Court File No. T-2293-12

FEDERAL COURT

BETWEEN:

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

Plaintiffs (Applicants)

and

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

Defendants (Respondents)

PLAINTIFFS' REPLY MOTION RECORD TO DEFENDANTS' MOTION RECORD

(Motion for Certification)

FIELD LLP
2500 – 10175 101 Street NW
Edmonton, AB T5J 0H3

Jon Faulds, QC, Dan Carroll, QC
Lily Nguyen
Counsel for the Plaintiffs (Applicants)

Tel: 780-423-3003
Fax: 780-428-9329
Email: jfaulds@fieldlaw.com, dcarroll@fieldlaw.com, lnguyen@fieldlaw.com

DEPARTMENT OF JUSTICE CANADA
Prairie Region, Saskatoon Office
10th Floor, 123 – 2nd Avenue South
Saskatoon, SK S7K 7E6

Marlon Miller and Jennifer Souter
Counsel for the Defendants (Respondents)

Tel: 306-241-5387
Fax: 306-975 6240
Email: marlon.miller@justice.gc.ca
jennifer.souter@justice.gc.ca

TABLE OF CONTENTS

TAB

Court File No. T-2293-12

FEDERAL COURT

BETWEEN:

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

Plaintiffs (Applicants)

and

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

Defendants (Respondents)

REPLY MEMORANDUM OF FACT AND LAW

1. The Defendants' Memorandum opposing Certification rests on misunderstandings of the facts and the law and mischaracterizations of the Plaintiffs' claims, namely:

   a. That there is an existing prohibition on U.S. honeybee packages;

   b. That the claim is an attack on a group within the proposed class;

   c. That all proposed class members must agree on how this Court should dispose of the issues; and

   d. That the Plaintiffs ("Beekeepers") have demonstrated "antagonism" against other beekeepers or members of the proposed class.

2. Some of these erroneous assertions were considered and rejected by the Federal Court of Appeal in the Defendants' unsuccessful motion to strike the claim.[1] The Defendants' attempt to resurrect these issues should be rejected.

The Defendants have not "prohibited" U.S. packages since December 31, 2006

3. The Defendants appear to assert that there is an existing lawful prohibition against the importation of honeybee packages from the United States.[2] They argue that by challenging

---

[1] See *Paradis Honey v Her Majesty the Queen*, 2015 FCA 89, 2015 CarswellNat 837 ("*Paradis Honey FCA*"), **Plaintiffs' Motion Record ("PMR"), Volume 5, pp 1257-1269** (subsequent citations will be to Volume:page); Leave To Appeal to the Supreme Court of Canada denied *HMQ et al v Paradis Honey Ltd et* al, 2015 CanLII 69423 ("*Paradis Honey* SCC"), **PMR 5:1198**.

this prohibition, the Beekeepers place themselves in irretrievable conflict with other beekeepers that benefit from the prohibition and prefer to keep it in place.[3]

4. These arguments ignore the FCA's conclusion that no lawful prohibition has existed since the expiry of the *Honeybee Importation Prohibition Regulation, 2004*, SOR/ 2004-136 on December 31, 2006. Instead, there is only a "blanket guideline" that "conflicts with the law on the books," namely s. 160 of the *Health of Animals Regulation*. This "law on the books" states that the Beekeepers are "entitled to receive permits and import honeybees" when import conditions regarding pest and disease risk are satisfied.[4] Contrary to the Defendants' implication, the Beekeepers do not challenge the law, but only seek damages for the Defendants' negligent or abusive failure to implement it.

The Beekeepers do not "accuse" any class members of wrongdoing

5. The Defendants fundamentally misconstrue the nature of the Beekeepers' claim. They insist that the claim is an attack on a group within the proposed class, who the Beekeepers "accuse of wrongdoing" by "influencing the Minister's decision."[5]

6. The Beekeepers make no such attack. All beekeepers have the right to lobby the Defendants to advance their self-interest. The "wrongdoing" alleged is that the Defendants abandoned their duty by giving effect to lobbyists' self-interest over statutory grounds of pest and disease risk required to justify refusal of an import application. This is analogous to refusing to accept immigration applications from one ethnic group at the behest of a rival ethnic group, or refusing applications for lawful tax deductions from one business group because rival business owners asked them to.

The "acceptability of the Minister's decision" is for the Court to decide, not the class

7. The Defendants cite as a basis for conflict the fact that all beekeepers do not agree on how to interpret the law, whether the Minister breached the law, and what the facts of the

---

[2] Defendants' Memorandum of Fact and Law ("MFL") at paras 4-8, **Defendants' Motion Record ("DMR") 1:0002-1:0003**
[3] Defendants' MFL at para 35, **DMR 1:0009**
[4] *Paradis Honey FCA* at paras82-85, **PMR 5:1259**
[5] Defendants' MFL at para 36, 44 and 96, **DMR 1:0010, 1:0011 and 1:0024**

matter are.[6] But these are for the Court to determine after a contested hearing, not a matter for a vote by claimants. Unanimity of class members is not relevant or required. The opt-out process exists to address such issues.

Allegations of "conflict" and "history of antagonism" are not substantiated

8. The Defendants argue that the Beekeepers are in conflict because they seek to advance their own cause to the detriment of other class members, and because they have demonstrated antagonism toward some class members.[7] This is not accurate.

9. Firstly, the Beekeepers' interests are aligned with the proposed class. The Beekeepers seek to establish a claim for all prospective members, whether or not they lobbied to open or close the border. Regardless of whether a beekeeper "support(s) the Minister's decisions,"[8] all beekeepers had a right to apply and be considered for import permits under s. 160 of the *HAR* and a further right to receive them, if the Defendants lacked the evidence of pest and disease risk to justify refusal.

