Court File No. T-2293-12

FEDERAL COURT

PROPOSED CLASS ACTION

Between:

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

Plaintiffs

- and -

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

Defendants

PLAINTIFFS' MEMORANDUM OF FACT AND LAW

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PART I: STATEMENT OF FACTS

A. Overview

[1] The Plaintiffs ("Beekeepers") assert that Canada negligently, or through abusive administrative action, denied them their lawful right to seek import permits for honeybee packages from the U.S. by abdicating its regulatory authority to a third-party industry group dominated by beekeepers that wanted to keep the border closed to U.S. packages. In doing so, Canada substituted political opinion for what the law required to be an evidence-based assessment of pest and disease risk, and enabled some beekeepers to profit from the denial of rights of others.

[2] The Beekeepers now move to certify this action ("the Action") as a class action on behalf of an estimated 1,400 Canadian commercial beekeepers.

[3] The Beekeepers have satisfied the first condition of certification required under Rule 334.16(1) of the *Federal Courts Rules* ("*FCR*"). The Federal Court of Appeal has determined (with leave to appeal to the Supreme Court of Canada denied) that the Beekeepers' pleadings disclose a reasonable cause of action both in regulatory negligence and in a novel cause of action for "abusive administrative action."[1] Accordingly, this issue is *res judicata* by way of issue estoppel. The Beekeepers understand that Canada agrees with this position.

[4] As a result, the main questions on this motion ("the Motion") are whether the remaining four conditions of certification are also satisfied.

[5] The Beekeepers submit that that there is an identifiable class made up of approximately 1,400 commercial beekeepers; that the common issues make up not only a substantial ingredient of each class member's claim but predominate; that the size of the class and nature of the Action make a class proceeding not only the preferable but also the only viable way of proceeding, and that the representative plaintiffs are well-qualified to move the litigation forward.

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[1] *Paradis Honey et al v HMQ et al*, 2015 FCA 89, 2015 CarswellNat 837 ("*Paradis Honey FCA*"), **Plaintiffs' Motion Record ("PMR"), Volume 5 at 1258, 1262-1263, 1268** (subsequent citations shall be to Volume:Page); LTA denied *HMQ et al v Paradis Honey Ltd et al*, 2015 CanLII 69423 ("*Paradis Honey SCC*"), **PMR 5:1198**.

[6] Accordingly, the Beekeepers submit that the Action should be certified as a class proceeding.

B. Background of the Claim

[7] The Beekeepers are established commercial beekeepers based in Alberta, British Columbia and Manitoba respectively. They are supported in the Action by at least another dozen commercial beekeepers variously located in Alberta, British Columbia, Manitoba and Saskatchewan.[2]

[8] Canadian beekeepers regularly experience a significant loss of bees every winter from cold weather, compounded by other factors such as pests and disease. Data from the Canadian Association of Professional Apiculturists ("CAPA") show average annual losses of 15% to 35% of honeybee colonies in Canada in the years 2008-2012. To replace lost colonies, beekeepers split up existing colonies, purchase domestic bees from other beekeepers or import bees from outside of Canada.[3]

[9] Live honeybees are imported as a "package" or a "queen." A "package" is a cereal box-sized frame containing a queen and several thousand honeybees. A "queen" refers to a matchbox-sized frame with a queen and several attendant bees. A package replaces a colony more quickly and cheaply than a queen.[4]

[10] The option of importing U.S. packages has not been available since 1987, when Canada closed the border to U.S. bee imports in all forms as an emergency measure to prevent the spread of varroa mites into Canada. However, Canada noted the spread of varroa mites to all of Canada by 2004, with treatment-resistant varroa mites found in 7 of 10 provinces in that year.[5] In 2015-16, Honeybee Enterprises Ltd. lost 1,000 out of its 1,400 colonies, or 71%, primarily due to varroa mites.[6]

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[2] J. Paradis Affidavit September 20, 2013 ("2013 Paradis Affidavit"), **PMR 1:17**; J. Gibeau Affidavit September 25, 2013 ("Gibeau Affidavit"), **PMR 1:149**; W. Lockhart Affidavit September 18, 2013 ("Lockhart Affidavit"), **PMR 1:143**

[3] 2013 Paradis Affidavit, **PMR 1:11**

[4] 2013 Paradis Affidavit, **PMR 1:11-12**

[5] 2013 Paradis Affidavit, **PMR 1:12-13**; 2013 Paradis Affidavit, **PMR 1:45, 1:64**

[6] Gibeau Transcript, **PMR 4:951**

[11] The border closure was partially lifted with the enactment of the *Honeybee Importation Prohibition Regulation, 2004* ("*HIPR-2004*") on May 19, 2004, which opened the border to U.S. queens, but extended the border closure to U.S. packages until December 31, 2006 ("the Prohibition Period"). There has been no renewal of the Prohibition Period, although *HIPR-2004* was not repealed until June 11, 2015.[7]

[12] The ability to import U.S. packages after December 31, 2006 is determined pursuant to ss. 12 and 160(1.1) of the *Health of Animals Regulations* ("*HAR*"), enacted pursuant to the *Health of Animals Act* ("*HAA*"). Section 12 allows a person to import live honeybees in accordance with an import permit obtained for that purpose and s. 160(1.1) requires the Minister to issue a permit if he is satisfied that the activity is not likely to result in the introduction into or spread in Canada of a "vector, disease or toxic substance."[8]

[13] The essence of the Action is that following the expiry of the Prohibition Period, Canada denied the Beekeepers their lawful right to seek import permits for U.S. packages by informing commercial beekeepers that the border remained closed to U.S. packages and rejecting any applications for import permits without consideration. Canada further informed them that it would not reconsider this policy until it had an opportunity to conduct a new risk assessment to update a 2003 risk assessment, but it would not conduct a new risk assessment until it received an "official request" from the Canadian Honey Council ("Honey Council") to do so.[9]

[14] The Beekeepers claim that Canada engaged in this conduct despite the fact that it knew or ought to have known that the Honey Council was a political body dominated by beekeepers interested in keeping the border closed for purposes unrelated to the regulatory criteria, such as: driving up the price of honey, reducing cross-border competition, making money selling domestic bees and trying to promote local foods. Canada also closed its mind to dissenting voices from minority beekeeper

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[7] *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136 ("*HIPR-2004*"), repealed SOR/2015-142, **PMR 5:1045**

[8] *Health of Animals Regulations*, CRC, c 296 ("*HAR*"), ss. 12 and 160(1.1), **PMR 5:1042, 5:1044**

[9] Amended Statement of Claim ("ASC"), **PMR 5:1346-5:1348**; 2013 Paradis Affidavit, **PMR 1:16, 1:95**

groups such as commercial beekeepers reliant on bee imports and refused to work with them to see if adequate protocols could be developed to manage risk.[10] In short, instead of engaging in the evidence-based risk analysis of bee pest risk required by law, Canada chose sides in a political fight.

[15] The Beekeepers say that as a result of the unlawful extension of the Prohibition Period, they were forced to turn to other means to replace or increase their colonies every year such as buying bees from less desirable sources and using more time- and chemical-intensive measures to keep bees alive through the winter, with detrimental effects on the quality of colonies and the honey produced. The Beekeepers claim aggregate losses for the Class of $200 million plus interest.[11]

C. Procedural History

[16] The Action was commenced by Statement of Claim filed December 28, 2012, with a Statement of Defence filed February 18, 2013. Notice of Motion for Certification was filed on September 12, 2013. Canada then moved to strike the Action in its entirety. The Federal Court struck it on March 5, 2014, the Federal Court of Appeal restored it on April 8, 2015 and leave to appeal to the SCC was denied on October 29, 2015. [12]

[17] Pursuant to the Case Management Judge's directions, the parties were permitted to amend their pleadings to accord with some of the issues that arose in the strike proceedings. This application relies on the amended pleadings.

