Federal Court  Cour fédérale

Date: 20170217

Docket: T-2293-12

Citation: 2017 FC 199

Ottawa, Ontario, February 17, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

PARADIS HONEY LTD., HONEY BEE 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

JUDGMENT AND REASONS

I. Introduction and Issues

[1] This is a motion to certify this action (the "Action") as a class action on behalf of an estimated 1,400 Canadian beekeepers. The subject matter of the underlying Action is the ban on importation of honeybees from the United States, which has been in effect, in various forms, since 1987.

[2] The Plaintiffs are Paradis Honey Ltd., Honeybee Enterprises Ltd., and Rocklake Apiaries Ltd. (collectively, the "Beekeepers" or the "Plaintiffs"). The Defendants are Her Majesty the Queen in right of Canada, the Minister of Agriculture and Agri-Food (the "Minister") and the

Canadian Food Inspection Agency ("CFIA") (collectively, the "Federal Crown" or the "Defendants").

[3] The Beekeepers, on their own behalf and on behalf of all class members (the "Class"), assert that the Federal Crown negligently, or through abusive administrative action, denied commercial beekeepers in Canada their lawful right to seek import permits for honeybee "packages", and failed to perform evidence-based assessments the of pest and disease risk associated with importing honeybees from the United States, to support the blanket prohibition on the importation of bee "packages", that has been in existence since 2006. They seek damages payable to the Class members for the losses and damages they sustained as a result of the Federal Crown's actions.

[4] The Federal Crown denies any alleged non-compliance with their public law duties, and also denies that it was either negligent or took any abusive administrative actions. Further, or in the alternative, the Federal Crown states, that by virtue of Crown sovereignty and Crown prerogative, the Federal Crown has the lawful authority and the right to control Canada's borders. Finally, the Federal Crown pleads and relies on the defence of statutory authority, as well as immunity to liability, under sections 8 and 10 of the *Crown Liability and Proceedings Act, RSC, 1985, c C-50.*

A. Issues

[5] The only issue in this motion is whether the five conditions of Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 are satisfied, such that the Action should be certified as a class proceeding:

1) Do the pleadings disclose a reasonable cause of action?
2) Is there an identifiable class of two or more persons?
3) Do the claims of the proposed class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members?
4) Is a class proceeding the preferable procedure for the just and efficient resolution of the common questions of law and fact?
5) Is there an appropriate representative plaintiff?

[6] If the Action is certified, the following issues need to be determined:

1) What are the common issues to be determined in the class proceeding?
2) In what manner should notice of certification and progress in the proceeding be provided to the Class?
3) When is the deadline and what is the form for opting out of the Class?
4) Is the litigation plan appropriate?

B. Results

[7] Based upon the evidence before the Court, I find that:

1) The pleadings disclose reasonable causes of action;
2) There is an identifiable class of two or more persons, and there are no disqualifying conflicts between members of the Class;
3) There are common issues, the resolution of which will advance the claims of all Class members. The resolution of these common issues will help the Court avoid duplication of fact-finding and/or legal analysis. The common issues predominate over questions affecting only individual members;
4) A class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law and fact. A class proceeding will achieve all three principles underpinning class actions (i.e., judicial economy, behavioural modification, and access to justice) more effectively than any alternative procedures;
5) Mr. Paradis, Mr. Gibeau, and Mr. Lockhart are appropriate representative plaintiffs.

[8] Therefore, contingent upon the Beekeepers updating their litigation plan and submitting it to the Court for approval, I grant the motion to certify the Action as a class proceeding. Additionally, I find that the nine common issues proposed by the Plaintiffs should be certified as common issues.

[9] The following questions are to be determined by the case management judge:

1) In what manner should notice of certification and progress in the proceeding be provided to the Class?
2) When is the deadline and what is the form for opting out of the Class?
3) What changes should be made to the litigation plan?

II. Background – Honeybees

[10] Canada's winter climate, especially in the northern regions, is hostile to bees. As a result, Canadian beekeepers regularly experience a significant loss of bees every winter due to the cold. This bee mortality is compounded by other factors, such as pests and disease. Data from the Canadian Association of Professional Apiculturists ("CAPA") shows that, from 2008-2012, commercial beekeepers had annual average wintering losses of 15% to 35% of their honeybee colonies.

[11] These losses mean that commercial beekeepers need to find a method of replacing colonies every year. The CAPA data indicates that colony loss due to winter is not uniform across Canada, and that beekeepers in Alberta, Saskatchewan, and Manitoba are

disproportionately burdened with the need to replace colonies, because beekeepers in these provinces have, on average, the greatest number of dead colonies year-to-year.

[12] Options to replace lost colonies include (1) trying to grow replacement colonies from existing colonies, (2) purchasing bees from domestic suppliers, and (3) importing bees from international suppliers. The purchase of bees can take either of two forms: “packages” and “queens”. A “package” contains a queen bee and thousands of worker bees, sufficient to form a viable colony as soon as it is introduced into a beehive. A “queen” contains a queen and a small number of attendant bees that keep the queen alive during transportation. “Queens” can be used to grow a new colony; however, this usually takes at least a year.

[13] In 1987, the Federal Crown closed the Canada-United States border to the importation of both “packages” and “queens”, as an emergency response to the discovery of varroa mite in certain beekeeping regions in the United States. From 1987 to 2006, the Federal Crown continued the prohibition on honeybee imports from the United States (with the exception of imports from the State of Hawaii, starting in 1991) by means of orders and regulations. The last of this series of regulations, the *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136 (*HIPR 2004*), permitted the importation of “queens” from the United States, but continued the prohibition against “packages”. *HIPR 2004* expired, without renewal, on December 31, 2006; however, it was not formally repealed until June 11, 2015. There have been no orders, regulations, or legislation enacted in *HIPR 2004*’s place.

[14] Prior to enacting *HIPR 2004*, the Federal Crown conducted a risk assessment (the "2003 Risk Assessment") that focused on the economic and biological risks to the Canadian beekeeping industry from four specific bee pests found in American bee populations: (1) varroa mite, (2) small hive beetle, (3) American foulbrood, and (4) Africanized honeybee. Based upon the findings in the 2003 Risk Assessment, the Federal Crown decided to lift the import prohibition against "queens" but not "packages". In the Regulatory Impact Analysis Statement that accompanies *HIPR 2004*, the Federal Crown acknowledged that the animal health status of Canadian honeybees was changing, and that there were differences in opinion among commercial beekeepers regarding whether maintaining the border prohibition was appropriate.

