Court File No: SCC ____ 2015

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 in the Court below)

and

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

RESPONDENTS
(Appellants in the Court below)

APPLICATION FOR LEAVE TO APPEAL OF HER MAJESTY THE QUEEN, THE MINISTER OF AGRICULTURE AND AGRI-FOOD AND THE CANADIAN FOOD INSPECTION AGENCY

(Pursuant to Paragraph 40(1) of the *Supreme Court Act,* R.S.C. 1979, C.s-19)

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

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Federal Court of Appeal has restructured Crown liability using public administrative law principles. The novel framework of government liability proposed by that court would expose policy decisions to liability in a manner that is inconsistent with years of jurisprudence from this Court. The court's conclusion that public representations, including those contained in the Regulatory Impact Assessment Statement (RIAS) and a commitment to consult industry participants on regulations trigger a private law duty of care on a regulator inappropriately shifts the balance between government exposure to tort liability and allowing governments to govern.

2. Leave should be granted in this case. The decision of the Federal Court of Appeal is so far-reaching it is one that should be the subject of legislation, if it is to be effected. Far

from an incremental development of the common law, it is inconsistent with well-established principles.

B. Factual Context

3. From 1987 to 2004, importation of bees from the United States was prohibited by various Orders and Regulations enacted pursuant to the *Animal Disease and Protection Act* and the *Health of Animals Act* ("*HA Act*").[1]

4. From 2004 to December 31, 2006, the importation of bee packages (bee colonies including a queen and worker bees) from the United States (except Hawaii) was prohibited by the *Honeybee Importation Prohibition Regulation, 2004*[2] enacted pursuant to section 14 of the *HA Act*.

5. The Respondents brought an action alleging that Canadian commercial beekeepers lose a number of bee colonies each winter and, therefore, must rely on imports of live bees to sustain, replenish or increase their bee colonies.

6. The Respondents allege the United States is the "least expensive and most productive source of live bee imports into Canada" by a "significant margin."

7. The Respondents state that the prohibition on the importation of bee packages under *Honeybee Importation Prohibition Regulation, 2004* expired and has not been renewed. They further state that despite the expiry of this *Regulation*, the Applicants continued to enforce a complete prohibition on the import of bee packages from the United States.

8. The claim does not allege any specific interactions between the Applicants and the Respondents. There is no allegation that any of the Respondents applied for a permit to import United States bee packages into Canada. According to the pleadings, the relationship between the Respondents and the Appellants is limited to the Crown'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

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[1] SC 1990 c.21

[2] SOR/2004-136 and accompanying RIAS - Tab 3E

industry." They allege that the Crown undertook to engage in consultations "with the industry," but then refused to consult with all industry stakeholders.

C. Legislative context

9. CFIA has the mandate and authority under the *HA Act* and *Health of Animals Regulations*[3] ("*HA Regulations*") to protect animal and public health.

10. 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.[4] 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 16 imposes an obligation on persons to present animals for inspection either before or at the time of importation. 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".[5]

11. Section 10 of the *HA Regulations* defines certain terms relating to the importation of animals including, "import reference document" and "regulated animals"[6]:

> "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...

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

> 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.

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[3] CRC c.296 – Tab 3D
[4] *HA Act, supra*, s. 14 – Tab 3C
[5] *HA Act, supra*, ss. 15-17 – Tab 3C
[6] *HA Regulations, supra*, s. 10 - Tab 3D

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

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

14. Section 12 of the *HA 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.

15. In turn, section 160 of the *HA Regulations* provides:

> 160(1) Any application for a permit or license 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.

16. It follows that, under subsection 160(1.1) of the *HA Regulations*, if the Minister or the CFIA is not "satisfied" to the best of their "knowledge and belief", then they are not authorized to issue a permit to import animals into Canada.

17. Under this statutory regime, no unregulated importation of honeybees into Canada is possible.

D. Nature of the legal claim

18. The Respondents' plea is in negligence and their core complaint focuses on the Applicant's decision imposing regulatory restrictions on importation.

