Factors that give rise to proximity must arise from the statute under which the regulator derives its duties, powers, and authority. In the present case, the *HA Act* and *HA Regulations* are the only source of the CFIA's duties.[79]

83. There are no specific interactions alleged in the Claim between CFIA and Paradis or HB Enterprises or Rocklake. In fact, there is no allegation that any of the plaintiffs even applied for a permit to import US Bee Packages into Canada. According to the pleadings, the relationship between the plaintiffs and the defendants is limited to the CFIA's 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 CFIA engaged in consultations "with the industry." They state that CFIA undertook to conduct annual reviews of the health of Canadian bees as part of its assessment on whether to maintain the importation prohibition.[80]

84. Mere interaction with "industry" in general terms does not create a close and direct relationship with the plaintiffs. The regulator is simply carrying out its regulatory mandate in the interests of animal health which may, incidentally, have broad economic aspects to it and for the industry as a whole.

85. The Ontario Court of Appeal in *Sauer* found that the plaintiffs' allegations of "public representations by Canada that it regulates the content of cattle feed to protect commercial cattle

[78] *Imperial Tobacco, supra*, at paras 44-45, BOA, Tab 1
[79] *River Valley Poultry, supra,* at para 66, BOA, Tab 21, *Los Angeles Salad, supra,* at para 55, BOA, Tab 22, *Attis v Canada (Minister of Health),* 2008 CarswellOnt 5661, 2008 ONCA 660, at para 31, BOA, Tab 31
[80] Statement of Claim, paras 23, 25, and 26, MR, Tab B

farmers among others...yields the conclusion that it is not plain and obvious that his claim of a *prima facie* duty of care will not succeed."[81]

86. However, the defendants submit that the Supreme Court of Canada in *Imperial Tobacco* implicitly rejects this finding in *Sauer* when it states 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."[82]

87. Indeed, the Ontario Court of Appeal in *Taylor v Canada (Attorney General)* later appears to have retreated from *Sauer* as it stated in that case at paragraphs 94-95, 97:

> Unlike *Attis* and *Drady*, which addressed the proximity requirement in detail, *Sauer* considers proximity in a single conclusory paragraph (para. 62). In that paragraph, the court referred to the regulator's "many public representations" declaring its intention to protect "commercial cattle farmers among others".
>
> In my view, a finding of proximity based entirely on a regulator's public acknowledgement of its public duties to those affected by its actions, coupled with reliance by those affected on the regulator's public statements, is inconsistent with the Supreme Court's rejection in *Imperial Tobacco* of the claim that Health Canada owed a private law duty of care to consumers of low-tar cigarettes because it had made public representations as to the relative safety of those cigarettes.
>
> ...
>
> This is not the time or place to pass upon the ultimate sufficiency of the pleadings in *Sauer*. I am satisfied, however, that the detailed analyses of proximity in *Attis* and *Drady*, particularly in light of the subsequent judgment in *Imperial Tobacco*, are more in line with the prevailing jurisprudence. The single conclusory observation in *Sauer*, standing alone, is not consistent with that jurisprudence.[83]

[underlining added, footnotes omitted]

[81] *Sauer, supra*, at para 62, BOA, Tab 25
[82] *Imperial Tobacco, supra,* para 45, BOA, Tab 1
[83] *Taylor v Canada (Attorney General)*, 2012 CarswellOnt 8820, 2012 ONCA 479, at paras 94-95, 97, BOA, Tab 32

88. In *Imperial Tobacco,* the pleadings included allegations that Canada promoted and encouraged smokers to consume low-tar cigarettes and made representations to consumers that light and mild cigarettes were less harmful to their health than other cigarettes. Canada was alleged to have acted beyond its capacity as a regulator. McLachlin C.J.C. concluded that, on the facts pleaded, the government did not owe a *prima facie* duty of care to consumers in making representations of this kind.

89. In *Attis v Canada (Minister of Health)*[84], the Ontario Court of Appeal noted the difference between actions of government regulators in the interest of the public good and other instances where the regulator directly interacted with specific, identifiable individuals. The court found that where government decides to enforce regulatory control over a product with broad-stroke policy decisions for the benefit of the public, there is no close and direct relationship with any individual participant, even though those decisions may not have positive implications for some.