PART II: POINTS IN ISSUE

[18] The sole issue is whether the Motion satisfies the five conditions ("Conditions") of Rule 334.16(1) such that the Action shall be certified as a class proceeding. The Conditions may be summarized as follows:

1. Do the pleadings disclose a reasonable cause of action?

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[10] ASC, **PMR 5:1344, 5:1347-1348**; Paradis Transcript, **PMR 4:863-4:864**; Gibeau Transcript, **PMR 4:962, 4:972-4:973**

[11] ASC, **PMR 5:1348-5:1349**

[12] *Paradis Honey v HMQ*, 2014 FC 215 ("*Paradis Honey FC*"), 2014 CarswellNat 480, **PMR 5:1254-5:1255**; *Paradis Honey FCA*, **PMR 5:1258, 5:1263, 5:1268**; *Paradis Honey SCC*, **PMR 5:1198**

2. Is there an identifiable class of two or more persons?

3. Do the claims of the proposed class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members?

4. Is a class proceeding the preferable procedure for the just and efficient resolution of the common questions of law and fact?

5. Is there an appropriate representative plaintiff?

[19] Because the Beekeepers and Canada agree that the first condition is satisfied, this will be addressed only briefly.

PART III: SUBMISSIONS

A. Overview of the certification test

[20] The moving party must satisfy all Conditions.[13] If satisfied, certification is mandatory.[14] The first condition that the pleadings disclose a reasonable cause of action is determined on the pleadings alone. For the remaining conditions, the Beekeepers must show "some basis in fact" that the condition is met.[15]

[21] As the SCC stressed, the evidential burden of "some basis in fact" is not a heavy one, and is less than a balance of probabilities. It is not intended as a preliminary assessment of the merits of the Claim. The question is not "will it succeed as a class action?" but rather, "can it *work* as a class action?"[16]

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[13] *AIC Limited v Fischer*, 2013 SCC 69, [2013] SCR 949, **PMR 5:1133**; cited in *Jones v Attorney General of Canada*, 2015 FC 1372 (CanLII), **PMR 5:1217**

[14] *FCR*, Rule 334.16(1), cited in *Manuge v Canada*, 2008 FC 624, reversed on other grounds 2009 FCA 29, appeal allowed on other grounds, 2010 SCC 67, **PMR 5:1222**

[15] *AIC Limited v Fischer*, **PMR 5:1133**

[16] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013] 3 SCR 477, 2013 SCC 57, **PMR 5:1278**; *Gottfriedson v Canada*, 2015 FC 706 (CanLII), **PMR 5:1191**

[22] As the SCC stated, Courts should also keep in mind that an overly stringent analysis is not required, considering that the order for certification can be amended or the Action can be de-certified at a later date if the Conditions are no longer met.[17]

B. The Federal Court of Appeal has determined that the pleadings disclose a reasonable cause of action, therefore the first condition fulfilled

[23] The test on the first condition is whether, assuming all facts pleaded to be true, it is plain and obvious that the claim cannot succeed.[18] This Court has recognized that this is identical to the test for whether a claim can be struck under Rule 221(1)(a) because it "discloses no reasonable cause of action."[19]

[24] In this case, the Federal Court of Appeal has already ruled the Beekeepers have a reasonable cause of action in the context of the strike motion[20] and the SCC rejected Canada's application for leave to appeal on October 29, 2015.[21] Accordingly, the issue is *res judicata* by way of issue estoppel.

C. There is an identifiable class of two or more persons

[25] In *Western Canadian Shopping Centres* ("*WCSC*"), the SCC identified three main rationales for requiring an identifiable class: 1) to identify persons who have a potential claim for relief against the defendants; 2) to define the parameters of the lawsuit in order to identify those who are bound by the result; and 3) to describe who is entitled to notice for certification.[22]

[26] In *Hollick*, the SCC noted three criteria for the existence of an "identifiable class": 1) the class must be defined by objective criteria; 2) the class must be defined

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[17] *Pro Sys Consultants Ltd.*, **PMR 5:1279**; see also *FCR*, Rule 334.19, **PMR 5:1034**

[18] *Pro Sys Consultants Ltd*, **PMR 5:1277**

[19] *Campbell v. Canada (Attorney General)*, 2008 FC 353 (CanLII) ("*Campbell FC*"), appeal allowed on other grounds 2012 FCA 45 (CanLII), **PMR 5:1159**; see also *Rhodes v Compagnie Amway Canada*, 2010 FC 498, **PMR 5:1284**

[20] *Paradis Honey FCA*, **PMR 5:1258**

[21] *Paradis Honey SCC*, **PMR 5:1198**

[22] *Western Canadian Shopping Centres*, 2001 SCC 46, [2001] 2 SCR 534 ("*WCSC*"), **PMR 5:1327**

without reference to the merits; and 3) there must be a rational connection between the common issues and the proposed class definition.[23]

[27] As the SCC stressed, the test is not intended to be an onerous burden. As stated in Rule 334.18(d), it is not necessary to know the identity of all of the Class members, nor their exact number. The plaintiffs do not have to show that every member shares the same interest in the resolution of the common issues, so long as the class is not unnecessarily broad such that it can be defined more narrowly without arbitrarily excluding some people. The definition should also avoid criteria that are subjective or that depend on the outcome of the litigation.[24]

[28] However, as the Federal Court of Appeal stressed in *Buffalo v Samson Cree Nation*, the Court has the discretion to amend the proposed class definition, and should be open to considering amendments so long as the plaintiff has not manifestly failed "to grapple with the substance of the matter" such that the Court concludes the plaintiff and plaintiff's counsel is not capable of "adequately representing the interests of the class." As Stratas JA wrote for the Court:

> I accept that in certification motions, and in the post-certification period, courts can be quite active and flexible because of the complex and dynamic nature of class proceedings: for example, they must always remain open to amendments to such matters as the class definition, the common issues and the representative plaintiff's litigation plan, and they can play a key role in case management.[25]

[29] This "flexible" approach was also endorsed by the SCC in *Hollick*, where it stated the Court may certify an action subject to later amendment of the class definition to cure a deficiency.[26] Similarly, Courts across Canada have reformulated or deleted components of class definitions to arrive at a satisfactory class definition.[27]

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[23] *Hollick v Toronto*, 2001 SCC 68, [2001] SCR 158 ("*Hollick SCC*"), **PMR 5:1212**

[24] *FCR*, Rule 334.18(d), **PMR 5:1033;** *Hollick SCC*, **PMR 5:1214**; *WCSC*, **PMR 5:1327**

[25] *Buffalo v Samson Cree Nation*, 2010 FCA 165 (CanLII) ("*Buffalo*"), **PMR 5:1138**

[26] *Hollick SCC*, **PMR 5:1214**

[27] E.g., *WP v Alberta (No 1)*, 2013 ABQB 296, appeal dismissed as moot 2014 ABCA 404, **PMR 5:1322-5:1322**; *Markson v MBNA Canada Bank*, 2007 ONCA 334 (CanLII) ("*Markson*"), **PMR 5:1230-5:1231**; *Bywater v Toronto Transit*

[30] Here, the Beekeepers proposed the following class definition in the Amended Notice of Motion for Certification:

> All persons in Canada who keep or have kept more than 50 bee colonies at a time for commercial purposes since December 31, 2006 and who have been denied the opportunity to import live honeybee packages into Canada from the continental United States after December 31, 2006, as a result of the Defendants' maintenance or enforcement of a *de facto* blanket prohibition on the importation of such packages.[28]

[31] The Beekeepers recognize that the second part of the definition beginning with "and who have been denied the opportunity to import ..." may raise concern that it is subjective, as it implies that Class members must embark on self-assessment of whether they feel they have been denied access to U.S. packages. This was not the intent, as the second part was intended as a descriptor and was not intended to narrow the class. It is the Beekeepers' position that anybody who falls within the first part necessarily also falls within the second part, and therefore the second part is surplus.

