Federal Court Cour fédérale

Date: 20241129

Docket: T-2293-12

Citation: 2024 FC 1921

Ottawa, Ontario, November 29, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

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

Plaintiffs

and

HIS MAJESTY THE KING as represented by THE MINISTER OF AGRICULTURE AND AGRI-FOOD and THE CANADIAN FOOD INSPECTION AGENCY

Defendants

JUDGMENT AND REASONS

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Overview

[1] By way of this class action the Plaintiffs, who are commercial beekeepers, seek damages on their own behalf and on behalf of the other class members, which damages they allege were caused by the negligence of the Defendants in prohibiting the importation of live honeybee packages from the continental United States [US] after 2006, thereby causing them economic harm. Five common issues were to be determined at the common issues trial.

[2] Broadly speaking, this action concerns the maintenance or enforcement of what is referred to in the first common issue as a *de facto* prohibition on the importation of honeybee packages from the US. Notably, it concerns the conduct of two assessments undertaken to determine the risk associated with such importation: *Risk Assessment on Honey Bees from the United States*, dated October 10, 2003 [2003 Risk Assessment], and *Risk Assessment on the Importation of Honey Bee (*Apis mellifera*) Packages from the United States of America*, dated January 2014 [2013 Risk Assessment]. Together, these will be referred to as the Risk Assessments.

[3] The first common issue asks 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, including a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments. This issue raises the question of whether a private law duty of care should be

imposed on the Defendants, which necessitates the analysis known as the *Anns/Cooper* test (*Anns v Merton London Borough Council*, [1978] AC 728 [*Anns*]; *Cooper v Hobart*, 2001 SCC 79 [*Cooper*]).

[4] The first question to be addressed when engaging that analysis is whether the duties of care asserted by the Plaintiffs are novel. That is, whether the relationship between the parties falls within, or is analogous to, a previously established category of duty of care. In this matter, I have found that both asserted duties – the duty not be negligent in the maintenance or enforcement of the import prohibition, and the duty to identify mitigation measures in the Risk Assessments – are novel (although I have also found that, in fact, the former encompasses the latter). Accordingly, a full analysis under the two-stage *Anns/Cooper* framework was required.

[5] The first stage of the *Anns/Cooper* test concerns foreseeability and proximity. On the evidence, and given the Defendants did not substantively address the question, I have found that it was reasonably foreseeable to the Defendants that the continued prohibition on the importation of US honeybee packages could potentially have negative economic consequences on some commercial beekeepers, which would include some members of the Class, as a result of the increased cost of importing packages from other countries and of overwintering. However, foreseeability alone is not sufficient to establish that a duty of care was owed to the Class. There must also be proximity. In that regard, I have found that in this case the legislative scheme, the *Health of Animals Act*, SC 1990, c 21 [*HA Act*] and *Health of Animals Regulations*, CRC, c 296 [*HA Regulations*], does not give rise to, and implicitly forecloses, a private law duty of care owed to the Plaintiffs. Even if that were not the case, the communications and interactions between the Canadian Food Inspection Agency [CFIA] and the Class properly fall within the regulator's role and do not give rise to a private law duty of care to protect the Class' economic interests with respect to the importation of US honeybee packages. In the absence of proximity, the Plaintiffs have not met their burden of establishing the existence of a *prima facie* duty of care.

[6] On this basis alone, the Plaintiffs' claim cannot succeed. As the Plaintiffs have failed to establish proximity between the Class and the Defendants, there is no duty of care owed and no negligence (*Taylor v Canada,* 2020 ONSC 1192 at para 594 [*Taylor 2020*]). Without a duty of care, there is no need to consider if there are residual policy considerations that would "trump" its existence (*Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 at para 57 [*Fullowka*]). This is the determinative issue in this case.

[7] Accordingly, there is no need to proceed further with this decision.

[8] However, given the time and effort expended at trial, and in the event that I have erred in this finding, I have also addressed the second stage of the *Anns/Cooper* test.

[9] The second stage of the *Anns/Cooper* test asks whether there are residual policy concerns, outside the relationship of the parties, that may negate the imposition of the duty of care. In this case, I have found that, had a *prima facie* duty of care been found at the first stage of the analysis, it would be negated by policy considerations. Specifically, the decision-making around the maintenance or enforcement of the prohibition on the importation of US honeybee packages was part of a course of conduct undertaken by CFIA in the interests of animal health and is immune from liability, as it is a matter of policy. Even if that were not the case, residual policy considerations, notably the conflict between CFIA's public duty and the proposed private duty to protect the economic interests of commercial beekeepers, but also concerns around indeterminate liability and a potential chilling effect on government consultations, would negate the duty. I have found that in these circumstances there was no discrete duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments; however, even if there were, it would be encompassed by these residual policy considerations.

[10] The second common issue asks whether any or all of the Defendants breached the requisite standard of care. I have found that, in this case, the applicable standard is that of a reasonable regulator in similar circumstances.

[11] Several documents and entities are relevant to this analysis. The World Trade Organization [WTO] was formed by the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 3 (entered into force 1 June 1995) [WTO Agreement]. Annexed to the WTO Agreement is the Agreement on the Application of Sanitary and Phytosanitary Measures [SPS Agreement]. A second relevant entity is the World Organization for Animal Health [WOAH], formerly the Office International des Epizooties [OIE]. This body will be referred to as the OIE in these reasons. It publishes the World Organization for Animal Health Terrestrial Animal Health Code, or the WHOA Code. This document was formerly known as the OIE Code, and it will be referred to as such in these reasons.

[12] The Plaintiffs assert that the SPS Agreement and the OIE Code established the standard of care to be met by the Defendants. However, I have found that these cannot be relied upon to impose a private law duty of care owed by CFIA to the Plaintiffs or to legally impose a standard of care on the Defendants with respect to the Plaintiffs. As is obvious from their terms, those documents are concerned with international trade between Member states, and trade disputes are dealt with as between those Member states. In this matter, there is no evidence that the US has commenced a trade dispute with Canada with respect to the prohibition on the importation of US honeybee packages. Further, in my view, *Pfizer Inc v Canada (TD)*, [1999] 4 FC 441, 1999 CanLII 8291, aff'd *Pfizer Inc v Canada*, [1999] FCJ No 1598, 1999 CarswellNat 2125 (FCA) [*Pfizer*] makes it clear that the *World Trade Organization Agreement Implementation Act*, SC 1994, c 47 [*WTO Agreement Implementation Act*] precludes a private law duty of care arising from the WTO Agreement. Therefore, nor can the SPS Agreement, which is part of the WTO Agreement, give rise to a private law duty of care to identify risk mitigation options. In the absence of a private law duty of care, and because the SPS Agreement and OIE Code are not legally binding as between the Defendants and the Plaintiffs (who are not a WTO Member), the risk assessment standards associated with the SPS Agreement and OIE Code are not legally binding on CFIA. Accordingly, there would be no legal requirement to take the OIE standards into account pursuant to Article 5.1 of the SPS Agreement. On that basis, the Plaintiffs' argument that the OIE Code sets the standard of care, and that the breach by the Defendants was the failure to consider mitigation in the Risk Assessments in accordance with those standards, rendering the Risk Assessments "invalid," cannot succeed.

[13] However, the SPS Agreement and the OIE Code are relevant to the content of the standard of care, even if they are not legally binding and applicable as between the Defendants and the Plaintiffs. This is because the process for conducting a risk analysis, which process includes risk assessment, as described in the SPS Agreement and OIE Code, is indicative of best practices and is reflected in the "CFIA Protocols" (the 2001, 2005 and 2009 versions of this document are in evidence). As such, they serve to inform the standard of care.

[14] To meet that standard of care, CFIA risk managers, as reasonable regulators, were required to engage in mitigation option evaluation following the Risk Assessments. This did not necessarily require a formal re-entry into the Risk Assessments. However, with respect to the 2003 Risk Assessment, there is a lack of evidence that the risk managers actually grappled with risk mitigation options in terms of the importation of US honeybee packages or that they took steps or made determinations reaffirming that certification, as a risk mitigation option, was not possible and that zoning was not feasible. Accordingly, I have found that the Defendants did not meet the standard of a reasonable regulator respecting the 2003 Risk Assessment. However, the evidence does establish that the Defendants met the standard of care respecting the 2013 Risk Assessment. Dr. Connie Rajzman, a risk manager with CFIA, attempted to identify risk mitigation options (the first step of option evaluation). She found that none could be proposed, either internally by CFIA or by the Provincial Apiculturists, who were specifically consulted on that issue.

[15] The third common issue asks whether or not recoverable loss or damages ensued as a result (of the breach of the standard of care). This requires that both factual causation, pursuant to the "but for" test, and legal causation be established.

[16] I have found that legal causation was made out because the nature of the losses the beekeepers allege they experienced – that is, the actual injury – is the precise loss that was foreseeable, namely economic loss as a result of the inability to access US packages.

[17] Respecting factual causation, the Plaintiffs submitted that this was a matter of general, rather than specific, causation. That is, the relevant question was whether the negligent conduct had the capacity to cause the harm alleged (relying on *Levac v James*, 2023 ONCA 73 [*Levac*] and *Wise v Abbott Laboratories, Limited*, 2016 ONSC 7275 [*Wise*]), rather than whether the harm was actualized. However, although causation in complex cases can be considered in terms of general and specific causation, I determined that this was not a case where causation should be divided. This is not a circumstance where establishing the capacity of the alleged negligence to cause the claimed losses involves complex scientific expert evidence or necessitates the drawing of an inference. Nor does the common issue, as stated, contemplate such a division.

[18] I agreed with the Defendants that, in order to prove causation, the Plaintiffs would have to establish two things: first, that the Class would have been able to import US honeybee packages if CFIA had assessed permit applications on a case-by case basis, or if mitigation measures had been included in the Risk Assessments; second, that compared to alternative methods of replacing winter losses, US honeybee packages would have been more productive or cheaper.

[19] I found that the Plaintiffs were unable to establish, but for the Defendants' negligence, they would have been permitted to import US packages. In particular, upon review of the expert evidence, I found that the same import conditions that were available for US queen imports at the time of the 2003 Risk Assessment would not have been available for or effective with respect to US honeybee packages. On the evidence, I have determined that other conditions were similarly not available.

[20] Respecting this issue, both parties tendered an expert economist witness. The Plaintiffs tendered Dr. Daniel Sumner, and the Defendants tendered Dr. Peter Nickerson. In closing, the Plaintiffs challenged Dr. Nickerson's independence, suggesting he had taken on the role of an advocate, a submission I have rejected.

[21] The Defendants challenged the reliability of Dr. Sumner's evidence, as he created a complex mathematical model to calculate economic loss to the beekeepers but relied, as parameters for that model, on his own best judgment rather than on actual data. However, the experts agreed that the relevant data did not exist. I agreed with the Defendants that the unreliability of Dr. Sumner's data may have impacted the probative value of his evidence were there to have been a subsequent trial on damages. However, I was not persuaded that Dr. Sumner's overall conclusion – economic loss to Canadian commercial beekeepers as a result of the import prohibition – had no probative value.

[22] The fourth common issue asks whether ss 3, 8 or 10 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*CLPA*] grant any or all of the Defendants immunity or otherwise limit their liability. The Defendants indicated in closing that they would not be relying on s 8. I have found that ss 3 and 10 do not offer immunity, but rather establish the statutory basis on which the Plaintiffs have the right to sue the Crown. The Crown may be vicariously liable for the tortious acts of its servants. CFIA is a servant of the Crown as defined by the *CLPA*, and the Crown is therefore vicariously liable for its negligence.

[23] The fifth common issue asks whether s 50.1 of the *HA Act* applies to limit the liability of CFIA for any actions or omissions after February 27, 2015. Section 50.1 provides immunity for conduct undertaken in good faith. There is no specific test for good/bad faith but jurisprudence has identified considerations that apply in assessing such claims. I had already found that CFIA's purpose under the *HA Act* and *HA Regulations* is to protect animal and human health. I have found that the evidence did not establish that the Defendants acted with an alien purpose or that they were seriously careless or reckless with respect to that purpose. Upon review of the jurisprudence concerning bad faith in the context of the evidence in this matter, I have found that the Defendants did not act in bad faith, either in general or with respect to the Plaintiffs' specific allegations.

[24] In the result, the Plaintiffs' claim does not succeed.

Procedural matters

A. Litigation history

[25] This action has a long procedural history, the details of which largely need not be addressed in this decision. Below I have identified prior procedural matters and prior determinations that are relevant or that will add context to my reasons.

i. Statement of claim

[26] This action was initially commenced by a statement of claim filed on December 28, 2012. A final, Amended Amended Statement of Claim was filed on April 6, 2017, subsequent to the certification of this matter as a class action.

ii. Motion to strike

[27] On November 8, 2013, the Defendants brought a motion to strike the statement of claim for disclosing no reasonable cause of action. That motion was initially granted by this Court (*Paradis Honey Ltd v Canada (Attorney General)*, 2014 FC 215). On appeal by the Plaintiffs, the Federal Court of Appeal overturned the motion judge's decision striking out the action and permitted the matter to proceed (*Paradis Honey Ltd v Canada (Attorney General)*, 2015 FCA 89 [*Paradis FCA*]). Leave to appeal to the Supreme Court of Canada was denied on October 29, 2015 (*Canada v Paradis Honey Ltd*, [2015] SCCA No 227). As will be discussed below, the Plaintiffs assert that the Federal Court of Appeal made certain findings in its decision overturning the motion to strike decision that are relevant to or binding on this Court.

iii. Certification as a class action

[28] In his Judgment and Reasons dated February 17, 2017, Justice Manson certified this matter as a class action (*Paradis Honey Ltd v Canada*, 2017 FC 199 [Certification Decision]). Justice Manson also permitted an amendment proposed by the Plaintiffs to the definition of the

proposed class. The class was therefore defined as "[a]ll persons in Canada who keep or have kept more than 50 bee colonies at a time for commercial purposes since December 31, 2006."

iv. The common issues

[29] The Certification Decision also found that it was appropriate, at that time, to certify all nine common issues proposed by the Plaintiffs, noting the *Federal Courts Rules*, SOR/98-106, Rule 334.19 [*Federal Courts Rules*], which permits the amending of a certification order (paras 70, 89). These were as follows:

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 damage.

[30] However, shortly before trial, at the request of the Plaintiffs and as consented to by the Defendants, the Trial Management Judge, by Order dated August 15, 2023, ordered that the common issues to be determined at the common issues trial of this action are the following:

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, including a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments.
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. 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.
5. Whether s. 50.1 of the *Health of Animals Act*, SC 1990, c. 21 applies to limit the liability of CFIA for any actions or omissions after February 27, 2015.

[31] It is undisputed that these five common issues are the only common issues now before the Court. The subject Order is found at Tab 25 of the Trial Record.

v. The "stipulations"

[32] By way of letter to counsel for the Defendants dated October 17, 2023, counsel for the Plaintiffs indicated that they had delivered their Memorandum of Fact and Law (written opening

submissions) and were writing in an attempt to clarify the issues and reduce the amount of witness testimony necessary for a very tightly scheduled trial.

[33] Counsel for the Plaintiffs stated that, as set out in their Memorandum of Fact and Law, their argument regarding the duty of care in relation to the 2003 and 2013 Risk Assessments relates solely to whether there was a duty of care to identify and assess risk mitigation options in those risk assessments. To the extent that the evidence of Canada's witnesses, particularly that of Drs. James, Rajzman, Alexander, Rheault and Pernal, would relate to the adequacy of those two Risk Assessments in any other respect (i.e., in identifying relevant risks), counsel for the Plaintiffs stated their view that such evidence was not relevant to the common issues. They stated:

> To resolve this issue, the Plaintiffs will stipulate at the commencement of the trial as follows:
>
> > - that reasonable people may disagree on the assessment of risk;
> >
> > - that the Plaintiffs and the Class take no position on the findings that are contained within the 2003 & 2013 Risk Assessments, and challenge and impugn only what those two risk assessments are missing and what was omitted from them; and
> >
> > - that the content of the 2003 & 2013 Risk Assessments is not at issue, except with respect to their failure to identify risk mitigation options, which, it is alleged, breached the standard of care.

[34] As to evidence regarding honeybee management practices, counsel for the Plaintiffs noted that Canada intended to call five beekeeper witnesses, whose "will say" statements indicated that they would provide evidence on the issues of honeybee management practices and their experiences with honeybee colonies developed from both splits and imported packages (which terms will be described later in these reasons). The letter states that the questions of whether Canadian beekeepers utilize a diverse variety of honeybee management practices, or whether they may have experienced different outcomes when developing honeybee colonies

from splits and/or imported packages, are uncontroversial and not relevant to the common issues. Counsel for the Plaintiffs stated:

> To resolve this issue, the Plaintiffs will stipulate at the commencement of the trial as follows:
>
> - that the Class members use a variety of honeybee management practices, including a variety of overwintering, disease treatment, colony strength assessment, and breeding techniques;
> - that a Class member's choice to specialize in the provision of pollination services or honey production or both may impact the honeybee management practices that it uses; and
> - that Class members have had variable experiences with developing honeybee colonies from splits and imported packages, including variable experiences regarding success rates and cost.

[35] Counsel for the Plaintiffs stated that they anticipated that these stipulations would obviate the need for much of the evidence of the above-named witnesses and potentially all of the evidence of the opt-out beekeeper witnesses. In light of these stipulations, counsel for the Plaintiffs asked counsel for the Defendants whether this would affect the Defendants' intended witness list or the timing of their evidence.

[36] A second letter, dated October 27, 2023, from counsel for the Plaintiffs responds to a letter of the same date from counsel for the Defendants (which letter is not in evidence). Counsel for the Plaintiffs stated that the first and second stipulations did not amount to an admission that the risk assessments were conducted reasonably and that the Plaintiffs' position is that they were not conducted reasonably because they failed to take into consideration mitigation measures that could be applied to the identified hazards. Counsel stated that the Plaintiffs would not be arguing that there are other omissions in the risk assessments. They further stated, with respect to the first stipulation, that the Plaintiffs would not be challenging the opinions expressed by the Canadian reviewers – these opinions were made to the program officer respecting the Risk Assessments, which the program officer was entitled to take into consideration – except insofar as any of them

may have included submissions on the issue of mitigation, which remained in issue. Counsel for the Plaintiffs also stated that the Plaintiffs would be taking the position that the Defendants were negligent and failed to act in good faith by continuing to rely on the 2013 Risk Assessment over the following years.

[37] Counsel for the Plaintiffs also addressed the stipulations in their opening statements. The two stipulation letters were admitted into evidence as Exhibit 1.

[38] I note that while five Class opt-out beekeeper witnesses had originally been set to testify at trial, ultimately three opt-out beekeepers were called by the Defendants to give evidence.

B. Partial Agreed Statement of Facts

[39] On October 24, 2023, the parties filed with the Court a Partial Agreed Statement of Facts upon which they rely in the trial of this action. A copy of the Partial Agreed Statement of Facts is found in the Trial Record.

C. Agreement on Protocol for Admission of Documents at Trial/Joint Book of Documents

[40] Prior to the commencement of trial, the parties entered into an Agreement on Protocol for Admission of Documents at Trial [Protocol], a copy of which is found in the Trial Record. This states that to facilitate the use of documents, streamline the proceeding and avoid where appropriate the costs and delay associated with calling witnesses to prove the authenticity or truth of the contents of documents at trial, the parties agreed to jointly file at the outset of trial a Joint Document Book [Joint Book of Documents] containing all the documents that the parties agreed may be entered into evidence without further proof, subject to the Protocol terms. The Joint Book of Documents was contemplated by the Protocol as being marked as Exhibit 1 on the first day of trial. The concluding paragraph of the Protocol states that it is subject to any directions and rulings of the Court.

[41] Although the Protocol anticipated entering all of the documents in the Joint Book of Documents as one exhibit in bulk, from the Court's perspective, logistically, the documents were best entered as evidence when put to a witness on an individual, exhibit-by-exhibit basis. This approach was initially confirmed by Plaintiffs' counsel and adopted. However, later during the trial, different counsel for the Plaintiffs took the position that the Joint Book of Documents should be admitted. This counsel went further and submitted that it should not just be entered as a single exhibit, as set out in the Protocol, but that it was his expectation that every document contained in the Joint Book of Documents would be entered separately and given an exhibit number. However, and as I pointed out at the time, this was not what was contemplated by the Protocol agreed between the parties.

[42] Ultimately, I ruled that individual documents would continue to be entered into evidence as individual exhibits as they were put to witnesses. Additionally, the Joint Book of Documents could be entered as one exhibit as contemplated by the parties pursuant and subject to the Protocol. This determination was influenced by the view of the parties that they had agreed that all of the documents contained in the Joint Book of Documents would be entered into evidence in this manner, subject to the terms of the Protocol.

[43] However, I advised counsel that as there are 1,664 documents contained in the Joint Book of Documents, which counsel advised amounted to about 50,000 pages or 28 volumes of documents, it was my clear expectation that they would have their witnesses speak to the documents that the parties deemed most significant to their respective cases. In that regard, the process already being followed at trial was the normal one, being that as a witness had a document put to them, it was entered as evidence and given an exhibit number. And, although the Joint Book of Documents could be entered as a bulk exhibit, it remained the role of counsel to make their respective cases. The Court could not be expected, at the conclusion of the trial, to review the remaining thousands and thousands of pages of documents in the Joint Book of Documents that were not addressed by a witness in an effort to determine which of these documents may be relevant and significant to the parties' various positions put forward at trial.

[44] In other words, the Joint Book of Documents could not act as a document dump on the Court nor as grounds for a scavenger hunt, in the event of an appeal, for evidence not mentioned at trial.

[45] To address this, it was agreed, and I ruled, that any documents contained in the Joint Book of Documents that were not put to a witness and entered as individual exhibits at trial, but that a party felt should be referenced in their case, could be identified as such in their closing brief. More specifically, as each individual document has been entered in the Court's eToolkit (an electronic trial document management system) and assigned an FC number, in their respective closing written submissions, the parties would identify the document by FC number and set out the significance of their reference to that document in a clear and meaningful way – not make just a bare reference to a document. That is, why the document is relied upon and how it meets the admissibility requirements of the Protocol. The parties were also required to provide pinpoint references (line, paragraph, page), as many of the documents are lengthy.

[46] Needless to say, the admissibility and weight (if any) assigned to such a referenced document is a determination to be made by this Court.

[47] Ultimately, the parties entered into an Agreement Regarding Joint Book of Documents. This confirms that, because the Joint Book of Documents was too large to upload as one exhibit in the eToolkit, the agreement would be entered in its stead as Exhibit 471. Further, that the Joint Book of Documents is comprised of documents FC00001 to FC01553, FC01724 to FC01845, FC01853 and FC01854, as identified and listed in the eToolkit.

D. The Plaintiffs' challenge to the qualification of Dr. Winston as an expert witness

[48] Prior to the commencement of trial, counsel for the Plaintiffs indicated by letter to the Court dated November 1, 2023, that the Plaintiffs intended to challenge the admissibility of the expert evidence of Dr. Mark Winston and Dr. Dewey Caron. The Defendants sought to qualify Dr. Winston as "an expert on the biology and behaviour of honeybees (*Apis mellifera*), including

Africanized Honeybees; honeybee management practices; and honeybee diseases, pests, parasites and vectors, including their transmission, spread, distribution, prevalence and treatment." The Defendants sought to qualify Dr. Caron as an expert on American beekeeping, honeybee health and honeybee *(Apis mellifera)* management practices.

[49] The letter states that the basis for the challenge was that Dr. Winston failed the fourth branch of the test in *R v Mohan*, [1994] 2 SCR 9 [*Mohan*] and *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*], "because he will be unable to provide evidence that is fair, objective and non-partisan." Further, that the expected evidence of both Dr. Winston and Dr. Caron was challenged "on the basis of relevance based upon the scope of the opinions expressed in their reports, and overlap in the two opinions." Counsel for the Plaintiffs also submitted in their letter that it would be premature to set out their supporting arguments in advance of trial.

[50] Ultimately, Dr. Winston was scheduled to be called as a witness on Friday, December 1, 2023. The Plaintiffs did not file written submissions fleshing out the intended challenge until after 7:30 p.m. on Thursday, November 30, 2023. The Defendants, in the absence of any further written submissions by the Plaintiffs, filed anticipatory written submissions during the day on Thursday.

[51] The Defendants sought to qualify Dr. Winston on the morning of December 1, 2023. The Plaintiffs, by way of *voir dire*, challenged the qualification. Arguments followed.

[52] This late identification of the specifics of the Plaintiffs' challenge was unfortunate and placed the Court in the difficult position of having to rule immediately on the issue or lose trial time to consider it. As the Plaintiffs were attempting to exclude the entirety of Dr. Winston's expert evidence, the determination of the matter was of considerable significance to the Defendants. Given this, I adjourned and advised the parties that I would provide them with my ruling on Monday morning. Dr. Winston was rescheduled to give his evidence, if it was found to be admissible, on Tuesday.

[53] Having heard the oral submissions and having read the written submissions, I declined to exclude the expert evidence of Dr. Winston. I advised the parties of this on Monday, December 4, 2023, and that my reasons for this determination would be set out in the decision on the merits. These are those reasons.

[54] The two-part test for the admissibility of expert evidence is set out in *Mohan*, being that the evidence is admissible when:

1. It meets the threshold requirements of admissibility, which are
    a) the evidence is logically relevant;
    b) the evidence must be necessary to assist the trier of fact;
    c) the evidence must not be subject to any other exclusionary rule;
    d) the expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is
        i. impartial,
        ii. independent, and
        iii. unbiased;
    e) For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose; and
2. The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as
    a) legal relevance,
    b) necessity,
    c) reliability, and
    d) absence of bias.

[55] If the proposed expert evidence does not meet the threshold requirements for admissibility, it is excluded. If it does meet the threshold requirements, the trial judge then has a

gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied, then the expert evidence may be admitted; if not, the evidence will be excluded even though it has met the threshold requirements (*R v Abbey*, 2017 ONCA 640 at paras 48-49 [*Abbey ONCA*]).

[56] As a preliminary observation, I note that during the *voir dire*, counsel for the Plaintiffs asked many questions that appeared to be intended to attack Dr. Winston's qualifications as an expert in honeybee health. Counsel for the Defendants objected to this line of questioning given that counsel for the Plaintiffs had previously indicated that the Plaintiffs' challenge to the admissibility of Dr. Winston's expert report was not based on his qualifications as a honeybee expert, but rather on his impartiality, independence and absence of bias. Ultimately, counsel for the Plaintiffs confirmed to the Court that the Plaintiffs accepted Dr. Winston's qualifications as an expert in honeybee health.

i. Dr. Winston's independence

[57] Dr. Winston swore an affidavit certifying that he read the Code of Conduct for Expert Witnesses [Code of Conduct] (*Federal Courts Rules*, Rule 52.2(1)(c) and Form 52.2), which Code of Conduct is attached as Exhibit B of his affidavit, and agreed to be bound by it. He also certified in his affidavit that, in his expert report (found at Exhibit A of his affidavit) and in any testimony he may give, he will provide "objective, evidence-based, expert opinion." He confirmed he understands that, as an expert, he is not an advocate for any party to the claim.

[58] When questioned by the Defendants' counsel, he confirmed that he had reviewed s 1 and s 2 of the Code of Conduct, which set out the general duty owed to the Court, prior to executing his affidavit. Specifically, that:

> 1 An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.

> 2 This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

[59] The Plaintiffs' challenge to Dr. Winston's independence is based on his prior reviews of a draft of the 2003 Risk Assessment and of the 2013 Risk Assessment, as well as his membership in the Canadian Association of Professional Apiculturists [CAPA] Bee Importation and Movement Committee [CAPA Import Committee], which the Plaintiffs characterize as "giving advice [to CFIA] that the border should stay closed."

[60] As indicated in the Partial Agreed Statement of Facts, the 2003 Risk Assessment was prepared by Dr. James of the CFIA. She prepared five drafts of the risk assessment. The second draft was sent to be reviewed by three third-party reviewers. These were Dr. Winston; Dr. Cynthia Scott-Dupree, a professor at the University of Guelph; and, Mr. Don Dixon, Manitoba's Provincial Apiculturist. They provided their comments on the draft collectively to CFIA. Dr. James revised the second draft, in part to address the comments received. A third draft of the risk assessment was shared with the Canadian Honey Council [CHC], CAPA and a representative of the Alberta Beekeepers Association. Dr. James also received responses from the Provincial Apiculturists and the Alberta Beekeepers Association. Various other people reviewed drafts of the 2003 Risk Assessment prior to its finalization on October 10, 2003.

[61] With respect to the 2013 Risk Assessment, Dr. Winston was retained, along with two others, on behalf of the provinces of Manitoba and Alberta to review that assessment.

[62] The Plaintiffs submit that Dr. Winston is incapable of providing non-partisan and objective assistance to the Court for two reasons.

[63] First, because he provided an "opinion" to CFIA regarding the 2003 Risk Assessment that in large part supported its conclusions and "advocated" for an increased level of risk to be ascribed to resistant American foulbrood [rAFB], which was adopted by CFIA in the final

version of the risk assessment. In oral submissions, the Plaintiffs added that Dr. Winston's opinions with respect to the 2003 and 2013 Risk Assessments demonstrated that he was a proponent of keeping the border closed to the importation of US honeybee packages.

[64] Second, that as a part of the CAPA Import Committee, Dr. Winston participated in giving advice to CFIA that the border between Canada and the US should remain closed to the importation of honeybee packages from the US. According to the Plaintiffs, Dr. Winston's "professional reputation" is on the line, compelling him to give evidence that validates his earlier opinions – thus, his evidence is not and cannot be objective (citing by way of analogy *Kobilke v Jeffries*, 2014 ONSC 1786).

[65] I note that, with respect to the 2003 Risk Assessment, by email of January 29, 2003, Dr. James advised Dr. Winston that his name had been provided to her as an expert in honeybees and the Canadian beekeeping industry. She asked if he would review a draft of the risk assessment "to ensure the scientific evidence provided is clear, complete and interpreted accurately." She advised that she had also asked Dr. Cynthia Scott-Dupree to review the document. Dr. Winston agreed and suggested that someone involved with regulations, such as one of the provincial apiarists, also review the draft. He suggested Mr. Don Dixon, a past president of CAPA and the Manitoba Provincial Apiarist.

[66] Subsequently, the three reviewers provided their collective "Comments on 'Risk Assessment of Honey Bees from the United States.'" In those comments, the reviewers stated:

> We have reviewed the February 2003 draft of the Risk Assessment concerning bee importations into Canada, and our independent analyses were remarkably similar. We conclude that the report underestimates risk in quite a few areas, and consider the potential consequences for Canadian beekeeping to be greater than described. The report below merges our independent comments, and may be a bit repetitive because of that, but hopefully it will emphasize our areas of mutual concern.

[67] The response states that, overall, the most significant issue that the reviewers identified with the draft risk assessment was the underestimation of the impact of rAFB at all levels of the assessment. The response then explained the rationale for this view and stated that rAFB should be rated as moderate to high in release and exposure potential, and high in consequences and overall risk. The reviewers also made various other comments associated with identified pages of the draft risk assessment. The response concluded by stating that the writers appreciated the opportunity to comment on the document and would be pleased to provide additional feedback if useful in the future.

[68] Dr. James subsequently revised the release, exposure, consequence and risk assessment for rAFB from low/low/low/negligible (January 2003 version) to high (release and exposure)/moderate/moderate (March 2003 version).

[69] The Plaintiffs point to this change between these drafts and assert that Dr. Winston thereby "advocated" for an increased level of risk to be ascribed to rAFB, which was adopted in the final version of the 2003 Risk Assessment. It is of note, however, that the final version of the 2003 Risk Assessment (October 10, 2003) has yet a different summary of risk estimates with respect to rAFB, being low (release)/moderate (exposure)/ moderate (consequence) and low (risk estimate). Nor do I agree with the characterization of the reviewers' joint comments as "advocating" for a risk increase. It is significant to note that the reviewers simply did as requested and provided their comments and the rationale for same. The response does not include any comment or specific position as to the border opening or closing.

[70] As to the review of the 2013 Risk Assessment, the Partial Agreed Statement of Facts states that following the completion of the 2014 (2013) Risk Assessment, the provinces of Alberta and/or Manitoba retained three experts to independently review that assessment. These reviewers were Dr. Winston, Kerry Clark and Denis Anderson.

[71] As the Defendants submit, that review did not give rise to, form or create a relationship with CFIA. It was a review conducted for Alberta and Manitoba.

[72] However, the Plaintiffs submit that the conclusion of that review supports that Dr. Winston has demonstrated a predisposition to keeping the border closed and is not capable of providing independent evidence to the Court. The Plaintiffs refer the Court to Exhibit 342, which includes a document entitled "Summary Report of Third Party Reviews on the Canadian Food Inspection Agency's Risk Assessment on the Importation of Honey Bee (*Apis mellifera*) Packages From the United States of America." It is dated May 22, 2014, and was prepared by Dr. Craig Stephen. The Alberta and Manitoba Provincial Apiarists retained Dr. Stephen to review and synthesize the third-party reviews provided to CFIA with respect to the 2013 Risk Assessment. The synthesis states that it was not expected to critically review the CFIA risk assessment or validate the reviewers' opinions. Rather, its purpose was to summarize the areas of agreement or difference between the reviewers to determine if there was consensus and discuss the implications of the level of agreement. The reviewers are not identified by name. The document states that no reviewer rejected the CFIA claim that there is still a high probability of introducing diseases and pests into Canada with the importation of honeybee packages from the continental US. Further, that all reviewers agreed, with only minor variation, on the assigned qualitative range of risk for each of the four hazards reviewed. The CFIA process was also adjudged by the synthesis to be credible and consistent with international standards.

[73] Counsel for the Plaintiffs put it to Dr. Winston that his position in 2013 remained the same as in 2003, being that the border should stay closed. His response was that in 2013, when the report for the governments of Manitoba and Alberta was prepared, the reviewers were evaluating the risk assessment, the level of risk and the scientific basis for the assessed risk. He did not recall that they were asked to give an opinion directly on whether the border should be open or closed. Rather, the report was generally designed to evaluate the quality of the 2013 Risk Assessment and not to make recommendations or decisions. When asked if his view, personally and professionally, in 2003 and 2013 was that the border should stay closed, his evidence was that, based on the information he saw at that time, he did have concerns about the border reopening.

[74] Counsel for the Plaintiffs then asked Dr. Winston whether, were this Court to find that the "opinion" he expressed in 2003 was "faulty," that would have an impact on or tarnish his professional reputation. Dr. Winston said no. He indicated that had he done something illegal, if he deliberately withheld information or if he lied, then yes, that could tarnish his reputation. But the reviewers did none of those things. Rather, based on the information available at the time, and to the best of their knowledge and utilizing their collective expertise, they gave a careful and unbiased answer. By way of example, he noted that if it turned out five years in the future that a new study demonstrated that what the reviewers had thought five years earlier was incorrect, but the reviewers clung to their view that had been shown to be incorrect, then that might tarnish their reputations. In any event, he was not concerned about this because he had approached everything with what he hoped was the utmost integrity. When directly examined, he was asked if he was able to assist the Court impartially in this matter and able to be independent and objective in the provision of his evidence. He confirmed that he was.

[75] As to Dr. Winston's involvement in professional associations, his evidence was that he was a member of the entomological societies of America, Canada and British Columbia, as well as CAPA and its US counterpart, the American Association of Professional Apiculturists [AAPA], pretty much his entire career. When cross-examined, he indicated that he had probably been a CAPA member since 1980 or 1981. As to the entry on his CV indicating that he had been a member of the CAPA Import Committee, he stated that he had not been a member of that committee for 20 to 25 years. When counsel for the Plaintiff then sought to have him confirm that he had been a committee member in 2003, he stated that he did not recall but thought not, as prior to that he had been the president of CAPA, and he did not think that he retained any committee membership during his presidency. He recalled no deliberations around 2003 as to the Import Committee that would have indicated that he was a member.

[76] I note that the CAPA Proceedings for 2003 indicate that Rob Currie was the president of CAPA at that time and that Doug McRory was the chairperson of the CAPA Import Committee, the other members of which were listed and did not include Dr. Winston. While it appears to be common ground that CAPA's membership comprises professionals with scientific expertise

pertaining to honeybees and that CAPA provides science-based advice to CFIA when requested to do so, the Plaintiffs have not established that Dr. Winston, as a CAPA member or member of the CAPA Import Committee, has been involved in providing any advice to CFIA with respect to bee importation.

[77] As held in White Burgess:

> [48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.
>
> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear

> cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
>
> [50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

[78] Thus, at the threshold level, the burden is on the Plaintiffs to show that there is a realistic concern that Dr. Winston cannot or will not comply with his duty.

[79] In my view, the Plaintiffs have not met this burden. First, the Plaintiffs have not established that Dr. Winston "advocated" to keep the border closed to the importation of US honeybee packages, as they assert. His involvement was simply to review and provide comments on the risk assessments, as an independent third party. The fact that the reviewers largely agreed with the assessments or, with respect to the 2003 draft risk assessment, were of the view that a higher level of risk existed in one area, does not establish that Dr. Winston had and maintains a view that the border should remain closed to the importation of US honeybees and is therefore not impartial. And, while Dr. Winston may have had a personal or professional opinion that in 2003 and 2013 there were concerns about honeybee health that supported the continued border closure, that issue was not the subject of the reviews he provided. Further, any such opinion was based on the information and science then available to him. This does not establish that Dr. Winston would be unwilling or unable to provide independent and impartial advice as to Canadian honeybee health at the trial of this matter.

[80] Further, as stated in *AstraZeneca Canada v Mylan Pharmaceuticals ULC*, 2017 FC 142, "to suggest that their [experts'] opinions have been tainted by prior work or affiliations can only hold water with compelling evidence of the same" (para 72). In these circumstances, Dr. Winston was not previously employed by CFIA and provided only independent third-party comments on the risk assessments. There is no compelling, or in fact any, evidence that his views are influenced or tainted by his prior involvement as a reviewer.

[81] In that regard, nor do I agree that he has "skin in the game" or a personal interest in the outcome of the action, and that he would therefore be compelled to defend his earlier comments and views. Dr. Winston is retired and, as he clearly explained, his comments as a reviewer were based on the science and information known to him at the time. He gave his best assessment and, even if it were later established that there was new and different information and science that would now lead him to a different conclusion, that would have no impact on his professional reputation, nor would it compel him to defend any prior view.

[82] In short, I found that the nature and extent of Dr. Winston's past involvement in reviewing the 2003 and 2013 Risk Assessments did not preclude him from carrying out his duty to this Court. He met both the threshold and gatekeeping requirements as to independence, impartiality and absence of bias.

[83] Should Dr. Winston's evidence, or the evidence of any expert at trial, give rise to new concerns about impartiality, independence or bias, then that would be addressed by way of the weight afforded to that evidence when making my decision in this matter.

[84] As to the gatekeeper role and relevance and necessity, as indicated above, the Defendants seek to qualify Dr. Winston as "an expert on the biology and behaviour of honeybees (*Apis mellifera*), including Africanized Honeybees; honeybee management practices; and honeybee diseases, pests, parasites and vectors, including their transmission, spread, distribution, prevalence and treatment."

[85] Significantly, much of Dr. Winston's expert report is made in response to the expert report of the Plaintiffs' expert witness, Dr. Pettis, who had already testified at trial when the Plaintiffs challenged the admissibility of Dr. Winston's expert report.

[86] Dr. Pettis was qualified, in part, "as an entomologist to give expert evidence on honeybee health and management in Canada and the US during the class period and, in particular, those diseases addressed in the CFIA risk assessment."

[87] I note that the Affidavit of Dr. Winston, to which his report is attached as an exhibit, states that he was asked to respond to the expert report of Dr. Jeffery Pettis and to respond to specific questions relating to Dr. Daniel Sumner's report. Dr. Sumner had also given evidence in the trial of this matter prior to the challenge to the admissibility of Dr. Winston's expert report. Dr. Winston's expert report itself gives a brief background on Canadian beekeeping and then provides general and specific comments responding to Dr. Pettis' expert report – these make up the bulk of the report. The report also answers specific questions posed to Dr. Winston, under "Other Points," and then addresses Dr. Sumner's expert report.

[88] I agreed with the Defendants that they are entitled to call expert evidence responding to Dr. Pettis' opinion evidence with respect to honeybee health and management, from a Canadian perspective, and that Dr. Winston's expert report does respond to Dr. Pettis' opinions. In my view, this was relevant and necessary evidence.

[89] Further, as the Defendants pointed out, at trial Dr. Pettis gave direct evidence as to queen bee and package production, migratory beekeeping as well as the presence, distribution and monitoring of Africanized honeybees [AHB], small hive beetle [SHB], resistant varroa mites [rVAR] and rAFB in Canada and the US. Dr. Winston's opinion addresses those hazards, how they are managed, how they are spread and how they affect populations of honeybees. I agreed that that evidence could potentially be relevant to whether the CFIA breached a standard of care in relation to the assertion that it negligently maintained and enforced a *de facto* prohibition on the importation of honeybee packages from the US. Further, the health status of honeybees in

both countries, the challenges that the competent authorities were facing in managing honeybee health and evidence on the realities of the honeybee industry in each country were potentially relevant to whether there could have been feasible mitigation measures available in either 2003 or 2014.

[90] The Defendants asserted that the Plaintiffs' attempt to "weaponize" the pre-trial "stipulations," or concessions, made shortly before the commencement of trial. In that regard, they refer to the letters dated October 17 and 27, 2023, from counsel for the Plaintiffs, which are described above.

[91] I noted that these "stipulations" do not speak to the evidence of the Defendants' intended expert witnesses. Nor, in my view, do they serve as a basis to exclude such evidence. The Plaintiffs had tendered their expert witnesses, who had given evidence on the topics to which Dr. Winston's report and his testimony had or would explicitly respond. In my view, the reliance on the "stipulations" in an effort to curtail responding expert evidence is a misplaced strategic maneuver that, if permitted, would be prejudicial to the Defendants.

[92] The Plaintiffs also submitted that Dr. Winston's evidence is not necessary to respond to Dr. Pettis' evidence. They make this assertion on the basis that the Court has already heard the defence evidence "from a multitude of 'participant experts' on the question of honeybee health in Canada (and in the United States)." They assert that Dr. Winston's evidence on the same topic is therefore not "necessary." According to the Plaintiffs, there is already ample defence evidence speaking to Canadian beekeeping practices and bee health; US bee health and the industry's mobility for pollination; and chemical and antibiotic treatments in beekeeping. Thus, the probative value of Dr. Winston's evidence is overborne by its prejudicial effect, as it layers on top of the participant experts' evidence and therefore would engage an inordinate amount of this Court's time that is not commensurate with its value.

[93] I did not agree with the Plaintiffs. First, the Plaintiffs have taken pains to remind the Court that the "participant experts" are not expert witnesses. This is true. Accordingly, those

witnesses, although having considerable scientific expertise, gave evidence as to factual events that, in some cases, engaged their expertise. That is, and as submitted by the Defendants, to the extent that those witnesses gave any opinions, these were provided to give context, background and rationale for the advice they gave and the actions they took at the time the events at issue occurred. This does not displace the need for the Defendants' expert opinion evidence as to the overall state of honeybee health or management practices – even if some of the content overlaps with other evidence.

[94] Second, Dr. Winston's evidence is, in my view, clearly logically relevant and therefore meets the *Mohan* threshold requirements. The Plaintiffs' submission above falls within the second part of the test – the gatekeeper stage.

[95] At that stage, the trial judge is engaged in a "cost-benefit" analysis. For expert evidence, the trial judge must decide whether opinion evidence that meets the threshold requirements of admissibility should still be ruled inadmissible because other potential harms to the trial process from admitting it outweigh its potential benefits – that is, whether the probative value of the expert evidence is outweighed by its potential prejudice (*Abbey ONCA* at para 114).

[96] As indicated in Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 6th ed (LexisNexis, 2022):

> 12.156 The trial judge must consider the potential prejudicial effect of the proffered expert evidence. Prejudice does not mean the proffered opinion will have a detrimental effect on the adversary's case. Prejudicial effect refers to the potential detrimental effect that the proffered evidence may have on the fairness of the trial or the integrity of the proceedings. The power to exclude potentially prejudicial evidence may be exercised for one or more of the following reasons: (1) the proffered opinion may be used by the trier of fact for the wrong purpose; (2) the expert evidence may mislead the trier of fact; or (3) the expert evidence may distort the fact-finding process. The trial judge may also exercise her or his residual authority if the proof of the evidence will consume an inordinate amount of court time that is not commensurate with its probative value. A trial judge may examine the extent to which an

> opinion is founded upon inadmissible hearsay evidence (for example, the unsworn evidence of a party who elects not to testify).

[97] I was not persuaded that permitting Dr. Winston's expert report to be admitted into evidence and his testimony at trial would consume an inordinate amount of time that was not commensurate with the probative value of this evidence.

[98] For all of these reasons, I found that Dr. Winston's expert evidence is admissible.

[99] He was qualified as an expert on the biology and behaviour of honeybees (*Apis mellifera*), including Africanized Honeybees; honeybee management practices; and honeybee diseases, pests, parasites and vectors, including the transmission, spread, distribution, prevalence and treatment. He was to address these primarily from the Canadian perspective.

[100] Before leaving this issue, I note that in their closing submissions, the Plaintiffs submitted that, unlike Dr. Winston, Dr. Pettis has no fixed opinions about whether imports of packages from the US should be allowed into Canada, nor does he hold opinions that "sustainable beekeeping" is superior to using packages to replenish stock. The Plaintiffs say that Dr. Winston brings both of these biases to his opinion. They further submit that Dr. Pettis remains actively engaged as an entomologist, whereas Dr. Winston himself told CFIA he would not be able to adequately review the 2013 Risk Assessment. Where the opinions of the two experts diverge, the Plaintiffs therefore ask this Court to prefer the evidence of Dr. Pettis. However, I had already determined that Dr. Winston was impartial and ruled that he was qualified as an expert in honeybee health. Nor did Dr. Winston's testimony at trial give rise to any suggestion of bias. I therefore decline to prefer Dr. Pettis' evidence on these bases.

[101] The Plaintiffs ultimately did not challenge the admissibility of Dr. Caron's expert evidence.

E. The Defendants' motion challenging read-ins proposed by the Plaintiffs

[102] Within the trial of this matter, on December 14, 2023, the Attorney General filed a motion in writing, pursuant to Rule 369 of the *Federal Courts Rules*, seeking an order of this Court, pursuant to Rule 289, requiring the Plaintiffs to include qualifications to their proposed read-ins from the examination for discovery of Dr. Mohit Baxi and Dr. Parthiban Muthukumarasamy. At that stage, the last witness had given evidence, but oral closing submissions had not yet been made.

[103] This is my ruling on that motion.

[104] Rules 288 and 289 are concerned with the use of examination evidence at trial:

> **Reading in examination at trial**
>
> **288** A party may introduce as its own evidence at trial any part of its examination for discovery of an adverse party or of a person examined on behalf of an adverse party, whether or not the adverse party or person has already testified.
>
> **Qualifying answers**
>
> **289** The Court may order a party who uses part of an examination for discovery as its own evidence to introduce into evidence any other part of the examination for discovery that the Court considers is so related that it ought not to be omitted.

[105] In *Canadian Pacific Railway Company v Canada*, 2020 FC 1058, Justice Diner reviewed the jurisprudence of this Court, including *Apotex Inc v AstraZeneca Canada Inc*, 2017 FC 545 at para 3 and *Mediatube Corp v Bell Canada*, 2016 FC 1066, and held as follows:

> [14] To summarize, to allow in a read-in qualification, a witness must have either (i) misunderstood the question, or (ii) the response being tendered by the other side must be misrepresentative of the true response, or (iii) it must lack necessary context or subject matter. The Court must ensure that the answers to questions fairly reflect the true response given and, if

> only a portion of the full answer is to be provided, that the partial answer does not introduce prejudice through lack of appropriate context. Carve-outs to responses should not occur such that the answers become disconnected from the discovery evidence provided. The jurisprudence errs on the side of caution for read-ins, favouring completeness over selectivity, which should be the default position to ensure fairness to the party being examined for discovery.

[106] The basic principle of Rule 289 is "to ensure that the answers to questions fairly reflect the true response given" (*Weatherford Canada Ltd v Corlac Inc*, 2009 FC 449 at para 2 [*Weatherford*]). Therefore, questions and answers must be viewed in context (*Weatherford* at para 3). This does not mean that other questions and answers on the same subject matter must be added beyond making clear to what the specific answer related (*Weatherford* at para 4), and the Court must always be concerned about fairness and prejudice to the parties and to the trial process (*Weatherford* at para 5).

[107] However, contextualization is particularly significant in circumstances where it better enables the trial judge to assign appropriate weight to the evidence (*Almecon Industries Ltd v Anchortek Ltd*, 2001 FCT 1404).

[108] In addition to these general principles, I have read and considered the parties' written submissions with respect to the proposed qualifications. I note that the Plaintiffs refer to jurisprudence from other jurisdictions, such as *Saskatchewan Co-Operative Wheat Producers, Limited v Luciuk*, 1931 CanLII 250 (SK CA) at para 6 and *Andersen v St Jude Medical, Inc*, 2010 ONSC 1824 at para 15.

[109] For ease of reference, I will below refer to Appendixes A, B and C as found in the Defendants' written submissions, which include tables of the Plaintiffs' proposed read-ins, the Defendants' proposed clarifying responses and the Defendants' corrections to the transcripts previously provided to Plaintiffs' counsel and to which the Plaintiffs are said to have agreed.

[110] I find as follows:

Dr. Muthukumarasamy – Appendix A

i. A-1 – proposed read-in p 7, Q 13, lines 3-23: proposed qualification pp 6-7, Q 13, lines 25, 1-3.

The proposed three-line add-in qualification is the first part of question 13. The Plaintiffs describe this as irrelevant preamble to the question but state that they do not oppose the addition of the preamble. The proposed read-in is permitted.

ii. A-2 – proposed read-in pp 8-9, Q 16-19, lines 11-25, 1-17.

The Plaintiffs consent to the transcript corrections at p 8, lines 19-20 and p 9, line 15. The corrections are accepted.

iii. A-3 – proposed read-in p 51, Q 145-146, lines 6-9: proposed qualification p 51, lines 20-24.

The proposed qualification is part of the answer to question 146 but is not included in the proposed read-in. The Plaintiffs assert the portion of the answer that they seek to read in is a clear and complete answer to the question asked and that the remainder of the answer is not responsive to the narrow question put to Dr. Muthukumarasamy. However, the answer is, in fact, clearly responsive to the question asked and the portion that the Plaintiffs attempt to carve out provides context to the answer given. It is permitted.

Dr. Baxi – Appendix B

i. B-1 – proposed read-in (September 12, 2018) pp 224-226, Q 786-788, lines 21-25, 1-25, 1: proposed qualification pp 211-212, Q 730, lines 25, 1-2; pp 212-213, Q 731-735, lines 14-25, 1-15.

Proposed read-in pp 226-227, Q 792, lines 22-25, 1-20: proposed modification p 226, Q 789-790, lines 3-12; p 228, Q 794, lines 5-9; pp 229-230, Q 798-804, lines 3-25, 1-19.

Proposed read-in (December 18, 2018) pp 562-563, Q 2065-2066, lines 18-25, 1-10: proposed modification (September 11, 2018) pp 168-169, Q 578-584, lines 9-25, 1-23.

The Defendants also submit that the Plaintiffs' read-ins do not include the response to the undertaking Plaintiffs' counsel requested on the question of annual review, being: Crown Response to Undertaking #94: In respect of

CAN-00063, FC00006 (Gazette 2 1999 RIAS) “Inquiries have been made. Other than the 1999 RIAS, no one now recalls a commitment to review the import prohibition on an annual basis.”

All of the questions raised with respect to the proposed read-ins concern the *Honeybee Import Prohibition Regulations, 1999*, and the proposed amendment of same as published in the *Canada Gazette, Part II*, on August 30, 2000. More specifically, they relate to the regulatory impact analysis statement [RIAS] accompanying the proposed amendment indicating that CFIA will continue to assess the situation annually, as well as to the issue of whether CFIA made any other commitments in that regard. All of the proposed clarifying responses address that issue. For example, Questions 786 to 788 ask why the annual review was effected in 1999, and the proposed clarifications, Questions 789 and 790, are a continuation of that line of questioning and the responses to same, as is Question 794 and its response. Similarly, proposed clarifying Questions 798 to 804 and the responses to same, as well as proposed clarifying Questions 730 to 735 and the responses to same, all address the same issue.

The Defendants submit that the proposed qualifications are necessary to fairly communicate the actual responses given. I agree. The qualifications are permitted.

ii. B-2 – proposed read-in: pp 245-249, Q 862-876, lines 14-25, 1-25, 1-25, 1-25, 1-10. The proposed qualification is stated as being required for context: “On March 11, 2019, the Defendants provided the following subsequent clarification to the response to the Plaintiffs' Q 876: Prohibition orders are temporary measures put in place to address specific concerns. These orders were reviewed initially on an annual basis until they were extended five years in 2000, to December, 2004. However, based on a risk assessment undertaken in 2003, the prohibition order was repealed in May, 2004 to allow honeybee queens from the U.S. until December 31, 2006. Since these orders are only temporary measures, CFIA decided to make regulatory changes in the Health of Animals Regulations which allowed importation of bees with import permits and was published in the Canada Gazette I on December 16, 2006, with final publication in Canada Gazette II on February 21, 2007. Therefore, due to regulatory changes, there was no need to extend the prohibition order. Finally, all of these changes were shared with Canadians via publication in the Canada Gazette.”

The Defendants state that they understand that the Plaintiffs do not challenge the proposed qualification concerning Q 876.

In that regard, the Plaintiffs' written submissions say that the Defendants group the read-ins into four categories, and that the Plaintiffs only take issue with two of them: "Questions respecting the *Honeybee Importation Prohibition Regulations*, 1999, Canada Gazette 2 Regulatory Impact Assessment Statements and related documents" (B-1) and "Questions relating to the trigger when seeking a new risk assessment" (B-3). This suggests that issue is not taken with the category described as "Question regarding the expiry of the *HIPR, 2004* in December 2006" (B-2), which includes Q 876.

Yet, in a table contained in the same written submissions, the Plaintiffs indicate that they take issue with items B-1 to B-4. As to B-2, they submit that what the Defendants propose is not a read-in and that the Defendants seek to admit evidence through explanation and argument and improperly use the motion to argue their case outside closing arguments. The Plaintiffs do not address or dispute that they received the subsequent qualification to Question 876, a copy of which is included in the Defendants' motion materials. In their written submissions, the Plaintiffs also state that they consent to the Defendants' "proposed corrections to evidence in Appendix C." Appendix C includes both a correction respecting p 248 line 18 to p 252 line 23 as well as the text of the clarification of Question 876.

I am unable to reconcile the Plaintiffs' positions. However, if B-2 is challenged, then I find that the proposed qualification is not a read-in under the Rules.

iii. B-3 – Proposed read-ins: pp 294-295, Q 1054-1057, lines 5-25, 1-7; p 296, Q 1062-1063, lines 13-25, 1-21. Proposed clarifications: pp 295-296, Q 1058-1061, lines 8-25, 1-12; pp 296-297, Q 1064, lines 22-25, 1-4.

Questions 1054 to 1064 are a continuing line of questions and answers that are fully connected and address the same issue, being what is necessary to obtain a new risk assessment. I agree with the Defendants that the proposed clarifications provide the complete answer of the discovery witness. They are permitted.

iv. B-4 – Proposed read-in: p 355, Q 1299-1302, lines 8-24. Proposed clarification: pp 354-355, Q 1298, lines 23-25, 1-7.

The Defendants say that they understand that the Plaintiffs do not challenge this read-in. However, like B-2, while the Plaintiffs appear to indicate that they do not take issue with the proposed qualification to B-4, they then list B-4 as being objected to.

Proposed clarification, Question 1298, is the lead-in question reciting a part of a document being read to the witness and asks if the witness agrees with same. The next Questions, 1299-1302, being the proposed read-ins, continue to ask questions about the same (unidentified) document. The proposed clarification is clearly connected to and part of that line of questions. It is permitted.

v. B-5 – Proposed read-in: p 453, Q 1714, lines 3-9. Proposed clarification: pp 452-453, Q 1714, lines 20-25, 1-9.

The Defendants state that they understand that the Plaintiffs do not challenge this qualification, and this appears to be the case based on the Plaintiffs' submissions. It is permitted.

Witnesses

[111] The trial took place over five weeks. During the course of the trial, many witnesses gave testimony, many documents were entered into evidence and, at the opening and closing of the trial, the parties made many arguments. I have heard and considered all of the testimony, evidence and arguments but will not in these reasons be describing or referring to every point raised and every piece of evidence. However, it may be helpful at the outset to identify each witness and the role they play in this action.

A. Plaintiffs' witnesses

[112] The Plaintiffs called the three representative plaintiffs to testify: Mr. John Gibeau, Mr. Jean Paradis and Mr. Bill Lockhart, as well as a commercial beekeeper, Mr. Brent Ash. Each of these witnesses described the commercial honeybee operations that they are or have been involved with and the management models they now employ or have previously employed.

[113] Pursuant to my Order dated October 24, 2023, the Plaintiffs also called Mr. Chris Forbes, who was the Deputy Minister of Agriculture and Agri-Food Canada [AAFC] between May 2017 and February 20, 2023 (at the time of the trial he was the Deputy Minister of Finance), and Dr. Harpreet Kochhar, President of the CFIA at the time of the trial. As proposed by the Plaintiffs

and reflected in my Order, Deputy Minister Forbes and Dr. Kochhar were to be examined only within the temporal limits and with respect to their decision-making processes during the course of their employment with AAFC and CFIA.

[114] The Plaintiffs called three expert witnesses: Dr. Francisco Zagmutt, who was qualified to give evidence respecting international standards governing risk assessments, in particular, animal health import risk assessments; Dr. Jeffery Pettis, an entomologist qualified to give expert evidence on honeybee health and management in Canada and the US during the Class period and, in particular, those diseases addressed in the Risk Assessments and as reported and regulated by the OIE; and Dr. Daniel Sumner, an economist who was qualified to give evidence respecting agricultural economics and economic impacts of restrictions on bee package imports from the US. The qualifications, expertise and experience of all of the expert witnesses is found in their CVs, which are before the Court and need not be described in these reasons.

B. Defendants' witnesses

[115] The Defendants called Dr. Cheryl James, a veterinarian and epidemiologist who worked in the Animal Health Risk Assessment [AHRA] unit of CFIA from 2001 to 2007. She was the risk assessor for the 2003 Risk Assessment.

[116] The Defendants called Dr. Nancy Rheault, who was the National Manager for the AHRA unit when the 2013 Risk Assessment was conducted. At the time of trial, she was the Senior Director of the Food Import/Export Division within the International Affairs Branch [IAB]. Dr. Pascal Moreau was the lead risk assessor for the 2013 Risk Assessment, but he passed away in 2017. Dr. Rheault was therefore called to give evidence on the conduct of the 2013 Risk Assessment.

[117] The Defendants also called several CFIA risk managers who gave evidence on their activities respecting what is described internally by CFIA as the "honeybee file." These included:

- Dr. Samira Belaissaoui, a veterinarian who, in 2003, was a risk manager who assisted Dr. Brian Jamieson, the lead on the honeybee file at that time. At the time of the trial, she was the National Manager with the Import/Export Live Animals and Germplasm Section within the Animal Import/Export Division of the IAB.

- Dr. Gary Kruger, a veterinarian who worked for CFIA from 2000 to 2021 and who had responsibility for the honeybee file from around January 2008 to April 2010. During that time, he was a Veterinary Program Specialist (Imports) in the Animal Health and Production Division [AHPD] (now the Animal Import/Export Division).

- Dr. Maria Perrone, a veterinarian (now retired) who, in her position as a Veterinary Program Specialist and then a Senior Staff Veterinarian in the Animal Import/Export Division, was responsible for the honeybee file from May 2005 to December 2007.

- Dr. Amy Snow, who was a veterinarian in CFIA's Animal Import/Export Division and who handled the honeybee file from March 2010 to November 2012. At the time of trial, Dr. Snow was a National Manager within the Animal Health Programs Division of CFIA.

- Dr. Connie Rajzman, a veterinarian who joined the Animal Import/Export Division of the IAB in 2010. She has had responsibility for the honeybee file since 2012. She testified about her activities around honeybee imports, including her consultations around the 2013 Risk Assessment.

[118] The Defendants also called four expert witnesses. These were:

- Dr. Mark Winston, who was qualified as an expert on the biology and behaviour of honeybees (*Apis mellifera*), including Africanized Honeybees; honeybee management practices; and honeybee diseases, pests, parasites and vectors, including their transmission, spread, distribution, prevalence and treatment. He was to address this primarily from the Canadian perspective;

- Dr. Dewey Caron, an entomologist who was qualified to give expert evidence on American beekeeping, honeybee health and honeybee (*Apis mellifera*) management practices, including commercial small-scale and migratory beekeeping; the production of honeybee packages and nucleus colonies and queens; honeybee health and biosecurity, including colony collapse disorder; diseases, parasites, pests and vectors, including their transmission, spread, distribution, prevalence and treatment in the US; and the biology, spread, distribution and prevalence of AHB in the Americas;

- Dr. Helen Roberts, a policy, risk and science advisor with the Exotic Disease Control team of the Department for Environment, Food and Rural Affairs [DEFRA] in London, England. She is an animal health risk assessor who was qualified to give expert evidence on the WOAH (OIE) recommendations for trade, animal health import risk assessments, international standards for risk assessment methodology and risk analysis and application of risk analysis; and

- Dr. Peter Nickerson, an economist and the principal and president of Nickerson & Associates LLC, an economics and statistics consulting firm in Seattle, WA. He was qualified as an applied economist and expert on economic, econometric and statistical analysis with respect to economic damage assessment.

[119] The Defendants also called three commercial beekeeper witnesses: Mr. Timothy Townsend, Mr. Calvin Parsons and Mr. Neil Specht. Each of these witnesses described the commercial honeybee operations that they own and the management models they employ.

[120] The Defendants called several other witnesses. These were:

- Dr. Stephen Pernal, a research scientist working for AAFC. He works at Beaverlodge Research Farm in Beaverlodge, Alberta, researching honeybees. Dr. Pernal has held a number of positions with CAPA, and he was president from 2006 to 2010. He has historically been consulted by CFIA respecting honeybee health, including at the time of the 2013 Risk Assessment. He gave evidence on these consultations, on a bee health survey with which he was involved, on CAPA reports, on winter losses and on other matters.

- Dr. Medhat Nasr is an entomologist. He was the Provincial Apiculturist for Alberta from 2002 to 2019. He was also a member of CAPA starting around 1990. He was chair of the CAPA Import Committee for eight years and later served as its vice president. He then served as CAPA president, a position he held for four years during which he was an ex officio member of the Import Committee. At the time of trial, he was still a member of the Import Committee. CFIA consulted Dr. Nasr in his various roles over the course of the Class period, and he gave evidence on these roles and consultations, as well as on the import protocol for the importation of US queens, which he developed, and other matters.

- Mr. Paul Kozak has been the Provincial Apiculturist for Ontario since 2010. He has also been a member of CAPA since about 2006. He has been involved with various CAPA committees, including the Import Committee, of which he became a co-chair in 2019. Mr. Kozak gave evidence on CFIA's consultations and on honeybee pests and diseases. In particular, he testified about an SHB incursion in Ontario.

- Dr. Caroline Dubé is a veterinarian with a PhD in Population Medicine. She started working with CFIA in 2002, in the Foreign Animal Disease section. She moved to the AHRA unit around 2011. For a few months of 2014, she worked with the United Nations as an Animal Health Officer, but she came back to CFIA in 2014 as an epidemiologist and science advisor. As of 2021, she was Acting National Manager, and she was appointed as National Manager in 2022. She held this position at the time of the Call for Information, which will be described later in these reasons, and she gave evidence on this and on her activities respecting the honeybee file.

- Dr. Ian Alexander is a veterinarian with a PhD in Pharmacology and Toxicology. He has held a number of positions with CFIA, with the most recent being Executive Director, Animal Health Strategic Initiatives, Science Branch, CFIA, from April 2021 to January 2023. He also served as the Chief Veterinary Officer for Canada from September 2012 to January 2014. Dr. Alexander was not involved in conducting the 2013 Risk Assessment, but he had the overall responsibility for it. He gave evidence on provincial and national surveillance programs and zoning, case-by-case assessment of applications and the requirements to revisit the 2003 Risk Assessment.

PART I

A. The parties

i. The Representative Plaintiffs

[121] There are three representative plaintiffs in this matter [Representative Plaintiffs].

[122] Paradis Honey Ltd. [Paradis Honey] describes itself as a family-owned and operated corporation, registered in Alberta, whose main business is beekeeping and the production of honey. Mr. Jean Paradis founded Paradis Honey in 1974. He sold his interest in the business to his son, Michael Paradis, in 2010. Paradis Honey currently operates approximately 3500 honeybee colonies.

[123] Honeybee Enterprises Ltd. [Honeybee Enterprises] is a British Columbia-registered corporation that has operations in Surrey, British Columbia and DeBolt, Alberta. Honeybee Enterprises was founded by Mr. John Gibeau in 2000. He sold his shares in the company to his sons in 2018. Honeybee Enterprises' primary business was blueberry and other pollination and the harvesting of honey at the end of the pollination season. It has around 2200 of its own hives and operates about 1000 more that are owned by its beekeeping manager. Since 2012 or 2013, Honeybee Enterprises has limited its business to buying and selling honey, and a sister company, Honeybee Honey Farm, has been in the business of beekeeping and honey production.

[124] Rocklake Apiaries Ltd. [Rocklake Apiaries] is a Manitoba-registered corporation in the business of beekeeping and honey production, as well as some beeswax. Mr. William Lockhart founded Rocklake Apiaries in 1978 and became its sole owner in 2003. In 2013, he sold the company to his brother and nephews.

ii. The Defendants

[125] The Minister is the Minister of Agriculture and Agri-Food [Minister]. The Minister generally has powers, duties and functions related to agriculture, products derived from agriculture and research related to agriculture and products derived from agriculture (*Department of Agriculture and Agri-Food Act*, RSC 1985, c A-9, s 4).

[126] CFIA is an agency of the federal Crown established by s 3 of the *Canadian Food Inspection Agency Act*, SC 1997, c 6 [*CFIA Act*]. The Minister is responsible for and has the overall direction of CFIA (*CFIA Act*, s 4(1)). CFIA is responsible for the administration and enforcement of a number of Acts, including the *HA Act* (*CFIA Act*, s 11(1)).

[127] CFIA has several branches with different roles and responsibilities.

[128] The Science Branch supports CFIA programming by developing surveillance plans for regulated animal diseases and providing risk assessment science advice, including country evaluations. The AHRA unit is part of the Science Branch.

[129] The IAB (formerly the Policy and Programs Branch) engages in international and trade activities related to the food, animal and plant business lines. The Animal Import/Export Division (formerly the Animal Health and Production Division, then the Terrestrial Animal Health Division) is part of the IAB. Risk managers in this division can request risk assessments. They may also have contact with industry respecting risk assessments.

[130] The Operations Branch has field staff who, among other work, do inspections and verify import permits when animals arrive. Inspectors in the Operations Branch also address permit applications.

B. Other entities

[131] Other entities that are relevant to this matter are the CHC, which is a national beekeeping organization with a board of directors comprised of delegates elected by each of the provincial beekeeper associations; the Provincial Apiculturists, who are responsible for administering provincial bee legislation and who engage in government liaison and beekeeper outreach activities; and CAPA, a group of academics and professional apiculturists, or professionals whose work involves managed bee species. Each of these entities will be described in greater detail later in these reasons.

C. Legislative scheme

[132] The relevant statutory scheme in this case is comprised of the *HA Act* and the *HA Regulations*, the Import Reference Document (explained below) and the *CFIA Act*.

i. *HA Act* and *CFIA Act*

[133] Pursuant to both the *HA Act* and the *CFIA Act*, the Minister is the Minister of Agriculture and Agri-Food (*HA Act* s 2(1); *CFIA Act* (s 2)).

[134] As noted above, CFIA is an agency of the federal Crown established by s 3 of the *CFIA Act*.

[135] Pursuant to s 4(1) of the *CFIA Act*, the Minister is responsible for and has the overall direction of CFIA (*CFIA Act*, s 4(1)). Pursuant to s 4(2), the Minister may delegate to any person any power, duty or function conferred on the Minister under the *CFIA Act*, or any Act or

provision that CFIA enforces or administers by virtue of s 11, except the power to make regulations and the power to delegate under s 4(2). Section 11 of the *CFIA Act* sets out the responsibilities of CFIA. This prescribes that CFIA is responsible for the administration and enforcement of a number of Acts, including the *HA Act* (*CFIA Act*, s 11(1)).

[136] Pursuant to s 5 of the *CFIA Act*, the Governor in Council shall appoint a President and an Executive Vice-president of CFIA. The President is the chief executive officer of CFIA and has supervisory powers over and direction of its work and staff. The President has the rank and all the powers of a deputy head of a department (*CFIA Act*, s 6(1)). The President may delegate to any person any power, duty or function conferred on the President by the *CFIA Act* or any other enactment (*CFIA Act*, s 7).

[137] Section 14 of the *HA Act* permits the Minister to make regulations prohibiting the importation of any animal into Canada for such period as the Minister considers necessary for the purpose of preventing disease or toxic substances from being introduced into or spreading within Canada:

> **Regulations prohibiting importation**
>
> 14 The Minister may make regulations prohibiting the importation of any animal or other thing into Canada, any part of Canada or any Canadian port, either generally or from any place named in the regulations, for such period as the Minister considers necessary for the purpose of preventing a disease or toxic substance from being introduced into or spread within Canada.

[138] Persons are prohibited from possessing or disposing of an animal or thing that the person knows was imported in contravention of the *HA Act* or the *HA Regulations* (*HA Act*, s 15(1)).

[139] The *HA Act* also addresses the inspection of an imported animal or other thing:

> **Importation into Canada**

> 16 (1) Where a person imports into Canada any animal, animal product, animal byproduct, animal food or veterinary biologic, or any other thing used in respect of animals or contaminated by a disease or toxic substance, the person shall, either before or at the time of importation, present the animal, animal product, animal by-product, animal food, veterinary biologic or other thing to an inspector, officer or customs officer who may inspect it or detain it until it has been inspected or otherwise dealt with by an inspector or officer.
>
> **Regulations**
>
> (2) The Minister may make regulations for exempting animals or things from the application of this section and respecting the manner of presenting things for inspection.

[140] Where the Minister determines that an animal or thing has been imported – or an attempt has been made to import an animal or thing – in contravention of the *HA Act* or the *HA Regulations* or that a requirement imposed by or under the regulations in respect of an imported animal or thing has not been met, it is forfeited to the Crown and may be disposed of as the Minister sees fit (*HA Act*, s 17).

[141] With respect to inspectors and officers, the President of CFIA may designate, under s 13 of the *CFIA Act*, analysts, inspectors, veterinary inspectors and officers for the purposes of the *HA Act* (*HA Act*, s 32(1)). An inspector or officer may, subject to any restrictions or limitations specified by the Minister, exercise any of the powers and perform any of the duties or functions of the Minister under the *HA Act*, except for powers mentioned in s 27(1), ss 27.1(1) and (2), s 27.4 and s 27.5 (*HA Act*, s 33(1)).

[142] For the purpose of detecting diseases or toxic substances or for a purpose related to verifying compliance or preventing non-compliance with the *HA Act*, inspectors or officers may employ the search and seizure and other powers and authorities set out in s 38 to s 41 of the *HA Act*.

[143] Liability under the *HA Act* is also addressed:

> **Her Majesty not liable**
>
> 50 If a person must, under this Act, do anything or permit an inspector or officer to do anything, Her Majesty in right of Canada is not liable
>
> > (a) for any costs, loss or damage resulting from the compliance; or
> >
> > (b) to pay any fee, including any rent or charge, for what is done or permitted to be done.
>
> **No liability**
>
> 50.1 No person who exercises powers or performs duties or functions under this Act is liable in respect of anything done or omitted to be done in good faith in the exercise of those powers or the performance of those duties or functions.

[144] Section 50.1 came into force in 2015.

[145] Compensation to the owners of animals is addressed in s 51(1) to s 59 of the *HA Act*.

[146] Regulation making under the *HA Act* is addressed in s 64(1) and includes:

> **Regulations**
>
> **Regulations — generally**
>
> **64 (1)** The Governor in Council may make regulations for the purpose of protecting human and animal health through the control or elimination of diseases and toxic substances and generally for carrying out the purposes and provisions of this Act, including regulations
>
> > **(a)** prohibiting or regulating the importation, exportation and possession of animals and things in order to prevent the introduction of any vector, disease or toxic substance into Canada or into another country from Canada;

……

f) for controlling or eradicating, or preventing the spread of, vectors, diseases and toxic substances and for quarantining, segregating, treating or disposing of, or for dealing generally with, animals or things that

(i) are, or are suspected of being, affected or contaminated by a disease or toxic substance,

(ii) have been in contact with or in close proximity to animals or things that were, or are suspected of having been, affected or contaminated by a disease or toxic substance at the time of contact or close proximity, or

(iii) are, or are suspected of being, vectors, the causative agents of disease or toxic substances;

Incorporation by reference

64.1 (1) A regulation made under section 64 may incorporate by reference any document, regardless of its source, either as it exists on a particular date or as it is amended from time to time.

Accessibility

(2) The Minister must ensure that any document that is incorporated by reference in a regulation made under section 64, including any amendments to the document, is accessible.

Defence

(3) A person is not liable to be found guilty of an offence or subjected to an administrative sanction for any contravention in respect of which a document that is incorporated by reference in a regulation made under section 64 is relevant unless, at the time of the alleged contravention, the document was accessible as required by subsection (2) or it was otherwise accessible to the person.

No registration or publication

(4) For greater certainty, a document that is incorporated by reference in a regulation made under section 64 is not required to be transmitted for registration or published in the Canada Gazette by reason only that it is incorporated by reference.

ii. *HA Regulations*

[147] The *HA Regulations* address importation of animals under Part II - Importation.

[148] Section 10 includes the definition "regulated animal," which includes honeybees:

> ***regulated animal*** means a hatching egg, turtle, tortoise, bird, honeybee or mammal, but does not include
>
> **(a)** germplasm;
>
> **(b)** members of the orders *Cetacea*, *Pinnipedia* and *Sirenia*; or
>
> **(c)** members of the order *Rodentia*, other than
>
> **(i)** prairie dogs (*Cynomys sp.*), African Giant Pouched Rats (*Cricetomys gambianus*) and squirrels of the family *Sciuridae*, from any country, and
>
> **(ii)** any other members of the order from Africa. (*animal réglementé*)

[149] The importation of regulated animals is governed by s 12, including:

> **Regulated Animals**
>
> **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.

[150] Permits and licenses are addressed in Part XIII of the *HA Regulations*, including:

> **Permits and Licences**
>
> Form and Conditions

> **160 (1)** Any application for a permit or licence required under the Act shall be in a form approved by the Minister.
>
> > **(1.1)** The Minister shall issue a permit or licence required under the Act if the Minister determines that the activity for which the permit or licence is issued would not, or would not be likely to, result in the introduction into or spread within Canada of a vector, disease or toxic substance or its introduction into another country from Canada.
> >
> > **(1.2)** A permit or licence issued by the Minister under these Regulations may be issued as a general permit or licence to owners or persons having the possession, care or control of an animal or thing for which the permit or licence is issued.
>
> **(2)** Any permit or licence required under the Act shall
>
> > **(a)** be in a form approved by the Minister; and
> >
> > **(b)** contain such conditions as are necessary to prevent the introduction of communicable disease into Canada or into any other country from Canada and the spread of communicable disease within Canada.
>
> …

[151] Prior to December 14, 2012, s 160(1.1) was written in the permissive, as follows:

> 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, the introduction into another country from Canada or the spread within Canada, of a vector, disease or toxic substance.

iii. Import Reference Document

[152] The "Import Reference Document" (as referenced in the *HA Regulations*) is found online at inspection.canada.ca/animal-health/terrestrial-animals/imports/import-policies/general/2002-3/eng/1321037138426/1577737753877, relevant portions of which are included in the Joint Book of Authorities. This document states that it is part of the Guidance Document Repository

(GDR) and that it was prepared on January 25, 2007. Further, that it is incorporated by reference into the *HA Regulations* and that any changes to the document must be in accordance with the CFIA Incorporation by Reference Policy. This policy states that for regulations made by the Governor in Council, the authority to incorporate a document by reference comes from the Acts that CFIA administers. Further, that the Acts listed contain specific requirements or exceptions for incorporating documents by reference. This list includes s 64.1 of the *HA Act* (s 6).

[153] The introduction of the Import Reference Document states that s 11 and s 12 of the *HA Regulations* "prohibit the importation of regulated animals and germplasm from any country except in accordance with either (a) a permit issued by the Minister, or (b) the provisions set out in section 12 of the Regulations and in this document." Further, that the definitions in the *HA Act* and the *HA Regulations* apply in the Import Reference Document.

[154] The Import Reference Document describes "equivalent risk areas" in Part 1 and "low risk areas" in Part II, in both cases stating that no areas are so designated at this time. With respect to "undesignated areas," Part III states that the world is an undesignated area for regulated animals, and, with respect to honeybees:

> **24.1 Honeybees**
>
> Honeybees may only be imported into Canada in accordance with Paragraph 12.(1)(a) of the Regulations.

D. Importation process

[155] The importation process was described by several of the Defendants' witnesses, including Dr. Belaissaoui, Dr. Kruger, Dr. Dubé, Dr. Snow and Dr. Perrone. In summary, this evidence was as follows.

[156] To start the process, a prospective importer must submit an import permit application in the required form and pay the required fee.

[157] However, before submitting an application, a prospective importer can check the publicly available online Automated Import Reference System [AIRS] to see if importation of a particular commodity is permitted and, if so, what import conditions would be applied to any permit issued for the importation of that commodity. Dr. Belaissaoui testified that this system was available to the public at least as early as 2003.

[158] When an import permit application is received, a CFIA veterinary officer checks to see if an import permit is available – meaning that import conditions have already been identified for that commodity that, if complied with, would bring the risk to animal health arising from the importation to an acceptable level, and these conditions are entered in AIRS. If so, an import permit inclusive of those conditions will be granted.

[159] If the import conditions indicate that a particular commodity is prohibited for importation (Dr. Belaissaoui testified that this could happen, for example, when there is a major disease of concern to Canada in the proposed exporting country such as foot-and-mouth disease, classical swine fever or African swine fever), then the application will be denied.

[160] If no import permit conditions are listed in AIRS and there is no prohibition, then the prospective importer is referred to the CFIA Ottawa office. A CFIA Operations Officer would then explain to the permit applicant the possible next steps, specifically, that a risk assessment is required for any importation of a new species, a new product or a commodity from a new country, as described in the *CFIA Protocol of the Animal Health & Production Division and Animal Health Risk Analysis Science Advice and Biohazards Division* [CFIA Protocol 2005].

[161] If the prospective importer wishes to proceed with a risk assessment, the request then goes to risk managers in the Import/Export Division, who determine if a risk assessment is possible. Dr. Belaissaoui explained that, in some cases, the risk manager will determine, without requiring a risk assessment, that the risk of import would be too great, such as when the exporting country has major diseases of concern to Canada. In that case, importation has already been prohibited and the outcome of a risk assessment could not be favourable. Similarly,

according to Dr. Dubé, if the OIE Code recommends sanitary measures for a particular risk, those measures may be applied without a risk assessment.

[162] If a risk assessment is required, and if the importer is still willing to proceed when they are informed of the expected timeframe for an assessment, then the risk assessment is undertaken.

[163] The risk assessment may determine that the risk of importation is negligible, in which case importation can proceed without sanitary measures. Otherwise, Dr. Belaissaoui testified that, if the outcome of the risk assessment was favourable, it is possible that import conditions could be developed to make the risk of the importation of the commodity acceptable. However, if no import conditions can be developed to reach an acceptable level of risk [ALOR], importation will be refused.

[164] Following the risk analysis process, AIRS is updated with the result. This would be available for all future importers of that commodity from that country.

[165] In some cases, importation may be considered on a case-by-case basis. Dr. Snow's evidence was that, in that event, importations still have to occur within an acceptable level of risk. CFIA generally applies such an approach when it has existing conditions in place and there are extenuating circumstances that are encountered, or if the risks of importing an inadmissible product are mitigated with post-import conditions that are highly controlled. In Dr. Snow's experience, the instances where importation has been permitted on a case-by-case basis have been importations to a containment lab.

PART II

A. Honeybee health and diseases

i. Varroa mite and rVar

[166] Varroa mite (*Varroa destructor*) is an external parasitic mite, large enough to be visible to the human eye, that feeds on adult honeybees' fat body and reproduces on developing honeybee pupae. The Agreed Statement of Facts states that varroa mites are vectors of various honeybee diseases. The expert evidence generally agreed that varroa mites transmit viruses and weaken the bees.

[167] Several options exist to treat for varroa. These include synthetic miticides, such as fluvalinate and amitraz, and organic acids, such as formic acid and oxalic acid.

[168] Varroa mites have developed resistance to synthetic miticides.

[169] Varroa resistant to fluvalinate was considered a hazard in the 2003 Risk Assessment. The expert evidence suggests that in 2003 it was at least present in Canada, although it may not have been present in every province, and it may have been localized within the provinces in which it had been reported. It was noted as being widespread in the US at the time.