90. The plaintiffs' allegations that the CFIA consulted and interacted with "industry" are too general and are not specifically directed to any one of the individual corporate plaintiffs. 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 facts pleaded in the Claim do not establish a close and direct relationship between CFIA and the individual commercial beekeepers.

d. Second stage of *Anns*: Assuming the CFIA owes the plaintiffs a *prima facie* private law duty of care, it is negated by overriding policy considerations

91. If a *prima facie* duty of care is found, such a duty is negated for broader policy reasons. Wilson J. described the second stage of the *Anns* test in *Neilson v. Kamloops (City)*[85] as follows:

[84] *Attis supra*,at para 65, BOA, Tab 31
[85] *Neilson v. Kamloops (City)*,[1984] 2 S.C.R. 2 at para 40, BOA, Tab 14

> ... are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise.

92. The defendants submit that there are two countervailing policy reasons that negate any duty of care that may be found: the risk of indeterminate liability and the immunity of government's core policy decisions.

i. Risk of indeterminate liability to an indeterminate number of importers

93. In this case, a finding that the CFIA owes a duty of care to protect the plaintiffs' private economic interests would expose it to indeterminate liability to an indeterminate class of people.

94. In *Cooper*, McLachlin, C.J. and Major J. stated:

> This brings us to the second stage of the *Anns* test. As the majority of the Court held in *Norsk Pacific Steamship Co.*, at p. 115, residual policy considerations fall to be considered here. These are 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. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?[86]
>
> [underlining added]

95. In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*,[87] McLachlin J. concluded that if a duty of care were owed to the claimants, there would be no sound reason to deny a duty of care to a host of other persons, thereby creating a "ripple effect" of indeterminate liability.[88]

[86] *Cooper, supra,* at para 37, BOA, Tab 16, see also *Design Services Ltd. v. Canada,* 2008 CarswellNat 1298, 2008 SCC 22, [2008] 1 SCR 737, BOA, Tab 33
[87] *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*,1997 CarswellNfld 207, [1997] 3 S.C.R. 1210, BOA, Tab 34
[88] *Bow Valley, supra,* at para 62, BOA, Tab 34

96. Some principled basis must exist to apply the duty of care to some and not to others. No such principled basis exists in this case. The plaintiffs' Claim seeks to recover for pure economic losses and, at paragraph 30 of the Claim[89], lists the kinds of those losses:

- Higher costs of importing packages from overseas
- Higher costs of building colonies from queens rather than packages, including higher labour, chemical, overwintering and other input costs
- Higher losses of colonies and attendant costs of replacing lost colonies
- Loss of productivity and sales
- Loss of opportunity to replenish, maintain or grow honeybee colonies
- Diminution of value of property owned
- Losses associated with business failures

97. Some of these losses are the same losses that other Canadians could claim against the CFIA if it was found to owe a duty of care to individual industry participants like the plaintiffs. For example, if the CFIA owed a private law duty of care for the plaintiffs' economic interests, it follows that they would also owe a similar duty of care to other industry participants wishing to import other animals into Canada for commercial purposes. It is foreseeable that the interests of one kind of animal importer could negatively affect the economic interests of a different kind of animal importer (where, for example, a disease carried innocuously in one animal may be spread to other animals with far more detrimental effects).

98. As well, if the CFIA owed such a duty of care to the plaintiffs, the CFIA could also be found to owe a similar duty of care to others involved in other industries, like the agricultural industry. Again, it is foreseeable that the importation of an animal innocuously (or not) carrying disease could transmit that disease to other life forms (plants, other animals, humans) with far more detrimental effects. Regulators cannot be placed in such untenable positions with the attendant risks of indeterminate liability.

[89] Statement of Claim, at para 30, MR, Tab

99. Indeterminate liability concerns also arise where a defendant lacks control over the number of parties who may make claims against it. In *Cooper*, the Supreme Court found that "the Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system."[90] Lang J.A. in *Attis* noted the numerous products and devices regulated by the *Food and Drugs Act* and concluded that the spectre of indeterminate liability negated the imposition of government liability.

