Court File No. T-2293-12

FEDERAL COURT
PROPOSED CLASS ACTION

BETWEEN:

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

Plaintiffs
(Respondents)

and

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

Defendants
(Applicants)

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

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PART I - INTRODUCTION

1. In this proposed class proceeding, the Plaintiffs claim the Defendants have breached a duty of care to commercial beekeepers since 2006 by failing or refusing to make any, or good faith, decisions on applications by beekeepers to import packaged honeybees from the United States. The Defendants move to strike this claim because they say (1) their sole duty is to act in the public interest, which precludes any duty to act in the interests of commercial beekeepers, and (2) their impugned conduct constituted policy which is immune from suit.

2. The Defendants' denial of a duty flies in the face of the regulatory scheme set out in the *Health of Animals Act* ("*Act*") and *Health of Animals Regulations* ("*Regulations*"). The Defendants' primary duty in regulating live bee imports is to act to safeguard the economic interests of the beekeeping industry and commercial beekeepers. As the Defendants stated in a regulatory impact analysis statement published with an amendment to the *Regulations*:

> The *Health of Animals Regulations* control the importation of animals into Canada in order to prevent the introduction of diseases **which could have a serious economic impact on Canada's animal agricultural industry**. (Emphasis added.)
>
> *Health of Animals Regulations, amendment*, SOR/92-23 & Regulatory Impact Analysis Statement ("RIAS"), *Canada Gazette Part II*, Vol. 126, No. 1 at 71, Plaintiff's Book of Authorities ("Plaintiffs' Authorities"), TAB1

3. In the case of commercial beekeepers, this duty based in legislation has been augmented by the Defendants' interactions with commercial beekeepers in which the Defendants have made repeated representations and promises to them and the industry to safeguard their economic interests.

4. With respect to the Defendants' policy argument, the Plaintiffs say no policy is involved. The Plaintiffs plead that the Defendants have breached their duty of care by refusing to make decisions on U.S. packaged honeybee import applications after December 31, 2006, when a statutory prohibition on such imports expired. During

the period of the claim, import applications have fallen to be determined under the general administrative scheme for considering and granting import permits of any animal on a case-by-case basis. Such case-by-case determinations, if made, could not be characterized as "core policy" decisions that are immune from action.

5. Moreover the Plaintiffs plead the Defendants abdicated their authority to an improper third party to make decisions based on improper considerations, which negates core policy immunity.

Statement of Claim, para. 28(g)-(h)
Proposed Amended Statement of Claim, para. 28(g)-(i)
Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 SCR 420 at 435-436, Plaintiffs' Authorities, TAB 2

6. For these reasons, it is not plain and obvious that the Defendants do not owe the Plaintiffs a duty of care. The motion to strike should be dismissed.

PART II – STATEMENT OF FACTS

7. In 1987, the Defendants by ministerial order expanded a ban on U.S. honeybee imports imposed on Eastern Canadian provinces across Canada, justifying it as an emergency measure to protect the commercial beekeeping industry from the varroa mite pest. It was acknowledged this would cause economic hardship to certain regions or groups of commercial beekeepers.

Bee Prohibition Order, 1986, amendment, SOR/87-39 & RIAS, *Canada Gazette Part II*, Vol. 121, No. 2 at 314-315, Plaintiffs' Authorities, TAB 3
Honeybee Prohibition Order, 1987, SOR/87-607 & RIAS, *Canada Gazette Part II*, Vol. 121, No. 22 at 3984-3985, Plaintiffs' Authorities, TAB 4
Honeybee Prohibition Order, 1988, SOR/88-54 & RIAS, *Canada Gazette Part II*, Vol. 122, No. 2 at 355-356, Plaintiffs' Authorities, TAB 5

8. The Defendants continued the complete ban on U.S. honeybee imports ("the Bee Prohibition") until 2004 through a series of ministerial orders and regulations,

representing throughout to commercial beekeepers that it was in their long-term economic interests and was justified by the pest situation. The Defendants promised to monitor and update their information to ensure that the ban lasted no longer than necessary, in light of the economic hardship this caused to some commercial beekeepers in the immediate term.

Honeybee Prohibition Order, 1990, SOR/90-69 & RIAS, *Canada Gazette* Part II, Vol. 124, No. 2 at 331-332, Plaintiffs' Authorities, TAB 6

Honeybee Prohibition Regulations, 1991, SOR/92-24 & RIAS, *Canada Gazette Part II*, Vol. 126, No. 1 at 71-74 , Plaintiffs' Authorities, TAB 7

Honeybee Prohibition Regulations, 1993, SOR/94-8 & RIAS, *Canada Gazette Part II*, Vol. 128, No. 1 at 38-39, Plaintiffs' Authorities, TAB 8

Honeybee Importation Prohibition Regulations, 1996, SOR/96-100 & RIAS, *Canada Gazette Part II*, Vol. 130, No. 3 at 680, Plaintiffs' Authorities, TAB 9

Honeybee Importation Prohibition Regulations, 1997, SOR/98-122 & RIAS, *Canada Gazette Part II*, Vol. 132, No. 5 at 726, Plaintiffs' Authorities, TAB 10

Honeybee Importation Prohibition Regulations, 1999, SOR/2000-323 & RIAS, *Canada Gazette Part II*, Vol. 134, No. 18 at 2044, 2046, Plaintiffs' Authorities, TAB 11

Honeybee Importation Prohibition Regulations, 2004, SOR/2004-136 & RIAS, *Canada Gazette part II*, Vol. 138, No. 11 at 794-795, Plaintiffs' Authorities, TAB 12

9. For example, in 2000, when the Defendants extended the Bee Prohibition for longer than the typical one- to two-year period promulgated in previous regulations, it promised to revisit the situation on a yearly basis. As stated:

> A five-year extension is proposed because there is no expectation that any of the above problems will be resolved in a two-year period. **The CFIA will continue to assess the situation with industry on an annual basis and, if necessary, will revise this position.** (Emphasis added.)

Honeybee Importation Prohibition Regulations, 1999, at 2046,
Plaintiffs' Authorities, TAB 11

10. As further explained in the RIAS accompanying the 2004 regulations, the purpose of the annual review was "to ensure that continuing the ban was appropriate."

Honeybee Importation Prohibition Regulations, 2004, at 795,
Plaintiffs' Authorities, TAB 12

11. In 2004, the Defendants partially lifted the Bee Prohibition to allow the importation of honeybee queens from the U.S., recognizing that the economic hardship suffered by groups of commercial beekeepers outweighed the declining risk posed by varroa mite and other pests. The Defendants continued the prohibition on U.S. packaged honeybees ("the Package Prohibition") for a further two years as a precautionary measure.

Honeybee Importation Prohibition Regulations, 2004 & RIAS,
at 794 and 800, Plaintiffs' Authorities, TAB 12

12. On December 31, 2006, the Defendants allowed the Package Prohibition to lapse. Imports of U.S. packaged honeybees became subject to the same administrative scheme that governed U.S. queen bee imports and live animal imports in general, namely ss. 12 and 160 of the *Regulations*. Prior to its amendment on December 14, 2012, s. 160(1.1) of the *Regulations* stated:

> (1.1) Subject to paragraph 37(1)(b) of the Canadian Environmental Assessment Act, the Minister may 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, the introduction into another country from Canada or the spread within Canada, of a vector, disease or toxic substance.

Honeybee Importation Prohibition Regulations, 2004 & RIAS,
at 794, Plaintiffs' Authorities, TAB 12

Regulations, ss. 12 and 160, Defendants' Authorities, TAB 5

13. On December 14, 2012, s. 160(1.1) was amended to remove any discretion on the Minister to refuse a permit if statutory conditions were met. The provision now states:

> ~~Subject to paragraph 37(1)(b) of the Canadian~~ Environmental Assessment Act, the Minister shall 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, the introduction into another country from Canada or the spread within Canada, of a vector, disease or toxic substance.

