Court File No.: T-2293-12

FEDERAL COURT
PROPOSED CLASS ACTION

BETWEEN:

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

PLAINTIFFS (APPLICANTS)

and

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

DEFENDANTS (RESPONDENTS)

DEFENDANTS' MOTION RECORD IN RESPONSE TO THE PLAINTIFFS' MOTION FOR CERTIFICATION

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MEMORANDUM OF FACT AND LAW

OVERVIEW

1. The plaintiffs' self-interests, rather than the interests of the proposed class, drive this proposed class action. The plaintiffs allege that the Minister wrongfully prohibited the importation of honeybee packages from the United States. While the plaintiffs claim to represent the interests of approximately 1400 commercial beekeepers, many beekeepers support the Minister's decision as lawful, acceptable and defensible. The plaintiffs have a history of antagonism towards proposed members on issues of honeybee importation and accuse members of their proposed class of improperly influencing the Minister's decisions to their economic detriment. The conflict between the representative plaintiffs and proposed members of the class is fatal to the certification.

2. This action should proceed as an individual claim by these plaintiffs who have an interest in importing honeybee packages for their own business purposes. A class action would not advance any of the plaintiffs' allegations in a meaningful way.

PART 1 - STATEMENT OF FACTS

A. The Causes of Action

3. The plaintiffs claim that the Minister of Agriculture and Agri-Food Canada ("the Minister") was negligent in making decisions on the importation of honeybee packages. They claim that the Minister owed them a duty and breached that duty causing them economic loss. The plaintiffs are also pursuing a novel tort referred to as "monetary relief in public law" alleging that the Minister's decisions were unacceptable and indefensible.

B. Regulatory Foundations

4. The Canadian Food Inspection Agency ("CFIA") has the mandate under the *Health of Animals Act*[1] (*"HA Act"*) and the *Health of Animals Regulations*[2] (*"HA Regulations"*) to protect animal and public health, which includes the regulation over the importation of animals in efforts to minimize the risk of introducing disease and pests into Canadian animal populations.

5. The Minister has prohibited the importation of honeybees, first by various regulatory prohibition orders[3] and then by regulatory control over the general authority to restrict importation of animals pursuant to the *HA Act* and *Regulations*.

6. Section 12 of the *HA Regulations* enacts a general prohibition on the importation of regulated animals[4] unless certain conditions are met:

> 12(1) Subject to section 51, **no person shall import a regulated animal** except;
>
> (a) in accordance with a permit issued by the Minister under section 160; or
>
> (b) in accordance with subsections (2) to (6) and all applicable provisions of the import reference document.

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[1] SC 1990, c. 21; **Defendants' Motion Record [DMR] Appendix A:Tab B.**
[2] CRC, c. 296; **DMR Appendix A:Tab C.**
[3] Most recently by the *Honeybee Importation Prohibition Regulation, 2004*, SOR/2004-136, repealed SOR/2015-142, s. 3, which had been enacted pursuant to section 14 of the *HA Act*; **DMR Appendix A:Tab D**
[4] Section 10 of *HA Regulations*; s. 24.1 Import Reference Document, January 25, 2007 Police Number AHPD-DSAE-IE-2002-3-4; **DMR Appendix A:Tab E**

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

> 160(1) Any application for a permit or license required under these Regulations shall be in a form approved by the Minister.
>
> (1.1) The Minister may, subject to paragraph 37(1)(b) of the Canadian Environmental Assessment Act, issue a permit or licence required under these Regulations if the Minister is satisfied that, to the best of the Minister's knowledge and belief, the activity for which the permit or licence is issued would not, or would not be likely to, result in the introduction into Canada…or the spread within Canada, of a vector, disease or toxic substance.[5]

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

9. CFIA advised the industry through communications in 2006 that despite the expiry of the *Honeybee Importation Prohibition Regulations*, there was no change to the risk assessment for honeybee packages from the continental United States and no import conditions could be developed to satisfy the Minister under the *HA Regulations*.[6] This is at odds with the plaintiffs' attestations that they and other commercial beekeeping contacts "understood" that the defendants intended to open the national border to United States honeybee packages upon the expiry of the *Honeybee Importation Prohibition Regulations*.[7]

C. Context to the Importation of Animals

10. As part of the World Organization for Animal Health ("OIE" – Office International des Epizooties), Canada recognizes standards and recommendations contained in the Terrestrial Animal Health Code, which has a chapter devoted to honeybees, addressing disease and pests. Canada has international obligations to report and

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[5] Subsection 160(1.1) was amended in 2012 replacing "may" with "shall".
[6] C. Rajzman Affidavit [Rajzman Affidavit], **Plaintiffs' Motion Record [PMR] volume 3, page 223-224 [volume:page]** at para 63-69; **PMR 3:531** at Exhibit U.
[7] J. Paradis Supplementary Affidavit sworn January 15, 2016 [Paradis Supplementary Affidavit] **PMR 1:164** at para 44.

assess risk.[8] Once the Minister is satisfied for the purposes of the *HA Regulations*, the Minister may then establish importation conditions under which importation may proceed in order to safeguard the Canadian animal health status.[9] Where no importation conditions have been or can be developed, importation is not permitted.