[32] As the surplus second part of the current definition risks an unintended lack of clarity, the Beekeepers propose that it be dropped, and the Class definition be simplified to the following:

> All persons in Canada who keep or have kept more than 50 bee colonies at a time for commercial purposes since December 31, 2006.

1. The Class is sufficiently numerous

[33] The three Beekeepers fall within the Class, and have the support of another dozen commercial beekeepers who fall within the Class. In addition, there are an estimated 1,400 commercial beekeepers in Canada.[29] It is clear that the requirement of at least two persons is met.

Commission, 84 ACWS (3d) 230, 1998 CarswellOnt 4645 (Ont Gen Div), **PMR 5:1150**

[28] Amended Notice of Motion for Certification, **PMR 1:2**

[29] 2013 Paradis Affidavit, **PMR 1:17-1:18**; Paradis Transcript, **PMR 4:846-4:847**

2. The Class is identifiable

[34] The time limitation of December 31, 2006 and the number of colonies a beekeeper keeps are clearly objective criteria. Furthermore, the evidence suggests the number of colonies kept by a beekeeper is to be found in data that is readily accessible, and thus constitutes a highly workable criterion.

[35] Beekeeping is regulated in every provincial jurisdiction in Canada and the necessity of tracking colony statistics is either express or implied in most provincial regulatory regimes. For example, Manitoba's bee mortality insurance program requires 50 colonies to be eligible for insurance, while Saskatchewan's crop insurance program requires a minimum of 100 colonies.[30] In Alberta, aspects of the Alberta Beekeepers Commission Plan, which requires disclosure of information and payment of service fees, applies at 100 colonies or more.[31] In Nova Scotia, Quebec, Ontario and Alberta, beekeepers must register and file data of colony numbers.[32] B.C. requires beekeepers to maintain records of the number of colonies they transfer.[33]

[36] Whether a beekeeper keeps bees for "commercial" purpose is also objectively discernible by evidence of whether a beekeeper's activities are personal or encompass commercial activities such as sales, marketing and profit-seeking. Furthermore, the concept of commerciality is in common legal usage, and there is a corresponding wealth of jurisprudence defining the meaning of the word "commercial" or determining if something was done for a "commercial purpose."[34] Clearly it is a concept amenable to objective determination by the Court.

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[30] *Overwinter Bee Mortality Insurance Program Regulation, 2015*, Man Reg 179/2015 ("*Manitoba Overwinter Insurance*"), s. 1 and Schedule, **PMR 5:1081, 5:1085-5:1086**; *The Saskatchewan Crop Insurance Corporation Regulations*, RRS c S-12.1 Reg 1, s. 27(2), **PMR 5:1109**

[31] *Beekeepers Commission of Alberta Plan Regulation*, Alta Reg 59/2006, s 6(2)(b), **PMR 5:1066**

[32] *Bee Industry Regulations*, NS Reg 319/2007, s. 3(4)(c), **PMR 5:1046-5:1047**; *Regulation respecting the registration of beekeepers*, CQLR c P-42, r 5, s. 2(3); *General*, RRO 1990, Reg 57, s. 1, **PMR 5:1075**; *Bee Regulation*, Alta Reg 194/2003, s. 3(2)(b), **PMR 5:1054**

[33] *Bee Regulation*, BC Reg 3,/2015, s. 9(5)(b), **PMR 5:1062**

[34] E.g., *Clevite Development Ltd. v Minister of National Revenue* (1961), [1961] Ex C.R. 296, 1961 CarswellNat293, **PMR 5:1183**; *McIntosh v Royal & Sun Alliance*

[37] The Class is not merits-based. No common issues need to be determined in order to determine whether a beekeeper has kept more than 50 colonies for commercial purposes after December 31, 2006.

[38] The Class is rationally connected to the common issues. The time limit relates to the claim that Canada breached its standard of care from December 31, 2006, when the Prohibition Period expired. The commerciality requirement relates to the claim that Canada owed a duty of care to commercial beekeepers based on its knowledge that they were being asked to sacrifice their near-term economic well-being for the greater good of the industry, and its pledge to them to continuously monitor the situation so that the economic hardship lasted no longer than necessary. It also relates to the claimed damages, which are for commercial losses.[35]

[39] The requirement of a minimum number of colonies relates to the claim for losses resulting from denial of access to U.S. packages, since only beekeepers with a certain number of colonies would have suffered colony losses to justify the expense of importation and therefore have been impacted by the ongoing border closure.

[40] On the proposed minimum of 50 colonies, this Court's holding in *Rae v Canada (National Revenue)* is germane: "Over-inclusion and under-inclusion are not fatal to the certification as long as they are not illogical or arbitrary."[36] That is, the number does not have to be exact, so long as it is not illogical or arbitrary.

[41] The Honey Council deems Eastern Canada and B.C. beekeepers to be "commercial" beekeepers with at least 50 colonies, although it sets the floor higher in the major honey producing provinces of Alberta, Manitoba and Saskatchewan.[37] As Mr. Gibeau stated, a person needs at least 50 colonies to "augment their income … in a significant way with bees." As Mr. Paradis stated, 50 is typically the minimum for eligibility for government programs aimed at commercial producers.[38] This is the

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Insurance Company of Canada, 2007 FC 23 (CanLII), **PMR 5:1238** (insurance contracts); *Universite de Sherbrooke v The Queen*, 2007 TCC 229 (CanLII), **PMR 5:1312, 5:1318** (input tax credits)

[35] ASC, **PMR 5:1342-5:1343, 5:1346, 5:1348**

[36] *Rae v. Canada (National Revenue)*, 2015 FC 707 (CanLII), **PMR 5:1281**

[37] 2013 Paradis Affidavit, **PMR 1:119**

[38] Gibeau Transcript, **PMR 4:959**; Paradis Transcript, **PMR 4:854**

case in Manitoba, which requires 50 colonies to access bee mortality insurance and be required to pay administration fees to the marketing board.[39]

[42] The Beekeepers submit that setting the floor higher than 50 would arbitrarily exclude beekeepers in many provinces that are used to being considered commercial.

[43] Finally, if evidence emerges to support a different floor, the Beekeepers submit that the Class may be modified pursuant to Rule 334.19, and that this is the sort of modification that falls squarely within the purpose of that rule.

[44] The Beekeepers acknowledge that not every Class member may be able to recover damages. For example, some Class members may be located in an area of Canada that rarely imports because it suffers few losses, or a quarantine zone that would have prohibited imports in any case.[40] However, jurisprudence establishes that it is not fatal for the class to include those who ultimately do not have a claim.[41]

[45] The Ontario Court of Appeal reached a similar conclusion in *Markson v MBNA Canada Bank* where the plaintiff sought to certify a claim that the bank had charged some of the holders of a certain type of credit card a criminal rate of interest on cash advances. The effective rate of interest could not be easily determined at the certification stage because it required knowledge of the size, duration and timing of the cash advance, which could only be determined by sifting through millions of credit card holder accounts. Nonetheless, the Court of Appeal certified a class consisting of all holders of that type of credit card, even as it acknowledged that those who could ultimately recover were likely to be a very small fraction of the class.[42]

[46] Accordingly, the Class meets the requirement of an identifiable class of two or more persons. The Class definition, as revised above, identifies who has a claim, who is entitled to notice and who is bound by the decision as set out in *WCSC*. As per

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[39] *Manitoba Overwinter Insurance*, **PMR 5:1081, 5:1085-5:1086**; *Honey Producers Administration Fee Regulation*, Man Reg 56/2009, **PMR 5:1078-5:1079**

[40] E.g., *Bee Quarantine Declaration*, NS Reg 150/90, **PMR 5:1048**; *Bee Quarantine District Regulation*, BC Reg 415/90, **PMR 5:1049**; Gibeau Transcript, **PMR 4:960**

[41] *Bywater*, **PMR 5:1150**; cited with approval in *Hollick v Toronto (City)* (1999), 46 OR (3d) 257, 1999 CarswellOnt 4135 (Ont CA), appeal dismissed 2001 SCC 68 ("*Hollick* CA"), **PMR 5:1205**

[42] *Markson*, **PMR 5:1227-5:1228, 5:1230-5:1231**

Hollick, the Class cannot be further narrowed without arbitrarily excluding claimants. The Beekeepers submit the proposed Class definition should be certified.