Regulations Amending and Repealing Certain Canadian Food Inspection Agency Regulations (Miscellaneous Program), SOR/2012-286 & RIAS, *Canada Gazette Part II*, Vol. 147, No. 1, s. 60 (at p. 78), Plaintiffs' Authorities, TAB 13

Health of Animals Regulations, CRC c 296, ss. 12 and 160, Plaintiffs' Authorities, TAB 14

14. The Plaintiffs claim that after December 31, 2006, the Defendants refused to consider or make any decisions concerning applications for U.S. packaged honeybee imports under the *Regulations*, in effect imposing a *de facto* package prohibition ("the *de facto* Prohibition"). Instead, they informed commercial beekeepers that no applications would be considered or granted until a specific faction ("the Faction") of the commercial beekeeping industry approved the Defendants lifting the *de facto* Prohibition by updating their risk assessment regarding the honeybee pest situation.

Statement of Claim, para. 28

Proposed Amended Statement of Claim, para. 28, Appendix A

15. To date, the Faction has consistently refused to provide such approval for reasons of its own including preservation of market share, reduction of cross-border competition, monopoly over the market for packaged honeybees, and higher profits at the expense of other groups of commercial beekeepers.

Proposed Amended Statement of Claim, para. 28(g), Appendix A

16. As a result of the Faction's refusal to approve risk assessment after December 31, 2006, the Defendants have maintained the *de facto* Prohibition until the present day. As a result the Plaintiffs, who would otherwise have replenished their colonies by importing packaged honeybees from the U.S., have been forced to turn to more expensive means of replenishing colonies.

Statement of Claim, paras. 29-30

Proposed Amended Statement of Claim, paras. 29-30, Appendix A

PART III – POINTS IN ISSUE

17. In response to para. 15 of the Defendants' Written Representations, the Plaintiffs do not allege a standalone ground of "acting without lawful authority." The Plaintiffs say the fact that the Defendants acted without or exceeded their lawful authority is a fact going to the claim of negligence.

18. Thus, the following points are in issue:

a. What is the test for a motion to strike on the basis that the claim discloses no reasonable cause of action under Rule 221(1)(a)?

b. Is the Plaintiffs' claim in negligence bound to fail because it is plain and obvious that the Defendants do not owe a duty of care to the Plaintiffs?

c. Should costs be awarded to the successful party?

PART IV – SUBMISSIONS

A. Test on a Motion to Strike under Rule 221(1)(a)

19. The Plaintiffs agree with the Defendants' statement of the test to strike pleadings as far as it goes. However, it is incomplete.

Defendants' Written Representations, para. 21

20. The striking of pleadings is considered a "draconian measure." As such, the test for granting a motion to strike is widely recognized as imposing a heavy or "stringent" burden on the moving party.

Odhavji Estate v. Woodhouse, 2003 SCC 9 at para. 15,
Defendants' Authorities, TAB 10

Apotex Inc. v. Syntex Pharmaceuticals Int. Ltd., 2005 FC 1310 at para. 33,
affirmed 2006 FCA 60, Plaintiffs' Authorities, TAB 15

21. As stated by the Supreme Court and the Federal Court, affirmed on appeal, a Court should grant a motion to strike pleadings only if it is satisfied "beyond doubt" that the Statement of Claim contains some "radical defect" such that it is "certain to fail" and "clearly futile."

Odhavji at para. 15, Defendants' Authorities, TAB 10

Apotex Inc. at para. 33, Plaintiffs' Authorities, TAB 15

22. Where a Court determines to strike a pleading, it must decide whether the pleading to be struck may be cured by granting leave to the responding party to amend the pleadings. Only where the Court is satisfied that the defect is one that cannot be cured by amendment should the Court strike the pleading without leave to amend.

Simon v. Canada, 2011 FCA 6 at para. 14, Plaintiffs' Authorities, TAB 16

Collins v. Canada, 2011 FCA 140 at para. 26,
Plaintiffs' Authorities, TAB 17

23. In *Gagne v. Canada*, this Court on appeal of a decision of a prothonotary suggested that a respondent seeking to defend against a motion to strike on the basis that an amendment would cure the defect should submit an amended draft statement of claim in support of the response.

Gagné v. Canada, 2013 FC 331 at para. 27, Plaintiffs' Authorities, TAB 18

24. Case law suggests that in assessing a motion to strike, a Court may consider the motion "as if the statement of claim had been amended."

Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency, 2013 BCCA 34 at para. 11, Defendants' Authorities, TAB 22

25. In response to any of the Defendants' concerns that the Statement of Claim does not disclose sufficient particulars, the Plaintiffs have prepared a draft amended Statement of Claim to reflect the fuller particulars provided in the affidavit of Jean Paradis in support of the Plaintiffs' Notice of Certification Motion, which was served on the Defendants and received by the Federal Court on September 25, 2013, prior to the Defendants' Notice of Motion to Strike ("Motion") served November 8, 2013. The proposed amended statement of claim is attached at **Appendix A.**

Proposed Amended Statement of Claim, Appendix A

26. Accordingly, the Plaintiffs' Statement of Claim should be struck in its entirety only if, assuming all the facts in the Statement of Claim to be true, the Court is satisfied beyond doubt that the Plaintiffs' claim is a) certain to fail, and b) cannot be remedied by leave to amend the Statement of Claim as proposed by the Plaintiffs.

B. Is it plain and obvious that the Defendants do not owe a duty of care to the Plaintiffs?

27. The Plaintiffs understand the Defendants' motion to strike the Plaintiffs' claim in negligence as being advanced on the sole ground that it is plain and obvious that

the Plaintiffs cannot establish that the Defendants owe them a duty of care to ground a claim of Crown negligence.

Defendants' Written Representations, para. 26

28. The test to determine whether the Crown owes a duty of care to a party or parties on a motion to strike is set out by the Supreme Court in *Knight v. Imperial Tobacco*, applying the test set out in *Cooper v. Hobart*. The test assumes all facts pleaded to be true. The test then asks, at the first stage, whether there is a relationship of proximity such that failure to take reasonable care might foreseeably cause loss or harm to the plaintiffs, in which case a *prima facie* duty of care is established. If the answer is yes, the test turns to the second stage, which asks whether this *prima facie* duty of care is negated by policy considerations. If the answer at the second stage is no, the Defendants owe the Plaintiffs a duty of care.

Knight v. Imperial Tobacco, 2011 SCC 42 at paras. 38-39,
Defendants' Authorities, TAB 1

~~*Cooper v. Hobart*, 2001 SCC 79 at paras. 30-31,~~
Defendants' Authorities, TAB 16

29. The Supreme Court in *Imperial Tobacco* also recognized that where the parties' relationship falls into a settled category of relationship recognized by prior jurisprudence, then a *prima facie* duty of care can be presumed, without embarking on Stage 1 of the analysis.

Imperial Tobacco at para. 37, Defendants' Authorities, TAB 1

30. While there are cases that find a duty of care on the basis of a relationship similar to that alleged in this case, the case law is diverse and it is doubtful that the alleged relationship in this case falls within a "settled" category either establishing or negating a duty of care. The existence of a duty of care should be determined on a trial of the merits.

31. For the purpose of this Motion only, the Defendants have conceded that the harm to the Plaintiffs was reasonably foreseeable. Thus, the focus of the Plaintiffs' submission is on the remaining questions of 1) whether the facts as pleaded disclose a relationship of proximity; and 2) if so, whether there are policy reasons to negate the *prima facie* duty of care.

Defendants' Written Representations, para. 42

1. Were the parties in a relationship of proximity?

i. The test

32. As the Supreme Court explained in *Cooper v. Hobart*, the requirement of "proximity" refers to the question of whether the parties are in a sufficiently "close and direct" relationship such that a duty of care should be recognized. This relationship may be based, among other things, on "expectations, representations, reliance and the property or other interests involved."