100. Similarly, the *HA Act* and *HA Regulations* do not solely affect the Canadian beekeeping industry and the legislative regime is not confined to regulating the importation of one kind of animal – honeybees - into Canada. There are numerous kinds industries, participants and animals affected by the *HA Act* and *HA Regulations.* In this context, the defendants have no control over the number or kind of individuals or industries that have an interest in importing a variety of animals into Canada for commercial or other purposes and therefore, have no control over the nature and extent of the losses that could be claimed by others. Such considerations operate to negate any duty of care that may be found because the defendants' risk of liability would otherwise expand to unknown proportions and quality.

ii. Immunity for policy decisions about importing animals into Canada

101. The plaintiffs' Claim challenges pure policy decisions. Such core policy decisions are immune to liability.

102. The Federal Court in *A.O. Farms Inc. v. Canada,*[91] noted that decisions of a political, social or economic nature do not give rise to a private law duty of care.

103. Paragraph 20 of the Claim alleges that since January 1, 2007, the defendants "have continued to enforce a complete prohibition on the import of bee packages from the United

[90] *Cooper, supra,* at para 54, BOA, Tab 14 and *Imperial Tobacco, supra,* at para 99, BOA, Tab 1
[91] *A.O. Farms Inc. v Canada,* 2000 CarswellNat 2619, [2000] F.C.J. No. 1771 (F.C.), BOA Tab 35

States and have communicated to the beekeeping industry that no permits will be granted for the importation of packages from the US." This is a true policy decision that commands deference.

104. In the analogous case of *Berg,* Barclay J. concluded that a similar decision to impose a complete ban on the importation of elk was a policy decision and that such a decision did not give rise to a duty of care. He stated at paragraph 78:

> Even if proximity were present, the duty of care would be negated at the second stage when policy is considered. The government made a policy decision, after balancing public and private interests, to ban the import of elk originating in certain areas, because of a concern over the possible effects such import could have on the health of the province's wildlife, including other species than elk. The government's decisions regarding policy command deference.

105. Gerwing J.A. supported Mr. Justice Barclay's reasoning in the Court of Appeal decision in *Berg* by addressing the legislative function at paragraph 6:

> We accept the Crown's proposition that on the facts all of the indicia of a legislative function exist. <u>That is, the decision is general and not directed at a particular person; it is based on a broad consideration of public policy rather than facts pertaining to the individual; and it creates a policy rather than applying a policy to an individual situation.</u> ...
>
> [underlining added]

106. The impugned decision in the Claim to "enforce a complete prohibition on the import of bee packages" from the US is a core policy decision from which no duty of care can arise.

D. <u>Conclusion</u>

107. The *HA Act* and *HA Regulations* are clearly intended to protect animal health. The scheme does not create a concurrent duty on CFIA to consider the plaintiffs' economic interests when exercising discretion in making decisions relating to the importation of animals. The alleged interactions with industry in the claim are insufficient to create proximity necessary to find a duty of care. Broad considerations of public policy in the interests of animal health govern the present allegations. The claim does not disclose a reasonable cause of action and it should be struck.

PART IV ORDER SOUGHT

108. The defendants seek an Order striking the plaintiffs' Claim in its entirety without leave to amend, and with costs.

DATED at the City of Edmonton, in the Province of Alberta, this 8th day of November, 2013.

William F. Pentney
Deputy Attorney General of Canada

Per: _____
Jaxine Oltean

Counsel for the Defendants
Department of Justice Canada
Epcor Tower
300 – 10423 – 101 Street
Edmonton, Alberta T5H 0E7

Tel: (780) 495-7324
Fax: (780) 495-8491
Email: jaxine.oltean@justice.gc.ca

Per: _____
Marlon Miller

Counsel for the Defendants
Department of Justice Canada

Tel: (306) 975-4439
Fax: (306) 975-6240
Email: marlon.miller@justice.gc.ca