[170] Amitraz-resistant varroa was considered a hazard in the 2013 Risk Assessment. The experts generally agreed that it was not present in Canada in 2013, but there was disagreement about whether it was present in the US at that time.

ii. American foulbrood (AFB) and rAFB

[171] American foulbrood [AFB] is a disease caused by a spore-forming bacteria that can be found in bee colonies. AFB persists in and spreads through contaminated equipment and hives, and it can be present in a colony without expressed symptoms. The agreed facts state that AFB is highly infectious and is the most widespread and destructive bee brood disease. The bacteria infect honeybee larvae and can spread to adult honeybees in the colony. AFB will cause the death of a colony if it is not controlled and can be spread through contact between colonies, food, nectar, honey, comb or beekeeping equipment contaminated with spores.

[172] AFB can be treated with antibiotics such as oxytetracycline [OTC]; however, this does not kill AFB at the spore stage but serves to mask the symptoms of the disease. Cultural controls, such as burning, are also used to destroy infected colonies and equipment. AFB can and has become resistant to antibiotics through repeated exposure. AFB resistant to OTC was considered a hazard in both Risk Assessments.

[173] The expert evidence suggests that rAFB may have been present in Canada at the time of both Risk Assessments. The comments of Dr. Winston, Dr. Cynthia Scott-Dupree and Mr. Don Dixon, the independent reviewers of a draft of the 2003 Risk Assessment, indicate they were concerned that the draft assessment had underestimated the impact of rAFB in part because of the limited distribution of rAFB in Canada, among other reasons. In the US, it was widely reported but of unknown frequency, as it was not regularly monitored.

iii. Small hive beetle (SHB)

[174] SHB (*Aethina tumida*) is endemic to Sub-Saharan Africa, was introduced to the US in 1996 and is a honeybee pest. SHB larvae consume brood, honey and pollen in the hive. The presence of SHB can be a problem because larval fecal matter can cause fermentation of honey and because a large number of larvae can cause a colony to collapse due to the damage to brood and honey supplies.

[175] There is no indication SHB was established anywhere in Canada at the time of the 2003 Risk Assessment. Before the 2013 Risk Assessment, SHB incursions had been detected on several occasions in Quebec and, notably, in southwestern Ontario. Quarantine zones were put in place and colonies were treated.

[176] SHB was present in the US at the time of both Risk Assessments.

iv. Africanized honeybee (AHB)

[177] AHB is a subspecies of European honeybee that was brought from southern Africa into Brazil and hybridized. It is a more defensive type of bee that is also more prone to stinging and swarming. Both Risk Assessments were concerned about introducing Africanized genetics into Canadian European honeybee populations and identified AHB as a hazard.

[178] The evidence on the presence of AHB in Canada in either 2003 or 2013 was inconsistent. According to Dr. Pettis, “Africanized bees were in Canada (at least AHB genes) without public alarm or beekeeping issues at the time of both the 2003 and 2014 assessments.” On the other hand, Dr. Winston testified that there was no AHB in 2003 or in 2014.

[179] It is an agreed fact that AHB first entered the US in 1990. AHB was present in at least the lower tier of states bordering Mexico at the time of the Risk Assessments.

B. Honeybee management models

[180] It is an agreed fact that prior to 1986, beekeepers in Canada were able to import bee packages from the US to replace winter losses or to build up their colony numbers. At that time, some beekeepers let all of their colonies die each fall (or culled them) and started anew each year with honeybee packages from the US. This was one model of beekeeping at that time.

[181] Since 1986, beekeepers have used a variety of methods, and combinations of methods, to manage their operations. All of the beekeeper witnesses testified that they overwinter their honeybees, and some indicated that they cull a small percentage of the colonies that they do not expect to survive the winter. Colonies can be overwintered outside, in which case they must be wrapped and insulated. Several beekeeper witnesses also overwinter some portion of their colonies inside, in specially built, dark, climate-controlled buildings. The beekeepers spoke about the feeding and care required for overwintered colonies.

[182] Not all of the colonies survive overwintering, although the percentage of colonies lost varies from year to year. Several annual CAPA winter loss reports since 2008 are in evidence. The losses can be caused by or contributed to by a variety of factors, including harsh or long winters and honeybee pests and diseases.

[183] To replace losses, beekeepers use some combination of the following methods. Beekeepers may purchase package bees from other countries, primarily New Zealand. Bee "packages" will be explained below. These beekeepers may also replace the queen from the imported package with a queen purchased from California. Bees may sometimes be purchased from domestic suppliers. Beekeepers can also "split" surviving colonies or create nucleus colonies, referred to as "nucs," which will be described below. Some beekeepers breed their own queens for use in the splits or to replace queens as needed. As indicated in the Plaintiffs' stipulations, beekeepers use a variety of measures to manage their operations.

[184] A typical physical bee colony as described at trial is essentially a wooden box with a cover, from which bees come and go to forage for pollen or nectar, containing ten or more frames of brood, bees and honey.

[185] Splitting a colony means that an existing healthy and strong colony will be divided into two colonies. The old queen and half of the frames and bees will form one colony, and the other frames and bees will form a new colony to which a new queen is added (or, for stacked colonies, the top and bottom colonies may be reversed and the old queen moved into the box with fewer bees). Some beekeepers, like Mr. Ash and Mr. Townsend, testified that splits are usually made in the spring and may be as productive as a non-split colony the year they are made. Others, like Mr. Lockhart, testified that splits are allowed to grow over the summer and provide a viable colony the following year after overwintering.

[186] Creating nucs typically involves taking usually two or more frames from an existing colony, placing them in a new colony and letting them grow over the summer into a full production colony for use the following year, after overwintering.

[187] I note that witnesses described slightly different processes for making splits and nucs and that Mr. Gibeau cautioned that the terms “nucs” and “splits” could be used interchangeably by some.

[188] As to the importation of bees, the Agreed Statement of Facts states that live bee imports generally take one of two forms. First, an importer might import honeybee “queens,” which consists of a small matchbook-sized cage containing a queen honeybee with about a dozen bee attendants to keep her alive during transport. Second, an importer might import a “package” of bees, a larger box containing a small colony made up of a queen bee and several thousand worker bees. Dr. Caron testified that a package of bees contains two to five pounds of bees. The 2013 Risk Assessment indicates that each pound represents about 3500 bees.

PART III

Chronology of events

A. Border closure in 1987

[189] It is an agreed fact that sometime prior to 1986, varroa mites were introduced into the US and, over time, spread through bee colonies in the US. As a result of the introduction of varroa mites, beekeepers in the US experienced substantial colony losses.

[190] In response to the outbreak of varroa mites in the US, Canada enacted the *Bee Prohibition Order, 1986,* SOR/86-339, which prohibited the importation or introduction of honeybees from anywhere in the US into New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island or Quebec until December 31, 1986. This was later extended to December 31, 1987 (*Bee Prohibition Order, 1986, amendment*, SOR/87-39). The importation of honeybees from the US was prohibited for all of Canada in 1987, by the *Honeybee Prohibition Order, 1987,* SOR/87-607.

[191] The importation of honeybees from the continental US continued to be prohibited by way of various prohibition orders or prohibition regulations until 2006 (*Honeybee Prohibition Order, 1988*, SOR/88-54; *Honeybee Prohibition Order, 1990*, SOR/90-69; *Honeybee Prohibition Regulations, 1991*, SOR/92-24; *Honeybee Prohibition Regulations, 1993*, SOR/94-8; *Honeybee Importation Prohibition Regulations, 1996*, SOR/96-100; *Honeybee Importation Prohibition Regulations, 1997*, SOR/98-122; *Honeybee Importation Prohibition Regulations, 1999*, SOR/2000-323).

[192] RIASs were published in the *Canada Gazette* together with the proposed amendments to the prohibition orders. Broadly speaking, these RIASs include information such as the background and purpose of the prohibition, the status of honeybee health, the positions of industry, alternatives that were considered, benefits and costs of the prohibition and consultations leading to the decision.

[193] Honeybee queens were permitted to be imported from Hawaii starting in 1992 (*Honeybee Prohibition Regulations, 1991*, SOR/92-24).

[194] The last of this series of orders and of these regulations, the *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136 [*HIPR, 2004*], permitted the importation of honeybee queens from the US but continued the prohibition on the importation of honeybee packages. *HIPR, 2004* expired, without renewal, on December 31, 2006 (it was repealed on July 1, 2015, SOR/2015-137). No orders, regulations or legislation have been enacted in *HIPR, 2004*'s place.

[195] Import permits for the importation of honeybee packages from the continental US have not been issued during the Class period, which began upon the expiration of *HIPR, 2004* on December 31, 2006.

B. 2003 Risk Assessment

[196] Dr. Cheryl James was tasked with conducting the 2003 Risk Assessment. Dr. James testified that she received the risk assessment request, dated March 20, 2002, on April 24, 2002. The request came from Dr. Jamieson, in the AHPD, and sought an assessment of the disease risk to Canadian honeybees associated with the unrestricted importation of honeybee queens and packaged bees from the continental US.

[197] CFIA's *Protocol of the Animal Health & Production Division and Animal, Plant and Food Risk Analysis Network (AFRAN), Science Division*, dated October 2001 [CFIA Protocol 2001], was used for conducting animal health risk assessments at that time.

[198] The 2003 Risk Assessment was a qualitative, rather than quantitative, assessment. Dr. James testified that a qualitative assessment is "essentially a risk assessment that's done in words, paragraphs, points of evidence," whereas a quantitative assessment could be conducted if there was good data to apply probabilities and numerical calculations to come up with a number at the end for the risk assessment.

[199] The 2003 Risk Assessment considered four hazards: fluvalinate-resistant varroa mite, AHB, SHB and OTC-resistant AFB.

[200] Dr. James testified that, in total, five drafts of the 2003 Risk Assessment were generated. Five individuals were listed in the assessment as having contributed to or having reviewed drafts of the assessment. Dr. Jamieson, the risk manager who had submitted the initial request, reviewed three drafts (October 4, 2002, November 25, 2002, and January 29, 2003). Dr. James testified that she expected that he also looked at the March version. Doreen Watler, the manager of the Plant Health Risk Assessment unit, and Louise DuMouchel, who also worked in the Plant Health Risk Assessment group, reviewed a draft on November 25, 2002. Cynthia Scott-Dupree and Mark Winston reviewed a draft on January 29, 2003.

[201] Dr. James testified that others would also have looked at the 2003 Risk Assessment: the draft would have gone to internal review within the AHRA unit; the risk managers (Dr. Jamieson and Dr. Belaissaoui) would have reviewed first drafts; at the second draft, Dr. Mark Winston, Don Dixon, and Dr. Cynthia Scott-Dupree were asked for their expert input on whether all the science was covered off and interpreted correctly; and the assessment was then sent to CHC and CAPA for further comments. The review process continued until May 30, 2003, at which point the risk assessment team compiled reviewer comments and responded to them.

[202] External input and review resulted in two changes to the risk assessment. First, based on a suggestion from Rhéal Lafrenière, the Provincial Apiculturist for Manitoba, the risk assessors separated the analysis of honeybee queens from the analysis of honeybee packages. Second, in response to the comments from Dr. Winston, Mr. Dixon and Dr. Scott-Dupree, a consideration of the proportion of producers who would spread rAFB through their management practices was included in the exposure pathway portion of the analysis.

[203] The final 2003 Risk Assessment was released on October 10, 2003, and resulted in the following risk estimates for the four identified hazards. For queens, the risk of fluvalinate-resistant varroa mite was moderate, the risk of OTC-resistant AFB was low, the risk of AHB was low and the risk of SHB was negligible. For US honeybee packages, the risk of fluvalinate-resistant varroa mite was high, the risk of OTC-resistant AFB was moderate, the risk of AHB was low and the risk of SHB was low.

C. 2003 to 2014

[204] As discussed above, under s 1(1) of the *HIPR, 2004*, the importation of honeybees from the continental US was prohibited until December 31, 2006. Section 1(2), however, indicated that s 1(1) did not apply to honeybee queens, with attendant bees, imported in accordance with a permit issued under s 160 of the *HA Regulations.* In effect, honeybee packages remained prohibited under the regulations, whereas honeybee queens with attendants could be imported in accordance with a permit.

[205] Import permit conditions were put in place for the importation of honeybee queens. These conditions include certification and/or inspection requirements respecting all four of the hazards identified in the 2003 Risk Assessment.

[206] The *HIPR, 2004* expired on December 31, 2006. However, the prohibition on honeybee packages from the US remained in place. It was determined that the regulation was no longer required to maintain the prohibition.

[207] Dr. Perrone communicated to stakeholders, including Heather Clay of CHC and Dr. Stephen Pernal of CAPA, that package importation would remain prohibited. She requested that the information be further distributed to their membership. Following an inquiry from Mr. Ash, Dr. Perrone also told Mr. Ash that nothing would change respecting the prohibition.

[208] Since the expiry of the *HIPR, 2004*, a number of individuals and businesses, including Paradis Honey, Honeybee Enterprises and Rocklake Apiaries, have requested permits to import honeybee packages from the US under s 160(1.1) of the *HA Regulations*. No permits have been issued for the importation of honeybee packages from the US. Permits for the importation of honeybee queens are issued regularly.

[209] Several of the Plaintiffs' beekeeper witnesses provided evidence that they requested, either in their own name or on behalf of a beekeeping organization, that the border be opened to the importation of honeybee packages. All of the Plaintiffs' beekeeper witnesses applied to import US honeybee packages between 2003 and 2014. This evidence will be set out in detail later in these reasons.

D. 2013 Risk Assessment

[210] The *Protocol of the Animal Health & Production Division and Animal Health Risk Analysis – Animal Health Science Division – Canadian Food Inspection Agency* [CFIA Protocol

2009] was in place at the time of the 2013 Risk Assessment. This document details the procedure for conducting a risk assessment.

[211] The request for the 2013 Risk Assessment came from Dr. Rajzman and was dated March 5, 2013. It was an urgent request for a full risk assessment; however, the request document did not include a request for mitigation measures.

[212] Dr. Moreau was assigned to prepare the 2013 Risk Assessment, which, like the 2003 Risk Assessment, was a qualitative assessment.

[213] Dr. Rheault testified that Dr. Moreau sought further information and reached out to subject matter experts, professional apiculturists and scientists from academia.

[214] Dr. Moreau also emailed the Provincial Apiculturists informing them of the risk assessment and requesting information to populate tables to describe the provincial legislative controls for honeybee diseases and to provide a summary of provincial surveillance and control measures for specific diseases. He specifically requested information on varroa mites, SHB and rAFB.

[215] CFIA also communicated with the United States Department of Agriculture Animal and Plant Health Inspection Services [USDA-APHIS] regarding the risk assessment, as USDA-APHIS is the OIE "competent authority" in the US (in particular, CFIA engages with the Veterinary Services unit regarding US exports to Canada). Dr. Moreau also reached out to some states along the Canada-US border, such as North Dakota, New York, Michigan and Maine, for information on SHB.

[216] Dr. Rheault testified that, once a draft was complete, it would have been peer reviewed by another assessor and reviewed internally within CFIA. She stated that early drafts were submitted to entomologists within CFIA and to the head of Laboratory Entomology. In an email

dated June 21, 2013, Dr. Rheault sent the draft risk assessment for review to Dr. Rajzman, the requester of the risk assessment in this case; Francine Lord, who was the Director in the Policy and Programs Branch; Martin Damus, a plant health risk assessor; Mohit Baxi, who was Dr. Rheault's director; Pierre Lafortune, who was the National Manager for the Animal Import/Export Division; and Primal Silva, an Executive Director within the Science Branch.

[217] Dr. Rheault prepared a memorandum to brief the Minister on the draft risk assessment on July 25, 2013.

[218] After the first internal review, the document was sent back to the risk manager. It was shared with the Provincial Apiculturists and with three external reviewers. The three reviewers, referred to by Dr. Rheault as subject matter experts, were Dr. Claude Boucher, Dr. Medhat Nasr and Dr. Stephen Pernal.

[219] Following external reviews, the draft risk assessment was officially shared externally with Canadian stakeholders from October 25 to November 25, 2013, although Dr. Rajzman testified that this deadline was extended to sometime in December. Dr. Rajzman shared the draft with the Council of Chief Veterinary Officers [CCVO], CAPA, Mr. Michael Paradis, Mr. Lockhart and a third individual named Ms. Cully.

[220] CFIA received 174 comments from Canadian individuals, national and regional bee associations and provincial representatives. Two responses came from US beekeepers. Dr. Moreau prepared a table documenting the comments received and drafted a "Review of Comments Received."

[221] Dr. Rheault sent an email on February 12, 2014, describing the process for the comment period and summarizing the responses, specifically their impact. Most comments did not undermine the outcome. There was one change to the entry assessment of AHB.

[222] A meeting was held on January 30, 2014, between the risk assessment group and the risk management group, as indicated by Dr. Rajzman's handwritten notes from that date.

[223] Dr. Rajzman contacted the Provincial Apiculturists to review the risk assessment and to provide mitigation options, and each of them responded.

[224] Dr. Rajzman also shared the 2013 Risk Assessment with Dr. Antonio Ramirez at the USDA-APHIS on May 15, 2014. CFIA received a response about the assessment on October 10, 2014.

[225] The final 2013 Risk Assessment was dated January 2014. It resulted in the following risk estimates for the four identified hazards for packages: the risk of amitraz-resistant varroa mite was moderate, the risk of OTC-resistant AFB was moderate, the risk of AHB was very low to moderate, and the risk of SHB was low to moderate. The importation of US packages remained prohibited.

E. 2014 to 2023

i. Applications for US package importation permits and responses to those applications

[226] The importation of US packages remained prohibited between 2014 to 2023, while the importation of queens and attendants continued to be permitted with import conditions. Three of the beekeepers who testified at trial gave evidence that they continued to apply to import US honeybee packages and called for the opening of the border in other ways. In particular, the COVID-19 pandemic resulted in a decreased ability for beekeepers to import from other source countries. This evidence is set out in detail later in these reasons.

ii. Call for Information

[227] On July 4, 2022, Dr. Rajzman distributed an Official Call for Scientific Information on Honey Bee Health [Call for Information]. The CFIA issued this call "to help determine if there is sufficient evidence to warrant a re-evaluation of the risks associated with the importation of US honey bee packages." The deadline for submissions was September 5, 2022, although Dr. Dubé testified that information submitted after the deadline was still considered. Dr. Rajzman testified that she sent the Call for Information to the Provincial Apiculturists, the CAPA listserv, the CHC and USDA-APHIS. She also asked that it be shared with the Apiary Inspectors of America [AIA].

[228] Submissions from individual submitters were received in response to the Call for Information, with 55 documents to review. Dr. Dubé reviewed these submissions.

[229] President Kochhar was briefed in June 2023. The slide deck prepared for Dr. Kochhar suggested that a new risk assessment could be justified to align with new methodology and to reflect control programs and hazard occurrence and distribution in the two countries since 2014. However, it also suggested that conclusions were unlikely to change, and that mitigation would be recommended for all hazards. Dr. Kochhar was provided with three options for consideration, along with the pros and cons of each: conducting a new risk assessment; exploring risk mitigation protocols submitted by USDA-APHIS; and, completing hazard identification only, without a new risk assessment. Dr. Kochhar's recommendation was to conduct a new risk assessment.

[230] A questionnaire was sent to the Provincial Apiculturists in September 2023 to consult on the status of honeybee health.

[231] As of the start of trial, the 2023 risk analysis process was ongoing.

PART IV

Common Issue #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, including a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments.

A. General principles – *Anns/Cooper* test

[232] What follows is an overview of the legal principles pertaining to negligence, in particular in the context of public authorities. More specifically, whether and in what circumstances a duty of care is owed. These principles are set out here at the outset as they form the framework of the legal analysis required of this Court. That framework must then be informed by the Court's findings of fact made based on the evidence presented at trial. The analysis of the legal principles, jurisprudence and evidence will result in the determination of Common Issue #1.

[233] In *Cooper*, the Supreme Court of Canada revisited the *Anns* test and clarified the role of policy concerns in determining the scope of liability for negligence. The resultant *Anns/Cooper* test was described by the Supreme Court of Canada in *Nelson (City) v Marchi*, 2021 SCC 41 [*Marchi*] as providing a unifying framework to determine when a duty of care arises under the wide rubric of negligence law, including allegations against government officials. That framework applies differently depending on whether the plaintiff's claim falls within, or is analogous to, an established duty of care or whether the claim is novel because proximity has not previously been recognized. In novel duty of care cases, the full two-stage *Anns/Cooper* framework applies. That is:

- whether the harm was a reasonably foreseeable consequence of the defendants' conduct and whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff (citing *Rankin (Rankin's Garage & Sales) v JJ*, 2018 SCC 19 at para 18 [*Rankin*]). If so,
- whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (citing *Cooper* at para 30).

[234] When the duty of care is not novel, there is generally no need to proceed through the full two-stage *Anns/Cooper* framework (*Marchi* at paras 16-19; *Rankin* at para 18; *Cooper* at para 39).

[235] In *Cooper*, the Supreme Court held that the proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may have a negative impact on the imposition of a duty of care (*Cooper* at para 30)

i. First stage of the *Anns/Cooper* test

[236] Reasonable foreseeability has been described as an objective test focussed on whether someone in the defendant's position ought to have reasonably foreseen the harm, that is, whether foreseeability was present prior to the occurrence of the incident at issue, and not only apparent through the lens of hindsight (*Rankin* at para 53). The Supreme Court of Canada in *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 13 cited *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty*, [1967] AC 617 (PC) at 643, where the degree of probability that would satisfy the reasonable foreseeability requirement was described as a "real risk," or "one which would occur to the mind of a reasonable man in the position of the defendan[t]… and which he would not brush aside as far-fetched."

[237] However, more than reasonable foreseeability is required; it must be supplemented by proximity.

[238] In *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*], the Supreme Court stated, at para 41, that:

> Proximity and foreseeability are two aspects of one inquiry — the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

[239] Proximity describes the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. In *Cooper* at para 32, the Supreme Court stated that "proximity" is the term used to describe the "close and direct" relationship described as necessary to ground a duty of care in *Donoghue v Stevenson*, 1932 CanLII 536 (FOREP), [1932] AC 562 (HL). At para 33, it also referred to its decision in *Hercules Managements Ltd v Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 SCR 165 at para 24, where it held that "[t]he label 'proximity', as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs."

[240] Defining that relationship may involve looking at "expectations, representations, reliance, and the property or other interests involved." Those factors permit an evaluation of the "closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant" (*Cooper* at para 34). The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case (*Cooper* at para 35).

[241] There are categories in which proximity has been recognized. When a case falls within one of those situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited (*Cooper* at para 36).

[242] The applicable legislation also plays a role when determining if a government actor owed a *prima facie* duty of care. This can come into play in three ways. First, where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. Second, where the duty of care is alleged to arise from interactions between the claimant and the government authority and where such a duty is not negated. Third, where the duty of care is based on both interactions between the parties and the government's statutory duties (*Imperial Tobacco* at paras 43-46).

ii. Second stage of the *Anns/Cooper* test

[243] In the second stage of the *Anns/Cooper* test, residual policy considerations are to be considered. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally (*Cooper* at para 37). The question is whether there are residual policy considerations outside the relationship of the parties that may negate the imposition of a duty of care (*Cooper* at para 30; *Apotex Inc v Canada*, 2017 FCA 73 at para 101 [*Apotex*]).

[244] As will be discussed below, the Supreme Court of Canada in *Marchi* also addressed the rationale for core policy immunity, a consideration under the second stage of the test, as well as the scope of decisions immune from review and how courts are to structure such an analysis.

[245] When applying the *Anns/Cooper* test, the plaintiff bears the legal burden of establishing a valid cause of action, and hence a duty of care. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden shifts to the defendant to establish that there are residual policy reasons why the duty should not be recognized (*Childs v Desormeaux*, 2006 SCC 18 at para 13; *Rankin* at paras 19-20).

[246] That said, the Supreme Court has also held that there is no private law cause of action for negligent breach of a statutory duty. In that regard, in *Holland v Saskatchewan*, 2008 SCC 42 at para 9 [*Holland 2008*], the Supreme Court held that the law to date has not recognized an action

for negligent breach of statutory duty. Rather, the proper remedy for breach of statutory duty by a public authority is judicial review for invalidity (see also *Apotex* at para 95; *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 211 [*Nevsun Resources*]).

B. Stage one *Anns/Cooper* test

i. Are the alleged duties of care novel?

[247] In *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 at para 26 [*Deloitte*], the Supreme Court noted that the term "proximity" is still used, in part, as a shorthand description of those categories of relationships in which proximity has already been found to exist (citing *Cooper* at para 23). If a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown. In that case, if a risk of reasonably foreseeable injury has also been demonstrated, then the first stage of the *Anns/Cooper* framework is complete and a duty of care may be identified (*Cooper* at para 36). In such circumstances, the second stage of the *Anns/Cooper* framework will seldom be engaged because any residual policy considerations will already have been taken into account when the proximate relationship was first identified (*Deloitte* at para 26, citing *Cooper* at para 39 and *Edwards v Law Society of Upper Canada*, 2001 SCC 80 [*Edwards*] at para 10; see also *Marchi* at paras 16, 17 and 19).

[248] In *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 64 [*Maple Leaf Foods*], the Supreme Court held that the first step in assessing proximity requires a Court to ask whether proximity can be made out by reference to an established or analogous category of proximate relationship (citing *Deloitte* at paras 26-28). It concluded, "[u]ltimately, then, to ground an analogous duty, the case authorities relied upon by the appellant must be shown to arise from an analogous relationship and analogous circumstances" (para 65).

[249] Thus, the first question to be addressed is whether the duties of care asserted by the Plaintiffs are novel.

[250] In their written opening submissions, the Plaintiffs divided Common Issue #1 and separately described and addressed what they viewed as two distinct duties of care owed by the Defendants to the Class:

- Not to be negligent in the maintenance or enforcement of the *de facto* prohibition on the importation of honeybee packages; and,
- To identify risk mitigation options in the 2003 and 2013 Risk Assessments.

[251] As will be discussed later in these reasons in the context of the *Anns/Cooper* stage two policy/operational analysis, in their closing arguments the Plaintiffs focussed virtually solely on the second alleged duty. I have found that these duties are not discrete and that the latter is encompassed by the former.

[252] However, given the Plaintiffs' opening submissions, the Defendants, in their own opening submissions, addressed each duty as described by the Plaintiffs and took the position that neither of the duties of care asserted by the Plaintiffs exists.

[253] As to whether either duty owed was novel, in their opening submissions, the Plaintiffs rely on *Fullowka* and the Supreme Court's reference at paragraph 27 of *Marchi* to its prior decision in *Just v British Columbia*, 1989 CanLII 16 (SCC), [1989] 2 SCR 1228 [*Just*] to assert that a finding of proximity would not be novel in the circumstances of this case. According to the Plaintiffs, the principle in *Just*, that users of an inspection permit regime could expect that it would be reasonably operated, and that there was a reasonably foreseeable risk that economic harm might befall users if it was not, has equal application in this case.

[254] The Defendants, with respect to the first duty of care alleged by the Plaintiffs in their opening submissions – that is, not to be negligent in the maintenance or enforcement of the *de facto* prohibition on the importation of honeybee packages – refer to *Flying E Ranche Ltd v Attorney General of Canada*, 2022 ONSC 601 [*Flying E Ranche*]. In *Flying E Ranche*, the plaintiff alleged that CFIA failed to prohibit the importation of cattle feed and cattle and that CFIA owed a duty of care to cattle farmers. The Defendants submit *Flying E Ranche* is

"persuasive authority" that any duty under the regulatory regime involving the importation of animals is not novel and has already been rejected. The Defendants submit that the second alleged duty of care, to identify risk mitigation options in the 2003 and 2013 Risk Assessments, is a novel duty. Further, that the negligent building inspection and negligent maintenance of roadway cases are not analogous to this case. Accordingly, a full *Anns/Cooper* analysis is required.

[255] As will be discussed later in these reasons, *Flying E Ranche* has factual similarities to the action now before me and is highly relevant to the question of whether the activities of CFIA pertaining to the importation of animals gives rise to a public law duty of care. However, the Ontario Superior Court of Justice [ONSC] in *Flying E Ranche* found that the circumstances before it did not fall within a recognized or analogous category, including the inspection cases, where a duty of care has previously been determined to be owed. It therefore applied a full *Anns/Cooper* analysis to determine if the defendants owed the class a duty of care and ultimately found that a duty of care did not exist.

[256] Thus, *Flying E Ranche* found that a factually similar claim was novel. And, because it was determined that no duty of care was established, the ONSC necessarily did not recognize a new category of duty of care.

[257] To the extent that the Plaintiffs assert that *Just* and *Fullowka* support that a finding of proximity would not be novel in the circumstances of this case, I do not agree. In *Just* the Supreme Court held that the users of a highway are in a sufficiently proximate relationship to the province because, in creating public highways, the province created a physical risk to which road users are invited. The province or department in charge could also readily foresee a risk to road users if highways are not reasonably maintained.

[258] The *Just* category of a duty of care is firmly established in Canadian law (*Marchi* at para 25, referencing *Cooper* at para 36). However, in *Marchi*, the Supreme Court stated that the factors uniting cases under the *Just* category are that a public authority has undertaken to

maintain a public road or sidewalk to which the public is invited, and the plaintiff alleges they suffered personal injury as a result of the public authority's failure to maintain the road or sidewalk in a reasonably safe condition. Where these factors are present, the *Just* category will apply, obviating the need to establish proximity afresh (*Marchi* at para 29). This is not such a case.

[259] This case does not involve issues of road maintenance or inspection or physical maintenance or safety inspection in any way, nor does it involve personal or property injury. It is not a circumstance like *Just* where users of a highway were found to be in a sufficiently proximate relationship to the province because, in creating public highways, the province created a physical risk to which road users are invited. Here, the circumstances do not include a risk created by the Defendants to which the Plaintiffs were invited. Rather, in this matter the Plaintiffs assert that the duty of care owed pertains to the maintenance or enforcement of the *de facto* prohibition on the importation of honeybee packages. Further, the alleged damages are pure economic loss.

[260] In that regard, I note the Supreme Court in *Deloitte* held that "factors which support recognizing 'novel' proximate relationships do so based upon the characteristics of the parties' relationship and the circumstances of each particular case" (para 27, citing *Cooper* at paras 34-35). At paragraph 27, *Marchi* referred to *Deloitte*, where the Court held that where a party seeks to base a finding of proximity upon a previously established or analogous category, a court should be attentive to whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized. And, by corollary, courts should avoid identifying established categories in an overly broad manner because, again, residual policy considerations are not considered where proximity is found on the basis of an established category (*Deloitte* at para 28, citing *Cooper* at para 39).

[261] Nor, in my view, is this matter analogous with other inspection cases such as *Fullowka*, also relied upon by the Plaintiffs. In *Fullowka*, the issues before the Supreme Court included whether the security firm and the Government of the Northwest Territories should be liable in

negligence for failing to prevent the murders of miners at the Giant Mine during a bitter strike. The question was whether those parties, in relation to the tort of another (the miner who committed the murders), failed to meet the standard of care imposed on them and thereby caused the ultimate harm. The issue was resolved by application of the *Anns/Cooper* test, focusing on the relationships in issue and whether there were particular considerations relating to foreseeability, proximity and policy in each case. Specifically, whether the actions of the alleged wrongdoers had a close and direct effect on the victim, as well as other considerations, including expectations, representation, reliance and the nature of the interests engaged by the relationship.

[262] The Supreme Court found that the regulatory scheme in the *Mining Safety Act* put the onus on mine owners, management and workers to observe safety regulations. The role of the mining inspectors was essentially to see that these persons were doing so. In that sense, the Supreme Court found that their role was analogous to the roles of the Law Society and Registrar of Mortgage Brokers in *Edwards* and *Cooper*, respectively. However, it went on to find that the relationship between the inspectors and the miners was considerably closer and more direct than the relationships in issue in those cases.

[263] The Court concluded that there was a close parallel between the matter before it and the Court's building inspection cases (*Kamloops (City of) v Nielson*, [1984] 2 SCR 2 [*Kamloops*]; *Rothfield v Manolakos*, [1989] 2 SCR 1259 [*Rothfield*] and *Ingles v Tutkaluk Construction Ltd*, 2000 SCC 12 [*Ingles*]), in which there were regulatory duties to inspect and enforce provisions of a building code. The purpose of the inspections was to detect, among other things, construction defects that violated the code. Those features of the building inspection schemes were similar to the mining safety scheme in issue in the case before it. The analysis of the duty of care on the part of the building inspectors in those cases supported the existence of a *prima facie* duty of care on the mining inspectors, and the relationship between the mining inspectors and the miners was analogous to that between the building inspectors and the owner, subsequent purchaser and neighbour. Like the building inspectors, the mining inspectors had a duty to inspect and enforce safety laws. Also like the building inspectors, while there was some discretion in how to carry out their duties, once the mining inspectors embarked on their

inspections, it was reasonable to think that they would exercise care in the way they carried them out.

[264] In *Fullowka*, the Supreme Court concluded that the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. Further, that in exercising this statutory power, the inspectors had been physically present in the mine on many occasions, had identified specific and serious risks to an identified group of workers and knew that the steps being taken by management and Pinkerton's to maintain safe working conditions were wholly ineffectual. Thus, there was a sufficiently close and direct relationship between the inspectors and the miners to give rise to a *prima facie* duty of care.

[265] Again, however, and unlike *Fullowka*, the matter before me does not involve inspection or enforcement of a regulatory safety regime, and I do not find that on its facts it is analogous to cases that do.

[266] In my view, *Flying E Ranche* is factually much more similar to the matter before me than are the inspection cases. *Flying E Ranche* was a class action brought on behalf of all Canadian farmers who raised cattle in May 2003. The plaintiff alleged that Canada, by way of AAFC and CFIA, was negligent in keeping Bovine Spongiform Encephalopathy [BSE] out of Canada by failing to implement a ruminant-to-ruminant feed ban in 1990, when it imposed an import ban on cattle from the UK, or in 1994, when Canada ordered the destruction of all remaining cattle that had been imported from the UK during the relevant time frame. The plaintiff also alleged that Canada was negligent in failing to adequately monitor and prevent cattle imported from the UK from entering the feed chain between 1990 and 1994. The plaintiff asserted that Canada owed a duty of care to cattle farmers due to its statutory obligations under three statutes, one of which was the *HA Act*, and other legislation intended to safeguard animal health. Further, that a duty was owed as a result of interactions with the class, and that cattle producers relied on the government's technical and scientific expertise within AAFC to prevent foreign diseases from infecting the Canadian cattle herd.

[267] In *Flying E Ranche*, the plaintiff argued that the case was strikingly similar to the inspection cases, including *Kamloops* and *Fullowka*, and also relied on *Adams v Borrel*, 2008 NBCA 62 [*Adams*], which found Agriculture Canada owed a duty of care to conduct a timely investigation into the source of a potato virus. The ONSC in *Flying E Ranche* noted that the plaintiff therein argued that, in those three cases, the key theme was that the public authorities undertook to act to address the issue, or risk, and that once a decision to act was made, the public authority must perform its undertaking without negligence.

[268] This is a similar argument that the Plaintiffs make in the matter before me. The Plaintiffs rely on the principle that "[w]here public authorities like the Defendants assume responsibility for ensuring compliance with a standard – risk analysis and its subset risk assessment – that, by definition, is intended to reduce risk of damage or harm, sufficient proximity has been established" (citing *Vlanich v Typhair*, 2016 ONCA 517 at para 31 [*Vlanich*]; *Fullowka*; *Kamloops*]. However, *Flying E Ranche* noted the caution in *Vlanich* that proximity in that case was limited to cases of *physical* damage or harm (*Flying E Ranche* at para 699).

[269] The ONSC in *Flying E Ranche* did not agree with the plaintiff. It found that the inspection cases had no application to the matter before it. That was because the actions, or inactions, alleged to be negligent by the plaintiff in that matter did not involve negligent inspections that could be compared to the role of a building inspector enforcing construction requirements, as in *Kamloops*, or to a mining inspector charged with ensuring safety of a mine, as in *Fullowka*. Further, that the facts in *Adams* were quite different. *Adams* involved negligent testing leading to a substantial number of false positives. What was impugned in *Flying E Ranche*, by contrast, was not the negligent enforcement of existing codes, the response to tangible and immediate risks to safety or poor testing methods. Instead, the case was about the decisions and actions of senior officials at AAFC engaged in assessing and determining a course of action in response to a novel threat about which much was unknown (*Flying E Ranche* at para 560). Further, *Adams* had been distinguished by the Ontario Court of Appeal [ONCA] in *River Valley Poultry Farm Ltd v Canada (Attorney General)*, 2009 ONCA 326, leave to appeal to SCC refused, 33223 (5 November 2009) [*River Valley*] as dealing with a different statute, the *Plant*

Protection Act, SC 1990, c 22 [*PPA*]. That statute had among its purposes the protection of farmers, which is not a purpose of the *HA Act*. The ONCA found that the different legislative purposes of the *PPA* and *HA Act* alone distinguished the claim in *Adams* from that of River Valley, but it also questioned at least some of the analysis in *Adams*. I note that *Adams* was similarly distinguished in *The Los Angeles Salad Company Inc v Canadian Food Inspection Agency*, 2011 BCSC 779 [*Los Angeles Salad*]. *Flying E Ranche* therefore found that to treat *Adams* as supporting the existence of a recognized or analogous category of duty of care would ignore the concern expressed by the Supreme Court in *Deloitte* and *Rankin* that "courts should avoid identifying established categories in an overly broad manner" and that previous categories of duty of care "should be framed narrowly" (*Flying E Ranche* at para 564, citing *Deloitte* at para 28).

[270] In *River Valley*, CFIA was sued for negligently investigating whether an egg producer's flock was infected by a dangerous strain of salmonella. There were testing delays, which caused CFIA to recommend that eggs be diverted to pasteurization and sold as pasteurized eggs. The plaintiff and the Ontario Egg Producers Marketing Board thought this impractical, and River Valley was then ordered by the Board not to market the eggs, leading to their destruction and the destruction of the flock. River Valley claimed that CFIA and Health Canada owed it a duty to investigate promptly and competently and, because they breached that duty, they were liable in negligence for River Valley's resulting economic losses. Because Canadian courts had not recognized that either CFIA or Health Canada had a private law duty of care in that factual setting, the parties brought a pre-trial motion to determine four questions of law, two of which were whether CFIA and Health Canada owed a duty of care to River Valley. The motions judge found that such a duty of care was owed. That finding was overturned on appeal to the ONCA (leave to the SCC denied). The ONCA found that whether CFIA or Health Canada owed a duty of care to River Valley to conduct a timely and competent investigation had to be determined by applying the *Anns/Cooper* test. Having done so, the ONCA found that neither CFIA nor Health Canada owed the alleged duty of care. My point here being that, because the ONCA engaged in the *Anns/Cooper* analysis, it necessarily did not consider the matter to fall within or be analogous to a category in which a duty of care had been recognized.

[271] A similar conclusion was reached in *Los Angeles Salad.* That case concerned an application to strike the plaintiffs' action on the basis that it was plain and obvious that the defendants did not owe them a private law duty of care. The case revolved around an investigation by CFIA, assisted by the Public Health Agency of Canada and Health Canada, into food products (baby carrots) distributed by the plaintiffs. In 2007, four cases of Shigella, a disease that can be caused by contaminated food, were reported. Following an investigation, the baby carrots were recalled. The plaintiffs asserted that CFIA and the other defendants were negligent in the way they conducted the investigation, tested the food products and communicated warnings to the public and regulators in the US about the potential contamination of the baby carrots. They contended that the defendants breached duties of care owed to them and that they were entitled to be compensated for the losses suffered. Among other things, they argued that their claims fell within a category of cases in which the courts have previously recognized a duty of care, being negligent inspection and/or investigation by a government body (relying on *Adams*; *Ingles*; *Rothfield*; and *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [*Hill*]).

[272] The British Columbia Supreme Court [BCSC] in *Los Angeles Salad* found that the facts of the case before it did not fall within a category in which a duty of care has been recognized. Nor could one reach the conclusion, in that case, that it was an inescapable reality that the immediate purpose of the legislative scheme (there the *CFIA Act*) was to protect the economic interests of a supplier of food products who was the author of the potential risk being investigated. Therefore, the BCSC could not conclude that the claim fell within a category of cases in which a duty of care in inspection had been recognized. It was accordingly necessary to engage with the *Anns/Cooper* analysis. Having done so, the BCSC struck out the plaintiffs' statement of claim.

[273] The British Columbia Court of Appeal [BCCA] dismissed the appeal (*The Los Angeles Salad Company Inc v Canadian Food Inspection Agency*, 2013 BCCA 34 [*Los Angeles Salad BCCA*]). It confirmed that the appellants had not established that their relationship with CFIA fell within or was analogous to a category of relationship in which a duty of care had been

recognized (paras 26, 28) such as the police investigation in *Hill* or the building inspection or other cases that had been addressed by the motions judge.

[274] *River Valley*, *Los Angeles Salad* and, most recently, *Flying E Ranche* are all cases that dealt with a purported duty of care owed by CFIA, and all explicitly or implicitly rejected that the alleged duties owed fell within or were analogous to the inspection category. Nor did those cases find that a new category had been established.

[275] In this matter, the Plaintiffs' first claim of a duty of care is concerned with the enforcement and maintenance of what is described as the *de facto* prohibition on the importation of US honeybee packages. That claim is not concerned with inspection and I find it does not fall within that established category of cases, nor is it clearly analogous to the inspection cases. Being attentive to the particular factors that justify recognizing the negligent inspection category does not lead to the determination that the relationship at issue in this matter is, in fact, truly the same as or analogous to the inspection category previously recognized (*Deloitte* at para 28).

[276] The second duty asserted by the Plaintiffs is that CFIA was required to identify risk mitigation options in the 2003 and 2013 Risk Assessments. In their opening submissions, the Defendants say that this is a novel duty, as the negligent building inspection and negligent roadway cases are not analogous to this case. The Plaintiffs made no submission in this regard in their opening submissions; however, their closing written submissions appear to assert that the duty is novel. In their oral closing submissions (which focus on the alleged duty to identify mitigation measures), the Plaintiffs submitted that there are no analogous cases and, therefore, a full *Anns/Cooper* analysis is required. I agree that this is a novel alleged duty.

[277] In conclusion, each case is highly fact specific, and I find that the circumstances of this matter are not "truly the same as or analogous to" a duty that has been previously recognized, such as the building inspection or road maintenance cases (*Deloitte* at para 28, cited in *Flying E Ranche* at para 556). Accordingly, it is necessary to proceed with the *Anns/Cooper* proximity analysis.

ii. Foreseeability

[278] The Plaintiffs submit that the Court is to consider whether the harm they suffered was a reasonably foreseeable consequence of the Defendants' conduct. They submit that it is uncontroversial that the Defendants' ongoing refusal to consider or assess import permit applications for US honeybee packages after December 31, 2006, resulted in the Class having to import honeybee packages from more distant locations. Further, that the Defendants knew that commercial beekeepers overwintering honeybee colonies would incur additional costs respecting feed, labour and maintenance of their colonies, which costs would not have been incurred if the beekeepers had been able to cull the hives at the end of each honey-producing season and replace them inexpensively with fresh bee packages imported from the US.

[279] The Defendants state that their submissions focus on proximity, rather than foreseeability, as proximity is the critical element when considering whether government regulators owe a *prima facie* duty of care to those who are subject to regulations. Further, that a robust analysis of proximity is the touchstone for recognizing a novel duty of care (citing *Wu v Vancouver (City)*, 2019 BCCA 23 at para 50 [*Wu*]).

[280] I agree that, in this case, proximity is the critical, and in my view the determinative, issue. That said, the evidence is clear that CFIA was aware, prior to and throughout the Class period, that the prohibition on the importation of US honeybee packages could potentially have negative economic consequences on some commercial beekeepers because of the increased costs associated with importing packages from other countries and overwintering. Accordingly, and in the absence of any substantive challenge by the Defendants, I find that foreseeability has been established.

iii. Proximity

[281] As indicated above, foreseeability alone is not enough to establish a *prima facie* duty of care (*Cooper* at para 22; *Edwards* at para 9; *Deloitte* at para 23). "Something more" is required, and that is proximity (*Deloitte* at para 23). Assessing proximity in the *prima facie* duty of care analysis entails asking whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law" (*Deloitte* at para 25, citing *Cooper* at paras 32 and 34; *Maple Leaf Foods* at para 63).

(a) Preliminary issue – *Paradis FCA* findings

[282] The Plaintiffs argued in their opening submissions that in *Paradis FCA*, the Plaintiffs' successful appeal of the Defendants' motion to strike this action, the Federal Court of Appeal "already decided," in paragraph 90 of that decision, that the duty of care in this matter is neither negated nor foreclosed by statute. In their closing arguments, the Plaintiffs acknowledged that the matter before the Court of Appeal was a motion to strike that was based only on the pleadings, but they asserted that it is a well-accepted principle that "an interlocutory judgement which definitely decides a question of law and from which no appeal is taken may be binding when the question is raised between the same parties, even in the same action" (citing *Aged Gingko Trust v John K Pennington Family Trust No 1*, 2009 ONCA 679 at para 25 [*Aged Gingko*]). The Plaintiffs argued that the Federal Court of Appeal's "conclusion that the Plaintiffs' allegations, if proven at trial, would result in liability, remains binding" and that it was not open to the Defendants to now contend that there is no legal basis for liability in negligence.

[283] Based on paragraphs 90, 91 and 95 of the Federal Court of Appeal's decision, the Plaintiffs assert that that Court "has already determined, as a matter of law, that the legislation does not foreclose a finding of proximity" and that, "[a]s a matter of law, it has already been determined here the [*sic*] legislative scheme does not foreclose a finding of proximity and the imposition of a private law duty of care owed to the beekeepers would be consistent with the broader public duties imposed by the statute."

[284] I do not agree with the Plaintiffs' interpretation of the Federal Court of Appeal's decision in *Paradis FCA*. There, that Court stated:

> On a motion to strike, all of the beekeepers' allegations must be taken as true. **Therefore, these reasons recount the allegations as if they have been definitively established. They have not.** Only after a trial will we know whether Canada conducted itself as the beekeepers say.
>
> (Emphasis added)

[285] The Federal Court of Appeal agreed with the Motions Judge that, on the facts as pleaded, the claim should not be struck for want of proximity and, in that regard, found that the Motions Judge had not erred (at para 89). The Federal Court of Appeal then went on to state:

> [90] The Supreme Court itself has observed that where there are "specific conduct and interactions" supporting proximity and the legislation does not foreclose a finding of proximity, it "may be difficult" to find lack of proximity: *Imperial Tobacco*, above at paragraph 47; see also *Cooper*, above at paragraphs 34-35 and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at paragraphs 29-30. This is the situation here. **The beekeepers plead** that in specific interactions, Canada assured them that imports affecting their economic interests would be banned only as long as there was scientific evidence of risk: see paragraph 26 of the statement of claim, as particularized by the proposed amended statement of claim. Absent that evidence of risk and but for the blanket guideline, Canada had to issue importation permits under section 160 of the *Health of Animals Regulations*, above. In light of these considerations, the relationship between Canada and the beekeepers is sufficiently close and direct to make it fair and reasonable that Canada be subject to a duty to respect the beekeepers' interests, at least to the extent of making rational, evidence-based decisions following proper legislative criteria: *Cooper*, above at paragraphs 32-36; Hill, above at paragraph 29; *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 225 O.A.C. 143.
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> [91] Put another way, **the relationship between the beekeepers and Canada, as pleaded**, is one of well-defined rights and entitlements based on specific legislative criteria, alongside specific interactions and assurances between the two. It is not one where someone is seeking a general benefit that may or may not be

> granted depending on a subjective weighing and assessment of policy factors.
>
> (Emphasis added)

[286] In my view, the Federal Court of Appeal made no determination – factual or legal – either that the alleged interactions were sufficient to establish proximity or that the alleged duty of care in the matter before me is not negated or foreclosed by statute.

[287] It simply found that the allegations *as pleaded* were sufficient to found the claim of proximity – for the purpose of defeating the motion to strike. It is for this Court, based on the evidence adduced at trial, to make factual findings which will either establish, or fail to establish, the Plaintiffs' allegations with respect to their interactions and relationship with the Defendants, and otherwise. While the Federal Court of Appeal described the law and how this tied into the Plaintiffs' allegations, it did not make a finding that in this case the legislative regime did – or did not – negate the alleged duty of care. As the Defendants point out, the Federal Court of Appeal did not engage in an interpretive analysis of the scope, purpose or intent of the *HA Act* or *HA Regulations* and made no finding or determination of a question of law in that regard. Rather, for the specific purposes and within the context of the appeal of the motion to strike, it accepted the Plaintiffs' allegations as true.

[288] Similarly, while the Plaintiffs assert that the Federal Court of Appeal found, at paragraph 95, that the subject legislative scheme does not foreclose a finding of proximity and the imposition of a private law duty of care, the Federal Court of Appeal did not make such a finding. The Federal Court of Appeal, when discussing the policy bar and *Imperial Tobacco*, stated, at paragraph 94, that "**[t]aking the allegations in the statement of claim as true**, I find nothing that implicates public policies or public duties in such a way that would trigger a policy bar. The Federal Court erred in finding to the contrary" (emphasis added). In paragraph 95, the Federal Court of Appeal set out the Plaintiffs' assertions as to the prevailing circumstances and their position that, given this, there was no inconsistency between the existence of a private law duty of care to the Plaintiffs and the public duty Canada owed.

[289] Based on the pleadings, which were to be taken to be true in the motion to strike, the Federal Court of Appeal did not agree with the Motions Judge, for the reasons it set out, with respect to the existence of a policy bar. However, and contrary to the Plaintiffs' submission, the Federal Court of Appeal otherwise made no finding on this issue.

[290] Given my findings above, the Plaintiffs' reliance on *Aged Gingko* is not relevant.

> (b) Does the legislative scheme give rise to, or foreclose, a finding of proximity?

[291] As set out above, the applicable legislation plays a role when determining if a government actor owes a *prima facie* duty of care, specifically with respect to proximity.

[292] In *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 [*Syl Apps*], the Supreme Court of Canada held that:

> [27] When the relationship occurs in the context of a statutory scheme, the governing statute is a relevant context for assessing the sufficiency of the proximity between the parties (*Cooper*, at para. 43; *Edwards*, at para. 9). As this Court said in *Edwards*: "Factors giving rise to proximity must be grounded in the governing statute when there is one" (para. 9).

[293] Subsequently, in *Fullowka*, the Supreme Court of Canada held that "[t]he statute is the foundation of the proximity analysis and policy considerations arising from the particular relationship between the plaintiff and the defendant must be considered" (at para 39, citing *Syl Apps* at paras 26-30).

[294] In *Imperial Tobacco*, the Supreme Court noted that there are three distinct situations in which the applicable legislation comes into play when determining if a government actor owes a *prima facie* duty of care. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty

of care is alleged to arise from interactions between the claimant and the government and is not negated by the statute. A third situation could arise where proximity is based on both (*Imperial Tobacco* at paras 44-46):

> [44] The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39).
>
> [45] The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.
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> [46] Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

[295] In *Taylor v Canada (Attorney General)*, 2012 ONCA 479 [*Taylor*], the ONCA held that:

> [76] The legislative scheme looms large in the proximity inquiry for two reasons. First, the question of whether a regulator should

owe a private law duty of care to those individuals affected by its actions is largely a policy decision that falls squarely within the legislative bailiwick. The legislature announces that policy decision through the terms of its legislation. Second, even where the legislation is not determinative and the court must look to the interaction between the regulator and the plaintiff, the terms of the legislation describing the powers and duties of the regulator may to some extent shape the relationship between the regulator and the regulated. That relationship will be relevant in deciding whether the specific interactions between the regulator and the plaintiff are sufficient to create the degree of proximity required to establish a prima facie duty of care.

[77] The legislative scheme must be examined at the outset of the duty of care inquiry. If that scheme expressly or by implication forecloses or imposes a private law duty of care, the duty of care inquiry need go no further. It is not for the court to contradict the terms of the legislative scheme.

[78] Legislative schemes under which regulators operate almost inevitably impose public duties on those regulators. Plaintiffs have, generally speaking, had little success in demonstrating that those schemes impose a private law duty of care. To the contrary, courts have been more inclined to find that legislative schemes by implication preclude a private law duty of care to individuals affected by those schemes. Statutory schemes that provide immunity to the regulator, create remedies to injured parties other than tort remedies, or impose duties on the regulator that conflict with a private law duty of care to an individual have all been held to compel the conclusion that the legislative scheme implicitly forecloses a finding that the regulator owes a private law duty of care to an individual: see *Cooper*, at paras. 43-44; *Edwards*, at paras. 16-17; *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261, [2011] S.C.J. No. 24, 2011 SCC 24, at para. 69; *Syl Apps Secure Treatment Centre v. D. (B.)*, [2007] 3 S.C.R. 83, [2007] S.C.J. No. 38, 2007 SCC 38, at paras. 49-50, 59-63; [page183] *Eliopoulos v. Ontario (Minister of Health and Long-Term Care)* (2006), 2006 CanLII 37121 (ON CA), 82 O.R. (3d) 321, [2006] O.J. No. 4400 (C.A.), at paras. 14-20.

[79] Where the legislation is not determinative one way or the other, the courts explore the specific circumstances of the interactions between the regulator and the plaintiff in the context of the legislative scheme to decide whether a sufficiently "close and direct" relationship exists to justify the imposition of a prima facie duty of care: see *Imperial Tobacco*, at para. 50; *Hill*, at paras. 26-45; *Fullowka v. Pinkerton's of Canada Ltd.*, [2010] 1 S.C.R. 132,

> [2010] S.C.J. No. 5, 2010 SCC 5, at paras. 37-55; *Heaslip*, at paras. 15-31.

[296] In *Wu*, the BCCA summarized the general principles that apply to the recognition of *prima facie* private law duties of care owed by public regulators as follows:

> [54] First, it is possible that a private law duty of care may arise explicitly or by necessary implication from a statutory scheme: see *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para. 43. The existence of a statutory scheme of regulation does not foreclose the possibility of finding proximity.
>
> [55] Second, while a scheme of statutory regulation may be relevant to whether proximity exists, generally the existence of such a scheme is insufficient to support a finding of proximity. The Supreme Court of Canada appears to have moved beyond its statement in *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at para. 9, that factors giving rise to proximity must be grounded in the governing statute if one exists. More recently, in *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, Justice Cromwell observed that statutory duties "do not generally, in and of themselves, give rise to private law duties of care": at para. 13. A similar view is found in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24. In that case, the Chief Justice, endorsing *Broome*, reasoned that "[w]here the defendant is a public body, inferring a private duty of care from statutory duties may be difficult, and must respect the particular constitutional role of those institutions": *Alberta* at para. 74. Much the same view was articulated in *Imperial Tobacco*. In that case, the Court noted "[i]t may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care": at para. 44.
>
> [56] Third, a principal reason why public law duties are, standing alone, generally insufficient to create proximity is because statutory schemes generally exist to promote the public good. To the extent that one conceives the issue as a matter of legislative intent, as the Supreme Court of Canada noted in *Imperial Tobacco*, it is difficult to infer that a legislature intended to create a private law duty where a scheme is aimed at a public good: at para. 44. Viewed in this way, the question is whether the legislature intended as a positive matter to create a private law duty notwithstanding that the scheme is aimed at promoting the public good. The basic proposition remains, however, that a public law duty aimed at the public good does not generally provide a sufficient basis to create proximity with

> individuals affected by the scheme. This is so, even if a potential claimant is a person who benefits from the proper implementation of the scheme. This proposition is illustrated by numerous cases including *Cooper*, *Gill v. Canada (Minister of Transport),* 2015 BCCA 344, *Imperial Tobacco,* and *Elder Advocates*, to name just a few.
>
> [57] Fourth, where a conflict arises between a potential private law duty and the public authority's duty to the public, the private law duty would unlikely be recognized. This is so whether the issue is viewed as one of proximity or as a policy reason to negate a duty. This principle has been engaged in a number of cases, see for example, *Imperial Tobacco*, *Cooper*, *Gill*, *Los Angeles Salad*.
>
> [58] What I take from these broad principles is that, as a general proposition subject only to arguably rare exceptions, statutory duties owed by public authorities are insufficient to ground private law duties arising out of interactions that are inherent in the exercise of the public law duty. Indeed, it is difficult to convert public law duties into private law duties where those public law duties exist to promote a public good. Generally, discharging public law duties does not give rise to a private law duty of care to particular individuals.

[297] The BCCA in *Wu* found that, typically, if a private law duty of care is recognized, it will arise from specific interactions either between the public authority and the claimant sufficient to create the necessary proximity or in the context of a statutory scheme (*Wu* at para 59, citing *Imperial Tobacco* at paras 45-46).

[298] Here, the Plaintiffs take the position that the Federal Court of Appeal made a binding determination that the legislative scheme in this action did not foreclose a finding of proximity and focus on the second situation described in *Imperial Tobacco,* where the proximity essential to the private law duty of care is alleged to arise from a series of specific interactions between the government and the claimant. For the reasons above, I do not agree that the Federal Court of Appeal made such a determination.

[299] The Defendants' view is that where there are no allegations that fall outside a regulator's role, if proximity exists, it must arise from the statute, as the statute is the only source of the regulator's duties, public or private. The Defendants submit that CFIA was not participating in an initiative that fell outside its regulatory functions. Rather, that the entirety of the evidence related exclusively to CFIA's role in the importation of animals. The Defendants submit that this fits squarely within CFIA's regulatory function, and the purpose and intent of the regulatory scheme is important to the analysis. Accordingly, the Court must examine the governing statutory scheme to determine whether it contemplates public duties or a private duty of care.

[300] I agree that it is necessary to examine the legislative scheme to determine if it imposes or forecloses a private law duty of care. If such a duty is foreclosed, then that is the end of the matter. If the statute is indeterminative, then it is necessary to consider the second situation.

[301] In this matter, the *HA Act* and *HA Regulations* comprise the relevant legislative scheme. Significantly, this scheme has previously been considered in the context of the *Anns/Cooper* proximity analysis.

[302] *River Valley*, as indicated above, concerned a claim by an egg producer that CFIA and Health Canada breached a private law duty of care owed to them to promptly and properly investigate, resulting in economic harm to the egg producer. The ONCA held that where, as in the case before it, a governmental authority exercises discretionary power under a statutory regime, proximity must be determined by looking at the relevant statute (*River Valley* at para 66). There, like in the matter now before me, the relevant statute was the *HA Act*, which the ONCA found was the only source of CFIA's duties (citing *Cooper* at para 43). The ONCA held that the ultimate question was whether the *HA Act* disclosed a legislative intention to exclude or confer a private law duty of care. It found that the *HA Act* disclosed an intention to exclude a private law duty (*River Valley* at para 66). The purpose of the *HA Act*, its statutory compensation scheme and its immunity clause were compelling factors demonstrating the absence of proximity between CFIA and River Valley and, instead, showing that CFIA's duty was to the public as a whole, not to individual farmers or egg producers.

[303] The ONCA found that the purpose of the *HA Act* could be gleaned from its long title, an act "respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals." It also cited *Vona v Canada (Minister of Agriculture)* (1996), 1996 CanLII 800 (ON CA), 30 OR (3d) 687, [1996] OJ No 3621 (CA) at 691, where the ONCA noted that the purpose of the *HA Act* is to enable the Crown to protect the health of people and animals. In *River Valley*, the ONCA found that nothing in the *HA Act* suggested that one of its purposes is to protect the economic interests of individual farmers (*River Valley* at para 68).

[304] Further, that inspectors charged with tracking the spread of infectious disease inevitably must focus their investigations on persons or sites where exposure or contamination has potentially occurred. In carrying out their investigations, inspectors appointed by CFIA have broad discretionary powers to inspect enterprises and to seize, detain and quarantine animals. In exercising these broad powers, inspectors are not obliged to be mindful of the economic interests of individual farmers. Their overriding concern is the protection and promotion of human and animal health (*River Valley* at para 69).

[305] The ONCA also found that the statutory compensation scheme in s 51 of the *HA Act* pointed to the absence of proximity. By enacting that scheme, Parliament addressed the concern that the economic interests of individual farmers may be harmed by CFIA's actions. A farmer whose animal is destroyed under a CFIA order or is injured during CFIA testing is entitled to apply for compensation. And, at the same time, the combination of s 51 of the *HA Act* and s 9 of the *CLPA* demonstrated an express legislative intent to preclude an action for negligence against CFIA where statutory compensation has been paid (*River Valley* at paras 70-73).

[306] Additionally, the statutory immunity clause in s 50 of the *HA Act* further showed an absence of proximity. The ONCA held that s 50 shields CFIA inspectors from lawsuits for actions taken in carrying out their statutory duties and is a broad immunity clause. It noted that, at that time, and unlike many other statutory immunity clauses, it was not qualified by an express requirement that to be entitled to its protection, inspectors must be acting in good faith. The

ONCA noted that while River Valley sought to get out from under s 50 by contending that it applies only when CFIA's inspectors carry out their duties properly and does not apply when they act negligently, this contention made no sense. By its wording, s 50 protects inspectors whether or not they are at fault. Moreover, it is precisely when they are alleged to be negligent that they will likely need to rely on this protection. At the very least, s 50 strongly pointed to a legislative intent to preclude a private law duty (*River Valley* at paras 77-79).

[307] I note that subsequent to the ONCA's decision in *River Valley*, the *HA Act* has been amended to include s 50.1, which does import a good faith requirement. However, in my view, this does not detract from the ONCA's overall finding that s 50 supports a lack of proximity.

[308] The ONCA concluded that the legislative purpose of the *HA Act*, together with provisions for statutory compensation in s 51 and statutory immunity in s 50, in combination, showed an absence of proximity. Accordingly, the ONCA concluded that CFIA did not owe a *prima facie* duty of care to River Valley (*River Valley* at para 83).

[309] While in this case the Plaintiffs' claim against CFIA does not concern inspection or engage the compensation scheme, overall, this analysis is still very much applicable to the issue of proximity in the matter before me, as it addresses the purpose of the *HA Act* and the impact of s 50.

[310] Another case in which the *HA Act* was the relevant statutory scheme is *Flying E Ranche*, the facts of which are summarized above. Part of the plaintiff's allegation in that case was that Canada owed a duty of care to cattle farmers respecting BSE due to its statutory obligations.

[311] I note that in *Flying E Ranche* the relevant statutes were the *Feeds Act*, RSC 1985, c F-9 [*Feeds Act*]; the *Animal Disease and Protection Act*, RSC 1985, c A-13 [*ADPA*] (which was replaced by the *HA Act* in 1991); the *HA Act*; and the regulations passed under those Acts. The ONSC agreed with the ONCA's decision in *River Valley* as to the purpose of the *HA Act* and

noted that the plaintiff in *Flying E Ranche* had not argued that proximity arose from the *HA Act*, instead relying only on the *ADPA* and the *Feeds Act*. The ONSC found that the *ADPA*, like its successor the *HA Act*, "was a statute with broad public interest goals – to protect the health of animals and people" (*Flying E Ranche* at para 581). It did not impose a private law duty of care owed to the class, it had broad public purposes and it did not, expressly or by implication, create a private law duty of care between the defendant and the plaintiff (*Flying E Ranche* at para 584). The ONSC similarly found that the *Feeds Act* and *Feeds Regulations, 1983*, SOR/83-593, did not create a duty of care towards cattle producers, even though, like the *ADPA* and the *HA Act*, their operation could benefit cattle farmers.

[312] As to the potential conflict between public and private duties of care, as noted above, the Supreme Court held in *Imperial Tobacco* that statutes are often aimed at public good, like regulating an industry. It found that, in those cases, it may be difficult to infer that the legislature intended to create private law duties: "[t]his may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public" (at para 44). In *Syl Apps*, the Supreme Court noted that where an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity (*Syl Apps* at para 28, citing *Cooper* at para 44; *Edwards* at para 6). Such a conflict exists where the imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties. It further noted that a statutory immunity provision may also be relevant (*Syl Apps* at para 29, citing, by way of example, *Edwards* at paras 16-17).

[313] In *River Valley*, the ONCA addressed this potential conflict in the context of CFIA's duty as a regulator:

> [84] Although unnecessary to my conclusion that no private duty of care exists, I see at least one overriding policy consideration that also negates a private duty. That consideration is the potential for conflict if CFIA must be mindful not only of the health of animals and the public, but as well the economic interests of individual farmers.

> [85] River Valley submits that no conflict can exist because the public, CFIA and individual farmers all have the same interest: to ascertain the absence or presence of disease or contamination, in this case DT104. As testing is scientific and objective, all interested and affected parties will consider themselves bound by the results.
>
> [86] I take a different view. In some instances, and this case is perhaps a good example, the potential for conflict between the economic interests of an individual farmer and the public interest does exist. The conflict may arise over the extent of the testing necessary to determine whether an animal is diseased. In this case, initial testing of River Valley's barn 4 showed no DT104 in any of the samples. With those negative test results in hand and having regard to its own economic interests, River Valley may well have fairly claimed that it should have been able to market its eggs. However, CFIA, with the benefit of Health Canada's expertise, took a more cautious approach in the public interest and insisted on further testing at the point where the hens were about to lay their eggs. CFIA fairly claimed that this further testing was needed to be fully satisfied that the flock in barn 4 was not contaminated. Undoubtedly, other kinds of conflict may arise if CFIA inspectors have to worry about the economic interests of individual farmers as well as their obligation to the public to protect human and animal health.

[314] In *Flying E Ranche*, in the context of policy concerns, the ONSC also considered whether recognizing a duty of care to the class in that case would create a conflict with the regulator's public duties, citing *Fullowka*: "[c]onflicting duties have been an important consideration in dealing with proximity in claims against regulators and others carrying out statutory duties: see, e.g., *Cooper, Edwards, Syl Apps and Hill*. Serious negative policy consequences may flow where such conflict exists" (*Fullowka* at para 72, cited in *Flying E Ranche* at para 701). The ONSC held that the interests of cattle farmers do not always align with the duties of the Department of Agriculture. Referencing *River Valley* at paragraph 86 and *Eliopoulos v Ontario (Minister of Health and Long-Term Care)* (2006), 2006 CanLII 37121 (ONCA), 82 OR (3d) 321 at para 33, the ONSC found that it would be contrary to the public interest to hold that government owes a private law duty of care to one particular industry or economic group when it is responding to a new and serious threat to animal and, potentially, human health. It would "interfere with sound decision-making" because of the "fear or threat of lawsuits" (*Flying E Ranche* paras 702-704).

[315] Here, while it may be in the economic interests of the Class members – certain commercial beekeepers – to permit the importation of US honeybee packages, CFIA's public duty is to the public good. The importation of cheaper and geographically more available bee packages may, in the short term, benefit some individual beekeepers. However, if that importation results in the importation or spread of honeybee diseases or pests, this could have a detrimental impact on all beekeepers in Canada; on farmers who use bees to pollinate their crops and whose income is derived from selling those crops; and, on the public at large, which is dependent upon the consumption of those agricultural products. As Dr. James testified, there were some beekeepers who were of the view that diseases and pests could be managed by bringing in US honeybee packages each spring, working the bees for the summer and then destroying the bees before winter. While that might work well for those beekeepers if they had an economical source of bees each spring, it might not work for their neighbours overwintering their bees, as bees are foragers, and pests and diseases spread.

[316] The Plaintiffs, in addressing the legislative scheme, do not directly address the content of the *HA Act* or the *HA Regulations* in the context of their purpose or whether or not the legislative scheme imposes or forecloses a public law duty of care.

[317] Instead, they refer to the RIASs published in the *Canada Gazette*, with respect to proposed amendments to regulations concerning the prohibition of the importation of US honeybee packages prior to 2006. The Plaintiffs assert that the RIASs demonstrate that the purpose of the importation provisions of the *HA Act* and the *HA Regulations* was the protection of the economic interests of the industry. They submit that the "overriding purpose" of the statutory scheme, with respect to honeybee importation, was not to promote the interests of the public at large but to protect the survival and economic well-being of the commercial beekeeping industry.

[318] However, the Defendants point to requested undertakings from the Plaintiffs to disclose the documents and witnesses upon which the Plaintiffs relied in support of their allegation that the regulatory scheme was intended to protect the economic viability of the beekeeping industry.

This request became part of an undertakings refusal motion. The Plaintiffs' response to those undertakings is a letter dated November 13, 2019, from Plaintiffs' counsel, which refers to and attaches an Appendix "A." That Appendix simply lists and describes the RIASs as responsive to the various undertakings. The evidence referred to by the Plaintiffs themselves, in support of their submission that the beekeepers were the very class of individuals that the Risk Assessments and import prohibition were intended to affect, cites only the RIASs and does not point to any testimony of the Defendants supporting the Plaintiffs' assertion. Thus, the RIASs comprised the only evidence provided by the Plaintiffs as to the alleged representations that bee imports were regulated for the purpose of protecting the economic interests of a segment of the honeybee industry.

[319] In my view, and for the reasons set out above, the *HA Act* is concerned with the health of animals and, consequently, the health of people. As its long name indicates, it is an "Act respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals." Its purpose is not to protect the economic interests of the honeybee industry (or any segment thereof), or of any other regulated industry. Nothing in the *HA Act* supports this. Rather, its overarching purpose is to protect the health of people and animals generally. That is, to protect the interests of the Canadian public at large. Of note in this regard is that s 64(1) of the *HA Act* permits regulations to be made "for the purpose of protecting human and animal health" through the control or elimination of diseases and generally for the purposes of the *HA Act*.

[320] Further, a RIAS is an analysis of the expected impact of the subject regulatory initiative which, among other things, explains the elements of the regulatory proposal, alternatives considered and consultations carried out (Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations*, 2nd ed (Ottawa, 2001), 2001 CanLIIDocs 235 at 182-183). The Federal Court of Appeal has held that, while RIASs may serve as an interpretive tool of the regulations they accompany, they cannot override the clear language of those regulations (*Teva Canada Ltd v Sanofi-Aventis Canada Inc*, 2014 FCA 67 at para 77; see also *Ijaz v Canada (Citizenship and Immigration)*, 2015 FC 67 at para 43 and *ViiV Healthcare ULC v Canada*

(Health), 2020 FC 756 at para 24). Here the Orders and Regulations to which the RIASs applied have long since expired, the last of these in 2006. What remains is the statutory scheme: the *HA Act* and *HA Regulations*.

[321] The Federal Court of Appeal in *Paradis FCA* found that the Motions Judge in the motion to strike erred in suggesting the *HIPR, 2004* were aimed at protecting Canadians' health and safety and supported a broad public interest policy bar. The Federal Court of Appeal noted that the Motions Judge acknowledged that those regulations expired at the end of 2006 but found that the purpose behind them somehow continued, supporting the creation and enforcement of the alleged blanket guideline. The Federal Court of Appeal held:

> [97] On this, the Federal Court erred. It is trite law that administrative action can only be supported by the law on the books: *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, 162 N.R. 177 (C.A.), aff'd [1994] 3 S.C.R. 1100, 176 N.R. 1; *Janssen Inc. v. Teva Canada Limited*, 2015 FCA 36. Expired laws are no longer on the books. In this case, once the regulations expired, any public policies and public duties expressed in the regulations also expired.

[322] On that same reasoning, the RIASs that accompanied the expired Regulations and Orders are of questionable, or at least limited, interpretive value with respect to the purpose of the *HA Act* and *HA Regulations*. They may provide context for events at issue in this action, but the RIASs for the expired Regulations and Orders are not a part of the statutory scheme delineated by the *HA Act* or the *HA Regulations.* The RIASs are not independent publications. Rather, they accompany notifications to the public of regulatory amendments published in the *Canada Gazette, Part II*, and state that they are not part of the Order that they accompany.

[323] In any event, the RIAS contained within the *Canada Gazette, Part II*, Vol 121, No 2 at 314-316, dated January 21, 1987, accompanying the publication of the *Bee Prohibition Order, 1986*, amendment, SOR/87-39, notes that the order prohibits the entry of bees into Eastern Canada from the US. This was necessary because those beekeepers overwinter their honeybees, and the risk of introducing the honeybee tracheal mite by US bees was "of serious consequence."

As to the anticipated impact, the RIAS notes the order would require beekeepers needing replacement bees or queens to obtain them from a source other than the US (e.g., New Zealand). It acknowledges that, for the beekeepers who do not overwinter bees and who instead destroy their bees in the fall, the order "may be unpopular because they could desire to obtain bees from the USA." Thus, the RIAS acknowledges that beekeepers with differing models of beekeeping will be affected differently by the order.

[324] The RIAS also describes the consultation by way of a special meeting with the CHC, CAPA and various beekeeper associations held in Winnipeg in September 1986 and states that all of those organizations indicated support for the order.

[325] In their opening submissions, the Plaintiffs quote the section of the RIAS entitled "Consistency with Regulatory Policy and Citizens' Code," which states:

> Beekeepers' organizations are already aware of the Order which was in place in 1986. The Winnipeg meeting allowed for prior notice of the intent to extend the Order for 1987. All eastern and western beekeepers should be aware of the Order and are given every opportunity to comment on the extensions of the entry of U.S. bees into Eastern Canada but the survival of the whole of the industry is at stake.

[326] In my view, while this recognizes that if the extension of the order prohibiting the importation of honeybees from the US was not effected, then this could have devastating consequences for the industry as a whole, it does not demonstrate that the purpose of the *HA Act* and *HA Regulations* is primarily to protect the economic interests of beekeepers.

[327] I have also reviewed the other RIASs contained within the *Canada Gazette, Part II* referenced by the Plaintiffs and included in the Joint Book of Authorities [JBOA]. These generally indicate that the *HA Regulations* control the importation of animals into Canada in order to prevent the introduction of diseases which pose a threat to human health and safety or could have a serious effect on Canada's agricultural industry (see, for example, the RIAS published in the *Canada Gazette, Part II*, Vol 130, No 3 at 680, accompanying the publication of

the *Honeybee Importation Prohibition Regulations, 1996*, SOR/96-100) or that the purpose of the *HA Act* is to "prevent the introduction of animal diseases into Canada and to prevent the spread within Canada of diseases of animals that either affect human health or could have a significant economic effect on the Canadian livestock industry…" (*Canada Gazette, Part II*, Vol 138, No 11 at 794-5, accompanying the publication of the *Honeybee Importation Prohibition Regulations*, SOR/2004-136). In my view, the RIASs recognize that the primary *purpose* of the *HA Act* is the prevention of the introduction or the spread of animal diseases in Canada – the *impact* of which introduction or spread would be on human health and/or on the economic wellbeing of the Canadian livestock industry. As in *Flying E Ranche*, the "dual objectives" of protecting the public and farmers is reflected in the RIASs in this case (*Flying E Ranche* at para 587).

[328] In any event, as I have said above, the last of the orders is dated 2006 and has long since lapsed, and subsequent case law has interpreted the *HA Act* as a statute with broad public interest goals – to protect the health of animals and people (*Flying E Ranche* at para 581; *River Valley* at para 68).

[329] In summary, in my view, *River Valley* and *Flying E Ranche* support that the *HA Act* does not impose a private law duty of care owed to the Class. The *HA Act* has broad public purposes and does not, expressly or by implication, create a private law duty of care between the Defendants and the Plaintiffs. These larger goals include protecting animal and human health by preventing the importation or spread of animal diseases and pests. The ancillary impacts of this larger goal include protecting the public, which depends on the consumption of agricultural products that could be damaged by such animal diseases or pests, and the economic impact – positive or negative – on industries that produce such agricultural products. Neither the *HA Act* nor the *HA Regulations* contains anything suggesting that one of their purposes is to protect the economic interests of individual farmers. Further, the recognition of a private law duty of care in these circumstances would conflict with the CFIA's overarching statutory or public duty (*Imperial Tobacco* at para 44, citing *Syl Apps* at para 28 and *Fullowka* at para 39). Accordingly, the legislative regime applicable in this case does not give rise to or impose a private duty of care

owed to the commercial beekeepers. Rather, for the reasons above, it implicitly forecloses such a duty.

[330] The *Anns/Cooper* analysis could end here (*Taylor* at para 77). However, in the event that I am wrong and the legislative scheme does not foreclose the existence of a private law duty of care in these circumstances or is indeterminative, I will also consider whether the proximity requirement is met in this case based on the relationship of the parties.

[331] Prior to doing so, however, and before leaving the role that statute plays in determining proximity, I will address the Defendants' submission that there is no positive statutory duty to identify risk mitigation.

(c) No positive duty to identify risk mitigation

[332] The Defendants submit that, with respect to the second alleged duty, neither the *HA Act* nor the *HA Regulations* imposes a duty to consider mitigation measures, or in fact to conduct risk assessments at all. They say that the only statutory duty is to prevent the entry and spread of disease.

[333] In that regard, the Defendants rely on *Elder Advocates*, which involved a large class of elderly residents of Alberta's long-term care facilities who alleged that the government artificially inflated accommodation charges to subsidize the cost of medical expenses. At the certification hearing, various pleas were struck out, but a plea based on the duty of care alleged in negligence was permitted in part. This was upheld on appeal. The Supreme Court found that the pleadings did not support a negligence claim in the absence of a positive statutory duty to audit, supervise, monitor and administer the funds in relation to the accommodation charges and that any such activities that were undertaken did not create sufficient proximity to impose a *prima facie* duty of care. Rather, the specific acts fell under the rubric of the administration of the scheme. The mere providing of a service was insufficient, without more, to establish a relationship of proximity. The Supreme Court found that, assuming the facts pleaded to be true,

the negligence claim was bound to fail at the first step of the *Anns/Cooper* inquiry. Absent a statutory obligation to do the things that the plaintiffs claimed were done negligently, the necessary relationship of proximity between Alberta and the claimants could not be made out (*Elder Advocates* at paras 70-73).

[334] Here, the duty imposed by the *HA Regulations* is that the Minister shall issue a permit if they determine that the activity for which the permit is issued would not, or would not be likely to, result in the introduction into or the spread within Canada of a vector, disease or toxic substance (s 160(1.1)). While risk assessments or risk analyses are tools that can be utilized in assessing whether an import permit can be issued pursuant to s 160(1.1), the *HA Act* and the *HA Regulations* are silent with respect to the conduct of risk assessments or other assessment measures. Accordingly, there is no positive obligation on CFIA to conduct them. While I appreciate that, in their closing submissions, the Plaintiffs submitted that they are not asserting that a positive duty was owed in this regard, in my view, that does not erase this proximity consideration. That is, absent a statutory obligation to conduct the Risk Assessments, which the Plaintiffs say were conducted negligently because they failed to identify risk mitigation options, the necessary relationship of proximity between the Defendants and the Plaintiffs is not established (*Elder Advocates* at para 70-73).

(d) Was there a close and direct relationship?

(i) Interactions with the Defendants

[335] As discussed above, proximity, which must be established to ground an alleged private duty of care owed to a plaintiff, can also arise from specific interactions between government and a plaintiff such that government, through its conduct, is shown to have entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In such cases, the legislative scheme is still relevant to the analysis if, for example, a finding of proximity would conflict with the state's general public duty as established by the statute (*Imperial Tobacco* at paras 43, 45).

[336] The Plaintiffs argue that the duty of care in this matter arises from a lengthy series of specific interactions between the Class and the Defendants, which, they assert, is not negated or foreclosed by the governing statutory regime. Based on their view that the Federal Court of Appeal already determined as a matter of law that the statutory scheme in this matter "does not foreclose a finding of proximity and the imposition of a private law duty of care owed to the beekeepers would be consistent with the broader public duties imposed by the statute," the Plaintiffs assert that this Court need only determine whether the evidence of all the interactions and representations between the parties is sufficiently close and direct to make it just and fair, having regard to that relationship, to impose a duty of care on the Defendants (citing *Marchi* at para 17).

[337] The Plaintiffs argue that by repeatedly representing to the beekeepers over the decades that the Defendants acknowledged that the purpose of the *HA Act* and *HA Regulations* was to prevent the introduction of disease into Canada that could seriously affect or have a significant economic effect on the agricultural industry, the Defendants placed themselves in a special relationship with the Class. The relationship was supplemented and fortified by an overwhelming degree of interactions between the parties through repeated letters, meetings, emails, questions and consultations, telephone calls, discussions, applications and the like. According to the Plaintiffs, over time, this gave rise to a discrete duty of care to complete the Risk Assessments in accordance with prevailing professional, industry and international standards governing risk analysis, which ought to have included and identified risk mitigation measures.

[338] Conversely, the Defendants argue that CFIA did not interact with the commercial beekeeping industry in a manner that establishes a close and direct relationship such that a private law duty of care should be owed to protect the industry's economic interests concerning the importation of animals. The Defendants submit that CFIA was not participating in an initiative that fell outside its regulatory functions. Rather, any interactions or communications respecting the maintenance and enforcement of the regulatory scheme or with respect to the completion of risk assessments and consideration of risk management measures were in

furtherance of CFIA's regulatory function to protect animal health and were inherent in the exercise of that public law duty.

[339] As I have found above, I do not agree with the Plaintiffs that the Federal Court of Appeal made a finding that the *HA Act* and *HA Regulations* do not foreclose the possibility of the imposition of a private law duty of care by the Defendants, and I have found that the statutory scheme implicitly indicates the opposite. My analysis that follows on the issue of proximity is therefore made in the alternative. That is, in the event that I have erred in that finding.