Cooper v. Hobart, 2001 SCC 79 at paras. 32, 34,
Defendants' Authorities, TAB 16

33. In *Imperial Tobacco*, the Supreme Court described three types of scenarios in which proximity could be established to ground a Crown regulator's private law duty of care to a party or parties. These are:

a. where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme alone;

b. where the duty of care is alleged to arise from a series of specific interactions between the claimant and the government and is not negated by statute; and

c. where the duty of care is based on a combination of the government's statutory duties and the interactions between the parties.

Imperial Tobacco at paras. 43-46, Defendants' Authorities, TAB 1

34. In this case, the Plaintiffs submit that the Defendants' *prima facie* duty of care is apparent from the statutory scheme alone, or based on a combination of the government's statutory duties and the interactions between the parties.

35. The statutory scheme in question is that set out in, or inferred from, the *Act*, *Regulations* and related regulations. It is common ground between the parties that the *Act* and *Regulations* authorize the Defendants to regulate the importation of U.S. packaged honeybees, including enacting prohibitions for set time periods under s. 14 of the *Act* and granting import permits under ss. 12 and 160 of the *Regulations*. The question is: For what purpose are the Defendants to thus regulate?

Defendants' Written Representations, paras. 57, 61-62

36. The Supreme Court has established that the modern, purposive approach governs statutory interpretation. This approach requires courts to interpret the words of legislation "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42, [2002] 2 SCR 559 at 580, Plaintiffs' Authorities, TAB 19

37. As stated by the Supreme Court, the Court may have regard not only to purpose statements set out in the legislative enactment itself or any related enactments, but also non-legislative statements of purpose or comments from the body that drafted the legislation, as well as "administrative policy and interpretation."

Medovarski v. Canada (Minister of Citizenship and Immigration), 2005 SCC 51, [2005] 2 SCR 539 at 547, Plaintiffs' Authorities, TAB 20

Nowegijick v. R., [1983] 1 SCR 29 at 37, Plaintiffs' Authorities, TAB 21

38. The Federal Court of Appeal has recognized that a regulatory impact analysis statement ("RIAS") is an indicator of legislative intent.

Bayer Inc. v. Canada (Attorney General), 166 FTR 160 (Fed. CA), 1999 CanLII 8099 at para. 7, Plaintiffs' Authorities, TAB 22

ii. Duty of care arises under the legislative scheme

39. In this case, an RIAS published concurrently with the Defendants' amendment of the *Regulations*, earlier cited at paragraph 2, clearly states that the purpose of the importation provisions of the *Act* and *Regulations* is the protection of the economic interests of industry.

Health of Animals Regulations, amendment & RIAS, *Canada Gazette Part II*, Vol. 126, No. 1 at 71, Plaintiffs' Authorities, TAB 1

40. Furthermore, the RIASs and other statements published concurrently with the Defendants' various orders and regulations regarding honeybee imports also establish that the Defendants acted primarily with the interests of commercial beekeepers and the industry in mind.

41. This is apparent in the RIAS accompanying the Defendants' enactment in 1986 of a one-year regulatory prohibition on U.S. honeybee imports into Eastern Canadian provinces. The RIAS recognizes the sacrifices of some beekeepers, but justifies the action on the basis of the good of the long-term interests of the industry. The RIAS also notes efforts to consult broadly with industry stakeholders. There is no mention of the interests of the general public. As stated:

> All eastern and western beekeepers should be aware of the Order and are given every opportunity to comment on the extension of the entry of U.S. bees into Eastern Canada but the survival of the whole industry is at stake…
>
> For the beekeepers who do not overwinter bees and destroy their bees in the fall the Order may be unpopular because they could desire to obtain bees from the U.S.A.…

> A special meeting of the Canadian Honey Council, Canadian Association of Professional Apiculturists and the various Beekeepers' Associations was held in Winnipeg in September 1986. All of the above organizations indicated support for the Order.

Bee Prohibition Order, 1986, amendment, at 314-315, Plaintiffs' Authorities, TAB 3

42. The preoccupation with commercial beekeepers and the industry is once again apparent in an RIAS published with the Defendants' expansion of the regulatory prohibition to Western Canada. As stated:

> The Order is necessary due to the diagnosis of the mite *Varroa jacobsoni* in Wisconsin and Florida. This mite would have disastrous effects on Canada's beekeeping industry …
>
> The Order is consistent with the Regulatory Policy and Citizens' Code since:
>
> 1. It is the result of full consultation with the Canadian Honey Council and other representative groups of the industry.
> 2. The various provincial government authorities have been consulted.
>
> Although it stops the importation of honeybees until December 31, 1987, in reality, few if any bees are required at this time of year, and the impact on the industry will be minimal…
>
> Consultation with the industry has gone on for two years … Consultation at this time supports the Order.

Honeybee Prohibition Order, 1987 & RIAS, at 3984-3985, Plaintiffs' Authorities, TAB 4

43. The Defendants continued the Bee Prohibition for several years through a series of orders and regulations, each lasting for a specific period. In the RIASs accompanying these orders and regulations, it is apparent that the Defendants held

the interests of commercial beekeepers and the industry paramount, with little thought for the public at large.

Honeybee Prohibition Order, 1988, & RIAS, at 355-356,
Plaintiffs' Authorities, TAB 5
Honeybee Prohibition Order, 1990, & RIAS, at 331-332,
Plaintiffs' Authorities, TAB 6
Honeybee Prohibition Regulations, 1991, & RIAS, at 71-74 ,
Plaintiffs' Authorities, TAB 7

44. In addition, the Defendants in RIASs repeatedly recognize that the purpose of *Act* and *Regulations* with respect to animal importation is to prevent the introduction of diseases which could "seriously affect," or have a "serious effect" or "significant economic effect" on Canada's agricultural industry.

Honeybee Prohibition Regulations, 1993 & RIAS, at 39,
Plaintiffs' Authorities, TAB 8
Honeybee Importation Prohibition Regulations, 1996 & RIAS, at 680,
Plaintiffs' Authorities, TAB 9
Honeybee Importation Prohibition Regulations, 1997, & RIAS, at 726,
Plaintiffs' Authorities, TAB 10
Honeybee Importation Prohibition Regulations, 1999 & RIAS, at 2044,
Plaintiffs' Authorities, TAB 11
Honeybee Importation Prohibition Regulations, 2004, & RIAS, at 794-801,
Plaintiffs' Authorities, TAB 12

45. The Defendants' objective to protect the commercial beekeepers and the industry is apparent from the RIAS accompanying the *Honeybee Importation Prohibition Regulations, 2004*, pursuant to which the Package Prohibition expired on December 31, 2006. In this document, the Defendants embarked on an 8-page analysis of how its latest regulatory measure would affect the interests of commercial beekeepers and the industry, and outlined the struggles of commercial beekeepers, alternatives to the regulatory measure, costs and benefits to specific regions and groups of

commercial beekeepers, and consultation initiatives with stakeholders in the industry. The Defendants' concern for "the public at large" is limited to a single mention on p. 796.

Honeybee Importation Prohibition Regulations, 2004, & RIAS at 794-801,
Plaintiffs' Authorities, TAB 12

46. The Defendants' purpose in regulating U.S. honeybee imports to protect commercial beekeepers is consistent with the overall purpose of the *Act* and *Regulations*, which is repeatedly stated to include control and prevention of disease in animals that could have serious economic impact on industry.