D. There are common questions of law and fact

[47] In *WCSC*, the SCC set out the following test for determining the existence of a common issue:

> The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus, an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. [43]

[48] The Class members do not have to be identically situated with respect to the defendants, the common issues do not have to pre-dominate over non-common issues, and the resolution of the common issues does not have to conclusively determine each class member's claim. However,

> The class members' claim must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. [44]

[49] The Beekeepers propose nine common issues, set out at paragraph f(1) to f(9) in the Amended Notice of Motion for Certification. For ease of reference, they are also listed in **Part VI** of this Memorandum.[45]

1. The common issues allow the Court to avoid duplication of fact-finding and legal analysis and are necessary to each Class claim

[50] The first three proposed common issues are necessary elements to the tort of negligence, dealing with duty of care, standard of care and causing recoverable loss. If the Beekeepers cannot prove each of those elements, then the claim in regulatory negligence will fail for each of the Class members. Conversely, if the Beekeepers succeed in proving these essential elements of negligence, each of the Class member's claims in regulatory negligence is materially advanced.

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[43] *WCSC*, **PMR 5:1327**

[44] *WCSC*, **PMR 5:1327**

[45] Part IV: Proposed Common Issues, **PMR 5:1023-5:1024**

[51] The legal issues posed by the first three common questions rest on facts common to each Class member's claim, namely Canada's conduct in maintaining a border closure to U.S. packages notwithstanding its duty pursuant to ss. 12 and 160(1.1) of the *HAR*. Although there is evidence that Canada's agents interacted directly with the Beekeepers and other beekeepers on occasion, the undisputed evidence is that this was consistent with the policy Canada had adopted with respect to all beekeepers in Canada.[46] There is no evidence that any beekeeper received special treatment with respect to the alleged border closure. Accordingly, the first three issues should be certified as common.

[52] The fourth proposed common issue deals with whether a common measure or framework should be used for assessing damages and, if so, what is the appropriate measure or framework. Although damages assessments are typically considered an individual issue, jurisprudence has recognized that some legal questions pertaining to damages may be determined on a common basis. For example, in *Rumley*, the SCC in the context of a case relating to institutional child abuse in a residential school held that the availability of punitive damage may be determined on a common basis where the allegations concern "systemic negligence" rather than individual circumstances.[47]

[53] In *Wilson v Servier Canada Inc.*, the Ontario Superior Court held that

> Punitive damage claims are generally appropriate for treatment as a common issue when ... the claims relate to the conduct of the defendant rather than the individual circumstances of class members.[48]

[54] The allegations and evidence in this case clearly point to "systemic negligence" with a focus on Canada's conduct, rather than on each Class member's individual circumstances. Furthermore, claim and evidence is that Class members suffered a single type of loss – the loss of opportunity to import U.S. packages at market prices, resulting in adoption of more expensive measures to make up for the

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[46] Rajzman Affidavit, **PMR 2:221**

[47] *Rumley v B.C.*, 2001 SCC 69, [2001] 3 SCR 184, **PMR 5:1294-5:1295**

[48] *Wilson v Servier Canada Inc.* (2000), 50 OR (3d) 219, 2000 CanLII 22407, LTA ref'd 2000 CarswellOnt 4399 (Ont Div Ct), LTA ref'd 2001 CarswellOnt 3077 (SCC), **PMR 5:1334**; see also *Chace v Crane Canada Inc.* (1997), 14 CPC (4th) 197, 1997 CanLII 4058 (BCCA), **PMR 5:1169-1170** (punitive damages); *Bunn v Ribcor Holdings Inc.* (1998), 38 CLR (2d) 291, 1998 CarswellOnt 2031, **PMR 5:1147**

loss.[49] Resolving how to quantify the Beekeepers' losses would resolve the issue for all Class members. Accordingly, this is an appropriate common issue.

[55] The fifth proposed common issue is whether the Action arises "otherwise than within a province" within the meaning of s.39(2) of the *Federal Courts Act* such that the six-year limitation period applies.[50] Canada has pleaded that it does not.[51] Resolving the issue requires an assessment of how Canada's conduct in closing the border should be legally characterized. As it rests on common facts, it is amenable to determination as a common issue.

[56] It is true that if this question is determined in the negative, then the provincial limitation period would apply, which would vary with each provincial jurisdiction. Nevertheless, this can only be determined *after* resolving the proposed common issue. Moreover, any issues regarding how the different provincial limitation periods apply may be dealt with through the creation of subclasses under Rule 334.16(3).[52]

[57] The sixth and seventh questions deal with Canada's claimed defences. Canada has pleaded it is entitled to statutory and common law immunity under the *Crown Liability and Proceedings Act* and the Crown prerogative respectively.[53] If either or both defences succeed, this would determine every Class member's claim. If they do not, then every Class member's claim would be materially advanced. As with the issues above, the factual basis on which the question would be determined is common across the Class and therefore these issues should be certified as common.

[58] The eighth and ninth questions deal with whether Canada's acts or omissions constitute abusive administrative action for which it should be liable for damages. Since the underlying facts are the same as those relevant to the claim of regulatory negligence, the same analysis applies. The legal issues rest on common facts of

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[49] ASC, **PMR 5:1348,** 2013 Paradis Affidavit, **PMR 1:17**; Rajzman Affidavit, **PMR 2:221**

[50] *Federal Courts Act*, RSC 1985 c F-7, s 39(2), **PMR 5:1028**

[51] Amended Statement of Defence ("ASD"), **PMR 5:1354**

[52] *FCR*, Rule 334.16(3), **PMR 5:1032-1033**

[53] ASD, **PMR 5:1353**

Canada's border closure after December 31, 2006 that affected all commercial beekeepers in the same way and can be resolved as a common issue.

2. The common issues are a "substantial common ingredient" in each Class member's claim

[59] The common issues form a substantial ingredient in each Class member's claim. Although it is not necessary under Rule 334.16(1)(c), the Beekeepers submit that they also overwhelmingly predominate over the individual issues.

[60] The common issues include Canada's liability on both alleged causes of action and all of Canada's alleged defences. They also include the question of how damages should be determined. Resolution of the common issues in the Beekeepers' favour would determine the legal basis for every Class member's claim and leave only the damages assessment to be resolved. Rule 334.18(a) expressly prohibits this assessment issue as grounds for refusing certification.[54] Moreover, if the Court finds in favour of aggregate damages or establishing a common damages framework, the outstanding individual issues would be largely reduced to an exercise in calculation. Accordingly, the common issues far exceed the individual issues and the "common issue" condition is met.

E. A class proceeding is the preferable procedure for the just and efficient resolution of the common questions

[61] The SCC in *AIC v Fischer* stated that the condition of preferable procedure requires some basis in fact to show that 1) a class proceeding would be a fair, efficient and manageable method of advancing the claim, and 2) it would be preferable to any other reasonably available means of resolving the class members' claims, including avenues of redress other than court actions.[55]

[62] The preferability inquiry must be conducted keeping in mind the three main goals of class action proceedings, namely "judicial economy, behaviour modification and access to justice." However, the question is not whether a class proceeding

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[54] *FCR*, Rule 334.18(a), **PMR 5:1033**

[55] *AIC v Fischer*, **PMR 5:1133**; see also *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2009 ABCA 182, **PMR 5:1305-5:1306**

actually achieves those goals, but rather whether it furthers those goals relative to other forms of proceeding. As the SCC stated, "This is a comparative exercise."[56]

[63] Rule 334.16(2) establishes five mandatory factors for consideration, summarized as follows: 1) whether the common questions predominate; 2) whether a significant number of Class members have a valid interest in controlling their own litigation; 3) whether the claims are or were the subject of other proceedings; 4) the practicality and efficiency of other means of resolving the claim; and 5) whether the administrative burden of a class proceeding is justified.[57]

1. The common questions overwhelmingly predominate

[64] The Action relates to Canada's negligent or abusive acts and omissions after December 31, 2006 and points to Canada's actions prior to that time with respect to commercial beekeepers to establish a duty of care. These acts and omissions related to policies and procedures it adopted with respect to the Class.