[340] The analysis requires an assessment of the circumstances surrounding the relationship between the Plaintiffs and the Defendants, including looking at the "expectations, representations, reliance, and the property or other interests involved" to determine whether, having regard to that relationship, it would be just and fair to impose a duty of care on the Defendants. This is very much a fact-driven determination, as the factors that may satisfy the requirement of proximity "are diverse and depend on the circumstances of the case" (*Cooper* at paras 34 and 35). As put in *Wu* at para 51:

> …proximity recognizes those circumstances in which one individual comes under an obligation to have regard for the interests of another so as to be required to take care not to act in a manner that would cause injury to those interests. Proximity involves an analysis both of the nature of the relationship between the parties and the kind of harms carelessness might cause: see *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency,* 2013 BCCA 34. It involves having regard to all relevant factors arising from the relationship between the parties: *Deloitte* at para. 29.

[341] In this matter, there is no dispute that CFIA's role is that of a regulator. Accordingly, one of the factors to be considered in this case is whether the facts demonstrate a relationship and connection that is distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator's work (*Taylor* at para 80). Put otherwise, factors that are "generic and inherent in the regulatory framework" are not indicative of a relationship of proximity (*Wu* at para 64).

[342] The evidence is clear that the Plaintiffs have had communications over the years with CFIA and others about the prohibition on the importation of honeybees from the US as well as the potential impact of the importation ban on those commercial beekeepers who would have preferred to import US honeybee packages. However, I find that the Plaintiffs have not established that these communications exceed what would be the normal range of interactions between a regulator and the regulated industry, thereby giving rise to a special relationship with CFIA. I reach this conclusion based on the evidence described below and the evidence as to the context in which these communications occurred. Leading up to my analysis, which culminates in my determination of this point, I will first below set out the evidence most relevant to proximity as identified by the Plaintiffs and given by the Representative Plaintiffs and their witness of fact (Mr. Ash). Informed by this evidence and the applicable legal principles, I will then set out my analysis, incorporating the Defendants' evidence concerning interactions with Class members. I have provided a significant level of detail in describing this evidence not only because it addresses individual communications with the Plaintiffs and communications and interactions by the Defendants with the Plaintiffs and others, but also because it provides critical context to the nature of the relationship between the Defendants and the Class.

(ii) Plaintiffs' Evidence

[343] As indicated above, there are three Representative Plaintiffs in this matter: Mr. Gibeau, Mr. Paradis and Mr. Lockhart. Each of these gave evidence at trial. Additionally, Mr. Brent Ash, a Manitoba commercial beekeeper, testified. Their testimony concerning their interactions with CFIA and other relevant information was as follows.

Mr. Gibeau

[344] Mr. Gibeau testified that he was the treasurer and then the president of the British Columbia Honey Producers' Association, holding each of these positions for four years, although he did not indicate when he held them. His testimony was that the British Columbia Honey Producers' Association had approximately 500 members, including his company, Honeybee

Enterprises. Mr. Gibeau explained that the British Columbia Honey Producers' Association is a member of the CHC and that it had an elected delegate that would attend CHC meetings. He testified that within the British Columbia Honey Producers' Association, there were discussions about the importation of US honeybee packages and that this was a contentious issue. As president, he had brought a proposal to support importation, but no other member would second the proposal. He therefore informed the CHC that British Columbia was not in support of importing honeybee packages from the US.

[345] As to communications with CFIA, Mr. Gibeau was referred to a May 10, 2004, letter from him to Dr. Belaissaoui of CFIA. This letter references the proposed regulation change for the importation of US queen bees and *Canada Gazette*, Vol 138, No 15 – April 10, 2004. In his letter, Mr. Gibeau expresses his support of the proposed order (regulatory amendment) to permit the importation of honeybee queens and their attendants from the continental US. He also states that his company, the Honeybee Centre, had excellent relationships with queen bee suppliers from New Zealand and Hawaii, but that the suppliers could not meet the demand. He states this was a crisis for beekeeping and pollination industries in Canada. His testimony was that he did not speak with Dr. Belaissaoui and he did not know if he received a response to his letter.

[346] Mr. Gibeau was also referred to a December 14, 2011, email from him to Mr. Rod Scarlett of the CHC, copied to others, including Dr. Snow of CFIA; Dr. Nasr, the Alberta Provincial Apiculturist; Paul van Westendorp, the British Columbia Provincial Apiarist; and a New Zealand beekeeper. The email referred to a letter Mr. Gibeau had sent to Dr. Snow on December 10, 2011, regarding his opposition to new importation restrictions on New Zealand honeybees, which required pre-inspection at the bee yard rather than pre-treatment at the package assembly yard. Mr. Gibeau stated his view that the new conditions were unreasonable and unmanageable. His concern was that, rather than complying with the new requirements, the New Zealand beekeepers would sell their bees elsewhere, forcing Canadian beekeepers to lobby even harder for the importation of US packages or the opening of the US border, at the risk of introducing Africanized genetics and SHB. He indicated that Dr. Snow had indicated that the restrictions were developed in consultation with the CHC, and he requested that the directors of

the CHC re-examine the issue, considering the response from New Zealand bee exporters, and that the CHC ask CFIA to modify the import permit conditions accordingly. When asked about this letter at trial, Mr. Gibeau's testimony was that he wrote to the CHC because the CHC communicates with CFIA on a regular basis.

[347] On January 19, 2013, Mr. Gibeau sent an email to Dr. Aitken of CFIA, attaching a copy of an Application for Permit to Import. Mr. Gibeau acknowledged receipt of an import permit for New Zealand honeybee packages and stated that he would be importing over 1200 packages that year at a cost of $170,000 and that the same bees would cost half of this if imported from California. He stated that he also wanted to start the process to import packages from California. He believed the prohibition of imports should be changed because there were no diseases or pests that could be imported that were not already in Canada, and Africanized bees could not establish themselves here. He attached an Application for Permit to Import in that regard. Mr. Gibeau testified that he wrote the email to Dr. Aitken because he was hoping that providing a brief explanation would prompt CFIA to "reconsider or look at the application or ask [him] for more information or do something other than reject it."

[348] Dr. Aitken responded by email of February 1, 2013, which response included that:

> Conditions for the importation of the commodity "packaged bees" into Canada from the United States are not currently available for permits to be issued. Previous assessments have led to prohibitions and consistently resulted in the CFIA not issuing permits for this commodity as the Minister was not satisfied that this commodity would not, or would not be likely to, result in the Introduction or spread of disease within Canada as per section 160 (1.1) of the *Health of Animals Regulations* (C.R.C., c. 296). This is a long standing situation and conditions are not currently available due to a number of assessments that have been conducted in the past.
>
> A protocol is available to importers who wish to request CFIA to consider the development of new import protocols where import conditions are not currently available. If import conditions can be developed by CFIA-Headquarters (HQ) upon completion of the review, then an import permit may be issued. However, at this current time, no such permit can be issued for "honey bee" packages from the United States. After the review process,

> personnel from Head Quarters will advise as to when and whether conditions can be developed for the issuance of a permit.
>
> For such conditions to be developed, the prospective importer should review the following protocol: Development of New Import Protocols - Procedures for Clients (TAHD-DSAT-IE-2003-3-7 April 8, 2011) available at http://www.inspectlon.gc.ca/animals/terrestrial-animals/imports/policies/general/2003-3/eng/1321065624928/1323826579004

[349] On April 16, 2013, Mr. Gibeau wrote to CFIA requesting that new import protocols be developed for US packaged bees from Northern California. He stated this communication would address the issues identified in the CFIA document, "Development of New Import Protocols – Procedures for Clients." He said he was prepared to pay the fee for a full assessment. The letter set out his views, including that any risk to importation would be offset by economic advantages to beekeepers, growers and the Canadian community at large; that there was a tremendous demand for US honeybee packages, as transport costs made bees from New Zealand, Australia and Chile unaffordable; and that demand for bees to pollinate canola, blueberries and cranberries had never been more critical. The letter identified his supporting documentation. At trial, he testified that he did not recall if he received a response. I note in passing here that this request postdates Dr. Rajzman's March 5, 2013, request that a new risk assessment (the 2013 Risk Assessment) be conducted.

[350] Mr. Gibeau's next communication to CFIA put to him at trial by Plaintiffs' counsel was a letter from Royal City Bees (a company he testified that he formed in 2018) dated March 27, 2021, to which he attached an Application for Permit to Import Live Animals, Hatching Eggs, and Animal Germplasm under the *HA Act*, seeking to import 1000 packaged bees from Northern California. His letter indicates that package bee imports from New Zealand had been cut in half because of reduced flights (due to the COVID-19 pandemic), that beekeepers were facing a critical shortage of bee livestock and that the only logical solution was to permit packaged bees to be imported from California. CFIA responded by email of April 14, 2021, stating:

> I am writing in reply to your email to the National Centre for Permissions (Animal) dated April 9, 2021.

> As indicated in our previous email, your permit application request was denied as conditions for the importation of the commodity "packaged bees" into Canada from the United States are not available for permits to be issued at this time. Our understanding of current conditions and review of the 2014 assessment resulted in the CFIA not issuing a permit for this commodity as the Minister was not satisfied that it would not, or would not be likely to, result in the introduction or spread of disease within Canada as per section 160 (1.1) of the Health of Animals Regulations (C.R.C., c. 296). In summary, this is a long-standing situation and import conditions, to mitigate the ongoing disease risks that USA honey bee packages continue to present, are not currently available.
>
> It is not a standard procedure for the National Centre for Permissions (Animal) to forward email correspondences on behalf of permit applicants. Please note that the CFIA has a Complaints and Appeals Office (CAO) where stakeholders can register complaints about CFIA services or regulatory decisions. More information is available at https://inspection.gc.ca/about-the-cfia/accountability/complaints-and-appeals/eng/1547179421299/1547179421595 including a complaint form.

Mr. Paradis

[351] Mr. Paradis' testimony was that the Alberta Beekeepers Commission (formerly Alberta Beekeepers Association) started as a beekeepers' association in the 1930s, evolved into a lobby group and now also conducts and funds research. To be a member, beekeepers must have more than 100 colonies and pay the required fee. Mr. Paradis was elected as a director of the Alberta Beekeepers Commission in 1987. He was also chair of its import committee from 1996 to 2007, the mandate of which was to access bee stock from the US, specifically Northern California. Mr. Paradis was also the Alberta Beekeepers Commission's (Alberta) delegate to CHC and, as such, he sought to have CHC support the importation of bees from California. Mr. Paradis was also a member of Peace River District Honey Producers, a more regional group of beekeepers, from about 1985 forward.

[352] As to communications with CFIA, Mr. Paradis testified that he did not recall if he spoke to CFIA during the 2003 Risk Assessment process, but that he had spoken to many CFIA

individuals over the years. He provided no specifics on these communications. He was referred to a document submitted to CFIA on December 16, 2002, entitled "Importation of U.S. Honeybees Part 1: Issues Update." When asked if he recognized this document, he indicated that it appeared to be the Alberta Beekeepers Association's comments to CFIA during the comment period for the 2003 Risk Assessment.

[353] Mr. Paradis testified that he was aware that in 2003 Dr. Nasr was working on a US queen bee importation protocol. Mr. Paradis did not recall if he spoke with Dr. Nasr while Dr. Nasr was developing the protocol.

[354] Mr. Paradis, on Paradis Honey letterhead, wrote to Dr. Samira Belaissaoui on April 21, 2004, expressing his support of the proposed regulation as set out in the *Canada Gazette, Part I*, April 10, 2004, *Honeybee Importation Regulations, 2004*, which would allow the importation of honeybee queens from Northern California. In that letter, he also stated that he had been lobbying for the importation of honeybees from the US for many years; that, in his view, importation would not cause risk to the industry; that closing the border to US packages had caused the industry hundreds of millions of dollars in lost income; and that beekeepers who opposed importation were engaging in protectionism and other matters. He did not recall speaking to Dr. Belaissaoui about this letter.

[355] On May 3, 2004, Mr. Paradis, on Peace River Honey Producers letterhead and on behalf of that entity, wrote to Dr. Belaissaoui again responding to the *Canada Gazette, Part I*, April 10, 2004, proposed regulations and supporting the proposed importation of US honeybee queens. This letter sets out similar views to those expressed in Mr. Paradis' April 21, 2004, letter with respect to the continued prohibition on the importation of US honeybee packages and asserts that the 2003 Risk Assessment was not as thorough as it should have been. When asked by Plaintiffs' counsel on re-direct why he sent this letter, he testified that he sent it "to try to convince them to allow us to be—to have access to the California bee packages."

[356] By email of July 13, 2004, Dr. Clarice Lulai of CFIA responded to a July 7, 2004, letter from Peace River Honey Producers sent by Mr. Paradis. She noted the 2003 Risk Assessment formed the basis for opening the US border for honeybee queens but indicated there were risks associated with the importation of packages. She indicated that if Mr. Paradis or any group of beekeepers he represented knew of any science providing contrary evidence, then they should make this known to Alberta Agriculture through the province's apiculturist. The issue should then be discussed with both CAPA and the CHC, as they are the organizations that represent the interests of the honeybee industry in Canada. She stated that CFIA consults with both organizations on a regular basis so that its regulatory framework reflects the needs of industry while, at the same time, protecting the health of animals and plants in Canada.

[357] The next communication put to Mr. Paradis at trial was a January 25, 2005, letter on the Alberta Beekeepers Association letterhead to Dr. Lulai, signed by Mr. Paradis as chair of the importation committee of that association. This took issue with a January 6, 2005, letter from Dr. Lulai and, among other things, noted that CFIA had made revisions to protocols for the importation of bees from Australia and New Zealand and suggested that the same flexibility and understanding of what the association considered to be the minimal risks could be applied to the California protocol.

[358] Mr. Paradis was then taken to a November 3, 2005, letter from Dr. Perrone to Mr. Paradis as the chair of the Alberta Beekeepers Association. Dr. Perrone acknowledged a letter of October 25, 2005, proposing alternative conditions regarding the importation of honeybee queens from California and the Alberta Beekeepers Association's concern regarding the limited availability of honeybee queens from the US. However, she indicated that the interests of the entire industry, as well as the health concerns of individual Canadians (regarding Africanized honeybees), had to be considered. As had been discussed by phone the prior week, the CHC, which CFIA recognized as the national association for the Canadian beekeeping industry, was satisfied with the current protocol, and its membership would not support a recommendation to change the existing importation conditions. Further, the CAPA Import Committee, which CFIA considered a source

of technical expertise, did not feel that a review of the current requirements for the importation of honeybee queens from the continental US was warranted at that time.

[359] Mr. Paradis was next shown a letter dated January 17, 2006, on the Alberta Beekeepers Association letterhead, to Dr. Perrone. The letter is signed by Mr. Paradis as the chair of the importation committee of that association. The letter attached two resolutions passed by the association seeking changes to the current honeybee queen importation protocol and a detailed study. The letter addresses Dr. Perrone's November 3, 2005, email and takes the view that because she noted that not all provinces supported the importation of queens from California, CFIA was seeking a "political" rather than a scientific solution. It also expressed the view that the 2003 Risk Assessment was flawed and came to the wrong conclusions. It concluded that the intent of the letter was to reiterate that the Alberta Beekeepers Association found the import protocol unacceptable, as it restricted the availability of queens from California and therefore impacted the livelihood of producers.

[360] I find that, at trial, Mr. Paradis had little recollection of these letters or of any discussions with CFIA, with one exception. That was a phone conversation with Dr. Aitken. Mr. Paradis said that he called Dr. Aitken to express his dissatisfaction with having an import permit denied (he recalled this conversation because a change of phone and related noises caused Dr. Aitken to ask Mr. Paradis if he was recording the call). Mr. Paradis was then referred to an email chain starting with Dr. Aitken to Mr. Paradis dated March 14, 2012, where Dr. Aitken stated, pursuant to their telephone call, that CFIA was unable to issue an import permit for the importation of packaged bees from the US at that time. Further, that two things would have to occur before this could change. First, CFIA would need evidence from the Canadian industry (via the CHC) that reopening the border to US packages was a decision supported by the majority of the industry. Second, a full risk assessment would need to be done to assess the hazards of importing packages from the US in the current circumstances. Mr. Paradis initially testified that this email was consistent with the phone call he had with Dr. Aitken; on cross-examination, however, he said the conversation happened after the email. When asked if he was sure, he testified that he assumed the email concerned the subject telephone conversation but that the second part of the

email, concerning the risk assessment, was not part of the conversation. Mr. Paradis also testified at trial that Dr. Aitken told him during this call that if CHC made a request to CFIA that the importation of US honeybee packages be permitted, then "CFIA would make it happen." Given that Mr. Paradis could essentially only identify the communications put to him because they were under his signature and that he had no other recollection of the documents, I find that the contemporaneous email from Dr. Aitken describing the call likely accurately represents the subject conversation.

[361] Finally, Mr. Paradis was referred to an email chain wherein Dr. Aitken responded, on February 1, 2013, to Mr. Paradis' application to import US honeybee packages submitted on January 22, 2013. Dr. Aitken advised, as per their previous discussions, that conditions for the importation of packaged bees into Canada from the US were not currently available. Further, that a protocol was available to importers who wished to request that CFIA consider the development of new import protocols where import permits were not currently available. Dr. Aitken explained how to access CFIA's documentation applicable in that regard. Mr. Paradis testified that he did not avail himself of this process. When asked if Paradis Honey had ever asked for a risk assessment to be conducted, Mr. Paradis said he was not sure. However, when an answer to an undertaking was put to him in which he confirmed that no formal request for a risk assessment was made between 2007-2012, he agreed that Paradis Honey had not done so.

[362] Mr. Paradis also identified an Import Permit dated April 24, 2007, for the importation of 8000 US honeybee queens; an Import Permit dated May 4, 2011, for the importation of 8000 honeybee queens from the US; an Application for Permit to Import dated January 11, 2016, seeking to import 5000 packages of honeybees and queens from the US, which he testified was likely submitted by his son and daughter-in-law, the then owners of Paradis Honey; and, an Application for Permit to Import Live Animals, Hatching Eggs, and Animal Germplasm Under the *HA Act*, dated March 5, 2022, made by Mr. Paradis personally seeking to import an unspecified number of US honeybees packages, which request was denied.

Mr. Lockhart

[363] Mr. Lockhart testified that he founded Rocklake in 1978. He was one of its two shareholders from 1978 to 2003, when he became the sole owner. In 2013, he sold Rocklake to his brother and nephews. Rocklake was a member of the Manitoba Beekeepers' Association for as far back as he could recall. He was on the board of directors of that association for four terms, each of which was either a three- or four-year duration. Most decisions made by the Manitoba Beekeepers' Association arose from resolutions made by members at the annual general meeting, which were then voted on. Every member got one vote, regardless of the number of colonies they had. The board of directors also took any concerns that were federal in nature to the CHC, who might lobby on the association's behalf. Mr. Lockhart was never Manitoba's representative at the CHC, but he was a member of the CHC and, as such, attended some CHC meetings. He testified that it was only the provincial CHC representatives who spoke at the meetings.

[364] As to communications with CFIA, Mr. Lockhart was referred by Plaintiffs' counsel to an April 23, 2004, letter from Rock Lake Apiaries, signed by Mr. Lockhart and addressed to "whom it may concern," indicating that the US border should be opened to the importation of honeybee queens and that, without a source of quality queens, the industry could not expand. Mr. Lockhart did not recall to whom he sent the letter and did not recall Dr. Samira Belaissaoui's name. When shown a document entitled "Pre-publication of the proposed amendment to allow the importation of honeybees from the continental U.S., Comments received since April 10, 2004" listing 76 comments, he confirmed that his name and company were listed as item 53 and that the entry reflected his comments in his April 23, 2004, letter. Despite this, he then testified that he could not identify any specific reason why he sent the letter, beyond suggesting that it may have been the general state of the industry and how hard it was to access replacement stock as a whole. I find that the purpose of the letter was to provide a response to the consultation offered with respect to the proposed amendment.

[365] Mr. Lockhart was referred to an email chain, the first communication of which is from him to Dr. Aitken dated April 11, 2013. There, Mr. Lockhart expressed his concern with winter

losses, splitting and the difficulty of keeping colony numbers level and his interest in having access to bee packages from the US. He asked if there was a disease profile being conducted in Canada or a risk assessment being carried out. Dr. Aitken responded that he had just been advised that CFIA had initiated a risk assessment. On April 30, 2013, Mr. Lockhart asked if the results of the risk assessment then being carried out by CFIA would be available to producers and, if so, how he could obtain a copy. The Partial Agreed Statement of Facts states that Mr. Lockhart, Mr. Paradis, the Chief Veterinary Officer of each province, CAPA and the CHC were invited to provide comments on the 2013 Risk Assessment.

[366] Mr. Lockhart sent an email to CFIA on November 20, 2013, with the subject line "Risk Assessment for USA Honey Bees" expressing his view that because his business was near the US border, it had always been subject to the same diseases and pests present in the US. He explained the need for quality replacement stock and his experiences with Australian and New Zealand packages, described potential treatment for pests and diseases in packages to reduce risk and noted that concerns about Africanized stock existed with both packages and queen imports, the latter of which were permitted.

[367] Finally, Mr. Lockhart was referred to an Application for Permit to Import 1000 2 lb honeybee packages from California, which he indicated was dated 2013. Mr. Lockhart testified that for a long time he did not recall receiving a response, but in fact he had.

Mr. Ash

[368] Mr. Ash is not a Representative Plaintiff but gave evidence at trial. He has been an owner and manager of Ash Apiaries Ltd since 2002 or 2003. Ash Apiaries has been a member of the Manitoba Beekeepers' Association since the 1980s, and Mr. Ash testified that he attends meetings sporadically. Mr. Ash is a member of the Canadian Honey Producers' Association (now the Canadian Beekeepers Federation) and was president in the first few years of its operation. He testified that the Canadian Beekeepers Federation was established prior to the 2003 Risk Assessment because larger commercial beekeepers were of the view that they did not have

"a voice" at the provincial level and therefore at the CHC or, through the CHC, to government or CFIA. That is, if the position being advocated did not have majority support, then CHC would not bring those concerns forward, and only provincial delegates were able to voice opinions at CHC meetings. Mr. Ash testified that with respect to the 2003 Risk Assessment, the Canadian Honey Producers' Association "couldn't make our voice heard plain enough." The association then became dormant for quite a while but had recently re-started. It started with 46 members and now has 36 from BC, Alberta, Saskatchewan, Ontario and Quebec.

[369] Mr. Ash confirmed on cross-examination that the Canadian Beekeepers Federation (successor to the Canadian Honey Producers' Association) lobbies government officials and has retained a lobbyist. Asked if the Federation had advocated opening the border to the US Embassy, he testified that he was not one hundred percent sure – he is just the treasurer. Asked if the Federation approached Members of Parliament, he testified that it could have been the Federation, or the lobbyist, he was not sure. As to approaching the US House of Representatives and US experts, he testified that he did not know.

[370] Ash Apiaries had about 1200 colonies in 1984-1985. It killed its bees every fall and relied on the purchase of US honeybee packages each spring to replace its stock. It did not overwinter, although it did try overwintering a small number of colonies, about 50, before the border closed. It now overwinters about 14,000 colonies and is one of Manitoba's largest honey producers, if not the largest. Most of Ash Apiaries' revenue is from honey production.

[371] As to correspondence with CFIA concerning importation and permits, by email of October 16, 2006, Mr. Ash wrote to Dr. Barr and Dr. Belaissaoui, as he had been advised they were the CFIA contacts with respect to the prohibition on the importation of US honeybees, and asked about the status of the import ban. Dr. Belaissaoui forwarded his message to Dr. Perrone, who was then responsible for the honeybee file. Mr. Ash repeated his request to Dr. Perrone and added that he represented the Canadian Honey Producers' Association and he wanted to share the information with them.

[372] Dr. Perrone responded on October 31, 2006. She explained that although the current *Honeybee Importation Prohibition Regulations* were due to expire on December 31, 2006, nothing would change regarding the importation of honeybee packages from the US. This was because the regulations were no longer required to prevent the importation. Under s 12(1) of the *HA Regulations*:

> 12.(1) Subject to section 51, no person shall import a regulated animal except
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> > (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.

[373] She indicated that the import reference document lists the conditions under which certain live animals can be imported from the US. Honeybees were not listed in this import reference document; therefore, by default, under s 12(1), an import permit was required to import live honeybees from the US. She stated that this did not change anything with regard to the prohibition on importing honeybee packages from the US because under s 160(1.1) of the *HA Act*:

> 160.(1.1) The Minister may, subject to paragraph 37(l)(b) of the *Canadian Environmental Assessment Act*, issue a permit or licence required under these Regulations where 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 spread within Canada, of a vector, disease or toxic substance.

[374] She stated that, in other words, an import permit would only be issued by CFIA's Animal Health Division if the results of a risk assessment are favourable for the commodity in question. As Mr. Ash knew, the results of the risk assessment on the importation of honeybees from the US in 2003 indicated that honeybee packages would present an unacceptable risk of introducing honeybee pests and diseases into Canada. Therefore, unless the results of a new risk assessment indicated that honeybee packages no longer presented a significant disease risk, the importation of honeybee packages from the US would remain prohibited, and, as she had explained above,

the *Honeybee Importation Prohibition Regulations* no longer needed to be extended in order to enforce this. Considering that the last risk assessment had been completed only a few years ago, it was unlikely that a new risk assessment, at that time, would yield a more favourable result.

[375] Mr. Ash testified that after receiving this email he still made applications to import US honeybee packages. He was referred to another email chain starting on January 31, 2012, where Mr. Ash indicated to CFIA that he intended to make such an application. CFIA responded advising that there was no need to send an application for US honeybees packages because, as Mr. Ash knew, this was not permitted. However, as discussed the previous year, he could send a letter addressing his concerns, and the best way of presenting his case was by working with his association and presenting it as a whole. He made an application to import 4000 packages of US honeybees on February 21, 2013. He testified that he probably received a rejection letter.

[376] By email dated February 26, 2013, Dr. Aitken responded advising that conditions for the importation of the commodity "packaged bees" into Canada from the US were not currently available for permits to be issued. Dr. Aitken stated that previous disease evaluation and risk assessments had led to prohibitions and consistently resulted in the CFIA not issuing permits for this commodity, as the Minister was not satisfied that this commodity would not, or would not likely, result in the introduction or spread of disease within Canada as per subsection 160(1.1) of the *HA Regulations.* These risk assessments were not able to identify import conditions that could be implemented to mitigate the animal health risks identified with US honeybee packages. As such, the importation of this commodity into Canada had not been allowed. Dr. Aitken indicated that a protocol was available to importers to request that a risk assessment be conducted by CFIA to determine the risks associated with this commodity and whether they can be mitigated through the imposition of import conditions. He included information on how to obtain and respond to the protocol. If, following this process, it was determined that import conditions could be developed to address the animal health risks that were found to exist through previous assessments, then an import permit may be issued. However, in the absence of a new full risk assessment, no such permit could be issued for "honey bee" packages from the US.

[377] By email of March 4, 2014, Mr. Ash contacted CFIA and again expressed his desire to import 4000 US honeybee packages. Dr. Aitken responded on March 10, 2014, acknowledging the inquiry and advising that import permit conditions for the importation of US honeybee packages were not currently available for CFIA import permits to be issued in view of the results of the current Risk Assessment. Accordingly, Dr. Aitken was unable to proceed with issuing a CFIA import permit for packaged honeybees from the US at that time, should an application be received.

[378] Mr. Ash submitted another application to import 4000 packages of US honeybees on February 19, 2014, which was denied. He submitted an application on March 17, 2015, to import 2000 US honeybee packages. An email of March 27, 2014, from CFIA advised that comparing the application to the national requirements to import this commodity determined that the application would be declined. Mr. Ash applied again on March 13, 2017, and, by email dated March 15, 2017, was again advised that comparing the application to the national requirements to import this commodity determined that the application could not be approved and that packaged honeybees from the US are not permitted entry into Canada. The email also referred him to the attached AIRS, which indicates that packaged honeybees are to be refused entry and, under conditions for import, reads “PROHIBITED ENTRY.” The document also indicates that a risk assessment may be required before the development of import conditions could be considered and that the nearest CFIA office can be contacted if more information is desired about the risk assessment process. Mr. Ash applied to import 5000 packages of US honeybee packages on March 12, 2019, and received a denial email dated April 2, 2019; he applied on April 13, 2021, and received a denial email on May 5, 2021; he applied on February 8, 2022, and received a denial email on February 9, 2022; and he applied on February 21, 2023, and received a refusal email on February 21, 2023. His testimony was that he did not recall ever responding to or following up on any of these communications.

[379] Mr. Ash was referred by Plaintiffs’ counsel to an email dated April 9, 2013, from him to the then federal Minister of Agriculture, Mr. Gerry Ritz, attaching a letter that Mr. Ash said had been sent to the Minister and Dr. Snow over a year before and which the evidence determined

was sent by email on March 2, 2012. In the email to Minister Ritz, Mr. Ash said he did not require a formal response but wanted to let the Minster know that the situation was even worse that year given overwintering losses and that they were desperate to have the opportunity to access imported honeybee packages from the US. The letter to Dr. Snow set out why Mr. Ash was of the view that importation of US honeybee packages should be permitted, referring to overwintering losses; limited bee supply; deteriorating colony health due to an increasing number of bee pests, which required increased chemical use; honey contamination caused by the use of chemicals; labour shortages; the relative economic viability of US packages; and the "virus profiles" of bees from his hives compared to those of a package producer in California, which he said showed that California bees had fewer viruses than his own. He suggested a new risk assessment should be conducted. The letter states that Mr. Ash realized that the Minister had previously heard all of the arguments from both sides of the issue but that, in Mr. Ash's view, substantial changes were required to position the industry for future growth. He testified that the purpose of sending the letter was to make the Minister aware of the situation.

[380] In an email chain starting on March 2, 2012, Mr. Ash had sent the above letter to Dr. Snow, who responded on the same day thanking him for his comments and advising that a formal response would follow. She also noted that the honeybee industry was not alone in dealing with this type of difficult situation, but, to maintain a consistent approach, there was a system in place that CFIA must apply in all cases. It was her job to work within that system to ensure that CFIA met the standard of "acceptable level of risk" for the importation of all commodities into Canada. On April 23, 2012, Mr. Ash emailed Dr. Snow to advise that he had been told that New Zealand packages ordered the prior fall would not be delivered as expected. He stated that while his personal situation was then very good – the weather was good, his bees came through the winter quite well and he should not have too much trouble splitting hives and getting their numbers back up to capacity – other beekeepers would not be that fortunate. He stated that the industry needed the option of importing US bee packages. Dr. Snow responded on April 24, 2012, stating that she again encouraged him to share his experiences with the CHC and, before CFIA would make a decision on the importation of US honeybee packages, several things would need to occur:

> 1) the CFIA would require an official request from the Canadian industry (via the Canadian Honey Council) stating that reopening the border to US packages was a decision that represented the wishes of and was supported by the majority of the Canadian industry, and that they wished to have the situation re-evaluated; and
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> 2) a full risk assessment would need to be done to assess the hazards of importing packages from the US given the current situation (the last risk assessment was done in 2003 and may need to be updated), to determine if/how packages can be imported within what is considered an acceptable level of risk. Even before a complete risk assessment was done, there would have to be enough evidence to show that the situation has changed in the US with respect to the risks associated with packages in order to meet our acceptable level of protection.

[381] Mr. Ash testified that he was not sure he responded to Dr. Snow's email, that he did not think he raised this with the CHC – which was well aware of his position – and that he did not recall requesting a full risk assessment.

[382] He did, however, receive a copy of the 2013 Risk Assessment and thought he had also received a draft version of that document. On November 22, 2013, he sent a letter to Dr. Lord in which he provided his comments on the risk assessment. This addressed AHB, AFB, rVar and his concerns with the risk assessment. He stated that Ash Apiaries Ltd then had 7000 colonies in Manitoba and for many years had been attempting to grow that business, but that overwintering bees there was not economically feasible in the long run (I note in passing here that his testimony at trial was that it is now up to 14,000 colonies). He went on to restate the content of his letter to Dr. Snow. His position was that the risks identified in the risk assessment could be managed by beekeepers. He testified at trial that, in his view, the risk assessment CFIA conducted had not considered the science or the economics.

[383] With respect to other interactions with CFIA and Agriculture Canada, Mr. Ash was referred by Plaintiffs' counsel to an email dated December 16, 2002, which he sent to five other recipients, including Mr. Michael Paradis. The email states that the joint CHC and CAPA meetings in Niagara Falls were attended to promote the Canadian Honey Producers' Association

to potential new members and to introduce the organization to CFIA. Mr. Ash states he was fortunate to meet with Dr. Jamieson one morning and that they spoke of the temporary closure of the Australian border due to SHB, and Dr. Jamieson indicated that more information was awaited from the Australian authorities. The email also reports that the Canadian Honey Producers' Association's concerns about a suitable supply of packaged bees and queens was also discussed, that Dr. Jamieson had advised that a draft risk assessment was in progress and that CFIA was waiting for more information from CAPA. The Canadian Honey Producers' Association would be given the opportunity to comment on the risk assessment. Further, that Dr. Jamieson was displeased with a letter-writing campaign by individuals who were in favour of the border remaining closed and was aware that an equal number of letters could come from those who wanted the border opened, counselling against such an approach. In his email, Mr. Ash also reported on continued support by the CHC for the US border closure and on other news brought forward by the CHC.

[384] When asked about this email at trial, Mr. Ash added that he recalled that he had also discussed with Dr. Jamieson the Canadian Honey Producers' Association's issues with CHC – being their view that the organization was "outvoted" at CHC and that the association was therefore trying to get its voice heard. Further, although not reflected in his email, that the Canadian Honey Producers' Association wanted some risk mitigating measures for "your bee health, your economics, economics of the bee industry." He also indicated that Dr. Jamieson had told him that the risk assessment was made publicly available for comment.

[385] Mr. Ash was also referred to an April 11, 2003, letter from him in his capacity as president of the Canadian Honey Producers' Association to Dr. Jamieson. The letter responds to the 2003 Risk Assessment and expresses the view that the risks assessed by CFIA, while real concerns, could be managed effectively by honey producers, who would be faced with these risks whether or not the border was opened. He testified that the association was of the view that the risk assessment was not done properly. While not indicated in the April 11, 2003, letter beyond reference to producers being able to manage the risks, he testified that he did not think the "mitigation factors" that could have been looked at were addressed.

[386] Mr. Ash was referred to a letter sent to Dr. Belaissaoui on November 13, 2003, expressing support for CFIA's proposed amendment to the existing regulations that prohibited the importation of US queens and packages. Although he testified that he wrote this letter and recalled sending it to Dr. Belaissaoui, I note that it is actually signed by Bryan Ash. Mr. Ash testified that the letter was sent in response to the proposed regulatory change (permitting the importation of US queens) and that he thought he received a response but was not sure.

[387] Mr. Ash was also referred to an undated letter from him as president of the Canadian Honey Producers' Association to Dr. Belaissaoui regarding *HIPR, 2004, Canada Gazette, Part I*, Vol 138, No 15 – April 10, 2004, supporting the proposed amendment (to import US queens), as it would provide options for the industry to grow and prosper.

[388] Mr. Ash was referred to an email dated December 20, 2004, from him, as president of the Canadian Honey Producers' Association, to Dr. Jamieson. The letter advises that the association would be holding its annual general meeting on January 31, 2005, in Saskatoon and invites Dr. Jamieson to attend to discuss CFIA's perspective as to the current queen import protocols and any potential changes, short and long term, for the honey/pollination industry. Mr. Ash noted that Dr. Jamieson would be attending the CHC meetings and that he hoped to have the opportunity to meet to discuss the Canadian Honey Producers' Association's concerns. Dr. Jamieson responded advising that Dr. Lulai would be representing the AHPD at the honeybee industry meeting in Saskatoon and, by copy of his responding email, advised her of the invitation.

[389] In that regard, Mr. Ash was referred to an undated letter from him as president of the Canadian Honey Producers' Association to Dr. Lulai thanking her for taking the time to meet on January 31, 2005, in Saskatoon. The letter indicates that the purpose of this meeting was to introduce the association and to gain an understanding of the role that CFIA plays in the industry and how changes could be made so that the industry could grow. The letter states that in her presentation, Dr. Lulai explained the need for science and suggested that a request could be made for a revision to the risk assessment to include treated packaged bees. The letter expresses the association's view that to keep chemical residue out of honey, there was a need to import US bee

packages so that bees could be treated outside their boxes. Mr. Ash could not recall when this letter was sent but thought it concerned the 2003 Risk Assessment. His testimony was that, at the meeting, there was a discussion of the science used. It did not make sense to the association, and it did not convince them that there was an issue or show how they could mitigate risk. This is not reflected in Mr. Ash's letter to Dr. Lulai. Mr. Ash testified that the meeting was also attended by Dr. McCool, who was on the food side of CFIA, and that honey contamination was discussed.

[390] Mr. Ash was also referred to an undated letter to him from the then Minister of AAFC, Mr. Gerry Ritz. He could not recall when the letter was sent, suggesting perhaps 2013 or 2014, but he was not sure (I note that it appears to pre-date the 2013 Risk Assessment). Mr. Ash was not asked about the content of the letter but, as it provides a snapshot of the perspective of the Minister and CFIA at that time, it is of note. The Minister acknowledged Mr. Ash's email about the closure of the border to the importation of US packaged honeybees and stated, in part:

> As you indicated, the inability to import packaged bees from the U.S. has been a long-standing issue that has divided the honeybee industry in Canada for many years. The present prohibition on the importation of packaged U.S. honeybees is based on a 2003 science-based risk assessment, which indicated that importation could not occur within an acceptable level of risk. The importation of queens from the U.S. is permitted because there are mitigating measures that can be applied to shipments to reduce the risk to an acceptable level, and these measures cannot be applied to packaged bees.
>
> The Canadian Food Inspection Agency (CFIA) has indicated that it would need to receive an official request from the Canadian Honey Council to reconsider the position on packaged bee imports. Should an official request be submitted, an updated risk assessment would be required to thoroughly evaluate the honeybee health situation in the U.S., and the border would only be reopened if the risk level was found to be demonstrably low. Risk assessments performed by the CFIA are not routinely reviewed, and usually only occur if there has been a significant shift in either the information available or the sanitary status of a country that would reduce the risk to an acceptable level. This has not yet been demonstrated for the 2003 honeybee risk assessment; thus, it has not yet been updated.
>
> In your letter, you mention the challenges the industry faces in rebuilding colony numbers after winter losses each spring. Despite

> these serious challenges, Statistics Canada's provisional totals indicate that the Canadian honeybee industry had 627,713 colonies in 2011, which is the second-highest number of colonies on record after 2006, when there were 628,401 colonies. This achievement capped four continuous years of modest annual growth in national hive numbers and is due to the continuing hard work and reinvestment of beekeepers addressing bee health issues and replenishing their stocks through queen purchases and hive splitting.
>
> You have raised many valid concerns pertaining to the health of the honeybee industry in Canada. Provincial apiculturists are a suitable reference source for some of these issues. With regard to viral diseases, the viral status of honeybee colonies has not been the factor that has historically prevented trade. I note your comment that the disease status of both the U.S. and Canada are comparable. However, this is not true of the hazards identified in the 2003 risk assessment process, which are small hive beetles and Africanized honeybees. While small hive beetles do exist in certain areas of Canada, they are not widespread and the affected areas remain under provincial restriction and oversight. There is no evidence to suggest that Africanized honeybees are present in Canada.

[391] The letter went on to discuss the challenges surrounding accessing sufficient numbers of workers for the Canadian beekeeping sector.

[392] Mr. Ash was also referred to an email chain starting on March 2, 2012, between him and Mr. Robert Sopuck, whom he identified in his testimony as his then local Member of Parliament. The email referred to an attached letter to Dr. Snow (that letter is not attached to this email). The email states that many commercial beekeepers, primarily in western Canada, wanted the option to import US honeybee packages. Further, that the issue had fractured the industry for the past 25 years and that it was not possible for the industry to unite with a single goal as CFIA would like. The email states that Mr. Ash seeks an independent third party to consider all of the facts and lead the industry forward. He seeks the support of Mr. Sopuck to investigate the issue, taking into account the science and economics. Mr. Sopuck responded on March 16, 2012, noting that, at that time, CFIA could not provide an import permit for packaged bees from the US but that packaged bees could be imported from Australia, New Zealand and Chile, within what is

considered to be an acceptable level of risk, as determined by a science-based risk assessment. Further, and as Mr. Ash undoubtedly knew, the conclusion of the 2003 honeybee risk assessment was that the risk posed by reopening the border was high. Risk assessments by the CFIA usually only occur if there has been a significant shift in information available or the sanitary status of the country that would reduce the risk to an acceptable level. This would "overrule" the conclusions reached in the previous assessments. And, to reconsider the position on packaged bees, CFIA would need an official request from the CHC. Mr. Sopuck indicated that he was not well versed in this issue and it was therefore difficult to provide guidance. He suggested that Mr. Ash follow CFIA protocol and work towards submitting an official request from the CHC. Mr. Ash testified that he did not think that he had responded to this email.

[393] Mr. Ash was also referred to an August 15, 2013, letter from the then Manitoba Minister of Agriculture, Food and Rural Initiatives, Mr. Ron Kostyshyn, to Minister Ritz, copied to Mr. Ash and the Manitoba Beekeepers' Association. The letter concerned Manitoba's overwinter losses – for which Manitoba had implemented Overwinter Bee Mortality Insurance –, the need for CFIA to complete its risk assessment as soon as possible and the Manitoba Beekeepers' Association's proposal that, if the prohibition were not repealed, Manitoba be granted a special import permit to allow that province to import US bees. Mr. Ash testified that he did not recall any response to the letter.

[394] Mr. Ash was referred to a March 2014 email from him to Dr. Snow, Dr. Rajzman, Minister Ritz, Mr. Sopuck, Senator Buth and the Ministers of Agriculture and Finance concerning an attached email from a New Zealand package bee broker advising that it anticipated receiving 25% less bees than Canadian orders it had taken. Mr. Ash expressed his view that Manitoba needed another bee supply option. Mr. Ash did not recall if he received any response to his email.

[395] However, he was also referred to a June 20, 2014, email from Minister Ritz thanking Mr. Ash for his update regarding his order for replacement honeybees from New Zealand. This email noted that CFIA recognized that several Canadian beekeepers had been interested in the potential

to source honeybees from the US. In that regard, CFIA had finalized an updated risk assessment for the import of packaged honeybees from the US, and a final decision had been reached based on a science- and risk-based approach that the border to the US would remain closed, as risk-mitigating measures could not be developed to protect the Canadian honeybee population. Although the Minister understood that it was too late to initiate new orders for this spring, he noted that honeybee packages could be imported from Australia and Chile and stated that CFIA was committed to investigating other countries for available sources of honeybees.

[396] The Minister stated that Mr. Ash might be interested to know that Canadian beekeepers' associations and a wide range of stakeholders were co-operating to address bee health issues. Action to support bee health required an integrated and coordinated effort by multiple partners, as well as a science-based approach, to ensure effectiveness. On March 25, 2014, AAFC had sponsored a bee health workshop in Ottawa that brought together federal and provincial officials; representatives from the beekeeping, horticulture, grains, oilseeds and seeds sectors; industry service providers; and experts in the field drawn from national associations and organizations with direct implication in national bee health issues and solutions in Canada. As a result of that discussion, leaders from these sectors had made a commitment to further the dialogue and to pursue collaborative action in specific areas to address risks and opportunities related to bee health in order to ensure a sustainable future for agriculture and beekeeping.

[397] Mr. Ash responded on June 20, 2014, and, among other things, requested a meeting by the Minster with some commercial honey producers. Mr. Ash testified that there was no meeting with the Minster.

[398] Mr. Ash testified that the documents put to him during his testimony were the only written records of communications between him and CFIA or the Department of Agriculture concerning the US border closure. He stated that he had general telephone conversations with the Minister and Deputy Minister’s offices but that he could not recall what was discussed. On cross-examination, he testified that his telephone conversation was with the Deputy Minister and concerned an effort to set up a meeting with him. On re-direct, Mr. Ash was asked what the main

focus of the discussion was in all of the conversations he had with CFIA, his Member of Parliament, the Deputy Minister and others. He stated that it was what the import prohibition had done to the industry and risk mitigation strategies that could have been taken into account to avoid it as well as the general lack of science or the fact that the science did not make sense based on "our business models." However, the written correspondence reviewed above does not support that statement.

[399] On this point, I am satisfied that the written correspondence recording the discussions and meetings is the best evidence of what discussions were held, with whom they were held and what they entailed. I make this finding in light of the passage of time, the fact that the written documents were made contemporaneously with the events they depict, Mr. Ash's inability to recall any telephone conversations beyond one to the Deputy Minister's office intended to set up an appointment and his obvious reliance, when testifying, on the content of written documents to aid his recollection of the events and information depicted therein. In particular, I find that his testimony that risk mitigation strategies were a focus of those communications is not supported by the evidence and was likely intended to support the Plaintiffs' case.

[400] I pause here to note that in Schedule A of their written closing submissions, the Plaintiffs list what they describe as examples of evidence of proximity between CFIA and the honeybee industry. They divide these into four categories: interactions and reliance on the CHC; interactions surrounding the risk assessments; interactions with respect to permits; and, interactions/communications giving rise to knowledge of harm. Many of the communications included in Schedule A have been addressed above. However, the Plaintiffs also rely on evidence of various of the Defence witnesses to support their proximity argument. I will address that evidence below in my analysis along with other evidence that is relevant to this issue.

[401] That said, I will not specifically address the evidence that the Plaintiffs refer to as giving rise to knowledge of harm. This is because the Defendants have not substantively challenged that the potential negative consequences of the prohibition on US package importation were

foreseeable or that the Defendants had knowledge of the possibility of economic harm to some commercial beekeepers resulting from that prohibition.

(iii) Preliminary observations

[402] By way of preliminary observations, I first note that, in their closing submissions, the Plaintiffs argue that the Defendants repeatedly represented "to the beekeepers for over decades that the Defendants recognized, accepted and acknowledged that the purpose of the [*HA Act*] and [the *HA Regulations*] was to prevent the introduction of disease into Canada which could 'seriously affect' or have a 'significant economic effect' on the agricultural industry in this country" (referencing the RIASs). Further, that this relationship was "supplemented and fortified by an overwhelming degree of interactions between the parties" that gave rise to a discrete duty of care to conduct the risk assessments in accordance with the prevailing standards, which ought to have included and identified risk mitigation options. When addressing proximity, the Plaintiffs focus on the alleged failure to properly conduct the Risk Assessments.

[403] However, in my view, the issue of the conduct of the Risk Assessments is more closely tied to the standard of care and the breach of same, as will be addressed later in these reasons.

[404] The issue at this stage of the analysis is the nature of the relationship between the parties. That relationship is regulatory; therefore, the question is whether the interactions between the Defendants and the Plaintiffs fell outside CFIA's regulatory functions and, if so, whether they establish a close and direct relationship such that a private law duty of care is owed to protect the Class' economic interests pertaining to the importation of animals, specifically US honeybees.

[405] Second, I have found above that the purpose of the *HA Act* and the *HA Regulations* is the protection of the health of animals and humans, not the protection of the economic welfare of any industry segment. Other than the RIASs, discussed above and to which I will return below, the Plaintiffs point to no evidence supporting that the Defendants represented to the Plaintiffs

that the purpose of the *HA Act* and *HA Regulations* was to protect the economic interests of the agricultural industry.

[406] Third, I note that Canada closed its border to US honeybee packages in 1986. It is apparent from the evidence that, at least as early as the publication of the RIAS in 1987, there has been – and continues to be – division within the beekeeping industry about the prohibition on the importation of US honeybee packages. Further, that this division in opinion was well known to beekeepers, CFIA, the CHC and CAPA. The issue of US honeybee importation has been addressed in many venues over a very long time. Indeed, for some 37 years.

[407] Accordingly, the mere fact that there have been many communications and interactions pertaining to the importation of US bees is unsurprising. In other words, although the Plaintiffs point to the long period of time over which communications and interactions on this issue took place, the duration of the interactions does not, in and of itself, establish proximity. Rather, it is the nature of those communications and interactions, not merely their quantity, which will determine if there exists a special relationship between the Plaintiffs and the Defendants, the regulator, necessary to found a private law duty of care not to cause the Plaintiffs economic harm.

[408] As indicated above, the question is whether the evidence demonstrates a relationship and connection that is distinct from, and more direct than, the relationship between the regulator and that part of the public affected by the regulator's work (*Taylor* at para 80). In that regard, factors that are "generic and inherent in the regulatory framework" are not indicative of a relationship of proximity (*Wu* at para 64).

(iv) Nature of Communications with the Plaintiffs

[409] I have described in detail above the communications as highlighted by the Plaintiffs at trial, as they demonstrate not only the content of the communications between the Plaintiffs and CFIA, but also the context for those communications. That context is that of a regulator

communicating with members of the subject industry, beekeeping, about matters that impact that industry. In my view, they do not demonstrate an unusual or close and direct relationship outside the regulatory sphere.

[410] For example, Mr. Gibeau provided evidence that, during the 18-year period between 2006 and 2023, he communicated personally with CFIA on five occasions. His May 2004 letter was in response to the opportunity provided to the general public, by way of publication in the *Canada Gazette*, to comment on the proposed regulatory change to permit the importation of US queens, which he supported. His December 2011 email to the CHC, copied to CFIA, concerns his opposition to changes to importation restrictions on New Zealand honeybees, although that issue is not directly concerned with the importation of US honeybee packages. His January 2013 letter indicated his belief that applications to import US honeybee packages should be allowed. Dr. Aitken's response explained why this was not permitted and provided information on how Mr. Gibeau could request that CFIA consider developing new import protocols, which process Mr. Gibeau engaged in his responding letters. Mr. Gibeau's final communication on March 27, 2021, was an application for an import permit.

[411] Mr. Paradis' communications in April 2004 on his own behalf and in May 2004 on behalf of Peace River Honey Producers were made in response to the opportunity afforded, by way of the *Canada Gazette*, to comment on the proposed regulatory change permitting the importation of US queens. The July 2004 exchange with Dr. Lulai concerned importation of US honeybee packages and the 2003 Risk Assessment findings, and Mr. Paradis was advised that if he had new risk evidence, then this should be shared as set out. His emails in 2013 pertain to his import permit application, as did Dr. Aitken's response. His remaining correspondence generally expresses disagreement with CFIA's importation positions.

[412] Mr. Lockhart's April 2004 letter was in response to the *Canada Gazette* publication of the proposed regulatory amendment to permit the importation of honeybee queens; his April 2013 letter asked if there was a risk assessment being carried out; and, his November 20, 2013,

letter set out his view on importation. The 2013 application to import is just that, an import permit application.

[413] Mr. Ash, who is not a representative plaintiff, communicated with CFIA in 2006 about the status of the importation ban and received a response from Dr. Perrone explaining the operation of the *HA Regulations* and import reference document. Much of his correspondence concerned the expression of his desire to import US honeybee packages, actual import permit applications and CFIA's responses explaining why, pursuant to the regulatory regime, those applications were denied. He also wrote in support of the proposed regulatory amendment to permit the import of US queens, and, on behalf of the Canadian Honey Producers' Association and personally, he provided comments on the 2003 Risk Assessment. The remaining correspondence generally addresses his view that the importation of US honeybee packages should be permitted.

[414] In my view, when the publication of a proposed regulatory change in the *Canada Gazette* affords the public a period of time within which they may comment on the proposal, evidence of such responses cannot support a special relationship with those who respond. Such opportunities are open to the public in general – not just a particular segment of the public (in this case the Class). Moreover, such consultation and these opportunities to respond are clearly part of, or inherent to, the regulatory process. Similarly, when a regulator invites a broad stakeholder base to provide responses to other consultations, such as comments in response to the 2013 Risk Assessment, this does not serve to demonstrate a special relationship between CFIA and the Plaintiffs.

[415] In that regard, the role of consultation in the context of the proposed regulatory change was addressed in Dr. Belaissaoui's testimony about the regulatory amendment process that allowed the importation of US queens. Her evidence was that any amendment process typically has to be published. Proposed amendments are first published in the *Canada Gazette, Part I* for a comment period. If there are no major concerns, then they are published in the *Canada Gazette, Part II* for implementation. Dr. Belaissaoui stated that it is an important part of the regulatory

process to publish the proposed amendment and to provide a comment period. This provides all stakeholders and the public with an opportunity to comment on the proposed regulatory changes. If opposition was expressed to a proposed amendment, or if questions or concerns were raised that could be answered, then that was part of the consultation process for regulatory change.

[416] Dr. Belaissaoui testified that it would be highly unusual for CFIA to suggest a regulatory amendment without pre-publication of intent and at least a 30-day comment period given that CFIA was aware that some provinces were opposed to the proposal. Only unanimous stakeholder support would permit the skipping of this step. Even if there were strong support for an amendment, it would still be published in the *Canada Gazette, Part I* for consultation so that all stakeholders and the public had an opportunity to comment on the proposed regulatory change.

[417] The evidence shows that the comments received were compiled into two tables with dates received, the individual or organization who made the comment, a summary of the comment, whether the commenter was in support of the importation of queens and whether or not they had received a response. The first of these tables recorded the comments of those who were in favour of the proposed amendment and contained 102 responses. Mr. Gibeau, Mr. Paradis and Mr. Ash were among these. A second table with 76 comments from those who were against the proposed amendment to permit the importation of US queens was also generated.

[418] In my view, the fact that Mr. Gibeau, Mr. Paradis and Mr. Ash (as well as various beekeeping associations) were among the members of the public and stakeholders who provided comments in response to the proposed regulatory change to permit the importation of US queens is not evidence of a close and special relationship of the Class with CFIA.

[419] In that regard, the Plaintiffs point to the comments submitted by the Manitoba Beekeepers' Association during the comment period for the 2013 Risk Assessment, which attached a document entitled "Importation of Packaged Honey Bees from California, United States, to Manitoba, Canada" [Manitoba White Paper]. They submit that the Manitoba White Paper supports proximity in the context of interactions surrounding the risk assessments (this

document was subsequently again provided to CFIA, by Mr. Rhéal Lafrenière, the Manitoba Provincial Apiculturist, in response to a request by Dr. Rajzman that the Provincial Apiculturists review the 2013 Risk Assessment and provide any options, mitigating measures or conditions that may allow the importation of honeybee packages from specific states having a higher health status). In my view, the submission of the Manitoba White Paper in response to a request for comments from stakeholders, which request was part of the consultation conducted within the risk assessment process, does not establish a special relationship of proximity between CFIA and the Plaintiffs. While the document was authored by the Manitoba Beekeepers' Association, it was part of a broader consultation.

[420] I will address case law considering whether consultation gives rise to proximity below.

[421] As to import permits, applying for permits to import honeybees, which part of the regulatory regime has been described above, and communications in that regard also cannot give rise to a special relationship. It is the role of CFIA, as the regulator, to issue or deny import permit applications. Thus, the communications of the Representative Plaintiffs, as well as Mr. Ash, to CFIA requesting import permits or taking issue with the refusal to issue such permits do not support the Plaintiffs' claim of a special relationship of proximity. Responding to such requests falls squarely within CFIA's regulatory mandate.

[422] I note in passing here that, as examples of CFIA interactions regarding permits, the Plaintiffs, in Schedule A of their written closing arguments, refer to two email chains with Dr. Rheault. The first chain includes an email dated June 4, 2021, from John Conrad, the Assistant Deputy Minister, Primary Agriculture Division. Mr. Conrad noted that the Alberta Beekeepers Commission had asked CFIA for an emergency exemption the previous December to allow the importation of packaged bees from Northern California. The chain was forwarded to Dr. Rheault on June 6, 2021.

[423] The second email chain starts with an email from Connie Phillips, the Executive Director of the Alberta Beekeepers Commission, from March 23, 2021. It was sent to Dr. Rheault, among

others. Ms. Phillips says that the Commission had requested an emergency exemption in December 2020 for packages from Northern California but that CFIA refused to consider the request at that time. The letter goes on to again request an emergency exemption.

[424] Again, however, these communications do not demonstrate that CFIA was participating in an initiative that fell outside its regulatory functions. CFIA's regulatory role requires it to consider such requests from members of a regulated industry, and importation of US honeybees was a matter of animal health, regardless of the fact that it may also have had economic consequences. Nor do the communications demonstrate a special relationship between the Class and CFIA.

[425] And, while Dr. Rajzman shared the 2013 Risk Assessment with Mr. Lockhart and Mr. Paradis, this was at their request. At the same time, it was also shared with CAPA, the Chief Veterinary Officers of each province, the Provincial Apiculturists and other stakeholders. One hundred and seventy-four comments were received in response to the draft 2013 Risk Assessment. It is obvious that the 2013 Risk Assessment was generated in the course of CFIA's regulatory activities. The fact that Mr. Paradis and Mr. Lockhart were, at their request, provided with a copy and permitted to comment is not, in my view, sufficient to give rise to a special relationship between CFIA and the Class. They participated as stakeholders within a regulatory consultative process.

[426] Over the years, there were other communications to CFIA and the Minister expressing the views of Mr. Gibeau, Mr. Paradis and Mr. Lockhart, as well as Mr. Ash and industry associations these beekeepers represented. Most of those communications essentially take issue with the position taken by CFIA, as the regulator, concerning the prohibition on the importation of US honeybees. Again, however, the mere fact that there is disagreement with a government position and that this is expressed to government cannot ground a private law duty of care. Were it so, concerted letter-writing campaigns, lobbying efforts and/or advocacy efforts would be sufficient, in any regulatory regime, to establish proximity.

[427] I also acknowledge that while the communications described above between CFIA and the Representative Plaintiffs and Mr. Ash are those that were put to the Representative Plaintiffs at trial, they were not the only such communications between CFIA and beekeepers and beekeeper associations. In Schedule A of their closing submissions, the Plaintiffs identify other documents upon which they rely, many of which I have addressed in these reasons (by footnote references and in Schedule B of their written closing submissions, the Plaintiffs also list other communications found in the Joint Book of Documents). However, I find that the communications in whole do not establish that CFIA engaged with the Class in a manner that was not inherent to the regulatory process and CFIA's public law duty to protect animal health. That is, I find that these communications do not, in and of themselves, demonstrate a proximate relationship between the Plaintiffs and the Defendants that would support a private law duty of care. These communications are demonstrative only of interactions and communications inherent to the regulatory relationship.

(v) CAPA and the Provincial Apiculturists

[428] It is not clear to me whether the Plaintiffs intended to rely on CFIA's interactions with CAPA and the Provincial Apiculturists in support of their argument on proximity. Although the Plaintiffs' examples of proximity in Schedule A to their closing submissions do not emphasize any relationship between CFIA and CAPA, parts of their submissions refer to interactions with CAPA in the context of the proximity analysis.

[429] It may therefore be helpful here to briefly describe CAPA and the Provincial Apiculturists and their interactions with CFIA and beekeepers.

[430] CAPA is described in the Partial Agreed Statement of Facts as "the Canadian Association of Professional Apiculturists, a group of academics and provincial apiculturists. Full voting membership in CAPA is open to: federal and provincial apiculturists; extension, teaching, or research apiculturists; apiary inspectors and disease or pest inspection staff; apicultural technicians; and other professionals whose work involves managed bee species."

[431] Two Provincial Apiculturists who are CAPA members gave evidence at trial: Mr. Paul Kozak and Dr. Medhat Nasr.

[432] Mr. Kozak described the role of the Provincial Apiarist in Ontario as having two parts. The first part is primarily regulatory (administration of the *Bees Act*). He also works closely with apiary inspectors, the apiary program and with the registration of beekeepers. The other part is advisory and involves outreach to beekeepers, working with researchers and advising internally to government and externally to beekeepers, universities and other stakeholders. Mr. Kozak testified that he has been a member of CAPA since about 2006. He has been involved with various committees, including the CAPA Import Committee. He testified that most Provincial Apiculturists are *de facto* members of the CAPA Import Committee.

[433] He described the role of the CAPA Import Committee as being to "provide options on issues raised by the CFIA, CHC, researchers, and specialists." CAPA's Executive Committee's role was to be "aware of major issues and provide additional comment and direction where needed." CAPA is a volunteer organization.

[434] He testified that the CAPA Import Committee discusses pest and disease status in Canada and updates on disease status in other countries and, to an extent, in individual provinces. It also works with outside stakeholders such as the CHC (as the industry association) as well as with CFIA on an as-requested basis.

[435] Mr. Kozak spoke to communications and interactions with CFIA, indicating that, from time to time, CFIA would request that CAPA provide input or feedback or review risk assessments. Communication also flowed the other way, and if a CAPA committee or individual became aware of new updates concerning pests and diseases, they may advise CFIA of this.

[436] Dr. Nasr also described his role as the Alberta Provincial Apiculturist. He testified that the first mandate for Provincial Apiculturists is to implement the relevant bee acts and

regulations. This includes addressing the mandatory registration of anyone who keeps bees in the province; conducting surveys and surveillance to ensure bee health; and liaising for the apicultural program representing the provincial Minister at different levels, including in terms of economics and in dealing with CFIA, PMRA (Pest Management Regulatory Agency), the federal government more generally and his colleagues across the country. There is also an extension and education component, to help beekeepers understand changes in the industry and how to adapt.

[437] Dr. Nasr testified that the Provincial Apiculturists are a group of specialists who assist each other and communicate about emerging issues and the management of same. They interact by way of conference calls and via CAPA as a platform. There is an annual CAPA meeting at which the Provincial Apiculturists also separately meet to exchange information. Every Provincial Apiculturist is an *ex officio* member of the CAPA Import Committee.

[438] With respect to interactions with CFIA, Dr. Nasr testified that CFIA relies on the Provincial Apiculturists to annually provide information on bee health in each province. CFIA also occasionally makes requests for information and opinions, based on science, to allow CFIA to understand developing honeybee issues. Each Provincial Apiculturist also provides an annual report on honeybee health, submitted through CAPA.

[439] In terms of proximity, it is significant to note here that CAPA's membership does not include beekeepers. Rather, it is made up of scientists who have expertise and knowledge of bee health. Dr. Pernal described CAPA's membership as professionals in Canada whose job it is to work with honeybees or other bee species. They would include people like university professors that might do bee research, government employees like Dr. Pernal, provincial government employees, those involved more on the regulatory affairs side as well as the Provincial Apiculturists, whose job it is to enforce the *Bee Act* in each province. Dr. Nasr also testified that CAPA does not include beekeepers as members.

[440] Suffice it to say here that the evidence before me was clear and undisputed that CFIA considered and relied upon CAPA and the Provincial Apiculturists as sources of sound scientific information about honeybee health, pests and diseases.

[441] However, interactions between CFIA and CAPA do not establish or even contribute to a special relationship between the Plaintiff beekeepers and CFIA. The beekeepers are not members of CAPA. Mr. Kozak testified that, typically, inquiries received from provincial beekeeping associations would be referred to CHC as the national industry organization for beekeepers. CAPA communicated primarily with the CHC and not individual beekeepers or beekeeping associations.

[442] Thus, although the Plaintiffs assert that CFIA relied on CAPA's expertise, in the context of establishing proximity, the fact that CFIA considered and relied upon CAPA and the Provincial Apiculturists as sources of sound scientific information and advice about honeybee health, pests and diseases does not establish a special relationship between CFIA and the Plaintiffs.

(vi) Meetings with CAPA

[443] This leads to CFIA attendance at CAPA meetings. The Plaintiffs suggest that attendance by CFIA supports interactions with and reliance upon the CHC.

[444] In that regard, the Partial Agreed Statement of Facts indicates that one CFIA representative (two in 2007, 2008 and 2010) attended the annual CAPA meetings between 2002 and 2012 and, in most of those years, those representatives presented reports on the importation of honeybee packages and/or queens.

[445] The CAPA reports are referred to as "proceedings," which is accurate, as they reflect the events and reports presented at the annual general meeting of the subject year. They generally

follow a set format. The members in attendance are listed, as are guests and speakers. For example, in the 2003 Proceedings, Heather Clay of the CHC, Dr. Jamieson of CFIA, D. MacMillan of the CHC, C. Boucher, Brian Hamilton and the CHC Directors are so listed. The Reports given at the meeting are listed (CFIA Report, CHC Report, CAPA President's Report, Financial Report, Import Committee Report, Chemicals Committee Report, Non-apis Committee Report, New Publication Report, CBRF Report, Communications Committee Report and Awards Committee Report). The CFIA Report that year was made by Dr. Jamieson, who discussed a number of topics and developments. The CHC Report also dealt with a range of topics. All of the submitted reports are brief and essentially serve as an update of developments.

[446] The Provincial Reports in the 2003 Proceedings include a report of all provinces (table form) for the 2002 production season as well as a report from each province, prepared by the Provincial Apiculturist of that province, providing information about beekeeping industry statistics and bee diseases and pests. The proceedings also include four research reports and indicate that a joint meeting of the AAPA, AIA and CAPA was held. CAPA's bylaws are also set out, and the 2003 CAPA executive and committee members, as well as its general membership, are listed.

[447] The 2004 CAPA Proceedings indicate that Dr. Belaissaoui provided the CFIA Report. Her testimony was that she gave an update on the regulatory process (to amend the regulatory prohibition to permit the importation of US honeybee queens) and advised that CFIA sought each province's position concerning the import conditions for US honeybee queens developed in Kelowna (the meeting in Kelowna is addressed below). She testified that this was "again about the sharing of information." The 2004 CAPA Proceedings reflect this.

[448] Many of the CAPA annual proceedings are in evidence. Over the years, CAPA's annual proceedings have generally take the same format but have been refined, and new committee reports have been added. For example, the 2022/23 Proceedings indicate that at that meeting, Dr. Stephen Pernal of AAFC made a presentation concerning national statistical trends in honey, beekeeping and pollination, which was accompanied by a PowerPoint. The CHC Report

provided an overview of the CHC's activities over the previous 12 months and was accompanied by a PowerPoint. The Pest Management Regulatory Agency provided an update, as did Dr. Rajzman for CFIA, which included an update on the import risk assessments of honeybees from Ukraine, Italy, Cuba and Slovenia; and on exports from Canada to the US requiring viral testing within ten days, including Slow bee paralysis virus (SBPV) and Deformed wing virus C (DWV-C), among other topics

[449] The Committee Reports include the Winter Loss Survey Report, prepared by Dr. Nasr. CAPA and the Provincial Apiculturists coordinated the annual honeybee wintering loss report. This includes a survey of harmonized questions, with the Provincial Apiculturists collecting survey data from all provinces. The data is reported, including what each province ranked as the top four suspected causes of colony losses as reported by responding beekeepers. An AAPA Update Report and AIA Report are included, as are the Provincial Reports.

[450] CFIA representatives did attend the CAPA annual meetings, as did other stakeholders such as the CHC, the Provincial Apiculturists, AAPA and the AIA. The CAPA annual proceedings demonstrate that there is information and data-sharing facilitated by CAPA and, in some cases, proposed go-forward actions. Viewed in the context of the CAPA meetings as a whole, CFIA's attendance was as a guest and as a regulator providing informational updates to the attendees and benefitting from the exchange of information with other attendees. I find that CFIA representatives attending CAPA meetings and providing updates to the attendees, exchanging potential paths forward or being alerted to new scientific articles does not create a special relationship between CFIA and Plaintiff beekeepers.

[451] And, while the CHC, the national beekeeping association, was also a guest attendee at the annual CAPA meetings, it is difficult to see how the fact of its attendance serves to create a special relationship between the Plaintiffs and CFIA in these circumstances. I find that CFIA's attendance at what was primarily a scientific professional meeting cannot be construed as interactions with beekeepers giving rise to a special relationship with the Class. Nor does CFIA's attendance in this regard comprise activities outside its regulatory role.

[452] So, while the Plaintiffs note that Dr. Perrone presented a report entitled “Importation of Honeybees: Regulatory Update” at the 2007 CAPA annual meeting as an example of an interaction with and reliance on the CHC, I do not agree that this supports a special relationship outside CFIA’s regulatory role in communicating with stakeholders, including but not limited to the CHC.

(vii) Other Meetings

[453] The Plaintiffs also point to other meetings such as Mr. Ash’s meeting with Dr. Jamieson while both were attending a joint CHC and CAPA meeting in December 2012, which Mr. Ash testified that he attended to promote the Canadian Honey Producers’ Association. While Mr. Ash did use that opportunity to speak with Dr. Jamieson, this does not appear to have been a formal meeting between CFIA and the Canadian Honey Producers’ Association. And, in any event, conversations with beekeepers and beekeeping associations about beekeeping current events or concerns appear to me to be part of the regulator’s role. This conversation is not evidence of a special relationship with the Class. The same is true of the December 20, 2004, meeting of Mr. Ash, as the president of the Canadian Honey Producers’ Association, and Dr. Lulai and Dr. McCool. Mr. Ash’s testimony was that he asked to meet with Dr. Jamieson, whom he believed would be attending CHC meetings at that time. The CFIA attendees were Dr. Lulai and Dr. McCool. The stated purpose of the meeting was to introduce the Canadian Honey Producers’ Association and to gain an appreciation of CFIA’s role.

[454] Similarly, on December 8, 2020, Dr. Rajzman, along with Dr. Baxi and Dr. Lafortune, had a meeting with the Alberta Beekeepers Commission. Dr. Rajzman’s written summary of the meeting, which she confirmed in her testimony at trial, indicates that the Commission asked CFIA to open the US border to the importation of honeybee packages, primarily on the basis of hardships due to long winters and issues related to COVID-19. However, CFIA explained that the decision was based on a science-based risk assessment that had determined that the risk was too great. CFIA requested that if there was new scientific information/measures (i.e., not anecdotal) that could mitigate the risk of importation, then the Commission send it, and it would

be reviewed by CFIA. Further, that the CHC had advised that it had secured packages for the upcoming season and that there were no foreseen shortages for 2021. This meeting was convened at the request of the Alberta Beekeepers Commission, and, in any case, engaging with a stakeholder group seeking to express its industry-related concerns, and inviting that group to provide scientific information in support of their position, does not fall outside CFIA's regulatory role.

[455] I will also address here a meeting (held in conjunction with other meetings then scheduled) convened by CHC that concerned the development of import protocols for the importation of US queens that was held in Kelowna, British Columbia, in October 2003 [Kelowna Meeting]. Although the Plaintiffs do not rely on this meeting in terms of establishing proximity, it is an example of a CFIA and CHC interaction on which significant focus was placed at trial.

[456] By way of background, Dr. Nasr, the then Alberta Provincial Apiculturist, testified that, because he was concerned about the smuggling of US queens into Alberta and the potential harm this could cause, he began work on a US queen importation protocol for Alberta Agriculture, Food and Rural Development. The suggested protocol was shared with beekeeper associations (and revised), CFIA, the CHC and CAPA. Ultimately, the discussion became national and was led by the CHC as the national beekeeper association (I note that the importation of US queens was ultimately permitted following the 2003 Risk Assessment).

[457] Dr. Belaissaoui, when discussing the Kelowna Meeting, indicated in email correspondence to the Saskatchewan Provincial Apiculturist, "It is not our intent to attend a general industry meeting on this topic. If there is to be a 'technical meeting' attended by a significant number of Provincial Apiculturists to discuss possible import conditions for U.S. queens, CFIA will endeavour to attend. Limited CHC participation is anticipated as well in any meeting to develop import policies."

[458] Dr. Belaissaoui and Dr. Bill Anderson attended the Kelowna Meeting. Dr. Belaissaoui's testimony was that the intent of the meeting was to work together with people who had expertise in honeybees to develop import conditions for US queens if the proposed amendment was implemented. Dr. Belaissaoui testified that her role in this meeting was to give information on the regulatory aspect, in terms of import conditions and export certification – that is, what was practical to include in import conditions. Five Provincial Apiculturists attended, including Dr. Nasr. Ms. Clay from the CHC and representatives of provincial beekeeping associations and their CHC delegates, including from the Alberta Beekeepers Association, also attended.

[459] By letter dated October 28, 2003, Ms. Clay wrote to Dr. Anderson describing the Kelowna Meeting and attaching a summary of the results of same, as prepared by the CHC. Ms. Clay stated that the goal of the CHC *ad hoc* committee was to bring together expert opinion of the major stakeholders (industry, provincial and federal governments) to develop industry recommendations for import conditions that address the health and environmental concerns of the bee industry. This goal was also stated in the Terms of Reference of the attached document, entitled "Proposed Import Conditions for Honeybee Queens," which, significantly, also indicated that the meeting was not intended to indicate support or otherwise for the proposed amendment to the regulations (permitting the import of US queens). That decision would be open for debate when the amended regulations were published in the *Canada Gazette, Part I*. The recommendations were stated to have been based on scientific and technical advice.

[460] I raise this meeting here because, although it was convened by the CHC and was attended by CFIA and other stakeholders, it is illustrative of interactions between CHC and CFIA. More specifically, the evidence establishes that CFIA attended in its capacity as a regulator to work toward the development of import conditions for the importation of US honeybee queens, on the understanding that it was to be a technical meeting about developing workable conditions. Such participation does not exceed the role of a regulator.

(viii) No commitment to annually review US honeybee health

[461] As discussed above, in my view the RIASs do not establish that the purpose of the *HA Act* and the *HA Regulations* is to protect the economic interests of individual beekeepers. It follows that the RIASs are not representations to the Plaintiffs or interactions sufficient to ground a private law duty of care. I agree with the Defendants that the RIASs accompanied proposed regulations and are explanations of those regulations provided to the public. As such, they cannot ground a duty of care to a particular group, in particular, the Class.

[462] However, the Plaintiffs assert that the RIASs demonstrate a commitment by CFIA to annually review US honeybee health. The Defendants say that the RIASs do not support this. They submit that this assertion is based on documents from 2002-2004, and that none of the documents supporting this claim as identified by the Plaintiffs postdate the expiry of *HIPR, 2004*. Further, that the evidence establishes that any commitment to conduct an annual review was made in the context of the five-year term of the *HIPR, 1999* (prohibition regulations normally being for one- or two-year terms). The Defendants say that the Plaintiffs have not provided any evidence that, during the following 19 years, CFIA committed to annual reviews of the importation of US honeybee packages. Further, that none of the beekeepers who gave evidence testified that they were promised an annual review, much less that they relied on such a promise.

[463] The August 30, 2000, publication of the *Canada Gazette, Part II* extended the order prohibiting the importation of US honeybees to December 31, 2004 [*HIPR, 1999*]. The RIAS states, among other things, that a five-year extension was proposed because there was no expectation that the concerns described (SHB and varroa mite) would be resolved in a two-year period. CFIA would continue to assess the situation with industry on an annual basis and, if necessary, would revise the position. It seems apparent from this that the referenced annual assessment was premised on the fact of the five-, rather than two-, year extension and the anticipation that there would be no change in honeybee diseases during that five-year period. I understand the annual assessments to pertain to that period.

[464] In that regard, the Memorandum to the President seeking a decision to allow a regulatory amendment to permit the importation of US honeybee queens, prepared by Dr. Belaissaoui, states in part that in August 2000, when the import prohibition was extended through December 2004, it was agreed that CFIA should review the situation annually to ensure that continuing the ban was appropriate. This is clearly connected to the above RIAS. Similarly, another Memorandum to the Minister prepared by Dr. Belaissaoui on the same topic states in its background section that in 2000, when the import prohibition was extended through December 2004, it was agreed that the CFIA should review the situation annually to ensure that continuing the ban was appropriate. An October 23, 2003, Memorandum to the Minister (which during her testimony Dr. Belaissaoui identified as a question period card) updating them on the issue of the importation of US queens includes in the background section that in August 2000, when the import prohibition was extended through December 2004, CFIA agreed to review the situation annually to confirm the necessity of the ban. Again, it seems apparent that the annual review is in reference to the extension of the *HIPR, 1999*.

[465] In their opening submissions, the Plaintiffs refer to documents included in Schedule H to their memorandum, "Key Evidence Re CFIA's Commitment to Annually Review the Import Ban." The Memoranda to the President referred to above were on this list. Most of the other documents in Schedule H were not entered as exhibits at trial, nor were many of them included in the Joint Book of Documents. In any case, none of these documents are from later than 2004, and they say nothing more than that, in the context of the extension of the ban through to 2004, it was agreed that CFIA should review the situation annually to ensure that continuing the ban was appropriate. None of the documents appears to be a representation to the beekeeping industry. The Plaintiffs' read-ins on this issue lead me to the same conclusion.

[466] This evidence does not establish that CFIA represented to the Class members that there would be an annual review after the five-year extension period. Further, that time period was followed by the completion of the 2003 Risk Assessment. The consistent evidence of CFIA witnesses at trial was that risk assessments are not annually or routinely reviewed. Rather, they will be reviewed, or a new risk assessment will be conducted, if there is scientific information

indicating that there has been a change in the level of risk in either the exporting or importing country. It can reasonably be inferred from this that the annual assessments described in the RIASs did not extend beyond the 2003 Risk Assessment.

[467] The bottom line here, in terms of proximity, is that the Plaintiffs have not established that there was a representation by CFIA to the Class that annual assessments would be conducted beyond the expiration of *HIPR, 1999* in 2004, nor that there was any reliance by the Class on such a representation. In sum, although the Plaintiffs rely heavily on the RIASs to support their claim of proximity, I find that the RIASs do not do so.

(ix) Interactions with and reliance on CHC

CHC as national representative body

[468] The evidence is clear that CFIA considered the CHC to be the national association of Canadian beekeepers. For example, Dr. Perrone testified that CFIA always tried to make decisions based on what was best for the whole country, rather than for a particular sector or province, and that CFIA considered the CHC to be the national industry organization representing Canadian beekeepers across the country. Further, that the CHC view or perspective was recognized by CFIA as the view of the Canadian industry as a whole. She also communicated to Mr. Paradis that CFIA recognized the CHC as the national association for Canada's beekeeping industry. Dr. Snow testified that she considered the CHC to be the voice for the national honeybee industry, a view she reconfirmed on cross-examination. Dr. Rajzman also considered the CHC to be representative of the national beekeeping industry.

[469] The CHC also represented itself as the national representative of Canadian beekeepers. For example, in a letter dated November 25, 2013 (in which CHC declined to take a position on the importation of US honeybee packages), it described itself as "the umbrella organization" of the provincial beekeeping associations.

[470] The Partial Agreed Statement of Facts defines the CHC as "a not-for-profit national body that represents the interests of Canadian beekeepers (although the parties disagree as to the extent to which CHC has authority to represent or that it represents the interests of all Canadian beekeepers). The CHC provides a forum to beekeepers to discuss common issues and it makes recommendations to various levels of government."

[471] The evidence of Mr. Paradis was that CHC's leadership comprises one delegate from each of the provinces (provincial beekeeping associations), except the Maritime Provinces, which have one delegate. According to Mr. Townsend, Alberta has two delegates. There is also one delegate from Bee Maid, a cooperative owned by beekeepers. Mr. Paradis testified that delegates can bring forward resolutions on various topics from their home provincial associations to CHC meetings. Mr. Townsend testified that in CHC decision-making, each delegate has one vote. Provincial delegates are expected to vote to advance the position taken by their provincial association. A majority of CHC director/delegate votes is required to support a motion.

[472] The Partial Agreed Statement of Facts indicates that the commercial beekeeping industry operates in all Canadian provinces. Further, that commercial beekeeping operations in Alberta, Saskatchewan and Manitoba tend to be larger than in other provinces. While beekeeping operations in other provinces tend to be smaller, the number of beekeepers is greater than in the Prairie Provinces, particularly in Ontario and British Columbia.

[473] At trial, Mr. Ash expressed his view that commercial beekeepers did not have a "voice" at the provincial association level and, therefore, at the CHC and CFIA. Further, that the CHC required majority support to advocate a position. The underlying premise of this view is that while the Prairie Provinces had more bee colonies, they had the same vote at the CHC as provinces who had fewer colonies but more (smaller or hobbyist) beekeepers. The view held by some commercial beekeepers that they lacked a "voice" led to the formation of the Canadian Honey Producers' Association (now the Canadian Beekeepers Federation).

[474] This has been a longstanding debate, as illustrated by a 2004 Memorandum to the Minister – Importation of Honeybees from the Continental U.S. This indicates that, at that time (January 2004), 53% of the total number of honeybee colonies were found in Alberta and Manitoba and were owned by 15.5% of Canadian beekeepers, while 40% of Canada's beekeepers lived in Ontario and Quebec and owned about 18% of the honeybee colonies. The Memorandum notes that western producers who owned large numbers of colonies were of the view that while they were dependent on honeybee-generated income for their livelihood, many eastern beekeepers were hobbyists who merely supplemented their incomes through beekeeping. The western producers were of the view that it was the eastern hobbyists that prevented them from importing US queens (as indicated above, importation of US queens was permitted as of 2004).

[475] Be this as it may, the evidence is that the CHC is the national beekeepers' association. No evidence was presented to establish any other national beekeepers' associations (other than the opinion expressed by Mr. Ash, nor did the Plaintiffs put forward evidence in support of their allegation, as contained in the Amended Amended Statement of Claim, that the CHC is dominated by a "Faction" that did not act in the best interests of the commercial beekeeping industry as a whole).

[476] Because the CHC represents all Canadian beekeepers, the CHC is broader than the Class. Therefore, CFIA interactions with CHC represent interactions with more than just the Class or even just commercial beekeepers. In short, specific interactions between CFIA and the CHC are not interactions that are exclusive to the Class. And, while CFIA viewed the CHC as the representative of the national beekeeping industry, it was also well aware that beekeepers (and provinces) were highly divided on the matter of the importation of US honeybee packages.