Health of Animals Regulations, amendment & RIAS at 71,
Plaintiffs' Authorities, TAB 1

Regulations Amending the Health of Animals Regulations, SOR/2001-210
& RIAS, *Canada Gazette Part II*, Vol. 135, No. 13, p. 1185-1186,
Plaintiffs' Authorities, TAB 23

Regulations Amending the Health of Animals Regulations, SOR/98-409 &
RIAS, *Canada Gazette Part II*, Vol. 132, No. 17 at 2348,
Plaintiffs' Authorities, TAB 24

47. From this it is clear that the purpose of the statutory scheme with respect to honeybee importation was not to promote the interests of the public at large, but rather to protect the survival and economic well-being of the commercial beekeeping industry.

iii. Duty of care arises from Defendants' conduct

48. In addition to the relationship arising from the statutory scheme, there were also numerous interactions between the parties that point to a "close and direct" relationship of proximity.

49. As is apparent from the RIASs and the Plaintiffs' pleadings, the Defendants co-operated and consulted with commercial beekeepers on an ongoing basis prior to December 31, 2006 to craft and justify their honeybee import policy.

Statement of Claim, para. 26(f)
Proposed Amended Statement of Claim, para. 26(f)

50. After December 31, 2006, the Defendants continued to maintain a close and direct relationship with commercial beekeepers that went well beyond their relationship to the general public. This relationship went so far as the Defendants delegating or submitting its authority to certain factions of commercial beekeepers, allowing them to dictate the operation of the importation scheme with respect to U.S. honeybee packages. Indeed this close relationship with a faction of the industry is an element of both the duty and the breach alleged by the Plaintiffs.

Statement of Claim, paras. 26 and 28(g)
Proposed Amended Statement of Claim, paras. 26 and 28(g)

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iv. Duty of care is supported by precedent

51. In *Adams v. Borrel*, the New Brunswick Court of Appeal held that the federal Crown owed a *prima facie* duty of care to New Brunswick potato farmers not to negligently mishandle a potato virus on the basis of the statutory scheme set out in the *Plant Protection Act* alone. The Court noted that the Crown's statutory obligation to the potato farmers was clear from the stated purpose of the *Plant Protection Act* "to protect plant life and the agricultural … [sector] of the Canadian economy by preventing … the spread of pests."

Adams v. Borrel, 2008 NBCA 62 at paras. 43-44,
Defendants' Authorities, TAB 24

52. In this case the RIASs provide an equivalent indication of the legislative intent sufficient to ground a duty of care to the Plaintiffs.

53. In *Sauer v. Canada*, the Ontario Court of Appeal held on a motion to strike that the federal Crown owed a *prima facie* duty of care to Ontario cattle farmers to regulate cattle feed in their interests, on the basis of the Crown's regulatory authority over the cattle farmers, combined with public representations that it would protect their economic interests. The cattle farmers had sued the Crown for negligence in allowing the continued inclusion of ruminant meat and bone meal ("RMBM") in cattle feed in a 1990 regulation, and not prohibiting RMBM in cattle feed until the passing of a 1997 regulation. They claimed damages for economic loss arising from the closure of the U.S.-Canada border to cattle exports after the feed contaminant caused mad cow disease in an Alberta cow. If anything, the statutory intent, representations by and conduct of the Crown in this case provide a stronger basis for the finding of a duty than existed in *Sauer*.

Sauer v. Canada, 2007 ONCA 454 at paras. 56-62, leave to appeal denied 2008 CanLII 36470 (SCC), Defendants' Authorities, TAB 25

54. In *Imperial Tobacco*, the Supreme Court held that the federal Crown owed a *prima facie* duty of care to tobacco companies not to negligently misrepresent the properties of low-tar cigarettes. The duty arose from the statutory scheme through which the Crown regulated the tobacco companies, in combination with the Crown's "programme of cooperation with and support for tobacco growers and cigarette manufacturers" that included advice and directions to the tobacco companies respecting low-tar products.

Imperial Tobacco at paras. 52-54, Defendants' Authorities, TAB 1

55. In *Fullowka v. Pinkerton's of Canada Ltd.*, the families of deceased miners sued the Crown for the alleged negligence of its mine inspectors who had allowed a mine to remain open during a strike. One of the strikers entered the mine and planted a bomb that killed nine miners. The Supreme Court of Canada held that the government regulator owed a *prima facie* duty of care to mine workers with respect to its inspection and decision to allow the mine to remain open. That duty arose from the inspectors' statutory duties, physical presence in the mine, identification

of serious risks to mine workers, and knowledge of the ineffective steps taken by management to prevent violent acts. A similar combination of factors, albeit in a less dangerous setting, is found in this case.

Fullowka v. Pinkerton's of Canada Ltd., 2010 SCC 5 at paras. 1-2, 55,
Plaintiffs' Authorities, TAB 25

56. The Defendants argue that the Ontario Court of Appeal in *Taylor v. Canada* "appears to have retreated" from *Sauer*.

Defendants' Written Representations, para. 87

57. However, in *Taylor*, the Ontario Court of Appeal did not overrule *Sauer*. Instead, it merely clarified that it does not accept a broad proposition that the Crown's duty of care can be based "entirely on a regulator's public acknowledgment of its public duties to those affected by its actions." As the Court expressly noted, however, those representations may form part of the "factual matrix" and it made no finding as to "the ultimate sufficiency of the pleadings in *Sauer*."

Taylor v. Canada (Attorney General), 2012 ONCA 479 at paras. 94-97,
Defendants' Authorities, TAB 32

58. The Defendants suggest that their relationship with the Plaintiffs was more akin to the relationship between the parties in the cases of *Berg v. Saskatchewan*, *River Valley Poultry* and *Los Angeles Salad Company*, cases in which no Crown duty of care was found.

Defendants' Written Representations, paras. 31-36; 40, 70-80

59. In *Berg*, elk farmers sued the provincial regulator for damages for negligence in detecting infection in a herd of elk on inspection, resulting in the refusal of permits to import certain herds of elk.

Berg v. Saskatchewan, 2003 SKQB 456, para. 72,
Defendants' Authorities, TAB 19

60. In *River Valley Poultry*, a poultry farm sued the federal regulator for damages for negligence in failing to detect salmonella in its poultry flock earlier, leading to losses when its flock was destroyed.

River Valley Poultry Farm Ltd. v. Canada (Attorney General), 2009 ONCA 326, para. 2, leave to appeal denied 2009 CanLII 61385 (SCC), Defendants' Authorities, TAB 21

61. In *Los Angeles Salad Company*, a number of carrot exporters sued the federal regulator for damages for negligence in inspecting its carrots and erroneously finding Shigella bacteria, leading to destruction of the plaintiffs' carrot inventory.

Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency et al, 2013 BCCA 34, para. 2, leave to appeal denied 2013 CanLII 51857 (SCC), Defendants' Authorities, TAB 22

62. *Berg*, *River Valley Poultry* and *Los Angeles Salad Company* are all negligent inspection cases, which involve substantially different considerations from the present claim.

63. In each case the Court found that the regulator in carrying out inspection duties had an overarching duty, which conflicted with any duty to protect the economic interests of the subject of the inspection. In *Berg*, this duty was to protect wildlife and other species at risk to address environmental concerns in the interests of "all residents of the province." In *River Valley Poultry*, this duty was "to the public as a whole" "to protect the health of people and animals." In *Los Angeles Salad Company*, this duty was "to protect the health of Canadians by preventing the sale of contaminated food in Canada."

Berg, para. 76, Defendants' Authorities, TAB 19
River Valley Poultry, para. 67, Defendants' Authorities, TAB 21
Los Angeles Salad Company, para. 55, Defendants' Authorities, TAB 22

64. By contrast, in this case, the stated purpose of the statutory scheme, which was reinforced by interactions between the parties, establishes that the Defendants' primary duty in regulating honeybee imports was the protection of commercial beekeepers' interests, excepting only where they were superseded by the interests of the commercial beekeeping industry as a whole. Any interest of the public in factors relating to bees are secondary in nature.