[15] Following the expiry of *HIPR 2004*, a beekeeper's ability to import honeybees, both "queens" and "packages", is determined under the general import permit system for live animal imports: sections 12 and 160(1.1) of the *Health of Animals Regulations*, CRC c 296, enacted pursuant to the *Health of Animals Act*, SC 1990, c 21. Section 12 allows a person to import live honeybees in accordance with an import permit, and section 160(1.1) requires the Minister to issue a permit if he is satisfied that the activity is not likely to result in the introduction into or spread in Canada of a vector, disease, or toxic substance.

III. Background – Procedural History

[16] This is the second motion to certify a class action based on allegations by the Beekeepers that:

1) Following the expiry of *HIPR 2004*, the Federal Crown denied the Beekeepers the right to seek import permits for "packages", rejecting any applications for import permits without consideration;

2) The Federal Crown informed commercial beekeepers that the border remained closed to American "packages", and the Federal Crown would not reconsider this policy until a new risk assessment was completed, which it represented would only be done following an "official request" from the Canadian Honey Council ("Honey Council");
3) As a result of the Federal Crown's unlawful extension of the prohibition against "package" imports, commercial beekeepers were forced to buy replacement bees from less desirable sources, and use more time-intensive and expensive measures to keep their bees alive over the winter. This resulted in aggregate losses for the Class of $200 million plus interest.

[17] The Action was originally commenced by Statement of Claim, filed December 28, 2012, with a Statement of Defence following on February, 8, 2013. The original Notice of Motion for Certification was filed on September 12, 2013; in which the Beekeepers claimed that the Federal Crown acted negligently.

[18] The Federal Crown moved to strike the Motion for Certification in its entirety, based upon failure to disclose a reasonable cause of action (i.e., condition (1) of Rule 334.16(1)). On March 5, 2014, Mr. Justice André Scott struck the motion, finding that it was plain and obvious that the Beekeepers' claim of negligence based on lack of lawful authority would fail (*Paradis Honey Ltd v Canada (Attorney General)*, 2014 FC 215 [*Paradis Honey FC*]).

[19] On April 8, 2015, Mr. Justice David Stratas, writing for the majority of the Federal Court of Appeal, reversed Mr. Justice Scott's finding, and found instead that the "facts as pleaded support a claim in negligence and bad faith", as well as a "claim for monetary relief in public law" (*Paradis Honey Ltd v Canada (Attorney General)*, 2015 FCA 89 at para 77 [*Paradis Honey FCA*]). Leave to appeal to the Supreme Court of Canada was denied on October 29, 2015.

[20] Conditions (2) to (5) of Rule 334.16(1) were not addressed in *Paradis Honey FC* or *Paradis Honey FCA.*

IV. Analysis of Rule 334.16(1) Conditions

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

[21] The Federal Court of Appeal has determined that the Beekeepers' pleadings disclose reasonable causes of action in both regulatory negligence and a novel cause of action for abusive administrative action warranting monetary relief (*Paradis Honey FCA,* above, at paras 111 and 118).

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

[22] The Supreme Court of Canada, in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paragraph 38 [*WCSC*], identified three rationales for requiring class actions to proceed only with an identifiable class: (1) to identify persons who have a potential claim for relief against the defendants; (2) to define the parameters of the lawsuit in order to identify those who are bound by the result; and (3) to describe who is entitled to notice for certification.

[23] In *Hollick v Toronto (City),* 2001 SCC 68 [*Hollick*], a case issued shortly after *WCSC,* above, the Supreme Court of Canada stated that there were three criteria for finding the existence of an "identifiable class": (1) the class must be defined by objective criteria; (2) the class must be defined without reference to the merits of the action; and (3) there must be a rational connection between the common issues and the proposed class definition.

[24] The burden is on the proposed representative plaintiff to show that the class is defined sufficiently narrowly, such that it meets these criteria (*Hollick,* above at para 20). Interpreting the legislative history of class actions, the Supreme Court of Canada stated that class action legislation should be interpreted generously (*Hollick* at para 14); therefore, the representative's burden is not an onerous one. The representative does not need to show that "everyone in the class shares the same interest in the resolution of the asserted common issue[s]", only that the class is not "unnecessarily broad [emphasis in original]" (*Hollick* at para 21).

[25] Further, *WCSC* makes it clear that the criteria of a rational connection between the common issues and the proposed class is to be approached purposively, such that it is "not essential that that the class members be identically situated vis-à-vis the opposing party, but that the resolution of the common issues are necessary to the resolution of each class member's claim" (*WCSC* at para 39).

[26] The identity of the class members can also be amended, should the Court find post-certification that a different class definition would be more appropriate. In *Buffalo v Samson Cree Nation,* 2010 FCA 165 at paragraph 12 [*Buffalo*], Mr. Justice Stratas stated:

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

[27] The Federal Crown argues that there is no identifiable class of two or more persons. They also state that the Class definition is based on subjective and merits based criteria.

[28] The Federal Crown asserts that the term “commercial” is subjective. On cross-examination, Mr. Paradis commented that a person who has only five colonies and makes $1000 may think that they are commercial, despite being a much smaller operation than what the Beekeepers would consider a commercial operation. Therefore, it would be impossible to define commercial in a way with which all beekeepers would agree.

[29] The Federal Crown further asserts that the most problematic, subjective feature of the Class definition is that each Class member needs to determine whether or not he or she is a member of the group of beekeepers who oppose opening the United States border to importing “packages” (the “Faction”). They argue that the members of the Faction have interests that are opposed to the Beekeepers and, therefore, that the some of the Class members would have their interests harmed by the relief sought by the Class. The Federal Crown submits that there is no objective means of determining whether any given beekeeper is a member of the Faction, making the class over-inclusive.

[30] Finally, and most importantly, the Federal Crown argues that the inclusion of beekeepers who are part of the Faction creates irresolvable conflicts within the Class, because some Class members will not have a claim and some will be negatively impacted by the relief sought by the Beekeepers.

[31] The Federal Crown submits five cases—*Nixon v Canada (Attorney General)*, [2002] OJ No 1009; *Paron v Alberta (Environmental Protection)*, 2006 ABQB 375; *Asp v Boughton Law Corporation*, 2014 BCSC 1124; *Lacroix v Canada Mortgage & Housing Corp*, [2003] OJ No

2610; and *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 BCCA 193—in support of their argument that the Class is unidentifiable and there is clear conflict within the Class, making it uncertifiable. However, these cases are distinguishable from the facts here.

(1) Class definition

[32] The Beekeepers proposed the following Class definition in the Amended Notice for Motion for Certification:

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

[33] Although the Beekeepers argue that the phrase "and who have been denied the opportunity to import …" is only intended as a descriptor, and is not intended as language to narrow the class, in their Memorandum of Fact and Law, they propose that the Class definition be amended as follows:

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

[34] Changing the definition of a class at a hearing or developing a class definition is at the discretion of the Court (*Buffalo*, above, at para 15).