[477] Further, to the extent the Plaintiffs did take issue with CHC as a representative body (which position was not pursued at trial), this would not appear to support that they had any expectations that CFIA interactions with CHC would create a duty of care on the part of CFIA to be mindful of commercial beekeepers' interests – economic or otherwise.

Role of CHC in CFIA decision-making

[478] In any event, even if interactions between CFIA and CHC could support a finding of proximity between CFIA and the Plaintiffs, and I have found that they do not, I find that the interactions in question did not exceed CFIA's regulatory role. As the Defendants submit, the evidence has not shown that CFIA's communications were "distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator's work" (*Taylor* at para 80); rather, they inherently arose from the regulatory framework in the interests of animal health.

[479] In their Amended Amended Statement of Claim, the Plaintiffs assert that the Defendants breached the duty of care owed to the Class by, among other things, delegating or submitting their regulatory decision-making to the CHC, which the Defendants knew or ought to have known was dominated by certain commercial honeybee "factions" that did not act in the best interests of the commercial beekeeping industry as a whole. In their opening submissions, the Plaintiffs asserted that the relationship between the CHC and CFIA "went so far as the Defendants permitting their importation decisions to be captured by the Canadian Honey Council, allowing that organization to dictate the operation of the import scheme respecting American honeybee packages." In support of this assertion, they refer to the letter from Minister Ritz to Mr. Ash, described above at paragraph 390.

[480] In their closing submissions, the Plaintiffs say that when responding to requests from commercial beekeepers to relax import restrictions, or when preparing responses on behalf of the Minister, CFIA advised that an official request from the CHC was a "necessary precondition" for the CFIA to reconsider import restrictions – notwithstanding that there is no requirement for this in the *HA Regulations*.

[481] I would first note that the evidence establishes that CFIA sought, by way of interactions with CHC and to the extent possible, to ensure that industry's interests aligned with CFIA's proposed courses of action. For example, Dr. Snow gave evidence that CFIA's regulatory role

necessarily includes industry consultation and engagement to ensure that those impacted by regulatory action are kept abreast of developments and can prepare for any potential consequences. Similarly, she was taken on cross-examination to an April 29, 2011, email to a Mr. Sheran in which she indicated, among other things, that CFIA appreciated that the wishes and needs of producers across Canada varied, which is why CFIA consulted with national organizations such as the CHC to represent overall national interests. Dr. Snow stated, in closing, "In Canada, the CFIA focuses on maintaining the health of Canadian honeybees, and we strive to respond to the needs of the Canadian producers while doing so."

[482] Dr. James similarly testified that industry does not have the regulatory authority to decide border opening or closing – that was definitely CFIA's role – but within the role of risk management, there was also a role to consult with industry to ensure it was onside.

[483] In Schedule A of their closing written submissions, the Plaintiffs referred to an internal CFIA email dated October 13, 2006, in which Dr. Barr explained why they could let the prohibition order lapse and wrote that "Maria [Perrone] is going to check with the Industry to ensure they are OK with this. If they object, we will have to re-thing [*sic*] but she is going to try to be very persuasive." When Dr. Perrone was asked about this email at trial, she said the following: "…I don't think 'convince' is the correct term. We just wanted to make sure that industry was comfortable with the prohibition order expiring and not being renewed….".

[484] The CFIA evidence also indicates that industry engagement can avoid wasting regulatory resources, for example, by not conducting risk assessments for country/commodity combinations that are of no assistance to an industry. In that regard, Dr. Rajzman asked Rod Scarlett, who at that time was chair of the CHC, to poll the CHC membership to determine if there would be interest in honeybee importation from Malta. As it turned out, there was no interest because production was not sufficient in Malta to warrant the resources needed for a risk assessment.

[485] In that respect, although in support of their submission on proximity the Plaintiffs point out that Dr. Rajzman communicated with Mr. Scarlett, it is the nature of CFIA's communications

with the CHC, and not the mere fact that communications took place, that informs proximity. Indeed, referred to a March 2018 email exchange with Mr. Scarlett about a request from Italian beekeepers about exporting honeybees, Dr. Rajzman testified that it was not up to the CHC to decide whether bees would be imported from European countries.

[486] For their part, the Defendants submit that consultation with the national industry group is important to be aware of activities and to anticipate impacts; however, animal health is the primary goal. As examples, the Defendants referred to Dr. Rajzman's involvement in working group meetings that dealt with SHB, which included CFIA, the CHC, CAPA and the Provincial Apiculturists; and to her attendance at the Honeybee Sustainability Working Group, which included CFIA, the CHC, the Provincial Apiculturists and others. Dr. Rajzman participated in groups such as a Bee Health Roundtable, co-chaired by AAFC and the CHC, to look at bee health in Canada. She also consulted CHC when there were incursions into the import condition radius for honeybee queens from the continental US. I agree that these are examples of the reasonable engagement of a regulator with a regulated industry – by way of engagement with the CHC (and others) – that clearly fall within the CFIA's animal health mandate.

[487] Dr. Snow also gave detailed evidence respecting CFIA's relationship with CHC in the context of her communications with Michael Paradis, who had emailed Dr. Aitken on May 10, 2011, about an erroneously issued permit. Among other points, Michael Paradis expressed his view that the prohibition of importation should be revisited. He urged that CAPA and the CHC be afforded only a small voice and proposed that there should be a panel of entomologists to discuss his views with Dr. Snow and Dr. Pernal (who he stated agreed with him "on all counts"). He stated that he would like to be included in that discussion.

[488] Dr. Aitken forwarded Michael Paradis' email to Dr. Snow for response. Dr. Snow responded by email dated May 12, 2011, writing in part:

> This brings me to the next point related to industry consultation. The CFIA strives to respond to the needs of the national industry groups, while still working within the bounds of our mandate. Working with industry is very important to us, as can be

> demonstrated this year by the situation in Hawaii: The CFIA worked to maintain Hawaii as a source of queens despite the change of health status which could have resulted in that area being ineligible to export to Canada.
>
> Industry consultation is not only done with the honeybee industry - it is an essential part of decision making for all animal commodities, for both import and export related issues. We consult regularly with other groups such as the Canadian Cattlemen's Association, the Canadian Sheep Federation, Equine Canada, the Canadian Pork Council, just to name a few. The honeybee industry is unique however, in the sense that the provinces do have greater involvement in honeybee health issues than for other commodities. There are examples of other sectors in which the provinces do have greater involvement - the best example I can think of is identification requirements and movement reporting for ruminants in Quebec, which is entirely a provincial mandate, above the national requirements.
>
> Your comments below indicate that there is a need and a desire to import packages from the US. I would recommend that you discuss this issue with representatives of the Canadian Honey Council. It is important that industry discuss and determine what the national position is (and this is not going to be a consensus, but a majority) and then this position can be raised with CFIA to re-open discussions pertaining to the importation of packaged bees from the US. These discussions can involve input from Dr. Steve Pernal if he chooses to be a part of them, and will also involve other CAPA members and provincial apiculturists.

[489] Michael Paradis then sent a follow-up email on May 18, 2011, attaching a letter responding to Dr. Snow and to which Dr. Snow responded on May 26, 2011. She stated that the importation of packages was not an issue that CFIA was going to be able to resolve that import season and encouraged Mr. Paradis to engage his industry representatives about this issue in preparation for future discussion.

[490] On cross-examination concerning Michael Paradis' email, it was put to Dr. Snow that this was an example of a commercial beekeeper contacting CFIA to request changes to import conditions, and she agreed that this was a fair description of the communication. She was then asked if it was fair to say that when she referred beekeepers' requests to the CHC, it was

because, unless the CHC agreed to the change, then CFIA was not going to make any changes. Dr. Snow testified that it is not unusual, and in fact it is a consistent pattern for CFIA, to consult with national industry groups. The goal of importation is that it occur within what is considered by CFIA to be an acceptable level of risk, but, realistically, there is no zero-risk environment. Therefore, it is very important that national industry associations be aware of importation activities and provide general support for those activities so they can anticipate impacts to their industry. Dr. Snow had also attended meetings and received correspondence from Canadian beekeepers indicating that there was no agreement on importation and that there was disagreement within the industry. Accordingly, it was important to have CHC's position that signalled a willingness to reconsider evaluation of the importation of US honeybee packages.

[491] What I take from this is that industry consultation through national associations can have an indirect role in regulatory decision-making to the extent that industry concerns are taken into consideration when CFIA is making decisions and thereby inform those decisions. However, as discussed above, CFIA's consultation respecting honeybees – whether with the Representative Plaintiffs, the CHC or others – without more does not give rise to proximity. Further, such interactions do not dictate CFIA's decisions. Rather, they provide information that assists CFIA in determining whether a course of action best serves the industry as a whole while also protecting animal health.

[492] Dr. Snow's evidence also provides an example of how CFIA works with interested parties, including the CHC, in response to threats to honeybee health. In April 2010, the USDA-APHIS advised Dr. Snow that SHB had been detected for the first time in Hawaii. Dr. Snow contacted Dr. Nasr, then head of the CAPA Import Committee, about imposing the same import conditions for SHB on Hawaiian queens and about how arriving queens would be inspected. She ultimately advised the USDA-APHIS that the import conditions for Hawaiian queens would be changed to the same conditions in place for queens coming from the continental US and that AIRS would be updated accordingly. On the same date, she also emailed CHC (and others) to inform it of these developments and that she was working closely with the Provincial Apiculturists to track recent shipments from Hawaii so that inspection could be performed. She

recognized that that time of year was an incredibly busy time for the honeybee industry but stated that her hope was that CFIA "can accomplish our goal of protecting the health of Canadian honeybees, which directly impacts the honeybee industry, without too much interruption to importations." The change to the import conditions would cause issues with shipments of queens arriving over the following days – permits were cancelled, new permits were re-issued and shipments of queens were quarantined and inspected by CFIA and Provincial Apiculturists. Given these challenges, Dr. Snow indicated that she would be in contact with CAPA and the provincial apiculture specialists to ensure as smooth a transition as possible. In my view, in taking these actions, Dr. Snow was acting within her mandate as a regulator. And, significantly in the context of proximity, the goal she sought to achieve in dealing with the Hawaii SHB discovery was animal health – the health of Canadian honeybees. The impact on the honeybee industry (economic and otherwise) was directly related to honeybee health but was not her regulatory mandate. Further, while CFIA consulted with Dr. Nasr, CFIA was the decision-maker. CHC was not a part of this decision-making process.

CHC approval not a pre-condition to importation

[493] I will turn now to the evidence relied on by the Plaintiffs in support of their assertion that CHC approval was a pre-condition to importation. The Plaintiffs refer to an August 9, 2011, internal email from Dr. Alexander. This provided background information pertaining to the honeybee import permit issued in error to Michael Paradis. Dr. Alexander stated:

> In discussions with this importer in May of this year, it was indicated to him that the CFIA was open to discussing this issue again, but that changes would not be possible for the 2011 import season, which was already underway and only continues for a few months. Discussions would include consultation with the Canadian Association of Professional Apiculturists Import committee (CAPA, with whom the CFIA consults for all honeybee import related issues) and the national honeybee industry group, the Canadian Honey Council (CHC). Dr. Snow has already contacted these groups to prepare them for discussions on this topic throughout the fall and winter. In addition, it was explained to the importer that he should also work with industry groups to prepare a position on this issue, as the CFIA responds to the national industry consensus position when dealing with a request where there is not universal agreement (it is our understanding that this

> issue has been discussed extensively in the past the industry has been quite divided). It may also be reasonable to perform an updated risk assessment to evaluate the importation of packaged bees with the information that is currently available, as it is possible that the situation has changed since 2003. This option was presented to the importer as well, but it was indicated that the decision as to whether or not to proceed with the risk assessment should come after initial discussions with CAPA and CHC.

[494] When cross-examined, the following exchange occurred:

> Q Okay. So am I correct that by phrasing this response as you did, you were telling the MP that the CFIA had decided that a precondition to any change to the ban on U.S. bee packages was support from the majority of industry; correct?
>
> A It was part of it, plus a risk assessment that indicated that the importation could safely occur. So I guess you could have worded it either way, one way or the other, but in this case, majority of industry came first and then the risk assessment, but you could argue that the risk assessment would have to be done and then supported by industry, because it is a national program, the import. When we're looking at border controls, if we apply a permit for something, we want to have it be something that could be permitted for all importers, not just for a single importer.

[495] I agree with the Plaintiffs that this and other evidence establishes that CFIA's stated approach in 2011 and 2012 was that it required a request from CHC – which would signify that the majority of the beekeeping industry wanted to reopen the border to the importation of US honeybee packages. In Dr. Alexander's words in his testimony, the CHC was a "favourable mechanism" to provide support and leadership on behalf of beekeepers in Canada. However, it is significant to note that while receipt of a CHC request might prompt the conducting of a new risk assessment, the border would not be opened unless and until a risk assessment determined that the risks in doing so would be low enough to warrant that reopening. Accordingly, I am not persuaded that a request from CHC was a determinative or an exclusive "pre-condition" as suggested by counsel. Rather, the health of Canadian honeybees was the ultimate determinative factor.

[496] In that regard, Dr. Snow indicated on cross-examination that she had worked on developing a response that she believed to be meant for Mr. Paradis arising from a request made to the Minister's office. She was referred by Plaintiffs' counsel to an email dated June 21, 2012, in which she was asked to comment on a proposed response. The third paragraph of the proposed response states:

> The Canadian Food Inspection Agency (CFIA) has indicated that it would need to receive an official request from the Canadian Honey Council to reconsider the position on packaged bee imports from the U.S. Should an official request be submitted, an updated risk assessment would be required to thoroughly evaluate the honeybee health situation in the U.S., and the border would only be reopened if the risk level was found to be demonstrably negligible or very low….

[497] The following exchange then occurred:

> A On the receiving an official request from the Canadian Honey Council, that –
>
> Q Yes, it being a necessary precondition.
>
> A That's correct.
>
> Q When you sent this – when you drafted this response, you knew very well that there would never be consensus at the CHC about opening the border to U.S. packages; correct?
>
> A I don't think the bar needs to be consensus. It's not that everyone within the industry is going to agree. The bar should be that the national industry is representing a majority of their relevant stakeholders. So I think "consensus" is the wrong terminology to use here, and I think it's possible for a national industry group to have a position where not everyone within that industry agrees on the direction.

[498] She testified that she agreed that there was no regulatory requirement for CFIA to receive an official request from the CHC to reconsider the position on package bee imports from the US. However, that the link to the regulations was that an import permit is issued when the Minister believes that the importation can happen under the acceptable level of risk (ALOR). If that bar is

not met, then the regulations do not support the issuance of the permit, “which is a precondition for importation.” Dr. Snow also reiterated that, in many files, CFIA looks to national industry groups for support for import activities because of the potential impacts to those sectors. Further, as her subject email indicated, risk assessments are not routinely reviewed and are usually only updated if there has been a significant shift in the information available or in the sanitary status of a country that would reduce the risk to an acceptable level. There was no information that there had been such a change in circumstance with respect to the reduction of risk associated with the importation of US honeybee packages.

[499] Again, having CHC confirm that the majority of the beekeeping industry wanted to have the border reopened was what CFIA conveyed as a first step; however, this was a two-step process. Without a favourable risk assessment, the border would not open. That determination lay solely with CFIA.

[500] More significantly, there is no evidence that the CHC ever made an official, or any, request for CFIA to reconsider its position on the importation of US honeybee packages. Yet, the 2013 Risk Assessment was undertaken.

[501] The “Risk Assessment Request” contained in the 2013 Risk Assessment states, “A risk assessment was done on this commodity in 2003, there is a need to have it updated. Requests for import permits continue to be received by the CFIA.”

[502] Dr. Rajzman, who made the risk assessment request, confirmed on cross-examination that the reason for the request was that the prior assessment was ten years old (the 2003 Risk Assessment) and that CFIA had been getting a lot of requests for imports.

[503] In the absence of any evidence as to an official request from CHC to CFIA to reconsider the import prohibition , and given a reconsideration did in fact occur (the 2013 Risk

Assessment), I am not persuaded that an official request from the CHC was relied upon by CFIA as a "necessary pre-condition" to revisiting the import restrictions on US packages.

[504] I would also point out that Mr. Paradis was informed of the CFIA protocol by which potential importers could request that import conditions be effected. The evidence was that, between 2007-2012, Mr. Paradis did not make a formal request that a risk assessment be undertaken. On that point, I note at trial counsel for the Plaintiffs asked Dr. Perrone whether a January 17, 2006, letter from the Alberta Beekeepers Association would constitute a request for a risk assessment, specifically a portion of it that speaks to flaws in the 2003 Risk Assessment and cautions against relying on that assessment. Dr. Perrone said it would not, as CFIA has a particular process for requests. The evidence also confirms that Dr. Aitken informed Mr. Ash of the protocol and that Mr. Ash did not respond to or follow up on any of the permit refusals he received. I acknowledge Mr. Gibeau's April 16, 2013, letter to Ms. Francine Forest in which he states that he would be prepared to pay the required fee for a full assessment, but even if this were accepted as a formal request, the 2013 Risk Assessment was already underway at that time.

[505] In sum, while there was a route open to any beekeeper to request that a risk assessment be undertaken, there is no evidence that throughout the Class period any such request was made. This is significant on a number of fronts, but, in this context, there is no evidence that an actual risk assessment request was ever refused on the basis that the CHC had not made an official request that one be conducted.

[506] To sum up this point, to the extent that the Plaintiffs are suggesting that the "pre-condition" is evidence of a specific interaction demonstrating proximity between CHC and CFIA, viewed in the context of other evidence, I do not find that it supports this submission. Nor do I agree that it illustrates that CFIA abdicated its decision-making to CHC. Moreover, as discussed above, it is difficult to see how CFIA's potential interaction with CHC in this regard demonstrates a special relationship between CFIA and the Plaintiffs, given that CHC is representative of the industry as a whole.

[507] Industry consultation and, to the extent possible, industry agreement with proposed courses of regulatory action were certainly important to CFIA. However, viewed in whole, the evidence supports that the ultimate decision about whether or not to import honeybees (whether from the US or other countries) depended upon the outcome of scientific analyses of the risks of importation, and not on the opinion of CHC.

[508] For instance, when cross-examined, Dr. Rajzman was asked, "how did the interests of CAPA affect you and CHC and the decision making about opening the border?" She responded that any recommendations that she made would be science-based and based on the health of Canadian honeybees. Further, that CFIA does not make decisions by polling industry members, again stating that her recommendations are based on the health of honeybees primarily.

[509] Dr. Kochhar, when testifying about the 2013 Risk Assessment, stated that the most important factor in his decision-making about whether or not to order a new risk assessment was whether there was new scientific evidence and information available and whether there was a refined methodology for conducting the risk assessment. Referred on redirect to a March 14, 2012, email, Dr. Alexander stated that there is usually something that prompts a change in a risk assessment, some information that suggests that there was a significant shift in the situation that would have changed the risk level. And, in an email from June 16, 2022, Dr. Dubé told a Thomas Oulton, "For the CFIA to redo a risk assessment, a documented change in the health status or in control programs, either in Canada or the exporting country could warrant a re-evaluation." This and other evidence indicates that CFIA considered new information respecting honeybee health to be essential in determining whether to revisit a risk assessment. An email from 2012, put to Dr. Snow, indicates that "Risk assessments performed by the CFIA are not routinely reviewed, and usually only occur if there has been a significant shift in either the information available or the sanitary status of a country that would reduce the risk to an acceptable level. This has not yet been demonstrated for the 2003 honeybee risk assessment; thus, it has not yet been updated." Dr. Snow said of this paragraph at trial, "that's the position that I've stated a number of times, and I would restate that here."

[510] The evidence above does not support that CFIA relied on or deferred to CHC in its decision-making.

(x) Case law concerning industry consultations

[511] As I have indicated above, the mere fact that consultations took place, or that there was public consultation with respect to the proposed regulatory change to allow for the importation of US queens, does not give rise to a private law duty of care. The relationship between CFIA and beekeepers is that of regulator and regulated industry.

[512] In that regard, I note that in *Flying E Ranche* the plaintiff relied on a range of communications and interactions between Agriculture Canada and the cattle industry to support its argument on proximity, including stakeholder meetings at which information and updates were provided to industry and frequent and extensive interactions between representatives of cattle producers and Canada. The ONSC held that those interactions did not create sufficient proximity such that it could find that a duty of care arose. Further, as to consultations, it stated at paragraph 614:

> …Similarly, consultations with industry, do not on their own create a duty of care. Governments are expected to consult with those affected by their actions and do so frequently, especially with regulated industries. This is not to ensure, however, that government is doing what an industry wants or is acting in the interests of that industry, but to ensure that government is acting in the public interest on the best information available, including input from affected stakeholders, and that those stakeholders are aware of what the government is doing, or not, and why.

[513] The ONSC concluded, at paragraph 615, that the types of interactions raised in that case were all, essentially, in furtherance of achieving the purposes and objectives of the relevant legislation, which included the *HA Act*. They did not qualify as "specific interactions" in which the government had "assumed duties separate and apart from its governing statute" (citing *Imperial Tobacco* at paras 45 and 53). Nor were the interactions "distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator's

work" (citing *Taylor* at para 80). Quoting *Wu* at paragraph 64, the ONSC found that the consultations were "generic and inherent in the regulatory framework and, accordingly, are not indicative of a relationship of proximity."

[514] In *Flying E Ranche*, the ONSC also found that there was an absence of evidence of detrimental reliance. While the cattle producers looked to government for information and counted on government to prevent BSE from emerging in Canada, the Court held that this was no different than expecting government to fulfill it statutory mandate to prevent or control animal disease of all kinds, stating that "[i]t is not reliance that creates proximity" (*Flying E Ranche* at para 625).

[515] Similarly, in this matter I find that the consultations conducted by CFIA with respect to the 2003 and 2013 Risk Assessments, and otherwise, fell squarely within its regulatory function to protect animal health. The purpose of the Risk Assessments was to identify bee diseases and pests that posed a hazard and to assess the level of risk they posed to the health of Canadian honeybees if importation was permitted.

[516] There was also no evidence of reliance, beyond the Plaintiffs' assertion that the Defendants represented to the Plaintiffs "over decades" that the Defendants "recognized, accepted and acknowledged" that the purpose of the *HA Act* and the *HA Regulations* was to prevent the introduction of disease into Canada that could seriously affect or have a significant economic effect on the agricultural industry – which the Plaintiffs assert gives rise to a special relationship with the Class. However, as discussed above, this alleged representation stems solely from the RIASs, which relate to orders and regulatory amendments that had all expired before the Class period.

[517] The Plaintiffs assert that *Flying E Ranche* can be distinguished on its facts because in this case the evidence demonstrates that beekeepers had no choice but to rely on the "various representations that the import prohibition would continue only so long as there was unmitigable risk." They assert that in *Flying E Ranche* the farmer plaintiffs could decide for themselves

whether to use the subject feed, while in this matter the beekeepers "are dependent upon the CFIA to exercise care when it makes decisions that affect them." I fail to see how this is a relevant factual distinction or how it assists the Plaintiffs. First, the only representations identified by the Plaintiffs in this case are those they assert arise from the subject RIASs. Second, all industry regulators are expected to act within and to fulfill their mandate. As a part of that mandate – rightly or wrongly – the CFIA prohibited the importation of US honeybee packages, and regulatory compliance is required of beekeepers (hypothetically, CFIA could also have permitted the importation and been sued by other beekeepers alleging that the importation caused them economic harm). The mere fact that a regulator makes such decisions, one way or the other, does not give rise to proximity. Were it so, every regulatory decision would attract a private law duty of care. That is to say, regulatory compliance is not reliance establishing proximity. Moreover, even if the Plaintiffs' reasoning were accepted, the Plaintiffs in this case were free to import honeybee packages from places other than the US. Their issue is one of economics, as they assert that the other sources were more expensive and of lesser quality.

[518] It is also perhaps of assistance to consider *Aylmer Meat Packers Inc v Ontario*, 2022 ONCA 579 [*Aylmer*] as an example of actions by a regulator that fall outside their role as such. In *Aylmer*, officials from the Ontario Ministry of Agriculture, Food and Rural Affairs took control of an abattoir and the meat stored there. Nineteen months later, when they returned control to the owners, the meat had spoiled due to a freezer malfunction and the business was destroyed.

[519] The owner brought an action claiming that the Ministry owed it a duty of care to act reasonably in exercising its regulatory responsibilities in suspending its abattoir license, occupying its plant and storing and destroying the detained meat. With respect to specific interactions, the ONCA found that the trial judge failed to directly address whether the specific interactions between the owner and the Ministry official gave rise to a duty of care. Further, that the trial judge's finding that there was no evidence of dealings between the parties or representations made by the official to the owner outside the regulatory interactions was too narrow in light of *Imperial Tobacco* and *Hill*. In *Hill*, Chief Justice McLachlin observed that

targeting a suspect for investigation, even without more interaction, could bring a duty of care into existence.

[520] The ONCA found that the relevant specific interactions included the manner and timing of: suspending the licence and failing to hold the prescribed hearing; taking control of the plant, securing it and forcing the owner's personnel to pass through security to gain access; failing to maintain the freezer; allowing the meat to spoil; removing and destroying the meat; and, returning control of the plant to the owner. The ONCA held that these specific interactions were not the ordinary day-to-day regulatory contact between Ministry personnel and a regulated abattoir. Further, the specific interactions gave rise to a duty of care because the owner was targeted as a suspect in regulatory breaches, much like the suspect in *Hill*.

[521] In my view, *Alymer* is distinguishable, as the specific interactions of the Defendants in this case do not exceed the ordinary interactions between the Defendants as regulators and the Plaintiffs as members of the regulated industry. CFIA interactions such as consultations were part of the regulatory process, as was the conducting of risk assessments, which were a tool utilized to determine if the proposed importation met an acceptable level of risk. Nor were the Plaintiffs or the Class "targeted" suspects. The importation ban applied to all beekeepers. The evidence is clear that the Defendants were aware that the beekeeping industry was divided on the subject of importation. CFIA was aware of the view that the economic interests of one group of beekeepers, the Class, may have benefited from the importation of less expensive US honeybee packages. It was also aware of the view of other beekeepers that their economic interests could be harmed by the importation because of the adverse impact this would have on Canadian bee health generally, which they sought to guard against by conducting their beekeeping operations using methods that avoided such importation. The Class was not targeted by CFIA's actions, which were aimed at protecting honeybee health.

[522] I would also note that the other communications listed by the Plaintiffs in Schedule A of their written closing arguments as demonstrating interactions surrounding risk assessments were all initiated by the beekeepers. I find that CFIA's responding communications were appropriate

responses by a regulator to inquiries or requests of members of the regulated industry who would be impacted by the risk assessments. For instance, Dr. Rajzman sent the 2013 Risk Assessment to Mr. Paradis and Mr. Lockhart in response to their request that she do so. In my view, it is not "just and fair" to find proximity where a regulator responds to communications from individuals subject to regulation, without something more.

[523] The Plaintiffs attempt to distinguish *Flying E Ranche* on a number of other bases. These include, with respect to proximity, that the ONSC in *Flying E Ranche* found that the impugned actions were purely Department of Agriculture decisions that involved no agreement from industry (referencing para 618 of *Flying E Ranche*). The Plaintiffs say that, on the contrary, the evidence in the present case establishes reliance by CFIA on industry agreement and the CHC's support, or lack thereof, respecting the importation of US honeybee packages.

[524] However, in *Flying E Ranche*, the ONSC found that although the interactions between representatives of cattle producers and Canada were frequent and extensive, they did not create sufficient proximity such that, on a balance of probabilities, a duty of care should be found. Further, that consultations with industry do not on their own create a duty of care. In that case, there was wide stakeholder consultation and dialogue with industry, and the ONSC held:

> [618] Nevertheless, in addressing the threat of BSE, the Department of Agriculture made its own decisions. While a consensus was reached at meetings on some issues, the steps taken, or not taken, were AAFC decisions as indicated, for example, by Dr. Bulmer's notes on the Minutes of the 18 June 1990 meeting as to what items to "park." This did not involve or require agreements with, or direction to, specific industry participants. The decisions taken, rightly or wrongly, were squarely within the public, statutory functions of the Department. This is not a case like *Imperial Tobacco*, where specific representations were made, direction was given and agreements were reached with a limited group of manufacturers which went beyond and were "apart from [the regulator's] statutory duties" to create a "special relationship."

[525] Here, as I have found above, CFIA consulted with industry, including the CHC, and sought confirmation from the CHC that the majority of its membership sought to open the border

to the importation of US honeybee packages prior to conducting a new risk assessment. However, contrary to the Plaintiffs' assertion, the evidence does not establish that CFIA represented to the Class that it would not grant import permits without industry approval. Rather, while CFIA sought to have the CHC confirm that the majority of beekeepers sought to open the border to the importation of US honeybee packages before a new risk assessment was conducted, the 2013 Risk Assessment was conducted despite there being no evidence that an official request from the CHC was received to trigger it.

[526] Further, as discussed above, the evidence does not establish that CFIA abdicated or delegated it decision-making authority to the CHC or that the CHC made decisions concerning when and whether the Risk Assessments would be conducted or revisited. CFIA's evidence at trial was clear that it made those decisions, and, relatedly, that it made the decisions about whether or not the prohibition would continue.

[527] This is not a basis upon which *Flying E Ranche* can or should be distinguished.

[528] The Plaintiffs also attempt to distinguish *Taylor 2020*, a case the Defendants cite for the proposition that evidence of interactions between one or a few members of a class is not evidence of proximity with the class. In that regard, the Plaintiffs refer to a paragraph in which the ONSC found that a telephone hotline set up for the purpose of communications between Health and Welfare Canada and those with concerns arising from having received a medical implant was an effort to help individuals, not to take on a duty of care in connection with the granting of any notice of compliance. Further, that calls between a lawyer for the caller and Health and Welfare Canada did not serve to demonstrate proximity on which a duty of care could be based, as they were made after the fact, being after the implantation and after the harm and difficulties became apparent. The Plaintiffs say that *Taylor 2020* is distinguishable based on the longstanding relationship between the Class and the Defendants that predates the class period and the harms for which remedies are sought. They say that they do not argue that the maintenance of the import prohibition created the duty of care, but rather that CFIA owed a duty

of care prior to the decisions to continue the import prohibition when it was conducting the Risk Assessments.

[529] Frankly, I fail to see how this assists the Plaintiffs. Proximity is, in all cases, fact based. As stated by the ONCA in *Taylor*, a predecessor decision to *Taylor 2020*, "[f]indings of proximity based on the interactions between the regulator and the plaintiff are necessarily fact-specific" (*Taylor* at para 80). Thus, while the after-the-fact hotline call did not amount to proximity in *Taylor 2020*, what is at issue in terms of proximity in this matter are the actual interactions and communications between the Plaintiffs and the Defendants in this matter, which I have addressed above and concluded did not give rise to proximity. Further, and as I have also found above, the duration of the relationship is not determinative.

[530] As to *Los Angeles Salad*, in terms of proximity, the Plaintiffs say that in that case the only evidence tendered was a CFIA webpage and one incident of direct contact, which falls woefully short of the evidence that the Plaintiffs have tendered. Again, this does not assist the Plaintiffs, as proximity is fact specific in each case, and I have above made the factual findings relevant to proximity in this matter.

(xi) Conclusion on interactions

[531] In conclusion, the Plaintiffs assert that the duty of care in this matter arises based on the second scenario identified in *Imperial Tobacco*. That is, where the duty of care is alleged to arise from a series of specific interactions between the claimant and the government and is not negated by statute. Accordingly, they say that the task of this Court is to determine whether the evidence of all the interactions and representations between the parties is sufficiently close and direct to make it just and fair, having regard to the relationship, to impose a duty of care in law on the Defendants (referencing *Marchi* at para 17).

[532] I agree with the Plaintiffs' articulation of the Court's task. And, having reviewed the evidence as to the nature and purpose of the communications and interactions upon which the

Plaintiffs rely and also the broader evidence as to CFIA's interactions with beekeepers or beekeeping industry associations, I find that these do not demonstrate a close and direct relationship to the Class outside CFIA's regulatory mandate to protect animal health. They were not specific interactions that gave rise to a special relationship resulting in a duty of care. Nor have the Plaintiffs established any reliance on or any expectations arising from those interactions that would support the existence of a private law duty of care. Any relevant interactions or communications respecting the prohibition on the importation of US honeybees were in furtherance of CFIA's regulatory function to protect animal health and were inherent in the exercise of that public law duty.

(e) Conclusion - First Stage of the Anns/Cooper test

[533] The first stage of the *Anns/Cooper* test concerns foreseeability and proximity. In this matter, the Defendants do not concede, but nor do they oppose or substantively address, the question of foreseeability. Given the evidence before me, I have found that it was reasonably foreseeable to the Defendants that the continued prohibition on the importation of US honeybee packages could potentially have negative economic consequences on some commercial beekeepers, which would include some members of the Class, as a result of the increased cost of importing packages from other countries and of overwintering. However, foreseeability alone is not sufficient to establish that a duty of care was owed to the Class. There must also be proximity. In that regard, I have found that in this case the legislative scheme, the *HA Act* and *HA Regulations*, does not give rise to, and implicitly forecloses, a private law duty of care owed to the Plaintiffs. Even if that were not the case, the communications and interactions between CFIA and the Class do not give rise to a private law duty of care to protect the Class' economic interests with respect to the importation of US honeybee packages. In the absence of proximity, the Plaintiffs have not met their burden of establishing the existence of a *prima facie* duty of care.

[534] On this basis alone, the Plaintiffs' claim cannot succeed. As the Plaintiffs have failed to establish proximity between the Class and the Defendants, there is no duty of care owed and no

negligence (*Taylor 2020* at para 594). Without a duty of care, there is no need to consider if there are residual policy considerations that would "trump" its existence (*Fullowka* at para 57).

[535] Accordingly, I need not proceed further with this decision. I am also of the view that this is the determinative issue in this case.

[536] However, given the time and effort expended at trial, and in the event that I have erred in this finding, I will continue and address the second stage of the *Anns/Cooper* test.

C. Second stage of the *Anns/Cooper* test

[537] The second stage of the *Anns/Cooper* test asks whether, if foreseeability and proximity are established at the first stage, there are residual policy considerations, outside the relationship of the parties, that may negate the imposition of a duty of care (*Marchi* at para 18, citing *Cooper* at para 30). These are concerned with "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?" (*Cooper* at para 37).

[538] Again, I stress that I have found above that proximity has not been established; therefore, there is no duty of care owed by the Defendants to the Plaintiffs in these circumstances. Accordingly, the analysis that follows is provided only in the event that I have erred in that determination.

[539] One of the issues that can arise at this stage, and does arise in this case, is whether the decision at issue is a policy decision (which is immune from liability) or an operational decision (which can give rise to liability). The Supreme Court of Canada has said, "the question of what constitutes a 'true' or core policy decision is a 'vexed one, upon which much judicial ink has

been spilled' (*Imperial Tobacco*, at para. 72). There can be no magic formula or litmus test producing an obvious answer for every government decision (para. 90)" (*Marchi* at para 50). While the Court in *Marchi* went on to provide guidance on what comprises core policy decisions and how to determine whether a decision is core policy, in my view, in this case the issue remains a vexed one.

[540] This is particularly so given the differing and, in the case of the Plaintiffs, changing focus as to the scope of the duty of care in this case. More specifically, it is so given the Plaintiffs' view that the scope of the duty can be narrowed or restricted to the alleged duty to identify risk mitigation options when conducting the Risk Assessments.

[541] I find that it is necessary, as a first step, to identify the duty encompassed by Common Issue #1. This, in turn, affects the decisions at issue alleged to give rise to a duty of care.

i. Scope of the duty

[542] For ease of reference, I again note that Common Issue #1 states as follows:

> Whether any or all of the Defendants owed the proposed Class a duty of care not to be negligent in the maintenance or enforcement of the *de facto* prohibition, including a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments.

(a) Plaintiffs' position

[543] In their opening submissions, the Plaintiffs asserted that the Defendants purposefully misconstrued the duty alleged. The Plaintiffs say what they were alleging was a "discrete narrow duty, consistent with the Supreme Court of Canada direction that the 'decision or conduct at issue must be described with precision' and the 'duty asserted must be tied to the negligent conduct alleged'" (referencing *Marchi* at para 76). Further, that the Court should disregard the Defendants' effort to posit a broad duty in order to mask the negligent operational decisions as

policy. The Plaintiffs asserted that what was at issue in this matter are operational and not policy decisions.

[544] The Plaintiffs then divided the duty of care as described in Common Issue #1 into two separate duties. They first asserted that the Defendants owe the Class a duty of care not to be negligent in the maintenance or enforcement of the *de facto* import prohibition. The premise of the argument supporting that position was stated to be that the Defendants had no right to apply a blanket ban prohibiting importation of US honeybee packages. Rather, the legislative scheme required that the Defendants look at the unique circumstances of each permit application when it was made and assess if the specific requested activity would result in the introduction or spread of a vector, disease or toxic substance (*HA Regulations*, s 160(1.1)). The Plaintiffs asserted that the Defendants promised and undertook to "monitor and update their information to ensure that the border ban lasted *no longer than was necessary*." The Plaintiffs included a schedule of what they described as key evidence regarding CFIA's commitment to annually review the importation ban [Schedule H, discussed above]. The Plaintiffs alleged that since 2006, "the Defendants had a duty to continuously assess the health conditions of U.S. bees, as well as to assess the risks and potential mitigation measures that could be undertaken to potentially allow the import of packages." The Plaintiffs asserted that this did not happen and, instead, the Defendants "rely on their own failure to identify risk mitigation options as the reason to refuse any consideration of import permit applications."

[545] According to the Plaintiffs, since 2006 when the *HIPR, 2004* expired, there were only two lawful means by which the Defendants could meet their statutory duties – they could either enact new regulations extending the prohibition or assess the import permit applications on a case-by-case basis pursuant to s 160(1.1) of the *HA Regulations*. They submitted that the failure to do either was negligent and illegal conduct and that the Minister was acting outside his legal authority by refusing to assess the Class' import permit applications. The Plaintiffs asserted that to enforce the border prohibition over a 17-year period without lawful authority demonstrated decision-making paralysis and that "[o]nce a decision to act has been made, a government may be liable in negligence for the manner in which it implements that decision." Once *HIPR, 2004*

expired in 2006, the Defendants were required to operationalize or implement that decision surrounding the import permit scheme reasonably, lawfully and in a non-negligent manner (i.e. in compliance with the terms and legislative criteria of the *HA Regulations*). The Plaintiffs say that the Defendants had a duty to act reasonably, which, at a minimum, meant lawfully and in accordance with their own statutory scheme.

[546] The "decision" referred to by the Plaintiffs would appear to concern the decision to continue the prohibition without renewing the *HIPR, 2004* or conducting case-by-case assessments of submitted applications for import permits.

[547] The Plaintiffs next asserted that the statutory regime includes both an obligation to receive and assess import permit applications and a duty of care. In that regard, they asserted, "Pursuant to that regulatory scheme, the Defendants' primary duty in the regulation of honeybee imports is to safeguard the economic interests of the beekeeping industry and commercial beekeepers." The Plaintiffs argued that the Defendants undertook this duty in 1987, through the RIASs and otherwise. They asserted that the duty of care to the beekeepers was demonstrated by the statutory regime and the Defendants' statements and interactions with the Class, which demonstrated that the purpose of the Defendants' actions "was to safeguard and protect the class' economic interests." According to the Plaintiffs, the duty owed by the Defendants was to act in a reasonable and prudent manner. The refusal to assess all import applications after 2006 was a breach of statutory duty constituting unlawful conduct that caused economic damage to the Class.

[548] The Plaintiffs then separately asserted that the Defendants owed a duty of care to identify and consider risk mitigation options in the 2003 and 2013 Risk Assessments. The argument being, in essence, that the decisions to undertake the Risk Assessments were policy decisions, but the manner in which they were carried out – which the Plaintiffs asserted was negligent – was operational in nature. The Plaintiffs asserted that once a government agency makes a policy decision to take certain steps, then it owes a duty of care to all who may be injured by the negligent implementation of that policy. Accordingly, there was a duty to those whose

businesses were dependent upon the results of the assessments to prepare them reasonably and in accordance with prevailing standards.

[549] However, when closing submissions were made, the Plaintiffs focused almost exclusively on the alleged duty pertaining to the conduct of the Risk Assessments. According to the Plaintiffs at closing, Common Issue #1 "describes the limited and narrow duty asserted and already ties that duty to the negligent conduct alleged. The impugned decisions at issue are specifically enumerated: a risk analysis process which resulted in two Risk Assessments that fell below the acknowledged prevailing standard of care, then relied upon for some twenty years to deny import permit applications for honeybee packages from the United States." They say that the Defendants ignored their own operational standards when they conducted the two Risk Assessments. Those failures were then relied upon in support of an unlawful operation of the import permit scheme. The Plaintiffs say that is what this case is about, and not opening or closing the border *per se*. The Plaintiffs again asserted that the duty is narrow, circumscribed and defined with precision, and, accordingly, reliance on other cases where the duty framed is not analogous ought to be rejected.

[550] The Plaintiffs also referred (in the context of proximity) to *Paradis FCA* and submitted that the Federal Court of Appeal "characterized the potential duty of care owed in this case: a *duty to respect the beekeepers' interests* to the extent of making rational evidence-based decisions following proper legislative criteria." The Plaintiffs say this is the "content of the duty" they allege and assert has been established, being a duty to identify mitigation options in the conduct of the Risk Assessments.

[551] I note, however, that the Federal Court of Appeal made no reference to any duty to identify mitigation options. This is because that duty was not pled (it was added to Common Issue #1 by order of the Case Management Judge on August 15, 2023, addressed further below). Rather, the Federal Court of Appeal, when considering the appeal of the motion to strike, addressed the Plaintiffs' argument that the Defendants had adopted a policy that no permits would be issued for the importation of US honeybee packages. The Statement of Claim (which

predated the Amended Amended Statement of Claim, which was the pleading at the time of trial) alleged that this constituted a *de facto* ministerial order or directive for which there was no lawful authority. The Federal Court of Appeal stated *that the beekeepers pled* that in specific interactions, Canada assured them that imports affecting their economic interests would be banned only as long as there was scientific evidence of risk. Absent that evidence of risk and but for the blanket guideline, Canada had to issue importation permits under s 160 of the *HA Regulations*. The Federal Court of Appeal then made the statement that the Plaintiffs quote in part, being: "In light of these considerations, the relationship between Canada and the beekeepers is sufficiently close and direct to make it fair and reasonable that Canada be subject to a duty to respect the beekeepers' interests, at least to the extent of making rational, evidence-based decisions following proper legislative criteria" (*Paradis FCA* at para 90). Or, "[p]ut another way, the relationship between the beekeepers and Canada, *as pleaded*, is one of well-defined rights and entitlements based on specific legislative criteria, alongside specific interactions and assurances between the two" (*Paradis FCA* at para 91), the legislative criteria at issue being s 160(1.1) of the *HA Regulations* (emphasis added).

[552] At trial, the Plaintiffs did not address legislative criteria pertaining to the alleged duty to identify risk mitigation options, and, as I have found above, the *HA Act* and *HA Regulations* do not require CFIA to conduct risk assessments. Accordingly, there is no applicable legislative duty in that regard, nor are there legislative criteria to be met.

[553] During oral closing submissions, the Plaintiffs again emphasized that precision is important with respect to the framing of the duty because the nature and content of the alleged duty serves to determine indeterminacy (at the proximity and second stage of the *Anns/Cooper* test) and whether the impugned decision is policy or operational in nature.

(b) Defendants' position

[554] In their opening submissions, the Defendants addressed the split duties as put forward by the Plaintiffs and took the position, for the reasons they set out, that neither duty of care asserted by the Plaintiffs exists. They addressed both duties in the course of their analysis.

[555] In their written closing submissions, the Defendants also addressed both aspects of the alleged duty. In their oral closing submissions, the Defendants responded to the Plaintiffs' articulation of the duty of care as expressed at the closing of their case and submitted that while the Plaintiffs now argue that the duty is narrow and circumscribed, their submissions actually referred to a broader scope. In that regard, the Defendants pointed out that the Plaintiffs had submitted that there was a duty to respect the beekeepers' interests to the extent of making rational, evidence-based decisions following proper legislative criteria; a duty to be mindful of the Plaintiffs' interests; a duty grounded in the SPS Agreement; and a requirement, relying on *Vlanich*, that once a regulator endeavours on an activity, it must do so reasonably if it is affecting others. The Defendants submit that these are broadly defined duties even though the Plaintiffs assert that the duties owed are very specific. The Defendants submitted that the analysis required in this case is whether there is a private law duty of care owed to importers of animals when conducting regulatory functions relating to the importation of animals under the *HA Act* and *HA Regulations*. Nor does expressing the duties as the Plaintiffs have chosen to do change the purpose and intent of the regulatory scheme.

(c) What is the decision or conduct at issue?

[556] By way of background and for purposes of context, I note that Common Issue #1 was amended by order of the Case Management Judge dated August 15, 2023. At that time, the words "including a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments" were added. However, the overarching duty of care not to be negligent in the maintenance or enforcement of the *de facto* prohibition remained.

[557] That overarching duty is entirely reflective of the pleadings contained in the Amended Amended Statement of Claim, dated April 6, 2017. This states that the Plaintiffs claim damages

payable to the Plaintiffs and to the other Class members, in an amount equal to the losses and damages they sustained as a result of "the Defendants' negligence in imposing or enforcing a prohibition on, or denying import permits for, the importation into Canada of live honeybee packages from the continental United States after 2006 to the present day."

[558] The Amended Amended Statement of Claim alleges, among other things, negligent conduct by the Defendants and that they owe the Plaintiffs a duty of care with respect to the restrictions on the importation of US honeybees. They allege this duty arose from the purpose of the *HA Act* and *HA Regulations*; representations the Crown made to the Canadian beekeeping industry that it regulated imports to protect the beekeeping industry, in particular its economic viability; the Crown's duty under s 12 and s 160 of the *HA Regulations* to receive and assess import permit applications for US honeybee packages; and, the Crown's actions regarding the importation of US honeybee packages, including the prohibition and its partial relaxation, "which were mainly aimed at fostering and protecting the viability of the beekeeping industry," among other factors.

[559] The Amended Amended Statement of Claim alleges that the Defendants owed a duty of care to the Plaintiffs and the Class with respect to restrictions on the importation of US honeybee packages, including not to continue the prohibition after 2006 without lawful authority or lawful purpose; not to impose a blanket prohibition "under the guise of Ministerial discretion"; and, after 2006, to receive and assess applications for US honeybee package imports or to deny them only on the basis of the conditions set out in s 12 and s 160 of the *HA Regulations*.

[560] The Defendants allegedly breached their duty of care by, among other things, basing decisions to maintain the prohibition on outdated and inaccurate information; refusing to update information without the approval of the "Faction"-dominated CHC; failing to conduct or obtain a current risk assessment; and, misusing or failing to exercise ministerial responsibility and discretion with respect to permitting or denying the import of US honeybee packages, including by delegating or submitting regulatory decision-making authority to the "Faction"-dominated

CHC, which entity did not act in the best interests of the commercial beekeeping industry as a whole and acted for improper purposes and contrary to the statutory scheme.

[561] The pleading states that the Crown knew or ought to have known that its negligence and continuation of the import prohibition would cause the claimed loss and damage to the Plaintiffs and Class, who relied on package imports to sustain and grow their beekeeping operations and businesses.

[562] The clear focus of the Amended Amended Statement of Claim is the continuation of the prohibition on the importation of US honeybees and what the Plaintiffs alleged was negligent conduct and breaches of the duties of care alleged to be owed to them in that regard. References to risk assessments are limited and assert only that there was a failure to conduct a current risk assessment. The pleadings, which must underlie or inform Common Issue #1, do not assert a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments. Rather, that duty is now stated as being included within Common Issue #1 by the revised wording of that issue.

[563] My point here is that while the Plaintiffs now assert that the alleged duty is a discrete and narrow one concerned with the identifying of risk mitigation options in the Risk Assessments, this is not reflected in the underlying pleading. It therefore seems questionable whether the alleged duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments can be a discrete duty of care as the Plaintiffs submit. Rather, to survive, that duty would have to be included within the overarching duty not to be negligent in the maintenance or enforcement of the *de facto* prohibition – which is precisely what Common Issue #1 states. Given this, any duty pertaining to the identification of risk mitigation options must be included and fall within that overarching duty; it cannot be viewed in isolation.

[564] The Plaintiffs assert, as I have discussed above, that repeated representations over the decades as to the purpose of the *HA Act* and *HA Regulations* led to a special relationship with the Class. The Plaintiffs also assert that this relationship was supplemented and fortified by an overwhelming degree of interactions between the parties and that “[o]ver time, this gave rise to a

discrete duty of care to complete the Risk Assessments in accordance with prevailing professional, industry and international standards," which ought to have included the identification of risk mitigation measures. However, it is not apparent to me how the alleged special relationship could give rise to this discrete duty. Proximity is concerned with the relationship between the parties, not conduct.

[565] In that regard, *Stewart v Pettie*, [1995] 1 SCR 131 [*Stewart*], although not a class action, considered whether a commercial host could be liable for injuries sustained by a passenger of a car driven by an intoxicated driver to whom the commercial host had served alcohol. The Supreme Court referred to *Anns*, *Kamloops* and *Just* as establishing the modern approach to determining the duty of care and found that there was a high degree of proximity in the matter before it. In *Stewart*, it was argued that two duties of care were owed to the passenger: first, not to serve the driver past the point of intoxication; and second, to take positive steps to ensure that he did not drive a car. The Supreme Court found this articulation of the duties confused the existence of the duty of care with the standard of care: "The question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct. The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care" (*Stewart* at para 32). The Court quoted Fleming's *The Law of Torts*, 8th ed (1992) at pages 105-6:

> The general standard of conduct required by law is a necessary complement of the legal concept of "duty". There is not only the question "Did the defendant owe a duty to be careful?" but also "What precisely was required of him to discharge it?" Indeed, it is not uncommon to encounter formulations of the standard of care in terms of "duty", as when it is asserted that a motorist is under a duty to keep a proper lookout or give a turn signal. But this method of expression is best avoided. In the first place, the duty issue is already sufficiently complex without fragmenting it further to cover an endless series of details of conduct. "Duty" is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation….

[566] *Stewart* has been referred to in other decisions with respect to the distinction between the existence of the duty of care owed to a plaintiff and the standard of care. Notably, in *Rausch v Pickering*, 2013 ONCA 740, the Ontario Court of Appeal stated the following:

> [37] The foundation of a claim in negligence is the recognition of a duty of care owed by the defendant to the plaintiff. A duty of care is not a duty to do anything specific: the duty is to take reasonable care to avoid causing foreseeable harm to those with whom one is in a relationship of proximity.
>
> [38] **An error frequently made is conflating the duty of care with the standard of care.** They are discrete concepts. As the Supreme Court of Canada wrote in *Stewart v. Pettie* [citation omitted] at para. 32, "the question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct." The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care.…
>
> [39] The existence of a duty of care simply means that the defendant is in a relationship of sufficient proximity with the plaintiff that he or she ought to have the plaintiff in mind as a person foreseeably harmed by his or her wrongful actions. It is not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm: *Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201, at paras. 25-27.
>
> (Emphasis added)

(See also *Fisher v Richardson GMP Limited*, 2022 ABCA 123 at para 43; *Jastram Properties Ltd v HSBC Bank* Canada, 2021 BCSC 2204 at para 40 (a class action certification motion); *118143 Ontario Inc v City of Mississauga*, 2015 ONSC 3691 at para 219; *Argent v Gray*, 2015 ABQB 292 at para 63; *Evans v Anderson*, 2023 BCSC 143 at para 116; *Gelowitz v Revelstoke (City)*, 2022 BCSC 46 at para 134 [*Gelowitz*].)

[567] In sum, as stated in *Gelowitz*:

> [134] …The existence of a duty of care is a question of law. It turns on the nature of the relationship between the parties; specifically, whether there is a relationship of sufficient proximity such that it is fair to expect the defendant to have the plaintiff in mind as a person foreseeably at risk of harm from the defendant's actions and omissions. The question of what conduct was required

> of the defendant to satisfy the duty of care is a question relevant to the standard of care: *Stewart v. Pettie*, 1995 CanLII 147 (SCC), [1995] 1 S.C.R. 131 at para. 32.

[568] Thus, although the identification of mitigation measures is referred to as a "duty" in Common Issue #1, in my view, identifying mitigation measures in the Risk Assessments would more properly be an example of conduct that would inform the standard of care. In any event, the wording of Common Issue #1 asks whether the Defendants owed a duty of care not to be negligent in the maintenance or enforcement of the *de facto* prohibition, "including a duty to identify risk mitigation options."

[569] In my view, the Plaintiffs' allegations went beyond their concerns about a duty to identify risk mitigation options in the Risk Assessments and how those assessments were conducted, and included allegations about the requirement to conduct annual reviews, monitor honeybee health and update the 2003 Risk Assessment. In their closing submissions, and despite their arguments as to the narrowness of the duty and the decisions and/or conduct at issue (i.e. discrete operational decisions as to how the Risk Assessments were conducted, that is, without identifying mitigation measures), the Plaintiffs make reference to the broader duty and other decisions. And, as the Defendants pointed out, in oral closing submissions the Plaintiffs also, at times, referred to a broader duty. I would add that at trial the Plaintiffs also pursued some of these broader duties with CFIA witnesses. For example, they pursued the issue of annual reviews when cross-examining Dr. Snow and case-by-case assessment of import permit applications when cross-examining Dr. Alexander.

[570] As will be discussed further below when applying the *Marchi* factors (and in more detail elsewhere in these reasons), the evidence demonstrates that CFIA's enforcement or maintenance of the importation ban involved multiple decisions over time, including, but not limited to, when and whether to conduct Risk Assessments. The relevant decision-making was broader than just the decision-making around how the Risk Assessments would be conducted.

[571] And this takes us back to *Marchi*. In that case, Ms. Marchi argued that the trial judge had erred by improperly focusing on snow removal in general without narrowing in on the impugned decision. She submitted that the case was not about the written policy's priority schedule for plowing and sanding or its snow clearance and removal policies generally, which were unchallenged. At issue was the clearing of snow from the parking stalls in the 300 block of Baker Street and the creation of a snowbank along the curb without ensuring safe access to sidewalks. Ms. Marchi submitted that even assuming that the written policy was core policy, the clearing of parking stalls and the creation of snowbanks was not mandated by any of the City's documents; it was the operationalization or implementation of snow removal (*Marchi* at para 75).

[572] The Supreme Court held:

> [76] We agree with Ms. Marchi and the Court of Appeal that the trial judge erred. First, he described the decision or conduct at issue too broadly, focusing on the entire process of snow removal. At issue is the City's clearing of snow from the parking stalls in the 300 block of Baker Street by creating snowbanks along the sidewalks — thereby inviting members of the public to park in those stalls — without creating direct access to sidewalks. Even if the written Policy was core policy, this does not mean that the creation of snowbanks without clearing pathways for direct sidewalk access was a matter of core policy. In a duty of care analysis, the decision or conduct at issue must be described with precision to ensure that immunity only attaches to core policy decisions (see, e.g., *Imperial Tobacco*, at para. 67). The duty asserted must be tied to the negligent conduct alleged. In this case, the plaintiff claims that the City was negligent in how they actually plowed the parking spaces. The trial judge's conclusion that the "City's actions were the result of policy decisions" was overbroad, merging together all of the City's snow removal decisions and activities. The City's submissions before this Court do the same.

[573] The Plaintiffs rely on *Marchi* to support their argument that the duty of care in the matter before me is limited to and precisely described as the discrete duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments, the negligent conduct being the failure to identify mitigation options.

[574] However, as discussed above, in my view the duty to identify risk mitigation options is not a discrete duty and must be viewed in the context of the overarching duty not to be negligent in the maintenance or enforcement of the *de facto* prohibition. Further, in *Marchi*, the overarching policy decisions were not challenged and the activity complained of (snow clearing) did not impact Ms. Marchi for an extended period of time. That is very different from the circumstances before me. The Plaintiffs' pleadings, the wording of Common Issue #1, the Plaintiffs' opening submissions and the evidence elicited at trial all extend beyond the decision-making around how the Risk Assessments were conducted. They demonstrate that, over the years, multiple decisions were made and actions taken with respect to the continuation of the prohibition on the importation of US honeybees from 2006 to the present. These decisions and actions concern a course of conduct or principle of action – the enforcing or maintaining of the import prohibition. In other words, the scope of the challenge to the government decision-making and conduct is much broader in the matter before me that it appears to have been in *Marchi.*

[575] While *Marchi* holds that the duty asserted must be tied to the negligent conduct alleged, I understand this to mean that when conducting a duty of care analysis to determine if a decision or a course of conduct is a policy or is operational in nature, the actual conduct at issue (in that case, how the parking stalls were actually plowed) must be clearly defined to permit that analysis to be properly conducted. In this case, despite the Plaintiffs' closing arguments as to the narrowness of the duty and conduct at issue, their allegations before and throughout the trial included other allegedly negligent conduct. This conduct and the alleged duty to identify risk mitigation measures all fall within the overarching duty not to be negligent in the maintenance or enforcement of the *de facto* prohibition.

[576] In conclusion, I find that the decisions and conduct at issue in this matter are broader than the identifying of mitigation options in the Risk Assessments.

ii. Policy decision or operational decision?

(a) Legal framework

[577] In *Cooper*, the Supreme Court addressed the rationale for the policy and operational decision distinction:

> 38 It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80).

[578] More recently, in *Marchi*, the Supreme Court addressed why core policy decisions are immune from liability and how a core policy decision is identified. In that regard, it stated:

> [39] Applying private law negligence principles to public authorities presents "special problems" (*Sutherland Shire Council*, at p. 456, per Mason J.). While legislation makes the Crown subject to liability as though it were a person, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions" (*Just*, at p. 1239). Government decision-making occurs across a wide spectrum. At one end are public policy choices that only governments make, such as decisions taken "at the highest level" of government to adopt a course of action based on health policy or other "social and economic considerations" (*Imperial Tobacco*, at para. 95). Courts are reluctant to impose a common law duty of care in relation to these policy choices (see *Dalehite v. United States*, 346 U.S. 15 (1953), at p. 57, per Jackson J., dissenting). At the other end of the spectrum, government employees who drive vehicles or public authorities who occupy buildings clearly owe private law duties of care and must act

> without negligence (L. N. Klar and C. S. G. Jefferies, *Tort Law* (6th ed. 2017), at p. 348). Tort law must ensure that liability is imposed in this latter category of cases without extending too far into the sphere of public policy decisions.

[579] The Supreme Court held that the primary rationale for shielding core policy decisions from liability in negligence is to maintain the separation of powers. Subjecting those decisions to private law duties of care would entangle the courts in evaluating decisions best left to the legislature or the executive. Separation of powers protects the independence of the judiciary; the legislature's ability and freedom to pass laws; and the executive's ability to execute those laws, set priorities and allot resources for good governance. "Core policy decisions of the legislative and executive branches involve weighing competing economic, social, and political factors and conducting contextualized analyses of information. These decisions are not based only on objective considerations but require value judgments — reasonable people can and do legitimately disagree…." Public authorities must be allowed to "adversely affect the interests of individuals" when making core policy decisions without fear of incurring liability. Moreover, while the legislative and executive branches sometimes make core policy decisions that ultimately cause harm to private parties, the remedy for those decisions must be through the ballot box instead of the courts. Conversely, there are good reasons to hold public authorities liable for negligent activities falling outside this core policy sphere where they cause harm to private parties. The rationale for core policy immunity – protecting the legislative and executive branches' core institutional roles and competencies necessary for the separation of powers – should serve as an overarching guiding principle in the analysis. Ultimately, whether a public authority ought to be immune from negligence liability depends on whether and the extent to which the underlying separation of powers rationale is engaged (*Marchi* at paras 42-49)

[580] With respect to determining if a decision is a core policy decision or an operational decision, the Supreme Court held:

> [54] However, the key focus must remain on the nature of the decision (*Just*, at p. 1245; see also *Imperial Tobacco*, at para. 87), and this focus is supported by the identification of additional hallmarks of core policy decisions. In *Just*, this Court explained that core policy decisions will usually (but not always) be made

> "by persons of a high level of authority" (p. 1245). This was later echoed by McLachlin C.J. in *Imperial Tobacco* when she stated that, generally, core policy decisions will be made "by legislators or officers whose official responsibility requires them to assess and balance public policy considerations" (para. 87). In *Brown*, the Court explained that core policy decisions involve "planning and predetermining the boundaries of [a government's] undertakin[g]" (p. 441). In addition, "decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions" (*Just*, at pp. 1242 and 1245 (emphasis added)).
>
> [55] The characteristics of "planning", "predetermining the boundaries" or "budgetary allotments" accord with the underlying notion that core policy decisions will usually have a sustained period of deliberation, will be intended to have broad application, and will be prospective in nature. For example, core policy decisions will often be formulated after debate — sometimes in a public forum — and input from different levels of authority. Government activities that attract liability in negligence, on the other hand, are generally left to the discretion of individual employees or groups of employees. They do not have a sustained period of deliberation, but reflect the exercise of an agent or group of agents' judgment or reaction to a particular event (see H. J. Krent, "Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort" (1991), 38 *U.C.L.A. L. Rev*. 871, at pp. 898-99).
>
> [56] Thus, four factors emerge from this Court's jurisprudence that help in assessing the nature of a government's decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria.

[581] The Court then provided a framework to structure the analysis and held that in weighing the above factors, the key focus must always be on the underlying purpose of the immunity and the nature of the decision. None of the factors is necessarily determinative alone, and more factors and hallmarks of core policy decisions may be developed; courts must assess all the circumstances (*Marchi* at para 66; see also paras 67-68).

[582] As stated by the Supreme Court in *Imperial Tobacco,* core policy government decisions protected from suit are decisions as to a course or principle of action that are based on public

policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. However:

> This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable (*Imperial Tobacco* at para 90).

[583] They are a "narrow subset of discretionary decisions," meaning the presence of choice is not a marker of core policy (*Marchi* at para 67, citing *Imperial Tobacco* at paras 84 and 88). The parties agree that the *Marchi* policy/operational analysis is the framework that applies in this case. They disagree, however, as to the scope and outcome of that analysis.

[584] The Plaintiffs assert that imposing a duty upon the Defendants to properly undertake risk analysis pursuant to prevailing standards has no effect or impact on core spheres of constitutional competencies: "As these decisions were ones based entirely on scientific technical standards or general standards of reasonableness, they are properly reviewed for negligence." They submit, "No policy decision was at stake respecting the standard of care required of risk analysis or consideration of import permit applications after December 31, 2006." Nor did political or value judgments enter into the decision-making analysis. Rather, "as a matter of law, the Defendants were obliged to act lawfully in the operation of the statutory import permit scheme and to follow their own internal and international standards governing risk analysis." The Plaintiffs submit that the refusal of scientists to adhere to the alleged internal and international standards did not involve competing social or political factors. Further, that the decisions at issue did not involve planning or a sustained period of deliberation or debate. Instead, the decisions reflect the exercise of an agent or group of agents' judgment or reaction to a particular event (citing *Marchi* at para 55).

[585] I would point out here that while the Plaintiffs have asserted a narrow duty of care limited to identifying risk mitigation options in the 2003 and 2013 Risk Assessments, some of the above submissions pertain to the broader duty of care not to be negligent in the maintenance or enforcement of the *de facto* prohibition. That is, broader decision-making is at issue.

[586] On this latter point, and before moving into the analysis of the *Marchi* factors, I note *Flying E Ranche*'s comment that "a decision of the Government of Canada to pass or to refrain from passing general legislative measures reflecting current policy cannot as a rule give rise to a cause of action in tort by a member of the general public" (*Flying E Ranche* at para 672, citing *Kuczerpa v R*, 1993 CarswellNat 1388 (FCA), leave to appeal dismissed, [1993] SCCA No 194 at para 5; see also *Sumere v Transport Canada*, [2009] OJ No 4213 (SC) at para 9, cited in *Flying E Ranche* at para 673). *Flying E Ranche* confirmed that the failure to conduct a review and to amend the *Feeds Regulations* in 1990 to ban ruminant meat and bone meal, as well as its decision not to impose a feed ban before 1997, were "quintessential policy decisions" (*Flying E Ranche* at para 670). The plaintiff in *Flying E Ranche* argued that it did not seek to hold government liable for failing to legislate, but rather for a failure to consider and take reasonable measures to implement Canada's policy of keeping BSE out of Canada. However, the ONSC found that this was a complaint that Canada did not decide on a course of action that required legislation. This was a policy, rather than an operational, decision. Similarly here, I find the Defendants' decision not to enact a new regulation when *HIPR, 2004* expired, and to rely instead on the *HA Act* and *HA Regulations*, to be immune from review. As such, the analysis of the *Marchi* factors will look at the decision-making process around how the Defendants went about maintaining and enforcing the *de facto* prohibition after that initial decision.

(b) Application of the *Marchi* factors

[587] The Supreme Court framed the first *Marchi* factor as follows:

> [62] First: the level and responsibilities of the decision-maker. With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the

> closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles (*Just*, at pp. 1242 and 1245; *Imperial Tobacco*, at para. 87).

[588] The Plaintiffs assert that the evidence at trial demonstrates that the risk analysis decision-makers were not remotely close to democratically accountable officials, as they were scientists or veterinarians in all cases. Further, that the Defendants tendered no evidence at trial to support a finding that the impugned conduct was a result of executive branch decision-making or the legislative process, or that it had any aspect of good governance associated with it. Rather, the Defendants' evidence was consistent that the science alone drove "all of the decision-making that gave rise to this action." Thus, the Defendants have not met their burden of establishing that the decisions were core policy decisions and, as such, immune from suit.

[589] The Defendants submit that, with respect to the levels and responsibilities of decision-makers, the Court must consider where the decision-maker falls within the executive hierarchy, as well as how that individual's job responsibilities require assessing and balancing public policy considerations (citing *Marchi* at para 62 and *Flying E Ranche* at paras 657 and 658). The Defendants say that CFIA's decisions to update the Risk Assessments or request further information involved senior-level veterinary officers, and the evidence at trial demonstrates that the president of CFIA was involved in the decision-making process with respect to US honeybee packages.

[590] In my view, what is clear is that both the level and responsibilities of the decision-maker are relevant to the first *Marchi* factor. In *Flying E Ranche*, the ONSC stated:

> [652] …The decision in *Just*, which predates *Imperial Tobacco* by many years, observed that although policy decisions are "generally made by persons of a high level of authority in the agency", they may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors." (Emphasis added in *Flying E Ranche.*)

[591] Further, that:

> [658] The conduct of Canada which gives rise to this action was a result of decisions made by veterinarians and epidemiologists at senior levels of the Department of Agriculture on courses of action to take to prevent BSE from entering the Canadian herd after consideration of risks and in light of scientific knowledge at the time.

[592] Thus, although the Plaintiffs say that every witness from CFIA who testified in support of the Defendants' defence around risk analysis, risk assessment and mitigation/management were scientists or veterinarians, even if that is so, this alone would not necessarily mean the first *Marchi* factor should weigh against policy immunity. The particular responsibilities of these individuals also have to be considered.

[593] In this case, the scientists and veterinarians involved in the decision-making around the maintenance and enforcement of the import prohibition held senior-level positions within CFIA. For example, Dr. Rajzman, who requested the 2013 Risk Assessment, was a Senior Veterinary Officer in the Animal Import/Export Division of CFIA.

[594] In *Flying E Ranche*, the ONSC found that the decision to ban the importation of cattle from the UK was a course of action decided upon to prevent BSE from entering Canada and was a policy decision. The Minister would have been involved in that decision, which involved political, economic and international trade issues as well as concerns regarding relations with the UK. Operationally, the import ban was implemented by the refusal to grant import permits, and, had they been issued in error, that potentially could have given rise to liability. Similarly, the decision to refuse entry of the Mirabel cattle and to have them destroyed was a decision as to a

course of action based on policy considerations, including the desire to be particularly cautious. The actual destruction was operational, and, had it been done negligently, that might have given rise to liability, but that was not what happened, nor was it what the case was about.

[595] Further, that the purpose and design of a monitoring program were also matters of policy. Senior officials in the Animal Health Division of AAFC had decided to monitor the UK imports for clinical signs of disease. Whether that was a prudent decision or not, it was a decision on a course of action based on the scientific knowledge at the time and was made in support of the goal of preventing BSE from entering the Canadian cattle herd.

[596] In *Flying E Ranche*, the plaintiff had also argued that the decisions to ban the import of cattle and to destroy cattle were operational in that they were implementations of BSE policies. The Court rejected that argument on the basis that the policies at issue were really only statements of objectives. For example, the objectives had been discussed at a stakeholder meeting about what should be done to achieve them, including a recommendation to consider a feed ban, which, after hearing from interested parties, a CFIA official decided to "park." The Court held that a decision not to adopt a course of action, which was taken in light of the scientific knowledge at the time and after considering economic and other factors, was a policy decision.

[597] Thus, circumstances where decision-makers are highly placed within the executive hierarchy or are close to an elected office will increase the possibility that a claim of negligence will raise separation of powers issues. However, what is more relevant to the circumstances before me is the second circumstance described in *Marchi* – the circumstance where the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, which would lean towards core policy immunity. Here, as in *Flying E Ranche*, what this entails is a series of decisions as to a course of action based on policy considerations.

[598] In my view, the evidence establishes that CFIA decisions around whether or when to update or prioritize honeybee risk assessments were part of a larger system of decision-making,

which includes monitoring honeybee health and responding to new information such as by adapting import protocols, where necessary. In this context, the conduct of the Risk Assessments may be understood as part of a broader course of action taken in the interests of honeybee health.

[599] For example, the rationale for conducting the 2003 Risk Assessment found in the Risk Assessment Request, which forms part of the 2003 Risk Assessment document itself, includes that there had been some changes in US honeybee health since the importation ban had first been put in place. CFIA's evidence was consistent that risk assessments are not routinely reviewed. Rather, a review usually only occurs if there has been a significant shift in either the information available or the sanitary status of a country that would perhaps reduce the risk to an acceptable level, thus rendering conclusions of the previous assessment obsolete. That is, a review may occur where there is scientific information as to a change in health status or control programs, either in Canada or the exporting country. Dr. Rheault also testified that if a request was received to revisit or review a previous risk assessment, it would be considered as part of the workload and priorities, but that there was no automatic system for CFIA to review all risk assessments on a specific time frame.

[600] As to prioritization, this includes that when requesting a risk assessment, the risk manager completes a form entitled "Prioritization of a Risk Assessment/Scientific Advice." Dr. Rajzman completed this form when she requested the 2013 Risk Assessment, indicating that the 2003 Risk Assessment was out of date and there was an immediate need to have it updated. Further, that requests for import permits continued to be received by the CFIA. Dr. Rheault summed up the factors that determine risk assessment priority, which include urgency, timing, workloads, cost recovery, availability of information and whether a risk assessment had been prepared before. Dr. Dubé testified that each risk assessor is working on three to four files at a time. There can be a backlog, and emergencies may pull assessors away from their work on risk assessments. There was also some evidence that whether a risk assessment is for a new country/commodity combination or whether it is an update to an existing assessment also plays a role in how risk assessments are prioritized. In particular, counsel for the Plaintiffs asked Dr. Rajzman about the difference between the Ukraine and the US risk assessment, specifically

about whether there was the same reliance on industry to determine whether there was interest in importation. Dr. Rajzman testified that the assessment for Ukraine was a new risk assessment, whereas the US was about reopening an assessment. The risk assessment group must be able to prioritize risk assessments and, in that instance, they had previously completed a risk assessment for the US, and there was no information the health status of honeybees had changed. Ukraine was a new risk assessment.

[601] Complementing the general requirement that there be a change in the information available about honeybee health before CFIA is likely to reopen or conduct a new risk assessment for that same country/commodity is CFIA's monitoring of honeybee health in Canada and the US, as well as in other exporting countries. Monitoring is part of a larger network of decision-making in the interests of animal health.

[602] There is evidence that CFIA monitored and responded to changes in honeybee health in exporting countries, including the US. While CFIA does not have in-house honeybee health and management experts, the risk manager witnesses testified that CFIA has a responsibility to keep track of changes in honeybee health. Dr. Snow testified that she had a responsibility to seek expert information, which, in the case of honeybees, resided outside CFIA. Dr. Kruger testified that one of his "responsibilities on the honeybee file was keeping up to date on the health status of honeybees in Canada and in the countries that exported honeybees to Canada." Dr. Perrone testified that CFIA does not monitor bee health directly, but that they rely on contacts with other entities. CAPA is the main source of technical expertise on honeybees and honeybee health. CFIA also has contacts in other countries. Additionally, they have subscriptions on ProMed, which Dr. Perrone described as a notification system through which disease outbreaks around the world are reported; OIE also has a notification system; and, CFIA members attend meetings about honeybees. Finally, referring to her notes from a call with Paul Kozak, Dr. Rajzman testified, "every year prior to releasing import permits, I am asked by the permit office if there's been any changes to the honeybee health status of the countries we import from, so for the first question, it was me asking him have you heard—is there anything that we need to change or to hold back on."

[603] There is also evidence that CFIA responded to changes in honeybee health. For example, Dr. Perrone's testimony was that, following a finding of AHB originating from Australia in 2006, she immediately advised the authorities from Australia that CFIA was suspending the importation of honeybees until a change to import requirements could be implemented. Although packages would no longer be permitted to be imported from most of Australia, CFIA agreed to recognize an AHB-free zone in Western Australia. Queens were permitted to be imported under similar import conditions applicable to US queens.

[604] Other examples include that in October 2009, Dr. Kruger became aware of a varroa mite infestation on Hawaii's Big Island, which had previously been free from varroa mites. Until new import conditions could be developed with USDA-APHIS, CFIA suspended queen imports from Hawaii. Import protocols were negotiated and implemented. And, in April 2010, Dr. Snow was informed that SHB had been detected in Hawaii. Dr. Snow consulted with Dr. Nasr, then the head of the CAPA Import Committee, about imposing the same import conditions for SHB as already applied to queens from the rest of the US, and about how arriving queens would be quarantined and inspected. The next day, she informed the USDA-APHIS that import conditions for Hawaiian queens would change to address the SHB issue.

[605] In 2019, there were AHB incursions within the 100-mile radius of queen bee breeding operations in California. Dr. Rajzman testified that CHC was concerned about the incursion and with the consequential possibility of losing California, i.e., that the importation of queens from California would no longer be an option for Canadian beekeepers. Dr. Rajzman spoke with Mr. Kozak, who said he would meet with the Provincial Apiculturists to discuss the issue and would put together an option package for her consideration based on a scientific review of AHB to see if CFIA could reduce the radius. Based on the AHB options produced, CFIA was able to reduce the radius to 50 miles.

[606] Dr. Rajzman also testified about concerns about a discovery of varroa in Australia in 2022. One of the existing requirements for export to Canada was that Australia be free of varroa. Based on information received from the Australian authorities, CFIA determined that, going

forward, the import conditions for packaged bees from Australia would include that the packages be imported from areas free of both varroa and SHB (rather than just SHB).

[607] In 2020, CFIA received a request to import honeybee packages from Montana into Alberta in light of COVID-19 and consequent impacts on industry access to honeybee packages from permitted sources. The rationale for the decision to maintain the *status quo*, with the US border being closed to the import of packages, is found in a decision record that is in evidence. This states that:

> Consideration was given to this request as the CFIA recognizes that the beekeeping industry is in a crisis. The situation in the United States is under constant review and there is no scientific evidence to indicate that the border can be safely opened. Furthermore, import requirements and conditions are made at a national level, not regional/provincial.
>
> The CFIA, AAFC, and the CHC have explored many possibilities to aid in the supply of honeybee packages such as potential charter flights, using courier companies and providing nuclei hives to other parts of the country (from Canadian beekeepers who fared better after winter). New Zealand has begun to start shipping packages to Canada therefore this should provide some relief to the industry.

[608] The recommendation to keep the border closed was Dr. Rajzman's. She testified that she made that recommendation because her mandate is to protect Canadian honeybee health, and because import controls are federal jurisdiction (the proposed importation was for Alberta alone).

[609] The point of this summary is that, as the Defendants submit, this and other evidence demonstrates that CFIA has broad policies pertaining to whether and when risk assessments will be conducted or updated and that monitoring and prioritization are aspects of same. Those policies pertain to the importation of honeybees from all sources, including the US, and are clearly concerned with CFIA's obligation to protect honeybee health.

[610] The Plaintiffs seek to distinguish *Flying E Ranche* and, in that regard, submit that the judge in that case was persuaded by the fact that the Minister had made all of the decisions, and there were "massive" trade implications such that the decisions involved were policy and political in nature. However, as indicated above, the judge in *Flying E Ranche* actually found that the decisions at issue were made by veterinarians and epidemiologists at senior levels of the Department of Agriculture.

[611] I find that the nature of the decision-making around the maintenance of the prohibition on the importation of US honeybees entailed a course of action for the purpose of protecting honeybee health. That decision-making was undertaken by senior scientists based on scientific information as to change, or a lack of change, in honeybee health, including in Canada and the US. It was their responsibility to monitor and assess honeybee health and to advise the Minister whether the prohibition should remain in place and whether the border should remain closed. This decision-making, peripherally, included economic considerations to the extent that it acknowledged that maintaining the prohibition protected the whole of the beekeeping industry, and those who were dependent upon it, from the consequences of the spread of disease and vectors, even while recognizing that maintaining the prohibition had the potential for economic harm to those commercial beekeepers whose preferred business model was to destroy all of their bees each fall and purchase new US bee packages every spring. However, the focus of CFIA's decision-making was properly on bee health, not economics.

[612] The prohibition was initially effected by regulation for some provinces in 1986 and for all of Canada in 1987, and that was a legislative decision. When *HIPR, 2004* lapsed in 2006, the prohibition was maintained by decisions made within CFIA based on policies pertaining to whether and when risk assessments will be conducted or updated.

[613] All of that said, overall this *Marchi* factor does not strongly militate towards policy decisions given the limited consideration of economic, social and political considerations. However, nor is this a circumstance where CFIA was simply implementing operational decisions.

[614] The second *Marchi* factor was stated by the Supreme Court as follows:

> [63] Second: the process by which the decision was made. The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.

[615] The Plaintiffs submit that the "actionable decisions" constitute activities falling outside the protected sphere of policy because they are based entirely on scientific technical standards or general standards of reasonableness and, therefore, are properly reviewed for negligence, referencing *Marchi* at paras 51 and 65. Further, that neither the failure to identify risk mitigation options nor the failure to consider import permit applications after December 31, 2006, can be characterized as a core policy decision. Rather, the Defendants' conduct was wholly based on science. In that regard, the Plaintiffs say this is a situation where the government activities are, as described in *Marchi*, "generally left to the discretion of individual employees or groups of employees. They do not have a sustained period of deliberation, but reflect the exercise of an agent or group of agents' judgment or reaction to a particular event" (*Marchi* at para 55).

[616] Conversely, the Defendants submit that the evidence establishes that the decision-making process in this matter included deliberations, public discussions and inputs from a variety of sources that include industry perspective and advice from subject matter experts, as demonstrated by internal briefing notes and memoranda to the Minister's office respecting recommendations and decisions. Further, that the process was intended to have broad application and be prospective in nature, pointing to core policy decisions (citing *Marchi* at para 63 and *3311876 Nova Scotia Limited v Trenton (Town*), 2023 NSSC 60 at paras 57-62 [*Trenton*]), as demonstrated by CFIA's decision to use AIRS as a communication tool and resource for officers responding to permit applications. This has broad application across the permitting process for all regulated animals under the *HA Act*, and CFIA's decision to allow an officer to consult and

rely on the import conditions in AIRS in responding to individual permit applications engages directly with policy decisions. The Defendants submit that relying on AIRS, instead of conducting a fresh risk assessment in response to each permit application, is a lawful and protected policy decision.

[617] In my view, the evidence demonstrates that the process by which the decisions were made and actions taken concerning the course or principle of action – the enforcing or maintaining of the import prohibition – demonstrate that these included public policy considerations.

[618] The evidence concerning consultation is set out in detail above. For the purposes of this discussion of the decision-making process, I note by way of example that Dr. Belaissaoui prepared a July 15, 2003, Memorandum to the President recommending that CFIA expedite an amendment to the *HIPR, 1999* to allow the importation of honeybee queens from the US, and CFIA engaged in public consultation with respect to the proposed regulatory change permitting the opening of the border to the importation of US honeybee queens; CFIA sought input from the CHC and CAPA when it was conducting the 2003 Risk Assessment; CFIA had regular communications and consultations with CAPA and the Provincial Apiculturists, respecting the 2013 Risk Assessment specifically, but also respecting honeybee health generally; the 2013 Risk Assessment was shared with stakeholders for comment; and CFIA engaged in consultation by way of the Call for Information in 2023.

[619] An illustration of the decision-making process is also found in the February 25, 2014, Memorandum to the Minister of Agriculture and Agri-Food, prepared by Dr. Rajzman and approved by her manager and director as well as by Dr. Kochhar as President of CFIA. This provides the background to the prohibition, including the divided views on the importation of US honeybee packages, and explains that the 2013 Risk Assessment had been the subject of a one-month consultation process with stakeholders that received 173 responses; that the final 2013 Risk Assessment on the importation of US honeybee packages had been sent to the CCVO and the Provincial Apiculturists for input regarding possible mitigation measures, eight out of nine of

whom had determined that mitigation measures were unavailable at that time but wished to keep discussions open; that contact had been made with Hawaii regarding that state's honeybee health status; and, that CFIA was exploring Ukraine as a potential source of packaged bee imports. The memorandum concluded that CFIA was unable, on the basis of its updated risk assessment, to establish conditions that could mitigate the risks posed by the importation of US packaged honeybees. As a result, CFIA was maintaining the border closure to the US for packaged honeybees but would continue to keep discussions open with the US and stakeholders for future considerations.