65. In *Berg* and *River Valley Poultry*, the Court also found that the alleged duty of care to the elk or poultry farmers was negated by express statutory provisions set out in the applicable statute. In *Berg*, the statutory immunity provision immunized the Crown for acts done in good faith, and the pleadings did not disclose any allegations of acting other than in good faith. In *River Valley Poultry*, the Crown's duty of care was negated both by a statutory immunity provision immunizing the Crown when carrying out its statutory duties, such as inspections, as well as a statutory compensation scheme for losses suffered as a result of inspection. By contrast in this case, there is no statutory immunity provision that immunizes the Defendants from refusing or failing to implement their own statutory scheme, or acting for improper purposes outside of the statutory scheme.

Berg, para. 75-77, Defendants' Authorities, TAB 19
River Valley Poultry, paras. 67-79, Defendants' Authorities, TAB 21

66. Even if it were found that the *Act* and *Regulations* impose a general duty to act in the public interest, this would not conflict with the Defendants' specific duty to regulate honeybee imports in the interests of commercial beekeepers and the industry. There is no public interest that could be harmed by imposing a duty of care on the Defendants to implement their own statutory scheme of determining whether to grant import permits in accordance with disease risk and not for some extraneous, improper purpose.

67. Accordingly, it is not plain and obvious that the Defendants did not owe the Plaintiffs a *prima facie* duty of care.

2. Is the *prima facie* duty of care negated by policy considerations?

68. The second stage of the test for a Crown duty of care, namely whether a *prima facie* duty of care should be negated for policy considerations, is concerned with matters beyond the relationship of the parties. This stage is concerned with "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally."

Cooper v. Hobart, para. 37, Defendants' Authorities, TAB 16

69. As the Supreme Court noted, one of the primary concerns at this stage is whether the duty of care sought to be imposed would result in the government being liable for a policy decision, which is generally immune.

Cooper v. Hobart, para. 38, Defendants' Authorities, TAB 16

70. The "policy/operational" distinction was explained by the Supreme Court in *Imperial Tobacco*. The immunity for policy decisions recognizes that the Crown "must be free to govern" without becoming subject to tort liability. By contrast, an "operational" decision, or execution of policy, does not attract the same concern. However, to attract immunity, the policy decision must be "neither irrational nor taken in bad faith."

Imperial Tobacco at paras. 74, 76, Defendants' Authorities, TAB 1

71. In *Brown v. British Columbia*, the Supreme Court explained the difference between a "true policy" decision, and an operational decision as follows:

> True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
>
> The operational area is concerned with the practical implementation of the formulated policies, it mainly covers

> the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.
>
> *Brown v. British Columbia*, at 441, Plaintiffs' Authorities, TAB 2

72. However, as recognized in *Imperial Tobacco* and *Brown*, there is one type of policy decision that is not immune from liability. That is where the exercise of policy powers cannot be said to have been carried out in good faith, but rather for an improper or irrational purpose.

73. The requirement for good faith to immunize a policy decision, regardless of the degree of discretion authorized, is well-established in law. As stated in *Roncarelli v. Duplessis*,

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. ... "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.
>
> *Roncarelli v. Duplessis*, [1959] SCR 121 at 140, Plaintiffs' Authorities, TAB 26

74. In *Brown v. British Columbia*, the Supreme Court elaborated on this principle, quoting Wilson J.'s words in *City of Kamloops v. Nielsen* with approval:

> In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been

> considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.
>
> *Brown v. British Columbia*, at 436, Plaintiffs' Authorities, TAB 2

75. In this case, the applicable statutory scheme after December 31, 2006, required execution or operation of policy, not making of policy.

76. As stated by the Supreme Court in *Brown v. British Columbia* and *Imperial Tobacco*, a "true" or "core" policy decision for which the government may claim immunity requires "a course or principle of action" that is "based on a balancing of economic, social and political considerations."

Imperial Tobacco at para. 90, Defendants' Authorities, TAB 1

77. It is arguable that prior to December 31, 2006, the Minister engaged in policy decision making in enacting the series of orders and regulations that resulted in the Bee Prohibition and Package Prohibition. In doing so, the Minister had to engage in a balancing of economic, social and political considerations of specific beekeeper groups in relation to the commercial beekeeping industry as a whole, expressed through a formal legislative instrument.

78. However, on December 31, 2006, the Package Prohibition lapsed. Thereafter, the Defendants purported to regulate bee imports under the general provisions of ss. 12 and 160 of the *Act*. These provide for receiving and assessing applications for import permits from individual commercial beekeepers on a case by case basis.

79. Under the statutory scheme, the Minister was authorized or required to grant import permits for U.S. packaged honeybees if he was satisfied that the statutory conditions set out in s. 160(1.1) were met, namely that granting an import permit would not pose undue risk of introducing or spreading a "vector, disease or toxic substance" into Canada. The administrative scheme did not contemplate any "balancing of economic, social and political considerations" at any time between December 31, 2006 and the present day.

Regulations, ss. 12(1) and 160, Plaintiffs' Authorities, TAB 14
Regulations, ss. 12(1) and 160, Defendants' Authorities, TAB 5

80. The Defendants appear to argue that such decisions were policy decisions because, at least prior to a regulatory amendment effective December 14, 2012, they involved the use of discretion, as demonstrated by the presence of the word "may" in s. 160(1.1).

Defendants' Written Representations, paras. 62-64

81. However, in *Imperial Tobacco*, the Supreme Court expressly stated that discretionary decision making is not the same thing as policy making. As the Court recognized, many operational decisions involve the exercise of discretion, but this by itself does not qualify them as core policy. Immunizing all of them "casts the net of immunity too broadly."

Imperial Tobacco, paras. 84, 88, Defendants' Authorities, TAB 1

82. Secondly, to the extent that any of the Defendants' actions after December 31, 2006 may be characterized as *ad hoc* policy-making, the Plaintiffs plead that the Defendants exercised their powers for an improper purpose by allowing improper third parties to dictate the availability of U.S. packaged honeybees for their own purposes, which were outside of the statutory scheme.

Statement of Claim, para. 28(g) to (h)
Proposed Amended Statement of Claim, para. 28(g) to (i)

83. In *Sauer*, the Ontario Court of Appeal on a strike motion held that policy considerations did not negate a *prima facie* duty of care owed by the federal regulator to cattle farmers to regulate cattle feed. This was because even accepting the Crown's argument that Sauer sought to attack the Crown for policymaking in deciding to regulate or not to regulate in a certain way, the plaintiffs had pleaded the Crown's regulatory decisions were not made in good faith. The same principle applies here.

Sauer at paras. 63-64, Defendants' Authorities, TAB 25

84. The Defendants argue that the facts pleaded here are analogous to *Berg*, in which the policy nature of the Crown's decision to ban elk imports from certain areas negated any *prima facie* duty of care. The Plaintiffs submit the nature of the decision in *Berg* is not the same as the case-by-case application of the routine statutory test in issue here.

Defendants' Written Representations, paras. 104-105

85. In addition the Court noted in *Berg* that the decision to ban the importation of elk from certain areas "cannot be characterized as anything but being in good faith, taken to accomplish the goals of the Act." This is distinguishable from cases, as here, in which lack of good faith is alleged.

Berg at para. 77, Defendants' Authorities, TAB 19

86. Accordingly, the Defendants' conduct is not immune on the basis of the policy/operational distinction, since it was neither a policy decision nor, if it was policy making, a good-faith exercise of the Defendants' discretion.

87. In addition to the requirement to consider the policy/operational distinction, the Supreme Court established in *Cooper v. Hobart* that other policy considerations may apply to negate the duty of care.

Cooper v. Hobart, paras. 52-55, Defendants' Authorities, TAB 16

88. In *Fullowka*, the Supreme Court stressed that such policy considerations must be "compelling," with "a real potential for negative consequences of imposing the duty of care."