11. Under Canada's importation protocol, a prospective importer must first determine if the Minister has established import conditions under which importation of the commodity of choice from the country of choice may be permitted. This can be done by contacting CFIA directly or using CFIA's online tool called the Automated Import Reference System ("AIRS").[10]

12. AIRS is a publicly accessible platform that allows interested persons to search for import conditions relating to a commodity arising from CFIA's Risk Assessment protocols.[11]

13. Contrary to the plaintiffs' assertions, AIRS is not unique to any particular commodity and it does not carry authoritative function. It is a platform that informs potential importers whether there are import conditions developed for a particular commodity from any country in the world. Where no import conditions have been or can be developed under the authority and discretion of section 160(1.1) of the *HA Regulations* a user will see a standard entry to this effect, which the plaintiffs have interpreted in Mr. Paradis' affidavit as a "de facto" prohibition over honeybee packages. However, an importer seeking to import cattle from China, as an example, would see the same message.[12]

14. A request can be made to CFIA to develop or update a risk assessment. The importer pays a fee for this service. A Risk Assessment process can be triggered by other means.[13]

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[8] Rajzman Affidavit, **PMR 2:213-216** at paras 13-25.
[9] Rajzman Affidavit, **PMR 2:213** at para 12; **PMR 2:298** Exhibit F
[10] J. Paradis Affidavit dated September 20, 2013 [Paradis Affidavit 2013], **PMR 1:15** at para 38; **PMR 1:87** at Exhibit 8.
[11] Rajzman Affidavit, **PMR 2:216** at para 27.
[12] Rajzman Affidavit, **PMR 2:216-217** at paras 28-30.
[13] Rajzman Affidavit, **PMR 2:217-218** at paras 31 & 37.

D. Industry Participants

15. The Canadian Association of Professional Apiculturists (CAPA) is a professional organization whose members study, educate and administer in the fields of apiculture and pollination. CFIA works with CAPA members to, among other things, facilitate the transfer of information to industry participants on the development of import conditions.[14]

16. The Canadian Honey Council (CHC) is the national organization of the beekeeping industry representing 8,000 apiculturists across Canada. Each province has one or more beekeeper organizations that have a regional presence. The CHC has a board of directors made up of individuals from regional/provincial member organizations.[15]

17. The Alberta Beekeepers Association, a provincial organization, has been outspoken in responding and reacting to CFIA's import protocols and conditions. As the "Import Committee Chairman" of the Alberta Beekeepers Association, Mr. Paradis wrote to CFIA a number of times in 2003-2006, raising concerns about CHC's and CAPA's role in developing import conditions.[16]

18. However, in that same time period, the Alberta Beekeepers Association recognized that the delegates to the CHC represent the beekeeping industry of Canada and should be the consultative body.[17] Contrary to the attestations of the plaintiffs that the divide is East/West, there is disagreement between members of the proposed class on the issue of importation of honeybees throughout the Western provinces as well.[18]

19. CFIA does not develop regional or individual import conditions, one of the reasons being the spread of disease can affect disease-free areas in Canada.[19] Due to regional differences in the interests of the honeybee industry and the state of disease

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[14] Rajzman Affidavit, **PMR 2:218-219** at paras 39-41.
[15] Rajzman Affidavit, **PMR 2:219-220** at paras 42-44.
[16] Rajzman Affidavit, **PMR 2:220** at para 45.
[17] Rajzman Affidavit, **PMR 2:220** at para 46.
[18] As one example, see Rajzman Affidavit, **PMR 3:673** at Exhibit HH.
[19] Rajzman Affidavit, **PMR 2:221** at para 49.

in Canada, beekeepers have been divided on the question of honeybee imports. Mr. Paradis has been in conflict for many years with those who are opposed to importing honeybee packages.[20]

20. CFIA has developed import conditions for certain honeybee commodities (particularly honeybee queens from Hawaii) with input from CAPA and CHC, despite the opposition of those who do not support the plaintiffs' allegations. When asked in cross examination about CHC's position on this particular import issue, Mr. Paradis commented that it depended on the issue whether he felt he had a voice through the CHC.[21]

21. CFIA completed a Risk Assessment on the importation of honeybee packages from the United States in 2013.[22] It was made available for public comment.[23] Many beekeepers provided comments.[24] The responses received during the comment period were divided. CFIA created a summary of the responses, set out by province, that showing that 72% of individuals and beekeeping organizations were in agreement with the Minister's Risk Assessment.[25] The CHC also reiterated the conflict within the industry.[26]

22. The plaintiffs have made applications to import honeybee packages from the continental United States.[27] The Minister denied the importation requests. Not all members of the proposed class applied for importation permits.

23. All beekeepers, commercial or not, can be affected by the risk of disease and pests associated with importation of honeybee packages. Not all commercial beekeepers are willing to accept this risk. The choice to accept the risk is an individual business decision that the plaintiffs, but not all beekeepers, would prefer to take.

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[20] Rajzman Affidavit, **PMR 2:221** at para 50.
[21] Paradis Transcript, **PMR 4:889**.
[22] Rajzman Affidavit, **PMR 2:226** at para 81.
[23] Rajzman Affidavit, **PMR 3:594** at Exhibit GG.
[24] Rajzman Affidavit, **PMR 2:226-228** at paras 86-101.
[25] Rajzman Affidavit, **PMR 2:228** at para 100; **PMR 3:741** at Exhibit VV.
[26] Rajzman Affidavit, **PMR 3:740** at Exhibit UU.
[27] Rajzman Affidavit, **PMR 3:562-575** at Exhibits BB, CC, DD.