[35] In this case, it is not clear that the phrase "who have been denied the opportunity to import live honeybee packages…" narrows the Class definition. This phrase can be interpreted in two ways. The Federal Crown argues that it describes only beekeepers who applied for permits, or expressed some interest in importing "packages", and were, or felt they were, denied by the Minister. Conversely, the Beekeepers assert that it describes all commercial beekeepers in Canada, who by virtue of the prohibition have been denied the opportunity to import, and is not a description that narrows who is included in the Class.

[36] Based upon the causes of action disclosed in the pleadings, a generous and purposive interpretation of the Class definition favours the Beekeepers' position. If the trial judge determines that the Federal Crown acted negligently or in a manner that was an abusive administrative action, then it follows that all commercial beekeepers in Canada will have been denied the opportunity to import honeybees from the United States, during the relevant time.

[37] Since the original Class definition and the proposed amended Class definition encompass the same beekeepers: commercial beekeepers, who have had more than 50 colonies since December 31, 2006. I find that the amendment to the Class definition should be allowed.

(2) Is the criteria objective and independent of the merits of the Action?

[38] The Federal Crown argues that (1) setting the minimum number of colonies at 50 colonies is an arbitrary restriction with no objective boundaries; and (2) the term commercial is subjective.

[39] The Beekeepers assert that there are an estimated 1,400 commercial beekeepers in Canada, and that the Class is identifiable by objective criteria that are independent of the merits of the Action. Both the time limitation of December 31, 2006, and the number of colonies are clearly objective criteria. The Beekeepers submit that data regarding the number of colonies a beekeeper would have had during the period between December 31, 2006 and the present is readily accessible in provincial records. They also argue that the commercial nature of any beekeeper's activities is also objectively discernable, using common legal definitions of commercial activity and commercial purpose.

[40] On their website, the Honey Council states that commercial beekeepers in Eastern Canada and British Columbia operate small to medium sized operations of 50-50,000 colonies. Mr. Gibeau, one of the proposed representative plaintiffs, testified that a person needs to have at least 50 colonies to significantly augment their income, and to qualify for most federal or provincial government agricultural safety net programs. Mr. Gibeau explained that, in setting the minimum number, the Beekeepers were trying to ensure that hobbyists were excluded from the Class, because they have different interests from commercial beekeepers. Therefore, the Beekeepers assert that the minimum of 50 colonies is logical, and is neither over- nor under-inclusive.

[41] I find the Federal Crown's argument that the number of colonies is an arbitrary cut-off unpersuasive. As the Beekeepers show, the number 50 is tied to both representations made by the Honey Council about the size of commercial beekeeping operations in the Eastern Provinces and British Columbia, and government assistance programs that require a beekeeper to have at least

50 colonies to qualify. The Beekeepers acknowledge that requiring beekeepers to have 50 or more colonies may prevent some commercial beekeepers from taking part in the Action. However, as Madam Justice Martine St-Louis said recently, in *Rae v Canada (National Revenue)*, 2015 FC 707 at paragraph 56, "over-inclusion and under-inclusion are not fatal to the certification as long as they are not illogical or arbitrary". In this case, I find that setting the cut-off for the Class at 50 colonies is both logical and non-arbitrary.

[42] Similarly, the Federal Crown's assertion that each beekeeper would have to subjectively assess whether or not they were a "commercial beekeeper" is not reasonable. There exist clear, objective criteria that can be used to determine whether a beekeeper has a commercial operation. The Beekeepers provide examples of cases where a court had to make a determination as to whether an activity was commercial in nature: *Clevite Development Ltd v Minister of National Revenue*, [1961] EX CR 296; *McIntosh v Royal & Sun Alliance Insurance Company of Canada*, 2007 FC 23; and *Université de Sherbrooke v The Queen*, 2007 TCC 229 [*Sherbrooke*].

[43] *Sherbrooke*, above, in particular, points towards a relevant set of criteria for determining whether an operation is commercial: the *Excise Tax Act*, RSC 1985, c E-15 [ETA]. In the *ETA*, a "taxable supply" is defined as "a supply that is made in the course of a commercial activity". "Commercial activity" of a person is defined as follows in section 123(1) of the *ETA*:

> *commercial activity* of a person means
>
> (a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

> (b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
>
> (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;
>
> …

[44] Subsection (b) of the definition of "commercial activity" states that any adventure or concern in the nature of trade is a commercial activity. The Court is experienced at determining whether an activity is in the nature of trade, or done as part of the normal course of trade. This Court, in particular, regularly evaluates whether certain activities are "ordinary and bona fide" commercial and is prepared to set out objective criteria to determine whether a beekeeper's activities are commercial (for example, see the *Trade-marks Act*, RSC 1985, c T-13, section 10).

[45] The definition of "commercial activity" in the *ETA* "implicitly recognizes that a business may exist without a reasonable expectation of profit, but states that a business without a reasonable expectation of profit is not a 'commercial activity'" (*Bowden v Canada*, 2011 FCA 218). Mr. Gibeau testified that a beekeeper with around 50 colonies could expect to make between $25,000 and $50,000 annually, from both the sale of honey and pollination services. Therefore, it is appropriate to define a commercial beekeeper as a beekeeper who has a reasonable expectation of making a profit from his or her beekeeping activities.

[46] Whether a person has a reasonable expectation of profit is an objective determination (*Moldowan v Canada*, [1978] 1 SCR 480 [*Moldowan*], overruled in *Canada v Craig*, 2012 SCC 43 on a different point of law). The Supreme Court of Canada, in *Moldowan*, above, listed the following as part of a non-exhaustive list of factors that should be considered when determining whether there is a reasonable expectation of profits: the profit and loss experience in past years, the taxpayer's training, the taxpayer's intended course of action, and the capability of the venture as capitalized to show a profit after charging capital loss allowance.

[47] As noted above, the Beekeepers have deliberately designed a class definition that excludes hobbyist beekeepers. Therefore, limiting the class to beekeepers who reasonably expect to make profits from their beekeeping activities is logical, and is neither over- nor under-inclusive. Therefore, I find that it is appropriate to define "commercial beekeeper" for the purpose of the Action as a beekeeper who has made commercial sales in the ordinary course of business. The Class definition—all persons in Canada who keep or have kept more than 50 bee colonies at a time for commercial purpose since December 31, 2006— is objective and independent of the merits of the Action.

(3) Is there a rational connection to the common issues?