19. The Respondents allege that from January 1, 2007 (the day after the expiring of the *Honeybee Importation Prohibition Regulation, 2004*), the importation of bee packages from the United States was prohibited without "lawful authority" or "lawful purpose" and that the prohibition was unreasonable. This, the Respondents allege, was a breach of the Applicants' duty of care. They assert that in the absence of a valid regulatory prohibition, the Minister was obliged to consider applications for import on a case-by-case basis, and that he failed to do so. They seek compensation for business losses and seek damages representing the increased costs incurred as a result of having to import bees from countries other than the United States.

20. The Respondents seek damages of $200,000,000.00 resulting from the allegedly unlawful prohibition on the importation of honeybee packages from the United States after January 1, 2007. The Applicants applied to strike the claim on the basis that it did not disclose a reasonable cause of action.

E. Decisions of the courts below

i) The decision of the Federal Court

21. The Federal Court considered the Applicants' motion to strike and applied the duty of care test from *R. v. Imperial Tobacco*. It found that the *HA Act* and *HA Regulations* are intended to protect animal health and public safety and that the statutory scheme did not create a duty of care to protect the Respondents' private economic interests. The Federal Court further found that the allegations of general representations in the RIAS[7] and consultations with "the industry" at large were not sufficient to create a close and direct relationship with the Applicants. While the Federal Court noted that it was not certain the claim would fail under the first stage, it concluded that any *prima facie* duty of care that could exist was negated by overriding policy considerations. Imposing a duty of care to protect the Respondents from economic loss would lead to indeterminate liability. The decision not to grant import permits after December 31, 2006 was a true policy decision. The Federal Court struck the claim as the pleadings did not disclose a reasonable cause of action.

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[7] The RIAS accompanying the *Honeybee Importation Prohibition Regulation, 2004* is at Tab 3E

ii) The decision of the Federal Court of Appeal

Majority Reasons (Stratas and Nadon JJA)

22. Stratas JA (Nadon JA concurring) concluded that the relationship between Canada and the beekeepers was sufficiently close and direct to make it fair and reasonable to impose a duty of care, on the basis of the allegation of "representations" and the general undertaking by the Minister to consult with industry participants. He found no inconsistency between the existence of a private law of duty of care to the beekeepers and the duty that Canada owed to the public under the statute, and held that once the regulations providing for a blanket prohibition expired, any public policies and public duties expressed in the regulations also expired. Finally, he found that the immunity from liability for "core policy" decisions in *Imperial Tobacco* does not doom the Appellants' claim to failure.

23. Stratas JA went on to find that tort law for public authorities is in disarray and should be reformed to allow the courts to order "monetary relief in public law" to persons who suffer economic losses as a result of "abusive administrative action". This approach would base liability on a two-part analytical framework: (1) whether administrative action was unacceptable or indefensible in the administrative law sense; and (2) whether the court should exercise remedial discretion to order compensation for resulting economic losses.

24. In applying this framework to the case at bar, Stratas JA found that the allegations, if proven, could establish that Canada's officials took it upon themselves to create and enforce an unauthorized blanket policy preventing beekeepers from exercising their legal right to apply for importation permits on a case-by-case basis under section 160 of the *HA Regulations*. The majority also found that the allegations have a flavour of maladministration which could prompt an exercise of discretion in favour of a monetary award.

Dissenting Reasons (Pelletier JA):

25. Pelletier JA agreed with the Federal Court's analysis of proximity and the primary purpose of the legislative scheme. He held that the Applicants acted in their capacity as

regulators, relying on *Imperial Tobacco*. He found the alleged representations in the exercise of regulatory power distributed in the RIAS accompanying the regulations could not be the basis of a relationship of proximity, particularly when it was not pleaded that the Respondents relied upon such representations. Pelletier JA also concluded that the allegations of influence by those with an economic interest in maintaining the prohibition on importation did not lend themselves to a characterization of bad faith and could not be the basis for finding proximity. Pelletier JA did not address the second stage of the *Anns* test.