E. Proposed Class Definition

24. The original proposed class definition included:

> 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]

25. In their Memorandum of Fact and Law, the plaintiffs are seeking to amend their proposed class definition 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.[29]

F. Allegations against members of the proposed class

26. The plaintiffs allege that the Crown refused to update its information on the honeybee pest situation without approval of the CHC, which was dominated by certain commercial beekeeping factions, which the plaintiffs identify as "the Faction". They allege that the Crown submitted its regulatory authority to the Canadian Honey Council.[30]

27. The plaintiffs allege that the Crown knew or ought to have known that the CHC did not represent the interests of the commercial beekeeping industry and that the interests of the Faction were in conflict with the interests of certain groups or regions of commercial beekeepers on the issue of honeybee package imports.[31]

28. The plaintiffs allege that the CHC's position was influenced by the Faction's purposes outside of the regulatory scheme, its focus being on its own economic interests.[32]

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[28] Amended Notice of Motion for Certification, **PMR 1:2-3.**
[29] Plaintiffs' Memorandum of Fact and Law, **PMR 5:996** at para 32.
[30] Amended Statement of Claim, **PMR 5:1344** at paras 26(c)(vi) and (vii).
[31] Amended Statement of Claim, **PMR 5:1344** at para 26(d.1).
[32] Amended Statement of Claim, **PMR 5:1344** at para 26(d.2).

29. The plaintiffs say that the Crown breached a duty of care owed to the plaintiffs -- to be mindful of their economic interests -- by delegating or submitting its regulatory decision making authority to the CHC when it knew or ought to have known that the CHC was dominated by the Faction, which did not act in the best interest of the commercial beekeeping industry, but rather for improper purposes.[33]

30. The defendants deny these allegations, and will seek to establish that the Minister's decision on importation was based upon the risk of introduction and spread of disease and pests. There are many class members who support the Minister's decision.

PART II - ISSUES

31. The issue is whether the plaintiffs have met their burden under Rule 334.16(1) of the *Federal Courts Rules*[34] by establishing that:

    a. there is a reasonable cause of action;
    b. there is an identifiable class of two or more persons;
    c. the claims of the class members raise common question of law or fact;
    d. a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
    e. the representative plaintiffs would fairly and adequately represent the interests of the class.

32. The class representative bears the burden to "show some basis in fact" for the certification requirements set out at subsection 334.16(1)(b) - (e) of the *Federal Courts Rules*.[35]

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[33] Amended Statement of Claim, **PMR 5:1347** at para 28(g)(i).
[34] *Federal Courts Rules*, SOR/98-106, **PMR 5:1030-1031**
[35] *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158 at para 25 **DMR Appendix B:Tab 5**; *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 99 **DMR Appendix B:TAB 13.**

33. The defendants previously brought an application to strike. The majority of the Federal Court of Appeal found that it was not plain and obvious there was no cause of action pleaded by the plaintiffs.[36]

34. For the purposes of this motion for certification, the defendants concede that the pleadings raise a reasonable cause of action. The question on this application, is whether the plaintiffs' causes of action can be prosecuted as a class action.

PART III - SUBMISSIONS

35. The plaintiffs' claims cannot be prosecuted as a workable class action. The overriding theme of conflict between the plaintiffs and proposed members of the class taints each certification element. The plaintiffs propose to include members in their class with whom they are adverse in interest. There is no judicial authority for doing this. The plaintiffs' plan is to present only evidence that assists their own views and business interests, and not those of the entire class they purport to represent. They are not capable of fairly and adequately representing the divergent interests of all commercial beekeepers. The opt-out provisions do not resolve these concerns.

A. There is no identifiable class of two or more persons

36. The merits of the plaintiffs' claim that a Faction is unduly influencing the Minister would need to be assessed to identify which beekeepers are the target of the plaintiffs' accusations and should be excluded from the class they purport to represent. The term "commercial" carries a subjective component that is neither identifiable nor measurable. Given the discord among the proposed class on the alleged breaches and the acceptability or defensibility of the importation prohibition, the class definition is not rationally connected to the causes of action and encompasses members that do not have a claim.

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[36] *Paradis Honey Ltd et al v CFIA* 2015 FCA 89 **DMR Appendix B:TAB 11.**

37. The Supreme Court of Canada in *Dutton* stated that the class definition must identify:

> (1) objective criteria that will permit the identification of potential class members without reference to the merits of the claim; and
>
> (2) a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues.[37]

(1) The class definitions are based on subjective criteria and are merits based

38. The first difficulty with the proposed class definition lies in the antagonism between the plaintiffs and other members of the proposed class definition who form the alleged "Faction". If one accepts that a party cannot represent the interests of a group of people whom it accuses of wrongdoing, then the identity of those in the Faction requires a subjective and merits-based assessment. It is not possible to define this class in a way that is both objective and free from conflict within the class.[38]

39. In *R v Nixon*[39] the Ontario Superior Court rejected a class definition where there was conflict between the representative plaintiff and members of the proposed class. There, a prisoner sought to represent all prisoners in a claim against Canada arising from a fire in the penitentiary. However, the plaintiff's proposed class members included the very prisoners he accused of starting the fire. Separate inquiries about who could be identified as those who started the fire would be necessary. The complainant argued that the members could make that assessment themselves, and voluntarily remove themselves from the class. The Court rejected these proposed solutions and denied certification.