Fullowka at para. 57-58, Plaintiffs' Authorities, TAB 25

89. The *Fullowka* Court further held that a *prima facie* duty of care is not negated by a regulator's general duty to regulate in the public interest, nor by a merely

speculative or potential conflict, nor by the fact that the duty of regulation always carries with it some weighing and balancing of competing interests. As it stated:

> The Court of Appeal asserted that imposing a duty to carry out their public duties with reasonable care "might cause [the regulators] to over-regulate or under-regulate in an abundance of caution". This, in my view, is speculative and falls far short of showing that there is a "real potential" for negative policy consequences arising from conflicting duties. Moreover, any tension between the broader public interest with the immediate demands of safety may be taken into account in formulating the appropriate standard of care.
>
> *Fullowka* at paras. 72-73, Plaintiffs' Authorities, TAB 25

90. As noted at paras. 63 to 65 above, the duty of care alleged here does not conflict with any other overarching duty. The Defendants' primary duty here was to regulate in the interests of commercial beekeepers and the industry. Any duty to the public was clearly secondary and in any event does not involve competing considerations.

91. Furthermore, the duty of care sought to be imposed here to individual commercial beekeepers would not conflict with the Defendants' duty to the industry as a whole to prevent animal disease. The Plaintiffs do not challenge the Defendants' authority to make decisions under s. 160(1.1) of the *Regulations* on the basis of risk of animal disease. Rather, the Plaintiffs challenge the Defendants' failure or refusal to make such decisions.

92. With respect to the final policy consideration, no spectre of indeterminate liability arises from finding the Defendants owed a duty of care to the parties in whose interests they regulated, as established by the statutory scheme, or to whom they specifically assumed a duty by various interactions and representations. Those parties would clearly be limited to commercial beekeepers only. The risk of a duty to the public at large does not arise.

93. The situation is akin to that in *Adams v. Borrel*, in which the New Brunswick Court of Appeal held that recognizing a duty of care owed by the regulator to the

Plaintiff potato farmers, whose interests the *Plant Protection Act* was intended to protect, did not raise the spectre of indeterminate liability:

> In any event, it should not be forgotten that we are dealing with a limited class of potential plaintiffs: potato farmers... Thus, as the duty at issue relates to the farmers and not to the public at large, any analogy with the facts in *Cooper v. Hobart* would be entirely misplaced.
>
> *Adams v. Borrel*, para. 45, Defendants' Authorities, TAB 24

94. The Supreme Court in *Fullowka* explained that the principle of indeterminate liability is closely related to the question of proximity. The question is whether there are "sufficient special factors" in the alleged relationship to give rise to a duty, such that recognizing a duty of care in that relationship would not result in "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

Fullowka, para. 70, Plaintiffs' Authorities, TAB 25

95. In this case, those special factors include the individual, case-by-case nature of the current import scheme, the Defendants' specific representations of its regulation in the economic interests of the Plaintiff beekeepers, and the Defendants' ongoing interactions with beekeepers (or more recently a faction thereof) regarding the issue of importation of packaged bees. Any liability in such circumstances would not be indeterminate, but limited to those to whom the Defendants made such representations and with whom the Defendants had interactions, i.e., commercial beekeepers.

96. The Defendants also appear to suggest that the spectre of indeterminate liability necessarily arises in a claim for pure economic loss, but does not elaborate on how it may be in this case. As the Supreme Court has observed, a claim for economic loss does not automatically give rise to a risk of indeterminate liability.

Defendants' Written Representations, para. 96

Fullowka at para. 70, Plaintiffs' Authorities, TAB 25

97. In *Hercules Managements Ltd. v. Ernst & Young*, regarding a claim of negligent misrepresentation on the part of auditors to investors, the Supreme Court recognized that while pure economic loss claims may raise the spectre of indeterminate liability in some cases, it does not arise where there is sufficient indicia of proximity. In the case of negligent misrepresentation, this was satisfied when the auditors knew the identity of the person or persons who would rely on their report, and the plaintiffs relied on the auditors' report for the purpose for which it was prepared.

Hercules Managements Ltd. v. Ernst & Young, [1997] 2 SCR 165 at 197-198, Plaintiffs' Authorities, TAB 27

98. Similarly in this case, there is ample indicia that the Defendants knew the class with whom they were dealing, and knew the specific nature of the losses the members of the class would be subject to by the Defendants' negligent action or inaction.

99. As noted in *Sauer*, the onus is on the Defendants to establish that it is plain and obvious that the *prima facie* duty of care is negated by a policy consideration. If they fail to do so, the Court should not look further.

Sauer at para. 63, Defendants' Authorities, TAB 25

100. The Plaintiffs submit that the Defendants have not met their onus. Accordingly, the claim should not be struck.

C. Should costs be awarded against the unsuccessful party?

101. The Defendants have sought costs against the Plaintiffs on the basis of Rules 400 and 401 of the *Rules*.

Notice of Motion to Strike, para. 11

102. However, Rules 400 and 401 are displaced by Rule 334.39(1) pertaining to class action proceedings, which states that "no costs may be awarded against any party to

a motion for certification of a proceeding as a class proceeding" barring certain exceptional circumstances. Neither the Plaintiffs nor Defendants have pled any exceptional circumstances.

Federal Courts Rules, Rule 334.39(1), Plaintiffs' Authorities, TAB 28

103. In *Campbell v. Canada (Attorney General)*, the Federal Court of Appeal established that the "no costs" rule under Rule 334.39(1) applies "as soon as the parties to the action are made parties to the certification motion." This applies to costs associated with any steps taken after that date.

Campbell v. Canada (Attorney General), 2012 FCA 45 at paras. 45-47, Plaintiffs' Authorities, TAB 29

104. The Plaintiffs filed their Notice of Motion for Certification, naming all of the Plaintiffs and Defendants as parties, on September 12, 2013. Accordingly, under Rule 334.39(1) and *Campbell*, all parties are immune from costs from that date.

PART V – ORDER SOUGHT

105. The Plaintiffs seek an Order dismissing the motion to strike without costs.

DATED at the City of Edmonton, in the Province of Alberta, this 29th day of November, 2013.

Field LLP

Per: _____
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APPENDIX A
TO THE WRITTEN REPRESENTATIONS
OF THE PLAINTIFFS
("Proposed Amended Statement of Claim")

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

AMENDED STATEMENT OF CLAIM TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: _____

Issued by:_____
(Registry Officer)

Address of local office:
Scotia Place
10060 Jasper Avenue
Tower 1, Suite 530
Edmonton, Alberta T5J 3R8

TO:

Her Majesty the Queen
c/o The Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

The Minister of Agriculture and Agri-food, Gerry Ritz
1341 Baseline Road
Ottawa, Ontario
K1A 0C5

The Canadian Food Inspection Agency
1400 Merivale Road
Ottawa, Ontario
K1A 0Y9

CLAIM

1. The Plaintiffs, Paradis Honey Ltd., Honeybee Enterprises Ltd. and Rocklake Apiaries Ltd., claim on their own behalf and on behalf of all class members ("the Class"), as defined below:

    a. An order pursuant to Rules 334.16(1) and 334.17 of the Federal Court Rules ("the Rules") certifying this action as a class proceeding and providing any ancillary directions;

    b. An order pursuant to Rules 334.12(3), 334.16(1)(e) and 334.17(b) appointing the Plaintiffs as the representative plaintiffs of the Class;

    c. Damages payable to the Plaintiffs and to the other Class members, in an amount equal to the losses and damages they sustained as a result of:

        i. the Defendants' negligence in imposing or enforcing a prohibition on, or denying import permits for, the importation into Canada of live honeybee packages from the continental United States after 2006 to the present day;

        ~~ii. The Defendants' acting without lawful authority by imposing a prohibition on, and denying import permits for, the importation into Canada of live honeybee packages from the continental United States after 2006 to the present day;~~

    d. Pre- and post-judgment interest pursuant to ss. 36 and 37 of the *Federal Courts Act*, R.S.C., 1985, c. F-7;

    e. Such further and other relief as this Honourable Court deems just.