26. In respect of the majority's introduction of a novel claim of monetary relief in public law, Pelletier JA did not agree that the existing framework for government liability under private law tort and judicial review remedies required legal reform by the Courts.

PART II – STATEMENT OF QUESTION AT ISSUE

28. The Federal Court of Appeal's decision raises the following issues of public importance warranting intervention by this Court:

a) Is a new form of legal liability for wrongful actions of public officials necessary?

b) Is the proposed species of action blending public law and tort law an intrusion on the legislative function?

c) Can a *prima facie* duty of care arise from statements of regulatory intent and undertakings to consult with industry?

PART III – STATEMENT OF ARGUMENT

29. The Federal Court of Appeal's proposed liability model is a significant departure from established jurisprudence of this Court and the current framework in administrative and tort law holding public officials to account. The majority judgment is thus unsupported by authority and uncertain in its application.

30. This case again raises the question of negligence liability arising from allegations of public law mistakes. In *Imperial Tobacco*, this Court stated clearly that government

statements to the public are insufficient to create a proximate relationship. Statements in a RIAS, undertakings to consult with potentially affected parties before regulatory action is taken, and regulatory actions based on consultations with some but not all industry participants, should be insufficient to create proximate relationships with individuals. Imposing tort liability in these situations inappropriately prevents government from governing.

31. The Federal Court of Appeal's decision significantly lowers the threshold for claimants to plead a viable claim against the Crown, contrary to existing authority. The proposed analytical framework could expose government to expanded liability in damages for core policy decisions, unrestrained by traditional tort elements and defences.

A. Is a new form of legal liability for wrongful actions of public officials necessary?

31. Under the Federal Court of Appeal's novel framework, claimants would no longer need to establish that they have a close and direct relationship with a government actor to sustain an action in negligence, nor would they have to show that the conduct of officials met the high test for the tort of misfeasance in public office. Rather, they would simply be able to allege they have suffered a loss as a result of an unauthorized government decision. This judgment would significantly expand the ambit of Crown liability, put a chill on regulatory action, and inappropriately inhibit the government's ability to govern.

i) Creation of a public law tort regime is contrary to fundamental principles

32. In *Liability of the Crown* Hogg, Monahan and Wright identify Dicey's "idea of equality" as the leading feature of British-derived law of government liability.[8] This principle, that government officials ought to be held to the same rules as private individuals, is embedded in legislation subjecting the federal Crown to liability in tort. Section 3 of the *Crown Liability and Proceedings Act*[9] makes the Crown vicariously liable in tort for the damages for which it would be liable "if it were a person". By virtue of section 10 of the

[8] Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at page 2-3 noting A.V. Dicey, *The Law of the Constitution.*
[9] RSC, 1985, c. C-50 – Tab 3D

Crown Liability and Proceedings Act, the personal liability of a Crown servant is a precondition to the Crown's liability.[10]

33. Hogg, Monahan and Wright note that this idea of equality must yield for one important aspect, namely, the rules that private law reflect that governments must be able to govern.[11] The common law duty of care test is designed to facilitate a balancing of these competing interests.

34. The framework for determining the existence of a private law duty of care is rooted in the House of Lords' decision in *Anns v Merton London Borough Council*[12] ("*Anns*"). That analysis has been recognized and applied by this Court in numerous cases including, *Kamloops (City) v Nielsen et al*[13], *Just v British Columbia*[14], *Cooper v Hobart*[15], *Edwards v Law Society of Upper Canada*[16] and most recently *Imperial Tobacco*. It has been applied in cases involving all levels of government. A number of decisions of provincial appellate decisions across Canada have concluded that public law duties do not give rise to a tort duty of care.[17] As this Court has said, "invalidity is not the test of fault, and it should not be the test of liability."[18] A public error does not automatically give rise to liability.[19]