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[37] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 38 **DMR Appendix B:TAB 18**; *Windsor v Canadian Pacific Railway Limited*, 2007 ABCA 294 at para 18 **DMR Appendix B:TAB 19.**

[38] *Boucher v Public Service Alliance of Canada*, 2005 CanLII 23098 (ON SC) at para 26 **DMR Appendix B:TAB 3.**

[39] *R v Nixon*, 2002 CarswellOnt 1350, [2002] OJ No 1009; **DMR Appendix B:TAB 14.**

40. In the present case, the plaintiffs could not answer who is actually part of the Faction, other than to give vague descriptions of "groups" who oppose the importation of honeybee packages. They allege that there is a Faction in every province.[40]

41. In the cross examination of Mr. Gibeau, the defendants explored whether there was an objective way to identify the beekeepers who opposed the importation of honeybee packages from the United States:

> Q: How do you know when someone's in the faction?
>
> A: Well, the group that opposes the importation of bees from California would be part of a – a faction.
>
> Q: Do you have to ask them, Are you part of this – are – do you not agree with the importation of bees?
>
> A: Oh, yes.[41]

42. In *Paron v. Alberta*,[42] another analogous case of conflict between the representative plaintiff and the proposed class, a cottage owner sought to certify a class of cottage owners who were interested in the water levels of a lake affected by a power industry operator. The lake level had been the subject of a long-standing controversy. During times of high water levels, low lying areas would experience flooding. Conversely, during periods of low water levels, cottage owner on high ground would experience drought. The proposed plaintiff was a cabin owner who was in a high-level dry area.

43. In *Paron*, the Court was concerned that the class membership was dependent on a state of mind, thereby rendering it impossible for the defendants to know who is in and out of the class.

44. If the plaintiffs in the present action are unable to identify whom they are accusing of influencing the Minister's decision, how are the 1400 members of the proposed class supposed to make that assessment for themselves?

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[40] Paradis Transcript, **PMR 4:864;** Gibeau Transcript, **PMR 4:956, 4:961, 4:978.**
[41] Gibeau Transcript, **PMR 4:961.**
[42] *Paron v Alberta*, 2006 ABQB 375; **DMR Appendix B:TAB 12.**

45. Another subjective component in the class definition arises from the stipulation that the class includes "commercial" beekeepers who keep more than 50 bee colonies.

46. When asked in cross-examination who would consider themselves "commercial" beekeepers, Mr. Paradis commented that someone who makes $1000.00 may think it is a big deal and although they only hold 5 hives, they may **think** they are commercial.[43] Mr. Paradis further attempted to define "commercial" by stating that "if you're eating all the honey and burning all your candles, then maybe you're not commercial."[44]

47. Mr. Gibeau in cross examination had similar difficulties in identifying who would fit into his category of "commercial". He estimated there were 7-8 commercial beekeepers in British Columbia that make a living solely from honeybees but that there are other "serious sideliners", "semi-commercial" beekeepers and others who may "augment their income" in a "significant way".[45] All of these descriptors carry a subjective component necessarily requiring self-assessment and cannot be reconciled with any objective record or document.

48. Again, if the plaintiffs cannot define the parameters, how is the Court or the class members able to determine who has a claim, who will be bound by the decision, who is entitled to notice,[46] and, potentially, who is entitled to a settlement? The plaintiffs' attempt to limit the class to only those "commercial beekeepers" that have 50 colonies or more is in reality an arbitrary restriction with no objective boundaries.

49. The inability of the plaintiffs to show an objective basis in fact to determine class membership[47] places the responsibility on the members to self-assess whether they have a claim and are in fact part of the class.

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[43] Paradis Transcript, **PMR 4:852.**
[44] Paradis Transcript, **PMR 4:848-849.**
[45] Gibeau Transcript, **PMR 4:959.**
[46] *Sun-Rype Products Ltd. v Archer Daniels Midland,* 2013 SCC 58 at para 57; **DMR Appendix B:TAB 17.**
[47] *Ibid,* at paras 55 and 58.

(2) The proposed class definition is not rationally connected to the common questions of law and fact and does not identify those persons who have a potential claim for relief

50. Commercial beekeepers in the proposed class who support the Minister's decision do not have a claim that the Minister's decision was negligent, or that the Minister's decision is unacceptable or indefensible.[48] Accordingly there is no rational connection between the proposed class definition and the causes of action.[49]

51. The plaintiffs acknowledge that the first proposed class definition is not suitable because it requires potential class members to engage in "self-assessment" of whether they have been denied the opportunity to import honeybee packages. The plaintiffs have attempted to cure that defect by removing the reference to being denied the opportunity to import. However, because of the allegations in the Amended Claim related to lost opportunities to apply for a permit and to be assessed on a "case-by-case" basis, the second definition suffers from the same problems.

52. For the claim to succeed, one would need to conclude that the Minister unlawfully and improperly denied members an opportunity to import honeybee packages. Not all proposed 1400 commercial beekeepers agree with those allegations and therefore not all have a claim.

53. Mr. Paradis testified in the cross examination that there is a "faction" of commercial beekeepers in every province who do not want what Paradis Honey Ltd. wants.[50] Mr. Gibeau gave similar evidence in relation to commercial beekeeper factions in central Alberta. When asked if those same persons within the faction are also members of the class, Mr. Gibeau confirmed that they are.[51]

54. The plaintiffs "acknowledge that not every class member may be able to recover damages"[52] and cite authorities to say this is not fatal to the plaintiffs' application.