[620] In my view, this and other evidence establishes that the maintenance or enforcement of the importation prohibition was deliberative, included debate both publicly and with other stakeholders and was intended to have broad application and be prospective in nature, as demonstrated by the import permit application process.

[621] While it is true that science underlay the decision-making process, I do not agree with the Plaintiffs that the process can be described as "a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation" leading to it being operational in nature. The process of determining if a risk assessment was required included multiple inputs at various times and levels.

[622] In sum, while the Risk Assessments themselves were based on science, they were one part of the course of conduct and decision-making process with respect to the enforcement or maintenance of the import prohibition. This *Marchi* factor, the decision-making process, weighs in favour of policy immunity, particularly respecting the decision not to assess each permit application on a case-by-case basis and respecting the timing of updates to the Risk Assessments.

[623] The third *Marchi* factor, budgetary considerations, was explained as follows:

> [64] Third: the nature and extent of budgetary considerations. A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions "concerning budgetary allotments for departments or government agencies will

> be classified as policy decisions" because they are more likely to fall within the core competencies of the legislative and executive branches (see, e.g., *Criminal Lawyers' Association*, at para. 28). On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.

[624] The Plaintiffs submit that no budgetary considerations were engaged in this matter.

[625] The Defendants submit that budgetary and resourcing considerations factor heavily in CFIA's determinations as to processing applications, where to monitor, when to update existing risk assessments and when to request information from third parties. Dr. Rheault's testimony, referred to at paragraph 600 above, supports that there were many factors influencing how risk assessments are prioritized, and that there was no automatic system for the risk assessors to review all risk assessments on a specific time frame.

[626] As the Defendants point out, decisions concerning budgetary allotments for departments can be classified as policy decisions "because they are an attempt by the public authority to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertaking and of their actual performance" (*Lowe v Sidney (Town of)*, 2020 BCSC 335 at para 24). However, in my view, the evidence in this case does not support that this is a circumstance, such as the lighthouse example in *Just* cited by the Defendants, where a clear budgetary decision was made (in *Just*, the example was that if a policy decision were made that new airport facilities would be funded at the expense of lighthouse inspection, then no liability would lie with the government if a lighthouse beacon were extinguished and a shipwreck ensued).

[627] The evidence in this case does not include actual budgetary information of decision-making. Rather, it speaks generally to the demands on CFIA and its resources. CFIA witnesses' evidence respecting the prioritization of risk assessments and the demands on CFIA resources is described above. Generally, it supports that CFIA juggled competing demands on resources,

particularly when there were outbreaks or new diseases of concern, and that CFIA had to prioritize some projects over others.

[628] In my view, decisions such as relying on import conditions and AIRS, rather than case-by-case assessments of permit applications, are policy in nature when viewed in the context of the expediency of that system and resource allocation. Similarly, so may be decisions about when to update risk assessments, monitoring efforts and shifting priorities. However, beyond generally speaking to the broad range of responsibilities of CFIA and the allocation of human resources to address this, the evidence does not directly address budgetary allotments. Accordingly, this *Marchi* factor does not weigh in favour of policy immunity.

[629] Finally, the fourth *Marchi* factor was described by the Supreme Court as follows:

> [65] Fourth: the extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment (Makuch, at pp. 234-36 and 238). Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria.

[630] The Plaintiffs assert that the evidence supports that science alone drove all of the decision-making that gave rise to this action and that the decision-making was the direct result of "administrative direction, expert or professional opinion, technical standards or general standards of reasonableness" (citing *Marchi* at para 52) and, therefore, outside the protection of policy immunity.

[631] Conversely, the Defendants submit that the consideration of scientific information and the balancing of competing interests weigh in favour of policy immunity (citing *Flying E Ranche* at para 658). Whether to update the 2003 or 2013 Risk Assessments required weighing the

available scientific information, or lack thereof, and other inputs to make value judgments about how to proceed.

[632] As I understand it, the Defendants suggest that the decisions around monitoring bee health and updating risk assessments were made after consideration of risks and in light of scientific knowledge available to the Defendants at the relevant times. The evidence of Dr. Alexander was that a change in a risk assessment would be prompted by information suggesting a significant shift in the situation/risk level that would render the previous assessment obsolete. Dr. Kochhar's testimony was that the most important factor with respect to whether to conduct a new risk assessment would be the existence of new scientific evidence. However, I am not persuaded that this evidence strongly demonstrates competing interests.

[633] That said, the determination of when the science, from various sources, is such that a new risk assessment is warranted – or that a new risk assessment will only be triggered by relevant new scientific information – are value judgments which formed part of the course of conduct and decision-making process that served to continue the enforcement or maintenance of the import prohibition. Similarly, the decision to assess permit applications against the import conditions in AIRS – which, in the case of US packages, would result in refusal – rather than assessing each application on a case-by-case basis is a value judgment about how to efficiently run an import permit scheme.

[634] In that respect, this Marchi factor has some positive weight in considering the applicability of policy immunity.

(c) Conclusion on the *Marchi* factors

[635] In the course of weighing the four factors analyzed above, none of the factors is necessarily determinative on its own (*Marchi* at para 66).

[636] The nature of the decision in this matter is the ongoing consideration of whether to maintain the prohibition on the importation of US honeybee packages. This was not left to the discretion of individuals or one specific group of CFIA employees. Further, at various times and in various circumstances, there was extensive consultation, both publicly and with those having external expertise. This consultation was relied upon in that course of conduct. Finally, there were some value judgments at play on the part of CFIA for which there were no objective criteria, specifically with respect to when to update risk assessments and how best to process import permit applications. Although this is not a case where the decision is clearly one of policy, the *Marchi* factors, weighed together, lean toward such a finding.

[637] Further, I am guided by *Marchi*'s reminder that the key focus must always be on the underlying purpose of the immunity and the nature of the decision, being the protection of the legislative and executive branches' core institutional roles and competencies necessary for the separation of powers. In the present case, the decision at issue, the maintenance or enforcement of a *de facto* prohibition, was part of a larger program of decision-making toward the goal of preserving animal health. Adopting such a program falls within CFIA's executive-branch functions and is properly immune from review.

iii. Other residual policy concerns

[638] As stated in *Fullokwa:*

> [57] The question is whether there are broad policy considerations beyond those relating to the parties that make the imposition of a duty of care unwise: *Odhavji Estate*, at para. 51. At issue is the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally: *Cooper*, at para. 37. In order to trump the existence of what would otherwise be a duty of care (foreseeability and proximity having been established), these residual policy considerations must be more than speculative. They must be compelling; a real potential for negative consequences of imposing the duty of care must be apparent: *Hill*, at paras. 47-48; A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at pp. 304-6.

[639] In this matter, I have found that a *prima facia* duty of care does not arise because proximity has not been established. In *Deloitte*, as no duty of care was established, the Supreme Court did not consider policy considerations. Nevertheless, I will deal with these broad policy concerns briefly.

(a) Indeterminacy

[640] The policy concern with respect to indeterminate liability is that the proposed duty of care, and therefore the right to sue for its breach, is so broad that it extends indeterminately. There must be a principled basis upon which to draw the line between those who are owed the duty and those who are not (*Fullowka* at para 70).

[641] Relevant to the present case is that the "risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss" (*Imperial Tobacco* at para 100; see also *Martel Building Ltd v Canada*, 2000 SCC 60 at para 37 [*Martel*]).

[642] The Plaintiffs submit that no spectre of indeterminate liability arises from the imposition of a duty of care on the Defendants to "the very parties in whose interests they regulate" – some 1,400 persons in Canada – therefore, no risk of a duty to the public at large arises. Further, the duty itself is narrow: the Plaintiffs articulate it as the duty "to conduct risk analysis and concordant Risk Assessments reasonably, in accordance with domestic, internal and international standards." They submit that the facts in this matter are similar to those in *Adams*, which found the regulators owed a duty of care to a limited class of potential plaintiffs, being potato farmers. In closing oral submissions, the Plaintiffs emphasized that indeterminacy means the scope of liability is impossible to ascertain, citing *Deloitte* at para 43.

[643] Conversely, the Defendants submit that Canada would be exposed to indeterminate liability if a private law duty of care were owed to prospective importers of honeybees to protect those importers from economic harm. This is because if a duty of care were owed to the commercial honeybee importers to consider permit applications on a case-by-case basis, then

CFIA would owe the same duty to all importers of all animals, as there is no principled basis on which to distinguish between importers of different animals.

[644] The Defendants also submit that while the Plaintiffs focus on the 2003 and 2013 Risk Assessments regarding the importation of US honeybees, any such duty would extend to the assessment of the risk of importing honeybees from each of the other countries from which honeybees could be imported. The importation process, specifically the use of AIRS to identify import conditions, followed by the granting or denial of import permit applications, is available for all prospective importers and applies equally to all sources of import. A duty to conduct a risk analysis for each import application on its own unique circumstances would create unknown liability to an unknown number of importers.

[645] The Defendants also argue that if CFIA has a private law duty to identify risk mitigation options in its honeybee risk assessments, then there is no principled basis upon which to exclude a CFIA duty owed to all those who wish to import any regulated animal, where requests for imports were refused based on risk assessments that did not consider mitigation options. The Defendants submit that the fact that a class has been identified and economic experts have formulated opinions on potential losses to the class does not resolve this policy consideration (citing *Flying E Ranche* at para 697; *Los Angeles Salad BCCA* at paras 63-67).

[646] The Defendants also note that other agricultural sectors, in particular crop producers who are reliant on pollination, depend on honeybees for their economic viability. The Defendants argue that if there is a private law duty of care to importers of animals regarding the application of CFIA's animal import scheme under the *HA Act* and *HA Regulations*, then that duty would also extend to other entrepreneurs who rely on animal imports, particularly honeybees, for revenue. The potential impact of liability for honeybee imports could, in the Defendants' submission, extend liability to the broader agricultural sector.

[647] The parties' approach to indeterminate liability is informed by their view of the alleged duty. The Plaintiffs assert that imposition of a duty of care on the Defendants would only be a

duty imposed on the Class, and not to the public at large. The Defendants are of the view that any duty, which they see as being broader, would also apply to other importers under the regulatory scheme as well as to members of industries who rely on regulated imports.

[648] The facts of *Elder Advocates*, relied upon by the Defendants, are summarized in above at paragraph 333. The Supreme Court found that, assuming the facts pleaded to be true, the negligence claim was bound to fail at the first step of the *Anns/Cooper* inquiry. Absent a statutory obligation to do the things that the plaintiffs claimed were done negligently, proximity could not be made out (see *Elder Advocates* at paras 70-73).

[649] However the Court went on to find:

> [74] Were the pleadings to satisfy the first step of the *Anns/Cooper* test, they would fail at the second step, which asks whether the *prima facie* duty of care is negated by policy considerations. Where the defendant is a public body, inferring a private duty of care from statutory duties may be difficult, and must respect the particular constitutional role of those institutions: *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, *per* Laskin J., as he then was, for the Court. Related to this concern is the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention. It is arguable that to impose a duty of care on the plaintiff class on the facts pleaded would open the door to a claim in negligence by *any* patient in the health care system with an entitlement to receive funding for health services, whether primary or extended. This raises the spectre of unlimited liability to an unlimited class, decried by Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444: see *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66.

[650] To the extent that the Plaintiffs have not abandoned their argument that CFIA owed a duty to assess all import applications on a case-by-case basis, I note that their opening submissions included the following: “Once the regulation lapsed on December 31, 2006, imports and permit applications were subject to the same administrative scheme and HAA Regulations that governed the importation of honeybee queens and *live animal imports generally*. This

requires a case-by-case assessment of every permit application" (emphasis added). Similarly, "After December 31, 2006, Defendants chose to regulate honeybee imports pursuant to the general provisions of sections 12 and 160 of the HHA [*sic*] which provided for the receipt and assessment of import permit applications on a case-by-case basis."

[651] Thus, the Plaintiffs' initial submissions appear to recognize that any duty to assess import permit applications on a case-by-case basis is a general one and applies to all animals imported under the regulatory regime, not just honeybees. Further, the evidence establishes that the importation permit process, which uses AIRS to identify import conditions in determining whether to grant permit applications, has application to many, if not all, prospective importers, regulated animals and sources of import. I therefore agree with the Defendants that if a duty of care was owed to the commercial honeybee importers (the Class) to consider permit applications on a case-by-case basis, then CFIA would owe the same duty to all importers of all animals and that there is no principled basis on which to distinguish between importers of different animals.

[652] While this does not expose the Defendants to indeterminate liability to the public at large, *Elder Advocates* held that it was at least arguable that recognizing the duty of care in that case would open the door to a claim to any patient "within the health care system" with an entitlement to receive funding. In my view, this is similar to opening the door to a claim in negligence in this case by all other importers of animals who have been denied a permit for the importation of a regulated animal within the animal import regulatory system, without case-by-case consideration of their application. Further, Canada would have no control over the number of importers who submitted an application (see *Cooper* at para 54; *Imperial Tobacco* at para 99). And, on a purely practical level, such a duty would likely bring the import system to a halt by virtue of the sheer number of risk analyses or other forms of assessment that would be required.

[653] The Defendants' next argument is that CFIA may be liable to importers of any animals where, like the 2003 and 2013 Risk Assessments, importation was prohibited based on a risk analysis process that did not consider mitigation. As the Defendants submit, the trial evidence of Dr. Dubé and Dr. Rheault was that mitigation is commonly not included in risk assessments. Dr.

Rheault also testified that the risk assessment unit dealt with risk assessment requests concerning other diseases affecting importation, such as avian influenza, H5N1 and swine influenza, and many different commodities from different countries. The Defendants submit that a private law duty of care to importers to identify mitigation measures in CFIA risk assessments would expand Canada's liability beyond the 2003 and 2013 Risk Assessments for US honeybees to an indeterminate class of prospective animal importers, the composition and size of which is beyond its control.

[654] Essentially, the Defendants' position is that a duty to consider risk mitigation as part of the risk assessments, if breached, could give rise to liability to an unknown number of importers of any species of animal who were unable to benefit from more economically viable import opportunities, or who suffered other economic losses, when importation of an animal was prohibited on the basis of an unfavourable risk assessment that did not consider mitigation.

[655] If there is a duty to consider risk mitigation options when conducting risk assessments and a failure to do so is negligent conduct, then I do not see a principled reason why this would not be the case for *any* prohibition on animal imports resulting in economic loss. That would impose "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Fullowka* at para 70; *Los Angeles Salad BCCA* at para 63), as CFIA has no control over the number of persons who seek to import animals. This factor therefore weighs in favour of negating any *prima facie* duty of care respecting risk assessments.

[656] As the Defendants submit, *Flying E Ranche* held that defining the scope of the Class and its damages does not resolve the concern about indeterminate liability for pure economic loss. "Recognizing a duty to one plaintiff can open the door to recognition of others who may look to the defendant for compensation for economic losses as well" (*Flying E Ranche* at para 697). In *Flying E Ranche*, the evidence was that many industries, not just cattle producers, were affected by BSE and the government's response to it. This included slaughterhouses, renderers, feed producers, cattle and sheep farmers and others, and there was evidence of links to those businesses. The Court in that case noted that the losses by those industries would also be

economic, rather than physical, and the limits might be difficult to determine. Further, the losses claimed arose in a commercial context involving an inherent business risk best guarded against by insurance, and allowing recovery may encourage a multiplicity of inappropriate lawsuits (*Flying E Ranche* at para 700, referring to *Martel*). Accordingly, it accepted that indeterminate liability to an indeterminate number of claimants weighed against finding a duty of care in that case.

[657] Thus, based on *Elder Advocates* and *Flying E Ranche*, it would appear that in a class action, the fact a class has been defined does not necessarily mean that there is not a concern about indeterminate liability. In that regard, I acknowledge the Plaintiffs' reliance on *Adams*. There, seed potato farmers alleged that Agriculture Canada negligently conducted an investigation into the source of a potato virus, causing the farmers economic loss. The New Brunswick Court of Appeal [NBCA] stated that Agriculture Canada had not advanced any policy arguments, including indeterminate liability. However, that Court went on to say, "In any event, it should not be forgotten that we are dealing with a limited class of potential plaintiffs: potato farmers." Further, that as the duty at issue pertained to farmers and not the public at large, any analogy to the facts in *Cooper* would be misplaced (para 45). In my view, *Adams*, which pre-dates *Elder Advocates* and *Flying E Ranche*, did not make a definitive finding on the issue of whether there can be indeterminate liability policy concerns even when there is a defined class. And, depending on the factual circumstances, it may be that indeterminate liability arises when the duty and liability extend to those impacted by a regulatory regime, as opposed to the public at large. I also appreciate that in *Paradis FCA* the Federal Court of Appeal stated that there was no possibility of indeterminate liability, as the Class is limited and the circumstances alleged to have given rise to liability were "most uncommon." However, in view of the evidence before me as opposed to the pleadings upon which the Federal Court of Appeal based its statement, I find that not all of the surrounding circumstances, such as the use of import conditions and AIRS, are uncommon. Rather, the importation process is common to all animal imports.

[658] Finally, the Defendants submit there was evidence that other agricultural sectors are reliant on pollination by honeybees for economic viability and that the commercial beekeepers

testified about the interests of crop producers who rely on honeybees for custom pollination contracts. I note that it is on this basis that the Plaintiffs sought to distinguish *Flying E Ranche*, stating that the sheer indeterminate breadth of those individuals who were potentially harmed was critical to the rejection of the duty in that case. In this case, there is some limited evidence that other agricultural sectors are reliant on commercial beekeepers. For example, Mr. Gibeau testified that blueberry growers in British Columbia are not able to retain enough pollinator bees because of the shortage of available honeybees. Thus, it is not entirely speculative that if there were a private law duty of care owed to importers of regulated animals with respect to the importation of same, then that duty, and resultant liability, would also extend to other parties who rely on animal importation, particularly honeybees, to generate revenue. However, the evidence in support of this is weak. Therefore, it has not been established that this is a circumstance like *Los Angeles Salad*, where the BCSC held,

> If a duty of care to protect the economic interests of a supplier of food existed, then it is difficult to see on what principled basis a duty would not be owed to a multitude of other persons whom it would be reasonably foreseeable would suffer economic loss by negligent inspection. Claims could be advanced by retailers, wholesalers, suppliers, food processors, distributors, farmers and employees of each of the above. This appears to be exactly the kind of problem that has led to a *prima facie* duty of care being negatived in other circumstances (para 124; see also *Los Angeles Salad BCCA* at paras 63-67).

[659] In summary, if a duty of care was owed to the Class to consider permit applications on a case-by-case basis (and I have found that it was not), then CFIA would owe the same duty to all importers of all regulated animals who have been denied an import permit without a case-by-case consideration of their application. There is no principled basis on which to distinguish between importers of different animals, thus leading to indeterminate liability. This favours the negating of any *prima facie* duty of care. The same is so if there is a duty to consider risk mitigation when conducting risk assessments. However, the Defendants have not established that indeterminate liability arises from the potential for liability to a wide group of other agricultural sectors (or other third parties) due to their economic reliance on commercial beekeepers.

[660] Nevertheless, overall, this policy factor – indeterminate liability – weighs against a duty of care in the present case.

(b) Chilling effect

[661] The Plaintiffs refer to *Alymer*, where the ONCA overturned a trial judgment that the Plaintiffs say failed to impose liability against the provincial equivalent of the CFIA. The ONCA overturned the judgment because the trial judge had not given effect to *Hill* and other cases that reject the argument that recognition of a duty of care should be refused because it would have a chilling effect on government action. *Alymer* quoted the Supreme Court in *Fullowka* that any alleged "tension between the broader public interest with the immediate demands of safety may be taken into account in formulating the appropriate standard of care" (*Alymer* at para 60, citing *Fullowka* at para 73). The Plaintiffs submit, based on this, that a chilling effect does not arise from the fact that a regulator may owe a duty of care, but arises only if the regulator is held to a standard of perfection in its decision-making.

[662] However, I note *Fullowka*'s point, in the paragraph cited by *Alymer*, was that the court below erred in finding that a duty to carry out public duties reasonably might cause regulators to over- or under-regulate because that conclusion was speculative and fell below the standard required to show that there was a real potential for policy consequences *resulting from conflicting duties*. As such, although over- or under-regulating could be concerned with the chilling effect, the Supreme Court in *Fullowka* was addressing conflicting duties.

[663] The Plaintiffs do not engage with the Defendants' submission that consultation is important to good governance and that imposing the proposed duty of care on the Defendants would have a chilling effect on such consultations.

[664] Specifically, the Defendants submit that Canadian jurisprudence is clear that communications and consultations in furtherance of a regulator's function do not create proximity. They cite *Flying E Ranche,* which indicates that such a concept is also applicable at

the second stage of the *Anns/Cooper* test. The concern is that if proximity were to arise from consultations between a regulator and the regulated industry, there would be a chilling effect on such consultations, as governments may be reluctant to consult if it could create a private law duty of care (*Flying E Ranche* at para 709). The Defendants submit that importation of animals on a commercial scale can have negative impacts on members of the industry; therefore, the interests of members are important considerations in decision-making. The Defendants submit that if a duty of care were to arise from consultation with stakeholders on animal health issues, there would be a chill on consultation with respect to decisions that affect industry on a national scale. I agree.

[665] I would also point out that in *Hill*, *Alymer* and *Fullowka*, the proposed duty of care would have a chilling effect on the very activity that was alleged to have been conducted negligently, while in this matter, the consultations were not the target of the negligence claim.

[666] In *Hill*, for example, the concern about the proposed tort of negligent investigation was that police would take an "unduly defensive approach to investigation of criminal activity" (*Hill* at para 56). That is, it was argued that imposing a duty not to investigate negligently would chill investigation generally. The chilling effect was associated with the specific conduct challenged for negligence. Indeed, the Court in *Hill* resolved the "chilling effect" argument, in part, by suggesting that the way police officers achieve the balance between cautiousness and prudence on one hand, and efficiency on the other, falls to be considered in determining what the standard of care should be. In this matter, there is no such resort to the standard of care because there was no allegation that the consultations subject to a chilling effect were done negligently.

[667] I would also point out that the Supreme Court did not consider it to be "necessarily a bad thing" if police were more careful in conducting investigations – that is, the impact of any alleged chilling effect would not necessarily be harmful (*Hill* at para 56). In the present case, on the other hand, in my view a reduction in government's consultation with industry would be a "bad thing," given the importance of consultation to good governance.

[668] *Alymer*, relying on *Hill*, held that the trial judge erred because she "did not give effect to Hill and similar authorities that reject the argument that recognition of a duty of care should be refused because it would have a 'chilling effect' on government action" (*Alymer* at para 59). Although the analysis on this point was not detailed, the conduct that would be subject to the chilling effect in *Alymer* was, like in *Hill*, the very conduct that was subject to the duty. The proposed duty owed by the Ministry of Agriculture, Food and Rural Affairs was to act reasonably in exercising its regulatory responsibilities in suspending the abattoir licence, in occupying Alymer's plant and in storing and destroying detained meat. The (ultimately rejected) policy consideration was that this duty would have a chilling effect on the exercise of regulatory responsibilities in the public interest.

[669] While a "chilling effect" was not referred to explicitly in *Fullowka*, that case is cited by *Alymer* in this context. In *Fullowka*, the Supreme Court rejected the Court of Appeal's assertion that imposing a duty to carry out public duties with reasonable care might cause regulators to over- or under-regulate in an abundance of caution. Specifically, a mining inspector's duty to order the immediate cessation of work in an unsafe mine (which the inspector is required to do under statute) would not have a chilling effect on the inspector carrying out their public duties, because all it demands is that the public duties be carried out reasonably. Here again, the alleged chilling effect relates to the very activities subject to the negligence claim.

[670] Accordingly, those cases are of limited help in determining whether any duty can be negated because of a possible chilling effect on government consultation with industry, given that consultation is not the subject of the negligence claim.

[671] *Flying E Ranche*, on the other hand, is factually similar to the present case. There, even though the reasonableness of the consultations was not challenged, the ONSC stated that a residual policy concern was that, if proximity were to arise from consultations between Agriculture Canada and cattle industry associations, there would be a chilling effect on consultations, as governments may be reluctant to consult if doing so could create a private law duty of care. While the ONSC found that this was "somewhat speculative," it was not disputed

that consultation is an accepted practice of good governance. The ONSC concluded that this potential chilling effect on consultation was also "a concern that weighs against finding a duty of care arising from consultations" (*Flying E Ranche* at para 709).

[672] I recognize the caution in *Paradis FCA* that too low a standard respecting the chilling effect would inappropriately immunize government from liability. There, Justice Stratas was responding to the Federal Court's finding that "recognizing a duty of care 'could have' a chilling effect on Canada's performance of its duties." Justice Stratas found that the "could have" standard set the bar far too low, as it could always be speculated that recognizing a duty of care could have a chilling effect. Here, however, the Defendants do not broadly allege that the government's "performance of its duties" will be chilled. They are concerned that government consultation with industry will be chilled, and this outcome should be avoided because consultation is an important principle of good governance.

[673] As the Supreme Court stated in *Hill*, policy concerns raised against imposing a duty of care must be more than speculative. A "real potential" for negative consequences must be apparent (*Hill* at para 48). In my view, the potential of a chilling effect on government consultations is not abstract or merely speculative. Governments often and regularly consult with stakeholders in a multitude of circumstances. I agree with the Defendants that, as a matter of policy, government efforts to consult and involve industry in the decisions that affect them should not result in government being open to liability to that industry. Accordingly, like in *Flying E Ranche*, I find that the chilling effect weighs against the proposed duty in the present case.

(c) Conflict between the public duty and the asserted private law duty of care

[674] In my analysis of the question of whether a duty of care arises from the statutory scheme, giving rise to proximity (I found that it did not), I addressed the issue of potential conflicts between public and private duties of care. This was in the context of whether the recognition of a private law duty would conflict with CFIA's duty to the public arising from the *HA Act* and *HA*

Regulations, in light of the purpose of that statutory scheme. Specifically, CFIA's overarching statutory and public duty under the *HA Act* and the *HA Regulations* is to protect animal and human health, which conflicts with a private law duty of care aimed at protecting the economic interests of the Class.

[675] The Defendants submit that conflict can be dealt with in the proximity analysis at the first stage of the *Anns/Cooper* test, but that *Syl Apps* suggests it can be factored into the analysis at both stages of the test. They note that *Flying E Ranche* addressed conflict at the policy considerations stage.

[676] In *Syl Apps*, reasonable foreseeability was not disputed, but the Supreme Court found that the analysis stalled at the proximity stage, the deciding factor being the potential for conflicting duties. There, the family of a child brought an action against Syl Apps, a treatment center, alleging that it and a social worker had treated the child as if her parents had abused her. The family asserted that this was negligent conduct that caused the child not to return to her family, thereby depriving the family of a relationship with her. The Supreme Court held that imposing a duty of care on the relationship between the family of a child in care and that child's court-ordered service providers created a genuine potential for serious and significant conflict with the service providers' transcendent statutory duty to promote the best interests, protection and well-being of the children in their care (*Syl Apps* at para 41). Further, to impose a duty of care in that context created a potential conflict with their ability to effectively discharge their statutory duties (*Syl Apps* at para 49).

[677] However, the Supreme Court also held that if a *prima facie* duty of care is found to exist based on reasonable foreseeability and proximity, then it is still necessary to assess whether there are any residual policy reasons that make the imposition of a duty of care unwise (*Syl Apps* at para 31).

[678] On that basis, policy is relevant at both the proximity stage and the residual policy concerns stage of the *Anns/Cooper* test. "The difference is that under proximity, the relevant

questions of policy relate to factors arising from the particular relationship between the plaintiff and the defendant. In contrast, residual policy considerations are concerned not so much with 'the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally' (*Cooper*, at para. 37)" (*Syl Apps* at para 32).

[679] I have found that the Plaintiffs have failed to establish proximity in the first stage of the *Anns/Cooper* test. The potential conflict arising from CFIA's overarching statutory duty was a factor contributing to that determination. The relationship between CFIA and the Class arises solely from statute (the *HA Act* and *HA Regulations*). It is between a regulator that is obliged by the purpose of the statutory scheme to protect animal health (in this case, the health of honeybees) and a segment of the regulated beekeeping industry that asserts that CFIA was negligent in the enforcement or maintenance of the importation ban, including in how it conducted the Risk Assessments, causing it economic harm. I have found that the Plaintiffs failed to show that the relationship with CFIA clearly fell within or was analogous to a category of relationship in which a duty of care has been recognized (see e.g. *Los Angles Salad BCCA* at paras 25-26, 28). Further, that imposing a duty of care on that relationship would result in potential conflict with CFIA's overarching statutory duty and its ability effectively to discharge its statutory duties.

[680] Given this finding, and like *Syl Apps,* there is no need to also consider conflict at the second stage of the *Anns/Cooper* test.

[681] However, even at the second stage, residual policy, where the considerations are concerned with the effect of recognizing a duty of care on other areas, I reach the same conclusion for much the same reasons.

[682] In *River Valley*, even though the ONCA found there was no private law duty of care, it went on to also find that there was potential for conflict if CFIA must be mindful not only of the health of animals and the public, but also the economic interests of individual farmers (or, in the

present case, beekeepers). It found this to be an overriding policy consideration that also negates a private duty of care at the second stage of the test.

[683] That said, a conflict must be real and not speculative (*Aylmer* at para 58). Further, a "conflict or potential conflict does not in itself negate a *prima facie* duty of care; the conflict must be between the novel duty proposed and an 'overarching public duty', and it must pose a real potential for negative policy consequences" (*Hill* at para 40). I agree with the Defendants that the potential for conflict here is real because the private economic interests of regulated parties and the public interest in protecting the health of people and animals will not always align. Indeed, in this case they do not.

(d) International relations

[684] The Defendants also suggest that interactions on an international level between trading partners give rise to public policy considerations that can negate a *prima facie* duty of care. The Defendants cite *Cropvise Inc and Wolf & Wolf Seeds Inc v Canadian Food Inspection Agency*, 2018 NBCA 28 at paras 101-109 [*Cropvise*], in which it was claimed that CFIA had failed to negotiate the release of potatoes for trade with the competent authority in Venezuela. In that case, it was determined that the actions and decisions of CFIA that gave rise to the claims represented a course of action that was based on the balancing of economic, social and political considerations with respect to diplomatic relations with Venezuela. The NBCA concluded that a *prima facie* duty of care was negated based on public policy considerations. The Defendants submit that the manner and extent to which Canada negotiates with international trading partners draws in considerations that are incompatible with a private law duty of care to an importer of a commodity.

[685] The Defendants submit that the evidence establishes that in the present case, USDA-APHIS consistently gave information to CFIA that there were no movement controls and no changes in the disease status of US honeybees, and that it did not propose protocols or a disease-free zone. This is unlike other countries, such as Australia, that proactively identified to CFIA risk management measures to attract or re-engage trade. CFIA also interacted with trading

partners in response to various pest situations and diseases for honeybees and other animals, not because there is a private law duty to do so, but due to the nature of international trade of animals.

[686] In my view, *Cropvise* is distinguishable on its facts. There, the proposed duty owed to potato farmers was to negotiate the release of potatoes for trade in Venezuela. The NBCA found that the duty conflicted with CFIA's obligation to be sensitive to the nature of the relationship with Venezuela and to the possible effects of their actions on future trade and on the trade relationship generally. CFIA had to be free to subordinate the interests of a specific industry to broader international relations goals and could not be expected to act as agent for the potato farmers in the international trade arena.

[687] In the matter before me, there is no evidence that CFIA's decision not to issue import permits for US honeybee packages was influenced by any concern on Canada's part about preserving relations with the US. CFIA was not put in a position where it had to determine whether it would pursue the interests of the beekeepers or subordinate those interests to broader international relations goals. *Cropvise* therefore does not assist the Defendants, and this policy consideration does not apply to negate the duty of care.

(e) Conclusion on residual policy concerns

[688] In *Fullowka*, the Supreme Court stated that "[c]onflicting duties have been an important consideration in dealing with proximity in claims against regulators and others carrying out statutory duties: see, e.g., *Cooper, Edwards, Syl Apps* and *Hill*. Serious negative policy consequences may flow where such conflict exists: *Syl Apps*, at para. 28" (*Fullowka* at para 72). However, it stated that such consequences will not necessarily follow from every imposition of a duty of care on those who carry out statutory or public duties. Further, in *Hill* the argument that conflicting duties should preclude a finding of proximity was considered and rejected. There, the majority emphasized that a conflict or potential conflict of duties does not in itself negate a *prima facie* duty of care; rather, the conflict must be between the duty proposed and an overarching public duty, and it must pose a real potential for negative policy

consequences. Similarly, in *Deloitte*, the Supreme Court noted that indeterminate liability is a residual policy consideration, nothing more. The presence of indeterminacy need not be dispositive of liability in all cases. To approach the analysis otherwise would transform indeterminate liability from a policy *consideration* into a policy *veto*.

[689] In this case, I find the conflict between the duty proposed (to maintain or enforce the prohibition ban in a manner that protects the economic interests of the Plaintiffs) and an overarching public duty (to protect animal health) poses a real potential for negative policy consequences. In my view, this is compelling and determinative at both stages of the *Anns/Cooper* test. As the ONCA held in *River Valley*, the potential for conflict if CFIA must be mindful not only of the health of animals and the public, but the economic interests of individual farmers (or, in the present case, the commercial beekeepers who comprise the Class) is an overriding policy consideration that negates a private duty of care. However, even if this policy concern alone was not sufficient to find that an imposition of the duty of care "not to be negligent in the maintenance or enforcement of the *de facto* prohibition" would be "unwise" and should not be effected, considering and weighing it together with the indeterminacy and chilling effect concerns addressed above (and the fact that the claim concerns pure economic loss) would tip the scale in that regard.

[690] And, even if I am in error in finding that the alleged duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments was not a discrete duty and was a decision that was operational in nature, the above policy concerns would still serve to negate that duty.

iv. Second stage *Anns/Cooper* test – conclusion

[691] The second stage of the *Anns/Cooper* test asks whether there are residual policy concerns, outside the relationship of the parties, that may negate the imposition of the duty of care. In this case, I have found that proximity is not established at the first stage of the test respecting the relationship between CFIA and the Class. However, in the event that I have erred and a *prima facie* duty were found, it would be negated by policy considerations. Specifically, the decision-

making around the maintenance or enforcement of the *de facto* prohibition on the importation of US honeybee packages was part of a course of conduct undertaken by CFIA in the interests of animal health and is immune from liability, as it is a matter of policy. Even if that were not the case, residual policy considerations, notably the conflict between CFIA's public duty and the proposed private duty to commercial beekeepers, but also concerns around indeterminate liability and a potential chilling effect on government consultations, would negate the duty. This encompasses any duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments, which I have found, in these circumstances, was not a discrete duty.

Common Issue #2 - Whether any or all of the Defendants breached the requisite standard of care

A. What is the standard of care?

[692] As stated in *Marchi*:

> [91] To avoid liability, a defendant must "exercise the standard of care expected that would be of an ordinary, reasonable and prudent person in the same circumstances" (*Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201, at para. 28). Relevant factors in this assessment include whether the risk of injury was reasonably foreseeable, the likelihood of damage and the availability and cost of preventative measures (P. H. Osborne, *The Law of Torts* (6th ed. 2020), at pp. 29-30; *Bolton v. Stone*, [1951] A.C. 850 (H.L.)). A reasonable person "takes precautions against risks which are reasonably likely to happen" (*Bolton*, at p. 863).
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> [92] The reasonableness standard applies regardless of whether the defendant is a government or a private actor (*Just*, at p. 1243). In *Just*, Cory J. recognized that the "standard of care imposed upon the Crown may not be the same as that owed by an individual" (at p. 1244). However, this is not because public policy concerns applicable to governments displace the reasonableness standard. In fact, Cory J. was clear that the analysis under duty of care must be "kept separate and distinct" from the analysis of the standard of care (at p. 1243). It is important that the standard of care analysis not be used as another opportunity to immunize governments from liability, especially when a determination has already been made that the impugned government conduct was not core policy.

[693] The parties agree that the reasonableness standard applies to both government and private actors.

[694] The Plaintiffs articulate the standard as: “Here, the standard of care that the CFIA was required to meet is that of an ordinary, reasonable and prudent regulator making decisions about whether to permit the importation of honeybee packages from a foreign country that is a trading partner of Canada.” They state the standard of care analysis relates only to the question of whether the risk analysis was negligently performed.

[695] The Defendants emphasize that, in the context of a challenge to the decision-making of a regulator of animal health, the standard must reflect the circumstances of an individual exercising discretion. In that regard, in *River Valley* at para 5, the ONCA noted that the court below had determined that the standard was “how a reasonable [regulator] with like skills and expertise would have acted in like circumstances” (this finding was not at issue on appeal). And, in *Flying E Ranche,* the ONSC held that “the reasonableness standard ‘gives due recognition’ to professional discretion ‘provided that it stays within the bounds of reasonableness.’ This means that the standard of care is not breached simply because the exercise of discretion was not ‘optimal’, as long as it falls ‘within the range of reasonableness’” (*Flying E Ranche* at para 716).

[696] The Defendants articulate the standard as follows: “the appropriate standard of care for CFIA decision-makers can be defined as that of a reasonable regulator with a mandate to protect animal health, and in the circumstances where prospective importers have alleged they have lost an opportunity to import packaged bees.”

[697] In my view, the applicable standard of care is simply that of a reasonable regulator in similar circumstances.

B. The alleged breaches of the standard of care

[698] In their opening submissions, the Plaintiffs submitted that the Defendants breached their duty of care not to be negligent in the maintenance or enforcement of the *de facto* import prohibition. They asserted that it was unreasonable and a breach of the standard of care for the Defendants to refuse to consider, receive or assess any import applications after December 31, 2006. This allegation was not directly addressed in closing arguments.

[699] In their closing submissions, the Plaintiffs focused on three ways in which they alleged the Defendants breached the standard of care.

[700] First, broadly speaking, the Plaintiffs allege that CFIA breached the standard of care by failing to consider risk mitigation options in the 2003 and 2013 Risk Assessments. In that regard, the Plaintiffs argue that the OIE Code and SPS Agreement set the prevailing standards and that the breach with respect to the Risk Assessments was in the Defendants' failure to consider mitigation in accordance with those standards.

[701] Second, the Plaintiffs allege the Minister breached the standard of care by abdicating their exclusive decision-making authority with respect to issuing permits to CFIA. In turn, CFIA overstepped its authority by refusing to issue permits without statutory authority.

[702] Third, the Plaintiffs allege that the Defendants breached the standard of care by including hazards in the Risk Assessments that should not have been considered.

[703] I will address each of these issues in turn.

i. The maintenance and enforcement of the regulatory scheme

[704] In their opening submissions, the Plaintiffs alleged that the Defendants had to either enact a new regulation prohibiting the importation of honeybee packages following the expiration of the *HIPR, 2004* on December 31, 2006, or assess import permit applications on a case-by-case basis pursuant to s 160(1.1) of the *HA Regulations*, but the Defendants did neither. The Plaintiffs asserted that the failure to do either was either negligent or illegal conduct. The Plaintiffs submitted that the unreasonableness of this conduct, and presumably, therefore, the breach of the standard of care (although the Plaintiffs' submissions conflate the duty of care and the standard of care), was evident because the Defendants knew of the lawful means by which to keep the border closed to imports and also because of the length of time during which the unlawful scheme existed.

[705] The Defendants, in their opening and closing submissions, disagreed with the Plaintiffs' assertion that when the *HIPR, 2004* expired, continued refusals to issue import permits were illegal or unreasonable. They submitted that while a prohibition regulation is one way to regulate imports, a regulation prohibiting imports except in accordance with a permit is another. Under s 12 and s 160(1.1) of the *HA Regulations*, honeybee imports are prohibited, except in accordance with a permit. When effective import conditions to allow safe importation have not been developed, or a new risk assessment resulting in import conditions has not been conducted, CFIA does not issue import permits. Further, nothing in the regulatory scheme requires CFIA to assess permit applications on a case-by-case basis.

[706] In these reasons, I have set out the legislative scheme in paragraphs 132-154 above, as well as the evidence of various of the Defendants' witnesses describing the importation process at paragraphs 155-165.

[707] Section 12 of the *HA Regulations*, Regulated Animals, states that no regulated animals (which includes honeybees, as set out in the *HA Regulations* definition of "regulated animal")

shall be imported except in accordance with a permit issued under s 160 (s 12(1)(a)) or in accordance with the applicable provisions of the import reference document (s 12(1)(b)). Section 160(1.1) of the *HA Regulations* states that the Minister shall issue a permit required under the *HA Act* if the Minister determines that the activities for which the permit is issued would not, or would not be likely to, result in the introduction or spread within Canada of a vector, disease or toxic substance.

[708] The Defendants submit that the Plaintiffs misunderstand the relevant regulatory decision respecting the issuance of permits. That decision is the development of import conditions, where possible, based on the determination of a risk assessment respecting the risks of importation of the subject commodity.

[709] Based on the evidence of the Defendants' witnesses, I agree. It is clear that the import permit process for regulated animals – which is not just honeybees – is that where import conditions have been developed that allow for the safe importation of that commodity from a country or zone, these will be entered into AIRS. When a potential importer applies to import a commodity, if such import conditions have been developed, then a permit will be issued that will include those import conditions. Where import conditions have not been developed, the potential importer can follow the protocol and, if necessary, request that a risk assessment be conducted. If a risk assessment were conducted that determined that appropriate import conditions could be effected to allow the importation at an acceptable level of risk, then those conditions would be entered into AIRS and applied not just to that importer but to all import permit applications for that commodity/country.

[710] The Minister's determination of whether or not the importation of a commodity under s 160(1.1) would or would be likely to result in the introduction or spread of a vector or disease in Canada – and therefore whether or not a permit will be issued – is based on this risk analysis/permitting process. There is no evidence that the Minister otherwise issues permits.

[711] In that regard, the Defendants submit that CFIA, as the Minister's delegate, was not satisfied that the importation of honeybee packages from the US would not or would not be likely to introduce or spread disease within Canada. Therefore, they submit that CFIA had no lawful authority to issue an import permit when the requirements of s 160(1.1) were not met.

[712] The bottom line here is that the only way to import honeybees is with a permit issued under s 160. Importation is otherwise prohibited. Given this, I do not agree with the Plaintiffs that when *HIPR, 2004* expired, a new regulation was required in order to lawfully prohibit the importation of honeybees. The existing regulatory scheme lawfully achieves the same result by prohibiting importation of regulated animals except where the requirements of s 160(1.1) have been met.

[713] Further, as the Defendants submit, nothing in the *HA Act* or the *HA Regulations* requires a case-by-case consideration of every individual import permit submitted to CFIA. Given the many species of imported animals and the volume of importation, to require this would have the practical effect of bringing the animal importation system to a standstill. The evidence demonstrates that only in very particular situations are case-by-case assessments conducted. For example, Dr. Snow's affidavit states that case-by-case assessment may be appropriate for applications for importation to a containment lab, when an animal is to be used and disposed of in an approved manner such that there would be no chance of escape or release. Dr. Alexander gave similar evidence, suggesting a case-by-case assessment may be applicable when there are existing conditions in place but there are extenuating circumstances, or if the risks of importing an inadmissible product are mitigated with post-import controls, such as if animal material is being imported into a secure lab environment. The Plaintiffs provided no evidence suggesting that the importation of US honeybee packages amounts to such a unique and limited circumstance.

[714] In conclusion on this point, I find that the regulatory scheme and process by which CFIA declined to issue import permits for US honeybee packages, or, as framed by the Plaintiffs, "maintained or enforced the *de facto* prohibition," was both lawful and reasonable. Accordingly,

the Plaintiffs' argument that the Defendants breached the standard of care in this regard cannot succeed.

ii. The prevailing risk assessment standard and was it breached?

(a) The SPS Agreement and OIE Code do not create private law rights or obligations

[715] There are three main documents relevant to the parties' arguments on the prevailing standard of care. These are the SPS Agreement, the OIE Code and the CFIA Protocols (the CFIA Protocol 2001, 2005 and 2009). There are multiple versions of the OIE Code in evidence, and, unless otherwise noted, reference to the OIE Code in these reasons will be to the 2012 version.

[716] By way of background, Canada approved the WTO Agreement by way of the *WTO Agreement Implementation Act*. The SPS Agreement is one of the multilateral agreements concerning the trade in goods contained in Annex 1A of the WTO Agreement.

[717] The preamble to the SPS Agreement notes that Members desire to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics (the OIE, now WHOA) and the relevant international and regional organizations operating within the framework of the International Plant Protection Conventions – without requiring Members to change their appropriate level of protection of human, animal or plant life or health. Annex A of the SPS Agreement, s 3, Definitions, defines "International standards, guidelines and recommendations," including "for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics" (s 3(b)). Article 5.1 of the SPS Agreement states that Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

[718] "Sanitary measure" is defined in the OIE Code as meaning "a measure, such as those described in various chapters of the Terrestrial Code, destined to protect animal or human health or life within the territory of the OIE Member from risks arising from the entry, establishment and/or spread of a *hazard*" (italic original).

[719] The SPS Agreement defines "Sanitary or phytosanitary measure" as any measure applied:

> a. to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> b. to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> c. to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> d. to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

[720] Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

[721] Although the SPS Agreement makes no specific reference to the OIE Code, s 3(b) of Annex A of the SPS Agreement would appear to encompass same. The 2002 OIE Code itself states that the SPS Agreement recognizes the OIE as the relevant international organization

responsible for the development and promotion of international animal health standards, guidelines and recommendations affecting trade in live animals and animal products (Article 1.3.1.2). The expert report of Dr. Zagmutt states that the SPS Agreement formally recognizes the WOAH (OIE) as the relevant institution for setting such international standards, guidelines and recommendations, citing s 3(b) of Annex A. Dr. Roberts' expert report states that the OIE sets the standards and recommendations for international trade in live animals and their products. I accept that the SPS Agreement recognises the OIE as the international organization tasked with setting such standards, guidelines and recommendations and that the OIE Code is such a document. The OIE Code is updated frequently, if not always annually, and various editions have been entered into evidence.

[722] In 2004, the OIE published its *Handbook on Import Risk Analysis for Animals and Animal Products*, 1st ed, vol 2 [OIE Handbook].

[723] Section 2 of the OIE Code concerns import risk analysis.

[724] The first issue to be addressed here is the status of the SPS Agreement and OIE Code with respect to this action.

[725] Although s 3 of the *WTO Agreement Implementation Act* states that the purpose of the Act is to implement the WTO Agreement and s 8 states, "The agreement is hereby approved," this does not necessarily mean that the SPS Agreement is part of Canada's domestic law. As held in *Pfizer*, ss 3 and 8 are not sufficient to establish that the WTO Agreement and agreements annexed thereto (in that case, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* [TRIPS Agreement], Annex 1C) have been legislated into federal law. Part II of the *WTO Agreement Implementation Act* demonstrates that Parliament envisioned a number of implementation techniques, including the amending of affected legislation: "Parliament gave legal effect to its WTO obligations by carefully examining the nature of those obligations, assessing the state of the existing federal statutory and regulatory law and then deciding the

specific and precise legislative changes which were required to implement the WTO Agreement" (*Pfizer* at para 45). Further:

> When Parliament said, in section 3 of the WTO Agreement Implementation Act, that the purpose of that Act was to implement the Agreement, Parliament was merely saying the obvious; it was providing for the implementation of the WTO Agreement as contained in the statute as a whole including Part II dealing with specific statutory changes. When Parliament said in section 8 of the WTO Agreement Implementation Act that it was approving the WTO Agreement, Parliament did not incorporate the WTO Agreement into federal law…. What Parliament did in approving the Agreement is to anchor the Agreement as the basis for its participation in the World Trade Organization, Canada's adherence to WTO mechanisms such as dispute settlement and the basis for implementation where adaptation through regulation or adjudication was required (at para 48).

[726] The Court concluded that it was plain and obvious that Parliament did not legislate the WTO Agreement into federal domestic law and, in particular, Article 33 of the annexed TRIPS Agreement. It therefore granted the defendant's motion to strike Pfizer's statement of claim.

[727] As the Defendants point out, although many consequential amendments were made to existing Canadian legislation to implement the WTO Agreement, Parliament did not so amend the *HA Act* or *HA Regulations* to incorporate the SPS Agreement, or any provisions thereof, into that legislation and, therefore, into Canada's domestic law.

[728] Further, "[t]he WTO Agreement is an international agreement to which sovereign states are the only parties" (*Pfizer* at para 36; see also *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 172-173). Similarly, the SPS Agreement is an agreement between "Members" of the WTO, that is, the WTO Member states. Thus, the SPS Agreement, to the extent that it creates any rights and obligations, does so only between WTO Members. The Plaintiffs are not Member states. The SPS Agreement does not give rise to a private law duty of care owed by CFIA to domestic importers, such as the Plaintiffs.

[729] In that regard, in the context of the duty of care, it is of note that the *WTO Agreement Implementation Act* prohibits private causes of action:

> **Prohibition of private cause of action under Part I**
>
> **5** No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of Part I or any order made under Part I.
>
> **Prohibition of private cause of action under Agreement**
>
> **6** No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement.

[730] In *Pfizer*, this Court addressed issues related to the existence of the statutory bars contained in s 5 and s 6 of the *WTO Agreement Implementation Act*. There, the declaration Pfizer sought was to enforce or determine a right or obligation that arose solely from or by virtue of the WTO Agreement. "Simply put, Pfizer seeks to enforce what it claims to be a right to a patent term of 20 years from the date of its N815 patent application, a right which is said to arise from the TRIPS Agreement which is part of the WTO Agreement" (*Pfizer* at para 50). The Court found that there was no merit in that argument. The Court looked at implementation provisions in other statutes concerning trade agreements and concluded that:

> [55] The true purpose of sections 5 and 6 of the WTO Agreement Implementation Act is evident as are similar provisions in the other implementation statutes referred to above. **What Parliament is saying is that these international trade agreements are matters of public law concerning public rights, rights affecting Canada as a sovereign state. They are not matters of private economic or commercial rights giving rise to causes of action and legal proceedings.** These sections do not eliminate any private rights; they do not extinguish rights; **Parliament is simply saying no such rights arise.**
>
> [56] Parliament's concern relates to the very nature of international trade agreements between sovereign states and the mechanisms for dispute settlement and the enforcement of panel or arbitration rulings.

> [57] The WTO Agreement provides for such mechanisms. Parliament did not want private parties except where it may be appropriate, to initiate private actions which would disrupt or adversely affect the agreed to equilibrium for dispute settlement.
>
> (Emphasis added)

[731] More generally, this Court has also held that international agreements do not confer rights on individuals residing in the party states. In *Kimoto v Canada (Attorney General)*, 2011 FC 89 [*Kimoto*] at paras 47-50, aff'd *Doug Kimoto v Canada (Attorney General)*, 2011 FCA 291, a case about Canada's *Pacific Salmon Treaty* with the US, this Court held that the appellants could not have a judicial claim because, as a condition precedent thereto, the treaty would have to have been implemented by national legislation (para 47). *Kimoto* referred to *R v Vincent* (1993), 1993 CanLII 8630 (ON CA), 12 OR (3d) 427 [*Vincent*], leave to appeal to SCC refused, which referred to the well-established case law that rights created or conferred by an international treaty belong exclusively to the sovereign contracting parties and that the treaty is beyond the reach of municipal courts unless implemented by legislation. The Court in *Kimoto* noted that *Vincent* refers to the decision of the House of Lords in *Rayner (JH) (Mincing Lane) Ltd v United Kingdom (Department of Trade & Industry)*, [1990] 2 AC 418, [1989] 3 All ER 523, which concluded that an international treaty cannot confer a right upon an individual, or upon a group of individuals, who reside in the contracting countries. Further, that a right mentioned in an international treaty is not justiciable before a Canadian court.

[732] In my view, the WTO Agreement, the annexed SPS Agreement and the OIE Code similarly cannot be relied upon by the Plaintiffs to impose a private law duty of care owed to them by CFIA or to legally impose on the Defendants the standard of care as may be depicted therein, as the SPS Agreement and OIE Code are not binding as between the Defendants and the Plaintiffs. As is obvious from their terms, those agreements and the OIE Code are concerned with international trade between Member states, and trade disputes are dealt with as between those Member states (SPS Agreement Article 11, Consultations and Dispute Settlement; WTO Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes; OIE Code (2012) Article 5.3.8, the OIE informal procedure for dispute mediation). In

this matter, there is no evidence that the US has commenced a trade dispute with Canada with respect to the prohibition on the importation of US honeybee packages. (I note in passing here that Dr. Pettis' evidence was that the US itself does not allow the importation of honeybee packages from anywhere in the world and imports queens only from New Zealand. When asked if any country in the world permits the importation of US honeybee packages, he stated that he thought that they had recently, at one point, been shipped to the Middle East.) As to the OIE Code, the evidence of Dr. Zagmutt was to the effect that the SPS Agreement is the mechanism by which the WTO Members agreed to take into account the relevant risk assessment standards, which standards are found in the OIE Code. However, there is no evidence that the OIE Code could have application independent of the SPS Agreement.

[733] As the Defendants point out, in their opening submissions the Plaintiffs stated that they anticipated establishing that CFIA was bound to follow the SPS Agreement (presumably as the mechanism through which CFIA would be obliged to comply with the standards found in the OIE Code) as part of its duty of care owed to the Class. I note that in their closing oral submissions, the Plaintiffs asserted that the common issue required the Court to determine "whether the defendants were negligent in the maintenance and enforcement of the import prohibition on honeybee packages, including the identity – the duty to identify risk mitigation options in both the 2003 and 2013/14 risk assessments and if they breached the relevant standard of care." Further, that "[t]he duty is grounded in the SPS agreement."

[734] If the alleged duty of care to identify risk mitigation is grounded in the SPS Agreement, as the Plaintiffs submit, then this presupposes that the SPS Agreement can create private rights or obligations. However, in my view, *Pfizer* makes it clear that the *WTO Agreement Implementation Act* precludes a private law duty of care arising from the WTO Agreement. Therefore, nor can the SPS Agreement, which is part of the WTO Agreement, give rise to a private law duty of care to identify risk mitigation options. To impose such a duty would contravene the WTO Agreement. In the absence of a private law duty of care, and because the SPS Agreement and OIE Code are not legally binding as between the Defendants and Plaintiffs (who are not a WTO Member), the risk assessment standards associated with the SPS Agreement and OIE Code are

not legally binding on CFIA. Accordingly, there would be no legal requirement to take the OIE standards into account pursuant to Article 5.1 of the SPS Agreement.

[735] Accordingly, on that basis, the Plaintiffs' argument that the OIE Code sets the standard of care, and that the breach by the Defendants was the failure to consider mitigation in the Risk Assessments in accordance with those standards, cannot succeed.

[736] However, as will be discussed below, the OIE Code does serve to inform the content of the standard of care.

(i) Admissibility of Dr. Zagmutt's evidence concerning international law

[737] Before leaving this point, I will address the issue that arose at trial as to the admissibility of certain of the evidence of Dr. Zagmutt. Specifically, Dr. Zagmutt was qualified as an expert witness in his capacity as a veterinarian and epidemiologist to give evidence respecting international standards governing risk assessments, in particular, import risk assessments, risk analysis and risk management. Dr. Zagmutt's expert report addressed the WTO Agreement, the SPS Agreement, the OIE Code and the CFIA Protocols, as well as the 2003 and 2013 Risk Assessments in the context of same. However, it also spent considerable time discussing a trade dispute between Canada and Australia in which Canada successfully argued before the WTO Dispute Settlement Body, and on appeal to the Dispute Settlement Appeal Body, regarding import restrictions imposed by Australia with respect to certain Pacific salmon exports from Canada (see *Australia – Measures Affecting Importation of Salmon* (1998), WT/DS18/R (Panel Report) *Australia –Measures Affecting Importation of Salmon* (1998), WT/DS18/AB/R (Appellate Body Report) [collectively, the *Salmon Case*]).

[738] The Defendants provided written submissions and argued before me that any evidence of Dr. Zagmutt interpreting international law was inadmissible. In particular, that an expert crosses the line and usurps the role of the Court when they opine on the consistency of a state's action

with international conventions and obligations (citing *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 at para 67 [*International Air*]).

[739] In *International Air*, the appellants argued, among other things, that the *Air Passenger Protection Regulations* adopted by the Canadian Transportation Agency contravened Canada's international obligations under the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 28 May 1999, 2242 UNTS 309 [*Montreal Convention*], which was ratified by Canada and incorporated into its domestic law by amendments to the *Carriage by Air Act*, RSC 1985, c C-26 [*Carriage by Air Act*]. The Attorney General brought a motion seeking to strike parts of the affidavits of two of the appellants' expert witnesses on the basis that they contained inadmissible legal opinions on the interpretation of the *Montreal Convention*, which was an issue at the very core of the appeal.

[740] The Federal Court of Appeal held that it is well established in Canadian evidence law that facts are to be pleaded and proved, whereas law does not need to be proved and courts will take judicial notice of it. Opinions on matters of law are therefore not admissible, since it is for the court to decide questions of law. Foreign law has long been characterized as fact for the purpose of the law of evidence. It must be pleaded and proved at trial, unless otherwise provided by statute. In most cases, this will be done by expert evidence. As to international law, the Court of Appeal agreed with the Attorney General, at least with respect to customary international law and to international treaties that have been incorporated into Canadian law, that this is a question of law and that Canadian courts should take judicial notice of it without the need to resort to expert opinion. Further, that evidence purporting to give a legal opinion on the interpretation or application of an international convention is inadmissible, especially when this is a central issue the Court has to resolve to dispose of a case.

[741] The Court of Appeal concluded that courts ought to take judicial notice of customary international law and of treaties that have been ratified and implemented into Canadian law without the need of any expert evidence. Both are incorporated into Canadian law and judges are expected to treat them as law, not as fact. Expert evidence on international law, just like expert

evidence on any issue of domestic law, should therefore not be countenanced. Counsel should make submissions on international law themselves, without resorting to the added credibility of an expert (*International Air* at paras 64-65).

[742] Of note, the Court of Appeal left aside international conventions and treaties that have not been implemented by Canadian (federal or provincial) statutes, since they are not part of Canadian law. It held that, in the matter before it, there was no need to consider how an international instrument that Canada has ratified but not yet implemented ought to be brought into evidence, given that the *Montreal Convention* was incorporated into Canadian law through the *Carriage by Air Act* (which specified that the provisions of that Convention set out in Schedules I and V of the Act had the force of law in Canada as described therein).

[743] I am not persuaded that *International Air* assists the Defendants given that the WTO Agreement is not implemented into Canadian law via amendments to the *HA Act* or *HA Regulations* made pursuant to the *WTO Agreement Implementation Act*. That said, Dr. Zagmutt's report, as it pertains to the *Salmon Case*, is essentially his interpretation of that case, including descriptions of the arguments made therein and conclusions reached by the tribunals. He relies on the case to support his opinion that, as a WTO member, Canada must follow the SPS Agreement when imposing sanitary measures involving international trade and that the SPS Agreement requires that such measures be based on a risk assessment following international standards. Essentially, Dr. Zagmutt utilizes the *Salmon Case* as a legal precedent. He states that this is "a very important case in the animal health risk assessment community as we use its arguments and conclusions as guidance of how to perform and evaluate risk assessments under the SPS Agreement." Similarly, that the case "remains the precedent for how to interpret and apply the SPS agreement and OIE Code to establish sanitary measures that affect the international trade of animals and animal products."

[744] Dr. Zagmutt confirmed when testifying at trial that he has no legal expertise. Thus, to the extent that he interprets and applies the *Salmon Case* to arrive at an opinion that the SPS Agreement is legally applicable to and binding on CFIA in this matter, or otherwise testified as

to the effective legal status of the SPS Agreement and the OIE Code (i.e. whether their terms were mandatory or aspirational), I agree with the Defendants that his evidence encroaches upon the realm of legal conclusion. I afford no weight to those aspects of his report and testimony concerning this opinion. Indeed, in their written closing submissions, the Plaintiffs address the *Salmon Case* and make the arguments that one would expect of counsel, as opposed to Dr. Zagmutt, in interpreting and applying that case.

[745] That said, I do agree with the Plaintiffs that Dr. Zagmutt's evidence is properly intended to and does speak to the content of the standard of care. In that regard, counsel submitted that Dr. Zagmutt was before the Court to describe international standards with respect to risk assessment as well as the framework of how the WTO Agreement, the SPS Agreement and the OIE Code hang together. I see no concern in that regard. However, while I also agree with counsel for the Plaintiffs that "whether or not the defendants were legally bound by those standards is a question of law for the Court to decide after considering the totality of the evidence," I find that Dr. Zagmutt overstepped that line in much of his initial expert report.

[746] For example, one of Dr. Zagmutt's findings is that the Risk Assessments were "invalid" because they did not include mitigation as required by the OIE Code. However, this argument presupposes that the OIE Code is binding on CFIA in the context of this action. Dr. Zagmutt would have been qualified to comment on whether the Risk Assessments conformed with OIE standards, but commenting on the legal effect of non-conformation goes beyond his proper role.

[747] On this point, although in the context of the causation analysis, the Defendants point to Annex 2 of the WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes [Dispute Settlement Understanding]. This states that the rules and procedures of the Dispute Settlement Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1, which includes the SPS Agreement (Appendix 2).

[748] According to this document, WTO Members undertake to accord sympathetic consideration to and afford adequate opportunity for consultation with respect to representations made by another Member state concerning measures affecting the operation of any covered agreement taken within the territory of the former Member (Article 4(2)). If the Member to whom the request is made does not respond, or if it does not enter into consultations in good faith within the stipulated time periods, then the Member requesting the consultation can request the establishment of a panel (Article 4(3)). If consultations take place but fail to settle the dispute within 60 days, the complaining party may also request that a panel be established (Article 4(7)). Panels are established pursuant to Article 6, and Appellate Bodies are established pursuant to Article 17. Panel and Appellate Body reports are adopted by the Dispute Settlement Body [DSB] (Article 16.4; 17.14).

[749] Article 19 addresses the remedial powers of a Panel and Appellate Body:

> *Article 19*
>
> *Panel and Appellate Body Recommendations*
>
> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.
>
> …
>
> *Article 22*
>
> Compensation and Suspension of Concessions
>
> 1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

> 2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.
>
> …

[750] The DSB is established by the Dispute Settlement Understanding to administer the rules and procedures of the Dispute Settlement Understanding and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements (Article 2.1).

[751] Thus, in the event that a measure by a Member state is not in conformity with the applicable agreement, the Panel or Appellate Body can only recommend to that Member that it conform. If the challenged Member declines to do so, the complaining Member may request, and the challenged Member shall enter into, negotiations with the aim of developing mutually acceptable compensation. If that fails, the complaining Member can request of the DSB that the challenged Member be suspended from concessions or other obligations under the agreements to which the Dispute Settlement Understanding applies. The DSB "shall keep under surveillance the implementation of adopted recommendations or rulings" (Article 21.6).

[752] Also of note is Article 3.7, General Provisions, as it summarizes the approach to be taken to disputes:

> 7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive

> solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

[753] The remedial powers of the Panel and Appellate Body are demonstrated in the *Salmon Case*, upon which Dr. Zagmutt and the Plaintiffs heavily rely. There, the Panel determined that Australia was acting inconsistently with its obligation under the SPS Agreement (Articles 5.1 and 2.2) and made a recommendation to the DSB that Australia be requested to bring its measures into conformity with its obligations under the SPS Agreement:

> 8.2 Since Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment", we conclude that to the extent Australia has acted inconsistently with the DSU and the SPS Agreement it has nullified or impaired the benefits accruing to Canada under those agreements.
>
> 8.3 Given our conclusions above – and without prejudice to Canada's rights under Article 22.6 of the DSU – we encourage the parties to resume their efforts to reach a mutually acceptable solution consistent with the SPS Agreement and the DSU in order to achieve the prompt settlement of this dispute.
>
> 8.4 We *recommend* that the Dispute Settlement Body request Australia to bring its measures into conformity with its obligations under the DSU and the SPS Agreement.
>
> (Emphasis original)

[754] Similarly, the Report of the Appellate Body made findings and conclusions that it set out and, as to remedy:

> 280. The Appellate Body *recommends* that the DSB request that Australia bring its measure found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *SPS Agreement*, into conformity with its obligations under that Agreement.
>
> (Emphasis original)

[755] In those disputes, the Panel and Appellate Body recommended the DSB request that Australia bring the subject measure into conformity with its obligations under the SPS Agreement. This is consistent with the process and remedial authority described in the Dispute Settlement Understanding.

[756] As the Defendants point out, in the *Salmon Case*, neither the Panel nor the Appellate Body purported to nullify the subject measures under Australian law – and, I would add, nor did they purport to nullify them pursuant to the Dispute Settlement Understanding or otherwise.

[757] As noted above, in this matter there is no evidence that the US has brought a trade complaint against Canada pursuant to the SPS Agreement with respect to the prohibition on the importation of US honeybee packages. Even if it did, and if a Panel were constituted pursuant to the Dispute Settlement Understanding, the remedies available to the Panel do not include nullifying an import restriction under Canadian law. That is, and as the Defendant puts it, the Dispute Settlement Understanding cannot require that the import be permitted. Nor, I would add, can it render a risk assessment "invalid," a term used by Dr. Zagmutt.

[758] Treaties, such as the WTO Agreement, require legislative action to become part of domestic law (*Nevsun Resources* at para 85). As discussed above at paragraphs 725-727, the *WTO Agreement Implementation Act* does not legislate the WTO Agreement, including the SPS

Agreement, into Canadian domestic law (*Pfizer*). Section 13 of the *WTO Agreement Implementation Act* does, however, address suspension and concessions:

> **Orders re suspension of concessions**
>
> 13 (1) The Governor in Council may, for the purpose of suspending in accordance with the Agreement the application to a WTO Member of concessions or obligations of equivalent effect pursuant to Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes set out in Annex 2 to the Agreement, by order, do any one or more of the following:
>
> > (a) suspend rights or privileges granted by Canada to that Member or to goods, service providers, suppliers, investors or investments of that Member under the Agreement or any federal law;
> >
> > (b) modify or suspend the application of any federal law with respect to that Member or to goods, service providers, suppliers, investors or investments of that Member;
> >
> > (c) extend the application of any federal law to that Member or to goods, service providers, suppliers, investors or investments of that Member; and
> >
> > (d) take any other measure that the Governor in Council considers necessary.
> >
> > …

[759] The Defendants submit that s 13(1) is the linkage between the DSB decisions and Canadian law, but that it is a limited linkage. I agree that it permits Canada to suspend concessions or obligations granted by Canada to another Member state pursuant to Article 22 of the Dispute Settlement Understanding. Nothing more.

[760] In conclusion on this issue, the Plaintiffs assert that the Defendants breached the standard of care by failing to comply with the SPS Agreement and OIE Code, specifically by failing to complete a full risk analysis for the 2003 and 2013 Risk Assessments. They state, “The Defendants were obliged to comply with the terms of the OIE Code and the SPS Agreement, and their failure to comply is a breach of the relevant standard of care.” They further submit that the

CFIA Protocols are simply CFIA's interpretation of its obligations under the SPS Agreement and the OIE Code, and, by themselves, the Protocols do not establish the standard of care CFIA had to meet. However, I have found that the SPS Agreement is not legally binding as between the Plaintiffs and the Defendants.

[761] Even if that were not so, I find that the consequences of breaching the SPS Agreement do not include the possibility of invalidating or nullifying the Risk Assessments pursuant to the Dispute Settlement Understanding or Canadian law. I reject Dr. Zagmutt's opinion that the Risk Assessments' failure to meet the international standards for risk assessment or CFIA's own Protocols renders them "invalid."

[762] I find that the SPS Agreement is concerned with international trade and the related trade measures taken between Member states, including risk assessment. As between Member states, the SPS Agreement and OIE Code are likely binding and enforceable to the extent of the international dispute resolution process envisioned by the Dispute Settlement Understanding. However, they do not apply to the relationship between CFIA and the Plaintiffs. The Plaintiffs are strangers to the SPS Agreement and OIE Code and would be strangers to the dispute resolution process arising from them. That is, they could be afforded no remedy by that process, which, in any event, and as demonstrated by the *Salmon Case*, is limited to recommendations that a country bring measures inconsistent with the SPS Agreement into conformity with its obligations.

[763] Given this conclusion, I need not engage in the parties' submissions as to whether the SPS Agreement and OIE Code are binding standards or mere recommendations.

(b) The SPS Agreement and OIE Code inform the standard of care

[764] It bears repeating that I am considering the standard of care only in the alternative. That is, in the event that I am wrong in my prior determination that the Defendants did not owe the Plaintiffs a private law duty of care in these circumstances.

[765] In that context, and as will be discussed below, the SPS Agreement and, in particular, the OIE Code, are relevant to the content of the standard of care, even if they are not legally binding and applicable as between the Defendants and the Plaintiffs.

[766] This is because the process for conducting a risk analysis, which process includes risk assessment, as described in the SPS Agreement and OIE Code, is indicative of internationally accepted best practices and is reflected in the CFIA Protocols. As such, these best practices serve to inform the standard of care.

[767] In that regard, Dr. Zagmutt's evidence was that the CFIA Protocols are aligned with and broadly comparable to the OIE Code in terms of risk analysis. I note that the CFIA Protocols themselves refer to the SPS Agreement and OIE Code. For example, with respect to hazard identification, they state that the identification of hazards for the importation of animals and animal products must be in accordance with the SPS Agreement and that the OIE list of diseases (Lists A, B and C) represents the principal list of diseases for conducting hazard identification for the importation of animals and animal products. With respect to risk management, they state that all decisions should be in accordance with the SPS Agreement, that international standards as prescribed in the OIE Code should represent the preferred choice of sanitary measures for risk assessment and that the application of those measures should be in accordance with the intention of those standards. Dr. Rheault's evidence was that the CFIA Protocols are based on the OIE Handbook. On cross-examination, in relation to an email put to her where it was confirmed that the 2013 Risk Assessment was conducted in accordance with the WTO requirements (respecting risk assessment), Plaintiffs' counsel suggested to Dr. Rheault that earlier in her testimony she had identified the OIE and international standards "as the prevailing standards for your conduct." While this is not apparent to me from Dr. Rheault's earlier testimony, she responded, "yes, I do."

[768] What is apparent from the evidence is that the CFIA Protocols are based on and are intended to reflect the OIE Code and Canada's obligations, as a WTO Member, to other WTO Members.

[769] The CFIA Protocols are statements of CFIA's policy on import risk analysis for animals and animal products. Such policies can inform the standard of care but are not determinative. As held in *Bergen v Guliker*, 2015 BCCA 283, which concerned police liability:

> [110] External indicators of reasonable conduct, including professional standards and internal policy, may inform the content of the standard and whether it was breached (*Hill* at para. 70; *Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201 at para. 29; *Burbank* at paras. 91-92; *Krawchuk* at para. 125). However, policies and statutory standards, while instructive, are not definitive of the content of the standard of care (*Hill* at para. 70). In *Roy*, this Court noted:
>
> > [36] The policy of a police force is an important factor in determining the standard of care a peace officer must observe, but it is not determinative, nor is it to be treated as if it were a statute imposing civil obligations. …
>
> [111] Similarly, while compliance with policy may be an important factor to consider in determining whether the standard of care has been met, failure to follow policy does not automatically compel the conclusion that the standard of care was breached [citing *D.H. (Guardian ad litem of) v. British Columbia*, 2008 BCCA 222]…
>
> [112] As well, in *Doern*, this Court endorsed the trial judge's conclusion that:
>
> > [15] … Although the policy does not, in itself, constitute the standard of care, compliance with the policy, in my view, is a very important factor to consider in determining whether the standard of care has been met.

[770] See also, for example, *Musa v Carleton Condominium Corporation No 255*, 2023 ONCA 605 at paras 38-39, which held that best practice guidelines may be considered, although they do not establish a legally enforceable standard of care. And, in *Krawchuk v Scherbak*, 2011 ONCA 352, in the context of a claim of negligence concerning a real estate agent, the ONCA held:

> [125] To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. This general standard, a question of law, will not vary between cases

> and there is no need for it to be established through the use of expert evidence: see Wong v. 407527 Ontario Ltd., 1999 CanLII 3788 (ON CA), [1999] O.J. No. 3373, 179 D.L.R. (4th) 38 (C.A.), at para. 23; Fellowes, McNeil v. Kansa General International Insurance Co., 2000 CanLII 22279 (ON CA), [2000] O.J. No. 3309, 138 O.A.C. 28 (C.A.), at para. 11. The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact (Wong, at para. 23; Fellowes, at para. 11). External indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.

[771] In this matter, the applicable standard of care is that of a reasonable regulator in similar circumstances. The SPS Agreement, OIE Code and CFIA Protocols inform that standard and assist the Court in determining whether CFIA's actions were reasonable in the prevailing circumstances. There may also be other external indicators of reasonable conduct. In any case, "[t]he standard is not perfection, or even the optimum, judged from the vantage of hindsight" (*Hill* at para 73).

(c) The relevant content of the SPS Agreement, OIE Code and CFIA Protocols

[772] In essence, the Plaintiffs' assertion is that the prevailing standards, as found in the SPS Agreement and the OIE Code and mirrored in the CFIA Protocols, required Canada, as the importing country, to conduct a four-step risk analysis (hazard identification, risk assessment, risk management/mitigation and risk communication). However, that CFIA conducted only one component of the required analysis process, risk assessment, when conducting the 2003 and 2013 Risk Assessments (although it was also acknowledged elsewhere in the Plaintiffs' submissions that hazard identification had been conducted). This was the breach of the standard of care.

(i) SPS Agreement

[773] In a nutshell, the SPS Agreement is concerned with ensuring that sanitary and phytosanitary measures imposed by Member states engaged in international trade are harmonized by use of international standards, guidelines and recommendations developed by the relevant international organizations, including the OIE (Preamble; Article 3; Annex A, s 3(b)). It seeks to ensure that Members "do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members" (Article 2(3)).

[774] In that regard, the SPS Agreement states that sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade (Article 2(3)). Article 5, Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection, indicates that Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risk to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations (Article 5(1)). And, when determining the appropriate level of sanitary or phytosanitary protection, Members should take into account the objective of minimizing negative trade effects (Article 5(4)).

[775] Dr. Roberts testified that, under the SPS Agreement, a country can set its acceptable level of risk (the ALOR). The ALOR is set by policy. The assessed level of risk is then determined through the risk assessment. The difference between the ALOR and the assessed level of risk provides the appropriate level of protection [ALOP], which is reached through the application of sanitary measures.

[776] She explained the ALOP as follows:

> So ALOP is your appropriate level of protection. And sometimes it's also—you could refer to the acceptable level of risk. Now these are—this is the concept that every country has the right to set its own acceptable level of risk… the idea is that you have what is a societal acceptable level for protecting animal, human, and plant health. And each country will say, we're happy that our acceptable level of risk is very low or low, and that means that anything that's

> higher than level you want to risk-manage down. And that degree of managing it down to your—from your assessed level to your acceptable level is called the appropriate level of protection.

[777] Referred to Article 5(5) of the SPS Agreement, which states that Members shall avoid arbitrary or unjustifiable distinctions in the levels of protection it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade, Dr. Roberts indicated that a country should have the same ALOR for all commodities. However, a different level of protection may be required for different commodities because the assessed level of risk may be different.

(ii) OIE Code

[778] Section 2.1 of the OIE Code, Import Risk Analysis, states that the principal aim of import risk analysis is to provide importing countries with an objective and defensible method of assessing the disease risks associated with the importation of animals, animal products and other products and materials. It states that the analysis should be transparent so that the exporting country is provided with clear reasons for the imposition of import conditions or refusal to import.

[779] Article 2.1.1 sets out the components of risk analysis. There are four aspects to risk analysis: hazard identification, risk assessment, risk management and communication.

[780] The first component, hazard identification, is stated to involve identifying the pathogenic agents which could potentially produce adverse consequences associated with the importation of a commodity and which may be present in the exporting country. It is then necessary to identify whether each potential hazard is already present in the importing country and whether it is a reportable disease or is subject to control or eradication in that country, to ensure that importation measures are not more trade restrictive than those applied within the country. Hazard identification is described as a categorization step. The risk assessment may be concluded if hazard identification fails to identify potential hazards associated with the importation. The

evaluation of the veterinary services (the governmental and non-governmental organizations that implement animal health and welfare measures and other standards and recommendations in the OIE Code), surveillance and control programs and zoning and compartmentalization systems are stated to be important inputs for assessing the likelihood of hazards being present in the animal population of the exporting country. An importing country may decide to permit importation using the appropriate sanitary standards recommended in the OIE Code, thereby eliminating the need for a risk assessment (Article 2.1.2).

[781] As described in Article 2.1.4, the risk assessment process consists of four interrelated steps (entry assessment, exposure assessment, consequence assessment and risk estimation). The OIE Code 2002 states that the "product is the risk assessment report which is used in risk communication and risk management" (Article 1.3.2.1 of that version). The principles of risk assessment are set out in Article 2.1.3 of the OIE Code 2012.

[782] The principles of risk management are set out in Article 2.1.5. Risk Management is described as the process of deciding upon and implementing measures to achieve the Member country's ALOP while at the same time ensuring that negative effects on trade are minimized. The objective is stated as being to manage risk appropriately to ensure that a balance is achieved between a country's desire to minimize the likelihood or frequency of disease incursions and their consequences and its desire to import commodities and fulfil its obligations under international trade agreements (Article 2.1.5(1)). There are four risk management components. First, risk evaluation is the process of comparing the risk estimated in the risk assessment with the Member country's ALOP. Second, option evaluation is the process of identifying, evaluating the efficacy and feasibility of, and selecting measures in order to reduce the risk associated with an importation in order to bring it in line with the Member country's ALOP. The efficacy is the degree to which an option reduces the likelihood and/or magnitude of adverse health and economic consequences. Evaluating the efficacy of the options selected is an iterative process that involves their incorporation into the risk assessment and then comparing the resulting level of risk with that considered acceptable. The evaluation for feasibility normally focuses on technical, operational and economic factors affecting the implementation of the risk management

options. Third, implementation is the process of following through with the risk management decisions and ensuring that the risk management measures are in place. Fourth, monitoring and review is the ongoing process by which the risk management measures are continuously audited to ensure that they are achieving the results intended (Article 2.1.6).

[783] The principles of risk communication are also set out (Article 2.1.7). Risk communication is described as the process by which information and opinions regarding hazards and risks are gathered from potentially affected and interested parties during a risk analysis, and by which the results of the risk assessment and proposed risk management measures are communicated to the decision-makers and interested parties in the importing and exporting countries. It is described as a multidimensional and iterative process and should ideally begin at the start of the risk analysis process and continue throughout (Article 2.1.7(1)).

(iii) CFIA Protocols

[784] The CFIA Protocols set out CFIA's Policy on Import Risk Analysis for Animals and Animal Products. For the purposes of this description, I am referring to the 2005 CFIA Protocol.

[785] The Import Risk Analysis Process is described and begins with a risk management decision to conduct a risk assessment for the importation in question. The risk assessment process is stated to consist of hazard identification and four interrelated assessment steps.

[786] Like in the OIE Code, hazard identification is a first and categorization step. The CFIA Protocols set out a list of the criteria employed for identifying hazards for imported animals and animal products. These include that the identification of hazards for the importation of animals and animal products must be in accordance with the SPS Agreement.

[787] The four risk assessment steps are each described in detail. These are release assessment (now called entry assessment), exposure assessment, consequence assessment and risk estimation.

[788] The principles of risk assessment are stated as follows:

> **PRINCIPLES OF RISK ASSESSMENT**
>
> 1. Risk assessment should be flexible to deal with the complexity of real life situations. No single method is applicable in all cases. This is exemplified by the variety of animal commodities, the multiple hazards that may be identified with an importation and hence, the different disease epidemiologies, detection and surveillance systems, exposure scenarios and types and amounts of data.
>
> 2. Both qualitative and quantitative risk assessments have merit.
>
> 3. An organizational arrangement that separates risk assessment from risk management decision-making is encouraged to ensure that the risk assessments are not influenced to fit prior regulatory conclusions.
>
> 4. The risk assessment should be based on the best, available information that is in accord with current scientific thinking. The assessment should be well-documented and supported with references to the scientific literature and other sources, including expert information elicitation.
>
> 5. Consistency and transparency in risk assessments should be encouraged in order to ensure fairness and rationality, comparison of risks and ease of understanding by all the interested parties. Consistency may be limited to similar commodities and depend on the types and amount of data available. Improvement in risk assessment methods should supersede consistency.
>
> 6. Risk assessments should illustrate the uncertainty in the risk estimation output.
>
> 7. Generally the risk estimates increase with increasing volume or quantity of commodity imported.
>
> 8. The risk assessment should be amenable to updating when additional information becomes available.

[789] Risk management and the principles of risk management are also described:

RISK MANAGEMENT

While risk management comprises a number of measures, not all will necessarily be included in every risk analysis. The elements of risk management (see Figure 3) include:

1. Risk evaluation - the aspect of risk management concerned initially with the decision to request a risk assessment and secondly, interpreting, comparing, judging the significance of and deciding the tolerability of the risk as estimated in a risk assessment document.