35. The Federal Court of Appeal has proposed a framework "for the benefit of future cases" where damages could be awarded against a public authority based purely on public law principles.[20] This framework would apparently not take into account any analysis of the nature of the relationship between the parties but, rather, focus on the nature of the decision

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[10] *The Cleveland-Cliffs Steamship Co. v The Queen* [1957] 1 SCR 810 at page 812 and 813
[11] *Liability of the Crown, supra* at page 4
[12] [1978] AC 728 (H.L.)
[13] [1984] 2 SCR 2
[14] [1989] 2 SCR 1228
[15] 2001 SCC 79, [2001] 3 SCR 537
[16] 2001 SCC 80, [2001] 3 SCR 562
[17] *Attis v. v. Canada (Health)*, 2008 ONCA 660 (leave to appeal refused [2008] SCCA No 491); *Williams v. Ontario*, 2009 ONCA 378 (leave to appeal refused [2009] SCCA No 298); *Drady v. Canada (Health)*, 2008 ONCA 659 (leave to appeal refused [2008] SCCA No 492); *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)*, 2006 CanLII 37121 (ONCA) (leave to appeal refused [2006] SCCA No 514); *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34 (leave to appeal refused [2013] SCCA No 134); *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326 (leave to appeal refused [2009] SCCA No 259)
[18] *Welbridge Holdings Ltd. v Greater Winnipeg*, [1971] SCR 957 at page 969; *Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 SCR 304 at para 20
[19] *Canada (AG) v TeleZone*, 2010 SCC 62, [2010] 3 SCR 585
[20] FCA Reasons para 112 – Tab 2C

of the public body under challenge. It is also not clear if under this proposed framework core policy decisions would be entitled to immunity, aside from the suggestion that this may affect the range of acceptability and defensibility of the decision in question.

36. This theory posits liability in damages via a new species of claim that blends public law and private law concepts. It would be a type of tort claim available exclusively against governments and public authorities, in which damages can be awarded for nothing more than a breach of statutory duty. In *Holland v Saskatchewan*, this Court confirmed that such a claim is not a cause of action recognized in law and ought to be struck:[21]

> 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]

37. The decisions of this Court have consistently rejected the proposition that civil liability arises upon proof of a breach of statute. Plaintiffs are rather required to establish the elements of a tort cause of action in which a breach of statute may or may not play a role.[23]

38. The novel theory proposed here eradicates any need for a plaintiff to establish the necessary elements of the tort of misfeasance in public office identified in *Odhavji Estate v Woodhouse*:[24]

> To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff.[25]

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[21] *Holland v Saskatchewan*, 2008 SCC 42, at paras 7-9, 11,
[22] *Holland, supra*, at para. 9,
[23] *The Queen (Can.) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at page 225, *Holland, supra*, at paras 8-9, *TeleZone, supra* at para 31
[24] 2003 SCC 69, [2003] 3 SCR 263
[25] *Odhavji Estate, supra* at para 32

39. *Odhavji Estate* also recognized that tort principles should not be applied to undermine government's ability to govern. The elements of the tort of misfeasance in public office serve to restrain frivolous claims by claimants who are affected by government decisions and are merely dissatisfied with the result. It is recognized that a government defendant should not be immune if a decision was made with an ulterior motive.[26] However, allegations of bad faith, which do not rise to the level of intentional conduct, are insufficient to found a claim in tort.[27]

ii) Remedies of judicial review are not to be merged with private tort theories

40. This Court in *TeleZone* noted that judicial review is directed at the legality, reasonableness and fairness of the procedures and actions of government decision makers, distinguished the public purpose of the judicial review process from tort, and refused to merge the two principles. Similarly in *Finney v. Barreau du Quebec* LeBel J cautioned against confusing the review of the legality of a public body's decisions with the rules determining that body's civil liability.[28]