[48] The Beekeepers argue that the Class as defined is rationally connected to the common issues. The time limit relates to the claim that the Federal Crown acted negligently or took abusive administrative action after *HIPR 2004* expired. The commerciality requirement relates to the duty of care the Federal Crown owes to the commercial beekeepers, based on its knowledge that the beekeepers were being asked to sacrifice their near-term economic well-being for the

long-term good of the industry. The commerciality requirement is also connected to the Federal Crown's representations that they would continuously monitor and assess how the imports would affect the Canadian honeybee industry, and the damages that the Beekeepers and other members of the Class suffered because of lack of access to American "packages".

[49] Regarding damages, the Beekeepers acknowledge that not every Class member may be able to recover damages. They state that the case is similar to *Markson v MBNA Canada Bank*, 2007 ONCA 334 [*Markson*], a case where the Ontario Court of Appeal certified a class consisting of all holders of a specific type of credit card, even though the card holders who could ultimately recover damages were only a small fraction of the class. In *Markson*, above, all of the class members could have been affected by the policies of MBNA Canada Bank; however, only a few had actually paid the criminal interest rates. In the Action, all Class members could have been affected by the *de facto* prohibition. I agree with the Beekeepers that there is a rational connection between the common issues and the Class.

(4) Is there conflict within the Class?

[50] Finally, based on the nature of the pleadings and relief sought by the Beekeepers, I am not persuaded that there is a clear conflict within the Class, such that some members neither have a claim nor are connected to the common issues. Similarly, I do not agree with the Federal Crown that the relief sought would be detrimental to any member of the Class.

[51] The Supreme Court of Canada in *Hollick*, at paragraph 21, stated that "the representative need not show that everyone in the class shares the same interest in the resolution of the asserted

common issue". It is possible that some of the Class members will not gain significant monetary benefits from the resolution of the common issues, should the Beekeepers succeed in the Action, because their business practices never depended on imports from the United States. However, the Federal Crown's assertion that they either have no claim or would be negatively impacted by the resolution of the common issues in the Beekeepers' favour mischaracterizes the nature of the pleadings.

[52] The Beekeepers assert that the Federal Crown negligently denied commercial beekeepers the opportunity to import "packages", and/or took abusive administrative action. The core of these two related causes of action, as described by Mr. Justice Stratas, in *Paradis Honey FCA,* is that the government behaved such that they did not fulfil a clear and specific duty to act. Regarding the potential new tort of abusive administrative action, he explains (at para 145):

> Courts have awarded monetary relief against public authorities where … using the language of public law, the failure to act was unacceptable or indefensible in the administrative law sense and there are circumstances of specific undertakings, specific reliance or known vulnerability of specific persons that trigger or underscore an affirmative duty to act.
>
> (citations omitted)

[53] Applying his legal analysis to the facts Mr. Justice Stratas continues (at para 148):

> Taking the allegations in the claim as proven, Canada's officials took it upon themselves to create and enforce an unauthorized, scientifically unsupported blanket policy preventing the beekeepers from exercising their legal right to apply for importation permits on a case-by-case basis under section 160 of the *Health of Animals Regulations*, above. This gives rise to a number of grounds for finding unacceptability and indefensibility: see paragraph 85 of my reasons, above.

[54] Paragraph 85 of *Paradis Honey FCA* lists four potential grounds for finding unacceptability and indefensibility:

> 1. The guideline should have been passed as a regulation.
>
> 2. The guideline conflicts with the law on the books.
>
> 3. The guideline is unreasonable, as it is not supported by any scientific evidence of a risk of harm due to importation.
>
> 4. A faction of commercial beekeepers captured the bureaucracy; thus, the guideline was enacted for an improper purpose.

[55] The Beekeepers' claims are that the Federal Crown acted negligently or abusively through use of guidelines that were not supported by scientific assessments and regulations, not that the Federal Crown made any particular decision regarding imports.

[56] The Federal Crown argues that some of the commercial beekeepers "clearly do not have a claim for relief based upon the allegations in the Amended claim (sic)… and should not be a part of the class". However, the issue of whether the Federal Crown acted or failed to act improperly affects all commercial beekeepers in Canada, because each beekeeper has an interest in the government enacting policies legally, and based on scientific evidence. The Beekeepers have asked for relief in the form of damages based on the Federal Crown's conduct, rather than relief tied to the individual circumstances of each Class member. What form the damages take (e.g., aggregate, sub-class, or individual), and how each Class member's loss is to be quantified are issues that will need to be resolved, but are not determinative of the overriding common interest of all commercial beekeepers to have lawful Federal regulation of the importation of bee "packages" into Canada.

[57] The Beekeepers have admitted that there is a Faction within the Honey Council that is opposed to reopening the border to "packages" from the United States. I agree that this is not fatal to their certification as a class, because resolution of the common issues would not negatively impact any beekeepers who are members of the Faction. A successful outcome for the Beekeepers on the merits of the Action would not adversely affect any member of the Class, because it does not follow that the United States border would be opened to "packages". I also agree with the Beekeepers that it is ridiculous to suggest that the Faction's conflict with the Beekeepers is in effect to maintain an unlawful prohibition on importation of "packages".

[58] The results of the Action would not be contentious, because the relief requested does not harm any member of the Class. A decision by the Federal Crown, following a proper review of the current state of honeybee health in Canada and the United States, to open the border to imports would not be sufficiently connected to the Action for the results of the Action to have harmed any Class member.

[59] Should a court find that the Federal Crown acted negligently or by abusive administrative action, the Federal Crown would not be prohibited from subsequently reassessing the risks of "package" imports and enacting regulations preventing imports, if they find, using current scientific evidence, that the border should remain closed. No beekeeper is adversely impacted by another beekeeper being compensated for harm suffered, if found to be the case.

[60] Finally, the five cases relied upon by the Federal Crown are distinguishable. *Nixon* and *Paron,* which consider impermissible conflict within the class, are discussed in detail below.

(a) *Nixon v Canada (Attorney General)*

[61] *Nixon* is a class certification case involving a fire at Kingston Penitentiary, in which a number of inmates set fire to items in their individual cells and threw the flaming objects into an open area. The proposed class definition was "all inmates on 'Range A' of the Kingston Penitentiary on October 31, 1999". The motion judge dismissed the motion for two reasons: (1) the class could not be defined because the class definition encompassed inmates who would not be a part of the class, and (2) the representative plaintiff was inappropriate.

[62] In finding that the class could not be defined, the motion judge stated that the class definition encompassed some class members who would not be a part of the class. Although all of the inmates were affected by the fires, the individuals responsible for setting the fires were prevented from recovery by reason of their wrongdoing and possibly liable in damages to the other inmates. The identity of these individuals was not known. Therefore, the proposed class could not be determined, without a preliminary finding on the merits.