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[48] *Ibid*, at para 57.
[49] *Hollick, supra* note 35 at para 19.
[50] Paradis Transcript, **PMR 4:864.**
[51] Gibeau Transcript, **PMR 4:957** and **PMR 4:978.**
[52] Plaintiffs' Memorandum of Fact and Law, **PMR 5:999** at para 44.

However, the difficulty here is not just about recovery of damages; it is that not every proposed class member has a claim.

55. The only evidence on this motion about a rational connection between the alleged common questions of fact and law is Mr. Paradis' statement in his Affidavit that there are "over a dozen" who support his allegations and therefore may have a claim.[53]

56. In an analogous case *Asp v Boughton Law Corporation*,[54] members of a First Nation entered into a business restructuring to share in the benefit of business opportunities. Some members understood that they would receive shares in a corporation for their investment. Instead, organizers created a trust, which allowed for discretion in distribution. The claimants proposed to represent all those who participated in the restructuring and sought an order that would effectively terminate the trust. The Court noted that some members of the proposed class were satisfied with the restructuring. The Court denied certification because there was conflict within the proposed class and the relief sought was not beneficial to all whom the representatives sought to represent. The proposed class was not rationally connected to the claim for relief.

57. Similarly, in *Lacroix v. Canada Mortgage & Housing Corp.*, the plaintiffs claimed to be entitled to a pro-rata share of a pension plan surplus distribution which occurred on January 1, 1999, even though they left the employment of CMHC between January 1, 1995 and October 23, 1998. The Ontario Superior Court declined to certify the class definition because the plaintiffs failed to show that the class definition had a rational relationship with the common issues "so that it can be said that all class members within the definition likely share a claim against the defendants."[55]

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[53] Paradis Affidavit 2013, **PMR 1:17** at para 48.
[54] 2014 BCSC 1124, **DMR Appendix B:TAB 2.**
[55] [2003] OJ No 2610 (Ont Sup Ct), at para 44; affirmed [2004] OJ No 4348 (Ont Div Ct); leave to appeal dismissed [2005] OJ No 484 (ONCA); leave to appeal dismissed [2005] SCCA No 164 (SCC); **DMR Appendix B:TAB 8** (Note *Lacroix* has many subsequent related proceedings)

58. In the present case, the plaintiffs offer *Bywater*[56] and the Ontario Court of Appeal decision in *Hollick*[57] in support of their proposition that "jurisprudence establishes that it is not fatal for the class to include those who ultimately do not have a claim."[58] However, all that these cases decide is that the identities of individuals in the class need not be known, provided that the class definition would enable the court to determine whether or not a person was in the class.[59] These authorities do not help determine whether a class definition can include members who oppose the relief sought by the representative plaintiffs and do not have a claim.

59. In *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands),*[60] the British Columbia Court of Appeal addressed a situation where proposed class members had conflicting claims of rights and did not share in the claim for relief. There, a First Nation commenced a proposed class action alleging that fish farms had a negative impact on the salmon population. The British Columbia Supreme Court certified the class as "all aboriginal collectives who have or assert constitutionally protected aboriginal and/or treaty rights to fish wild salmon".[61] The British Columbia Supreme Court relied upon the opt-out provisions to resolve the conflict.[62] On appeal, the British Columbia Court of Appeal overturned the certification.

60. The British Columbia Court of Appeal noted the conflict between the different collectives as to who actually had claims to fishing rights.[63] The Court noted that the in-depth analysis of the merits of the claim would prove difficult in determining

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[56] Plaintiffs' Memorandum of Fact and Law, **PMR 5:999** at para 44; Plaintiffs' Authorities **PMR 5:1148.**
[57] Plaintiffs' Memorandum of Fact and Law, **PMR 5:999** at para 44; Plaintiffs' Authorities **PMR 5:1203.**
[58] Plaintiffs' Memorandum of Fact and Law, **PMR 5:999** at para 44.
[59] Plaintiffs' Authorities, *Bywater*, **PMR 5:1148** at para 11, and Plaintiffs' Authorities, *Hollick* (ONCA), **PMR 5:1205** at para 11.
[60] 2012 BCCA 193; **DMR Appendix B:TAB 7**
[61] 2010 BCSC 1699 (BCSC) at para 271-272; **DMR Appendix B:TAB 7.**
[62] *Ibid*, at paras 131, 206, 240-242, 262-263.
[63] *Kwicksutaineuk* (BCCA), *supra* note 60 at para 54.

class membership.[64] The opt-out process is not a vehicle to cure this defect.[65] The lower court's decision was clearly in error.

61. In the present case, the plaintiffs' assertions carry a contentious legal result,[66] namely whether the Minister unlawfully denied all class members the opportunity to import, and leads to a merits-based inquiry for class membership. Commercial beekeepers who clearly do not have a claim for relief based upon the allegations in the Amended Claim have no rational connection to the causes of action and should not be part of the class.

B. There are no common questions of law or fact

62. The plaintiffs seek only to prove facts that support and benefit their self-interest, not the interests of all 1400 commercial beekeepers. Given the conflict among the class members over the acceptability of the Minister's decision on importation, not all proposed class members will benefit from the successful prosecution of this claim.