41. Section 18.4(1) of the *Federal Courts Act*[29] illustrates that judicial review is meant to provide timely access to the Court in a summary proceeding for corrective measures where the lawfulness of a government decision is challenged. Section 18.4(2) allows the Court, in an exercise of broad discretion, to convert a judicial review into an action.[30] However, a decision could be unlawful in a public law sense without having been caused by a wrongful act in a private law sense.[31]

42. The Federal Court of Appeal's novel framework confuses the criteria justifying remedies for public law errors with those that justify liability for private law wrongs. Simply being directly affected by a government decision, does not create a private law cause of action. While this Court has acknowledged there may be overlapping considerations, public

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[26] *Roncarelli v Duplessis*, [1959] SCR 121
[27] *Alberta v Elder Advocates*, [2011] 2 SCR 261 at para 78
[28] [2004] 2 SCR 17 at para 31
[29] RSC 1985, c. F-7
[30] *Meggeson v Canada (AG)*, 2012 FCA 175 at para 37
[31] *Association des crabiers acadiens Inc. v Canada (AG)*, 2009 FCA 357 at para 32

law and private law principles present distinct and separate justiciable issues.[32] The authority of the Federal Court to convert judicial reviews to actions is not an invitation to impose civil liability for public law errors, absent the requirements of tort law.

43. It is not appropriate to merge the legal principles governing administrative law remedies with those governing tort liability. The tort liability of the federal Crown is created by statute. It is engaged when a private law tort is committed by a Crown servant. This legal structure reflects the important idea of equality. Implementing a framework that would allow claims for damages based solely on public law principles expands government liability to unknown proportions. The proposed reform would generate uncertainty rather than clarity.

B. Is the proposed species of action an intrusion on the legislative function?

44. Introducing a novel claim for damages for public wrongs arising from administrative law principles will lead to uncertain ramifications warranting intervention of this Court. If public law and tort law are to be blended in the way contemplated by the Federal Court of Appeal, it would be change more properly effected by Parliament.

45. In *Friedmann Equity Developments Inc v Final Note Ltd*, this Court provided a list of general principles that govern judicial reform of the common law.[33] A change in the common law must be necessary:

- to keep the common law in step with the evolution of society;
- to clarify a legal principle; or
- to resolve an inconsistency [in the jurisprudence].

46. Any such change should be incremental and its consequences must be capable of assessment.[34] Factors that may be considered when reforming common law principles include, but are not limited to, the existence of dissenting opinions in the Supreme Court of Canada, a trend in departing from the principle by other Courts, criticism of the decision and inconsistency of decisions.[35]

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[32] *Telezone, supra* paras 28-30
[33] 2000 SCC 34 at para 42
[34] *Friedmann, supra* at para 42
[35] *Friedmann, supra* at para 43.

47. Complex changes to the law with uncertain ramifications should be left to the legislature, as a court may not be in the best position to appreciate fully the economic and policy issues underlying the choice it is asked, or chooses to make.[36]

48. The Federal Court of Appeal's proposed framework is not an incremental change. It significantly alters the scope of liability for public maladministration. All levels of government are involved in decision-making processes that impact citizens in a broad range of circumstances. Policy decisions, which have been immune from suit, will now survive the "plain and obvious" test, based simply on an allegation that the decision was substantively unacceptable and indefensible, expanding government liability with far-reaching effects.

49. In *Liability of the Crown* Hogg, Monahan and Wright discuss the problems created by various tort law reform proposals, some of which include many of the same elements upon which the Federal Court of Appeal relies.[37] For example, examining whether decisions are "unacceptable" and "indefensible" could encompass a broad range of considerations, both procedural and substantive. A civil court may usurp the function of the decision maker in determining what the "valid" decision should have been. Cases involving invalid policy decisions at a higher level of authority would invite the courts to redistribute benefits and burdens with far-reaching impacts. It is unlikely that monetary relief would assist as a remedial tool in the rebalancing of a myriad of interests, many of which could present conflicts.