[65] For example, Mr. Paradis's evidence shows that Canada's interactions with commercial beekeepers prior to December 31, 2006 took place on an industry-wide level, through CFIA officials' attendance at regular industry group meetings, invitation-only meetings with industry groups, collaboration to develop import protocols and ongoing dialogue with various beekeeping groups.[58]

[66] Although CFIA officials dealt with Mr. Paradis in particular, this was in a representative capacity, when Mr. Paradis was a delegate or executive member of the Honey Council, the president of the Alberta Beekeepers Association ("Alberta Association") or the chair of the Alberta Association's Importation Committee. Thus, representations made of ongoing monitoring and investigation and the opening of the border to U.S. packages after 2006 in the absence of further evidence were made not only to Mr. Paradis personally, but to those he represented. Moreover, they were consistent with Canada's own statements in regulatory impact analysis statements.[59]

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[56] *AIC v Fischer*, **PMR 5:1131-5:1132**

[57] *FCR*, Rule 334.16(2), **PMR 5:1032**

[58] J. Paradis Affidavit January 15, 2016 ("2016 Paradis Affidavit"), **PMR 1:155-1:164**

[59] 2016 Paradis Affidavit, **PMR 1:156-159, 1:161, 1:164;** 2013 Paradis Affidavit, **PMR 1:13-1:14, 1:60, 1:63-1:69**

[67] The evidence also shows that after December 31, 2006, Canada promulgated a national policy to refuse applications for U.S. package import permits, which was widely disseminated and communicated to any beekeepers who inquired. Canada then maintained the policy by deferring its decision-making to the Honey Council, as at least four of its representatives and officers, including Gerry Ritz, the Minister of Agriculture and Agri-Food, informed Mr. Paradis and other commercial beekeepers.[60]

[68] Canada does not dispute that its actions were nation-wide and industry-wide. As it pleaded, it had the right to close the border at all times. As its evidence shows, after December 31, 2006, it closed the border on a national basis by disseminating its policy to beekeepers and their provincial representatives, and was interested in hearing only the majority voice of the Honey Council and CAPA.[61]

[69] Because of the extent of the common factual and legal questions, the individual issues in this case are limited and may be reduced to a calculation exercise. Accordingly, determining the factual and legal issues in a class proceeding would greatly promote judicial economy. This favours certification.

2. The large size of the Class and the number of interested litigants preclude any other proceeding except a class proceeding

[70] The evidence is that the Class consists of an estimated 1,400 beekeepers.[62] It may be inferred that a sizeable number of the Class would be motivated and interested litigants.

[71] As Mr. Paradis deposed, U.S. package imports were historically the "cheapest, most productive (and) most reliable" means of replacing colonies[63] and therefore any commercial beekeepers who must replace significant bees every year would likely be interested in accessing them. There is strong evidence of continuing interest and need to replace bees. Industry statistics show annual provincial losses

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[60] Rajzman Affidavit, **PMR 2:224-2:225, 3:536, 3:543, 3:545-3:546, 3:556**; 2013 Paradis Affidavit, **PMR 1:15, 1:85, 1:87, 1:92, 1:95, 1:98, 1:99, 1:101-102**; Gibeau Affidavit, **PMR 1:150-1:151**;

[61] ASD, **PMR 5:1352-1353;** Rajzman Affidavit, **PMR 2:220-2:221, 2:225, 2:366, 3:536, 3:541, 3:546**; Paradis Transcript, **PMR 4:863**

[62] 2013 Paradis Affidavit, **PMR 1:18, 1:119**; Rajzman Affidavit, **PMR 2:219, 2:351**

[63] 2013 Paradis Affidavit, **PMR 1:12**

ranged from 12% and 44% of colonies on average, and annual national losses varied between 15% and 35% on average.[64] In 2013, the Manitoba Association reported that 74% of its 520 beekeepers, or 384 beekeepers, were in favour of opening the border so they could obtain U.S. packages.[65] Mr. Gibeau estimated that there are approximately 200-300 commercial beekeepers in Ontario who keep more than 50 colonies, although they are vastly outnumbered by hobbyist beekeepers.[66]

[72] There is no evidence of any alternative regulatory mechanism for resolving the Beekeepers' claims for compensatory damages. Although the *HAA* permits claims for compensation by owners of animals, this is only for honeybees ordered destroyed, injured or reserved for experimentation under the *HAA*.[67] That does not apply here.

[73] In the absence of a class proceeding, beekeepers seeking damages for past losses are left with the alternatives of individual litigation, group litigation or a test case. But the numbers are simply too large for individual litigation or group litigation. And while a test case might be helpful in establishing a precedent, each Class claimant would still be required to commence their own action in order to obtain damages, thereby limiting the benefits of judicial economy.

3. Canada persists in its impugned conduct, indicating a need for behaviour modification

[74] As the Ontario Divisional Court held in *Serhan*, sitting as an appellate court, a class proceedings regime is

> Intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.[68]

Where other avenues provide for adequate redress, this can be a factor against certification. Such is not the case here.

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[64] 2013 Paradis Affidavit, **PMR 1:22-1:26**

[65] Rajzman Affidavit, **PMR 3:673**

[66] Gibeau Transcript, **PMR 4:965-4:966**

[67] *HAA*, s. 51, **PMR 5:1038**

[68] *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665, 2006 CanLII 20322 (Ont Div Ct), **PMR 5:1301**

[75] The Action raises important issues concerning Canada's misconduct. As the FCA noted, the facts as pleaded not only supported a claim in the established tort of regulatory negligence, it also justified a claim in a novel tort of abusive administrative action:

> Canada's officials took it upon themselves to create and enforce an unauthorized, scientifically unsupported blanket policy preventing the beekeepers from exercising their legal right to apply for importation permits on a case-by-case basis under section 160 of the *Health of Animals Regulations*, above. This gives rise to a number of grounds for finding unacceptability and indefensibility. As alleged, Canada's conduct has a flavour of maladministration associated with it, something that can prompt an exercise of discretion in favour of monetary relief.[69] [References removed]

[76] Here, not only does Canada defend its past conduct, but it signals it will persist in this course of conduct, supporting a need for behavior modification.