[63] In this case, although the Beekeepers acknowledge that the interests of some potential Class members are being served by the current guidelines, and some have even lobbied for the border to remain closed, there is no evidence or allegations that certain members of the Class were actually responsible for the Federal Crown's negligent or abusive actions.

(b) *Paron v Alberta (Environmental Protection)*

[64] *Paron* is a class action certification case involving approximately 600 cottage owners on the shores of Wabamun Lake. The representative plaintiff alleged that TransAlta Utilities Corporation's Lakeshore electrical generating plant had affected, among other things, the level of the lake. The representative plaintiff was seeking damages, an injunction against TransAlta, and an order requiring Alberta to raise the lake level 18 inches. The proposed class included "all Alberta residents who claimed that, between 1996 and 2005, they owned residential lands contiguous to Wabamun Lake and that their use and enjoyment of the lands were adversely affected…"

[65] The motion judge found that the class definition was subjective because it included only residents who claimed that their enjoyment and use of their land was adversely affected. Further, not all of the class members would benefit from the lake waters being raised. In fact, some of the proposed class members would have their cottages and lands flooded.

[66] In the current motion, neither the original nor the amended Class definition suffers from the defect of subjectivity and a successful outcome would not result in a loss for any of the Class members. The Beekeepers have not framed the Action in a manner such that a successful outcome will effect a definite change in Canada's stance towards the import of honeybees from the United States. Additionally, it makes little sense to argue that ensuring that the Federal Crown exercises its administrative power appropriately harms any of the Class members.

(5) Conclusion

[67] Therefore, I find that the proposed amended Class definition is based upon objective criteria, without reference to the merits, and there is sufficient evidence to show that the common issues are rationally connected to the Class definition.

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

[68] In *WCSC*, the Supreme Court of Canada set out the following test for determining the existence of a common issue (at para 39):

> The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim … It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.

[69] These comments were repeated by Mr. Justice Rothstein, in *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at paragraph 108 [*Pro-Sys*], where he highlighted that the commonality question was to be approached purposively.

[70] The Beekeepers propose nine common issues:

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

[71] The Federal Crown argues that there are no common questions of law or fact, because of the conflict among Class members. They assert that not all proposed Class members will benefit from the successful prosecution of the Action, making this situation inappropriate for a class certification.

[72] The Federal Crown submits that the conflict between the Faction and the Beekeepers shows that the issues of whether the Minister's decision to deny imports fell below a standard of

care, or was indefensible, are not common questions among the proposed Class. It states that there is no evidence to show that all of the commercial beekeepers who would be in the Class share the allegations that the Minister has instituted a *de facto* prohibition. Further, the Federal Crown argues that it cannot be a common issue that the Minister has a duty to the Beekeepers to act in a manner that prevents their economic losses, because the logical corollary is that the Minister owes a similar duty to the Faction to protect them from economic loss associated with unacceptable risk of pests and diseases.

[73] The Federal Crown also objects to the characterization of causation as a common issue. It states that the assessment of the cause of the loss of the opportunity to import for each individual commercial beekeeper is too complex to deal with as a class, and would instead require individual trials. These trials would be necessary to assess each Class member's individual circumstances, and whether and in what manner each pursued the opportunity to import. Additionally, the manner in which each Class member managed wintering, pests, and disease risk would have to be evaluated individually, so that it could be determined whether the import prohibition actually caused any damage to the business.

[74] Finally, the Federal Crown argues that there is no common claim for relief, because the injury is not shared by all Class members. It contends that the Beekeepers have framed the issues of commonality in an impermissibly broad manner, in order to create the Class (*Rumley v British Columbia*, 2001 SCC 69 at para 29 [*Rumley*]), and ignored the fact that there are Class members who consider that there was no opportunity lost and would not benefit from the successful prosecution of the Action. At the hearing, the Federal Crown suggested an appropriate

alternative proceeding would be to allow a test case to proceed, with individual cases following if the Beekeepers were successful in the test case.

(1) Do common issues exist?

[75] I find that there are issues in common, such that allowing the action to proceed as a class action will avoid duplication of fact-finding and legal analysis, as well as a multiplicity of individual actions based on the same issues.

[76] Rule 334.16(1)(c) requires the Court to determine whether the claims of the class members raise common questions of law or fact, and whether or not those common questions predominate over questions affecting only individual members.

[77] In *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at paragraph 46, the Supreme Court of Canada stated that:

> *Rumley* and [*WCSC*] therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

[78] In this case, the two causes of action pleaded by the Beekeepers (issues 1 to 3, and 8), and the two defenses asserted by the Federal Crown (issues 6 and 7) are common issues that predominate over any questions that would affect individual commercial beekeepers. Any

negligent or improper regulatory actions taken by the Federal Crown will have affected the industry as a whole and are, therefore, common issues.

[79] Mr. Paradis' evidence was that the Federal Crown's interactions with commercial beekeepers were industry wide, both before and after 2006, and that the national policy to refuse applications was widely disseminated and communicated. Mr. Justice Stratas' framing of the allegations made by the Beekeepers regarding the guideline clearly shows that a determination of the issues relating to the Federal Crown's behaviour would not depend on the actions or views of individual Class members, and would materially advance the resolution of each individual's claim (*Paradis Honey FCA* at para 85):

> - The guideline is tantamount to a regulation that should have been passed as a regulation.
> - The guideline imposes an absolute prohibition against importation and, thus, conflicts with the law on the books, section 160 of the Health of Animals Regulations.
> - The guideline is unreasonable within the meaning of Dunsmuir v New Brunswick, 2008 SCC 9, as it is not supported by any scientific evidence of a risk of harm due to importation. The last risk assessment was several years out of date.
> - A faction of commercial beekeepers, acting for their own financial advantage, captured the bureaucracy and induced it to make the guideline; thus, the guideline was enacted for an improper purpose.
>
> (citations omitted)

[80] This framing of the issues suggests that the negligent act is not an act or omission directed towards a commercial beekeeper as an individual, rather it is negligence towards the industry, stemming from a failure to follow the import regulations that were in place after the

expiry of *HIPR 2004*. Similarly, the cause of action for the novel tort of abusive administrative action focuses on the Federal Crown's conduct (at para 144):

> As well, the quality of the public authority's conduct must be considered. This is because orders for monetary relief are mandatory orders against public authorities requiring them to compensate plaintiffs. And in public law, mandatory orders can be made against public authorities only to fulfil a clear duty, redress significant maladministration, or vindicate public law values.
>
> (citations omitted)

[81] Applying this framework to the Action, Mr. Justice Stratas found (at para 148):

> As alleged, Canada's conduct [i.e., creating and enforcing an unauthorized, scientifically unsupported policy preventing the beekeepers from exercising their legal right to apply for importation permits on a case-by-case basis] has a flavour of maladministration associated with it, something that can prompt an exercise of discretion in favour of monetary relief. The additional element of bad faith, pleaded here, buttresses that conclusion. As pleaded, the interactions between Canada and the beekeepers suggest that monetary relief may be required to fulfil a clear and specific duty to act.