63. The Supreme Court of Canada in *Dutton* stated:

> ...with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. **A class action should not be allowed if class members have conflicting interests.**[67]

64. The Supreme Court of Canada in *Pro-Sys Consultants Ltd.* provided guidance on how to determine whether there is a common question of law or fact:

> In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (CanLII), [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding

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[64] *Ibid*, at para 55 and 56.
[65] *Ibid*, beginning at para 80.
[66] *Ibid*, at para 97
[67] *Dutton*, *supra* note 37, PMR 5:1328 at para 40 [emphasis added].

or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

(1) The commonality question should be approached purposively.

(2) **An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.**

(3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

(4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

(5) **Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.** [68]

65. Whether the Minister's decision fell below a standard of care, or was unacceptable or indefensible are not common questions of fact or law among the proposed class.

66. The evidence in the plaintiffs' own materials show that there is conflict among commercial beekeepers over the acceptability of the Minister's decisions.[69] The plaintiffs have not presented any evidence that all commercial beekeepers in their proposed class share the common legal or factual allegation that the Minister has unlawfully or improperly instituted a "de facto prohibition".

67. The conflict will become even more problematic at a trial of common issues considering that the plaintiffs allege that the Minister owes a duty to be mindful of everyone's economic interest when making decisions on the importation of animals BUT must act in a manner that prevents economic loss to the plaintiffs who want access to honeybee packages. Would there would not also be a corresponding duty owed to those opposed to the importation to protect them from economic loss associated with unacceptable risk of disease and pests?

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[68] *Pro-Sys*, *supra* note 35, **PMR 5:1270** at para 108 [emphasis added].
[69] See, for example, Paradis Affidavit 2013, **PMR 1:85** and **PMR 1:102.**

68. There is also no common question of causation within the proposed class. Even if one accepts that this claim is about seeking recognition that all commercial beekeepers lost an opportunity to have applications lawfully and properly assessed, the complexity of the variables involved in loss of chance cases[70] would overwhelm any possible common issues within the proposed class, and require individual trials. To be successful, the Court would be required to assess each member's individual circumstances whether and in what manner they pursued that opportunity. Further individual inquiries would be needed to dispel any speculation over causation for economic loss.

69. These concerns are exacerbated by the fact that individual circumstances of the business of beekeeping differ among all proposed class members.

70. Both Mr. Paradis and Mr. Gibeau testified in the cross examination as to the individual management techniques used to control or eradicate disease and pests. Both have had colony losses due to pests and disease. Mr. Gibeau's business experiences high bee colony death, and he replaces them. They accept that risk, and manage it in their own individual way. Mr. Gibeau testified as to his knowledge about a commercial beekeeper involved in a livestock business who did not want packaged honeybees to be imported because it could negatively affect his business, the sale of healthy honeybees.[71]

71. Both admitted that there is a cost to controlling and eradicating disease. Both testified that they transport honeybees to different areas of the country for purposes that serve their economic pursuits (i.e. pollination). Their self-interest in importing honeybee packages is not shared by all members of the proposed class. Mr. Gibeau testified that there are commercial beekeepers who have management practices that allow them to operate without the need for importing packages.[72]

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[70] *Laferrière v Lawson*, [1991] 1 SCR 541; **DMR Appendix B:TAB 9**; *Folland et al v Reardon* [2005] OJ No 216, 2005 CanLII 1403 (ONCA) at paras 73 and 88; **DMR Appendix B:TAB 4**

[71] Gibeau Transcript, **PMR4:972.**

[72] Gibeau Transcript, **PMR 4:971.**

72. The plaintiffs have made applications for importation and the Minister denied the applications. This question of fact and causation is not shared among all proposed class members.

73. In an attempt to make a class action more palatable, recognizing that conflict exists within the proposed class, the plaintiffs generalize the common issues:

> 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 the border should remain closed and lobbying Canada to that effect.[73]

74. However, where an injury is not shared by all members of the group, there is no common claim for relief.[74] The plaintiffs have framed the issues of commonality between class members in overly broad terms reciting the elements of the causes of action. The Supreme Court of Canada in *Rumley v British Columbia*[75] cautioned against this approach.[76] Given the plaintiffs' assertions about how the Minister breached a duty of care owed to any given member[77] and whether such conduct caused any loss to a potential member, inevitably, the successful prosecution of the claims would require individual proceedings.

75. The lack of common issues between class members in this action "will call for different and conflicting arguments...and will impact on what evidence each competing group will want to adduce."[78] There are class members who consider that there was no opportunity lost and support the Minister's decisions based on risk of disease and pests. If the plaintiffs are successful in the prosecution of their claims that the Minister breached duties owed to them, and made decisions that,

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[73] Plaintiffs' Memorandum of Fact and Law, **PMR 5:1017** at para 118.
[74] *Hollick, supra* note 35, at para 19.
[75] 2001 SCC 69, [2001] 3 SCR 184; **DMR Appendix B:TAB 16.**
[76] *Ibid*, at para 29.
[77] Amended Statement of Claim, **PMR 5:1346-1348** at para 28.
[78] *Lacroix, supra* note 55, at para 54.

according them, were unacceptable and indefensible, not all proposed class members will benefit.