2. Option evaluation - the process of identifying, evaluating the efficacy and feasibility of, and selecting sanitary measures, in addition to those that may have been considered in the initial risk assessment, in order to reduce the risk associated with an importation. The efficacy is the degree to which an option reduces the likelihood and magnitude of adverse biological and economic consequences. Evaluating the efficacy is an iterative process that involves incorporation into the initial risk assessment which is then re-evaluated to determine the degree of risk reduction. The evaluation for feasibility normally focuses on technical, operational and economic factors affecting the implementation of the risk management options.

3. Implementation - the process of following through with the risk management decision on acceptance or refusal of the importation and ensuring that the risk management measures are in-place for either decision.

4. Monitoring and review - the ongoing process to observe the importation and conduct a review, if necessary, of the risk assessment, the sanitary measures and the risk management decision.

PRINCIPLES OF RISK MANAGEMENT

1. The risk management decision on importation should be based on the probability of adverse health effects on animals or humans; that is the health-associated outputs of the risk assessment. These health associated outputs may (and probably will) in their turn have economic consequences, which will then also be included as risk assessment outputs. All risk management decisions should be

> in accordance with the *Sanitary and Phytosanitary Agreement* of the WTO.
>
> 2. The international standards of the OIE, as prescribed in the *Code,* should represent the preferred choice of sanitary measures for risk management. The application of these sanitary measures should be in accordance with the intentions in the standards.

[790] Risk Communication is described as representing the interactive exchange of information among risk assessors, risk managers and other interested parties. It begins when a risk analysis is requested and continues after the implementation of the decision on the importation acceptance or refusal. The principles of risk communication are also described:

> **PRINCIPLES OF RISK COMMUNICATION**
>
> 1. The communication of risk should be an open, interactive and transparent exchange of information that may continue after the decision on importation.
>
> 2. The principal recipients of risk communication include the authorities in the exporting country and other stakeholders such as domestic and foreign industry groups, domestic livestock producers, and consumer groups.
>
> 3. Peer review should represent a component of risk communication in order to obtain scientific and analytic critique and to ensure the validity of the scientific data, methods and assumptions.
>
> 4. The uncertainty in the model, model inputs and the risk estimates of the risk assessment should be communicated.

[791] Two interpretive diagrams are included in the CFIA Protocols which speak to the import risk analysis process:

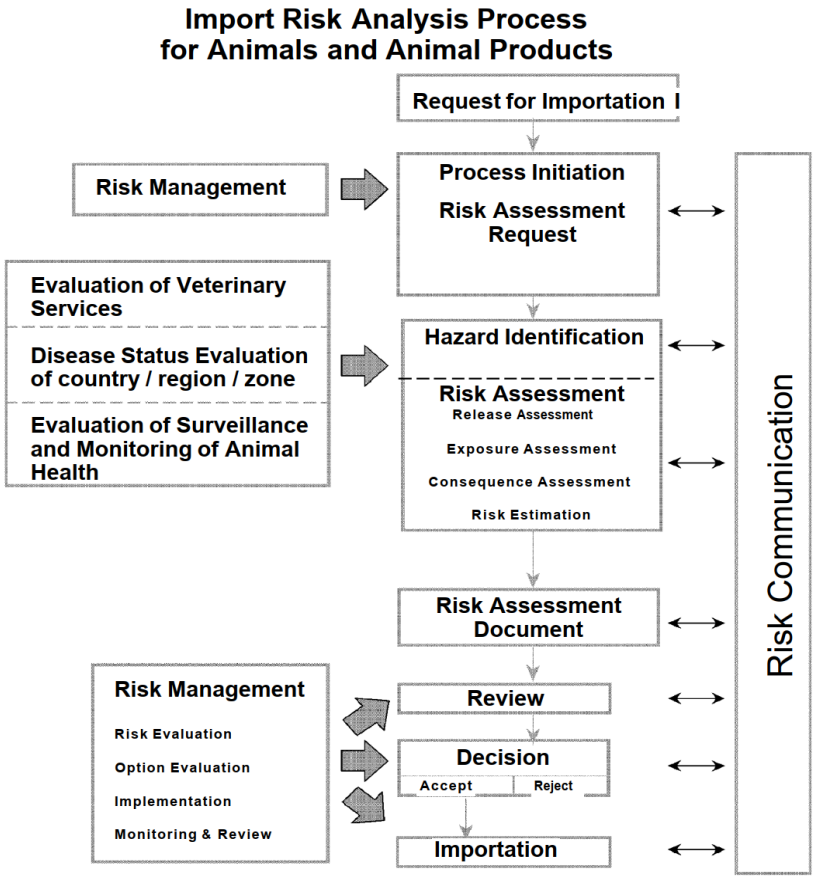

Figure 2. The relationships between hazard identification, risk assessment, risk management and risk communication in the import risk analysis process.

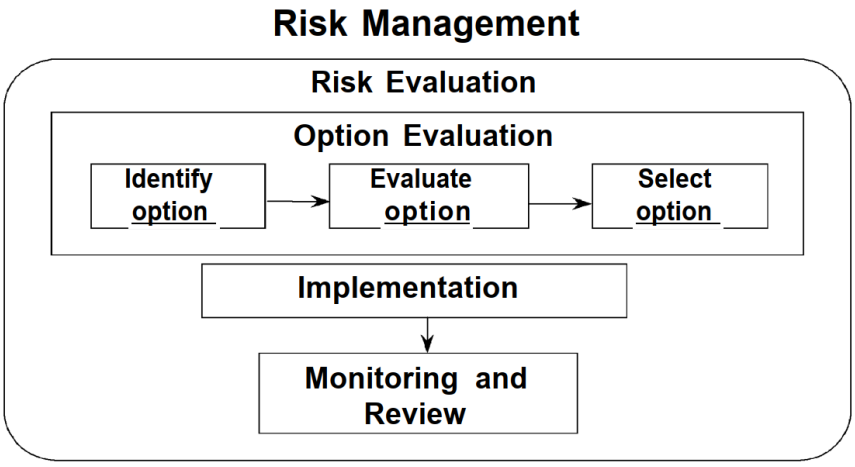

Figure 3. The elements of risk management.

PRINCIPLES OF RISK MANAGEMENT

1. The risk management decision on importation should be based on the probability of adverse health effects on animals or humans; that is the health-associated outputs of the risk assessment. These health associated outputs may (and probably will) in their turn have economic consequences, which will then also be included as risk assessment outputs. All risk management decisions should be in accordance with the *Sanitary and Phytosanitary Agreement* of the WTO.

2. The international standards of the OIE, as prescribed in the *Code*, should represent the preferred choice of sanitary measures for risk management. The application of these sanitary measures should be in accordance with the intentions in the standards.

[792] The CFIA Protocols provide definitions and other information, and they address other topics, such as disease status evaluation of a country/zone/region. However, for the purposes of the question of whether CFIA breached the standard of care with respect to the conduct of the 2003 and 2013 Risk Assessments, the above are the most relevant provisions.

C. Was there a breach of the standard of care?

i. Preliminary matter – risk assessment vs risk analysis

[793] In closing submissions, the Plaintiffs argued that CFIA failed to comply with the SPS Agreement and the OIE Code by failing to complete "a full risk assessment, otherwise called a risk 'analysis' for the 2003 and 2013 Risk Assessments." In a footnote, they say that the SPS Agreement uses the word risk "assessment" for the whole process of risk evaluation, and the OIE Code refers to the whole process as "risk analysis." The Plaintiffs say that while in their pleadings they refer to "risk assessment," they do so "in the sense used by the SPS Agreement." They say that, for the purpose of the closing submissions, they refer to "risk assessment" as the identification of hazards and the initial assessment of risk of those hazards on an unrestricted basis, and they refer to "risk analysis" or "risk evaluation" as the entire four-part process mandated under the OIE Code and the SPS Agreement.

[794] In closing oral submissions, the Defendants agreed that there are four stages to risk analysis. However, they submitted that what the Plaintiffs have challenged in this action is an alleged failure to identify risk mitigation measures *in* the Risk Assessments. While the Plaintiffs now assert that they used the term "risk assessment" in the pleadings "in the sense used by the SPS Agreement," the pleadings (the Amended Amended Statement of Claim) make no reference to the SPS Agreement. Rather, they are concerned with the timeliness and accuracy of the 2003 Risk Assessment. The Defendants say that the Plaintiffs have never challenged risk management and have always challenged risk assessment. This late-day challenge to identifying mitigation in a risk assessment is a disguised challenge to risk management.

[795] I agree that the Amended Amended Statement of Claim (filed in April 2017) makes no reference to the SPS Agreement. Nor does it reference the OIE Code or the CFIA Protocols. It asserts that the Crown's restrictions on the importation of honeybees were ostensibly based on risk assessments conducted by CFIA, the last of which was the 2003 Risk Assessment, which, as of January 1, 2007, was out of date and did not constitute a reasonable or legitimate basis for the prohibition on the importation of US honeybee packages. The pleadings also assert that the Crown breached its duty of care by basing its decisions to maintain the prohibition on outdated and inaccurate information, including the 2003 Risk Assessment, and by failing to conduct a current risk assessment.

[796] The focus of the pleadings is not the manner in which risk assessments were conducted. As addressed above, the issue of risk mitigation options arises in Common Issue #1, which asks whether any or all of the Defendants owed the proposed Class a duty of care not to be negligent in the maintenance or enforcement of the *de facto* prohibition, "including a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments."

[797] Given that the pleadings do not refer to the SPS Agreement, and in reading them in whole, I find the Plaintiffs' assertion that the reference to risk assessment therein was "in the sense used by the SPS Agreement" to be somewhat disingenuous. Common Issue #1 and the Plaintiffs' stipulations are also very clear on their face that the Plaintiffs are challenging the failure to consider risk mitigation *in* the Risk Assessments.

[798] In that regard, the point the Defendants make is that the "risk assessment" aspect of an overall "risk analysis" does not, pursuant to the OIE Code or the CFIA Protocols, include consideration of mitigation options. Put otherwise, by any standard, the Risk Assessments, as such, were not intended to include consideration of risk mitigation options.

[799] However, the Defendants acknowledge in their closing submissions that in both the OIE Code and the CFIA Protocols, risk analysis comprises four components: hazard identification, risk assessment, risk management and risk communication. Moreover, the evidence that I discuss

below demonstrates that risk assessment (which typically does not include risk mitigation) and risk management (which includes consideration of any risk mitigation measures) do not exist in total isolation from each other. How those elements interact within a risk analysis depends on the prevailing circumstances. Accordingly, whether risk mitigation measures are identified *in* the Risk Assessments, as such, is not the end of the standard of care analysis. As stated by Dr. Zagmutt, the risk management and risk assessment steps are integral and interlinked.

[800] On this point, I note that there is no serious disagreement between Dr. Zagmutt and Dr. Roberts as to what comprises a risk analysis for the purposes of the CFIA Protocol and the OIE Code. They agree that a full risk analysis comprises the four steps of hazard identification, risk assessment, risk management and communication. However, Dr. Roberts did not agree with Dr. Zagmutt that the 2003 and 2013 Risk Assessments were "invalid" because they did not meet the OIE international standards or the CFIA standards.

[801] Her testimony was that the four steps of risk analysis are distinct (other than communication) and that the 2003 and 2013 Risk Assessments are just that, risk assessments. They are not risk analyses. With respect to risk assessment and risk management, Dr. Roberts pointed out that risk assessment and risk management are separate steps in both the OIE Code and the CFIA Protocols. Best practice is that these should be conducted by different teams. This is because the risk managers take different factors into consideration – they may be influenced by politics, economics, social factors or other matters – while risk assessors are concerned only with the science. Risk managers decide on the risk question and the scope of the risk assessment. The risk assessors are to answer the question put to them, which, in Dr. Roberts' opinion, is what they did in this case.

[802] Based on the risk managers' risk question and scope identification, the risk assessors then prepare the risk assessment. Risk assessors can include risk management measures in the risk assessment if they are already in place for trade (that is, if the OIE Code has already established appropriate sanitary measures). However, if there is no risk management measure already identified, then the risk assessors do an unrestricted risk assessment. This risk assessment then

goes back to the risk managers, who consider whether risk management measures should be implemented. The risk managers can then ask the risk assessors to do a new risk assessment, including any new risk management measures, to determine the final risk estimation.

[803] Dr. Roberts confirmed on cross-examination that her expert report concerns risk assessment. She also agreed that the 2003 and 2013 Risk Assessments are not full import risk analyses. She did not agree that conducting the first two steps of the risk analysis (hazard identification and risk assessment) resulted in risk assessment but no sanitary measures. Her testimony was that the risk managers had the option, first, to see if there are risk measures (sanitary measures) available to them for the import of commodities by way of the WHOA manual (although I understood her to have been referring to the OIE Code, volume II of which gives recommended measures for different diseases). If such measures are identified, then these can be applied without the need to revisit or do a new risk assessment. This is because there are already internationally agreed recommendations in place. However, she did agree that this applied only if the disease at issue was listed and if mitigation measures were recommended. (I note there is an OIE list of diseases that each Member country has agreed to make notifiable or reportable. This list is found at Article 1.2.3 of the OIE Code. The disease must meet four criteria to be listed, being that it can be spread through the movement of equipment or animals; that at least one OIE Member country should be free of it; that transmission can be proven, and that it causes an impact on public or animal health or wildlife; and that infection is possible to detect.) If recommended measures were not available, then the risk managers would have to go back through the whole CFIA protocol on how to identify, evaluate, monitor, etc., risk management measures.

[804] Dr. Roberts' report states at p 11:

> The lack of evaluation of risk management options in the 2003 and 2014 risk assessments is not a reason to discount the findings of the risk assessment. However, in the case of the 2003 and 2014 reports, the risk assessments themselves are not a full import risk analysis. That is because there is no evaluation of the application of SPS risk management measures. That assessment of the management measures should be undertaken once the risk managers have agreed the scope for the risk assessment.

ii. The 2003 Risk Assessment

[805] In her testimony, Dr. James described the CFIA Protocol and stated that it is used to conduct animal health risk assessments. Further, that the CFIA Protocol explains the risk analysis process, comprising risk assessment, risk management and risk communication. Referring to the import risk analysis process diagram contained in the CFIA Protocol, she testified that this shows the whole risk analysis process. This is initiated by the AHPD (the risk managers), which submits a risk assessment request in the form contained in the Protocol. The request would go to the AHRA (the risk assessors). The risk assessors conduct a literature search, determine the hazards to be considered and then conduct the risk assessment. When complete, the risk assessment would go back to the risk managers to identify and evaluate any options available to mitigate risk, if required. The AHPD risk managers consult with external partners and experts, and they are responsible for communication. They would make the risk management decision. The decision could be to develop an import protocol (import conditions), in which case import permits would include those conditions.

[806] She explained that risk assessment (in the Science Branch) and risk management (in the Policy and Programs Branch) are separated into different branches of CFIA to protect risk assessors from any potential pressures, such as political pressure, which could lead to bias. The risk managers deal with those issues and would also be the ones in contact with beekeepers. She was referred to the Risk Assessment Summary section of the 2003 Risk Assessment. The beginning of that section states that the risk assessment represents a science-based evaluation to assist risk managers in decision-making and risk mitigation. Dr. James indicated that the risk assessment is based on science, but when available information is limited, it also includes identified uncertainties and assumptions relied on to reach a risk estimate.

[807] In this case, the risk assessment request came from Dr. Jamieson and sought an assessment of the disease risk to Canadian honeybees “associated with the unrestricted importation of honeybee queens and packaged bees from the continental United States.” After comments from reviewers were received on the draft risk assessment (which included separating

US queens from US honeybee packages in the risk assessment), Dr. James was asked by Dr. Belaissaoui, the risk manager, to look at risk mitigation for the importation of queen bees. In response, Dr. James reviewed the risk assessment, looking at the pathways for release and exposure and the consequences. She looked for places where there could be intervention to reduce risk and, in that regard, produced a document entitled *Potential Mitigating Measures to Reduce the Likelihood of Disease Introduction by Honey Bee Queens Imported from the United States*. She testified that she did not consider the feasibility, practicality or acceptability of these mitigation measures, as this was the role of the risk managers.

[808] On cross-examination, Dr. James reconfirmed that the risk assessment that she performed was conducted in accordance with the risk manager's request for the importation of US honeybee packages from the continental US with no restrictions. She explained that this was a starting point. Sometimes a risk assessment will determine that there are no significant risks, or sometimes, if the risk is not acceptable, the risk managers may find solutions that they feel bring the risk down to a tolerable level and proceed with those measures, in which case those measures need not go back through the risk assessment process. Her testimony was that in this case, there were risks identified as associated with importation. She explained again that the CFIA Protocol process is that the risk managers request risk assessments. The risk assessors identify the hazards and do the risk assessment. The risk assessment document goes back to the risk managers, who review it to determine if the risk is tolerable or not. If it is not tolerable, then they consider what the options are for managing the risk. If there are options that reduce the risk to tolerable levels, then the importation can proceed. She also explained again that it is not the role of risk assessors to look at options for risk mitigation. That is the role of risk managers, upon receiving the risk assessment, as they would have more knowledge of what was acceptable and practical. For the 2003 Risk Assessment, the risk managers were Dr. Belaissaoui and Dr. Jamieson. Dr. James testified that it is not the role of the risk assessor to incorporate mitigation options, unless the risk managers identify an option that they think might be feasible and want it added into the risk assessment.

[809] Dr. James testified that although the risk assessment did not contain any consideration of risk mitigation measures, it looks at the pathways of what needs to happen in order for a hazard to enter Canada and spread, and the consequences of this happening. These “points of evidence” should make it clear to the risk managers where there is potential for intervention. But it is the risk managers who decide what is practical and feasible.

[810] Dr. Belaissaoui, on cross-examination, was referred to the 2001 CFIA Protocol, which she confirmed would have been in place when the 2003 Risk Assessment was conducted. She confirmed the policy summary is consistent with AHPD’s role in the risk management process:

> The Animal Health and Production Division (AHPD) of the Canadian Food Inspection Agency (CFIA) is responsible for the decision to prohibit or allow importation of animals, animal germplasm and animal-sourced products. AHPD may establish specific conditions under which importation may proceed, e.g., testing, quarantine, in order to safeguard the Canadian animal health status. This document presents the steps followed in the import risk analysis process for animals and animal products.

[811] Further, that the steps listed and described in the policy (process initiation, hazard identification and risk assessment, peer review, import protocol development, import protocol, AHPD risk management decision, importation process and risk communication) happen in sequence. She explained that when a risk assessment outcome is favourable, then import conditions are developed, giving the example of the US honeybee queen import protocol developed with Dr. Nasr. She agreed that the risk management decision is the ultimate call about whether an import should or should not be permitted, with or without conditions. When asked, with respect to the 2003 Risk Assessment, to confirm that AHPD did not investigate or consider any mitigation measures that could be applied to US honeybee packages, she responded that this was because the risk was too high for packages. It was much higher than for queen bees (which had ultimately been segregated from packages in the risk assessment, and importation was permitted with import conditions). She did not recall any specifics of any risk reduction measures being investigated. When asked by Plaintiffs’ counsel to confirm that AHPD had decided that it could not allow package imports under any conditions, Dr. Belaissaoui’s testimony was that she did not know the specifics of the discussions because she was not

involved in all aspects of the honeybee file at the time. However, she stated that the general procedure for importation is that if the level of risk is too high, mitigating measures are not considered because the measures would not adequately mitigate such a high risk. She testified that usually, if the risk is beyond "negligible" or "very low," it is difficult to apply any mitigating measures that would sufficiently reduce the risk (I note that the 2003 Risk Assessment risk estimations for US packaged honeybees were "high" (rVar); "moderate" (rAFB); "low" (AHB); and "low" (SHB), while the risk estimations for US honeybee queens were "moderate" (rVar); "low" (rAFB); "low" (AHB); and "negligible" (SHB)).

iii. The 2013 Risk Assessment

[812] Dr. Rheault testified that in March 2013 a request for a risk assessment, in a standard form, was received from the risk managers. This request was for a top priority, full risk assessment, not including mitigation measures. She testified that the inclusion of mitigation measures was an option (as demonstrated by a box on the form that could be checked to select this). The risk assessors in the AHRA unit could propose mitigation measures, and they had a list of potential measures (for example, quarantine or testing, based on the OIE standards). However, it was for the risk managers to explore any possible options and assess their feasibility with stakeholders. She testified that it was normal to have a risk assessment request without mitigating measures.

[813] On cross-examination, Dr. Rheault was directed to an email dated February 12, 2014. The email advised that at a Senate Committee meeting, the Alberta Beekeepers Commission had stated that they had written to CFIA with respect to the 2013 Risk Assessment suggesting that it contained errors and omissions and that CFIA might wish to reconsider its conclusions, but CFIA had not responded. The Committee asked if it could be provided with a copy of CFIA's response. Dr. Rheault responded to the email advising that the 2013 Risk Assessment had been provided to stakeholders for comments and that 174 responses were received, recorded, evaluated and taken into consideration. Most of the responses provided opinion, rather than scientific information, but some of the information received resulted in slight modifications to

the risk assessment, although it did not trigger changes that would significantly modify the overall risk estimation. The revised risk assessment had been submitted to Programs (the risk managers) on January 23, 2014. The email then stated: “Please note that the risk assessment is only one part of the global risk analysis process which includes the risk communication and risk management. Currently, the risk managers (CFIA, Programs) have started discussions on risk management options with stakeholders.” When questioned about this and asked if the risk analysis process was incomplete, Dr. Rheault testified that this would depend on the scope of the request. For example, if a risk assessment conclusion was within the ALOR, then the risk analysis process might stop there. No mitigation measures would be put in place and risk management would not be considered. Dr. Rheault confirmed that the 2013 Risk Assessment was relied on to support the restriction on the importation of US honeybee packages, but she did not know if there was a subsequent document identifying risk management options. She testified that Dr. Rajzman had sent an invitation to stakeholders seeking potential mitigating measures and options and that this was part of the risk management discussion with them.

[814] Dr. Dubé gave evidence largely pertaining to the 2022 External Call for Information. However, she also testified that the typical risk analysis process is that the risk assessors will first conduct the hazard identification. They then move to the risk assessment, which may include peer review. Once the risk assessment is complete, it is sent to the risk managers, who evaluate options available to mitigate the identified risks. Dr. Dubé testified that the 2013 Risk Assessment was not the basis for the US honeybee package importation ban; rather, it was the start of the process. After a risk assessment is complete, then the evaluation of potential sanitary measures occurs – which leads to a decision.

[815] Dr. Dubé also testified that, typically, a first full import risk assessment request will not include risk mitigation measures or sanitary measures. At this stage, the risk managers want to know what the baseline risk is. She testified that risk assessment requests rarely include a request for the discussion of risk mitigation options. When that does happen, the risk assessors may identify any mitigation pathways that their research disclosed which the risk managers could

then explore, but that would not mean that such a pathway would lead the risk managers to feasible mitigation measures. The purpose is to have a baseline risk estimate without mitigation.

[816] She also testified that sanitary measures may already be found in the OIE Code or an import condition already in place for a specific commodity. And, if baseline risk is negligible or very low, then sanitary measures would not be required.

[817] Dr. Dubé also testified that some of her communications that were in evidence at trial addressed her view that CFIA communications to industry associations, the media and others gave rise to a messaging concern. Specifically, that the messaging focus was on risk assessment, seemingly conveying that risk assessment was the only piece of the decision-making, while in fact risk analysis is much broader. She testified that the risk managers had explained the process at a meeting, saying that the certificate of import is the decision document. This document is preceded by discussions and consultations. Dr. Dubé felt, with respect to the honeybee file in particular, there should perhaps also be documentation of the risk management process, as part of a full import risk analysis document. In a 2021 presentation, she proposed a process for risk analysis that included a template for a new risk management decision document. This would include a summary of the risk assessment/scientific evaluation and then a description of the risk management options and an explanation of how they were evaluated and whether or not they affected the ALOP. Essentially, it would explain how this process led to a risk management decision on importation. This document could be used as a risk communication tool. The template was utilized in the 2021 African swine fever decision-making process.

[818] Dr. Rajzman was the risk manager and made the risk assessment request with respect to the 2013 Risk Assessment. Her testimony was that the risk analysis steps (put to her in the context of the OIE Code) include mitigation. However, that in this case there were no risk mitigation measures or conditions available to allow the safe importation of US honeybee packages. She made this recommendation to her director, Dr. Lord. Her testimony was that she and Dr. Lord both reviewed the 2013 Risk Assessment, and Dr. Lord concluded that no mitigation was possible. Regardless, they would still consult with CAPA and the Provincial

Apiculturists to see if there were any measures that could be put in place, and they would also look at the OIE Code. Dr. Rajzman testified that the 2013 Risk Assessment had previously been shared for public consultation (as I have described above at paragraphs 219-220). She provided the final version of the assessment to the Provincial Apiculturists on January 31, 2014, which will be discussed further below. Based on the responses received from the Provincial Apiculturists, Dr. Rajzman concluded she could not propose any risk mitigation measures. She testified that this information was shared with the USDA-APHIS and, at that point, if they wanted to export US honeybee packages to Canada, it was their obligation to propose mitigation measures.

iv. Risk mitigation after the completion of a risk assessment

[819] Based on a review of the OIE Code and the CFIA Protocols, and considering the evidence of the CFIA witnesses as well as the evidence of Dr. Zagmutt and Dr. Roberts, I accept the evidence of Dr. Roberts, Dr. Rheault and Dr. Dubé that it is appropriate for risk managers, as a starting point, to request an unrestricted risk assessment. This serves to establish a baseline level of estimated risk. Their evidence is also clear, and I find, that once the estimated level of risk has been assessed, the risk manager's role, discrete from that of the risk assessors, is to make a risk management determination.

[820] Although Dr. Zagmutt's opinion was that the import restriction on US honeybee packages was not based on a valid risk assessment, this opinion was based on his view that the Risk Assessments only considered unrestricted imports and did not consider risk mitigation options. I do not understand his evidence to suggest that CFIA could not start with an unrestricted assessment before evaluating mitigation measures.

[821] I also accept Dr. Roberts' opinion that the risk assessment aspect of a risk analysis, as the second step of the four-step analysis, does not typically include risk management. In that regard, I also accept her opinion that the 2003 and 2013 Risk Assessments – insofar as they were just

that, risk assessments – did not fail to conform with the CFIA Protocol and OIE Code based simply on the fact that they did not address risk management.

[822] However, in these circumstances, this leaves the question of whether the standard of care required the risk managers, who in the conduct of a risk evaluation determine that the risk as estimated in the risk assessment was not at a tolerable level, to proceed to the next stage of risk management, being option identification and evaluation. More specifically, after a risk assessment is conducted identifying baseline risk that exceeds the acceptable level of risk, are risk managers required to consider potential risk mitigation measures by revisiting the risk assessment or otherwise?

[823] The Defendants acknowledge that the CFIA Protocols identify the elements of risk management, including "option evaluation." As indicated above, option evaluation is described as the process of identifying, evaluating the efficacy and feasibility of and selecting sanitary measures, in addition to those that may have been considered in the initial risk assessment. In the CFIA Protocols (and in the OIE Code), evaluating the efficacy of a measure is an iterative process that involves incorporation into the initial risk assessment to determine the extent to which the level of risk is reduced.

[824] However, the Defendants submit that this provision is found under the general statement that while risk management comprises a number of measures, not all will necessarily be included in every risk analysis. The Defendants also submit that the CFIA Protocols use broad permissive language and that there is no obligation to evaluate all possible risk management measures in all risk assessments. They submit that such a demanding obligation would limit the judgment of risk managers, under the risk evaluation element, regarding tolerability of the risk. And, under the option evaluation element, it would constrain the evaluation of efficacy and feasibility of any potential sanitary measures. They also submit that where no mitigation measures are identified, there is no basis in the CFIA Protocols to evaluate options. I am not persuaded by all of these submissions.

[825] First, I find that Dr. Roberts' evidence does not assist the Defendants. Her evidence, with respect to the option evaluation element of risk management, was that as a risk assessor she does not always take that step and that she is rarely asked by risk managers, when she has completed a risk assessment and identified risk, to put something back into the risk assessment. However, as indicated above, this was based on or qualified by the risk managers knowing what the risk management measures would be because they are already found in the OIE Code. The risk managers would therefore simply apply those existing, internationally agreed measures.

[826] So, for example, Chapter 1.2 of the OIE Code, Criteria for the inclusion of diseases, infections and infestations on the OIE List, lists those that are included within the category of bee diseases, infections and infestations at Article 1.2.3. This list includes American foulbrood and SHB. Chapter 9.4 concerns SHB infestation, and article 9.4.5 sets out the recommendations for the importation of queen honeybees with up to 20 attendants per queen. The veterinary authorities of importing countries should require the presentation of an international veterinary certificate attesting that the bees come from a country or zone officially free from SHB infestation. Or, the veterinary authorities of importing countries should require the presentation of an international veterinary certificate including an attestation from the veterinary authority of the exporting third country stating that the four listed requirements have been met (veterinary authorities and veterinary certificates will be explained in greater detail later in these reasons). Thus, a risk manager could simply apply these recommended sanitary measures.

[827] In my view, Dr. Roberts' evidence on this point suggests only that incorporating mitigation options into a risk assessment would not be necessary where CFIA opts to adopt existing OIE measures for a particular hazard. Dr. Rheault's evidence was to similar effect.

[828] The CFIA Protocol includes an overarching statement that while risk management comprises a number of measures, not all of these will necessarily be included in every risk assessment. This is followed by a list of the elements of risk management, which includes option evaluation. However, to the extent that the Defendants are suggesting that the overarching risk management statement supports that option evaluation – as part of risk management – need not

form a part of risk analysis, I do not agree. Nor do the Defendants point to any testimony that supports this suggestion. In my view, the overarching provision does, however, recognize that while a number of possible mitigation measures may exist, they need not all be considered in every circumstance. “Risk reduction options” or “mitigation measures” are defined in the CFIA Protocols as “any action or actions which reduces the risk of an agent to cause harm (to domestic livestock)….” Examples include quarantine, diagnostic testing, inspections, restricted use, processing, sentinel monitoring, etc.

[829] However, the CFIA Protocols do not offer guidance as to which risk management measures should be considered in a given case or how this determination is to be made. Nor does the option evaluation element of risk management indicate how options are to be identified.

[830] On that point, it is of note that while risk assessment is defined and described as an objective, repeatable, scientific process that should be based on the best available information that is in accord with current scientific thinking and be well documented and supported with references to scientific literature and other sources, the CFIA Protocols also appear to recognize that decisions of the risk managers entail a degree of subjective judgment.

[831] For example, the CFIA Protocols define “risk management” as:

> the process of identifying, evaluating, selecting and implementing alternatives for mitigating risk. It is the pragmatic decision-making process concerned with regulating the risk. As a decision process, it is involved in evaluating options to diminish or control present and predicted hazards to the biological and/or fiscal health of agricultural commodities…. Risk managers make implicit judgements about the safety of particular courses of action.

[832] Risk evaluation is defined in the CFIA Protocols as “the process of interpreting risks, including determining levels of risk acceptable to individuals, groups or society as a whole….” Risk evaluation, the first of the risk management elements, is stated to include “interpreting, comparing, judging the significance of and deciding the tolerability of the risk as estimated in a

risk assessment document." The "tolerable risk" is defined as "a management decision with regard to the acceptability of risk."

[833] And, while option evaluation concerns the process of identifying, evaluating the efficacy and feasibility of, and selecting sanitary measures, the evaluation of efficacy and feasibility are distinct. Feasibility is concerned with the practicality of implementation. This suggests that a proposed mitigation measure could potentially be eliminated from consideration by risk managers if it were determined not to be feasible. The same would be so with respect to efficacy.

[834] To conclude on this point, "Option evaluation" starts with the identification of possible mitigation measures. However, the CFIA Protocols indicate that not every measure must be considered in every case. This affords risk managers some discretion regarding which measures will be evaluated. They are also entitled to make implicit judgments about the safety of particular courses of action and judgments about the feasibility and efficacy of risk mitigation measures during the process of risk management. Given this discretion, I agree there may be circumstances where risk managers determine that no viable mitigation measures can be identified (i.e., options that, if applied, would reduce the risk to tolerable levels in the prevailing circumstances). In those circumstances, this risk management aspect of the process would appear to be resolved at the identification stage of option evaluation. However, what would appear to matter, for the purposes of meeting the standard of care of a reasonable regulator in similar circumstances, is whether the risk managers turned their minds to the identification and availability of potential mitigation measures.

v. Did the 2003 Risk Assessment identify but reject risk management measures?

[835] The Defendants submit that if the OIE Code and CFIA Protocols' description of the risk assessment includes risk management in risk assessment then, in any event, the 2003 Risk Assessment did identify, but rejected, risk management measures.

[836] In support of this argument, the Defendants say first that Dr. Jamieson considered the efficacy of certification when requesting the risk assessment and concluded that meaningful certification was not possible. Second, Dr. James specifically considered but rejected zoning as a sanitary measure or risk management measure. And, third, Dr. James separated the consideration of honeybee queens from honeybee packages, which was a comparative risk reduction measure. I will address these in turn.

(a) Certification

[837] Dr. Jamieson made the Risk Assessment Request, which is included in the 2003 Risk Assessment. The request was to "assess the disease risk to Canadian honeybees associated with the unrestricted importation of honeybee queens and packaged bees from the continental United States." The findings of the risk assessment would be used in determining whether the continued prohibition on the importation of honeybees from the continental US should be maintained.

[838] The request also provided the history, background and rationale of the request:

> History, background and rationale of the request:
>
> > Following the outbreak of the varroa mite in honeybees in the US in 1987, Canada prohibited the importation of honeybees from the continental US. Although, since 1987, the varroa mite has spread naturally across the border and within Canada, the ban on importation has been maintained.
> >
> > Since the initial introduction of the varroa mite, the health status of US honeybees has deteriorated. The varroa mite and American foulbrood (AFB) have become resistant to treatment, and the small hive beetle (SHB), another honeybee pest, has been introduced. [Recent experiences and related science have indicated that the SHB is not the significant pest that had been feared.] Because of lack of disease control programs and the migratory nature of US beekeepers, these diseases are considered to be widespread in the US. The tracheal mite is also believed to be much more widely spread in the US

> than in Canada, as some provinces attempt to control the disease.
>
> Antibiotic-resistant American foulbrood is known to be present in Alberta and BC, and it appears that there may be local occurrences of treatment-resistant varroa mite in at least four provinces.
>
> For several years, Alberta beekeepers have sought to have the border opened for the import of queens and packaged honeybees. Beekeepers indicate that successful overwintering is difficult, especially in the Peace River area where antibiotic resistant AFB is a complicating factor. In January 2002, BC and Manitoba beekeepers also requested that CFIA allow the importation of honeybee queens from the continental US, with certain health certifications. Resolutions for the opening of the border to the import of either queens or packaged bees from continental US were defeated at the February 2002 meeting of the Canadian Honey Council.
>
> The absence of honeybee disease surveillance and control programs in the US and the very mobile nature of US migratory beekeepers make it impossible for the US Department of Agriculture to provide meaningful health certification for the export of honeybees to Canada.

[839] The 2003 Risk Assessment, in the section entitled "Factors Affecting the Release Assessment," states that release assessment is a process that consists of describing the potential of a risk source to release or otherwise introduce risk agents into an environment accessible to animal populations. Considerations include the disease situation in the exporting region, the health status of the premise and animals and the pathogenesis of the disease agent. The section states that the highly migratory nature of the US beekeeping industry, coupled with poor honey prices and the need to maintain disease at very low levels to ensure strong hives for pollination, had resulted in increased exposure to disease and increased levels of treatment leading to increased resistance of parasites and disease in US honeybees. It goes on to describe the rental of large numbers of honeybee colonies for pollination in Southern California, Nevada, Maine, New Jersey and North Carolina. It explains that hives may be moved to several places across the US

over the course of a year, from the Florida citrus crop to California almonds, alfalfa fields, northern apple orchards and Maine blueberries, according to the pollination needs of various crops. Hives are generally returned to the southern US to overwinter, in order to ensure strong hives for the new season (citing a reference for this). The section states that the dispersal of hives every spring from their overwintering sites in the southern states to virtually all parts of the continental US may result in the dispersal of any diseases or pests carried by those hives. Given the highly migratory nature of the US beekeeping industry coupled with the general lack of movement controls, zoning of the US for honeybee diseases and pests would be very difficult.

[840] Further, as in Canada, national programs for beekeepers in the US do not include surveillance or control programs for honeybee pests and diseases. Unless local surveillance and control programs indicate otherwise, it had to be assumed that diseases and pests of interest (with the possible exception of Africanized honeybees) are distributed throughout the population of bees within the US. It was also assumed that the prevalence of disease and pests, particularly resistant diseases and pests, is higher in migratory hives. The section notes that state inspectors, or in some cases municipal/county inspectors, are responsible for implementing state disease control and surveillance programs. The level of inspection and legislated controls vary from state to state. It states that it is unlikely that inspectors are able to obtain good coverage of hives in states where there is a great deal of migratory beekeeping. Interstate movement controls must be very limited or non-existent so that hives may be moved quickly once a crop comes into bloom.

[841] I note here that the annual migration of a large number of US honeybee colonies across the US, and its continuance, is not in dispute. The evidence is clear on this point. For example, Dr. Caron's report states, "The commercial U.S. beekeeping industry is migratory with pollination rental fees constituting the majority of beekeeper income." It speaks to the increasingly migratory nature of the industry and says that as much as 88% of the colonies available are transported to California for almond pollination. Similarly, Dr. Pettis confirmed at trial that bees from all over the US converge on California for almond pollination. There is also documentary evidence to this effect, such as in the 2006 CAPA Proceedings. The joint AIA and AAPA report in this Proceeding acknowledges that "[a]lmond pollination and the migration of

hives across the country is adding in the spread of problems like Africanized honey bees (AHB) and SHB." The migratory nature of the US honeybee industry was and is a significant factor in the prohibition on the importation of US honeybees into Canada.

[842] The Plaintiffs argue that for the 2003 Risk Assessment, risk mitigation was simply not addressed, "presumably because Dr. Jamieson had made up his mind that the import prohibition should be continued before the Risk Assessment was conducted." Further, that the CFIA employees involved in the risk assessments did not turn their minds to identifying mitigation measures because they were "content to keep the import prohibition in place, because they had been told by the CHC and CAPA that those organizations wanted the border closed to US packages." However, the Plaintiffs point to no specific evidence in support of either of these assertions, and I find that there is no evidence that would support drawing such an inference. I also find that the migratory nature of the US honeybee industry was known to Dr. Jamieson, and it was reasonable for him to identify this in the history, background and rationale of the Risk Assessment Request. It was clearly a factor warranting consideration in the risk assessment, and it was considered in that context.

[843] The Defendants submit that Dr. Roberts and Dr. Zagmutt agreed that certification is a sanitary measure. Dr. Roberts testified that the international standards for sanitary measures referenced in Article 2.1.5 of the 2012 OIE Code include certification, movement controls and animal registration taken by the exporting country. Dr. Zagmutt testified that a sanitary measure could include certification by the exporting country and that certification is a mitigation measure. As the Defendants point out, Dr. Roberts' evidence was that it is significant and serious if a (exporting) country is unable to provide a meaningful health certificate, and if the country cannot certify the animals as safe for trade, they should not be traded.

[844] However, as outlined above, Dr. Jamieson and Dr. Belaissaoui were the risk managers for the 2003 Risk Assessment. Dr. Belaissaoui testified that she did not know the specifics of the discussions around risk mitigation because she was not involved in all aspects of the honeybee file at the time. However, her evidence was that the general procedure for importation is that if

the level of risk is too high, mitigating measures are not considered because the measures would not adequately mitigate such a high risk. Generally, if the risk level exceeds “negligible” or “very low,” it is difficult to apply any mitigating measures that would sufficiently reduce the risk.

[845] It may be that the risk managers were relying on their past experience and expertise in not circling back to specifically assess whether certification was a viable mitigation option for US honeybee packages. Nor is there any evidence that the ability of the US to certify the health of packaged bees differed from or changed after Dr. Jamieson’s statement in the Risk Assessment Request that it was impossible for the US to do.

[846] Put in terms of feasibility, the Risk Assessment Request does demonstrate that Dr. Jamieson, the risk manager, put his mind to the feasibility of certification, determining that this mitigation option was not possible/available. I view this as a feasibility assessment, as opposed to an efficacy assessment as submitted by the Defendants, because Dr. Jamieson does not appear to have looked to whether certification could effectively reduce risk, but rather to whether the US could provide meaningful certification. In either case, there is again no evidence that the feasibility or efficacy of US certification was considered when the 2003 Risk Assessment was complete and no evidence explaining why, at that stage, CFIA may have considered this to be unnecessary.

[847] I am unable to infer, from the limited evidence provided by Dr. Belaissaoui, that the risk managers specifically considered and rejected this risk mitigation option.

[848] Thus, regardless of Dr. Jamieson’s reference to certification in the Risk Assessment Request, there remains a lack of evidence as to the identification and consideration of risk management measures for US honeybee packages once the risk assessment aspect of the analysis was complete, as contemplated in the CFIA Protocol.

(b) Zoning

[849] The Defendants argue that Dr. James specifically considered zoning, another sanitary measure or risk management measure. They say that this is demonstrated by the section of the 2003 Risk Assessment entitled “Factors Affecting the Release Assessment,” which states, “Given the highly migratory nature of the US beekeeping industry coupled with the general lack of movement controls, zoning of the US for honeybee diseases and pests would be very difficult.” She also testified at trial that because of the nature of the US honeybee industry and the heavy emphasis on pollination and mobility, it would be very difficult to look at zones or regions that are free of disease.

[850] Dr. James, who was the risk assessor (not manager), also testified that she did not include any consideration of risk mitigation measures in the 2003 Risk Assessment, although she did note that “it should be clear from within the risk assessment document if there are areas where interventions could be made, and that would be clear to the risk managers. But they would have to decide what is practical and feasible to be done.” This is similar to Dr. Dubé’s testimony, referred to above, that risk assessors may mention pathways where the risk managers could explore mitigation. While I accept that risk managers could, based on the risk assessment, identify risk mitigation options, in my view, the indirect flagging within the risk assessment of matters that could be relevant to a subsequent evaluation of mitigation options is not, in and of itself, consideration of mitigation. Further, the testimony of Dr. Belaissaoui, one of the risk managers, is described above and does not confirm that zoning was specifically considered as part of possible risk management for US honeybee packages when the risk assessment was complete. While zoning may well not have been feasible, and therefore may not have been an option that warranted further evaluation, the difficulty here is that the evidence does not establish that the risk managers considered it and remained of the view that it was not a viable option following the completion of the 2003 Risk Assessment.

(c) Risk reduction – separation of queens

[851] The Defendants submit that in the course of conducting the 2003 Risk Assessment, in August 2003, Dr. James separated the consideration of US honeybee queens and US honeybee packages, because "queen bees present a much lower risk than packages."

[852] The 2003 Risk Assessment does divide queen and packaged bees. The Risk Assessment Summary starts with the statement that the risk assessment "represents a science-based evaluation to assist risk managers in decision-making and risk mitigation". The Statement on Overall Risk for queen bees includes that "[m]itigating measures are recommended for risk estimates greater than very low. It should be noted there is a cumulative effect for the hazards of interest."

[853] As the Defendants point out, the evidence confirms that CFIA worked with Dr. Nasr and others to develop an import protocol for US honeybee queens in order to mitigate the risks of importation. This became the basis for the import conditions that are applied to any import permit issued for the importation if US honeybee queens. The Defendants also point out, among other evidence, that Dr. Roberts' testimony was that considering whether something can be done with less risk is a risk management measure.

[854] As indicated above, Dr. James was asked by Dr. Belaissaoui to look at possible risk mitigation for the importation of queen bees and in that regard produced a document entitled *Potential Mitigating Measures to Reduce the Likelihood of Disease Introduction by Honey Bee Queens Imported from the United States*.

[855] In my view, the evidence demonstrates that this is a circumstance where the risk assessment process, via consultation, resulted in the identification of a potential risk management/mitigation option/action – the separation of the risk assessment of US queens from US packages – as the former was understood to have lower attendant import risks. This option

was taken to the risk managers, who instructed the risk assessors to identify potential mitigation measures. The result was that two sets of risk level values were included in the 2003 Risk Assessment: the (lower) level for US honeybee queens and the (higher) values for US honeybee packages. Dr. James testified that she did not consider these mitigations for queens in terms of feasibility, practicality or acceptability, as this was the role of the risk managers. However, it is apparent that the risk managers then evaluated this option and implemented it. That is, the elements of the risk management process set out in the CFIA Protocols were effectively followed, although not documented as such.

[856] In particular, in effect, the separation of US honeybee queens from US honeybee packages in the risk assessment and the reassessment of the risk following that change can be considered part of "an iterative process that involves incorporation into the initial risk assessment which is then re-evaluated to determine the degree of risk reduction." It meets the requirement that a mitigation option be incorporated into the risk assessment to assess its efficacy.

[857] However, the challenge remains that honeybee packages and honeybee queens are different commodities, and the question before me relates to the importation of US honeybee packages.

[858] Respecting US honeybee packages, it can be inferred that the risk evaluation following the reassessed risk determined that, compared to the mitigated and reassessed US queens, the risk as estimated for US packages was too high to be tolerated. However, as discussed above, Dr. Belaissaoui as the risk manager did not know the specifics of the discussions around risk mitigation.

[859] Although mitigation was considered and implemented for US queens, I can draw no such conclusion with regard to US honeybee packages. Notably, there is no evidence that at the time the queen protocol was being considered, there was also consideration of whether those or any import conditions could work for packages.

[860] As will be discussed later in these reasons in the context of causation, the evidence establishes and I accept that the risk of importing packages is higher than the risk of importing queens. However, by itself, this is not determinative of the standard of care analysis. The question is whether that risk, even if higher, could be mitigated – and, more significantly, if the risk managers considered this. While I am not persuaded that a formal, documented reassessment was necessarily required by the CFIA Protocols or in these circumstances, the evidence does not establish that risk mitigation options were identified and rejected for US honeybee packages after the risk estimation was complete, as the Defendants submit. Accordingly, with respect to the 2003 Risk Assessment, the evidence does not establish that the standard of care of a reasonable regulator in similar circumstances was met.

i. Did the 2013 Risk Assessment identify but reject risk management measures?

[861] The Defendants submit that Dr. Rajzman sought mitigation measures from the Provincial Apiculturists, who, as honeybee experts, had the expertise to consider how the risks posed by the four identified hazards might be reduced. However, the Provincial Apiculturists were largely unable to identify any mitigation measures. The Defendants note that Dr. Rajzman did consider, but did not accept, the Manitoba White Paper.

[862] For their part, the Plaintiffs assert that Dr. Rajzman gave the Provincial Apiculturists only ten days to come up with risk mitigation options. The Plaintiffs say that the Provincial Apiculturists said more time was required, and several indicated they would work with CFIA to develop import conditions, but this was ignored. The Plaintiffs state that, “shockingly,” Dr. Rajzman chose to treat all the responses as stating that no risk mitigation was possible, and that she then misrepresented to the Minister that “eight out of nine Provincial Apiculturists determined that mitigating measures were unavailable at this time.” The Plaintiffs also say Dr. Rajzman ignored a request from USDA-APHIS to work with CFIA on import conditions for packages.

[863] Dr. Razjman's evidence on this issue was that after the public comment period for the 2013 Risk Assessment was concluded, the risk assessment group made adjustments to the risk assessment based on same, and they provided her with a final copy of the document. On January 30, 2014, there was a meeting between the risk assessors and the risk managers to discuss what the risk assessors had found. The risk managers had looked at the mitigating measures proposed by the Manitoba White Paper and were then considering what they would do next in terms of mitigating measures by way of the Provincial Apiculturists. She referred to her notes from that meeting.

[864] By email dated January 31, 2014, Dr. Rajzman provided the 2013 Risk Assessment to the Provincial Apiculturists of each province. The email advised that CFIA was aware of the concerns of some honeybee producers desiring to import honeybee packages from the US. Given this, the Provincial Apiculturists were asked to review the risk assessment to see if they could provide "some options, mitigating measures, conditions that may allow the import of honeybee packages from some specific States with a higher health status." After options were received, if there were any, CFIA would share them with industry. Dr. Rajzman's testimony was that although the email indicated that the conclusion of the Risk Assessment was that the risks of the importation of honeybee packages from the US were greater than negligible and, therefore, that importation would not be allowed, a final decision had not yet been made. She testified that even if risk assessments are marked as final, they are not actually final and can be re-opened. If there were risk mitigation measures available, then the risk managers would consider these.

[865] She had requested responses by February 10, 2014. In her testimony, she explained why she had given this deadline for response. This was because honeybee imports generally start in the middle of March, once the snow is gone and the beekeepers can get into their colonies. Therefore, if the Provincial Apiculturists could identify any available mitigation measures by that deadline and the US could effect them, then it would be possible to salvage the upcoming import season. She also pointed out that this was in fact the second time that the Provincial Apiculturists had seen the 2013 Risk Assessment (it had been sent to the Chief Veterinary

Officers of each province, the CCVO, the Provincial Apiculturists and others on October 25, 2013).

[866] The responses can be summarized as follows:

- Paul van Westendorp, the Provincial Apiculturist for British Columbia, sent an email dated February 7, 2014, that referred to a conference call between the Provincial Apiculturists. The conclusion of this call was that, based on the divergent positions of the beekeeping industries in the respective provinces, no collective agreement could be reached at the time towards a framework that would accommodate the import of honeybee packages from the US. However, he recognized that this was a complex issue demanding ongoing attention and discussion. Later that day, he sent a second, relatively lengthy confidential email in which he referred to an article he had written for publication in BeeScene, a magazine of the British Columbia Honey Producers' Association, in which he questioned the Risk Assessment's conclusion and explained his concerns. He stated that the nature of the disagreement within Canada about the proposed bee package imports was one of risk tolerance (or aversion). Further, that he believed that "a framework of controlled imports of bee packages from approved sources (such as we currently have with selected Californian queen suppliers) is workable and would satisfy the demands of many commercial beekeepers while maintaining a credible system to safeguard the health of the Canadian honey bee population."

  When asked about the second email, Dr. Rajzman testified that she considered this to reflect Mr. van Westendorp's personal views. He had provided her with a copy of the magazine article;

- Dr. Medhat Nasr, the Provincial Apiculturist for Alberta, wrote that Alberta Agriculture and Rural Development had evaluated the 2013 Risk Assessment for importing US packaged honeybees, that the identified risks were valid and that conditions to mitigate these risks to negligible levels were not available at that time. Therefore, they supported the CFIA recommendations to keep the border closed;

- Mr. Geoff Wilson, the Provincial Apiculturist for Saskatchewan, referred to the conference call between Provincial Apiculturists on February 7, 2014, discussing risk mitigation procedures and conditions that would allow for the importation of US honeybee packages. He indicated that they were unable to develop a suitable solution that would allow for the safe importation of packages from the US. He further said that Saskatchewan would be willing to continue the discussion on the risk associated with the importation of packaged honeybees after the assessment was released and/or as other factors affecting the risk assessment changed;

- Mr. Paul Kozak, the Provincial Apiculturist for Ontario, stated that his technical opinion was that the risks outlined in the 2013 Risk Assessment were serious health risks for the disease status of honeybees in Canada. And, "Due to the nature of these pests it is not feasible to address these in a protocol that would allow honey bee packages from the USA to enter Canada without changing the disease status of the Canadian beekeeping sector." Therefore, the status for US honeybee packages should remain as is, and packages should not be permitted to be imported to Canada, for all provinces;

- Mr. Claude Boucher, the Provincial Apiculturist for Quebec, said, "My comments as a PA should reflect the position of our beekeeping industry here as our government interest is to develop and protect our industry and producers. So, I can hardly, as a PA, make comments (or suggest any mitigating measures to lower the risk identified) that will be in favor of any opening of the border for bee packages as our beekeeping industry is opposed to this because they estimate that the risk outweight [*sic*] any benefit for them." He also noted that it would be hard to explain that they may accept mitigating measures for SHB for package imports when they were at the same time working with Canada and CFIA to design an SHB control program;

- Mr. Chris Maund, the Provincial Apiculturist for New Brunswick, indicated that the New Brunswick Department of Agriculture, Aquaculture and Fisheries did not support the importation of US honey bee packages given the high probability of introducing diseases and pests into Canada (no mitigation measures were suggested);

- Ms. Joanne Moran, the Provincial Apiculturist for Nova Scotia, said, "Given the time period provided for a response […] we were unable to come up with mitigating measures that would allow importation." She also indicated that the Provincial Apiculturists agreed they would be willing to discuss the matter further;

- Mr. Chris Jordan, the Provincial Apiculturist for Prince Edward Island, said, "At this time, we were unable to come up with measures to allow this importation given the short time frame given to respond (February 10, 2014). Having said that, the provincial apiarists have agreed to discuss this issue further once all provinces have had a chance to consider any measures which would allow the safe importation of packages from the USA into Canada"; and

- Mr. Rhéal Lafrenière, the Provincial Apiculturist for Manitoba, advised that Manitoba Agriculture, Food and Rural Initiatives' [MAFRD] position was captured in the White Paper document that was developed with the Manitoba Beekeepers Association and submitted with the Association's comments during the November 25 comment period for the 2013 Risk Assessment, which he attached. He stated that MAFRD was supportive of working with the CFIA and other stakeholders to develop import conditions for packaged honeybees from California. It was also interested in participating in any discussion about

> legislative change to restrict imports of US packages to provinces that support developing import permits for US packaged honeybees, thereby allowing provinces who do not support the importation of US honeybee packages to deny the granting of import permits and entry into those provinces.
>
> (At the time, Newfoundland and Labrador did not have a Provincial Apiculturist.)

[867] Dr. Razjman testified that the Manitoba White Paper contained a mitigation measure for Africanized honeybees, using a drone excluder, which had been added to the 2013 Risk Assessment (after assessment of the document in that context). There were no new mitigation measures in the document. Further, while the Manitoba White Paper had suggested that imports be permitted only to Manitoba, import controls are a federal jurisdiction and are applied nationally.

[868] This evidence shows that, apart from Manitoba, whose submission by way of the Manitoba White Paper had already been considered and addressed as part of the consultation process, the only submission that could be construed as suggesting any mitigation options would be the second email from Mr. van Westendorp (British Columbia). Dr. Rajzman considered this to be reflective of his personal views rather than the position of the Provincial Apiculturist for that province.

[869] It is true that some Provincial Apiculturists did also indicate that they would be willing to discuss the matter further. Dr. Rajzman's testimony was that she was not involved in any further discussion on this topic and did not know if the Provincial Apiculturists had discussed it further. However, as the Defendants point out in closing oral submissions, no one followed up on it. I also note that the Plaintiffs point to no evidence that since 2014 the Provincial Apiculturists have, in fact, proposed mitigation measures. More importantly, the lack of follow-up does not undermine the fact that at the time of the 2013 Risk Assessment, no mitigation measures could be proposed, despite the fact that this was the second time the Provincial Apiculturists had seen the document and despite the opportunity they had to discuss possibilities together on their conference call. It is also noteworthy that the issue of US honeybee package importation and its attendant risks was a longstanding one of which the Provincial Apiculturists would have been

familiar both as a result of their positions as members of CAPA (which had a longstanding importation committee) and as they regularly liaised with CFIA on honeybee health. Accordingly, the Provincial Apiculturists were very much aware of the issue and were not taken by surprise by it. They, or their predecessors who held that position, had also been previously provided with a late draft of the 2003 Risk Assessment, by Dr. Jamieson, for comment.

[870] In my view, the evidence establishes that with respect to the 2013 Risk Assessment, after the risk assessment had been completed by the risk assessors, the risk managers, by themselves and through their communications with the Provincial Apiculturists, sought to identify any available risk mitigation measures. That is, the risk management process as described in the CFIA Protocols was followed. As it was determined that there were no mitigation measures available, no further option evaluation could occur.

[871] The CFIA Protocols (and OIE Code as reflected in the CFIA Protocols) inform the required standard of care and represent best practices. Here, risk managers' actions employed those practices. Accordingly, I find that the Defendants met the standard of care with respect to the 2013 Risk Assessment, as their actions were those of a reasonable regulator in similar circumstances.

[872] I also find that it was not unreasonable for Dr. Rajzman to have relied on the Provincial Apiculturists in reaching the conclusion that no mitigation measures were available. The Provincial Apiculturists have expertise and experience that was generously shared with CFIA on many occasions, including this one, and that has not been challenged in these proceedings. It also has to be said that while CFIA had no in-house expertise on honeybee health, even if it had, it is unlikely that it would have the luxury of having eleven staff apiculturists and having on-the-ground knowledge of the status of honeybee health in each province.

[873] I find that there is no merit to the Plaintiffs' assertion that Dr. Rajzman misrepresented to the Minister that eight out of nine Provincial Apiculturists determined that mitigation measures were unavailable at that time.

[874] Nor did she ignore a request from USDA-APHIS to work with CFIA on export conditions for US honeybee packages. On this latter point, Plaintiffs' counsel referred Dr. Rajzman to a March 11, 2013, email from Dr. Antonio Ramirez of USDA-APHIS, in which Dr. Ramirez stated that USDA-APHIS would like to request that Canada resume the importation of US packaged honeybees. He stated the view that US honeybees were safer than those coming from Australia and that, if Canada agreed, then USDA-APHIS believed that it would only be necessary to "slightly modify the existing export certificates for queen bees." He stated that USDA-APHIS would be happy to work with her on that. Dr. Rajzman's testimony on cross-examination was that this email was not in response to the Risk Assessment, as at that time Dr. Ramirez did not know that the Risk Assessment was taking place. Further, that she had replied to him and asked him to supply any available information on the status of honeybee health in the US and that there was eventually a conference call. Her notes on this call are in evidence.

[875] CFIA's interactions with USDA-APHIS will be addressed in detail later in these reasons in the context of causation. It is sufficient to say here that the evidence does not support that Dr. Rajzman ignored the request from USDA-APHIS. I also do not agree with the Plaintiffs' assertion that Dr. Rajzman's actions were negligent or that they are evidence of bad faith.

ii. Other arguments

[876] In the further alternative, the Defendants make a number of submissions intended to illustrate, based on the evidence cited, that what was known when the 2003 Risk Assessment was conducted established, on a balance of probabilities, that reasonable mitigation for US honeybee packages was not available.

[877] For their part, the Plaintiffs accuse the Defendants of spending trial time tendering evidence in an attempt to "manufacture an *ex post facto* 'impossibility' narrative from a vantage point of 2023, with over twenty (20) years of hindsight to bootstrap the propriety of their failure." They submit that the Defendants failed to undertake the required scientific analysis

contemporaneously with the risk analysis process, and the Court cannot now accept hindsight evidence to absolve the Defendants of their obligations.

[878] It is true that hindsight evidence cannot justify past decisions. For example, in *Flying E Ranche*, with respect to different steps that could have been taken to prevent BSE from entering Canada, it was held that "hindsight is not the test; one must consider the knowledge and standards of the day to determine whether Canada's actions, and more particularly the steps taken, or not taken, by the Animal Health Division of AAFC were unreasonable" (*Flying E Ranche* at para 731).

[879] I have considered the Defendants' submissions and reviewed the expert evidence that they have referenced to support their argument that, based on the information known at the time, mitigation was not possible. In my view, that issue can best be addressed in the context of causation.

[880] In conclusion, I find that CFIA did not meet the standard of care with respect to the identification and consideration of risk mitigation options in conducting the 2003 Risk Assessment but did meet the standard of care in that regard with respect to the 2013 Risk Assessment.

D. Ministerial abdication

[881] In their closing submissions, the Plaintiffs argued that the Minister was negligent and failed to fulfill their duties under the *HA Act*, by wholly abdicating to the CFIA the Minister's responsibility to make decisions about granting import permits, and by allowing CFIA to consider hazards that were not properly hazards. They asserted that by leaving the decision to issue import permits solely in the hands of CFIA, the Minister failed to independently exercise their responsibilities under the *HA Act* and the *HA Regulations* and thereby failed to independently exercise their responsibilities under the legislation. And, by failing to adequately supervise CFIA's actions, the Minister also breached the standard of care.

[882] In their oral closing arguments, the Defendants responded to this and argued that this is a new claim. They submitted that the Plaintiffs had sought to file a Reply to the Amended Third Amended Statement of Defence on November 1, 2023, in which they alleged that the Minister's failure to make a considered decision with respect to each application for the importation of US packages was an abdication of the Minister's decision-making responsibility. However, the Case Management Judge did not permit the filing of the proposed Reply and issued a direction in that regard on November 5, 2023. The Defendants say that this is an improper argument and should be rejected.

[883] I agree. First, the Amended Amended Statement of Claim makes only two references to abdication of responsibilities. Specifically, that the Crown owed a duty of care with respect to restrictions on the importation of honeybees, including not to abdicate its responsibilities under the *HA Act* or *HA Regulations* but to exercise its own judgment and discretion; and that the Crown breached its duty of care by abdicating its responsibilities to conduct proper and timely risk assessment and exercise its independent judgment with respect to permitting or denying the import of bee packages from the US. However, the allegations are primarily concerned with the Plaintiffs' claim that the Crown refused to act without the approval of the CHC, rather than that it abdicated its responsibilities to CFIA. Second, the November 5, 2023, Direction of the Case Management Judge found that the proposed Reply was improper and it was not accepted for filing. The new argument is rejected on this basis.

[884] Although my finding on this basis is determinative, I will also address the Plaintiffs' further assertion.

[885] That is, the Plaintiffs claim that the *HA Regulations* indicate that the decision to issue a permit rests with the Minister, not CFIA. They say that permits are issued in the Minister's name, as demonstrated by Import Permits in the record. Further, the evidence at trial was that CFIA had assumed all decision-making with respect to issuing permits: the Minister is informed, but not involved. This evidence, the Plaintiffs submit, demonstrates that the Minister failed their oversight of CFIA's permit-issuing functions and abdicated their decision-making powers. This

resulted in CFIA overstepping its authority by refusing to issue the permits without statutory authority for the refusal. While CFIA is responsible for the administration of the *HA Act* pursuant to s 11(1) of the *CFIA Act*, administration does not include the issuance of permits, which is not an administrative act and is expressly reserved to the Minister.

[886] In response, the Defendants argued s 11(1) of the *CFIA Act* indicates that CFIA is responsible for the administration and enforcement of a number of acts, including the *HA Act.* It is CFIA, and not the Minister, who is responsible for the administration and enforcement of the *HA Act*. Although the Plaintiffs asserted that the issuance of permits is not an administrative act, they provided no support for this claim.

[887] As indicated above at paragraphs 126 and 135 when discussing the legislative scheme, pursuant to s 4(1) of the *CFIA Act*, the Minister is responsible for and has overall direction of CFIA. Pursuant to s 4(2), the Minister may delegate to any person "any power, duty or function conferred on the Minister" under the *CFIA Act* or any Act or provision that the CFIA enforces or administers by virtue of s 11, except the power to make regulations and the power to delegate under s 4(2). Section 11 of the *CFIA Act* makes CFIA responsible for the administration and enforcement of the *HA Act.* The appointed President of CFIA is chief executive officer of the Agency and has supervision over and direction of its work and staff. The President has the rank and all the powers of a deputy head of a Department (*CFIA Act*, s 6(1)). The President may also delegate to any person any power, duty or function conferred on the President by the *CFIA Act* or any other enactment (*CFIA Act*, s 7). The President may designate any person or class of persons as inspectors, analysts, graders, veterinary inspectors or other officers for the enforcement or administration of any Act or provision that the Agency enforces or administers by virtue of s 11, in respect of any matter referred to in the designation (*CFIA Act*, s 13(3)).

[888] This legislative scheme does not suggest that the Minister alone can issue import permits. And, although the Plaintiffs assert that the issuance of permits is reserved exclusively to the Minister, they point to no legislative provision in support of this view. Indeed, the Import Permit

in evidence referenced by the Plaintiffs is not signed by the Minister but states that it is authorized by a named veterinarian “For the Minister of Agriculture and Agri-Food.”

[889] Nor am I convinced that the issuance of import permits is not part of the administration and enforcement of the *HA Act.* As discussed above, CFIA’s evidence, which I accept, is that when import permit applications are received, it is determined if there are existing import conditions in AIRS that are applicable to that commodity. If there are, a permit will be issued, which will incorporate those import conditions. If there are no import conditions, then the process described at paragraphs 160-164 is followed. In my view, the practical reality of this process also supports that it is an administrative act.

E. Hazards appropriately considered

[890] In their written closing submissions, the Plaintiffs point out that pursuant to s 64(1) of the *HA Act*, the Minister may make regulations for the purpose of protecting human and animal health through the control or elimination of diseases and toxic substances, including by prohibiting or regulating the importation, exportation and possession of animals and things in order to prevent the introduction of any vector, disease or toxic substance. They submit that s 160(1.1) of the *HA Regulations* mandates the Minister to issue a permit if the Minister determines that the activity for which the permit or licence is issued would not, or would not be likely to, result in the introduction into or spread within Canada “of a vector, disease or toxic substance” or its introduction into another country from Canada.

[891] The Plaintiffs submit that the potential introduction of AHB was not a statutory ground to deny a permit, as AHB is not a vector, disease or toxic substance. Therefore, that CFIA did not have jurisdiction to prohibit import on this basis and that CFIA failed to put its mind to this, demonstrating negligence and bad faith, as CFIA knew it was acting outside its jurisdiction by including AHB as a hazard in the Risk Assessments. The Plaintiffs assert that the “inclusion of AHB was arbitrary and a disguised restriction on international trade.” They also argue that at the times of both Risk Assessments, AFB and varroa were present without any national control

programs in place; that "resistant" AFB and varroa are not a different disease and pest, respectively; and that SHB was not an OIE-listed pest until about 2008, and it is neither a disease nor a toxic substance. Therefore, that none of the four hazards met the conditions of s 160(1.1) of the *HA Regulations* such that the Minister could refuse to issue an import permit.

[892] In oral closing submissions, the Defendants addressed the Plaintiffs' claim that the Minister was required to issue permits for honeybee packages because none of the four hazards met the conditions of s 160(1.1) of the *HA Regulations*. The Defendants pointed out that this submission was contrary to the Plaintiffs' stipulation that the risk assessments were reasonable other than insofar as they failed to consider mitigation. The Defendants also take issue with the accuracy of these allegations.

[893] I have set out the Plaintiffs' letter laying out the stipulations at paragraphs 32-35 above. For ease of reference, I note the relevant stipulations are as follows:

> As set out throughout the Plaintiffs' Memorandum of Fact and Law, primarily commencing at paragraph 35, **the Plaintiffs' argument regarding the duty of care in relation to the 2003 & 2013 Risk Assessments relates solely to whether there was a duty of care to identify and assess risk mitigation options in those risk assessments.** To the extent that the evidence of Canada's witnesses, particularly that of Drs. James, Rajzman, Alexander, Rheault and Pernal, relates to the adequacy of those two risk assessments in any other respect **(i.e. in identifying relevant risks)**, such evidence is not relevant to the common issue.
>
> To resolve this issue, the Plaintiffs will stipulate at the commencement of the trial as follows:
>
> - that reasonable people may disagree on the assessment of risk;
>
> - that the Plaintiffs and the Class take no position on the findings that are contained within the 2003 & 2013 Risk Assessments, and challenge and impugn only what those two risk assessments are missing and what was omitted from them; and
>
> - that **the content of the 2003 & 2013 Risk Assessments is not at issue**, except with respect to their

> failure to identify risk mitigation options, which, it is alleged, breached the standard of care.
>
> (Emphasis added)

[894] During the course of the trial, counsel for the Plaintiffs also reminded the Court of the stipulations, when questioning the relevance of some of the Defendants' questions to witnesses, and stated that the Plaintiffs did not impugn CFIA's finding with respect to hazard identification, only what was "missing from" the risk assessments. They similarly recalled for the Court that there was a stipulation that the content of the Risk Assessments and the conclusions reached in same are not in issue. Counsel for the Plaintiffs and the Defendants also advised the Court, prior to cross-examination of Dr. Roberts, that Dr. Zagmutt's initial report identified four issues but that it had been agreed, before he gave his evidence, that he would speak only to Issue 1 (that the risk assessments only considered unrestricted imports) and Issue 3 (that the risk assessments omitted available risk mitigation measures that could have reduced the risk to an acceptable level). The issues that would not be addressed were Issue 2 (that hazard identification was incorrect) and Issue 4 (that there were errors in the risk assessments). Counsel for the Plaintiffs stated that Dr. Zagmutt did not give evidence about Issues 2 and 4 "in light of our stipulation at the commencement of trial."

[895] It is not disputed that hazard identification is the first step in the risk assessment process. However, given their stipulations, it is not now open to the Plaintiffs to imply that the identified hazards were inappropriately considered in the risk assessment. While I appreciate that the Plaintiffs now attempt to frame these arguments in the context of authority and jurisdiction, I am not persuaded that the Plaintiffs should be able to utilize the broad allegation of negligent enforcement of the import prohibition to avoid their own stipulation that they were not taking issue with the risk assessments, apart from what they were missing.

F. Conclusion on standard of care

[896] In conclusion, I have found that the applicable standard is that of a reasonable regulator in similar circumstances. In this case, the standard of care is informed by the CFIA Protocols and

OIE Code. To meet that standard of care, CFIA risk managers, as reasonable regulators, were required to engage in mitigation option evaluation following the Risk Assessments. Although the Plaintiffs in their closing submissions note that risk assessments for honeybee packages for countries other than the US did consider mitigation, as did the risk assessment for honeybee packages from the US conducted in 1994, I find that option evaluation did not necessarily require a formal re-entry into the Risk Assessments. However, with respect to the 2003 Risk Assessment, there is a lack of evidence that the risk managers actually grappled with risk mitigation options in terms of the importation of US honeybee packages, or took steps or made determinations reaffirming that certification, as a risk mitigation option, was not possible and that zoning was not feasible. Accordingly, I find that the Defendants did not meet the standard of a reasonable regulator respecting the 2003 Risk Assessment. However, the evidence establishes that the Defendants did meet the standard of care respecting the 2013 Risk Assessment. Dr. Rajzman attempted to identify risk mitigation options (the first step of option evaluation) but found that none could be proposed, either internally by CFIA or by the Provincial Apiculturists, who were specifically consulted on that issue.

Common Issue #3 – Whether or not recoverable loss or damages ensued as a result

[897] This Common Issue is, like Common Issue #2, addressed only in the alternative. That is, in the event that my determinative finding under Common Issue #1 – that the Plaintiffs have not satisfied either the first (proximity/private law duty of care) or the second (policy immunity/residual policy concerns) stages of the *Ann/Cooper* test – is in error.

A. Legal backdrop

[898] Broadly speaking, causation is determined by looking at factual causation (using the “but for” test) and legal causation, to be proven on a balance of probabilities. Factual causation can be further divided, in complex cases, into general and specific causation, although this distinction is not part of the base test.

[899] The two branches of causation, factual and legal, are illustrated in *Marchi*:

> [96] It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.
>
> [97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[900] With respect to factual causation, the "but for" test is described in *Clements v Clements*, 2012 SCC 32 [*Clements*]:

> [6] On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) *caused* the injury. That link is causation.
>
> …
>
> [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.), at p. 1090, *per* Lord Bridge; *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311.

[10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell* and *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458. See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe* (1945), 71 C.L.R. 637 (H.C.), at p. 649; *Bennett v. Minister of Community Welfare* (1992), 176 C.L.R. 408 (H.C.), at pp. 415-16; *Flounders v. Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.

[11] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the . . . facts" (p. 569).
>
> (Emphasis added)

(See also *British Columbia v Canadian Forest Products Ltd*, 2018 BCCA 124 at para 135.)

[901] Factual causation can also be divided into general and specific causation. In that regard, the Plaintiffs cite *Wise*, which describes these as follows:

> [342] There are two aspects to causation. The first aspect is "general causation," which concerns the aspect of whether the defendant's misconduct has the capacity to cause the alleged damage and the second aspect is "specific causation," which concerns the aspect of whether the capacity to harm was actualized in the particular case. In the immediate case, the issue is thus whether it has been proven that AndroGel™ can cause serious CV events. If this is proven, it would remain for Mr. Wise to prove that his use of AndroGel™ did cause his heart attack.

[902] The difference is more fully explained in *Baghbanbashi et al v Hassle Free Clinic et al*, 2014 ONSC 5934 [*Baghbanbashi*]:

> [8] Causation is often obvious. However it is not always so. In complex cases, proof of causation can be subdivided into two elements, general and specific causation. These concepts are well described by the British Columbia Court of Appeal in *Stanway v. Wyeth Canada Inc*., 2012 BCCA 260 as follows:
>
> > [53] As the Court observed in *Harrington*, the division between general and specific causation affects certification. This division is examined in an article by Patrick Hayes entitled *Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification*, 19 J. Env. L. & Prac. 190 at 195:
> >
> > > Proving causation in the context of toxic substances, however, puts the added burden on plaintiffs to establish two types of causation, both general and specific. This is because, unlike the causal connection between being hit by a car and suffering a broken bone, for instance, the causal connection between a toxic substance and a disease is not as easy to decipher. **Thus, a plaintiff must first prove "general" or "generic" causation--that a particular**

> **substance is capable of causing a particular illness**. The issue must be addressed, whether explicitly or implicitly, in toxic torts litigation, since it is axiomatic that "an agent cannot be considered to cause the illness of a specific person unless it is recognized as a cause of that disease in general." **Next, a plaintiff must prove "specific" or "individual" causation--that exposure to a particular toxic substance did, in fact, cause the plaintiff's illness**.

[9] Court decisions in tort cases usually do not mention general causation because it is often obvious. Evidence is not needed, for example, to prove that being hit by a moving car can cause broken bones. The issue in most cases is simply whether, in that particular case, the car accident in issue broke the plaintiff's bones i.e. whether there is specific causation. General causation is often assumed. In vaccination cases however, general causation cannot be assumed. Before a plaintiff shows that her particular injury was caused by the vaccination she received, she first must establish that the vaccine can cause that type of injury that she suffered. This was made clear by Osler J. in a case involving the pertussis vaccine, *Rothwell v. Raes*, 1988 CanLII 4636 (ON SC), aff'd 1990 CanLII 6610 (ON CA), [1990] O.J. No. 2298 (C.A.), as follows:

> 11. It is apparent that all three of the plaintiffs' actions depend for their success upon a finding that there was a causal relationship between the administration of DPTP vaccine and the severe brain damage or encephalopathy suffered by the minor plaintiff. **If, on the balance of probabilities, it is found that the administration of DPTP can cause encephalopathy, or permanent, serious brain damage, the actions may succeed. If it is found, on a balance of probabilities, that such a causal relationship can exist, the plaintiffs have the burden of showing, again on the balance of probabilities, that it did exist with respect to Patrick**. The issue of causation, or the etiology of Patrick's condition, occupied a major part of the trial. If it is more probable than not that there is no causal connection between the pertussis component and severe, permanent brain damage, the actions must fail.

> 12. The first task before the court, therefore, is to determine whether it has been shown, on the balance of probability, that DPTP vaccine can cause severe, permanent brain damage such as Patrick has experienced.

(Emphasis in *Baghbanbashi*)

B. Is Common Issue #3 concerned with general or specific causation?

[903] The Plaintiffs take the view that Common Issue #3 is concerned only with general causation. That is whether, on the balance of probabilities, the prohibition of the importation of US honeybee packages is capable of causing the Class members the economic damages described by Dr. Sumner – increased expenses and lower production. The Plaintiffs say that they need not prove whether any of the Class members' increased costs were actually caused by the Defendants' negligence. The Plaintiffs say that a finding of general causation at the common issues trial helps frame the scope of the individual assessment process at a subsequent damages trial, or, if there is a quantifiable loss that does not require individual assessment, then possibly at an aggregate damages hearing. They say that here Common Issue #3 is a "remnant" of the pre-amendment common issues when aggregate damages was removed from the list of common issues and that they are asking the Court to answer *part* of Common Issue #3. However, the Plaintiffs also say that they have adduced evidence establishing specific causation for the four Class member witnesses – which goes a step beyond what is actually required to prove general causation.

[904] For their part, the Defendants say that Common Issue #3 is framed as a specific causation question, rather than just a general causation question, and that if the Plaintiffs wanted to address only one portion of causation, then they should have sought to amend Common Issue #3 as they did with Common Issue #1. On its face, Common Issue #3 asks whether or not recoverable loss or damage ensued (as a result of a breach of the standard of care) – not whether it is possible.

[905] I agree that, on its face, the question asked by Common Issue #3 is whether loss or recoverable damages actually ensued, not whether damages were possible. And, for the reasons that follow, I find that this is not a case where it is necessary to divide the causation analysis into general and specific causation.

[906] In that regard, I note that Common Issue #3 was not amended. It is the same question as originally posed. However, the original common issue #4 was removed. This was:

> 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?

[907] In my view, the initial common issue #4 was premised on a finding at trial that, by way of Common Issue #3, the Plaintiffs as a Class actually incurred damages. If so, then the next step would have been to determine how those damages were to be assessed – either as aggregate or individual damages. If the latter, the individual class members would have to establish that they personally incurred the Class damages (economic loss) and in what amount. The removal of the original common issue #4 is consistent with the division of this trial into two parts: common issues on liability, which was before me; and subsequently, if the Plaintiffs were successful on that aspect of the trial, a further determination as to how damages were to be assessed.

[908] In that regard, and more generally, I note that to be certified as such, a common issue requires all members of the class to benefit from the successful prosecution of the action, although not necessarily to the same extent (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 108). The *Federal Courts Rules* reflect this. They set out the conditions

under which an action shall be certified, which includes where the claims of the class members raise common questions of law or fact (Rule 334.16(1)), although a judge will not refuse to certify a proceeding as a class action solely on the basis of one or more of the grounds set out. These grounds include where "the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact" (Rule 334.18(a)).

[909] And, as stated by Justice Manson in the context of the certification of this matter, the fact that some Class members may have benefitted from the alleged wrongdoing, or may not be able to recover damages, does not change the fact that resolving issues 1 to 3 (and what were then 6 to 8) will advance the resolution of every Class member's claim. The Plaintiffs acknowledged that, depending on how each Class member dealt with the loss of opportunity to import, the quantum of damages, if any, available to each member may vary. However, Justice Manson stated that "the question of causation and the question of quantum are discrete" (Certification Decision at para 86).

[910] The appropriateness of the certification of Common Issue #3, as it is stated, was not challenged. Common Issue #3 asks *whether or not* recoverable loss or damage *ensued* because of the breach of the standard of care. In my view, the Plaintiffs' attempt at this stage of the proceeding to divide general and specific causation, within the existing certified common question, is actually a conflation of two things. It conflates the determination of the factual question that underlies Common Issue #3 (did the Defendants' negligence cause the Plaintiffs to suffer economic loss) with the subsequent assessment of damages if causation (and therefore liability) is established. The former engages the Class as a whole and will determine if there is a damages stage of the litigation, while the latter may be individually assessed or assessed in the aggregate. It may be, if the matter were to proceed to the damages stage, that even if the Defendants' actions are found to have caused the Class as a whole to suffer loss or incur economic loss, individual members of the Class may be found to have incurred different – or no – losses. But that is an assessment of damages, not specific causation at the Class level.

[911] Although causation in complex cases can be considered in terms of general causation, which asks whether the defendant's conduct has the capacity to cause the alleged damage, and specific causation, which concerns whether the capacity to harm was actualized in the particular case, these are two aspects of the same issue – causation. They both must be assessed within the causation analysis.

[912] And, while the Plaintiffs relied on *Levac* to support their arguments as to splitting general and specific causation, I am not persuaded that it does so. This is not a circumstance where establishing the capacity of the alleged negligence to cause the claimed losses involves complex scientific expert evidence or necessitates the drawing of an inference.

[913] *Levac* was a class action. Some of the patients of the appellant, Dr. Stephen James, developed infections after he administered epidural injections for pain relief, and an investigation concluded the outbreak was caused by inadequate use of Infection Prevention and Control [IPAC] practices and procedures. Dr. James was found to be negligent at trial.

[914] One of the issues on appeal was Dr. James' argument that the trial judge made impermissible class-wide findings on the evidence. He submitted that the decision below failed to account for each patient's unique and variable experience, which made common findings unworkable. The ONCA disagreed, noting that the very purpose of certifying common issues is to enable a trial judge to make common findings applicable to every class member if there is evidence to warrant them. The common issue as set out was taken as the point of departure, and the ONCA held that it was no longer open to Dr. James to contest the viability of the common issues.

[915] This supports that, in the matter before me, it is not now open to the Plaintiffs to suggest that the Court should only consider what they describe as a "part" or a "component" of Common Issue #3 (general causation/capacity to cause harm) and not whether the Defendants' actions actually caused harm (specific causation) to the Class as a whole.

[916] As to the specific class-wide findings that Dr. James challenged, although he accepted that it was open to the trial judge to make general findings on causation, i.e., that a breach of IPAC can cause infection, he submitted that only patient-specific evidence was capable of leading to any conclusion on specific causation, i.e., that the breach of IPAC caused the infections in any given patient's case. Indeed, part of Dr. James' appeal was based on the trial judge's use of statistical evidence as a basis to infer causation respecting a subset group of patients. In particular, Dr. James took issue with the trial judge's use of statistical evidence respecting rates of infection among Dr. James' patients to infer causation.