10. A beekeeper's political views should not bar a claim. As Jean Paradis stated in cross-examination, commercial beekeepers will act in a commercially reasonable manner. If they could have reduced expenses by replacing expensive overseas packages with cheaper U.S. packages, they would have done so regardless of their views.[9] Similarly, a person can maximize tax deductions while lobbying for a reduction in their availability in law. Of course, damages will depend on an assessment of individual circumstances, but the *Federal Courts Rules* say that is not a reason to deny certification.[10]

11. Secondly, the Defendants suggest the Beekeepers' success would expose other beekeepers to unacceptable levels of pest and disease risk.[11] But whether the Defendants had evidence of an unacceptable level of pest and disease risk to justify refusal is precisely what the Beekeepers dispute and one of the issues this Court must decide. The Defendants'

---

[6] Defendants' MFL at paras 52, 66, 75 and 89, **DMR 1:0013, 1:0017, 1:0019 and 1:0022**
[7] Defendants' MFL at paras 75, 80 and 86, **DMR 1:0019, 1:0021 and 1:0022**
[8] Defendant's MFL at para 75, **DMR 1:0019**
[9] Paradis Transcript, **PMR 4:879**
[10] *Federal Courts Rules*, SOR/98-106, Rule 334.18(a), **PMR 5:1032**
[11] Defendant's MFL at para 67, **DMR 1:0017**

argument puts the cart before the horse. As the FCA noted, if there was unacceptable risk at all times, the Beekeepers' claim fails.[12]

12. Thirdly, the claimed evidence of "antagonism" is no such thing. It consists of Mr. Paradis's observation that commercial beekeepers act in a commercially reasonable manner; Mr. Gibeau stating that beekeepers, a non-homogenous group, may prefer a prohibition for any number of reasons, many of which do not relate to pest and disease risk; and both men explaining beekeeping management techniques they have used and those available in the industry.[13] These were neutral, factual answers given to counsel's questions, and primarily aimed at providing basics about the industry.

Cases relied upon by the Defendants are distinguishable

13. The Defendants compare this case to *Boucher*, *Nixon*, *Paron, Asp*, *Lacroix* and *Kwicksutaineuk*, in which certification was denied for lack of identifiable class.[14] But those cases have little bearing on the "most uncommon" circumstances of this case.[15]

14. In *Boucher*, the claimants to a pension surplus proposed multiple class definitions and wanted to leave the class "open-ended." In *Nixon*, inmates of a correctional facility who sought damages for fires set or perpetuated by some of their number proposed a merits-based class definition that required mini-trials to determine class membership. In *Paron*, a lake homeowner sought higher water levels that would have flooded the properties of other members of the proposed class. In *Asp*, one of 17 family groups in an aboriginal investment vehicle sued the officers and directors and sought to unwind the investment vehicle, but could not provide a rational basis to exclude the other family groups who would be greatly affected by a winding up. In *Lacroix*, the plaintiffs sought to amend the nature of the claim and class definition into a series of subclasses advancing different theories of relief. In *Kwicksutaineuk*, the proposed class members were indistinct "aboriginal collectives" that "do not have capacity to sue."[16]

---

[12] *Paradis Honey FCA* at paras 95, 99 and 101, **PMR 5:126**
[13] Paradis Transcript, **PMR 4:879**, **4:896-4:899**; Gibeau Transcript, **PMR 4:949-4:953**, **4:971**
[14] Defendants' MFL at paras 38-39, 42, 56-57 and 59, **DMR 1:0010-1:0011 and 1:0014-1:0015**
[15] *Paradis Honey FCA* at para 100, **PMR 5:1261**
[16] *Boucher v Public Service Alliance of Canada*, 2005 CanLII 23098 (ONSC) at paras 19-23, **DMR 2:Tab 3**; *R v Nixon*, 2002 CarswellOnt 1350 at paras 6-7, **DMR 2:Tab 14**; *Paron v*

15. The Defendants cite *Laferriere* and *Folland* to argue that this case is a "loss of chance" case, and these are too complex to admit for common issues.[17] But the test for common issues is not whether issues are simple, but whether they are common. The facts and issues pertinent to the claim are substantially in common, which speaks strongly in favor of certification. The complexity of the case is no bar.[18]

16. As the FCA held, in addition to satisfying the conventional test for Crown liability in negligence, the Beekeepers allege that they and members of the proposed class are "victims of abusive administrative action warranting monetary relief."[19] When their claim is properly construed, there is no reason to deny certification.

DATED at the City of Edmonton, in the Province of Alberta, this 13th day of January, 2017.

FIELD LLP

Per: _____
Daniel P. Carroll, LLM, QC
Jonathan Faulds, LLM, QC
and Lily L.H. Nguyen, Counsel for the Plaintiffs
2500 – 10175 101 St NW
Edmonton, AB T5J 3G1
Tel: (780) 423-3003, Fax: (780) 428-9329
Email: jfaulds@fieldlaw.com, dcarroll@fieldlaw.com and lnguyen@fieldlaw.com

---

Alberta, 2006 ABQB 375 at paras 60-62, **DMR 2:Tab 12**; *Asp v Boughton Law Corporation*, 2014 BCSC 1124 at paras 47, 49-51, **DMR 2: Tab 2**; *Lacroix v CMHC*, 2003 CarswellOnt 2581 at paras 16, 36, 41, 43-44, **DMR 2: Tab 8**; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada*, 2012 BCCA 193 at para 100, **DMR 2:Tab 7**

[17] Defendants' MFL at para 68, **DMR 1:0018**

[18] As argued in the Plaintiffs' MFL, **PMR 5:1000-5:1003, 5:1004 and 5:1011**.

[19] *Paradis Honey FCA* at para 115, **PMR 5:1263**