C. A class action is not the preferable procedure

76. Requesting the Court to administer a divisive class where identification is plagued with self-assessment would nullify any judicial economy. To the extent that the plaintiffs are seeking clarification of the lawfulness of the Minister's decision-making process, this can be accomplished by a test case,[79] which would avoid the pitfalls of representing the interests of an indeterminate number of class members accused of wrongdoing.

77. This court in *Rae v Canada (National Revenue)*,[80] citing the Supreme Court in *AIC Limited v Fischer*,[81] held that a determination of whether a class action is the preferable procedure "requires comparing the class proceeding with other procedural options while bearing in mind the three goals of class proceedings: access to justice,[82] behavior modification, and judicial economy."[83]

78. The plaintiffs argue that success in the action would not prevent Canada from *lawfully* closing the border and that the action is not about promoting self-interest.[84] If each potential class member's claim is dependent on the "loss of opportunity" to apply[85] and be *lawfully* assessed, then the appropriate procedure is an individual challenge to a Minister's decision on the plaintiffs' individual applications for an importation permit.

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[79] *Federal Courts Rules* allow for joinder of claims at Rule 102.
[80] *Rae v Canada (National Revenue)*, 2015 FC 707; **DMR Appendix B:TAB 15.**
[81] *AIC Limited v Fischer*, 2013 SCC 69, [2013] SCR 949; **DMR Appendix B:TAB 1.**
[82] *Ibid*, beginning at para 26 for a detailed analysis of this goal.
[83] *Rae, supra* note 80 at para 62; *Fisher, supra* note 81 at para 16.
[84] Plaintiffs' Memorandum of Fact and Law, **5:1017** at paras 117-118.
[85] Amended Statement of Claim, **PMR 5:1346** at paras 28(b) and (c).

79. Where there is no commonality on the scope and effect of individual claims for missed opportunities, resolution of the plaintiffs' allegations will not significantly advance the action.[86]

D. The plaintiffs are unable to fairly and adequately represent the class

80. The proposed representative plaintiffs have displayed indifference and antagonism toward proposed class members who oppose the importation of honeybee packages. A representative plaintiff has a duty akin to that of a fiduciary – they must act in the interest of the members of the class.[87]

81. The plaintiffs' indifference was demonstrated in the cross-examinations. Mr. Paradis purported to know what was in the best interest of the "faction" despite their opposition.[88]

82. Mr. Gibeau identified reasons why the "faction" did not want packages imported from the United States as including: the beekeeping industry's desire to be self-sustaining, loss of income from selling unhealthy bees, risk of disease, and cross-border competition.[89] The plaintiffs are dismissive of these reasons, because they do not align with their interests.

83. Mr. Paradis confirmed that his operation has had diseases and pests. Perhaps his operation finds the risk manageable. However, both Mr. Paradis and Mr. Gibeau admitted that not everyone in the class has the same management strategies to deal with honeybee loss, diseases and pests. Both admitted to the increased costs to manage and control pests and disease. Imposing their individual acceptability of business risk on 1400 commercial beekeepers is not conducive to a class action.

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[86] *Hollick, supra* note 35 at para 32.
[87] *Hoffman v Monsanto Canada Inc.*, 2007 SKCA 47 at para 91, citing with approval *Hoffman v. Monsanto Canada Inc.*, 2005 SKQB 225. Leave to appeal to Supreme Court of Canada dismissed December 13, 2007, SCC No. 32135; **DMR Appendix B:TAB 6.**
[88] Paradis Transcript, **PMR 4:877-879.**
[89] Gibeau Transcript, **PMR 4:972-973.**

84. In *Paron* the Court noted that the plaintiffs' attitude of indifference toward class members who may be negatively impacted by his pursuit of the claim shows that he is not being fair and objective.[90]

85. Mr. Paradis divides the class he purports to represent by Eastern and Western interests, at times attesting that beekeepers in the West are "desperate" and "depend" on packaged honeybees. However, the true state of affairs in the industry is that many, if not the majority of beekeepers in the Western provinces also do not share these same alleged "understandings," "beliefs" or "needs".

86. In the present case, there is not only indifference to others' interests, there is antagonism against members of the proposed class through accusations of wrongdoing. The situation is analogous to the circumstances in *Nixon* where certification was denied on this element.[91]

87. Proof of the facts alleged in the Amended claim does not further the positions of all proposed class members, but rather serves the plaintiffs' self-interest in obtaining access to packaged honeybees to further their own business ventures. They are not advancing the common interest of all commercial beekeepers in Canada.

(i) The litigation plan is formulated to pursue the action in the self-interest of the plaintiffs

88. The litigation plan does not articulate in any meaningful way how the proposed representative plaintiffs intend to deal with the complex and divergent interests of the proposed class members.[92]

89. The plaintiffs objected to questions throughout the cross examinations about how they would deal with members of the proposed class who do not support and do not agree with the factual allegations in the Amended Claim, and they still offer no plan to address this issue.

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[90] *Paron, supra* note 42 at para 96.
[91] *Nixon, supra* note 39 at para 9 and 11
[92] *Paron, supra* note 42 at para 133; *Boucher, supra* note 38 at para 30.

90. The plaintiffs' proposed solution is that the *Federal Courts Rules* allow for an "opt-out" system.[93] Apparently, those who ***believe*** they are in the Faction are expected to opt-out. However, there is no way of knowing if one is indeed part of the Faction, unless someone proves that you are, which requires an assessment of the merits of the accusation. The plaintiffs have not suggested a workable plan for class members to make this determination on their own.