[917] The ONCA did not agree and held that:

> [64] While correlation is not scientific causation, scientific certainty is not required for legal proof: *Snell*, at pp. 330-31; *Benhaim*, at para. 47. The trial judge had the benefit of extensive expert evidence on the relationship between proper IPAC and infection rates. He found that the risk of serious infection among Dr. James' patients was staggering – at least 49 times higher than expected – and concluded that the statistical evidence was "so overwhelming that it cannot be ignored."
>
> …
>
> [66] In this case, there was powerful circumstantial evidence on which to conclude that a statistical association represented a causal link on a balance of probabilities. The trial judge further found that Dr. James had not put forward a viable, non-negligent explanation for the outbreak as a whole.
>
> [67] The trial judge's common finding on specific causation includes the important caveat, "absent sufficient evidence to the contrary." In this way, he recognized that the ultimate determination of whether a Class Member was infected because of Dr. James' breaches remains an individual issue. This does not shift the onus or burden of proof. Rather, at individual trials, each Class Member still must prove their case on a balance of probabilities. However, they will be able to rely on the trial judge's common findings, including that the infections among the non-Genetically Linked Patients are presumptively attributable to Dr. James' substandard IPAC. As the trial judge explained:
>
> > While each Class member will have to demonstrate their right to a claim by showing that they partook

> of this common risk and suffered consequences, the inference that their injury was specifically caused by Dr. James' actions is statistically proven. As in *Andersen*, *supra* and [*Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1984), 1984 CanLII 1938 (ON SC), 46 O.R. (2d) 113, aff'd (1986) 1986 CanLII 114 (ON CA), 54 O.R. (2d) 92 (C.A.)], *supra*, the evidence before me demonstrates that the risk ratio of Dr. James' epidural injections is well above 2.0, thus presumptively proving causation for class members (subject, of course, to any evidence which might emerge in an individual case rebutting this presumption).
>
> [68] This approach is consistent with well-established causation principles in negligence generally, and medical negligence specifically, where the defendant is often in a better position than the plaintiff to determine the cause of an injury: see e.g., *Snell*, at paras. 328-29; *Benhaim*, at paras. 48-49. As the trial judge noted, the procedures here occurred literally behind each patient's back.
>
> [69] Furthermore, although the *prima facie* finding was made on a Class-wide basis, it remains open to Dr. James to rebut this inference in respect of individual non-Genetically Linked Patients, where such evidence exists. While the reality is that a complete finding of causation may be an evidentiary inevitability in most cases, that is not the same as a shift in onus.
>
> [70] I see no error in the trial judge's reliance on statistical evidence in drawing a Class-wide, rebuttable inference that Dr. James' substandard IPAC caused the infections.

[918] The ONCA held that when the class action proceeded to the individual issues phase, most claimants would still be required to establish that they likely contracted their infection because of Dr. James' breaches. However, they would each benefit from the common presumption that any patient who developed an infection following an epidural injection performed by Dr. James was infected because of his negligent IPAC. This finding, which arose from the circumstantial evidence including the statistical rarity of such infections when proper IPAC is employed, established *prima facie* causation for each class member, subject to further evidence to the contrary.

[919] To support the dividing of general and specific damages the Plaintiffs also rely on *Wise.* That case was a proposed products liability class action brought by Mr. Wise and his spouse against Abbott, a pharmaceutical company that manufactured a topical ointment known as AndroGel™. Mr. Wise alleged that AndroGel™ caused serious cardiovascular events [CVs] such as heart attacks and strokes. Mr. Wise had experienced a heart attack after using the product. Abbott brought a motion for summary judgement to dismiss the action, which had not then been certified as a class action. One of the bases for the motion was that Mr. Wise could not prove general causation, i.e., that the product had the capacity to cause CVs. The ONSC granted Abbott summary judgment.

[920] It is of note that the expert and technical medical evidence in *Wise* was considerable, becoming a battle of experts about the epidemiology of hypogonadism and about the proven or not proven risks and benefits of AndroGel™. However, no expert and no regulator was prepared to commit to the opinion that the association between AndroGel™ and serious CV events was causal. The experts agreed that "what epidemiologists regard as association is not proof of general causation; rather it is from an association that an inference of general causation can sometimes be drawn" (*Wise* at para 307).

[921] The ONSC concluded the case did not permit an inference of general causation to be drawn from the evidence of association and biological plausibility. The ONSC was not convinced on a balance of probabilities that AndroGel™ was a cause of heart attacks and other serious CV events. Accordingly, there was no genuine issue requiring a trial about general causation.

[922] What *Levac* and *Wise* demonstrate is that when there is uncertainty surrounding general causation in cases of that nature, involving complex scientific medical evidence, and where statistical and/or epidemiological evidence may be required to show, on a balance of probabilities, that causation can be inferred, that inference of causation may be drawn. This inference is acceptable because scientific certainty is not required for legal proof (*Levac* at para 64).

[923] The action before me is not concerned with whether a toxic substance, a drug or a medical device or procedure has the capacity to cause physical harm, nor does this matter involve statistical or probabilities-based evidence necessary to infer general causation. What is at issue here is pure economic loss. Dr. Sumner's report, which is what the Plaintiffs rely on to assert that the Class incurred economic loss, created a complex model to estimate the total economic loss, not to determine whether, as a matter of probabilities, the Defendants' negligence had the capacity to cause that economic loss. That is, Dr. Sumner's expert report is not about the capacity to cause loss, but rather it is about whether Canadian commercial beekeepers as a Class experienced loss in fact.

[924] Further, although the Plaintiffs rely on *Levac* in support of their submission that, as the trial judge, I am to determine general causation on a class-wide basis, but that specific causation is to be left to individual assessment at the damages stage of the trial, *Levac* also found specific causation to have been established on a class-wide basis. In particular, the ONCA did not just confirm that Dr. James' breaches of the standard of care in relation to his IPAC practices could cause infection; it also upheld the trial judge's finding on specific causation on a class-wide level, being that an inference could and should be drawn that Dr. James' breaches of the standard of care in relation to his IPAC practices were the likely cause of the clinical infections suffered by class members, absent sufficient evidence to the contrary. *Levac* therefore supports that the role of the trial judge at the common issues phase of the trial is not just to make a general causation finding that the defendant's negligence is capable of causing the loss or damages claimed by the class, in this case economic loss. The second aspect of causation, specific causation, must also be addressed in the trial phase. As Justice Manson stated, questions of causation and damages are distinct.

[925] In this case, that finding on specific causation would determine whether the capacity to cause harm was actualized *with respect to the Class as a whole*. Unlike in *Levac*, however, the finding on specific causation with respect to the Class is not based on inference or statistical probability, and, accordingly, there is no common presumption based on statistical likelihood to apply at the damages stage of the trial. In this matter, the damages stage of the trial would

determine the proper measure of damages. This could potentially be through an aggregate damages assessment (although in view of the evidence before me, this may be difficult given the wide diversity in individual beekeeping practices), or a mechanism may be developed by which each beekeeper will establish what, if any, damages they actually incurred. However, causation would no longer be in question.

[926] In conclusion, Common Issue #3 asked whether or not recoverable loss or damage *ensued* as a result (of the breach of the standard of care). As discussed above, on its face this indicates that general and specific causation are encompassed by this common issue. Even if causation were divided and general and specific causation were considered separately, it is at the common issues trial that specific causation, in the context of the Class as a whole, must be determined. And, in any event, as discussed above, general causation is often assumed or is obvious. In this matter, I find that general causation is a matter of common sense. A negligently enforced or maintained import prohibition on US honeybee packages would have the capacity to cause economic harm to commercial beekeepers who relied on such imports as part of their business model (if US honeybee packages were more productive and less expensive and/or the prohibition resulted in additional operational expenses related to overwintering). Indeed, while foreseeability and causation are different aspects of negligence, as discussed above, the Defendants do not seriously challenge the foreseeability of economic harm to the Class (focusing on proximity instead), and, similarly, nor do they seriously challenge that the import prohibition has the capacity to cause economic loss.

[927] Causation in this case turns on whether the Defendants' allegedly negligent conduct actually caused the economic harm claimed by the Class.

C. Application of the "but for" test

[928] As set out above, a plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. This is a factual inquiry. If the

plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, their action against the defendant fails (*Clements* at para 8).

[929] In this case, the Defendants say that to meet the "but for" test, the Plaintiffs must demonstrate two things:

- That the Class would have been able to import US honeybee packages if CFIA had assessed permit applications on a case-by case basis, or if mitigation measures had been included in the Risk Assessments; and
- Compared to alternative methods of replacing winter losses, US honeybee packages would have been more productive or cheaper.

[930] The Defendants say that the Plaintiffs have not established any of these elements on a balance of probabilities.

[931] In closing written submissions, the Plaintiffs submit, "It is therefore probable that, but for the Defendants' maintenance of the import prohibition, [the] beekeepers would not have incurred costs associated with overwintering, off-season disease treatment, the increased costs of purchasing NZ packages, replacing winter loss with splits, and decreased productivity."

[932] I find that the Plaintiffs' articulation of the "but for" test, as the Defendants suggest, can only succeed if it is first established that the evidence supports that the Plaintiffs would have had access to US honeybee packages if the Defendants were not negligent.

[933] I have already found (at paragraphs 704-714 above) that the Defendants did not act unlawfully or unreasonably in the maintenance or enforcement of the import prohibition, including in their decision to consider applications to import US honeybee packages by utilizing AIRS, rather than on a case-by-case basis. Accordingly, I need not address the Defendants' causation submission concerning the case-by-case assessment of applications for import permits.

[934] I will address the "but for" test as follows:

> i. But for the Defendants' negligence in maintaining and enforcing the prohibition on the importation of US honeybee packages, would the Plaintiffs have been able to import US honeybee packages? Specifically, but for the Defendants' negligence in failing to identify mitigation measures in the Risk Assessments, would the Plaintiffs have been able to import US honeybee packages?

[935] If the importation could not have occurred in any event, then the Plaintiffs cannot link the Defendants' alleged negligence to the damages they claim.

> ii. If the Plaintiffs would have been able to import US honeybee packages but for the Defendants' negligence in maintaining and enforcing the import prohibition, then have the Plaintiffs established that US honeybee packages were less expensive and more productive that the alternative packages that were available to them, causing the economic loss that they claim?

[936] That is, is the claimed damage linked to the Defendants' negligence?

> i. Preliminary comment – stipulations/relevant evidence

[937] I have already discussed the Plaintiffs' stipulations. In their closing submissions, the Plaintiffs assert that oral and documentary evidence led by the Defendants regarding the merits of the contents of the 2003 and 2013 Risk Assessments, including with regard to the broad issues of honeybee health and disease/pest status and treatment in Canada and the US, is irrelevant and should be disregarded, as these matters do not remain to be determined given the stipulations. However, the Plaintiffs also led or elicited much evidence about honeybee diseases and pests from the representative Plaintiffs and the honeybee health experts. They also elicited evidence as to the merits of the Risk Assessments, including (and despite the stipulations) what should and should not have been identified as a hazard and taking issue with the assumptions made in the 2003 Risk Assessment. The Plaintiffs cannot have it both ways. In light of the stipulations, I find

that all evidence pertaining to the merits of the Risk Assessments is not relevant. What is relevant is evidence that speaks to mitigation measures, and this is the evidence that will be considered in the causation analysis that follows.

ii. But for the Defendants' negligence in failing to identify mitigation measures in the Risk Assessments, would the Plaintiffs have been able to import US honeybee packages?

[938] The Defendants' position is that no feasible mitigation measures were or have been identified to reduce the risk of the introduction and spread of diseases, pests and vectors by US honeybee packages to the satisfaction of the Minister. In this regard, the Defendants primarily rely on zoning and certification. Accordingly, I will first provide a general overview of what those terms mean in the context of risk assessment.

(a) Zoning

[939] There is no dispute between the parties that zoning is a risk mitigation measure.

[940] By way of background, and to generally explain what zoning is, I note that the OIE Code states that zoning is a procedure implemented by a country (under the provisions of Chapter 4.3) with a view to defining subpopulations of distinct animal health status within its territory for the purpose of disease control and/or international trade. Zoning applies to an animal subpopulation defined primarily on a geographical basis.

[941] The OIE Code defines zone/region as meaning a clearly defined part of a territory containing an animal subpopulation with a distinct health status with respect to a specific disease for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade. Chapter 4.3 deals with zoning and compartmentalization. I set out the general considerations, as they provide some context as to what zoning requires:

Article 4.3.2.

General considerations

The *Veterinary Services* of an *exporting country* which is establishing a *zone* or *compartment* within its territory for *international trade* purposes should clearly define the *subpopulation* in accordance with the recommendations in the relevant chapters in the *Terrestrial Code*, including those on *surveillance*, and the *identification* and *traceability* of live *animals*. The *Veterinary Services* of an *exporting country* should be able to explain to the *Veterinary Services* of an *importing country* the basis for claiming a distinct *animal health status* for the given *zone* or *compartment* under consideration.

The procedures used to establish and maintain the distinct *animal health status* of a *zone* or *compartment* will depend on the epidemiology of the *disease*, in particular the presence and role of susceptible *wildlife* species, and environmental factors, as well as on the application of biosecurity measures.

The authority, organisation and infrastructure of the *Veterinary Services*, including *laboratories*, should be clearly documented in accordance with the chapter on the evaluation of *Veterinary Services* of the *Terrestrial Code*, to provide confidence in the integrity of the *zone* or *compartment*. The final authority of the *zone* or *compartment*, for the purposes of domestic and *international trade*, lies with the *Veterinary Authority*.

In the context of maintaining the health status of a *population*, references to ‘import’, ‘importation’ and ‘imported animals/products’ found in the *Terrestrial Code* apply both to importation into a country and to the movement of *animals* and their products into *zones* and *compartments*. Such movements should be the subject of appropriate measures to preserve the *animal health status* of the *zone*/*compartment*.

The *exporting country* should be able to demonstrate, through detailed documentation provided to the *importing country*, that it has implemented the recommendations in the *Terrestrial Code* for establishing and maintaining such a *zone* or *compartment*.

An *importing country* should recognise the existence of this *zone* or *compartment* when the appropriate measures recommended in the *Terrestrial Code* are applied and the *Veterinary Authority* of the *exporting country* certifies that this is the case.

> The *exporting country* should conduct an assessment of the resources needed and available to establish and maintain a *zone* or *compartment* for *international trade* purposes. These include the human and financial resources, and the technical capability of the *Veterinary Services* (and of the relevant industry and production system, in the case of a *compartment*) including *disease surveillance* and diagnosis.
>
> Biosecurity and *surveillance* are essential components of zoning and compartmentalisation, and the arrangements should be developed through cooperation of industry and *Veterinary Services*.
>
> Industry's responsibilities include the application of biosecurity measures, documenting and recording movements of *animals* and personnel, quality assurance schemes, monitoring the efficacy of the measures, documenting corrective actions, conducting *surveillance*, rapid reporting and maintenance of records in a readily accessible form.
>
> The *Veterinary Services* should provide movement certification, and carry out documented periodic inspections of facilities, biosecurity measures, records and *surveillance* procedures. *Veterinary Services* should conduct or audit *surveillance*, reporting and *laboratory* diagnostic examinations.
>
> (Italic original)

[942] The CFIA Protocols do not define zoning but set out the disease status evaluation process for a country, region or zone, referring to the OIE Lists A, B and C, as well as to other diseases identified as animal health hazards associated with the importation of animals. They state that the criteria employed for the disease status evaluation of a country, region or zone varies depending on different factors (e.g. epidemiology of the disease, geographical or physical barriers, surveillance, etc.).

[943] Dr. Roberts addressed Chapter 4.3 of the OIE Code in her testimony. She stated that zoning is a risk management measure. It is the concept that within a country there can be different areas of disease status. For instance, if a country is free of a disease but has an outbreak of that disease, then a zone could be effected around the outbreak. Or, if a disease is endemic in a

country, the country may be able to effect a zone around a disease-free area within that country. Zones are under the auspices of the competent authority and are tightly controlled.

[944] I note that the competent authority is defined in the OIE Code as the veterinary authority or other government authority of a Member state having the responsibility and competence for ensuring or supervising the implementation of animal health and welfare measures, international veterinary certification and other standards and recommendations in the OIE Code in the whole territory. Veterinary authority is defined as the government authority of an OIE Member, comprising veterinarians, other professionals and para-professionals, having the responsibility and competence for ensuring or supervising the implementation of animal health and welfare measures, international veterinary certification and other standards and recommendations in the OIE Code for the whole territory.

[945] Dr. Roberts testified that the competent authority will look at things like movement control, surveillance and surveys. In the UK, movement control is done by way of licensing. A person who wants to move animals must have a license from the competent authority. The license will include requirements such as a veterinary inspection of the animals, usually 24 hours before they are moved, transportation that is biosecure and confirmation that the animals have been checked for disease. A survey provides information as to what is in the zone, such as the number of farms and the number of animals on each of those farms, and how regularly surveillance occurs. Surveillance can be both passive and active. Passive means that the owner of the animals knows the clinical signs of disease and would quickly report these to the competent authority. Active surveillance includes when the competent authority goes to a farm to take samples for disease testing. Zoning enables an exporting country to inform an importing country that they have a free zone, or, if an exporting country has an outbreak and a zone is effected, that trade can continue because of the controls effected in the zone. I note a “free zone” is defined in the OIE Code as a zone in which the absence of the disease under consideration has been demonstrated by the requirements specified in the OIE Code for free status being met. Within the zone and at its borders, appropriate official veterinary control is effectively applied for animals and animal products, and their transportation.

[946] Dr. Roberts testified that the competent authority of the exporting country is responsible for setting up a zone, which must be done before trade commences. The importing country has the right to review all of the information and data provided by the exporting country and, if they are confident in that data, then they would accept the zone and import from there. Her expert report also addresses zones and regions, including that the details of a zone or region would be agreed following an exchange of information between both countries, after which the application of the zone could be agreed to by the competent authority (of the country proposing the zone) and would be published by them. The publication of the zones or regions is necessary so the certifying veterinarian can check and sign the certificates with confidence.

[947] Dr. Zagmutt agreed that, pursuant to the OIE Code, certification is a mitigation measure, as is zoning. His report described zoning under the OIE as referring to a geographical part of a country with a distinct health status. He agreed that it is up to the exporting country to define a zone and to implement the measures stipulated in the OIE Code for setting up and maintaining a zone. He also agreed that this would require increased surveillance with respect to the zone as well as a buffer outside the zone to separate the animals inside the zone from those outside the zone. If there is a zone recognized by the OIE, then that is taken as a fact by the importing country. Countries can also have a bilateral negotiation where the exporting country may agree to creating a zone that may or may not be recognized by the OIE.

[948] In her testimony, Dr. Belaissaoui addressed the Disease Status Evaluation of a Country/Region/Zone section of the CFIA Protocols. She testified that she was familiar with and had been involved in the country evaluation process. Generally, countries are evaluated as a whole, rather than regions or zones. There are few zones. However, it can happen that an exporting country from which importation has already been allowed will experience a disease outbreak. In that event, the competent authority of that country, which is the equivalent to the CFIA or the federal government in Canada (the competent authority is not a province or a state), would formally contact CFIA to request recognition of a free zone based on extensive information that they are able to provide as to the status of the proposed zone, including surveillance and movement control.

[949] Dr. Belaissaoui also testified about an actual example of this sort of situation. In 2007, there was an outbreak of SHB in Western Australia (a region recognized by CFIA as free of SHB, which had never been reported there). An official with the central competent authority in Australia (Biosecurity Australia) advised CFIA of the outbreak, described the circumstances of the outbreak and explained the surveillance and control measures in a letter. Dr. Belaissaoui testified that, as a result of this notice, there was a suspension of the import conditions of honeybee packages. She then provided the information received from the Australian competent authority to Dr. Nasr (chair of the CAPA Import Committee) and Mr. Lafrenière (Provincial Apiculturist for Manitoba), who, upon review of same, identified further information that was needed to assess the risks involved in resuming package importation from Western Australia. Dr. Belaissaoui requested and received this further information from Australia, which included details of a quarantine and movement permit system, tracing, surveillance and the establishment of sentinel beehives (sentinel hives are hives placed around the boundaries of a zone that are sampled by inspectors periodically. If a hazard, in this case SHB, is found in a sentinel hive, then there would be an investigation, and it is possible the zone would expand). The Australian competent authority's responding letter also advised that the Chief Veterinary Officer of Western Australia had stated that all affected hives in the south-west of the state had been destroyed and that intensive surveillance had revealed no spread. He considered the south-west of the state free of SHB. A map of Western Australia was attached, which shows the area of surveillance and the area of SHB. The letter asked that the information be considered and stated that Australia looked forward to receiving CFIA's advice on the continued import of packaged honeybees from producers in south-west Western Australia. This letter was followed by further back-and-forth communications, including suggestions by Dr. Belaissaoui as to the certification CFIA needed for SHB from Australia, as Australia had advised that it could not certify bees for export under the existing conditions. When CFIA was satisfied with the revised certification wording, it amended its import conditions accordingly, allowing importation to resume. Dr. Belaissaoui testified that this was the normal process: the central competent authority reaches out with the necessary information and updates concerning an outbreak and the measures taken in response. CFIA reviews the information and follows up with the competent authority with any questions or to identify information still needed. The same process is followed for all species.

[950] Dr. Dubé's testimony provided another example of zoning. With respect to the *Qualitative risk assessment of honeybee packages imported from Italy* (November 30, 2022) [Italy Risk Assessment], the identified hazard was SHB. Dr. Dubé testified that Italy has a free zone for SHB. For the queen assessment, information was provided to CFIA, which CFIA verified with the competent authority. The information was also available online. The information included maps showing the affected area (Reggio Calabria) and the zone, as well as a large number of apiaries that are under surveillance as a buffer. Sentinel hives were in place in addition to surveillance, and the results of testing were tracked. The Italy Risk Assessment includes a colour-coded map recording the results of the testing, which provides a visual of where SHB is concentrated and supports that no SHB has been found in the free zone.

(b) Certification

[951] Certification is also a mitigation measure.

[952] Chapter 5.1 of the OIE Code, General Obligations Related to Certification, reads in part:

> Certification requirements should be exact and concise, and should clearly convey the wishes of the *importing country*. For this purpose, prior consultation between *Veterinary Authorities* of *importing* and *exporting countries* may be necessary. It enables the setting out of the exact requirements so that the signing *veterinarian* can, if necessary, be given a note of guidance explaining the understanding between the *Veterinary Authorities* involved.
>
> (Italic original)

[953] Article 5.1.2 explains the responsibilities of the importing country, and 5.1.3 does the same respecting the exporting country.

[954] Chapter 5.2, Certification Procedures, confirms the certification "should be based on the highest possible ethical standards, the most important of which is that the professional integrity of the certifying *veterinarian* should be respected and safeguarded." To that end, "It is essential

to include in any requirements only those specific statements that can be accurately and honestly signed by a certifying *veterinarian*."

[955] Article 5.2.2 explains what is required of the certifying veterinarian.

[956] Article 5.2.3 provides principles according to which international veterinary certificates should be drawn up. An international veterinary certificate is defined as "a certificate, issued in conformity with the provisions of Chapter 5.2., describing the animal health and/or public health requirements which are fulfilled by the exported *commodities*."

[957] Dr. Roberts testified that an international veterinary certificate is a risk management measure. It is an important part of an official veterinarian's job. If an animal is listed by the OIE, they must be accompanied by a veterinary health certificate, which has conditions for trade and is signed and stamped. It goes with the shipment and can be inspected at the border. It indicates what the animals are, and where they are from. For large animals, like horses or cows, the animal's microchip number would be on the certificate so it can be checked. Depending on the agreement for export, the document also covers other requirements, such as whether the animal came from an area free of disease. Thus, zoning and certification are related insofar as animals coming from a disease-free zone must come with certification to that effect.

[958] Dr. Roberts testified that if a country cannot provide meaningful health certification, then there should not be trade. She confirmed that certificates need to be validated by an official veterinarian and that these veterinarians should never sign certificates if they are unsure of their accuracy.

[959] Dr. Belaissaoui explained the relationship between import conditions and certification. She testified that once the import conditions are determined by the importing country, they are sent to the exporting country to begin working on an agreed certificate. An export certificate gives the importing country the assurance that the central competent authority of the exporting

country is supervising the certification process and that the import conditions are met. The export certificate can be filled out by a designated veterinarian, and the endorsement is to be done by the central competent authority, which in the US is the USDA-APHIS.

(c) Honeybee health experts' evidence about migration, zoning and certification

(i) Dr. Pettis

[960] As a preliminary point, I note that Dr. Pettis' CV indicates that he has been the North American representative on bee health to the OIE since 2008, and his evidence was that he actually helped write the most recent version of the OIE. However, when his qualification as to the OIE was challenged, it became clear that Dr. Perris served in that capacity only in 2008. It was also never clarified from his testimony what OIE "standards" he actually worked on. The OIE Code is comprised of two parts. Part I (or Volume I) contains general provisions. Part II (Volume II) is entitled "Recommendations applicable to OIE Listed diseases and other diseases of importance to international trade." Part II, for example, sets out the recommendations for the importation of bee colonies with respect to SHB (Article 9.4.6). When asked if he had done work on Part I of the OIE Code, Dr. Pettis could not recall the names of the documents he worked on. He stated that one was a manual. He did not identify the other but stated that he worked to harmonize both. Later in his testimony, he stated that the manual sets out specific tests and approved survey methods for specific pests and diseases of honeybees, for example, while the OIE Code is broader, dealing with things like declaring a country historically free of disease.

[961] I note that in Dr. Pettis' initial report, under the heading "References Cited," he lists "World Organization for Animal Health (OIE), *Manual of Diagnostic Tests and Vaccines for Terrestrial Animals* ("OIE Manual"), 2011-2018 versions available online through the OIE Documentary Portal at http://oie.int/" [OIE Manual]. Although no version of the OIE Manual is a part of Dr. Pettis' report (or any other expert report), I assume from this and his testimony that Dr. Pettis' work in 2008 involved the OIE Manual and possibly Part II of the OIE Code. Given his unclear testimony during the qualification challenge, I limited his qualification to that

concerning pests and diseases of bees as reported and regulated by the OIE. He was not qualified as an expert with respect to Part I of the OIE Code, although he may have referred to it in the context of his work in 2008. In terms of his expert report, this meant that his submission concerning "Canada's Adherence to OIE Standards for Live Animal Trade" was disregarded.

[962] Dr. Pettis testified that he believed his 2008 work to be the most recent "version of the OIE," but, while little turns on it, this statement would not seem to be accurate. Dr. Roberts' evidence was that the OIE Code has not changed appreciably since 2012. However, she also explained that each year, the OIE has a general session attended by all Member countries, usually represented by their Chief Veterinary Officers, where any proposed changes to the OIE Code or the OIE Manual, such as changes in the listing of diseases, will be discussed and voted upon. Indeed, a copy of the twenty-eighth version, 2019, of Volume I of the OIE Code forms a part of Dr. Zagmutt's report and lists regular updates, and Dr. Pettis' own report indicates that versions 2011-2018 of the OIE Manual are available online. In his initial report, Dr. Pettis states that the OIE Code and OIE Manual are revised annually, with the core tenets remaining the same but with new diseases or pests added as they become problematic. It may be that Dr. Pettis meant that the provisions of the OIE Manual specific to honeybees have not changed since 2008, but this too was unclear.

[963] That said, zoning is addressed in Dr. Pettis' initial report. However, this is primarily in the context of his assertion that the peer review process for the Risk Assessments was not independent and unbiased, an issue that was not pursued by the Plaintiffs at trial. (The stipulations also specifically state that the Plaintiffs would not be challenging the opinions expressed by the Canadian reviewers beyond the issue of mitigation, if addressed by the reviewers.) In that regard, Dr. Pettis cites as a deficiency in the peer review process a lack of response by CFIA to points raised by the reviewers. Specifically, with respect to the 2013 Risk Assessment, that Dr. Pernal had suggested that a zonal approach be considered for Africanized bees relative to packaged bee imports, as had been done for US queens, and that a zonal approach could be considered regarding where packages could be imported into Canada. I will address this assertion below.

[964] Dr. Pettis opined, in the section of his report addressing AHB and SHB, that the 2013 Risk Assessment failed to include a recommendation by Dr. Pernal, in his peer review comments, to import US honeybee packages from AHB-free zones. Dr. Pettis stated that the idea of zones is well established and verified by Canadian authorities, who require US queen breeders to subject their stock to molecular analysis for AHB genes to safely ship queens to Canada, and packaged bees come from these same beekeeping operations. Dr. Pettis questioned some of the concerns related to AHB found in the 2013 Risk Assessment and opined that the same genetic tests required to import queen bees could allow the safe importation of packaged bees free of AHB genetics.

[965] In his reply report, Dr. Pettis opined that a zonal approach would have worked in relation to the risk posed by AHB from honeybee packages imported from California. He suggested that this approach, employing similar testing methods used for the importation of queen bees, "would have been relevant for the package bees from California, but the CFIA did not consider this option." He testified that the same genetic test required by Canada to import queens could be used for packages because the queen breeder's operation is tested and proven as being AHB free. Further, he suggested at trial that when bees from a colony are shaken into a container to make packages, if a beekeeper opened an aggressive colony, they would simply close it and move on "for public relations reasons."

[966] In effect, Dr. Pettis' opinions on zoning and testing for AHB speak to his views on certification. Dr. Pettis' reply report responds to Dr. Caron's suggestion that AHB-free certification, while possible for queens, would not be possible for package bees (Dr. Caron's evidence is summarized below). The reply report states that the queen breeders who would ship packaged bees would have the vast majority of their bee colonies originating from the same tested queen mothers that are used to raise queens for export. Dr. Pettis also testified that the same certification protocol that applied to US queens with respect to Africanized bees would help cover US honeybee packages. The packages would come from the same certified queen producers: "Packaged bees come with a slightly elevated risk beyond queens but not that much elevated."

[967] With respect to migration, when cross-examined, Dr. Pettis confirmed that about 60% of all honeybees, from all over the US, are taken to California for almond pollination each spring. He confirmed that this presented an excellent opportunity for these colonies to share diseases and pests. Further, that they then migrate out of California to various locations in the US. Dr. Pettis confirmed that his report indicates that California queen and package bee producers move their bees to almond pollination in the spring; however, he testified that they move a part of their operation, not the queen-rearing part.

[968] As mentioned above, in support of his assertion in his initial report that the peer review process lacked independence and was biased, Dr. Pettis claimed that CFIA had not responded to comments about zoning made by Dr. Pernal, a peer reviewer of the 2013 Risk Assessment. In that regard, Dr. Pettis referred to an email from Dr. Pernal to Dr. Moreau, after the former had reviewed a draft of the 2013 Risk Assessment. Although he thought that, in general, the document was well balanced, Dr. Pernal commented that some consideration or analysis should be done to weigh the risk from Northern California alone. He noted that queen imports were restricted to that region and that CFIA may face questions from proponents of package imports about why a risk analysis of that region alone was not conducted. Dr. Moreau responded to this comment, stating, "[t]here has been no zoning assessment of the USA beekeeping industry because such zone does not exist. High migratory industry, lack of movement control,…would make it difficult to develop zones."

[969] Dr. Pernal also asked if CFIA would analyze the risk of importing packages into a specific zone or region in Canada. If CFIA would not consider this because it was not set up or was not feasible because of insufficient movement controls, he suggested that this be explicitly stated in the risk assessment. Dr. Moreau responded that there currently was no zone or compartmentalization in Canada for honeybees.

[970] Dr. Pernal replied stating that Dr. Moreau's response that no zones exist in Canada, so importing packages into a designated zone is not relevant, was as Dr. Pernal had thought. He went on to say that queens and apiaries in Northern California must meet export certification

standards. He asked whether the risk assessment should evaluate risks from the same region, as industry was asking to import from there. He stated that he could accept that this is not a zone, but the risk assessment gave the reader the impression that the risk of Africanization was analyzed on the basis of potentially importing queens from geographical areas where Africanization is endemic. Dr. Moreau replied indicating that it was his understanding that queens were theoretically allowed from all states but that it is only California that can meet the import requirements. The Risk Assessment was not based on a single state because of the highly migratory nature of the US beekeeping industry and the absence of movement control. Most of the US bee colonies were in the same area for almond pollination, and it would be difficult to exclude contact with potentially infested colonies. Further, the likelihood that potential diseases (pests) would enter Canada with an importation of 6-10,000 bees was higher than with the importation of a queen and a few attendants.

[971] Given the above, and to the extent that it pertains to Dr. Pettis' opinion on zoning, I do not accept Dr. Pettis' assertion that Dr. Moreau failed to respond to the points raised by Dr. Pernal regarding the 2013 Risk Assessment. This email chain was also put to Dr. Pernal at trial, and Dr. Pernal confirmed that it was concerned with comments he had provided on a draft of the 2013 Risk Assessment and the content of the email chain.

[972] At trial, Dr. Pettis was also asked about zoning in the context of SHB. He was referred to Part II (Volume II) of the OIE Code, Article 9.4.6, which recommends, among other things with respect to the importation of bee colonies, that veterinary authorities of importing countries should require the presentation of an international veterinary certificate that the bees come from a country or zone officially free from SHB. Dr. Pettis confirmed that SHB would have been one of the bee diseases or pests for which he was involved in setting guidelines, that the US was not free of SHB at that time and that there is no SHB-free zone in California.

[973] As to inspection in the US, Dr. Pettis was referred to the AAPA/AIA Report contained in the 2005 CAPA Proceedings, which indicates that the US does not have a national survey of all states to show the current status of disease. It states that, at that time, about 1/3 of states had

active bee programs, 1/3 had someone who is a state official who is responsible for their bee program and 1/3 do not have any program. As an example, it was noted that the state of California does not have a state bee program, and any interactions necessitated dealing with the individual counties. Dr. Pettis agreed with this and stated that the number of states with active bee programs has been diminishing, although he thought this may now have turned around and that there are more in place now. He provided no explanation of why he held this latter view.

[974] When asked on redirect what controls the state of California has with respect to the entry of bee colonies from all over the US, Dr. Pettis said there were at least three things looked for routinely. He believed the state wanted varroa levels below 5%, and it looked for an inspection report to that effect; certain counties in California will not accept trailer loads of bees (400 to 500 colonies) where there is SHB present in colonies, and these counties inspect for same; and loads are inspected for red fire ants, and if these are seen on the pallets, those loads are turned back.

(ii) Dr. Caron

[975] With respect to migration of US honeybees, Dr. Caron testified that there are about 3 to 3.5 million honeybee colonies maintained by beekeepers in the US. As much as 88% of the available colonies migrate to California each spring, usually between mid-February and mid-March, to pollinate the almond groves. His report states that almond pollination colonies originate from 40 of the 48 contiguous US states.

[976] His report also states:

> The almond growing region of California's San Joaquin and Sacramento valleys is roughly 400 miles long by 40 miles wide. This concentration of U.S. beekeeper colonies, the "Super Bowl of beekeeping" (Lowe 2018), creates a massive mixing together of U.S. colonies. It has been termed a "super spreader" event for bee pathogens. Cavigli et al. (2016) found "pathogen prevalence was highest in honey bee samples obtained immediately after almond pollination". The almond growing region overlaps the same area where California beekeepers produce package bees and queens.

[977] During his testimony, he discussed the concept of a "mixing bowl." The 400 by 40 mile almond-growing area is called the Central Valley. Virtually two thirds of the entire population of US bee colonies come to this very limited area for about a month each spring. Each almond grove may have colonies from several different producers who are contracted for pollination. This means that the "world's best beekeeper" may be adjacent to "the world's worst beekeeper" – so it is a "mixing bowl." Dr. Caron testified, "In terms of bee biosecurity, in terms of sanitation, it is the very worst condition that we could ever envision." Bees forage alongside bees from other colonies and also "drift" between colonies, meaning that an adult forager leaves its home colony but returns to a different one and is accepted because it is coming in with pollen, so there is a mixing of populations.

[978] Dr. Caron described package making in Northern California. To make packages, the cover of a colony box (typically a wooden box with frames slotted into it; a colony box was entered as an exhibit at trial) is lifted off and the frame with the queen is removed and temporarily set aside. Each of the other frames are then removed in turn and the bees from each of these frames are shaken into a funnel leading to a gathering cage. This continues, with between two and five different colonies being shaken into the gathering cage, which will hold about 20-22 pounds of bees. A door in the gathering box opens so the bees can be shaken into packages. The package producers are generally located in an area that is on the edge of almond pollination, mostly in six counties in the Central Valley.

[979] With respect to zones, Dr. Caron testified that zones are geographical areas. However, the area where queens and packages are raised in California is not a distinct geographical area. It is an area that overlaps with almond growing. So, while queens can and have been zoned (through the negotiated AHB radius, currently 30 miles, which Dr. Caron stated at trial was "in *de facto*, a zone"), it would be very difficult to designate a zone with packaged bees. In that regard, Dr. Caron was referred to a 2018 published article referred to in his report, "Africanized bees extend their distribution in California," which contains a map of California showing its counties and the then current distribution of AHB in that state. On a copy of that map, he drew in the almond pollination areas and the queen and package production areas, demonstrating their overlap.

[980] The issue of zoning was also addressed in Dr. Caron's report, where he states:

> Dr. Stephen Pernal, a reviewer of the second risk assessment team, suggested that there could be a zonal approach to where package bees could originate from in the U.S. for import into Canada. Dr. Pettis considers his suggestion to have merit. I do not. Honey bee colonies coming from the region of package bee production in the Southeastern U.S. take part in the pollination of almonds in California; the area of almond pollination is within the region where package bees are produced in California. Both areas have rVAR and SHB. I do not see how an exclusion zone of adequate isolation might be delineated, given the extent of migration of bee colonies in the U.S.
>
> Dr. Pettis returns to the zonal concept in his comments on Africanized bees. He suggests "the idea of zones is well established…U.S. queen breeders subject their stock to molecular analysis for AHB genes" to safely ship queens to Canada. I do not agree that such a zone might function for packages as it does for queens because it would be a monumental undertaking to enact. Package bees come from hundreds of colonies while queens come from a limited number of queen mother breeder colonies. (See section below on package bees)

[981] At trial, when asked about this part of his report, Dr. Caron testified he did not agree with Dr. Pettis or Dr. Pernal because his concept of zoning is that it would be an isolated geographical area that could be identified. The queen producers have such an area. The bees of the package bee producers, who are often the same people, are exposed to the "mixing bowl" during almond pollination. Package producers also purchase adult bees and brood from other beekeepers at the end of the almond pollination. Therefore, package producers are not isolated in just one area as are the queen-producing colonies. His evidence was that although he agreed that zoning is an approach that works with queens, it is not a viable option or a possibility with packaged bees.

[982] As to certification, Dr. Caron's testimony was that there are no US national laws relative to bee health. Individual states have their own bee health laws, primarily concerning AFB, but some states also have regulatory authority over pests such as SHB and genetic material such as AHB. Some states have rigorous inspection programs, with an apiary inspector who is a dedicated state employee. Other states may have someone in charge of the apiary program but

who has other responsibilities. About a third of the states have no apiary inspection program. For example, Oregon stopped apiary inspection in 1992. Many states have the authority to deny a permit for moving colonies to another location.

[983] California, at entry, does look for agricultural products that need prior approval, or prior inspection, including honeybees. At the California border, inspectors may examine tractor-trailers, which carry 400-500 colonies each, and if they detect SHB or fire ants, for example, they can deny entry of the tractor-trailer. However, they do not open colonies, and there is no inspection for varroa or AFB.

[984] The first inspection in California is when the bees reach the holding yards, prior to being moved to the almond groves. California county inspections vary by county. Some inspectors open colonies and inspect them, particularly colonies coming from states where there is no, or no rigorous, inspection.

[985] In California, the local agricultural inspectors are at a county level, and their numbers and inspection seasons vary. They have regulatory authority to enter property and to open and inspect colonies, mostly for AFB. They do not directly determine varroa loads, as varroa is not within inspectors' regulatory authority. The inspection report indicates how many colonies had AFB, or whatever might be actionable. There is also a section at the bottom of the report for "other" comments. As a courtesy for beekeepers whose colonies are inspected, inspectors note other conditions found, such as SHB or AHB. However, Dr. Caron's expert report indicates that state inspection programs normally have no regulatory authority regarding SHB spread.

(iii) Dr. Winston

[986] With respect to migration, Dr. Winston was asked about his March 18, 2014, letter to Dr. Nasr. Dr. Winston had been retained by the provinces of Manitoba and Alberta to provide an opinion on the 2013 Risk Assessment, and this was his letter in response. The letter states that Dr. Winston had been asked to provide a report on the accuracy of the information and

interpretation of the level of risk and a statement concerning whether, in his professional opinion, he supported the recommendations of CFIA.

[987] The letter states:

> The CFIA risk assessment is based throughout on a fundamental difference between US and Canadian beekeeping: in the US, beekeeping is highly migratory, whereas in Canada it is generally stationary. This has a profound influence on risk assessment. Because of the strong US migratory component, pests and diseases of bees in the United States spread quickly and become pervasive throughout the industry. Extensive colony overwintering in the southern states, the lack of interstate movement controls and a limited national management program are additional characteristics pointed out by the CFIA report that should contribute to any importation decision involving US bees.
>
> In contrast, the same pests and diseases when imported to Canada spread more slowly, and it takes many years to decades before becoming widespread. Thus, even when there are pockets of pest and disease infestations in parts of Canada, it remains useful to continue quarantine measures to protect the remainder of the industry.
>
> The risk assessment document accurately portrays this significant difference in the two country's beekeeping industries, and goes on to accurately assess and interpret the level of risk from package bee importations. Africanized honeybees, antibiotic-resistant American foulbrood, small hive beetle and amitraz-resistant varroa mites are identified as the primary hazards associated with the importation of honeybees from the U.S. The report does not include colony collapse disorder as an issue, wisely in my opinion, since there are multiple causes of that problem in the US and any dangers from importing packages from afflicted colonies are not evident at this time.
>
> My assessment of these four hazards generally agrees with the CFIA report, although I would rate the overall risk of resistant American foulbrood and amitraz-resistant varroa mites slightly higher than the CFIA assessment:

[988] The letter then goes on to address each of these hazards in turn.

[989] Dr. Winston testified that a fundamental difference in the Canadian and US beekeeping industries is the amount of migratory beekeeping in the US. The vast majority of US honeybees are moved once, twice or three times, and sometimes more, to pollinate crops across that country. This starts in February in a small area of California when a majority of bees from around the US are moved there for the almond pollination. There is also considerable movement through the pollination seasons elsewhere.

[990] His report also addresses migration and its impact:

> Overall colony mobility is even higher, as a considerable amount of pollination may not involve California crops. Morse and Calderone (2000) reported that 2.5 of 2.9 million honey bee colonies were transported long distances to pollinate apples, plums, prunes, melons, vegetables, blueberries, cranberries, sunflowers and many other crops in the US, across many states. In addition, package bees are sold extensively in the spring from Southern and California package-producing apiaries, and shipped throughout the United States, further increasing the movement of bees throughout the United States, and providing additional opportunities for pests, diseases and parasites to spread.
>
> This widespread colony mobility has a profound influence on risk assessment. Because of the strong US migratory and package bee industries, pests, diseases and parasites of bees in the United States can spread quickly and soon become pervasive throughout the industry. Varroa, for example, when first discovered in the US in 1987, had already made its way into many states across the country. Extensive colony overwintering at high densities in the southern states, the lack of interstate movement controls and a limited national management program are additional characteristics pointed out by the CFIA reports at the time that contributed to risk assessment decisions involving US package bees.

[991] Dr. Winston testified that in Canada there was some migratory beekeeping in 2003, which tended to be within a province, although there was movement from Alberta to British Columbia, and there was movement for canola seed pollination across the Prairies. Bees across the Prairies that were mainly kept for honey production were more or less stationary. Pest, diseases and parasites spread more slowly in those circumstances as opposed to in circumstances of country-wide migration.

[992] In his expert report, Dr. Winston questioned the idea of importing packages from zones considered AHB free, given the considerable movement of honeybee colonies throughout the US.

[993] Dr. Winston disagreed with Dr. Pettis' testimony that if a package producer were to open a hive containing AHB, then they would just close the hive and move on (i.e., they would not include those bees in the package making). Dr. Winston thought this evidence relied on assumptions. Dr. Winston stated that AHB behaviour is quite variable, and they might be aggressive some days and not aggressive on other days. Further, when packages are shaken, a number of hives are open at once, and there are bees flying everywhere. This would make it hard to identify if there was defensive behaviour and where it was coming from. He also pointed to pressure on package producers to get as many bees shaken into packages as possible, suggesting it was quite a burden to put on package producers to make that decision under the commercial pressure to produce packages. He therefore did not think, like Dr. Pettis did, that assuming beekeepers would close aggressive colonies and move on could be considered an effective mitigation measure.

(d) Significance of US migratory beekeeping

[994] The evidence is clear that the migratory nature of the US beekeeping industry is a significant overarching issue. Upon review of the expert evidence detailed above, and other evidence at trial, I find that US honeybee migration means that pests and diseases spread widely and more quickly in the US than in Canada, where the industry is more stationary.

(e) Importation of queen bees from Northern California – certification and zoning requirements

[995] It is an agreed fact that in February 2003, Dr. Nasr, Alberta's Provincial Apiculturist, began working on a protocol to permit the safe importation of US queens.

[996] In February 2003, a proposed protocol was generated, following consultation with others, which was shared with CFIA and the CHC. The protocol was broken down into two categories of proposed import conditions. The first concerned certification on the exporter's end, and the second concerned conditions for imported queens at the border (Dr. Nasr explained that this was a very early version of the protocol, so it referred to entry into Alberta rather than Canada because the request for a protocol had originated in Alberta). The proposed protocol was discussed at the Kelowna Meeting.

[997] Dr. Belaissaoui testified that the final form of those import conditions would be entered into AIRS. These conditions would then be incorporated into any import permits for US queens that were issued.

[998] At trial, Dr. Nasr was referred to a 2007 import permit for 8000 US queens from California and agreed that many of the conditions from his original proposal were incorporated into these permit conditions. These are as follows:

> **Selected Conditions / Conditions Choisies**
>
> **8000 HONEYBEE QUEENS**
>
> 1. The original or a copy of the signed original of this permit and any other necessary import / export documentation pertaining to the shipment of animal(s) or thing(s) must be provided for inspection at the first port of entry.
>
> 2. The conditions in this permit can only be changed or amended by a CFIA inspector. Any change to the permit by an unauthorized person will render the permit invalid.
>
> 3. Accompanying export documentation must be issued in either English or French.
>
> 4. The zoosanitary export documentation pertaining to the shipment must clearly describe the animal(s) or thing(s) and the country of origin. The export document must be issued within 45 days prior to exportation by an inspector of the US Animal and Plant Health Inspection Service (APHIS); or, by an inspector designated for such purposes by APHIS and endorsed by an official APHIS inspector.

The CFIA import permit number must be indicated on the export certificate

5. The following export certificate has been approved by HQ for use, however, any zoosanitary export certificate issued by the official veterinary services of the country of origin that meets the requirements set out in the import permit is also acceptable.

Certification/Inspection Requirements:

1) Canada, Honeybee queens

August 17th, 2004

6. Should the disease status of the country of origin change between the time of issuance of this permit and the time of unrestricted entry into Canada, the import shipment may be refused entry into Canada or be subject to additional quarantine and testing or treatment. Importers will be responsible for any additional incurred costs.

7. The apiary must be certified free from Africanized genetics as follows:

Certification/Inspection Requirements:

1) Mitochondrial Polymerase Chain Reaction-DNA (PCR_DNA) test results must not show signs of A. m. scutellata in the progeny of the breeding queens when tested according to the following protocol:

Mitochondrial (PCR-DNA) testing is done on random samples of worker bees who represent the progeny of the selected breeder queens. The testing must be conducted within 180 days prior to export. One worker bee should be collected from each breeder queen. Samples may be pooled and run as a single sample if appropriate for the technique. If the test indicates the presence of A. m. scutellata, whether from a single bee or from pooled bees, that queen producer will not be given certification to export queens. The testing must be carried out by an accredited or state laboratory.

2) The queen's originate from an apiary free of genes of the sub-Saharan type of the Africanized honey bee, Apis mellifera scutellata.

Based on current maps and surveillance programs for Africanized bees, Africanized honey bees have not, within the past year, been

detected within 100 miles of the apiaries from which the queens originate. A certificate from an authority of the State Department of Agriculture must accompany the shipment.

8. The apiary must be certified free from bee diseases as follows:

Certification/Inspection Requirements:

1) The apiary does not have any visible clinical evidence of American Foulbrood (AFB), European foulbrood (EFB) or Varroa mites when subjected to the following protocol:

Five percent of the colonies or a minimum of 25 bee colonies (whichever is greater) must be randomly selected and examined from each of the queen production and mating apiaries from which queens will be exported. Inspection for AFB, EFB and Varroa mites must occur within 45 days prior to export. Queens will be eligible for export if no clinical evidence of AFB, EFB or varroa mites was found.

Bee colonies will be examined as follows:

a) visual examination of brood for symptoms of AFB or EFB is required. Bee colonies used in queen production and mating apiaries must be free from visible clinical evidence of AFB or EFB. If either disease is found, queens will not be eligible for export. At least 3 brood frames per hive must be inspected.

2) b) Colonies must be assessed by alcohol washing of bee samples (200-300 bees/colony). The sample of bees must be placed in a basket, immersed in a solution of alcohol and the basket should be shaken for a period of at least 2 minutes. If varroa is not detected or is under 1% (1 mite per 100 bees tested), queen shipments will be allowed.

c) If varroa is found at levels above 1%, bee colonies in the queen rearing apiaries must be treated with a product that is registered in Canada. Treated colonies must be re-tested prior to collecting the queens and attendants to confirm that the level of varroa is below 1%.

9. The premises must be certified free of small hive beetle (SHB) (Aethina tumida) as follows:

Certification/lnspection Requirements:

1) The apiaries from which the queen bees are derived and any exporting establishments are free of the small hive beetle (SHB).

> All locations from which queen bees are derived or from where they will be shipped to Canada have been inspected for SHB with negative results by State apiary inspection within forty-five (45) days prior to export.
>
> Following due enquiry by a State apiary inspector, all queens and escorts were caught and placed in cages by hand. Packing of the cages into containers for export was done in an enclosed indoor area which is not accessible to the SHB.
>
> The exporter's facilities and operations are inspected by State apiary officers on an ad hoc basis.
>
> 10. A declaration pertaining to the food supplied to the bees, signed by the shipper must accompany the shipment.
>
> Certification/lnspection Requirements:
>
> 1) Food supplied to the bees during transit must not contain honey, or, if honey is used, the honey must have been irradiated to an approved level.
>
> …
>
> 19. The terms used in the accompanying export documentation must be consistent with definitions under the Health of Animals Act and Regulations.
>
> Certification/Inspection Requirements:
>
> 1) "Apiary" means any location belonging to a beekeeping operation where a group of hives (colonies) is maintained.
>
> 20. A physical inspection for the small hive beetle is required upon arrival at the port of entry and can be performed by an inspector of the CFIA or the CBSA.

[999] Dr. Belaissaoui testified that once the import conditions are developed, they are shared with exporting countries to determine what would be practical and feasible for those countries in terms of the certification process. There would then be negotiation back and forth until a final negotiated certificate was reached. With respect to the importation of US queen bees, USDA-APHIS and CFIA were able to reach agreed terms as to certification. Dr. Belaissaoui explained that the import conditions require that the export certificate be endorsed by USDA-APHIS. She

testified that import conditions are dealt with at the national, not state, level. They are applicable to all of the US, not just California.

(f) Have the Plaintiffs established that the same import conditions/mitigation measures applicable to US queen bees would be available for US honeybee packages?

(i) Applicability of the "apiary-wide" conditions

[1000] The Plaintiffs argue that the same mitigation measures applied to US queen importation could have been applied to the importation of US honeybee packages. In "but for" terms, they suggest that but for the negligence of the Defendants in failing to identify such mitigation measures with respect to US honeybee packages, the Plaintiffs would not have suffered the alleged economic loss. This issue was not directly addressed in Dr. Pettis' expert report or his reply report other than as indicated above with respect to AHB and genetic testing and his view that Dr. Pernal's comments to Dr. Moreau regarding AHB zoning had not been addressed by Dr. Moreau.

[1001] In that regard, the evidence at trial from various sources was that some Californian queen bee breeders were also suppliers of packaged bees. Counsel for the Plaintiffs asked Dr. Nasr if the "breeder-focussed" US queen export conditions would, therefore, already be satisfied for US packaged bees. He stated that he did not believe so. This was because, as he had previously described in his testimony, importing a queen bee means the queen and a few attendants who are hand picked are placed in a small cage for transport and can be inspected. Risk is minimized or mitigated by having small numbers. This is unlike packages, which contain a much larger volume of bees shaken into packages.

[1002] With respect to condition 7, certification pertaining to AHB, counsel for the Plaintiffs asked if Dr. Nasr agreed that this is an "apiary-wide" certification – the suggestion being that if the apiary is able to provide certification for its queens, then this should also be the case for its packages. Dr. Nasr's evidence on this point was not overly clear but, as I understood it, his point

was that the five or ten queen Northern California bee breeders selected to provide queens to Canada are referred to as group breeders. The ancestors of their queen bees have been tested for AHB. The condition requiring certification that AHB have not, within the past year, been detected within 100 miles (now 30 miles) of the apiaries from which the queens originate is meant to control the sperm available to the queen. This matters because she will be open mated (meaning the queens are able to fly and mate with drones in the area, as opposed to being artificially inseminated).

[1003] Asked the same question about condition 9, certification that premises be free of SHB, Dr. Nasr stated the practices for queen production are conducted in apiaries specified for queen production. So, where the intention is to ship to Canada, the 100-mile (now 30-mile) requirement is in play, the queen must be selected from stock that is free from AHB, SHB inspection must be conducted and other requirements of the import conditions must be met. "So all of the stuff to qualify that location, and that queen producers to ship queens from this part of his operation. He might use some queens some other place in his operation, away from this one, it might not qualify for meeting all of these requirements."

[1004] Counsel for the Plaintiffs on cross-examination also directed Dr. Caron to condition 7. Counsel noted Dr. Caron's prior testimony that he did not think that packages could be certified free of AHB. However, counsel asked whether, if the existing import condition required the "whole apiary" to be certified as AHB free, the condition would also equally apply to packages. Dr. Caron's testimony was that the importation of queens has been approved in the sense that the apiary contemplated by the permit is the apiary in which queens are raised – not the entire apiary of the beekeeper. The term "apiary," as Dr. Caron understood the protocol for the importation of queens to have been set up, "was the apiary that was involved in the queen rearing, not the entire apiary of the operation." Dr. Caron testified that he had spoken with two of the queen producers in Northern California and that they were utilizing only counties where they could effect what they call their queen mother colonies to meet the export requirements. They were not doing this apiary wide. Counsel then posed the same question with respect to condition 8 (apiary certified free of AFB and varroa mites). Again, Dr. Caron explained that the protocol originally (with a

100-mile distance requirement) and subsequently (when the distance was reduced to 30 miles) related to the apiary where the queens were produced: “They were not looking at the entire apiary operation.”

[1005] This is consistent with Dr. Nasr’s evidence.

[1006] It is also consistent with Dr. Caron’s evidence about *de facto* zoning, being that a zone is an isolated geographical area and that queen producers have such an area. His testimony was that package producers do not have the isolation of being in just one area, as do queen-producing colonies.

[1007] It is also of note that in his direct testimony, Dr. Caron stated that many of the same businesses produce both queens and packages. The queens are raised from selected colonies chosen to reflect what the producer views as the best qualities for a queen. This is unlike packaged bees. For packages, all that is needed are adult bees to populate the package (as well as a queen in a separate cage). These bees come from production colonies or are purchased from other beekeepers after almond pollination is finished and the colonies are strong. In other words, they are exposed to the mixing bowl of diseases.

[1008] I also note that on cross-examination, Dr. Pettis confirmed that to his knowledge there has been no zoning assessment of the US beekeeping industry and that no zone exists. He stated that this was with the exception that “all of the queen bees of Northern California have worked together as a group, and they are outside the Africanized zone.” This would suggest the queen bee producers are in a geographically segregated area.

[1009] In closing arguments, counsel for the Plaintiffs referred to the import permit conditions for queens and asserted (on the premise that the apiary is taken as a whole) that it was known that queen producers are package producers, and if the conditions applied to queens, it followed

that these same conditions could be met for packages. This argument was repeated in the causation portion of the Plaintiffs' submission.

[1010] However, as indicated above, this argument is not supported by the evidence. Dr. Caron and Dr. Nasr indicated that the producers who are exporting queen bees to Canada are producing those queens in areas separate from their package bee production so that they are able to meet the certification requirements. Their evidence, as well as that of Dr. Pettis, indicates that while some of the same Northern California beekeepers do produce both queen and packaged bees, for the group intending to export queen bees to Canada, production operations are not in the same geographic location.

[1011] The Plaintiffs did not question the CFIA witnesses about whether the required certification of apiaries for suppliers of US queens is "apiary wide" such that it could encompass the importation of both queen and packaged bees from the same apiary where there is no geographic separation of the production of the two.

[1012] I find that the Plaintiffs have not established, on a balance of probabilities, that the certification requirements for US queen bees, as set out in the import permits, are applicable "apiary wide," inclusive of any package bee operations. That is, they have not established that those import conditions were available and effective mitigation measures with respect to the importation off US honeybee packages.

(ii) Dr. Zagmutt's opinion that mitigation measures were available

[1013] Issue 3 as identified by Dr. Zagmutt's expert report is that the 2003 Risk Assessment omitted available risk mitigation measures that could have reduced the risk to an acceptable level, resulting in sanitary measures that were more trade restrictive than required. Dr. Zagmutt views this omission as being in violation of the SPS Agreement and thus the OIE Code and CFIA Protocols.

[1014] I have found above that the OIE Code and SPS Agreement do not have application to the relationship between the Plaintiffs and the Defendants. However, that through the CFIA Protocols, they inform the standard of care. Given this, in the context of causation, I will address Dr. Zagmutt's evidence suggesting that risk mitigation measures were available.

[1015] Dr. Zagmutt's report states that when the Risk Assessments were conducted, Canada had some sanitary measures in place in the form of provincial control efforts for rVar, rAFB and AHB, as well as for SHB starting in 2006. He states that, "Likewise, the US also had sanitary measures in place, including certification of shipments of queens and packages via regular inspections of apiaries for all four disease agents of interest, destruction of hives/colonies with AHB, destruction of hives/colonies with AHB, destruction of hives/colonies with AFB or SHB, and also testing available for rVar. Both countries had movement restrictions between some states/provinces." According to Dr. Zagmutt, this and the fact of importation from Australia showed that alterative mitigation measures were reasonably available with respect to the risks from imports of US honeybee packages.

[1016] The source for the information with respect to provincial controls that were said to be similar to those in place in the US is described in a footnote in the report as "Personal communication during phone conversation with Dr. Jeff Pettis, February 5th, 2021." Dr. Zagmutt's notes from this call were entered as an exhibit at trial.

[1017] Dr. Zagmutt was cross-examined about this call at trial. Dr. Zagmutt said he believed he might have had email communications after the call, but he was not sure. Given he would have included email conversations with Dr. Pettis as part of his report, he agreed there were no other emails that he would have provided, and the phone call in question might have been the only conversation where he took notes. However, he testified that it may have been that he had another call during which he did not take notes. Given Dr. Zagmutt's uncertain memory regarding his communications with Dr. Pettis, and given there are only notes from the February 5, 2021, call in evidence, I find that Dr. Zagmutt likely only had one communication with Dr. Pettis. This is significant because Dr. Zagmutt is not an expert in honeybee health. His opinion as

to whether mitigation measures were available based on the existence of provincial and US control mechanisms is based entirely on the information he received from Dr. Pettis.

[1018] Dr. Zagmutt confirmed at trial that the mitigation measures discussed on the call, and captured by his notes, were inspection and testing for some of the hazards. However, his notes are sparse, and Dr. Zagmutt testified that he did not write down everything Dr. Pettis told him. Counsel asked whether Dr. Pettis was referring to the status in 2021 when he told him, "Dakotas, Florida, California, NY, Texas, Chief apiary inspector, then e.g. FL 21 inspectors all over the state looking for AFB and varroa." Dr. Zagmutt said he was going by memory, but that was not the case. From what he could recall – again, going by memory – Dr. Pettis mentioned that at the time of the 2003 Risk Assessment, and perhaps before, there were up to 21 inspectors in Florida. When asked to confirm that Dr. Pettis gave him that information for the 2003 period, Dr. Zagmutt said that was correct to the best of his knowledge, but that the call was two years ago. He could not say whether the information referred to the time leading up to the risk assessment, or after the 2003 period. He said counsel would have to ask Dr. Pettis. Similarly, when asked about the part of his notes that said "Canada only 1-2 inspectors who were also extension agents," Dr. Zagmutt was unable to confirm the timeframe. He stated that, to the best of his knowledge, they talked about the period related to the 2003 Risk Assessment, but whether it was the same case five years or ten years after the risk assessment was not part of the discussion. Respecting the note that "Alberta, BC, other prairie provinces had more," Dr. Zagmutt could not recall Dr. Pettis saying how many more. When asked again about timeframe, Dr. Zagmutt said if he had to guess, it would be one year before and one year after 2003.

[1019] Specifically respecting the risk mitigation measures of inspection and testing for some hazards, Dr. Zagmutt said he believed those were discussed. When asked whether these would be with respect to the 2003 Risk Assessment, he said it was for "the period surrounding the risk assessment. So it could have been many years before. Could have also applied to years after."

[1020] When asked about the portion of the notes that says, "SHB visual inspection anything coming into California: destroy, turn back loads," Dr. Zagmutt confirmed that this was a measure

that was already in place. To the best of his recollection, even though he is not a bee expert, there was a region in California where there was an active surveillance system, which he believed was mostly implemented by industry. The idea was to avoid introduction of SHB into the area.

[1021] Given Dr. Zagmutt's weak memory of the phone call with Dr. Pettis, coupled with the ambiguity and lack of detail in Dr. Zagmutt's notes from the call and his testimony with respect to same, I find that the notes and Dr. Zagmutt's evidence that rely on this second-hand information are unpersuasive evidence. In any event, this evidence does not demonstrate that alternative mitigation measures were reasonably available with respect to the risks from imports of US honeybees.

[1022] In his report, with respect to risk mitigation (Issue 3), Dr. Zagmutt also notes that, in 2011, Canada allowed for the import of queens and packages from Australia, a country where SHB was present. He suggests that in making this decision, Canada recognized that risk management strategies were sufficient to reduce the risk from SHB in honeybees to an acceptable level.

[1023] However, based on the extensive evidence of zoning detailed above, I find that a zone is implemented by an exporting country to differentiate between regions with different health statuses. It requires monitoring and measures to prevent the incursion of a hazard into a free zone. As is explained more fully below at paragraphs 1033-1034 and 1123, a zone did not exist in the US at the time of either Risk Assessment. On the other hand, Australia was able to and did provide CFIA with evidence that Western Australia was SHB free and assurances that it would remain so, given the controls that were in place. Thus, while Dr. Zagmutt asserts that the fact of permitted importation from Australia shows that Canada "recognized that risk management strategies were sufficient to reduce the risk from SHB in honeybees to an acceptable level," this entirely ignores that Australia effected a zone within which SHB was not present and that importation conditions were developed to address importation from that zone (see paragraph 949 above). The situation in the US, where no zones have been effected, is not comparable to Australia. What the importation from Australia shows is that Australia demonstrated to Canada

that its SHB zoning was satisfactory to reduce the risk of importation from that country to an acceptable level. It does not show that alternative mitigation measures were reasonably available to mitigate the risk from the importation of US honeybee packages, as Dr. Zagmutt opines.

(g) Mitigation of specific risks

(i) SHB

Inspection of honeybee packages for SHB

[1024] More generally, with respect to inspection for SHB, the 2003 Risk Assessment recognizes that hand picking queens is a mitigation measure. With respect to the inspection of US queens, it states that "SHB adults move rapidly to dark corners and crevices when hives are opened. They are unlikely to be inadvertently included in shipments containing hand-picked queens and attendants." The release assessment was therefore estimated as low (for release, exposure and consequence assessment together, the risk estimate for SHB was found to be negligible). For packaged bees, where there was no such mitigation, the release assessment was estimated as high (for release, exposure and consequence assessment together, the risk estimate for SHB was found to be low).

[1025] The Plaintiffs did not propose that an available mitigation measure was that the thousands of honeybees in a package could be hand picked.

[1026] Hand picking allows for honeybees intended for export/import to be inspected. Dr. Nasr described in his testimony that queens are transported in small cages. The queen, along with four attendant workers, all of whom are hand picked, are individually placed in the cage (a queen bee cage was entered into evidence as an exhibit). Dr. James similarly testified that SHB are small but can be seen easily with the naked eye. Thus, SHB could be seen in a queen cage, while this would be difficult in a package of 15-20,000 bees.

[1027] Dr. Winston's report states that considerably higher rates of SHB importation can be expected with packaged bees, which was an important factor in the 2003 and 2013 Risk

Assessments. Dr. Winston testified that living organisms in a colony or on the bees themselves are much more likely to be shaken into a shaker box or package. When asked about the likelihood in 2014 that SHB would come into Canada in packages, Dr. Winston testified that it was "fairly likely," and that SHB could evade detection. He explained that inspection for SHB upon entry into Canada would not be feasible because, in a package, the worker bees will cluster around the queen, and an inspector would see the outer layer of bees, but not the vast majority of bees on the inside. Further, that packages have nooks and crannies that SHB could insert themselves into to avoid detection. Besides the fact that SHB would seek to avoid detection, Dr. Winston thought it would not be practical to inspect each and every package and somehow look through all the bees and inspect all the nooks and crannies.

[1028] Counsel for the Plaintiffs referred Dr. Winston to his earlier evidence that inspection for SHB would not be feasible. Dr. Winston confirmed that he did not think that inspection of individual packages one by one would be feasible. Even a subsample would be difficult to certify and verify because the beetles are small, and they might be difficult to see in packages. He confirmed they hide in crevices. When asked whether methods such as traps could be employed to assist with identifying SHB in packages, Dr. Winston said they were talking about hypotheticals, and, to his knowledge, there were no studies in 2003 or 2014 of any certification or mitigation measure that had a scientific basis behind it. When asked whether putting a trap into a package might be a workable solution for inspection to determine whether there was SHB in the packages that would be shipped, he said he would want to see data about how effective traps were. In the absence of such information, he did not think he could give an opinion. I note that the possibility of using traps as a mitigation measure was not further pursued.

[1029] Dr. Caron testified that queen cages are very small. A cage can be held in the hand and examined. If SHB are observed in the cage, it will not be shipped or sold. Unlike cages, an assessment of packages for SHB is not possible. Packages are considerably larger and have a population of about 10,000 honeybees. If SHB is in a colony and bees from that colony are shaken into a holding (collecting) box, the SHB, which are smaller than honeybees, will cling to the adult bees. The SHB cannot be excluded by "screening," as the screen openings must be

large enough for the adult bee to pass through and, therefore, so will the SHB. Dr. Caron testified that there is really no effective way to keep SHB out of packages if the colony from which the adult bees are shaken has SHB, and SHB is easily transported in packages.

[1030] This evidence establishes that the reason the import conditions for US queen bees required catching queens and their attendants by hand and placing them in cages is that this practice facilitated the effective inspection of bees for SHB given the ease of visual inspection afforded by a small number of hand-caught bees. Conversely, it also establishes that SHB would not easily be detected in bee packages. The evidence of Dr. Roberts, Dr. James and Dr. Nasr also confirms that it is an accepted principle of risk assessment that risk generally increases with the volume of the commodity imported (see also OIE Code 2.1.3(6)). That is, the risk of importing one animal is very different than the risk of importing 100,000 animals.

[1031] As I have found above, the Plaintiffs have not established that import permit condition 9, certification that an apiary is SHB free, is "apiary wide" and therefore could be applicable to both US queens and packages produced by the same supplier. Further, and in any event, I find that the Plaintiffs have also not established, on a balance of probabilities, that SHB certification and inspection requirements could effectively and feasibly also be applied as mitigation measures to US packaged honeybees – which are not hand caught and inspected for transportation in small numbers.

SHB as an OIE-listed disease

[1032] Since 2008, the OIE recommendation for SHB has been that honeybees should be imported from an SHB-free area. Indeed, as discussed above, since 2008, SHB has been an OIE-listed disease. Volume 1 of the OIE Code, Chapter 1.2, Article 1.2.3(8), lists SHB as included within the category of bee diseases, infections and infestations. Chapter 9.4 of Volume 2 of the OIE Code, "Small hive beetle infestation," Article 9.4.6, sets out the recommendations for the importation of live worker bees, drone bees or bee colonies with or without associated brood combs or for live bumble bees. It states that veterinary authorities of importing countries should require the presentation of an international veterinary certificate attesting that 1) the bees come

from a country or zone officially free from SHB; 2) the bees and accompanying packaging have been inspected and do not contain SHB or its eggs, larvae or pupae; and 3) the consignment of bees is covered with fine mesh through which a live beetle cannot enter.

[1033] Given that the US has not effected an SHB-free or other disease-free zone with the surveillance and movement controls required by the OIE Code, it could not provide the necessary certification for SHB. For instance, when counsel suggested to Dr. Kruger that CFIA never discussed a zonal approach with USDA-APHIS for SHB, although Australia had such a zone, Dr. Kruger responded that the US does not have a zone that is free of SHB except for the state of Hawaii. Dr. Pettis, the Plaintiffs' honeybee health expert witness, confirmed that, to his knowledge, there has been no zoning assessment of the US beekeeping industry, and no zone exists (other than the US queen bee producers who, as a group, are outside the Africanized honeybee zone).

[1034] Dr. Zagmutt acknowledged that he had no information that the competent authority of the US had established a zone with respect to honeybees.

[1035] However, in his opinion, the following statement in the User's Guide, General Remarks of the OIE Code is an assumption that underlies the whole of the OIE Code: "The recommendations in the [OIE] Code make reference only to the animal health situation in the exporting country, and assume that either the disease is either [*sic*] not present in the importing country or is the subject of a control or eradication programme." He acknowledged that Article 9.4.6 of the Code encompasses honeybees and recommends that importing countries should require the presentation of an international veterinary certificate attesting that the bees come from a country or zone that is SHB free. However, he stated that this Article would be "linked" to countries that would be free of the disease or that have an official control program. When asked if he knew that the US was not free of SHB, he stated that he was referring to Canada (although the certification referred to in Article 9.4.6 is to come from the exporting country). Further, that he understood Article 9.4.6 to set the standard that a country could accept without performing a risk assessment – but this, like all standards in the OIE Code, starts with the

assumption that the importing country is free of the disease or has an official control program for the disease. Dr. Zagmutt appeared to suggest that because Canada lacked an official national control program, it was not open to CFIA to require this certification. Dr. Zagmutt's opinion was that the provincial controls across Canada in respect of the movement of bees would not qualify as a control program.

[1036] In that regard, I note that in his expert report, under Issue 2, which considered hazard identification, Dr. Zagmutt asserted that hazard identification in the Risk Assessments was incorrect. He stated this was so because AHB is an invasive species, not a disease agent, and because rVar and rAFB were already present in Canada and were not under a federal surveillance control program. Dr. Zagmutt's opinion was that CFIA's assumptions of a lower prevalence of resistance for rVar and rAFB in Canada than existed in the US was flawed, as was its assumption that provincial movement controls were effective while (what Dr. Zagmutt viewed as) equivalent control measures in the US were ineffective. However, as discussed above, at trial the Plaintiffs abandoned Issue 2 and their allegations of negligence around hazard identification in the Risk Assessments. Accordingly, Dr. Zagmutt's views on the impact of a lack of an official control program with respect to SHB are no longer relevant.

[1037] That said, I also note that "Official control programme" is defined in the OIE Code itself as "a programme which is approved, and managed or supervised by the *Veterinary Authority* of a country for the purpose of controlling a *vector*, pathogen or *disease* by specific measures applied throughout that country, or within a *zone or compartment* of that country" (italic original).

[1038] There does not appear to have been disagreement that there was no official national control program in place in Canada at the time of the Risk Assessments. The 2003 Risk Assessment acknowledges this, stating, "Apart from the federal ban on imports, there are no bee disease control programs in place at the federal level. A limited amount of honey bee research is carried out at federal research centres. Virtually all disease control and surveillance responsibilities for bees reside with the provincial governments." The 2013 Risk Assessment acknowledges, "Provincial governments have legislative and regulatory authorities and programs

in place to manage and control the spread of bee diseases, in close collaboration with the Canadian Food Inspection Agency (CFIA).” The Partial Agreed Statement of Facts indicates that Canada has not had a national surveillance program for the monitoring of honeybee health since 2000.

[1039] However, I note that the User’s Guide, General Remarks, as relied upon by Dr. Zagmutt, do not refer to an “official control programme,” but only to a “control or eradication programme.” It is therefore not clear to me that the definition of an “official control programme” is what is referred to in the General Remarks. (However, Chapter 5.1.2(2) of the OIE Code does state that the international veterinary certificate should not include requirements for the exclusion of pathogens or animal disease which are present in the importing country and are not subject to any official control programme.)

[1040] Dr. Roberts was taken in direct examination to Chapter 4.14 of the OIE Code, Official Health Control of Bee Diseases. Counsel asked her to respond to Dr. Zagmutt’s opinion that a control program must be under the control of the competent authority, and that provincial control programs do not meet OIE guidelines. Dr. Roberts testified that she did not agree, and that a control program could be accomplished in different ways, at different levels and by different people if the competent authority is overseeing what is happening at the provincial level. This includes with respect to official health control of bee diseases as set out in Article 4.14.2 of the OIE Code, which states that in “each country or region,” official health control of bee diseases should include the matters set out. She was of the view that if the programs of a province, which has its own legislation and officials, are broadly aligned with global (OIE) standards, then such “devolved” animal health and disease control could comprise a control program.

[1041] Dr. Roberts was also taken to Chapter 1.6, Procedures for Self Declaration and for Official Recognition by the OIE. When asked whether there are official control programs for very specific diseases, Dr. Roberts confirmed there are. She testified that there are certain diseases that have a high impact globally for which official control programs are developed, such as foot-and-mouth disease. If a country wishes to show that they are free of such a disease, they

can generate a package of evidence for consideration by OIE. If accepted, then they are given the official stamp that the country (or zone) is free of that disease. When asked whether the control programs in the present case fall under Chapter 1.6, Dr. Roberts said, “Not for the bees, no. Those are not official control programs.” When asked whether these sorts of requirements for the official control programs are required for bees, she confirmed they are not.

[1042] Dr. Dubé also gave evidence, in the context of hazard identification, that she interpreted Chapter 1.6 to apply to the big reportable diseases. She interpreted Chapter 4.15 (now 4.14), Official Health Control of Bee Diseases, to permit the control programs referred to in that Article to be applied by the veterinary authority or other competent authority in the country, or in the region of the country. This resulted in the view by CFIA that Chapter 4.15 (now 4.14) allows Canada to use provincial regulatory oversight of honeybee control programs. In the case of SHB, based on the information that had been provided to CFIA in the past, there were provincial control programs in place to prevent the establishment and spread of SHB in Canada.

[1043] I also note that, as discussed below at paragraphs 1127-1131 with respect to the importation of US queens from Hawaii after the discovery of varroa mite there, USDA-APHIS agreed to keep the AFB and European foulbrood [EFB] import conditions. It also requested information on provincial bee acts and regulations as well as federal regulations. These were provided, and Dr. Kruger noted that all of the provincial bee regulations named varroa as a pest and that the provincial acts required that bees only be moved inter-provincially with a permit having restrictions. USDA-APHIS agreed to Canada’s proposed import requirements for Hawaiian queens. This would seem to suggest that USDA-APHIS accepted provincial movement controls as a control program for the purposes of negotiating export conditions.

[1044] Given the above, I disagree with the Plaintiffs to the extent that they are or are still asserting that Canada cannot rely on Article 9.4.6 of the OIE Code to require certification from the US that honeybees are being imported from a country or zone officially free from SHB. The basis for this position is that Canada does not have an “official control programme” for SHB and that provincial control programs cannot be used as control programs for this purpose; however, I

prefer Dr. Roberts' evidence to that of Dr. Zagmutt on this point. Dr. Roberts' work has been as a regulator. For example, her work has involved risk analysis since 2007, when she was a Scientific Officer in the Centre for Epidemiology and Risk Analysis, Veterinary Laboratories Agency, DEFRA. In 2008, she joined the Global Animal Health team, which was responsible for doing the horizon scanning and risk assessments for disease outbreaks around the world and considering those in terms of their risk to imports and export management. She also delivered training on risk assessment at the UK and European Union level. In 2013, she became a Senior Scientific Officer in the same department. At the time of trial, she was a policy, risk and science advisor in DEFRA's Exotic Disease Control team. This role involved providing science and policy advice to the Chief Veterinary Officer and to their team more generally on exotic diseases for animal health. She testified that she is the cross-government animal health risk assessor for imports and trade in general. She is a member of the European Food Safety Authority Animal Health and Welfare Panel, and she and the other Panel members must sign off on all the risk assessments that they do on behalf of the European Commission. Notably, she is a member of the OIE Collaborating Centre on Risk Assessment and Modelling. She also conducts risk assessment training on behalf of the United Nations Food and Agriculture Organization.

[1045] As to the status of SHB in Canada, given the Plaintiffs' stipulation that disease status is no longer relevant, I need not address this. However I do note that Dr. Kruger's evidence was that SHB had been detected in Quebec in 2008, but it did not become endemic. It had been discovered in Alberta and Manitoba in 2006 (DNA testing showed it came from Australia). The governments of those provinces had been able to eradicate it, so it had not become endemic. These are the only cases of which he was aware.

[1046] However, in September 2010, Mr. Kozak, the Provincial Apiarist for Ontario, informed CFIA of the discovery of SHB in Essex County, which is the extreme southwest corner of Ontario. In his testimony, Mr. Kozak described in detail the response taken by the Ontario Ministry of Agriculture, Food and Rural Affairs staff, which is also reported in the CAPA 2010 Proceedings and the Small Hive Beetle Report for Ontario – 2011 [2011 SHB Report], which he prepared. This response included as many inspections as possible before the end of the season,

working with epidemiologists and specialists who had experience in tracing and mapping the distribution of pests and diseases and, when the distribution was determined, setting up a quarantine area for the entire county of Essex and a part of the adjacent county (Chatham-Kent). Yards where SHB was found were detained (beekeepers could not move honeybee colonies or associated equipment) and some yards were depopulated (all the colonies were destroyed) or moved into the quarantine area. The 2011 SHB Report included a map of the quarantine area. Mr. Kozak also referred to the 2017 CAPA Proceedings' Report on Small Hive Beetle Inspection Activities for the 2017 Beekeeping Season in Ontario, which detailed the activities and protocols Ontario had utilized in response to SHB. It contained a chart summarizing where SHB had been found over a seven-year period in Ontario and what the response had been in each case (e.g. detainment orders, depopulation, movement and biosecurity plans). The Essex County quarantine was maintained until 2019. In his comments about the 2013 Risk Assessment, Mr. Kozak stated that although SHB had made some incursions into limited regions of Canada (three incidents: Manitoba, Alberta and Quebec), there had been successful programs and strategies in place to mitigate further incursions. He testified that because regulatory action was taken, SHB had not been able to become established (or endemic). Therefore, although SHB is present in Canada, the evidence shows that health control programs at the provincial level have been effective in preventing its spread.

Conclusion on SHB

[1047] In summary on SHB, the Plaintiffs have not established that import permit condition 9, certification that an apiary is SHB free, is "apiary wide" and therefore could be applicable to both US queens and packages produced by the same supplier in Northern California. The Plaintiffs have also not established, on a balance of probabilities, that SHB certification and inspection requirements could effectively and feasibly also be applied as mitigation measures to packaged bees – which are not hand caught and inspected for transportation in small numbers. Moreover, the evidence establishes that at the time of the 2003 Risk Assessment, SHB was considered to be a hazard and, accordingly, was on CFIA's proposed immediately notifiable list. Since 2003, SHB has been an immediately notifiable disease in Canada as demonstrated by Schedule VII of the *HA Regulations*. Since 2008, SHB has been an OIE-listed disease, and, as

such, OIE recommended that honeybees should be imported only from an SHB-free area. The US is not an SHB-free country and has not established an SHB-free export zone. SHB can and has become established in some areas of Canada but is subject to provincial control programs, which have limited its spread. It is not endemic in Canada. The US has not taken issue with the utilization of provincial movement controls with respect to other hazards. Given this, I find that the Plaintiffs have not established that the SHB inspection and certification requirements for US queens (or any other mitigation measures) would have been feasible and efficacious for the importation of US honeybee packages. Accordingly, that the Plaintiffs have not established, on a balance of probabilities, that mitigation measures for SHB were or are available. Given this, the but for test has not been met with respect to SHB.

(ii) AHB

[1048] I pause here to re-state that while time and effort was expended at trial eliciting evidence about whether the hazards in the Risk Assessments, including AHB, were appropriately identified as such, that issue was taken off the table by the stipulations. Accordingly, I am not addressing that issue or that evidence in these reasons.

[1049] Further, I have addressed some of the proposed mitigation measures for AHB above. In particular, I have found that the apiary-wide certification that was a viable import condition for US queens would not be an effective or available mitigation measure for US packages.

[1050] Nevertheless, I will below address testing for AHB genetics in greater detail.