[82] Further, as discussed above, I do not agree that there is a conflict within the Class such that the resolution of issues 1 to 3 and 6 to 8 will negatively impact certain members of the Class. Given that the cause of action in negligence is based on allegations that the Minister was and is "improperly refusing to consider section 160 applications" (*Paradis Honey FCA* at para 99), the Faction cannot be legally or factually in conflict with the allegation that the Minister unlawfully or improperly instituted a "de facto prohibition".

[83] All of the proposed Class members have an interest in the Federal Crown lawfully performing its administrative functions. Regarding assessing damages at trial, Mr. Justice Stratas

said, “the judge will consider what would have happened had the Minister acted properly, i.e., what would have happened in a ‘but for’ world where the blanket guideline did not exist”, and posited that permits may or may not have been available based upon the risk of disease and harm arising from importing “packages” (*Paradis Honey FCA* at para 101).

[84] Members of the Faction may hold different political views from the Beekeepers regarding whether the border should remain closed to “packages”, but that does make the questions of whether the Federal Crown was negligent, or took abusive administrative action, individual. The fact that they are in agreement with the Minister’s actions has little bearing on whether or not the Minister was acting improperly. There is no evidence that the Minister acted improperly towards only some commercial beekeepers. The Minister’s actions are legally and factually the same towards all Class members.

[85] In *Markson*, the Ontario Court of Appeal was faced with a similar situation, where some customers of MNB Bank Canada allegedly enjoyed the defendant’s potentially illegal lending practices, and found that the class should be certified because the cause of action was focused on the defendant’s conduct (at para 75):

> It may be that some customers of the defendant would prefer that it continue to have the right to break the criminal law (if it is doing so), in order to offer its customers some added advantages. In this sense, allowing the plaintiff to pursue a class proceeding may be seen as unfair to some of the customers. In an organized society however, I do not see this as the kind of fairness concern that should prevent a court from intervening. Rather, the concern should be whether the defendant is acting in according to the law.

[86] The fact that some Class members may have benefitted from these alleged wrongdoings, or may not be able to recover damages, does not change the fact that the resolving issues 1 to 3 and 6 to 8 will advance the resolution of every Class member's claim. The Beekeepers acknowledge that, based upon how each Class member dealt with the loss of opportunity to import, the quantum of damages, if any, available to individual beekeepers may vary. However, contrary to the Federal Crown's arguments, the question of causation and the question of quantum are distinct. Similarly, the fact that some Class members may believe it to be unfair to their interests, should the Federal Crown ultimately decide to open the border to "package" imports, does not create a conflict within the Class such that issues 1 to 3 and 6 to 8 are not common issues.

[87] Further, of the nine proposed common issues, 1 to 3 and 6 to 8 are the ones which will likely require the most time and resources, and therefore predominate over any individual questions that may arise. The fact that the issues relating to damages may be individual is not a proper basis for refusal to certify a class. Rules 334.18(a) and 334.18(e).

[88] I find that the claims of the Class raise common issues that predominate over questions affecting individual members, such that the criterion in Rule 334.16(1) is satisfied.

(2) Are issues 1 to 9 common issues?

[89] Turning to the nine proposed common issues—and noting that Rule 334.19 states that a judge may, on a motion, amend an order certifying a proceeding as a class proceeding or, if the

conditions for certification are no longer satisfied with respect to the proceeding, decertify it—I find that it is appropriate, at this time, to certify all nine issues as common.

[90] As discussed above, whether the Federal Crown owed each commercial beekeeper a duty of care and a standard of care (issues 1 and 2, respectively), and whether the Federal Crown's actions resulted in a recoverable loss (issue 3)—are common issues.

[91] Whether or not the causes of action arise "otherwise within a province" (issue 5) is a common issue. It is dispositive of whether the Class will be able to proceed as a whole, or whether sub-classes will have to be created based upon each Class member's location.

[92] Whether the *Crown Liability Proceedings Act* grants any or all of the Defendants statutory immunity, and whether the Defendants' actions or omissions fall within Crown sovereignty or the Crown prerogative (issues 6 and 7, respectively) are common issues. Should the Federal Crown succeed in either of these two defences, the Action will fail for the entire Class.

[93] Mr. Justice Stratas, for the Federal Court of Appeal, determined that Canada's allegedly abusive administrative action (issue 8) was creating and enforcing the unauthorized policy that they have implemented since 2006. Since the policy was directed towards all commercial beekeepers, this is a common issue.

[94] It is too early to know whether the Class will continue as a whole or will be split into sub-classes. As such, it is appropriate to treat the issues of damages from the claim in negligence and the claim in abusive administrative action (issues 4 and 9, respectively) as common issues for the purposes of certification. Particularly, the questions of whether aggregate damages are available to the Class and how those damages should be distributed are common issues. If it is found that individual damages are appropriate, it may be that the framework for calculating such damages will have to be done on the basis of sub-classes, and the necessary changes to the certification order can be made by the Court at that time.

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

[95] Rule 334.16(2) states that all relevant matters shall be considered in the determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether:

a) the questions of law of fact common to the class members predominate over any questions of individual members;
b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;
c) the class proceeding would involve claims that are or have been the subject of any other proceeding;
d) other means of resolving the claims are less practical or less efficient; and
e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[96] The Supreme Court of Canada, in *AIC Limited v Fischer*, 2013 SCC 69 at paragraphs 19 to 23 [*AIC*], set out a number of principles to be used in determining whether a class action is the

preferable procedure:

1) The starting point is the relevant statutory provision. The preferability requirement is broad enough to take into account all available means of resolving the class members' claims including avenues of redress other than court actions.
2) The court must look at the common issues in the context of the action as a whole, and when comparing possible alternatives with the proposed class proceeding, it is important to adopt a practical cost-benefit approach, and to consider the impact of a class proceeding on class members, the defendants, and the court.
3) The preferability analysis considers the extent to which the proposed class action serves the goals of class proceedings. The three principle goals of class actions are (1) judicial economy, (2) behaviour modification, and (3) access to justice. This is a comparative exercise, and the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals.