THE PARTIES

2. The Plaintiff Paradis Honey Ltd. ("the Alberta Plaintiff") is a family-owned and family-run corporation registered in Alberta, whose main business is beekeeping and the production of honey and honeybee-related products on a commercial scale. The Alberta

Plaintiff maintains approximately 3,500 colonies.

3. The Plaintiff Honeybee Enterprises Ltd. ("the BC Plaintiff") is a British Columbia-registered corporation that operates a honey farm, pollination business and visitor attraction in Surrey, B.C. The BC Plaintiff maintains approximately 1,400 colonies.

4. The Plaintiff Rocklake Apiaries Ltd. ("the Manitoba Plaintiff") is a Manitoba-registered corporation in the business of beekeeping and honey production. The Manitoba Plaintiff maintains approximately 3,000 colonies.

5. The Defendant Her Majesty the Queen is joined herein in its own right and as responsible for the Minister of Agriculture and Agri-food and the Canadian Food Inspection Agency, all of whom will be collectively referred to as "the Crown."

6. The Defendant Minister of Agriculture and Agri-Food ("the Minister") is responsible for and has overall direction of the Defendant Canadian Food Inspection Agency ("the CFIA").

7. The CFIA is an agency of the federal Crown established by the *Canadian Food Inspection Agency Act* and is responsible for the administration and enforcement of the *Health of Animals Act* and associated regulations.

THE CLASS

8. The Plaintiff brings this claim for damages pursuant to Part 5.1 of the Rules on its own behalf and on behalf of other members of the class ("the Class") comprising all persons and corporate entities 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 as a result of the Crown's prohibition on the importation of live honeybee packages from the continental United States after 2006.

Regulations, CRC c. 296 ("the *ADPR*"), as well as the *Honeybee Prohibition Regulations, 1991*, and its successor regulations, enacted pursuant to s. 14 of the *Health of Animals Act*, SC 1990, c. 21 ("the *HAA*"). Sections 20 of the *ADPR* and 14 of the *HAA* provide that

> *ADPR*:
> 20(1) Notwithstanding anything in this Part, the Minister may, by order, impose such conditions respecting the importation of an animal from the United States as he deems advisable to prevent the introduction of communicable disease into Canada or into any other country from Canada.
>
> *HAA*:
> 14 The Minister may make regulations prohibiting the importation of any animal or other thing into Canada, any part of Canada or any Canadian port, either generally or from any place named in the regulations, for such period as the Minister considers necessary for the purpose of preventing a disease or toxic substance from being introduced into or spread within Canada.

15. The Crown's restrictions on the importation of bees are ostensibly based on risk assessments conducted by the Defendant CFIA respecting the risks of disease or toxic substances resulting from allowing the importation of live bees from the United States. The last risk assessment and associated industry consultation was conducted by the CFIA in 2003 ("the 2003 Risk Assessment").

16. In 2004, following the 2003 Risk Assessment, the prohibition on live bee imports from the continental U.S. was continued by the *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136 ("*HIPR*-2004"), subject to an exception which allowed the Minister to issue an import permit to import queens.

17. The Minister's authority to issue such a permit arises pursuant to s. 64 of the *HAA* and ss. 12 and 160(1.1) of the *Health of Animals Regulation* ("the *HAR*"), promulgated pursuant to the *HAA* The Minister was authorized to issue such a permit where the Minister was satisfied that this "would not, or would not be likely to, result in the introduction into Canada, the introduction into another country from Canada or the spread within Canada, of a vector, disease or toxic substance."

18. Between 2004 and 2006 the Crown from time to time used the Minister's discretion under s. 160(1.1) of the *HAR* to grant permits for the importation of queens from the US. The importation of packages remained subject to the prohibition contained in the *HIPR*-2004.

19. The prohibition on the import of bees under *HIPR*-2004 expired on December 31, 2006 and has not been renewed by Regulation or formal Ministerial Order or Directive.

20. Notwithstanding the expiry of the prohibition under *HIPR*-2004, the Defendants since January 1, 2007 have continued to enforce a complete prohibition on the import of bee packages from the United States and have communicated to the beekeeping industry that no permits will be granted for the importation of packages from the US. A total prohibition ("the Prohibition") on such packages remains in place and constitutes a *de facto* ministerial order or directive for which there is no lawful authority.

21. After 2006, the Crown continued to grant permits for the importation of US queens pursuant to the Minister's discretion under s. 160(1.1) of the *HAR*.

22. The Defendants have conducted no risk assessment with respect to the importation of live bees from the US since 2003. The 2003 Risk Assessment is, and was as of January 1, 2007, out of date and does not constitute a reasonable or legitimate basis for the Prohibition or the Minister's exercise of discretion or *de facto* ministerial order or directive.

23. Prior to 2004, the Defendant CFIA undertook to conduct annual reviews of the health of Canadian bees as part of its assessment of whether the continuation of a prohibition on bee imports from the United States was warranted. The CFIA has not conducted such reviews since 2004 and the last such review is out of date and also does not constitute a reasonable or legitimate basis for the Prohibition or the Minister's exercise of discretion or *de facto* ministerial order or directive.

A. Negligence

24. The Plaintiff relies upon the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50,

especially ss. 3 and 23.

25. The stated purpose of restrictions on the importation of bees from the United States, whether by regulation or exercise of Ministerial discretion, is and has been to promote the health and interests of the Canadian bee industry and Canadian beekeepers by protecting them from risks associated with the importation of bees from the United States. Similarly, the stated purpose of the exception from the Prohibition for queens contained in *HIPR*-2004 was to assist the Canadian bee industry and Canadian beekeepers by providing access to an enhanced supply of queens to allow them to replenish bee stocks after winter losses. Consistent with this stated purpose the Crown engaged in consultation with the industry respecting its proposed restrictions.

26. The Defendants owed a duty of care to the Plaintiffs and the Class with respect to restrictions on the importation of honeybees from the United States, which duty of care arose from, *inter alia*:

    a. The implied and express purpose of the *HAA* and the Regulations including the *HAR* and *HIPR*-2004 is to regulate bee imports for the good and the economic interests of Canadian beekeepers and the Canadian beekeeping industry;

    b. The Crown's repeated representations to the Canadian beekeeping industry and commercial beekeepers that it regulated bee imports for the purpose of protecting the beekeeping industry and in particular the economic viability of the beekeeping industry, particulars of which include:

        i. The Crown's representations to commercial beekeepers that the immediate economic impact to them of closing the border to U.S. honeybee imports in 1987 was justified by the threat posed by honeybee pests to the long-term survival of the commercial beekeeping industry;

        ii. The Crown's representations to commercial beekeepers that it would continue the border closure in the face of their economic hardship only for so long as justified by the risks posed by the honeybee pest situation to the commercial beekeeping industry;

iii. The Crown's representations to commercial beekeepers that it would continuously monitor and update its information with respect to the honeybee pest situation to determine when the border closure was no longer necessary and justified;

iv. The Crown's representations to commercial beekeepers that the 2003 Risk Assessment justified lifting the border closure to U.S. queen imports in 2004, but continuing the border closure to U.S. package imports until December 31, 2006 as a precautionary measure;

b.1 The Crown's duty under ss. 12 and 160 of the *HAR* to receive and assess applications for import permits for U.S. packages from commercial beekeepers after December 31, 2006;

c. The Crown's actions regarding the importation of live bees from the US, including the Prohibition and the partial relaxation of the Prohibition by *HIPR-2004*, which were mainly aimed at fostering and protecting the viability of the beekeeping industry, particulars of which include:

i. The Crown's decision to prohibit honeybee imports into Canada from the U.S. in 1987 on the basis that it was an emergency measure required by the survival of the commercial beekeeping industry, notwithstanding the acknowledged economic hardship this would cause certain commercial beekeepers and beekeeping regions;