50. In a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.[38] Parliament has spoken on Crown liability. The legislator has decided that the Crown shall be liable as if it were a private person. The Crown's liability is vicarious, and depends on the application of private law tort principles. The law of government liability is not uncertain. It has been consistently applied.

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[36] *R v Salituro*, [1991] 3 SCR 654 at pp. 666 and 668, *Watkins v Olafson*, [1989] 2 SCR 750 at pp 760-761; *Friedmann* at para 43 relying on *Watkins, supra*.
[37] *Liability of the Crown, supra* page 206-207
[38] *Watkins, supra*, at pp. 760-761; *Salituro, supra* at p. 670

51. The Federal Court of Appeal's novel framework is not an incremental change to the common law. There is no basis to conclude that the evolution of society has necessitated the reform of Crown liability. Government decisions have impacted citizens in one form or another for years. The Federal Court of Appeal's decision is a substantive departure from established principles of law relating to Crown liability and traditional torts, thus warranting intervention from this Court.

C. Can a *prima facie* duty of care arise from statements of regulatory intent and undertakings to consult with industry?

52. The majority of the Federal Court of Appeal based its conclusion that it was not plain and obvious that no duty of care arose in this case on the thinnest of factual foundations. It found it was sufficient for the Respondents to plead that in exercising its public duties to regulate in the public interest, the Crown undertook to consult with those who would be affected by its regulatory actions, and made representations to the "beekeeping industry". As noted in the Pelletier JA's recital of the background, the Respondents' alleged representations were based upon information to the public in the RIAS, a statement published in the *Canada Gazette* about the intended scope and operation of regulations. If these kinds of "interactions" are sufficient to give rise to the type of proximity needed to support a duty of care in tort, governments will in effect be held liable simply for governing.

53. This approach represents a fundamental shift from established principle, and the resulting expansion of tort liability of public authorities is an issue of public importance.

54. The general interactions alleged in the Claim are the type of pleadings that other courts of appeal and this Court have concluded are insufficient to ground a close and direct relationship between a government regulator and claimant. Accepting that these general public representations, which are likely present in a very wide range of regulatory contexts, are sufficient to give rise to a duty of care would also have the potential to greatly expand the tort liability of public authorities. There is a public importance in maintaining a consistent approach when analyzing public obligations.

55. The test for proximity requires a series of "specific interactions" to 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."[39] In *Imperial Tobacco*, this Court noted that the relationship between the regulator and the claimants in that case was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous.[40] These public representations were insufficient to ground proximity.

56. A RIAS is a statement of general public objective. It is required by the federal government's policy on regulating. According to the RIAS Writer's Guide 2009,[41] the RIAS is part of a system to improve the process of regulating and the making of regulatory decisions. It is a purely informational document:

> A properly prepared RIAS provides a cogent, non-technical synthesis of information that allows the various RIAS audiences to understand the issue being regulated. It allows audiences to understand the reason the issue is being regulated, the government's objectives, and the costs and benefits of the regulation. It also addresses who will be affected, who was consulted in developing the regulation, and how the government will evaluate and measure the performance of the regulation against its stated objectives. The RIAS is, in effect, a public accounting of the need for each regulation.[42]

57. The intended audience includes Parliament (including the Standing Joint Committee for the Scrutiny of Regulations), Treasury Board and its officials, Ministers, affected parties (who are consulted during the drafting process) and the general public. Publication of the RIAS allows interested parties to have input into the regulatory process. After the regulations have been enacted, the RIAS stands as a statement of the policy intent behind the regulations. The RIAS explains the public law regime; it is not a promise or "representation" that regulatory action will ensure that no person is negatively affected by regulated parties or activities. Much less is it a reliable statement about any individual situation in which regulatory action might be taken. By definition it is not a representation addressed to particular individuals.