[97] The burden of proof is on the party seeking certification, and the standard is "some basis in fact" (*Pro-Sys*, at para 104), which has been interpreted by the Supreme Court of Canada to mean "sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage" (*Pro-Sys* at para 104). This requires the representative plaintiff to show that (1) a class proceeding would be a fair, efficient, and manageable means of advancing the claim; and (2) it would be preferable to any other reasonably available means of resolving the class members' claims (*AIC* at para 48).

[98] Further, the "Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial", because after certification the court has the "power to decertify the action if at any time it is found that the conditions for certification are no longer met" (*Pro-Sys* at para 105).

[99] The Federal Crown asserts that the identification of the Class is "plagued with self-assessment", which would nullify any judicial economy. Further, the Federal Crown argues that the Action depends on the Minister's actions causing each Class member to have suffered the loss of an opportunity. As such, individual issues predominate, making the appropriate procedure individual applications for relief. It suggests that, to the extent that the Beekeepers are seeking a clarification of the lawfulness of the Minister's decision-making process, a test case would be more appropriate.

[100] In my view, the common questions raised in this action overwhelmingly predominate, making this a clear case where a class action will result in judicial economy. Mr. Paradis' evidence shows that the Federal Crown interacted with the commercial beekeepers on an industry-wide level, both before and after December 31, 2006. Therefore, it was to the industry as a whole that the Federal Crown made representations, stating that ongoing monitoring and investigation of whether it was appropriate to open the border to "packages" from the United States was happening. The Federal Crown does not dispute that its actions were nation-wide and industry-wide.

[101] While the Federal Crown suggests that each Class member's lost opportunity is unique such that the resolution of the Beekeepers' allegations will not significantly advance any individual Class member's claim, I disagree. The common issues predominate over any questions affecting only individual members.

[102] There are an estimated 1,400 commercial beekeepers in Canada, who fall within the Class definition. The Beekeepers submit that it is likely that a sizeable number of these beekeepers would be motivated and interested in the litigation. In 2013, the Manitoba Association of Beekeepers reported that 384 commercial beekeepers were in favour of opening the border to "packages" from the United States. Mr. Gibeau estimates that there are 200-300 potential class members in Ontario, although he did not provide any assessment of their level of interest.

[103] There is no evidence that any of the Class members have an interest in individually controlling the prosecution of separate proceedings. In 2013, the Alberta Beekeepers' Commission submitted a letter to the CFIA expressing significant dissatisfaction with the methodology and findings of a risk assessment conducted in 2013 (the "2013 Risk Assessment"); however, no litigation has resulted. This supports the view that many of their members are interested in the issues underlying this action, but are not interested in pursuing individual claims. Aside from *Paradis Honey FC* and *Paradis Honey FCA*, there have been no other proceedings that involve the claims in the Action brought to the attention of the Court.

[104] The Beekeepers also argue that there is no alternative mechanism for resolving their claims for compensatory damages, and that the only regulatory compensation mechanism for the destruction of honeybees does not apply. In the absence of a class proceeding, the Class members are left with the alternatives of individual judicial review, individual litigation, group litigation, or a test case. They assert that a class proceeding is clearly the preferable means of resolving the issues, compared to any of the alternatives.

[105] As stated above, the three principal goals of class actions are (1) judicial economy, (2) behaviour modification, and (3) access to justice.

[106] Judicial review would not provide the Beekeepers with the compensation they seek and, because of the limited remedies available, would probably not lead to behaviour modification. For most commercial beekeepers, there is no obvious administrative decision on which to seek a judicial review, and judicial review may only be available to beekeepers who had applied for an import permit and were specifically denied. Further, given that the Federal Crown's alleged misconduct stretches back ten years, the 30-day limitation for judicial review would preclude the Beekeepers from bringing a judicial review based on any actions or omissions in those earlier years. Therefore, judicial review would further none of the goals of class actions

[107] The Federal Crown suggests that a test case would be the most efficient way to clarify the lawfulness of the Minister's actions. However, this ignores the fact that, should the test plaintiff succeed, each individual beekeeper would have to start an individual litigation. Not only would this lead to a multiplicity of actions, taking up the Court's time and resources, it could also risk inconsistency in fact-finding.

[108] It is undisputed that the Federal Crown's actions affected commercial beekeepers nation-wide. The Beekeepers have produced evidence, that meets the standard of "some basis in fact", showing that the Class would be fairly large. Each Class member, to succeed in their action, will need to show that the Federal Crown acted negligently or in a manner that embodied abusive administrative action, and that the defenses in sections 3, 8 , or 10 of the *Crown Liability and*

Proceedings Act and the defenses of Crown sovereignty or Crown prerogative do not apply. Due to the nature of the causes of action, and defenses, these analyses will depend on similar facts and legal analysis, regardless of the identity of the Class member. Therefore, the goal of judicial economy is better achieved by proceeding as a class action, than proceeding as a test case, followed by individual litigation.

[109] In invoking Crown sovereignty and Crown prerogative, the Federal Crown makes the argument that the decisions regarding honeybee "package" imports are strictly policy decisions. The implication of this is that the Beekeepers should only have political means of redress, such as lobbying and voting. Based on the evidence, this is an unsatisfactory procedure for effecting behavioural modification. The Beekeepers state that commercial beekeepers are outnumbered by hobbyists, who generally do not share the same economic concerns regarding colony replacement.

[110] Even though pollination is essential to Canada's agricultural interests, commercial beekeeping appears to be an industry which has had little success in engaging with the Federal Crown. For example, the evidence shows that the CFIA repeatedly refused to conduct a risk assessment, absent a request from the Honey Council, despite knowing that the Honey Council contained a majority of beekeepers who were opposed to opening the border. Additionally, despite evidence that the honeybee monitoring situation in the United States had changed significantly in 2009, the Minister waited until 2013 to perform a risk assessment, after the Action was commenced. Further, the 2013 Risk Assessment is allegedly based on questionable assumptions and out of date information, and may be of dubious scientific value.

[111] The Ontario Divisional Court, sitting as an appellate court, in *Serhan (Trustee of) v Johnson & Johnson* (2006), 85 OR (3d) 665 at paragraph 157, stated:

> The class proceedings regime in this province is specifically designed in that it is intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.

[112] Further, the Ontario Court of Appeal in *Markson*, at paragraph 71, stated:

> A class proceeding would therefore meet the goal of behaviour modification. While presumably an individual action that resulted in an injunction or declaration would achieve the same result, a class proceeding, unlike an individual action, will also have the advantage of requiring the defendant to account for the economic harm it has caused.