[77] As the evidence shows, Western beekeeping groups have pleaded with the CFIA to re-examine the U.S. package import issue, seek out or consider proffered evidence of manageable risk and work to develop safe protocols, but to no avail.[70] Canada shot down a 2008 proposal from the Alberta Association for a pilot project and arbitration, with CFIA officer Samira Belaouissai informing colleagues "we can't trust them" and advising that the only "impartial 3rd part(y)" available to the Alberta Association was the Supreme Court, but "we won't suggest them this option."[71] As Ms. Belaouissai said, CFIA should work only with the Honey Council and CAPA and run everything through them, despite the Alberta Association's articulated concerns about "deep-seated personal biases" at CAPA and the Honey Council's inability to properly represent commercial beekeepers' interests on imports.[72]

[78] Developments since the commencement of the Action hold out little hope that the issues may be resolved independently or in a different forum. As the evidence

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[69] *Paradis Honey FCA*, **PMR 5:1268**

[70] Rajzman Affidavit, **PMR 3:545-3:546, 3:547, 3:548-3:550, 3:551-3:555, 3:578, 3:673, 3:680-684, 3:685, 3:686-3:693, 3:694-695, 3:696-3:707**

[71] Rajzman Affidavit, **PMR 3:546**

[72] Rajzman Affidavit, **PMR 2:365 and 3:546**; Paradis Transcript, **PMR 4:863**

shows, the parties remain far apart on the same issues that preceded the Action. For example, Canada continues to assert its right to keep the border closed to U.S. packages notwithstanding ss. 12 and 160(1.1) of the *HAR*, which require the issuance of import permits absent knowledge of pest or disease risk. Canada also maintains it will work only with the Honey Council and CAPA despite the acknowledged "divide" in the industry and has made comments suggesting there will be no change until the minority persuades the majority to its viewpoint, which is highly unlikely.[73]

[79] Following the commencement of the Action, Canada did conduct a risk assessment on U.S. packages ("2013 Risk Assessment"), which concluded that the status quo should continue.[74] However, as beekeeper groups such as the Manitoba Beekeepers Association ("Manitoba Association") and Alberta Association informed the CFIA, the evidentiary basis of the 2013 Risk Assessment was highly suspect. As they stated, the evidence relied upon was out of date and incomplete, and much of it was opinion and assumption rather than science.[75] For example, one factor considered as part of the 2013 Risk Assessment was a poll of beekeepers and beekeeper groups, which found that 126 out of 174, or 72% of respondents, were in favour of keeping the border closed.[76] As Grant Hicks, president of the Alberta Association, wrote:

> You point out the fact that the pile of letters against the opening of the border is higher than the pile in favour. This only exacerbates our sorrow over the handling of this issue. This point should be the last thing you would consider when evaluating a scientific, regulatory, trade, and economic growth issue.[77]

[80] By contrast, the Standing Senate Committee on Agriculture and Forestry, after conducting an eight-month inquiry into bee health in which it heard from 85 witnesses including Canadian and international bee experts, recommended Canada open the border to U.S. packages and develop protocols to manage any risk.[78]

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[73] ASD, **PMR 5:1352-1353;** Rajzman Affidavit, **PMR 2:220-2:221, 2:224, 2:225-2:226, 3:556, 3:558**

[74] Rajzman Affidavit, **PMR 2:226, 3:651**

[75] Rajzman Affidavit, **PMR 3:673, 3:686**

[76] Rajzman Affidavit, **PMR 3:741**

[77] Rajzman Affidavit, **PMR 3:694**

[78] 2016 Paradis Affidavit, **PMR 1:166, 1:197-1:198**

4. A class proceeding is not only the most effective means of obtaining behaviour modification, it may be the only means

[81] The FCA held that on the face of the pleadings, the Beekeepers would succeed in obtaining judicial review of Canada's actions:

> My colleague suggests – and I agree – that had the beekeepers attacked Canada's conduct in this case by way of judicial review and had they proven their allegations, they would have succeeded.[79]

[82] However, the FCA held that judicial review would not provide the Beekeepers with the compensation they seek for past losses. Moreover, even if judicial review had been sought earlier, it would not have prevented the alleged losses:

> Might the beekeepers have mitigated almost all of their losses by bringing an application for judicial review seeking to quash the policy as soon as it was enacted? ...Even if that were so and even if they were successful in quashing the policy, quashing alone would not be an adequate remedy. Unaddressed would be the financial loss caused by the policy from the time it was first enforced through to the time the Federal Court, this Court or the Supreme Court quashed it – possibly a period of years.[80]

[83] An individual lawsuit cannot produce the same magnitude of damages as a Class proceeding for obvious reasons. Moreover, as discussed in the next section, the cost of litigation makes individual litigation unlikely. Similarly, a judicial review application generally does not result in damages. Even if it did under the principles articulated by the Federal Court of Appeal in *Paradis Honey* concerning public law damages, such an application must be brought within 30 days of the decision or order being first communicated.[81] This greatly limits the damages available.

[84] The type of remedy available on judicial review is limited in other ways. Firstly, there is no obvious administrative decision to seek judicial review on. A feature of Canada's impugned conduct is that it refused to accept any U.S. package import applications and make any decisions on them at all. So a beekeeper would first have to prove the existence of a decision that can be judicially reviewed.

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[79] *Paradis Honey FCA*, **PMR 5:1268**

[80] *Paradis Honey FCA*, **PMR 5:1268**

[81] *Federal Courts Act*, RSC 1985, c F-7, s 18.1(2), **PMR 5:1025-1026**

[85] Assuming a beekeeper is successful in this endeavour, a beekeeper may only be able to seek judicial review of a decision on its own application. It may not have standing to challenge Canada's action *vis a vis* another beekeeper. Moreover, an application for judicial review may only be available to beekeepers that have applied for an import permit and were specifically denied.

[86] In addition, a judicial review application is subject to a 30-day limitation period. But Canada's impugned conduct relates to a period from December 31, 2006 when it allegedly refused to conduct a risk assessment without the approval of the Honey Council. In 2013, it changed its position and informed beekeepers that a risk assessment of U.S. packages could be obtained under the standard protocol upon payment of a fee of $1,035 to $1,310.[82] It then conducted a risk assessment without the approval of the Honey Council.[83] The facts on which judicial review would be sought may be fundamentally different.

[87] For these reasons, no other proceeding including judicial review provides an adequate avenue for redress, either in damages or in the proper scrutiny of Canada's conduct. Canada's alleged systemic negligence or abuse of its authority would go unaddressed and unchecked. The Beekeepers submit that a class proceeding is not only the best means of furthering the goal of behaviour modification as compared with other alternatives, it is the only viable one.

5. Only a class proceeding provides access to justice for claimants otherwise precluded by the economics of litigation

[88] Case law shows that where the economics of litigation preclude Class members from seeking redress outside of a class proceeding, this weighs in favour of finding a class proceeding is the preferable procedure as a matter of access to justice.

[89] In *Nantais v Telectronics Proprietary (Canada Ltd.)*, the Ontario Divisional Court in granting leave to appeal held that a class proceeding was the preferable procedure where the "stupendous financial burden of a case such as this would consume all or almost all of the proceeds of the judgment of any single plaintiff."[84]

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[82] 2013 Paradis Affidavit, **PMR: 1:103-1:107, 1:108-1:110**

[83] 2013 Paradis Affidavit, **PMR 1:17, 1:111-1:118**

[84] *Nantais v Telectronics Proprietary (Canada Ltd.)* (1995), 25 OR (3d) 331, 1995 CanLII 7113 (ONSC), LTA ref'd [1995] OJ No. 3069 (Ont Div Ct), **PMR 5:1246**

[90] In *Endean v Canadian Red Cross Society*, the Court recognized that complex litigation, such as litigation that requires considerable expert evidence, may justify a class proceeding.[85] In *Harrington v Dow Corning Corp.*, the B.C. Superior Court (affirmed on appeal, with leave to appeal to the SCC denied) held that the existence of numerous claims for relatively small amounts supports a finding that the Condition of preferable procedure is met on the basis of access to justice:

> Greater difficulties would be experienced in administering separate proceedings for modest claims unless those claims were simply not pursued at all, which would defeat the whole purpose of class proceedings.[86]

[91] The same conclusion was reached in *Ormrod v Etobicoke*, where the Ontario Superior Court found a class action was the preferable procedure, since it would prevent approximately 85 claimants for past and future premiums in the low thousands of dollars from having to litigate their claims.[87]

[92] Here, the cost of advancing an individual litigation is extremely high. The defendant, Canada, is a sophisticated and experienced litigant with deep pockets and considerable resources. The issues are complex, some are novel and proof of liability will not be simple or inexpensive. Considering the potentially far-reaching implications of a decision on these issues, it would not be unexpected for the Action to proceed to the Supreme Court, with interveners.