91. The opt-out provision is grounded in the presumption that by not opting out, the class members have made an informed decision to participate in the class action.[94] This, of course, is based on the assumption that all class members have a claim.

92. In *MacDougall v Ontario Northland Transportation Commission*,[95] the Ontario Superior Court addressed a situation where a claim on behalf of beneficiaries of a pension plan, which challenged amendments to a plan, created a conflict of interests between retired and active pensioners. The Court rejected the notion that the opt-out provisions or subclasses could resolve the conflict within the class and concluded that the plaintiffs could not fairly and adequately represent the interest of the proposed class.[96] The decision was upheld on appeal to the Divisional Court.

93. The plaintiffs have not cited any authority for the proposition that the opt-out provisions are intended to negate the rule against conflict in Rule 334.16(1)(e)(iii) of the *Federal Courts Rules*, or that the opt-out provisions can serve that purpose in practice.

E. Conclusion

94. There is conflict and antagonism between the plaintiffs and members of the proposed class. As a result, the class definition does not describe an identifiable

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[93] *Federal Courts Rules* at Rule 334.21(1); **PMR 5:1033**.

[94] Eizenga, Peerless, Callaghan, & Agarwal, *Class Actions Law and Practice, Second Edition* (LexisNexis: Toronto, Ontario, Release 40, September 2016) at 5.75.1, FN2: "From a legal perspective the only reason to opt out of a class proceeding is to pursue individual litigation." **DMR Appendix B:TAB 20**

[95] 2006 CarswellOnt 6212 (Ont SC); affirmed 2007 CanLII 4303 (Ont Div Ct); leave to ONCA dismissed, 2007 CarswellOnt 8994; leave to SCC dismissed, SCC No. 32284; **DMR Appendix B:TAB 10.**

[96] *MacDougall* (Ont SC), *ibid*, at paras 86 and 133.

class, and the causes of action are not rationally connected to the proposed class definition.

95. The plaintiffs are purporting to represent the interests of the beekeeping industry in an effort to convince the Court that the Minister's decision on the importation of honeybee packages was negligent, unacceptable and indefensible. However, all of the members of their proposed class do not support these contentions. Those who do not, would not have a claim.

96. The plaintiffs have accused proposed class members of improper influence, which led to a decision that caused them economic loss. It is inappropriate to claim to represent the interests of a class of people that includes individuals who are alleged to have participated in the conduct that is the subject of complaint.

PART IV – ORDER SOUGHT

97. The defendants request an order dismissing the plaintiffs' motion to certify the action under Rule 334.16 of the *Federal Courts Rules*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Saskatoon, Saskatchewan, this 12th day of December, 2016.

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PART V – LIST OF AUTHORITIES

APPENDIX A

Legislation

A. *Federal Courts Rules*, SOR/98-106.

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

C. *Health of Animals Regulations*, CRC, c. 296.

D. *Honeybee Importation Prohibition Regulation, 2004*, SOR/2004-136; repealed SOR/2015-142.

E. Import Reference Document, January 25, 2007 Police Number AHPD-DSAE-IE-2002-3-4.

APPENDIX B

Case Law

1. *AIC Limited v Fischer*, 2013 SCC 69, [2013] SCR 949.

2. *Asp v Boughton Law Corporation*, 2014 BCSC 1124 (CanLII).

3. *Boucher v Public Service Alliance of Canada*, 2005 CanLII 23098 (ON SC).

4. *Folland et al v Reardon*, [2005] OJ No 216, 2005 CanLII 1403 (ONCA).

5. *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158.

6. *Hoffman v Monsanto Canada Inc.*, 2007 SKCA 47; Leave to SCC dismissed SCC No. 32135.

7. *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2010 BCSC1699; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 BCCA 193; Leave to SCC dismissed SCC No. 34909.

8. *Lacroix v Canada Mortgage & Housing Corp.*, 2003 CarswellOnt 2581, [2003] OJ No. 2610; affirmed [2004] OJ No 4348 (Ont Div Ct); leave to appeal dismissed [2005] OJ No 484 (ONCA); leave to appeal dismissed [2005] SCCA No 164 (SCC).

9. *Laferrière v Lawson*, 1991 CanLII 87 (SCC), [1991] 1 SCR 541.

10. *MacDougall v Ontario Northland Transportation Commission*, 2006 CarswellOnt 6212 (Ont SC); affirmed 2007 CanLII 4303 (Ont Div Ct); appeal to ONCA dismissed, 2007 CarswellOnt 8994; leave to SCC dismissed, SCC No. 32284.

11. *Paradis Honey Ltd et al v CFIA* 2015 FCA 89

12. *Paron v Alberta*, 2006 ABQB 375.

13. *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57.

14. *R. v Nixon*, 2002 CarswellOnt 1350, [2002] OJ No. 1009.

15. *Rae v Canada (National Revenue)*, 2015 FC 707.

16. *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184.

17. *Sun-Rype Products Ltd. v Archer Daniels Midland*, 2013 SCC 58.

18. *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46.

19. *Windsor v Canadian Pacific Railway Limited*, 2007 ABCA 294.

Other Related Materials

20. Eizenga, Peerless, Callaghan, & Agarwal, *Class Actions Law and Practice, Second Edition* (LexisNexis: Toronto, Ontario, Release 40, September 2016).