[113] I find that the goal of behaviour modification is best effected through a class proceeding.

[114] The Supreme Court of Canada, in *AIC* at paragraph 24, stated that access to justice in the context of class actions has two interconnected dimensions: (1) procedural—do the claimants have a fair process to resolve their claims—and (2) substantive—will the claimants receive a just and effective remedy for their claims if established. The Supreme Court of Canada went on to formulate a series of questions to help determine whether both of these elements are present in an class action (*AIC* at paragraphs 27 to 38):

1) What are the barriers to access to justice?
2) What is the potential of the class proceedings to address those barriers?
3) What are the alternatives to class proceedings?
4) To what extent do the alternatives address the relevant barriers?
5) How do the two proceedings compare?

[115] One of the major barriers to access to justice highlighted by the Beekeepers is the cost of litigating the Action. The Beekeepers started towards certifying this class in 2012. They have already expended a significant amount of time and resources into moving the Action forward, and it is likely that litigation will only become more expensive. They state that this is likely an action that will require significant expert testimony, as well as legal resources. The issues are complex and cross-border, and the litigation of the novel cause of action may take years, if there are appeals. Moreover, a class action is preferable in cases where the financial burden of a case would consume all or almost all of the proceeds of the judgement of any single plaintiff (*Nantais v Telectronics Proprietary (Canada Ltd)* (1995), 25 OR (3d) 331), which may well be the case here.

[116] Further, with regards to access to justice, any procedure that places the plaintiff in a position where there is a risk of having to pay a costs award compares less favourably to a class proceeding, under which there is costs immunity absent exceptional circumstances (Rule 334.39(1)).

[117] I find that it is doubtful that every Class member would be able to effectively bring an individual action, should the Action not move forward as a class proceeding. Therefore, I find that certifying a class action would best achieve the goal of access to justice.

[118] Finally, the Beekeepers assert that the fact that some Class members may prefer and benefit from the Federal Crown's impugned conduct should not be a factor in considering the preferable procedure. In *Markson*, at paragraphs 29, 66 and 67, the Ontario Court of Appeal

rejected the motion judge's finding that the fact that some members of the class were not in favour of the law suit (because they preferred perks of the borrowing option that carried the risk of a criminal rate of interest) was a conflict within the class which support the finding that a class proceeding was not the preferable procedure. I agree with the Beekeepers that this is a similar situation and, as I stated above, it is against public policy to deny certification because certain Class members may wish to retain the benefits of unlawful conduct.

[119] I am persuaded that the other means of resolving the claims in the Action are less practical and/or less efficient, and I agree with the Beekeepers that a class proceeding is the preferable procedure for the just and efficient resolution of the common issues.

E. Is there an appropriate representative plaintiff?

[120] In *WCSC*, at paragraph 41, the Supreme Court of Canada stated:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interest of the class.

[121] Rule 334.16(1)(e)(iii) expresses that the representative plaintiff cannot have, on the common questions of law or fact, an interest that is in conflict with the interest of other class members. Additionally, Rule 334.16(1)(e)(ii) requires the representative plaintiff to have

prepared a plan for the proceeding, and Rule 334.16(1)(e)(iv) requires that the representative plaintiff to provide a summary of any agreements respecting fees and disbursements.

[122] The Federal Crown argues that the proposed representative plaintiffs displayed indifference and antagonism, during cross-examination, towards proposed Class members who oppose the importation of honeybee "packages". The proposed representative plaintiffs identified the reasons that the Faction did not want to allow imports, and dismissed them. The Federal Crown asserts that it is unacceptable to allow the proposed representative plaintiffs to impose their individual business risk acceptability on the entire Class.

[123] The Federal Crown further submits that the dismissive attitude of the proposed representative plaintiffs is similar to that of the plaintiffs in *Paron* and *Nixon*, where certification was denied. Further, the Federal Crown contends that the opt out provisions are not sufficient to deal with members of the Class who do not support and do not agree with the factual allegations in the Amended Statement of Claim.

[124] As discussed above, I am not persuaded that there is any conflict within the Class on common issues of law or fact. In my opinion, Mr. Paradis, Mr. Gibeau, and Mr. Lockhart are appropriate representative plaintiffs.

[125] Moreover, there is no evidence that either Mr. Paradis or Mr. Gibeau are indifferent or antagonistic towards members of the Faction. They clearly disagree with the opinion that the border should remain closed, however, the evidence shows that they are interested in maintaining

the viability of the commercial beekeeping industry in Canada and have worked as part of provincial beekeeping associations towards that goal. Although the Federal Crown characterizes their motivations as self-interested, a successful outcome for the Action would not result in the border being open to honeybee "packages" from the United States. Their desire to receive compensation for their losses, because of alleged government negligence or abusive administrative action, is neither indifference nor antagonism towards the commercial beekeepers who want to keep the border closed.

[126] The Federal Crown argues that the Beekeepers are only interested in the profitability of their operations, a position that cannot be reconciled with other Class members' concerns over pests and disease. While it may be true that their interests are primarily economic, this is not related to either the common issues or the relief sought. Each Class member is allowed to have an opinion on whether the border should be open or closed, but the whole group has an interest in having the Minister do his or her job correctly and in accordance with the rule of law.

[127] The proposed representative plaintiffs and their counsel have demonstrated that they are competent, and have the capacity to advance the Action. They have submitted a proposed litigation plan, and are prepared to submit a summary agreement regarding fees and disbursements.

[128] Both parties agree that the litigation plan, which was prepared in 2013, needs to be updated. Therefore, I find that it is appropriate to certify the class proceeding with the condition

that the litigation plan be updated and brought back before the Court for approval, within 14 days of the publication of these Reasons.

V. Costs

[129] Per Rule 334.39(1), no costs are awarded for this motion.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The pleadings disclose reasonable causes of action.
2. There is an identifiable class of two or more persons, and there are no disqualifying conflicts between members of the Class.
3. There are common issues, the resolution of which will advance the claims of all Class members. These common issues predominate over questions affecting only individual members.
4. A class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law and fact.
5. Mr. Paradis, Mr. Gibeau, and Mr. Lockhart are appropriate representative plaintiffs.
6. The motion to certify this action as a class proceeding is granted, contingent upon the Plaintiffs submitting an updated litigation plan within 14 days of the date of this Judgment.
7. The nine common issues proposed by the Plaintiffs are certified as common issues.
8. No costs are awarded for this motion.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2293-12
STYLE OF CAUSE:	PARADIS HONEY LTD. ET AL V HMTQ
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 6, 2017
JUDGMENT AND REASONS:	MANSON J.
DATED:	FEBRUARY 17, 2017

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