[93] Moreover, trial of the Action will involve considerable expert evidence. For example, the Beekeepers assert that Canada caused their losses because it failed to conduct a proper examination of the risk of importing U.S. packages after December 31, 2006, which examination would have justified opening the border. But Canada may argue that the conditions for opening the border would not have existed in any

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85 *Endean v Canadian Red Cross Society* (1997), 148 DLR (4th) 158 (BCSC), reversed on other grounds (1988), 157 DLR (4th) 465, 1998 CarswellBC 716, leave to appeal allowed [1993] 3 SCR vi (note), **PMR 5:1187**

86 *Harrington v Dow Corning Corp.* (1996), 22 BCLR (3d) 97, 1996 CanLII 3118 (BCSC), aff'd [2000] B.C.J. No. 2237, LTA ref'd [2001] SCCA No. 21, **PMR 5:1196-1197**

87 *Ormrod v Etobicoke (Hydro-Electric Commission)* (2001), 53 OR (3d) 285, 2001 CarswellOnt 614, **PMR 5:1251**

case, and hence the Beekeepers suffered no losses. Refuting this requires proof from bee experts that the risk level would have been manageable. Experts will also likely be required to testify as to how damages should be assessed.

[94] An action in regulatory negligence is frequently high risk. A novel tort implicating public authorities is even higher risk. An individual beekeeper that runs this risk potentially faces a large costs award if unsuccessful. By contrast, the federal class action regime grants costs immunity absent exceptional circumstances, and the FCA has recognized this is for the purpose of providing access to justice.[88]

[95] Here, the Beekeepers seek to recover losses over the years from their inability to access U.S. packages. Their damages are limited by the number of packages they reasonably could have accessed had the border been open. Although the Beekeepers are among the largest commercial beekeepers in their respective provinces, and may have suffered extreme losses in certain years, the individual benefit of damages is unlikely to justify the risk and expense of individual litigation.[89]

[96] Considering the economics of litigation, if a class proceeding is not available, the Class members realistically have no other viable means to seek redress.

6. There are no reasons why the class proceeding would not be the preferable procedure

[97] The remaining mandatory factors under Rule 334.16(2) that have not been addressed above are: whether a significant number of Class members have a valid interest in controlling their own litigation and whether the claims have been the subject of other proceedings. As there is no evidence to invoke either of these factors, the Beekeepers submit they should be given no weight.

[98] Does the fact that some Class members may have preferred or benefited from Canada's impugned conduct mean a class proceeding is not the preferable procedure? The Ontario Court of Appeal in *Markson v MBNA Canada Bank* said no.

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[88] *Campbell v Canada (AG)*, 2012 FCA 45 (CanLII), **PMR 5:1165-1166**

[89] For example, in 2013, Honeybee Enterprises imported 1,274 New Zealand packages at $134 per package when the market price for California packages was $70 each, implying increased costs of 1,274 x ($134-$70) = $81,536. See Gibeau Affidavit, **PMR 1:150**

[99] In *Markson*, the plaintiffs sued the defendant bank for criminally high charges on cash advances on credit cards. The defendants argued that some members of the proposed class were not in favour of the lawsuit, because they actually preferred to pay a criminal interest rate in exchange for having the option to receive cash advances. The motion judge accepted that this was a conflict within the class that supported a finding that a class proceeding was not the preferable procedure. The Ontario Court of Appeal rejected this and described it as "fundamentally inconsistent." Whether the defendant's conduct was attacked in a class proceeding or an individual litigation, the finding of whether there had been a breach warranting a declaration and an injunction would be the same.[90]

[100] The same rationale applies here. Even if some Class members supported the border closure to U.S. packages and benefited financially from it, this does not change the fundamental legal issues concerning Canada's alleged negligence or abusive administrative authority. They would be the same whether advanced in a class proceeding or in individual litigation. Thus, this cannot be a factor in determining preferable procedure.

[101] Furthermore, the Beekeepers submit that here as in the factual scenario of *Markson*, it is against public policy to deny certification because certain Class members may wish to retain the benefits of unlawful conduct.

F. There is a representative plaintiff who satisfies the requirements set out in the *Rules*

[102] Rule 334.16(1)(e) requires a representative plaintiff to 1) fairly and adequately represent the interests of the class, 2) prepare a plan for the proceeding that sets out a workable method of advancing the proceeding, 3) not have a conflict of interest on the common questions of law or fact with the interests of other class members, and 4) provide a summary of any agreements respecting fees and disbursements between the representative plaintiff and the solicitor of record.

[103] Here, the Beekeepers have prepared a wide-ranging 21-page litigation plan ("Litigation Plan") as "Appendix A" to the 2013 Paradis Affidavit.[91] It

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[90] *Markson*, **PMR 5:1232**

[91] 2013 Paradis Affidavit, **PMR 1:121-1:141**

comprehensively deals with the stages of pre-certification, post-certification and post-common questions decision; required steps, timelines, notices, document discovery and oral examinations; interlocutory matters, settlements, expert evidence and more. It includes drafts of forms for various steps, such as the notice of certification, opt-out form and notice of determination of common questions. The Beekeepers submit this satisfies the requirement of a "workable plan" under Rule 334.16(1)(e)(ii).

[104] In addition, jurisprudence recognizes that the Court can certify subject to amendments to the plan to make it workable or Court and counsel can collaborate to modify or improve a plan as needed.[92]

[105] The Beekeepers submit the requirement for a summary of agreements respecting fees is satisfied by Mr. Paradis's evidence that he is ready to file this information in the manner and form desired by the Court.[93] The remaining requirements are dealt with below.

1. The Beekeepers fairly and adequately represent the interests of the Class

[106] In *Hoffman v Monsanto Canada Inc.*, the Saskatchewan Court of Queen's Bench stated the following about a suitable representative plaintiff:

> Their duty is akin to that of a fiduciary. They must have adequate knowledge and ability to instruct counsel and they must act in the interests of the members of the class. They are answerable to the Court for the adequate performance of these obligations.[94]

[107] In *Western Canadian Shopping Centers*, the SCC stated:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to

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[92] *Robinson v Medtronic Inc.*, [2009] OJ No. 4366 (SCJ), 2009 CarswellOnt 6337, affirmed 2010 ONSC 3777 (Ont Div Ct), **PMR 5:1287-1288**; see also *Chippewas of Sarnia Band v Canada (AG)* (1996), 29 OR (3d) 549, 1996 CarswellOnt 2396 (Ont. Gen Div), **PMR 5:1176-1177**; *McLaren v Stratford (City)*, [2005] OJ No. 2288 (SCJ), 2005 CarswellOnt 2353, **PMR 5:1242-1243**

[93] 2013 Paradis Affidavit, **PMR 1:21**

[94] *Hoffman v Monsanto Canada Inc.*, 2005 SKQB 225, 2005 CarswellSask 311 (QB), aff'd 2007 SKCA 47, LTA ref'd 2007 CarswellSask 725 (SCC), **PMR 5:1201**

> bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).

[108] Here, the Beekeepers meet the requirements. They have the knowledge, ability, interest and experience to advance the litigation on behalf of the Class. They have selected as counsel Field Law, a well-established law firm with experience in class litigation. The ability to bear costs is not relevant and should be given no weight because the Federal class action regime provides costs immunity under Rule 334.39. In any case, the Beekeepers are large, established commercial beekeepers.

[109] Moreover, each of the Beekeepers' principals, who have sworn affidavits in support of the Motion, have extensive knowledge of commercial beekeeping, are experienced in representing beekeepers, and have proven themselves to be motivated and competent in advancing the litigation on behalf of the Class members.