ii. The Crown's decision to continue the prohibition on honeybee imports into Canada from the U.S. until 2004 on the basis that it continued to be justified by the honeybee pest situation and the risk it posed to the commercial beekeeping industry;

iii. The Crown's decision to allow imports of U.S. queens starting in 2004 on the basis that the economic hardship suffered by certain groups of commercial beekeepers from the prohibition on U.S. honeybee imports outweighed the declining risk posed by varroa mite and other pests;

iv. The Crown's decision to continue the prohibition on U.S. packages until December 31, 2006, two years after U.S. queen imports were permitted, as a precautionary measure;

v. The Crown's decision to allow the Prohibition to lapse on December 31, 2006 under the *HIPR*-2004, resulting in the importation of U.S. packages becoming subject to the general import permit system that governed U.S. queen imports, as set out in ss. 12 and 160 of the *HAR*;

vi. The Crown's decision after December 31, 2006 not to receive and assess applications for U.S. packages without updating its information regarding the honeybee pest situation, and its refusal to update this information without the approval of the Canadian Honey Council, which was dominated by certain commercial beekeeping factions ("the Faction"); and

vii. The Crown's submission of its regulatory authority with regard to the regulation of U.S. package imports to the Canadian Honey Council;

d. The Crown's knowledge of the economic hardship suffered by certain beekeepers and beekeeping regions as a result of the continuation of the Prohibition;

d.1 The fact that the Crown knew or ought to have known that the Canadian Honey Council did not represent the interests of the commercial beekeeping industry as a whole and, in particular, that the interests of the Faction were in conflict with the interests of certain groups or regions of commercial beekeepers with regard to the issue of U.S. package imports;

d.2 The fact that the Crown knew or ought to have known that the Canadian Honey Council's stance on U.S. package imports was influenced by the Faction's purposes outside of the regulatory scheme, including, but not limited to: preservation of market share, reduction of cross-border competition, monopoly over the market for honeybee packages, and higher profits at the expense of other groups of commercial beekeepers;

e. The Crown's actions to alleviate the economic hardship suffered by certain beekeepers and beekeeping regions by measures such as partially relaxing the prohibition on the importation of queens from the US in 2004;

f. The Crown's extensive consultation and cooperation with the beekeeping industry and beekeepers on US bee import policy, particulars of which include:

i. Prior to December 31, 2006, consultation and co-operation with the Canadian Honey Council, commercial beekeepers as represented by each of the provincial associations, individual commercial beekeepers, the governments of each of the provinces, and other stakeholders of the commercial beekeeping industry with regard to U.S. honeybee import measures;

ii. After December 31, 2006, consultation and co-operation with, and submission of its regulatory authority to, the Canadian Honey Council; and

g. Other factors that may prove relevant.

27. The Crown owed a duty of care to each of the Plaintiffs and the Class with respect to restrictions on the importation of honeybees from the United States including to:

a. Take reasonable steps to avoid causing foreseeable economic hardship and other harms to the Plaintiffs and the Class without legal justification;

b. Not to continue the Prohibition after 2006 without lawful authority or lawful purpose;

c. Not to unreasonably, or without lawful authority or lawful purpose, deny the Plaintiffs or the Class import permits to import US packages;

d. Take reasonable care to act on timely and proper information in determining whether to allow imports of US packages;

e. Conduct timely monitoring, investigation, research and assessment of the beekeeping industry in Canada in determining whether to allow imports of US packages;

f. Not impose a blanket prohibition on the import of US packages under the guise of Ministerial discretion;

g. Not to abdicate its responsibilities under the *HAA* or the *HAR* but to exercise its own judgment and discretion;

h. After December 31, 2006, receive and assess applications for import permits for U.S. packages under ss. 12 and 160 of the *HAR*;

i. After December 31, 2006, if the Crown was going to deny import permits for U.S. packages, deny them on the basis of the statutory conditions set out under ss. 12 and 160 of the *HAR* and not for purposes outside of the statutory scheme; and

j. After December 31, 2006, if the Crown was going to continue the Prohibition as a matter of policy, continue it under the statutory authority set out by s. 14 of the *HAA*, including by enacting a regulation setting out a specific time period in which it would remain in effect, and not by adopting it on an *ad hoc* policy basis indefinitely.

28. The Crown breached its duty of care to the Plaintiff and the Class on or after January 1, 2007, by:

a. Improperly, and without lawful authority, continuing the Prohibition after the expiry of the prohibition period set out in the *HIPR*-2004 on December 31, 2006;

b. Improperly, and without lawful authority, denying the Plaintiffs and the Class on a blanket basis the opportunity to seek or obtain import permits for bee packages from the US;

c. Representing to the Plaintiffs and the Class that all applications for import permits for US packages would not be considered or would be automatically denied;

d. Basing its decisions to maintain the Prohibition on outdated and inaccurate information including the 2003 Risk Assessment;

e. Failing to conduct timely monitoring, research, investigation, assessment or consultation with respect to the ongoing necessity for the Prohibition;

f. Failing to conduct and obtain a current Risk Assessment with respect to the importation of bee packages from the US;

g. Misusing or failing to exercise ministerial responsibility and discretion under the *HAA* and *HAR* with respect to permitting or denying the import of bee packages from the US, particulars of which include:

   i. Delegating or submitting its regulatory decision making authority to the Canadian Honey Council when it knew or ought to have known that Canadian Honey Council was dominated by the Faction, which did not act in the best interests of the commercial beekeeping industry as a whole, and acted instead for improper purposes contrary to the statutory scheme as set out in paragraph 26(d.2);

h. Abdicating its responsibilities to conduct proper and timely risk assessment and exercise its independent judgment with respect to permitting or denying the import of bee packages from the US, particulars of which include:

   i. Refusing to update its knowledge and information regarding the honeybee pest situation without the approval of the Canadian Honey Council;

   ii. Refusing to receive or assess applications for import permits for U.S. packages without the approval of the Canadian Honey Council;

   iii. Refusing to reconsider or revisit its decision to continue the Prohibition without the approval of the Canadian Honey Council;

   iv. Refusing to consult with or hear from any stakeholders in the commercial beekeeping industry other than those represented by the dominant voting

bloc of the Canadian Honey Council; and

v. Closing its mind to honeybee research not endorsed or approved by the Canadian Honey Council, or not in support of the Canadian Honey Council's stance on U.S. package imports;

i. Denying import permits for U.S. packages for improper purposes contrary to the statutory scheme set out in ss. 12 and 160 of the *HAR*; and

j. Maintaining the Prohibition on an *ad hoc* basis contrary to the statutory scheme set out in s. 14 of the *HAA*.

29. The Crown knew, or ought to have known, that the Crown's negligence and the improper continuation of the Prohibition would cause loss and damage to the Plaintiff and Class, who relied on package imports to sustain and grow their beekeeping operations and business.

30. As a result of the Crown's negligence, the Plaintiffs and Class have suffered the following loss or damage:

a. Higher costs of importing packages from overseas;

b. Higher costs of building colonies from queens rather than packages, including higher labour, chemical, overwintering and other input costs;

c. Higher losses of colonies, and attendant costs of replacing lost colonies;

d. Loss of productivity and sales;

e. Loss of opportunity to replenish, maintain or grow honeybee colonies;

f. Diminution of value of property owned;

g. Losses associated with business failures; and

h. Such other loss or damage as may be proven at a trial of the common issues, or trials for individual members of the Class.

31. Wherefore, the Plaintiff seeks on its own behalf and the behalf of the Class:

    a. General, pecuniary and non-pecuniary damages for negligence in the amount of $200 million;

    b. Interest pursuant to the *Judicature Act*; and

    c. Such further or other relief as counsel may advise and this Honourable Court may allow.

32. The Plaintiff proposes that this action be tried at Edmonton, Alberta.

DATED at Edmonton, Alberta, Canada, this 28th day of December 2012.

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