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[39] *Imperial Tobacco, supra,* para 45
[40] *Imperial Tobacco, supra,* para 49
[41] Available on-line at http://www.tbs-sct.gc.ca/rtrap-parfa/riaswg-grrier/riaswg-grrier-eng.pdf
[42] RIAS Writer's Guide 2009 at page 2

58. In a decision that predates *Imperial Tobacco*, the Ontario Court of Appeal in *Sauer v Canada (AG)*[43] found that the plaintiffs' allegations of "public representations by Canada that it regulates the content of cattle feed to protect commercial cattle 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."[44] The "public representations" alleged in *Sauer* were found in the RIAS associated with the regulations whose reasonableness was impugned in that case.

59. In a decision that post-dates both *Sauer* and *Imperial Tobacco*, the Ontario Court of Appeal in *Taylor v Canada (Attorney General)*[45] retreated from *Sauer* stating:

> 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.[46]

60. In *Attis, supra*, the Ontario Court of Appeal noted the difference between actions of government regulators in the interest of the public good and 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

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[43] 2007 ONCA 454
[44] *Sauer, supra*, at para 62
[45] 2012 CarswellOnt 8820, 2012 ONCA 479
[46] *Taylor, supra*, at paras 94-95, 97

individual participant, even though those decisions may not have positive implications for some.[47]

61. The relationship alleged between the Appellants and the Respondents arose from 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."[48] The Respondents allege that the Crown engaged in consultations "with the industry" and that the Crown consulted with other industry "factions" to the exclusion of other industry stakeholders, when considering the continued prohibition of imported honeybee packages.

62. The RIAS is a public explanation of the need for regulation, not a communication that could establish a close and direct relationship with any particular individual. To the extent that the RIAS addressed the objective of limiting any resulting economic loss, this is no more than a restatement of the public statutory purpose of the *HA Act*, which aims at the protection of animal health from the risk of disease or toxins, in the interests of the public. This public purpose of the legislative scheme excludes the possibility that at the same time the legislation itself gave rise to a private law duty of care to protect the economic interests of an affected sector of industry.

63. Consultation with industry is a matter of good governance, as it enables government to gather information from affected parties relevant to the exercise of regulatory powers. Through consultations, government regulators become better informed about the factors justifying regulatory responses and initiatives. This practice cannot displace the legislator's intent to implement an existing statutory regime for the broader public good.

64. Nor does an undertaking to consult create a close and direct relationship with any individual industry participant. The decision to prohibit importation of bee packages from the United States was a decision the Minister was entitled to make with or without consultations. The decision requires the weighing of public policy considerations – it entailed a balancing

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[47] *Attis supra*,at para 65

[48] As noted in the FC decision and Pelletier JA's recital of the background upon which the majority agreed, the representations to the industry involved public statements in the RIAS

of the competing objectives of protecting Canadian beekeepers from the risk of imported diseases and of facilitating industry's access to different sources of bees for economic reasons. The essence of the Respondents' complaint is that the decision to prohibit importation of honeybee packages from the United States was not properly taken in a formal sense. Restrictions were allegedly imposed by way of a blanket policy rather than by way of regulations. This in no way diminishes the policy nature of the substantive decision, or casts any doubt on the *bona fides* of the decision.

D. Conclusion

65. Government actors must be able to make decisions in the public interest pursuant to statutory regimes without fear of civil liability, even where it is clear that those decisions are not what some people would have wanted. The decision of the Federal Court of Appeal in this case improperly lowers the threshold for civil liability, both in its application of negligence principles and in its proposed new theory of governmental civil liability.

66. Maintaining an appropriate balance between the ability of private parties to pursue the government for damages in tort and the ability of those charged with implementation of legislation and public policy to make decisions in the public interest is always an issue of public importance.

PART IV – COSTS

32. There is no reason costs should not follow the cause in this matter.

PART V – ORDER REQUESTED

33. The applicant requests that the application for leave to appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Saskatoon this 5th day of June, 2015.

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B. *Federal Court* Act, RSC 1985, c. F-7

C. *Health of Animals Act,* SC 1990 c.21

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E. *Honeybee Importation Prohibition Regulation, 2004 SOR/2004-136*