[110] Jean Paradis's family has deep roots in commercial beekeeping stretching back to the 1800s. Mr. Paradis founded and then operated Paradis Honey for 36 years, until he sold it to his son and his son's wife in 2010. He remains actively involved as an advisor and employee and continues to keep bees as a hobbyist. He also has a long track record representing beekeepers, including on the importation issue, serving on the Alberta Association's Board of Directors from 1978-1994 including several years as president, chairing the Alberta Association's importation committee for approximately 10 years until 2006, and serving as a delegate to and then executive member of the Honey Council for approximately six years.[95]

[111] John Gibeau founded Honeybee Enterprises, a commercial honey producer and retail seller of bee products, which also runs the Honeybee Centre, a learning centre and visitor attraction. Mr. Gibeau through his corporation has spearheaded education, promotion and charitable initiatives related to beekeeping both locally and internationally. Mr. Gibeau served as president of the British Columbia Honey Producers Association for four years, until approximately eight years ago.[96]

[112] William Lockhart co-founded Rocklake Apiaries in 1978. It is one of the largest commercial honey producers in Manitoba. Like Mr. Paradis, Mr. Lockhart

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[95] 2013 Paradis Affidavit, **PMR 1:9-1:10**

[96] Gibeau Affidavit, **PMR 1:148-1:149**; Gibeau Transcript, **PMR 4:955**

took lead roles in the industry, serving on the Board of Directors of the Manitoba Association for four terms and chairing the Manitoba Honey Marketing Board for two years. Mr. Lockhart is also knowledgeable about U.S. packages, having spent 20 winters in California as a queen bee breeder and bee packaging expert.[97]

[113] The Beekeepers have demonstrated they are willing and able to advance the Action. Mr. Paradis swore two substantial affidavits and attended at a day-long cross-examination on the same. Mr. Gibeau swore an affidavit and travelled from his home in British Columbia to attend a half-day cross-examination. Their responses in each cross-examination were articulate, informed and on point. Mr. Lockhart swore an affidavit stating he would make himself available for cross-examination. However, Canada deemed this unnecessary.

[114] It is not disputed that the Beekeepers' interests are not perfectly aligned with all members of the Class of commercial beekeepers. As Mr. Paradis deposed, commercial beekeepers rely on honeybee importation to varying extents, and some expected to profit from denial of access to U.S. packages.[98] This may affect their stance on whether Canada should have opened the border during the relevant period.

[115] However, jurisprudence establishes that a representative plaintiff does not have to have the "typical experience with other plaintiffs." Rather, as stated by the Ontario Divisional Court on appeal, it is "sufficient that he has no conflict of interest and is shown to be an individual who will fairly and adequately advance the class claims."[99] For the reasons below, the Beekeepers submit that there is no conflict that would bar the Beekeepers from acting as representative plaintiffs. Accordingly, the Beekeepers can provide fair and adequate representation of the Class.

2. The Beekeepers do not have any interests in conflict with other Class members on the common questions of law or fact

[116] As expressed in Rule 334.16(1)(e)(iii) and accepted in *1176560 Ontario Limited* on appeal, the only disqualifying conflict of interest would be a conflict on the common issues. Moreover, a conflict on the common issues does not necessarily

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[97] Lockhart Affidavit, **PMR 1:143**

[98] 2013 Paradis Affidavit, **PMR 1:11**; 2016 Paradis Affidavit, **PMR 1:55-1:56**

[99] *Abdool v Anaheim Management Ltd.* (1995), 121 DLR (4th) 496, 1995 CarswellOnt 129 (Ont Div Ct), **PMR 5:1124**

disqualify a proposed representative plaintiff if the conflict can be dealt with through the creation of a subclass. This is explicitly authorized under Rule 334.16(3).[100]

[117] In this case, there is no evidence of conflict on the common issues. The Action is a claim for damages against Canada for its past negligence or abusive administrative action in unlawfully denying Beekeepers the right to access U.S. packages for a certain period. The Beekeepers' success in establishing Canada's liability for damages does not affect the legal interests of any Class member in any way except with respect to the legitimate purpose of a class proceeding: to enable them to pursue damages and bind them to the result unless they opt out.

[118] The Beekeepers acknowledge not every Class member agrees with the Beekeepers' position that the border should have been open to U.S. packages in the relevant period of the Action. Some even opposed it. Nevertheless, this does not stop a Class member from seeking damages under the Action while holding the opinion that the border should remain closed and lobbying Canada to that effect. Nor does success in the Action impinge on Canada's *lawful* ability to close the border, should it so choose. The Action is not about whether beekeepers can hold political views and promote their self-interest, nor whether Canada can lawfully close its borders to certain imports. Rather it is about whether Canada, in defiance of its own laws, can substitute the self-interest of certain beekeepers for evidence of pest and disease risk in determining whether to grant a permit under ss. 12 and 160(1.1) of the *HAR*.

[119] Finally, if certain Class members do not wish to be part of the Class on principled grounds of not supporting the Action, they are free to express their disapprobation by opting out of the class proceeding. The Beekeepers submit that this is insufficient to ground a disqualifying conflict.

[120] Accordingly, the Beekeepers submit that they satisfy the criteria of Rule 334.16(1)(e) and should be certified as representative plaintiffs.

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[100] *1176560 Ontario Limited v The Great Atlantic & Pacific Company of Canada Limited* (2004), 70 OR (3d) 182, 2004 CarswellOnt 945 (Ont Div Ct), LTA ref'd 2004 CarswellOnt 3045 (Ont CA), **PMR 5:1114-1115**; *FCR*, Rule 334.16(3), **PMR 5:1032-1033**

PART IV: ORDER REQUESTED

[121] The Appellants request an Order for Certification in accordance with the terms set out in the Amended Notice of Motion for Certification, except with the proposed alternative Class definition referenced above.

[122] Pursuant to Rule 334.39 and *Paradis Honey FCA*,[101] no costs are sought in this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Edmonton, Alberta, this 26 Day of October, 2016.

FIELD LLP

P. Jonathan Faulds, LLM, QC
Daniel P. Carroll, LLM, QC
Lily L.H. Nguyen
Counsel for the Plaintiffs

[101] *FCR*, Rule 334.39, **PMR 5:1034**, *Paradis Honey FCA*, **PMR 5:1269**

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PART VI: PROPOSED COMMON ISSUES

Pursuant to paragraph f(1) to f(9) of the Amended Notice of Motion for Certification, the Beekeepers propose that following issues be certified as common issues:

1. Whether any or all of the Defendants owed the proposed Class a duty of care to not be negligent in the maintenance or enforcement of the de facto Prohibition.
2. Whether any or all of the Defendants breached the requisite standard of care;
3. Whether or not recoverable loss or damages ensued as a result;
4. What is the proper measure of damages, including:
    a. Whether or not aggregate damages are available and, if so, on what basis and in what amount;
    b. What are the appropriate criteria for the distribution of the aggregate damages among the members of the proposed Class;
    c. Alternatively, if individual damages are to be awarded, what is the framework or formula for the calculation of such damages;
5. Whether or not the cause of action arises "otherwise than within a province" pursuant to s. 39(2) of the Federal Courts Act, RSC 1985, c F-7, such that the applicable limitation period is 6 years from the time the cause of action arose;
6. Whether ss. 3, 8 or 10 of the Crown Liability and Proceedings Act grant any or all of the Defendants statutory immunity or otherwise limit the Defendants' liability;
7. Whether the Defendants' acts or omissions as alleged in the action fall within Crown sovereignty or the Crown prerogative such that no liability may attach to the Defendants;
8. Whether the Defendants' acts or omissions constitute abusive administrative action for which the Defendants should be liable for damages;

9. If the Defendants' acts or omissions constitute abusive administrative action for which the Defendants should be liable for damages, what is the proper measure of damages, including:

    a. Whether or not aggregate damages are available and, if so, on what basis and in what amount;

    b. What are the appropriate criteria for the distribution of the aggregate damages among the members of the proposed Class;

    c. Alternatively, if individual damages are to be awarded, what is the framework or formula for the calculation of such damages.