[1051] In his reply report, Dr. Pettis revisited his view that CFIA did not follow the OIE Code (which, as I set out above, I have determined that he was not qualified to address). In that context, he submits that a zonal approach would have worked in relation to the risk posed by Africanized honeybees, stating that “Canada imports queens from California utilizing a genetic testing system where the ‘queen mothers’, queens from which other queens are raised, are tested for Africanization. Many thousands of daughter queens are reared from these tested mother

queens and these new queens then mate with drones in the area." It was Dr. Pettis' view that Dr. Winston's concern that AHB drones could enter Canada in honeybee packages is actually not a concern. This was because while the area in California where queens are bred does have some AHB drones present, it continues to export "high-quality queens" thanks to genetic testing. He restated that a zonal approach employing similar testing methods would have been relevant for packages, but that CFIA failed to consider this option (I have addressed the latter assertion above).

[1052] Dr. Caron stated in his expert report that he did not agree with Dr. Pettis that, with respect to the requirement for molecular analysis for AHB genes that is applied to US queens, a zone might also function for packages. This is because it would be a "monumental undertaking" to enact. Packaged bees come from hundreds of colonies, whereas queens come from a limited number of mother breeder colonies.

[1053] Dr. Caron reiterated this point at trial, testifying that AHB certification would not be possible for packages. This is because the bees in any one package can come from two, three or four different colonies. To certify the queens as being free from Africanized genetics, they look at the mother colonies, which are colonies used to rear queens. Conversely, the queens that are used in package production colonies can come from that same stock or from any other stock, and some of the queens in those colonies get replaced. Dr. Caron went on to say that in the process of mating, queens mate with up to a dozen or more drones. It is therefore possible that, in her mating, she will be storing sperm from AHB drones (although I note that, in Dr. Pettis' view, as a queen mates with 8-20 drones, mating with 1-2 AHB drones would not cause a colony to be aggressive). Dr. Caron acknowledged that queen breeders can have an area flooded with European drones when the queens fly out to mate in an effort to prevent AHB, but he stated that this is a mixed bag. The best breeders attempt to control the stock by also rearing drone mother colonies, which they stock in the area where the queens mate, but this is not done by all queen producers.

[1054] Dr. Winston appears to have been concerned with the feasibility of testing packages, but also with the accuracy of that testing. For instance, in Dr. Winston's March 18, 2014, review of the 2013 Risk Assessment, sent to Dr. Nasr, Dr. Winston wrote that "it would be difficult to screen for [the presence of AHB] in packages as testing is expensive and not always sufficiently accurate." When asked at trial whether there could be screening for AHB in packages, Dr. Winston said, "It would be difficult. There are various tests you can do that are not completely reliable to screen for Africanization…." Dr. Winston also stated that shaken packages could contain AHB drones, giving rise to the possibility of mating with Canadian queens.

[1055] At trial, Dr. Pernal spoke to a March 20, 2003, email from him to the CAPA Import Committee concerning testing for AHB in US bees. Dr. Pernal agreed that mitochondrial DNA testing only establishes whether the maternal DNA has been affected by Africanization. It does not provide information about the introgression of Africanized alleles from drones (from when a queen mates with a hybridized drone), which the email says would be the concern with queen breeding areas in California. It then talks about the potential use of nuclear microsatellite arrays, which are tests that would give information about genetic material inherited from both parental sources. However, this form of testing is costlier, requires more sampling than the mitochondrial technique (which only really needs one bee analyzed per queen source) and provides information at the population level. At the time, that technique was not used for monitoring in the US.

[1056] I find that the concerns about the feasibility and accuracy of testing for AHB serve to reinforce my above finding that mitigation by way of zoning and certification would not have been reasonably available for AHB.

[1057] Finally, in their closing submissions, the Plaintiffs suggest that "requeening" a colony could reduce the risks associated with AHB. Dr. Pettis testified that replacing the queen in an aggressive colony with one from better or gentler stock could reduce the risks associated with AHB, as over the course of three to six weeks, her offspring would replace the aggressive bees. However, this is not a means of preventing the introduction into or spread within Canada of the hazard. Rather, it assumes that AHB would enter Canada and that the attendant risks would be

time limited for each aggressive colony if the queen were replaced. In my view, it would be reasonable for CFIA to find that this was not a viable mitigation measure.

(iii) rAFB

[1058] By way of refresher and as a useful summary, I refer to Dr. Winston's description of AFB and its treatment, which is as follows:

> American Foulbrood is caused by a spore-forming bacterium *Paenibicillus larvae*, affects the larval stages of honey bees, and is highly contagious. Once an individual larva is infected by bacterial spores, the disease progresses to kill the immature bee, which decays into a dry, dark scale that contains in excess of two billion spores that can persist and be infectious for decades in beekeeping equipment. Adult bees attempt to remove the decaying larvae, contaminating their mouthparts and digestive tracts, and spreading the spores through the nest as they share food with other adult bees, including nurse bees feeding larvae (CAPA 2013).
>
> If untreated, AFB spreads rapidly and leads to colony death. The disease moves between colonies and apiaries primarily through robbing, drifting, the interchange of diseased equipment by beekeepers, and feeding contaminated honey or pollen. The standard treatment for AFB was feeding oxtyetracyline (Oxy), used prophylactically to prevent infestations but also fed to suppress active infestations, although that practice would leave colonies potentially infectious as the antibiotic is not active against the spores. Given the ubiquitous and heavy use of Oxy, it's surprising that resistance didn't develop earlier, but by the 2003 CFIA risk assessment resistant AFB (rAFB) had become a concern.

[1059] Dr. Pettis' report similarly describes AFB as a bacterial disease that is highly contagious, as it spreads by means of spores that can persist in the environment for many years. Dr. Pettis testified that AFB is fairly easy to diagnose in the field because it can be seen and smelled, and that the average American beekeeper can detect it.

[1060] In his expert report, Dr. Caron described AFB as a bacterial disease that is the most serious disease for beekeepers worldwide. When not controlled, it will quickly kill an entire

colony. The spores can survive for decades and are not killed by antibiotics. Dr. Caron testified that the majority of beekeepers who see AFB in their colonies do not know if it is resistant or not, and that large-scale beekeepers routinely feed their bees an antibiotic so the disease is not expressed (that is, it is not growing vegetatively in their bee colonies). Similarly, Dr. Winston testified that AFB spores can be present in the absence of expressed symptoms.

[1061] The absence of expressed symptoms and the distinction between AFB and rAFB is relevant to inspection and certification. Dr. Caron's report indicates that, around the time of the 2003 Risk Assessment, rAFB was widely reported in the US but of unknown frequency (prevalence), as its presence was not uniformly monitored. Individual states that had regulatory authority to inspect were not looking for rAFB, but only AFB. Dr. Caron's evidence was that rAFB is not separately notifiable in the US and never has been. His report indicates that, where state inspection exists, inspection services do not test for rAFB.

[1062] Dr. Caron's report also states:

> It can be fairly assumed that the migratory movement of colonies, including to pollinate almonds, would at least temporarily mean rAFB colonies could be within close proximity to the bee colonies of package bee producers of California. Exchange of adult bees and or brood between pollinator and package beekeepers might hasten spread. Since package bees are obtained from a number of colonies, monitoring for rAFB would not be feasible.

[1063] With respect to inspection, Plaintiffs' counsel referred Dr. Winston to a 1966 study by P. Pankiw and J. Corner [1966 Pankiw & Corner], referred to in his expert report, which examined whether AFB could be transmitted by packaged bees. In that study, the researchers shook bees from healthy and from infected colonies into packages. The packages that were installed from colonies that had no evidence of AFB remained free of AFB when the packages were hived. Four out of six of the packages from infected colonies expressed AFB (when hived). Plaintiffs' counsel suggested that the study demonstrated that the risk of spread from a colony infected with AFB through packages "is not 100 percent." Dr. Winston stated that that particular study found that four of the six were found to be demonstrating expressed AFB. Counsel then noted that one

of the report's conclusions was a recommendation for rigid inspection of colonies before they are used for package making. It was suggested to Dr. Winston that this was a pretty simple condition that could be applied to reduce the risk of the spread of AFB through packages, as it would not be hard to conduct such an inspection. Dr. Winston said he did not know that he would say it was not hard. He testified that inspection is quite laborious, that it requires a skilled inspector to find evidence of AFB and, significantly to my mind, that it would depend a lot on whether AFB was being masked by antibiotics. AFB may be present in the bees but not appear in the colony.

[1064] As to the 1966 Pankiw & Corner study, this was referenced in the release and exposure assessment of the 2003 Risk Assessment. It supports the risk of spread of AFB from an infected colony in honeybee packages. Dr. Pettis took issue with the 1966 Pankiw & Corner study on the basis that it had not been repeated and no control packages were utilized to look for background AFB contamination in the equipment used in the test areas. Dr. Caron agreed that the sample size was not robust but noted that the study was published in a peer-reviewed journal featuring honeybee research. He was of the view that CFIA was entitled to rely on it in the 2003 Risk Assessment. Ultimately, although much time was spent at trial dealing with this report, its content and CFIA's reliance on same go to the content or merits of the 2003 Risk Assessment – which the Plaintiffs have stipulated they are not challenging.

[1065] I accept that, while an active AFB infection might be easy to detect, AFB may be present in a colony without expressing symptoms. I also accept Dr. Caron's evidence that in the US, there was no monitoring of or testing for rAFB independently of AFB. I am therefore not persuaded that CFIA would have been satisfied that certification following inspection would provide adequate assurance that US honeybee packages for export were free of rAFB.

[1066] It is also significant to note that most of the expert evidence about rAFB was concerned with control of the infection. Dr. Pettis states in his report that while rAFB was rated as a moderate risk in both the Risk Assessments, "alternative control methods" were available or being developed when the Risk Assessments were being written. His overall view is that because alternative controls were an option, "at most [rAFB] posed a minimal threat to beekeeping." He

asks, “Are bee pests serious? Yes. But they can be managed. In the US, the need for pollination has always outweighed the inconveniences of spread of a disease to new areas in that beekeepers can learn to deal with new problems.” He suggests that Canadian beekeepers are adaptable as well. Thus, Dr. Pettis’ perspective is not about whether the importation of rAFB by way of honeybee packages would not, or would not be likely to, result in rAFB’s introduction into or spread within Canada (which, pursuant to s 160(1.1) of the *HA Regulations*, is what would be required for the issuance of an import permit), but rather whether rAFB could be managed.

[1067] In that regard, I note that Dr. Snow’s affidavit indicates that a number of mitigation measures initially proposed in a risk assessment for Australia in 2010, including quarantining bees and destroying packaging, were rejected on the basis that they were not practical to reduce risk because CFIA could not effectively enforce them *after* the bees’ entry into Canada.

[1068] Further, and in any event, the evidence is that at the time of the 2003 Risk Assessment, only OTC was approved for use in Canada to treat rAFB, and alternative measures to manage rAFB gave rise to other concerns.

[1069] In his expert report, Dr. Pettis acknowledged that overuse of a single antibiotic can result in resistance by the bacteria to that antibiotic and that this had happened in the US with respect to OTC. There, ultimately, two new antibiotics were developed and approved for use: tylosin and lincomycin. The latter subsequently became available in Canada. In his testimony, he stated that tylosin and lincomycin are as effective as OTC, but there is an issue with persistence, meaning that they leave a residue in the colony and in the honey. This is why, in an article that he authored and to which he was referred by counsel for the Defendants, he stated that they should never be applied during nectar flow and should be used only as dusts, to reduce potential residue problems. Further, that limiting the use of antibiotics would prolong their usefulness by avoiding resistance and would reduce the risk of honey contamination, which was a serious issue in worldwide honey markets.

[1070] In his report, Dr. Pettis states that the threat to honeybees because of the development of OTC-resistant AFB was dealt with in the US through the adoption of cultural control methods such as burning equipment and through the use of alternatives like tylosin. In his testimony, Dr. Pettis acknowledged that antibiotics simply mask the disease and that "it's not effective against spores, and it's not effective long term. It's simply a tool to use to help control it." He suggested that the preferred course of action is that beekeepers should burn the infected colony and use antibiotics to treat the surrounding colonies as a temporary protection (although some beekeepers use antibiotics as a prophylactic). Dr. Pettis states that these are the only available control measures. Although infected equipment can be irradiated to kill the spores, this is not a normal practice. His report acknowledges that most countries do not allow for the use of antibiotics but suggests that a move toward cultural controls (burning) would lower the risk of antibiotic residues in honey "and expand trade options for Canadian honey." In his reply report, he asserts that beekeepers can adapt and learn to use new control strategies.

[1071] Dr. Caron's report states that OTC has been used for over 50 years to treat AFB. OTC masks the field disease symptoms by killing the vegetative stage; it does not kill AFB in the spore stage. As long as antibiotic treatment continues in the colony, the spores will remain, but field symptoms of AFB disease are not evident. If treatment stops, colonies containing spores may "break down" into an active, detectable AFB infection. AFB eventually became resistant to OTC, and, in the early 2000s, USDA-APHIS was being pressured to develop alternative antibiotics to replace OTC. This resulted in the registration of two additional antibiotics: tylosin was registered in 2005, and lincomycin was registered several years later. The latter has not been widely adopted for AFB treatment. Dr. Caron states that a concern of his and others is that the antibiotic tylosin has a much longer half-life, meaning it remains within the hive for a considerably longer time following treatment. While useful for masking AFB presence longer, it also means the antibiotic is present at less than optimum levels for a longer time, potentially hastening eventual resistance of the bacteria to it.

[1072] Dr. Caron states that the burning of bees and frames, boiling of equipment in a lye bath or treatment with gamma radiation were costly control measures compared to using an antibiotic.

[1073] Dr. Caron also notes that the registration of new antibiotics for treating AFB came after the 2003 Risk Assessment; therefore, those replacement antibiotics were not then legally available. The 2003 Risk Assessment indicated their approval was not assured.

[1074] Dr. Caron's report states that the 2013 Risk Assessment continued the moderate risk assessment for rAFB. Publications of Dr. Pettis and others reported rAFB to be widespread in the US. Most beekeepers had switched prophylactic antibiotic treatments from OTC to tylosin or were using both, OTC in the spring and tylosin in the fall (citing the study referenced). While information on alternatives to antibiotics was readily available, commercial beekeepers opted almost exclusively to use antibiotics. Dr. Caron states that elimination of bees and frames is not widely practiced by US beekeepers.

[1075] Dr. Winston also speaks to rAFB in his report.

[1076] The 2003 Risk Assessment identified OTC-resistant AFB as a hazard. The hazard assessment indicates that at that time, AFB was present at apparently low levels in all provinces and rAFB had been reported in Alberta and British Columbia. The release and exposure assessment element set out many factors considered, including that rAFB was thought to be widespread throughout the US and had been confirmed in 27 states, although there were no estimates available for prevalence (citing the studies relied upon for this information). This element of the 2003 Risk Assessment concluded that the overall likelihood assessment was high, acknowledging uncertainty regarding the degree of transmission attributable to hive and apiary management practices.

[1077] As to the consequence assessment, this states:

> 4. Consequence Assessment:
>
> Although there are a number of antibiotics which are effective against AFB, only one (oxytetracycline) is approved for use in Canada. Alberta beekeepers have had access to tylosin through extra-label prescription by veterinarians.

> It is uncertain if additional antibiotics would be approved for the treatment of rAFB, given public health concerns with overall levels of antibiotic resistance development and residues in honey. Treatment of AFB with antibiotics prevents the development of disease in larvae but has no impact on existing spores. Therefore, treatment must be continued indefinitely (given that spores survive for decades). Resistance may be more likely to develop under these conditions.
>
> Other methods to control rAFB include burning of infected hives, periodic inspection and removal of infected brood, disinfection of hives (e.g. using irradiation) or shaking bees from infected hives onto clean equipment (this latter method is not completely effective but may reduce the quantity of spores to a level whereby the bees are able to clear any remaining infectivity).
>
> The main consequence would be the loss of hives due to the lack of an approved antibiotic which is effective in preventing disease occurrence. Assuming most beekeepers use antibiotics to control AFB (Dixon, 2003), changes to more management intense methods of control would need to be implemented by beekeepers who introduce rAFB into their apiaries. The first line of defence would be to introduce hygienic measures to reduce spread to unaffected hives. For infected hives, previously described control measures could be put in place. However, the most effective of these, burning of infected hives or irradiation of hive equipment, are expensive to implement in comparison with the cost of antibiotic treatment. There are other antibiotics which have been demonstrated to be effective against rAFB. However, there is uncertainty about when or if these alternative antibiotics would be permitted for use in honey bees. The consequence assessment is estimated as moderate.

[1078] In short, the 2003 Risk Assessment took into consideration all of the points that Dr. Pettis now raises.

[1079] Further, and significantly, the bee health experts' evidence is consistent that at the time of the 2003 Risk Assessment, there was really only one new alternative control – new antibiotics. However, Dr. Caron's evidence was that tylosin was not registered in the US until 2005, and lincomycin was registered several years later. Thus, that alternative control was not available at the time of the 2003 Risk Assessment, leaving OTC as the only available antibiotic. This concern

was later expressed in a 2010 email from Dr. Nasr: “The importation of bees and queens from areas where AFB resistant to oxytetracycline is widespread represents a high risk to introducing and increasing the rate of spreading these resistance genes to our AFB. Thus, it will put the industry at high risk, specially no suitable antibiotics registered in Canada for treatment of these cases.”

[1080] In summary, and as the Defendants note, the alternative controls have disadvantages. Dr. Caron’s evidence was that biologically sound treatments, such as burning of bees and frames, is costly and time consuming compared to the use of an antibiotic. Further, Dr. Winston testified that if OTC were lost as an effective antibiotic, that would make treating AFB considerably more difficult, and the burning and irradiation of colonies are both very expensive. In that regard, Dr. Pettis acknowledged in his report that antibiotic use has saved beekeepers greatly in terms of loss due to AFB infection. Dr. Winston and Dr. Caron’s evidence was that alternative antibiotics were not registered in Canada in 2003. Further, that tylosin in particular left residue in the colony and in honey over a longer period of time and cannot be used at the time of honey production. These concerns raise questions about the viability or feasibility of the alternative control mechanisms. In particular, that at the time of the 2003 Risk Assessment, OTC was the only available antibiotic.

[1081] I find that that if CFIA had considered mitigation options with respect to rAFB in 2003, it could reasonably have determined that the available alternative control mechanisms were not feasible or viable mitigation options in the prevailing circumstances.

[1082] As to the 2013 Risk Assessment, I have found above that CFIA did consider whether there were available risk mitigation options with respect to the 2013 Risk Assessment; CFIA concluded that there were not. Accordingly, there was no breach of the standard of care in that regard. Therefore, whether these or other alternative controls were available at the time of the 2013 Risk Assessment is not relevant to this causation analysis.

(iv) rVAR

[1083] In his report, Dr. Winston described varroa mite as currently the most serious of the honeybee pests, diseases and parasites, in part because it feeds directly on bees, but perhaps more significantly because it transmits and activates viruses. Further, he indicated that varroa is widespread. It was discovered in the US in 1987, at which time the Canadian border was closed to importation. It was first reported in Canada in 1989 and spread slowly until 2002 due to limited migratory beekeeping and control via Apistan (fluvalinate) and formic acid. Varroa mites feed on both adult and larval bees. For the latter, they enter the larval cells when the bees are about to pupate, feeding on the pupae and mating and reproducing within the cells. The feeding has a direct impact, as it reduces the size of emerging adult bees, shortening their life spans and weakening the immune response. Additionally, the mites transmit and activate a number of viruses as they feed, including Deformed wing, Israeli acute paralysis and Sacbrood viruses. Untreated, a varroa infestation will generally kill a colony within two to three years (study citations omitted).

[1084] The evidence at trial from various witnesses was that synthetic chemicals, fluvalinate, coumaphos and amitraz, as well as “softer chemicals,” oxalic and formic acid, are used to control varroa. The 2003 Risk Assessment identified fluvalinate-resistant varroa as a hazard, and the 2013 Risk Assessment identified amitraz (Apivar)-resistant varroa as a hazard.

[1085] Dr. Pettis’ report indicates that fluvlinate in a slow-release strip, placed in the colony, was used widely to control varroa mites. At trial, he added that it was one of the better products for human and bee safety. However, after about ten years of use, mites developed resistance to that product. Dr. Pettis states that he developed a field test [Pettis Test], which allowed beekeepers to know when to switch to alternative controls, such as coumaphos and formic acid (the latter of which was approved for use in Canada in 1995). However, in the US, the switch to coumaphos resulted in resistance to that compound developing in about three years. At trial, Dr. Pettis confirmed that he had identified this resistance in 2003. He also stated that coumaphos had human toxicity issues and was “very deadly.” Beekeepers then switched to amitraz, applied via

strip. Dr. Pettis, in his report and at trial, took issue with early studies reporting amitraz resistance developing after two to five years. At trial, he stated that he did not believe it was true resistance. In his report, he states that while amitraz resistance had been suspected for many years, it was only documented in a detailed study in 2019. He added at trial that there were reports of some signs of true resistance in 2020, but it is not widespread and there has not yet been total failure of the product. In his report, Dr. Pettis states that alternative control products can be effective for mite control. Further, while an Integrated Pest Management [IPM] approach using cultural controls and organic acids is more time consuming, it has been widely adopted. According to Dr. Pettis, because formic acid was available and other miticides "were being approved" (coumaphos and then amitraz), the actual risk from fluvalinate-resistant mites to Canadian beekeepers "was not great."

[1086] On cross-examination, Dr. Pettis agreed that the US suffered devastating losses when fluvalinate resistance occurred. Asked if there were also devastating losses when coumaphos failed, he responded that beekeepers switched to amitraz and, if they were vigilant, they were able to stay on top of it. He also confirmed that chemical and antibiotic treatments used in beekeeping are not benign and that when a pest or disease enters Canada, there is an additional impact of the chemicals used to combat that pest or disease. On re-direct, he stated that amitraz rVar does not pose such a devastating threat because varroa alone does not kill colonies in massive numbers.

[1087] In his reply report, Dr. Pettis restated his views contained in his original report. In response to the Defendants' expert reports stating that alternative control products available to Canadian beekeepers were labour intensive, hazardous and not as effective as the hard chemicals (fluvainate and amitraz) to which the mites were becoming resistant, Dr. Pettis stated that this was true but did not preclude their use. As to 2000 and 2005 reports of early amitraz resistance (referred to below), Dr. Pettis stated that amitraz resistance was not found in extensive testing conducted from 2009 to 2014 at a USDA-APHIS lab using the Pettis Test (fluvalinate and coumaphos resistance was found). Thus, he reiterated that amitraz resistance was not reliably documented until 2020.

[1088] Dr. Caron's report states that while multiple factors are responsible for declining bee health, chief among them are varroa mites and viruses. Varroa mites are also a significant factor in the sudden collapse of bee colony populations. Dr. Caron describes fluvalinate (Apistan), which was approved for use in the US in 1990, as being highly effective in controlling the mites and that it was relatively non-toxic to bees. However, with heavy use, varroa mites developed resistance, and fluvalinate rVar had become widespread by the time of the 2003 Risk Assessment. Coumaphos was granted emergency use authorization in 1999. It seriously injured colonies, and varroa mites quickly developed resistance. In 2011, amitraz (Apivar) was granted emergency use in Canada. Dr. Caron disagreed with Dr. Pettis' view that early reports of amitraz resistance were inaccurate (citing Elzen et al 2000; Mathieu & Faucon 2000; and Sammataro et al 2005). He noted that three publications all reported evidence/suspicion of amitraz rVar; all three were published in peer-reviewed publications; and, two of the authors were USDA-APHIS scientists.

[1089] With respect to alternatives such as formic acid, Dr. Caron's report states that they are more difficult to use, more dangerous to the user and exhibit some significant negative side effects. Formic acid kills a portion of colony queens of treated colonies, kills bee brood and often causes the queen to temporarily cease egg laying. It is a caustic acid requiring the applicator to wear protective equipment. Its effectiveness is also reduced outside a narrow temperature range. Dr. Caron stated that he agreed with the 2003 Risk Assessment that there was a high likelihood that imported US honeybees would carry highly resistant varroa mites and that these would spread to previously unexposed hives. He was in total agreement with the 2013 Risk Assessment estimation of a high likelihood of importing bee packages with rVAR. At trial, Plaintiffs' counsel put to Dr. Caron that he had not considered mitigation measures in his report. Dr. Caron testified that in forming his opinion, he took mitigation measures into account in the sense that formic acid has been described as a material that could be used to reduce the risk of resistance to amitraz and agreed that it has been recommended that beekeepers alternate varroa treatments, as using only one product hastens resistance.

[1090] Both Dr. Caron and Dr. Pettis agreed that many beekeepers utilize an illegal formulation or use of amitraz, which contributes to the development of resistance.

[1091] Dr. Winston's report states that resistance to fluvalinate was first reported in Canada in 2001, but, at the time of the 2003 Risk Assessment, it was not present in all provinces and was still localized within the provinces where it had been reported. Colony losses of 30-40% were noted in the Cornwall area of Ontario where fluvalinate resistance had first been found. Coumaphos was given emergency registration in Canada in 2001 in response to the discovery of fluvalinate-resistant mites. At the time of the 2003 Risk Assessment, resistance to coumaphos was not yet extensive in Canada. Dr. Winston opined, given that the geographical range of fluvalinate resistance in Canada was still limited and that coumaphos resistance had been reported, it was sensible to have prevented further expansion through package importation that might have quickly resulted in resistant mites permeating Canada's beekeeping regions.

[1092] Like Dr. Caron, Dr. Winston did not agree with Dr. Pettis that amitraz rVar was not detected in the US or Canada until 2019 or that there were no published reports of amitraz resistance at the time of the 2013 Risk Assessment. Dr. Winston noted two of the studies also referred to by Dr. Caron, (Elzen et al (2000) and Sammataro et al (2005)), the latter of which included the statement that the "introduction of package bees and queens from other states that have resistant mites" may have explained the wide geographic distribution of amitraz resistance. Dr. Winston also noted that Dr. Pettis had sent an email to Dr. Moreau on September 22, 2013, stating, "At this point we suspect that some mites are resistant to Amitraz but have yet to fully test and verify resistance." Dr. Winston stated that given this information, CFIA was reasonably concerned that amitraz resistance could be widely present in the US. It had not been found in Canada as of 2013. The migratory nature of the US honeybee industry also supported that there was at least a moderate risk associated with package importation into Canada. At trial, Dr. Winston testified that a particular concern of his (and of CAPA) was that because fluvalinate and coumaphos resistance was so common across Canada, while amitraz resistance was not, amitraz was the only chemical left to treat varroa. Having an available synthetic that could be used

occasionally (within an IPM system) remained an important aspect of varroa management. There would be concern about resistance developing for this last available chemical.

[1093] Dr. Winston was referred to Dr. Pettis' statement that, in the US, the need for pollination has always outweighed the inconvenience of the spread of new disease, which beekeepers can learn to deal with. Dr. Winston opined that this was one of the reasons why colony mortality was so high in the US. In his view, the spread of disease was far more than an inconvenience. As to Dr. Pettis' statement in his report that in 2003 there were effective alterative controls available to Canada to allow the importation of honeybee packages, Dr. Winston stated that this was a standard that he did not know was met anywhere in North America. Formic and oxalic acid do provide some control for varroa (50-90% effective), but they are difficult to apply and are not as effective as synthetics (85-100% effective). Organic acids do have an important role in management and, ideally, beekeepers would not have to use synthetics, but the reality of beekeeping is that there needs to be an occasional option to use a synthetic if varroa transmission is to be controlled. This remained true for 2014. Dr. Winston testified that he was not asked to identify mitigation measures when he reviewed the 2003 Risk Assessment. Had he been, with respect to rVar, he did not think mitigation would be effective. While package producers could apply treatments in packages (e.g. fluvalinate or coumaphos strips or dusting with antibiotics), these measures are problematic, as increasing the number of treatments is likely to induce resistance. Mitigation is a double-edged sword. Dr. Winston testified that, other than chemicals and antibiotics, he did not see other ways of mitigating risk. The same was true for 2013.

[1094] I note here that the 2003 Risk Assessment, in the hazard assessment element, identified fluvalinate-resistant varroa mites as a hazard for a number of reasons, including that it was named on CFIA's proposed immediately notifiable list, was an OIE List B disease and was a named disease in all provinces except two. Five provinces had received emergency registration for coumaphos to treat rVar, but the evidence suggested that prevalence of rVar was then very low. Fluvalinate resistance had to be demonstrated before coumaphos could be used, and based on the evidence presented, rVar was present in those five provinces in limited areas.

[1095] The release assessment states that in the US, fluvalinate-resistant varroa mites were widespread and coumaphos-resistant mites were emerging. And, after three years of treating fluvalinate-resistant mites with coumaphos, coumaphos-resistant mites were emerging in some states. There were also reports that coumaphos was being misused, which practices were associated with rapid development of multiple resistance. The assessment states that pesticide treatments do not eliminate the mite. The purpose of this treatment is to reduce mites to a manageable level while minimizing pesticide damage to the bees. Treatment sufficient to kill all of the mites in a hive would also result in severe damage to the resident honeybee populations. The release assessment also speaks about weather conditions affecting the effectiveness of treatments and notes that, to avoid residues, treatment can only be applied when the hive is not producing honey. It explains that mites readily spread from one hive to another. Given the highly migratory nature of the US beekeeping industry, there was potential for rVar to be spread to any state, and, without movement controls, rVar could become established quickly in previously unaffected areas. It refers to a quantitative assessment of the release that estimated that over 8000 infested packages were likely to be imported each year, and, as packages typically contain 20,000 bees or more, there was potential for numerous resistant mites to be contained in each package. Given that the prevalence of resistance was increasing in the US, the proportion of packages with resistant mites imported each year would be expected to increase. Given this, the release assessment was “high” that rVar would likely be introduced through the import of packaged bees.

[1096] The exposure assessment concluded, for the reasons it set out, that rVar would likely spread quickly to previously unexposed hives in Canada. The exposure was assessed as “high,” and, overall, the time taken for rVar to become widespread would be substantially shortened.

[1097] The consequence assessment states, among other things, that varroa mite is the most important pest of honeybees and that uncontrolled varroa mite causes most hives to collapse within two years of infection. It states that hive losses may be significant where beekeepers are not aware that they have a resistance problem and that all beekeepers are advised to carry out regular resistance testing. The consequence assessment goes on to describe the treatment

available for rVar (fluvalinate, coumaphos and formic acid) and the issues with each of these. In particular, fluvalinate could no longer be used because of resistance; coumaphos was only available on an emergency release where rVar was shown to be established, there was uncertainty about its continued availability and there was evidence of resistance developing after only three years of use in the US; and formic acid is toxic and difficult to use, and its efficacy is weather dependent. It notes concern about the spread of coumaphos resistance in the US, which would leave formic acid as the only available treatment. It emphasizes the importance of keeping mite numbers at a manageable level. If rVar were imported into multiple locations, current control programs aimed at preventing its spread would be negated. It would no longer be possible to concentrate inspection efforts on known problem areas. Inspection resources would need to be increased or inspection priorities would need to change. The consequence assessment acknowledges that the initial response to a new pest is to eradicate it, but when that is no longer possible, the goal is to buy time. Delaying incursion allows for the development of natural barriers that may limit the spread and allow time for affected industries to adjust their practices to deal with the spread. For the above reasons, the consequence assessment was moderate for the honeybee industry, and spread of rVar would result in increased costs as a result of losses of hives and hive productivity, increased testing to detect resistance, the need to change treatment regimes and the inspection of hives in response to resistance problems at multiple sites.

[1098] My point here is that the Plaintiffs have stated that they are not challenging the content of the Risk Assessments, other than the lack of consideration of mitigation options. The 2003 Risk Assessment demonstrates that CFIA was well aware of the status of fluvalinate-resistant mites in the US and that coumaphos-resistant mites developed there within three years of use of that product. Further, that coumaphos resistance was very low in Canada at the time of the 2003 Risk Assessment. It found that there was a high risk of rVar being introduced by way of packaged bees and that it would likely spread quickly to previously unexposed hives.

[1099] In short, with respect to the 2003 Risk Assessment, Dr. Pettis does not take issue with the status of fluvalinate resistance at that time. He agrees that coumaphos became resistant in the US

within three years. And, at that time, it was only available as an emergency measure in Canada. Dr. Caron's evidence was that amitraz was not approved for use in Canada until 2011.

[1100] Given this, in 2003, the only available and viable control options were emergency use of coumaphos and the use of formic acid. Given the prevailing circumstances as identified in the 2003 Risk Assessment and the goal of delaying incursion of rVar to the extent possible, even if CFIA was negligent in failing to specifically address mitigation options, I am unable to find that the Plaintiffs have established, on a balance of probabilities, that "but for" that negligence, the importation of US honeybees would have been permitted. CFIA recognized all of the circumstances that Dr. Pettis outlines. CFIA could reasonably have concluded that the risks of importation would not be reduced to a tolerable level by the known, available control options (assuming that they are mitigation options). Dr. Pettis does not suggest that in 2003 there were available import conditions (such as inspection) that would have reduced the risk of importing rVar and that USDA-APHIS would have been able to certify.

[1101] As to the 2013 Risk Assessment, again, I have found above that CFIA did consider whether there were available risk mitigation options with respect to the 2013 Risk Assessment and that, accordingly, there was no breach of the standard of care in that regard.

[1102] Accordingly, and while it is not necessary to address this, I appreciate that Dr. Pettis disagrees about the extent to which amitraz resistance was known in 2013, but, in effect, that challenge is to the merits of the content of the assessment. In any event, while Dr. Pettis now challenges the early reports of amitraz resistance on the basis that, had they been true, amitraz resistance would have spread rapidly, as did the resistance to fluvalinate and coumaphos, this does not assist the Plaintiffs. CFIA's concern was with the spread of amitraz-resistant varroa mites. These were present in the US at the time of the 2013 Risk Assessment. Whether resistance there spread as quickly as it had for coumaphos (three years) or more slowly, as it had for fluvalinate (Dr. Pettis' evidence was that it was used for over ten years before there were reports that it was not effective), was not really the point. CFIA was concerned about the introduction of amitraz- resistant varroa because amitraz was the only remaining effective miticide. CFIA's goal

was to reduce the spread of amitraz-resistant varroa in Canada as much as possible, both in time and geographically.

(v) Conclusion – mitigation options for the identified hazards

[1103] Dr. Pettis, the Plaintiffs' bee health expert, does not suggest that the subject hazards would not enter Canada or that they would not spread within Canada were they to do so. Rather, his view is that importation should be permitted because beekeepers can learn to manage these hazards. To him, this is a tolerable risk and CFIA is being overcautious. However, the Risk Assessments are tools used to determine whether an importation should be permitted (if this would not, or would not be likely to, result in the introduction into or the spread within Canada of those hazards) and they assess the hazards in that context, ultimately determining if the risks are at an allowable level, the ALOR. The Plaintiffs have stipulated that they do not take issue with the identification of the hazards or the content of the Risk Assessments, other than what they omit – mitigation options.

[1104] In that regard, I have found that the same import conditions that were available for US queens were not available for US honeybee packages. Notably, package importation involves importing significantly more honeybees, which are not hand picked. This precludes visual inspection and certification for SHB and varroa. In addition, there was no SHB-free zone in the US, so zoning certification, as recommended by the OIE Code as of 2008, was not available. And, although an AHB radius was developed for queen imports, I have accepted the evidence that queen package production operations are isolated from and not in the same location as package production, and that "apiary-wide" AHB certification is therefore not applicable. Further, the feasibility and accuracy of AHB testing also support that testing would not be a viable mitigation strategy for that hazard.

[1105] With respect to rVAR and rAFB, where the concern was not merely the presence of the mites or beetles themselves, but with their resistance to treatment, evidence was tendered respecting ways in which beekeepers could choose to manage these hazards once they were

introduced into the Canadian population. However, s 160(1.1) requires that the Minister be satisfied that the importation will not, or will not be likely to, result in the introduction or spread within Canada of those hazards. In any case, there was also evidence of reasonable concerns respecting these management measures. In the case of rVar, in 2003 this included fluvalinate resistance, availability of coumaphos only on an emergency basis, potential coumaphos resistance and that organic acids came with concerns around toxicity, efficacy and difficulty in use. And, in the case of rAFB, antibiotics may mask symptoms of the disease such that pre-import inspection would be ineffective. Further, in 2003 there were concerns about resistance, that OTC was the only antibiotic approved for use in Canada and that cultural controls, such as burning and irradiation, are costly.

[1106] Thus, the Plaintiffs have not established that mitigation measures, particularly zoning, certification and inspection, would have been available for US honeybee packages with respect to AHB, SHB, rVar or rAFB. In the "but for" world, the Plaintiffs have not established on a balance of probabilities that, but for the Defendants' negligence, mitigation measures applicable to US queen imports would have been available such that the importation of US honeybee packages could be permitted, or that any other mitigation or control measures would have been available to that end.

(vi) Evidence as to an altered risk level

[1107] Finally, before leaving this issue, I note that the Plaintiffs also argue that the evidence confirms that an examination of mitigation measures would have altered the risk levels. On cross-examination, Dr. Roberts agreed that, as she had acknowledged in her report, if risk management had been taken into consideration, the risk level could have changed. Similarly, when asked whether certification that an apiary was free of AHB would mean that the risk of importing AHB in a package would be negligible, Dr. Winston agreed that, if certification had been done recently, the risk would at least be reduced. However, even if mitigation measures could or would have reduced the risk levels, this does not establish that they would have been

reduced sufficiently to meet Canada's acceptable level of risk. If they did not, then importation would not be permitted in any event.

(h) USDA-APHIS involvement/certification requirements

[1108] In response to the publication in the *Canada Gazette* of the proposed revised *Honeybee Importation Prohibition Regulations* in April 2004 seeking public comments about allowing the importation of US honeybee queens, Dr. Wayne Wehling, a Senior Entomologist with USDA-APHIS, responded with a one-page letter. He disagreed with CFIA's continued retention of the ban on US honeybee packages and stated that the ban could no longer be justified, as three of the four identified hazards are present in Canada and the fourth, AHB, posed little concern, citing an Alberta Beekeepers article. He went on to say USDA-APHIS looked forward to working with CFIA to develop export certification requirements for queen and attendant bees. Dr. Belaissaoui's testimony was that the usual response to a comment made with respect to a proposed regulatory amendment would be to send a responding letter.

[1109] It is an admitted fact that when Dr. James was conducting the 2003 Risk Assessment, she contacted the USDA-APHIS Beltsville bee laboratory, which Dr. Pettis testified was a bee diagnostic lab for the USDA-ARS based in Beltsville, Maryland, but that it was unwilling to provide any information on US honeybee disease status.

[1110] It is also an admitted fact that when the 2013 Risk Assessment was being conducted, Dr. Rajzman contacted the USDA-APHIS on May 23, 2013. She was advised that there were no honeybee movement controls in the US and no changes in bee diseases in the US for several years.

[1111] Her testimony at trial was that she had received an email from Dr. Antonio Ramirez dated March 11, 2013, advising that he had heard that there were some Canadian honeybee issues and asking if the queen protocol could be slightly revamped to bring packages into Canada. On cross-examination, the email was put to her and she confirmed its content, being that Dr. Ramirez

states that USDA-APHIS would like to request that Canada resume importation of US honeybee packages and that its understanding was that Canadian beekeepers strongly supported this. Dr. Ramirez stated the view that US packages posed little if any additional risk relative to queen imports, and, if Canada agreed, he believed only slight modifications to the existing export certificates for queen bees would be required, and APHIS would be happy to work with CFIA on this.

[1112] Dr. Rajzman testified that she responded to Dr. Ramirez advising him that a new risk assessment was then being performed and asking if he had any information that he could send about US honeybee health that could be used in the risk assessment. She did not hear back from him. She approached him again in May 2013 and a conference call was arranged. Her notes made at the time referred to the teleconference and were put to her at trial. She identified the four USDA-APHIS participants as Dr. Ramirez, Dr. Colin Stewart, Dr. Jacek Taniewski and Dr. Wayne Wehling. She testified that they provided the National Honeybee Survey, which was available online and which CFIA had seen previously, and that Dr. Wehling advised that there had been no changes in bee disease for several years and that there were no movement controls in the US. She testified that APHIS did not provide any further information and did not provide any mitigation proposal. She conveyed this information to Dr. Rheault and Dr. Moreau by email dated May 23, 2013.

[1113] On May 15, 2014, Dr. Rajzman sent Dr. Ramirez a copy of the 2013 Risk Assessment and advised him that it was the position of CFIA that the prohibition of the importation of US honeybee packages would continue, but that CFIA would continue to be open to discussion with stakeholders. Dr. Rajzman's testimony about this email was that it is Canada's practice to share risk assessments with other (exporting) countries and, if they were not in agreement, they could provide additional information. It was also a way for them to propose any mitigation measures. USDA-APHIS provided a response dated October 10, 2014. Dr. Rajzman testified that the response was concerned only with AFB and amitraz-resistant varroa. SHB and AHB were not addressed (I note that the document states that the main source of dispute involves the Risk Assessment's contention that, based on the studies cited, OTC-resistant *Paenibacillus larvae*,

which is the causal agent of AFB, and amitraz-resistant *Varroa destructor* are widespread in the United States. It makes five points in that regard.) She sent the response to the AHRA unit for evaluation. Dr. Rajzman testified that USDA-APHIS did not propose any mitigation measures. Further, that by email of September 2015 to Dr. Ramirez, she communicated that the USDA-APHIS response had been reviewed but did not trigger any changes that would significantly modify the overall risk estimate. She did not hear anything back from Dr. Ramirez or USDA-APHIS. I note in passing here that Dr. Rheault's testimony was that Dr. Moreau reviewed the US response and that Dr. Rheault instructed him that the additional references received from USDA-APHIS were to be added to the Risk Assessment and that a corresponding modification should be made.

[1114] On cross-examination, Dr. Rajzman was asked if any investigations were done to see if the queen protocol could be "revamped." She testified that the 2013 Risk Assessment established that the risks were too great for package importation. When asked if, as part of risk mitigation, she had contacted package producers in Northern California to see if they would be able to meet import conditions similar to those for US queens, or with any county or state about movement controls in package-producing areas, she testified that she did not. She explained this was because CFIA relies on communications with the central competent authority, which is USDA-APHIS. It does not go to states. If USDA-APHIS had suggested that state information might be available, then CFIA would ask USDA-APHIS to go to the individual states to gather the information. When it was suggested to her that CFIA could have put in a condition on the importation of honeybee packages that they only come from certain areas, Dr. Rajzman disagreed because it is the exporting country that sets its own zones and its own movement controls, not the importing country. CFIA does not know what the US can, or cannot, do in that regard. Dr. Rajzman testified that she did not ask Dr. Ramirez if the US would put movement controls in place, but as a professional knowledgeable in the field, he would have notified CFIA if a zone was going to be implemented. Dr. Razjman stated that if she cannot supply proposed mitigation, then it is the obligation of the US, as the exporting country, to do so if it wants to trade.

[1115] With respect to zoning, Dr. Rheault testified that zones must be defined with specific parameters to ensure that the exporting country has specific programs in place, such as traceability and tracking, to demonstrate that the zone is free of disease. The competent authority would have to demonstrate that Northern California is a disease-free zone with legislative, surveillance program and other controls in place. However, that type of information had not been received from the competent authority (USDA-APHIS).

[1116] Dr. Alexander also described zoning as being either a zone established around a disease outbreak so as not to affect trade from the rest of that exporting country, or a disease-free zone established in an area of a country free of disease that exists elsewhere within the country. He also described what information an exporting country would have to provide to the importing country to establish a zone. This would include information establishing a circumscribed and described geographical area and information about the size of the zone, what is occurring within that zone and the surveillance, movement control and monitoring in place to ensure the exporting country can confirm when the zone is changing. This information would come from the competent authority of the exporting country, which for the US is the USDA-APHIS. He testified that during his time as a chief veterinary officer [CVO] or executive director of CFIA, USDA-APHIS had never provided this type of information about a disease-free zone for honeybees, and there had been no discussion around the zoning of a particular area of the US.

[1117] Dr. Belaissaoui confirmed that the central competent authority is the equivalent of CFIA, or the federal government in Canada. It is not a state or province. Dr. Rajzman testified that it is the responsibility of the central competent authority of the exporting country to provide information about that country. In the US, the central competent authority is USDA-APHIS.

[1118] Part of Dr. Rajzman's notes from a June 7, 2022, meeting with Bee Sustainability, an Agriculture Canada industry group developed to promote the sustainability of honeybees in Canada, read, "go to USDA + ask for info" and "don't go to individual states." This was at the time of the Call for Information. Dr. Rajzman testified that her executive director, Dr. Parthi, had told her to go to the USDA-APHIS rather than to individual states because CFIA communicates

with the central competent authority of external trading partners. When asked if she was aware of why the request for information was not directed at individual states, she reiterated that CFIA deals directly with the central competent authority of foreign trading partners.

[1119] Dr. Rajzman also testified that on May 9, 2022, she sent an email to Dr. Colin Stewart at USDA-APHIS asking him for any information he had on surveillance, testing, enforcement, inspections, movement control or any kind of statistics he could provide on the honeybee breeding areas in Northern California. She was referred to the subject email string. This indicates that Dr. Stewart forwarded the email to Wayne Wehling (whom Dr. Rajzman indicated was a plant specialist at USDA-APHIS) and stated that Nancy Ting (whom Dr. Rajzman indicated was a veterinary services officer, export, at USDA-APHIS) was looking into it. His email states that "[t]here isn't anything solid for what you are looking for" and that she might find some information from the link provided. He suggested that the best bet might be to contact the California Department of Food and Agriculture for input and provided the contact information for Mark McLoughlin, although he was not directly related to bees. Dr. Rajzman testified that the link provided was to the honeybee survey that CFIA had already seen and that she had emailed Mark McLoughlin with her request (she was referred to this email at trial), but she had received no response. She advised Dr. Wehling and Dr. Stewart of this and asked if either of them would reach out to someone in California to obtain the requested information. Dr. Stewart responded that he was no longer involved in bee issues. Dr. Rajzman testified that she had not had any response from Dr. Wehling.

[1120] Dr. Dubé gave further evidence about the 2022 Call for Information. With respect to zoning, the draft document, version 3 of the *External call for information: Review of submissions pertaining to honey bee health in Canada and the United States* states that zoning is described in Chapter 4.4 of the WOAH (OIE) Code (presumably referring to the 2022 version) and requires surveillance that demonstrates freedom from the hazards at issue. The aim of zoning is to establish a disease/pest-free area in a specific area of a country. In order for CFIA, as Canada's competent authority, to recognize a foreign country's zones, the foreign country's competent authority, USDA-APHIS for the US, must submit a description of the control and surveillance

programs in place to substantiate their disease freedom claim. At the time of writing, CFIA had not received information from California or from USDA-APHIS suggesting that such a zone had been implemented. Based on CFIA's review of the control programs in place in the state of California and of the import requirements for the millions of honeybee colonies entering the state every year, there did not appear to be any evidence that a disease/pest-free area was established in the state or part of the state. Should the state, through USDA-APHIS, submit mitigation protocols or evidence of a disease/pest-free area for the hazards of concern to Canada, CFIA would conduct a thorough scientific evaluation of their impact on risks. Dr. Dubé confirmed that this document was simply explaining what would be required to consider a free zone and that CFIA had not received such information.

[1121] It is an admitted fact that on October 3, 2022, USDA-APHIS informed CFIA that there had been no changes to the national honeybee health status in the US since 2014.

[1122] As discussed above, the competent authority in Australia responded to an outbreak of SHB in Western Australia by providing comprehensive zoning and other information to CFIA, permitting it to develop acceptable import conditions. Similarly, the competent authority in Italy engaged with CFIA when the risk assessment for the importation of honeybee packages from that country was being developed. Italy identified an SHB-free zone as well as a buffer around that zone and provided mapping and other information demonstrating how the zone was maintained and enforced (see paragraphs 949-950 above).

[1123] The evidence of Dr. Rajzman was that Australia and Italy had both effected their own SHB zones and presented them to CFIA for approval. However, CFIA had not received any information from the US that it was willing to effect a zone.

[1124] In my view, it is clear from the SPS Agreement, the OIE Code, the CFIA Protocols and the above evidence that if the US, as an exporting country, wished to export honeybee packages from Northern California, or from anywhere else in the US, to Canada, then the onus was on it to provide the information necessary to satisfy Canada that the US could meet zoning, certification

or other import conditions to allow safe importation or to demonstrate that export conditions were not necessary.

[1125] I acknowledge that, on cross-examination, counsel took Dr. Belaissaoui to the CFIA Protocol 2001. Counsel suggested that, unlike the 2005 Protocol, the 2001 version, which would have been in place at the time of the 2003 Risk Assessment, does not require that a chief veterinary authority of an exporting country propose a zone for it to be considered in the risk assessment. Counsel also noted the graph on page 34, which says that a request comes from an exporting country or from the Import/Export Section of AHPD. Dr. Belaissaoui agreed the request could also come internally from CFIA. However, this does not assist the Plaintiffs in the context of the causation analysis, as the onus would still be on the exporting country to provide the information required to establish a proposed zone and necessary certification.

[1126] In that regard, information was provided in the context of the US queen importation, and the import conditions concerning same were met. While USDA-APHIS might have preferred to have been able to also export US bee packages to Canada (although Dr. Pettis' evidence was that the US does not export packages to anywhere in the world, except possibly the Middle East at one point), there is no evidence that USDA-APHIS provided data or information that would have supported an update of the 2013 Risk Assessment or a new risk assessment.

[1127] There is evidence that the USDA-APHIS engaged with CFIA respecting import conditions for honeybees in other contexts. In his affidavit, Dr. Kruger described the situation that arose in October 2009 when he became aware that varroa mites had been discovered on Hawaii's Big Island, which had previously been varroa free. Faced with this change of circumstance, he consulted internally and then with CAPA, by way of Dr. Nasr, as to whether the varroa import protocols in place for the importation of queens from the continental US and other countries could also be implemented with respect to queens from Hawaii. His affidavit states that in order for new import conditions to be implemented, the exporting country must agree to them, which involves a process of negotiation with the competent authority of that country. In this situation, he contacted Dr. Colin Stewart at USDA-APHIS, proposing the import conditions

already found in AIRS. Dr. Ramirez responded, advising that as a result of the proposal, USDA-APHIS was re-examining the existing export certificates for Hawaii and the continental US. Dr. Ramirez stated that to the best of USDA-APHIS's knowledge, both varroa mites and EFB were widespread in Canada and not under official control. USDA-APHIS opposed adding certification statements for varroa mites and wanted to remove the certification statements for EFB for that reason. Dr. Kruger then consulted with Dr. Nasr, who provided a detailed response on the status of varroa mites and AFB in Canada and confirmed that the EFB situation was similar but not as serious as AFB.

[1128] Dr. Kruger prepared a response to USDA-APHIS. This response advised that while CFIA agreed that Canada was not free of EFB, AFB and varroa, those diseases were under official provincial control. It was CFIA's mandate to ensure that the importation of federally regulated commodities, such as queen bees, would not result in the introduction into Canada, the introduction into another country from Canada, or the spread within Canada, of a vector, disease or toxic substance. The *HA Regulations* (s 160(1.1)) did not only restrict the importation of diseases from which Canada is free or for which we have official federal control, but any disease.

[1129] The email also set out the justification for the import conditions and compared the situations in the two countries. The concern was that changes in conditions would risk importing resistant varroa and AFB. Given that both varroa and AFB had only one effective and readily available treatment each (amitraz and OTC, respectively), the spread of resistance to these treatments would increase losses of bee colonies.

[1130] Dr. Kruger testified that this email was followed by a conference call between Dr. Kruger, Dr. Nasr and USDA-APHIS to discuss import conditions for Hawaiian queens. During that call, Dr. Kruger and Dr. Nasr explained the importance of maintaining similar conditions across exporting countries to slow the development of resistance to miticides in Canada, the primary concern being amitraz resistance. USDA-APHIS agreed to keep the AFB and EFB import conditions because tylosin was not registered for use in Canada for OTC-resistant AFB. USDA-APHIS requested information on provincial bee acts and regulations as well as federal

regulations. These were provided, and Dr. Kruger noted that all of the provincial bee regulations named varroa as a pest and that the provincial acts required that bees only be moved inter-provincially with a permit having restrictions. A further conference call was held, following which Dr. Jacek Taniewski advised Dr. Kruger that APHIS had agreed to Canada's proposed import requirements for Hawaiian queens and asked Dr. Kruger to work with Dr. Ramirez on the details of health certificates for export. This was accomplished, the new import conditions were implemented and the import suspension was lifted.

[1131] It is clear that, with respect to the import conditions Canada proposed for the importation of Hawaiian queens, Canada was satisfied the existing import conditions for varroa could also be applied to mitigate the new risk arising from the discovery of varroa in Hawaii. CFIA proposed these import conditions and USDA-APHIS engaged with that discussion, and even though it had initially expressed that Canada did not have an official control program for varroa (and EFB), it ultimately agreed with CFIA's proposed import conditions.

[1132] Conversely, in the case of US packaged bees, CFIA determined that mitigation measures were not available, so it did not propose import conditions. USDA-APHIS did not assert an unfair trade barrier under the SPS Agreement. It did not propose a disease-free zone for Northern California packaged bees or any certification or other mitigation measures.

[1133] The evidence laid out in detail above is significant because it establishes that it is the exporting state that must demonstrate with detailed documentation that zoning (including surveillance, biosecurity and movement control measures) and certification requirements can be met. It is exporting countries that must establish disease-free zones in their territories and provide the importing country (and/or the OIE) with satisfactory documentation supporting the establishment and maintenance of the zone. Without data and information from, and engagement by, the USDA-APHIS, CFIA would not be in a position to determine whether import conditions for US packaged bees could be implemented and/or if conditions similar to those for queen bee importation would be effective and feasible.

[1134] Further, with respect to the import conditions for US queens, whether USDA-APHIS would be able to certify that US honeybee packages are all sourced from apiaries free from SHB; that all locations from which packaged bees are sourced, and the packages (versus queen cages) themselves, can feasibly and effectively be inspected for SHB; that maps and surveillance programs for AHB would confirm that AHB has not been detected within 30 miles of the apiaries where all of the packages originated; that genetic testing for all sources of packaged bees (as opposed to queen bees, which come from limited sources/stock) has taken place; and that packages are sourced from apiaries that do not have visible clinical evidence of AFB and varroa based on an inspection of a sample within 45 days prior to export (including an alcohol wash for varroa, with treatment and retesting if the varroa load is higher than 1%) are questions of feasibility that only the USDA-APHIS can address.

(i) Conclusion on factual causation

[1135] In terms of causation, for the reasons above, I conclude that the evidence does not establish that but for CFIA's negligence in enforcing or maintaining the import prohibition – in particular, in not identifying risk mitigation options in the 2003 Risk Assessment – the importation of US honeybee packages would have been permitted. I have also found that the availability of mitigation options was addressed by CFIA in connection with the 2013 Risk Assessment.

(j) Legal causation

[1136] Legal causation is established where the plaintiff's injury is not too remote, or where the actual injury was the reasonably foreseeable result of the defendant's negligent conduct.

[1137] I determined earlier in these reasons that it was foreseeable that the Plaintiffs could suffer economic losses if the Defendants were negligent in the maintenance or enforcement of the import prohibition. The nature of the losses the beekeepers allege they experienced – that is, the

actual injury – is the precise loss that was foreseeable, namely economic loss as a result of the inability to access US packages. Accordingly, I find that legal causation is established.

iii. If the Plaintiffs had been able to import US honeybee packages but for the Defendants' negligence in maintaining and enforcing the import prohibition, then have the Plaintiffs established that they suffered economic loss because US honeybee packages were less expensive and more productive than the alternative packages that were available to them?

[1138] Because I have found above that the Plaintiffs have not met the "but for" test, I address the issue of economic loss only in the event that I have erred both on the issue of proximity and on my factual causation finding. It also bears repeating that the Defendants do not challenge that the import prohibition has the capacity to cause economic loss, general causation. Rather, they challenge the reliability of the expert economic evidence tendered by the Plaintiffs that grounds the Plaintiffs' theory of factual causation

(a) Overview of expert economic evidence

[1139] Both the Plaintiffs and the Defendants tendered expert economist witnesses. The Plaintiffs tendered Dr. Sumner and the Defendants tendered Dr. Nickerson. Each expert's evidence is summarized below.

(i) Dr. Sumner

[1140] Dr. Sumner was qualified as an expert in agricultural economics and in the economic impacts of the import restriction on US honeybee packages. In his report, Dr. Sumner described his assignment as relating to the use of economic models, data and simulation procedures to evaluate the economic consequences of the restriction on imports of packaged honeybees from the US. Specifically, he had been asked by counsel for the Plaintiffs to quantify the total economic losses, from 2007 through 2020, to commercial beekeepers (those with 50 or more

hives) in Canada caused by the continuation of the restriction on imports of packaged honeybees from the US.

[1141] His report includes a summary of his conclusions and opinions in that regard:

> 20. First, for commercial beekeepers, who operate the vast majority of hives in Canada, access to honey bee packages from the U.S. would have been an economically important tool for dealing with winter losses in their efforts to build and maintain hive health and strength as they entered the short but economically essential honey and pollination seasons.
>
> 21. Second, access to honey bee packages from the U.S. would have allowed them to reduce direct overwintering costs, and produce more honey than has been the case during the period from 2007 through 2020. These lower costs and enhanced production would have caused a larger honeybee industry with more hives and more honey production than occurred during the period from 2007 through 2020.
>
> 22. Third, commercial beekeepers in all regions of Canada have suffered substantial economic losses from the restriction on honey bee package imports in every year from 2007 through 2020.
>
> 23. Fourth, the 2020 present value of the sum of the losses from 2007 through 2020, in 2020 dollars, is $341,941,183. The calculation accounts for compound interest to report the losses of each prior year in 2020 present value terms. To check the robustness of my estimate I considered alternatives to some key parameters of my estimation methodology. I find the plausible range of the 2020 present value of losses is from about $251 million at the low end of the range to $453 million at the upper end of the range.

[1142] To check the robustness of his estimate, he considered alternatives to some key parameters of his estimation methodology. He found the plausible range of the 2020 present value of losses to be from about $251 million at the low end of the range to $453 million at the upper end of the range.

[1143] Essentially, Dr. Sumner built a mathematical model (software) to calculate the economic losses to Canadian beekeepers that he attributed to the import prohibition on US honeybee packages. To do this, he set himself eight tasks. For example, task number one was to determine the number of commercial hives in each year for each province and to determine the number of packages from the US that would have been demanded, mainly as replacements for winter losses, in each province in each year. As he describes it, the process of getting to the final compounded present value in 2020 dollars is separated into these eight tasks, each of which has several steps. These steps explain the logic of the calculations done in each equation and list the data and parameters inserted into each equation. Achieving each of these tasks includes setting various parameters.

[1144] I note that it is the assumptions made in setting some of these parameters that are challenged by the Defendants in the context of causation.

(ii) Dr. Nickerson

[1145] Dr. Nickerson was qualified as an applied economist and expert of economic, econometric and statistical analysis with respect to economic damage assessment.

[1146] Dr. Nickerson analyzed Dr. Sumner's report and reached the following conclusions:

> 15. First, I find that the model Dr. Sumner uses to develop his damage calculations is generally reasonable as it pertains to the costs of the regulation and appropriate from a conceptual economic perspective. His implementation of the model to develop his damages estimates, however, is fraught with problems. I discuss these in detail throughout this report.
>
> 16. Second, I find that Dr. Sumner made a fundamental coding error in his Excel spreadsheet. When corrected his preferred damage estimates are reduced by over $84 million.
>
> 17. Third, I find that Dr. Sumner has made additional errors that were economic in nature, and that corrections of those errors reduce his damage estimates by a substantial amount. A primary example is his comparison of package prices from different

sources that are fundamentally not comparable. Reasonable adjustments for these various errors can virtually eliminate his calculated damages.

18. Fourth, to obtain his estimates of damages, Dr. Sumner constructs a very intricate and complex spreadsheet that he uses to implement his economic model for the purpose of developing his damage estimates. His model and damage calculations require estimates of a very large number of decision variables and parameters. For a substantial number of these, I can find nothing in the available literature or statistics that support Dr. Sumner's assumptions regarding their values. Counsel for Canada has requested I assume that nothing in Canada's records or in the Plaintiffs' documents support them. My view is that Dr. Sumner essentially speculates regarding many of these values. Moreover, my expert opinion is that there is substantial uncertainty regarding a considerable number of these values. When I re-calculate Dr. Sumner's damage estimates using reasonable alternative values for these variables, I obtain damages that are always many millions of dollars less than his.

19. Fifth, a scenario in which the Canadian honey market would experience decreases in prices with increases in the quantity demanded for honey is plausible. An alternative set of assumptions regarding, which I regard as very reasonable, yields damage estimates less than half those obtained by Dr. Sumner.

20. Sixth, in finalizing his damage estimates, Dr. Sumner "compounds" and adds up past damage amounts to obtain the "present value" of those prior amounts. His calculations clearly include "interest on interest". I have been informed that the Crown's position is that this method is inappropriate and that only simple interest is allowed. I have been asked to assume that if there are damages, any pre-judgement interest on those damages would be calculated as simple interest. The use of simple interest alone instead of compound interest reduces the Plaintiffs' damage calculation by $9,911,480.

21. Missing throughout all of Dr. Sumner's report is any analyses or even recognition that the regulations might have had positive economic benefits that would cancel out or mitigate the alleged costs of regulation. If there are reduced incidents of disease, fewer mites and smaller numbers of winter losses, there would exist economic benefits to commercial beekeepers. The Plaintiffs seem to be arguing that there are simply no economic benefits to Canadian beekeepers related to the ban on sales of U.S. bee packages.

> 22. Lastly, Dr. Sumner appears to rely, at least to some extent, on responses to a survey he conducted in 2020 seeking data from commercial beekeepers. Any information from that survey must be considered unreliable. Dr. Sumner sent out approximately 150 surveys to commercial beekeepers. This is out of a population of as many as 2,000 commercial beekeepers in Canada. He received 19 responses from four provinces. Proper survey techniques are necessary to obtain reliable survey-based data. There is no evidence that Dr. Sumner used even the barest minimum of survey science in his survey execution. His response-rate was extremely small. There is no evidence of pre-testing, post-testing, tests for question construction bias, tests for response bias, tests for non-response bias, and other things that are necessary for a proper survey. Any reliance on data or information from this survey is inappropriate

(iii) Dr. Sumner's reply report

[1147] In his reply report, with respect to Dr. Nickerson's report (Dr. Sumner also addressed the report of Dr. Winston), Dr. Sumner acknowledged and corrected the four coding errors in his Excel spreadsheet model that were identified by Dr. Nickerson; added a simple interest calculation; addressed Dr. Nickerson's critique of Dr. Sumner's chosen values for parameters that were necessary to calculate damages; and, added a calculation to reflect lower damages if the opt-out beekeepers were not included in his calculation, as raised by Dr. Nickerson.

[1148] With respect to the parameters chosen, Dr. Sumner noted that Dr. Nickerson had suggested alternative values for some parameters. Dr. Sumner did not agree with those alternatives, stating, "I argue below that the available evidence and economic logic supports my initial choices, in most cases. Of course there remains a lack of precise information, but in most cases where [Dr. Nickerson] picks a plausibly lower value, a higher value is equally plausible." He then said, "As I stated in my original report, there is limited evidence about important economic features of the Canadian beekeeping industry and I was required to make judgements based on less hard evidence than I would have preferred." Dr. Sumner stated that in most cases he made little or no adjustment in his assessment of the parameters as a result of Dr. Nickerson's

report and that “the substantial and serious economic damage to Canadian commercial beekeepers remains the main conclusion of my analysis.”

[1149] In his concluding remarks, Dr. Sumner states: “My estimates of damages are conservative in that I use conservative parameters for relative productivity of US packages, conservative estimates of the package cost differential between New Zealand and US packages and a conservative estimate of the interest rate facing Canadian beekeepers.” His new best estimate using compound interest was $250,458,995. Using simple interest, it was $235,923,957.

(b) Preliminary issue – the weight of the expert evidence

[1150] The Defendants submit that Dr. Sumner’s evidence is unreliable, while the Plaintiffs take issue with Dr. Nickerson’s independence.

(i) Dr. Nickerson’s independence

[1151] The Plaintiffs submit that Dr. Nickerson’s critique of Dr. Sumner’s reports and evidence was really an advocate’s argument for his client’s position, rather than an independent expert’s assessment of the facts that may assist the court. They identify the following aspects of Dr. Nickerson’s experience and testimony as supporting that position:

a) he is a professional witness;

b) his professional witness experience is with wage/employment and mining cases, not the commercial beekeeping industry or the impact of trade restrictions;

c) despite only speaking to eight of approximately 2000 commercial beekeepers in Canada, all of whom were selected by the Defendants, he criticizes Dr. Sumner’s partial use of the results of a survey sent out to 150 randomly selected commercial beekeepers;

d) despite having the same limited data that Dr. Sumner had, and despite having no experience with the commercial beekeeping industry, he suggests the assumptions he used while recalculating Dr. Sumner’s estimate were “reasonable,” while Dr. Sumner’s judgment and experience were not;

e) despite acknowledging that the sensitivity of a model is assessed by adjusting assumptions upwards and downwards, he chose adjusting assumptions in a direction that would reduce the damages estimate – he did not recalculate by adjusting assumptions that would show an increase in the damage estimate;

f) he failed to apply a clear comparator (US queens) for what he calls a "margin" to be applied to US package prices, instead using a ratio that is eight times higher and which he acknowledged is likely not applicable;

g) he failed to conduct any reassessment of his own error in the calculation of honey prices in Canada, despite having that error identified by Dr. Sumner in a reply report two years ago; and

h) he criticized Dr. Sumner for not ascribing any value to any benefit that a ban could provide to beekeepers, but he didn't do any assessment of that benefit on his own.

[1152] The Plaintiffs rely on these and other points to argue that Dr. Nickerson is not an independent expert and that his advocacy should not be accepted over the evidence of Dr. Sumner.

[1153] I would first note that, unlike that of Dr. Winston, the Plaintiffs did not challenge Dr. Nickerson's impartiality at the time he was being qualified as an expert witness. Instead, in their closing submissions, they argue that he lacks independence, and, therefore, his evidence should not be accepted over the evidence of Dr. Sumner. I agree with the Defendants that if the Plaintiffs truly had an issue with Dr. Nickerson's independence or impartiality – based on their assertions of advocacy, all of which stem from his report – then this should have been raised in terms of the admissibility of his evidence when he was tendered to give expert evidence (see *Wise* at paras 64-65).

[1154] In any case, I am unconvinced, based on the concerns raised by the Plaintiffs, that Dr. Nickerson's evidence is not independent.

[1155] In that regard, Dr. Nickerson testified that he has been a full-time consultant for 20 years, and about 80% of his consulting work was litigation related. I am not persuaded that the mere fact that Dr. Nickerson's primary professional employment is as a litigation consultant, which

includes testifying as an expert witness, demonstrates that he is acting as an advocate for the Defendants. As the Defendants submit, Dr. Nickerson's long career as an economist in litigation does not mean that he is unable to be impartial. Rather, if Dr. Nickerson were to act as an advocate and be found to do so, that could very well be the death knell for such a career.

[1156] The Defendants also submit that the Plaintiffs' arguments that Dr. Nickerson is acting as an advocate are misconceived. They point out that in his expert report Dr. Nickerson not only pointed out Dr. Sumner's (subsequently admitted) coding error that, when corrected, reduced his damages estimate by over $84 million but also noted another coding error that, when corrected, increased Dr. Sumner's estimated damages by over $16 million. Further, in his report he states that his instructions were to make assumptions regarding costs associated with the increase in production induced by the elimination of the import ban, but that in his view those assumptions were inappropriate given the structure of Dr. Sumner's analysis, so he did not make them. In my view, this is indicative of a balanced approach, not advocacy.

[1157] I also fail to see how the fact that Dr. Nickerson's past work has been concerned primarily with labour and natural resources, rather than beekeeping, demonstrates advocacy. Dr. Nickerson's qualifications as an economist were not challenged by the Plaintiffs. In any event, if the subject matter of his past work were relevant (and I find that it is not) this would go to the weight to be given to his opinion, based on his experience, not to a lack of independence or impartiality. As to the remainder of the points listed by the Plaintiffs, I do not agree that these demonstrate advocacy. Rather, they identify the Plaintiffs' disagreement with approaches taken by Dr. Nickerson in his report to aspects of Dr. Sumner's report, or what the Plaintiffs view as gaps in Dr. Nickerson's analysis or response to Dr. Sumner's report.

[1158] In that regard, it is of note that Dr. Nickerson's evidence is that Dr. Sumner's model is sensitive to changes in inputs (parameters) and that the data underlying Dr. Sumner's input values are unreliable or nonexistent. So, for example, with respect to item e) in the Plaintiffs' above list, whether Dr. Nickerson adjusts assumptions in a direction that increases or decreases damages does not matter much – or demonstrate advocacy – in the context of demonstrating the

sensitivity of Dr. Sumner's model to such adjustments. Further, it is obvious that if different parameters are utilized, different results will be generated – in either direction.

[1159] Taken as a whole, I find that Dr. Nickerson's expert report does not lack independence or impartiality. Further, his testimony at trial was straightforward and responsive to all of the questions put to him. Nothing in his evidence demonstrated advocacy or a lack of impartiality.

(ii) Reliability of Dr. Sumner's evidence

[1160] The Defendants' position is that Dr. Sumner's evidence is not sufficient to prove general causation (the capacity to cause loss) because his opinions on the productivity of packages are based on assumptions that are not grounded on any evidence that is before this Court. Relying on *R v Lévesque*, 2000 SCC 47 [*Lévesque*] and *R v Abbey*, [1982] 2 SCR 24 [*Abbey*], the Defendants say that Dr. Sumner's conclusion that US honeybee packages are more productive than the alternatives is based primarily on speculation or assumption, rather than real data. Because Dr. Sumner relied on facts that were not established by admissible evidence that is before this Court, his opinion is of little probative value with respect to productivity (*Lévesque* at para 40; *Abbey* at 42-43).

[1161] I note that in concurring reasons in *R v Lavallee*, [1990] 1 SCR 852, Sopinka J. noted that there is a practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise, and evidence that an expert obtains from a party to the litigation touching a matter directly in issue (which was the case in *Abbey*). In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted by means of decision within that expertise. Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. "The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with

no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight" (900). What is required is that there be some admissible evidence to establish the foundation for the expert's opinion. However, the more the expert relies on facts not proved in evidence, the less weight may be attributed to the opinion (in the context of jury instruction). See also *R v Saul*, 2015 BCCA 149 at para 37.

[1162] In my view, making a determination of whether there is some admissible (or reliable) evidence to establish the foundation of Dr. Sumner's expert opinion requires an examination of Dr. Sumner's evidence with respect to the basis for the assumptions that underlie the parameters challenged by the Defendants.

(c) Challenged assumptions

[1163] I first note that Dr. Sumner's report addresses many factors in arriving at his estimated damages. These are not all addressed by the Defendants. Rather, their position is that causation in fact has not been established because the Plaintiffs' evidence does not demonstrate that US packages are more productive or less expensive than the alternatives, taking benefits into account.

[1164] The Defendants say that the sources of information on which Dr. Sumner based his assumptions vary. The prices for New Zealand packages were derived from a survey conducted by the Province of Alberta with hundreds of respondents; total production costs were also derived from Government of Alberta data. Other assumptions (overwintering as a share of total costs) were derived from a survey Dr. Sumner conducted. The relative productivity of New Zealand packages, US packages, splits and donor hives were not derived from any formal study; instead, Dr. Sumner relied upon his survey, conversations with the Plaintiffs and Canadian beekeepers he could not identify, conversations with US beekeepers without experience making splits in Canada and discussions with unnamed other experts. While Dr. Sumner agreed with Dr. Nickerson's assessment of the quality of the data on which Dr. Sumner had relied, he believed that he had made the best judgment of productivity he could.

[1165] The Defendants say that none of those assumptions is sufficiently reliable to demonstrate that, on a balance of probabilities, the class suffered a loss from the inability to import US packages.

(d) Challenged assumptions – comparative productivity

(i) New Zealand package productivity

[1166] Dr. Sumner's report states that packages imported from New Zealand and other places were less productive than US honeybee packages, which would have replaced the New Zealand imports had US imports been allowed. He states that the hives (packages) arrive later, are stressed from air travel and are off season for the Northern Hemisphere. He states that their honey production per colony is around 70% or less of a normally overwintered hive (Dr. Sumner set a healthy overwintered colony that remained at full strength as the reference, or "normal," colony, representing 100%).

[1167] Dr. Winston's report provides his opinion that, while a majority of Canadian beekeepers may believe that New Zealand packages are inferior to the formerly imported US packages, Dr. Winston was aware of no studies that would support the very specific 70% figure.

Splits and Donor Hives

[1168] Dr. Sumner's report indicates that another impact on honey production is the lower yield of donor hives relative to those left intact. There would have been fewer splits if US honeybee packages had been available. He states that the productivity of donor hives is about 95% of a normal hive. A split has honey production of about 60% of a normally overwintered colony. However, the important parameter for the impact analysis is the average honey production of split and donor colonies, which is a bit less than 80% of the productivity of a normal colony.

[1169] When asked at trial about the relative productivity of donor hives, Dr. Winston testified that he was only aware of research in British Columbia indicating that donor hives can have

equal productivity to an overwintered hive, but he would not know of data from other parts of the country.

[1170] Dr. Winston's report indicates that while honey production may be lower for splits in the first year, this would depend on the number of splits, queen quality, colony health and other factors. Dr. Winston's testimony at trial was that without that information, the origin of Dr. Sumner's 60% figure cannot be ascertained. Further, Dr. Winston's research in British Columbia indicates that two or three nuclei can be taken from a colony and that colony will still produce the same amount of honey as colonies from which no nuclei are taken. His research suggests that the 60% number, at least for British Columbia, is a considerable underestimate.

US package productivity

[1171] Dr. Sumner estimated that the average amount of honey that could be obtained from a colony created in the spring from an imported US package is about 85% of a normal hive. As to the source of these figures, a footnote indicates that Dr. Sumner's estimates are based on information from several active beekeepers who operate in short-season honey regions.

[1172] Dr. Winston testified that he was not aware of any data to support that a US package has productivity of 85% of a normal hive.

[1173] In his report, Dr. Nickerson raised three issues with Dr. Sumner's assumption that US packages would yield 85% of the honey produced by a normal colony. First, his actual estimate was 84%; second, this information could not have come from Canadian beekeepers, as they have not had access to US packages since 1987; and third, based on conversations with Canadian beekeepers who recalled using US packages in the 1980s, Dr. Nickerson's sense was that 85% may be an overestimate. Accordingly, he tested for the sensitivity of damage estimates to the value used by Dr. Sumner. Using 84%, Dr. Sumner's actual estimate, reduced the damages by $10 million. To Dr. Nickerson, this further suggested that Dr. Sumner's estimates are very sensitive to the value he chooses for that parameter.

[1174] Asked about this on cross-examination, Dr. Nickerson stated that he took issue with the assumptions in the sense that both Dr. Sumner and Dr. Winston agreed that there is no data and no study that points to the productivity of US colonies either before or during the prohibition or now.

[1175] Of note in this exchange, Dr. Nickerson pointed out that in his report he stated that his sense was that the US package productivity value might be an overestimate and:

> I will say now that I have – I have no idea what that productivity number is, and I don't think Dr. Sumner does, and I don't think Dr. Winston does.

Source of productivity figures, generally

[1176] In his testimony, Dr. Sumner confirmed that his productivity figures are not based on formal studies, as, to his knowledge, no studies exist. Respecting his conclusion that US packages are more productive, on cross-examination, Dr. Sumner stated that he received "a handful" of responses to his survey and that he had conversations with Canadian and US beekeepers about losses and the lower productivity of splits in a short season. He confirmed that the Canadian beekeepers he spoke with were Mr. Gibeau, Mr. Lockhart and Mr. Paradis but stated that he had talked to other beekeepers over the years. He acknowledged that US beekeepers would not have experience in making splits in Canada. Dr. Sumner stated that he made relatively little direct use of the survey information in determining productivity and that it was a supplementary source, given its relatively small sample of responses. The other information came from articles in bee magazines and academic articles, but there were no academic articles specifying the parameters for relative productivity. He agreed that the one question in the survey that concerned how colony replacement methods perform did not allow him to determine the specific relationship between those production numbers, just a relative sense of positions.

[1177] In sum, he stated that his determination of the productivity values was based on his judgement in talking to people, the survey responses and beekeepers in other places.

[1178] Dr. Winston's report states that he was not aware of any published data after 1987 that would support Dr. Sumner's relative productivity values, which are quantitatively quite specific.

[1179] Dr. Nickerson testified that he found no research studies or scientific statements indicating that the productivity of the various types of hives (splits, nucs, donor colonies, normal colonies) was a certain percentage of a "normal" hive or other studies pertaining to productivity. Dr. Nickerson testified that the Plaintiff beekeepers seemed to have varying opinions on productivity. Dr. Nickerson had also spoken with eight opt-out beekeepers, a few of whom talked about productivity (on cross-examination, Dr. Nickerson did not dispute that the notes of the discussions with the opt-out beekeepers indicated that only one spoke to productivity) and who seemed to have varied views on what they thought the productivity of the various colonies was. Asked what impact, if any, those conversations had on his opinion, he testified that in terms of his general opinion, they had no specific impact. The discussion with the opt-out beekeepers and the testimony of the Plaintiff beekeepers gave him a good idea of the variability and the differences that exist in the Canadian beekeeping industry.

[1180] The Defendants, in closing written submissions, refer to the read-in of the discovery of Mr. Lockhart to suggest that the Plaintiffs had no information on comparative productivity. Mr. Lockhart indeed stated that, for his part, there was no record-keeping or assessment of the relative productivity of hives.

[1181] As to the survey conducted by Dr. Sumner, Dr. Nickerson said that the survey was intended to collect information about Canadian beekeeping practices. However, no scientific standard was used for the survey. There was no pre-design or testing of questions, the people to whom the survey was sent were not randomly selected and there was no bias testing or follow-up questions. These are all standard measures in the survey world, but Dr. Sumner's survey did not adhere to them. This was important because these measures are taken to control for bias. In Dr. Nickerson's view, to accomplish what Dr. Sumner's survey intended, one or two relatively large surveys would be required. Given that there are between 1400 and 2100 commercial beekeepers in Canada, 300-400 responses would be needed, as the survey would be aimed at covering and

receiving responses from beekeepers of differing sizes and beekeeping practices from across the provinces. If that sort of survey were conducted, the data obtained could be utilized in statistical analysis with respect to productivity. However, Dr. Sumner's survey was not distributed by random sample, and he received only nineteen responses. Dr. Nickerson testified that the information received from the survey provided no useful data.

Culling Rates

[1182] The Defendants also point out that Dr. Sumner assumes that while the import prohibition has been in place, beekeepers have culled 5% of the colonies that they expect to lose in the winter. He assumes that if low-cost, high-quality US packages were available, the cull would increase to 80%.

[1183] Dr. Sumner states in his report that his judgment on culling is based on high culling rates before the import prohibition and documented profitability of culling to reduce winter losses.

[1184] Dr. Winston's evidence was that beekeepers' decisions about whether to cull colonies in the fall are based on many factors (weather, disease and pest levels in colonies, whether the beekeeper was trying to increase, decrease or maintain their colony numbers, etc.). To his knowledge, there is no standard wisdom or scientific studies suggesting either a 5% cull rate currently, or an 80% cull rate if package importation from the US were permitted. Dr. Winston also stated that it was not clear how the 80% figure arose, as he was not aware of any studies or common practices that would suggest that an 80% cull rate was recommended or practiced prior to 1987. And, even if it were, beekeeping in Canada is quite different today than it was in 1987, so that an assessment from before the border was closed in 1987 would be "almost meaningless" today.

[1185] Dr. Nickerson's report found the 5% cull rate to be an odd assumption in that it requires beekeepers to know in advance what their losses will be in the oncoming winter, nor could he find any source to support Dr. Sumner's assumed value of 5%. To test for sensitivity of damage estimates to the value assumed for this decision variable, Dr. Nickerson re-estimated the

damages value of the culling rate using 10% and 25%. The reductions in estimated damages were $20 and $81.5 million. Dr. Nickerson stated that Dr. Sumner's damage estimates are very sensitive to the value assumed for this decision variable.

[1186] Dr. Nickerson's report also states that Dr. Sumner's assumption that if beekeepers had access to US packages, they would cull 80% of their anticipated winter losses was an odd assumption. It required knowledge of what the upcoming losses would be. Further, Dr. Nickerson found no definitive data for the period prior to the import prohibition indicating how common the practice was of killing bees before winter. Dr. Nickerson cited a 1982 article indicating that, over the period from 1977-1981, the average number of packages imported was about 321,000, while the total number of colonies in Canada was about 586,000. Based on this, Dr. Nickerson stated that while the practice of killing bees in the fall and buying packages in the spring was common, a considerable number of colonies in Canada were apparently overwintered. Dr. Nickerson also cited an article by Dr. Winston published in 1986 that said, "There has been a tremendous increase in colony overwintering during the last 10 years, so that more than half of Canada's 530,000 colonies are now overwintered." Dr. Winston attributed this to "both concerns about the availability of imported bees in the future and to economic analyses showing higher profits per colony from overwintered colonies than from packages." Dr. Nickerson also stated that his conversations with Canadian beekeepers suggested that they had adapted substantially since 1987 in their ability to overwinter bees, and if they had had access to US packages, they may not have purchased them. Based on this, the assumed 80% cull rate seemed high, so Dr. Nickerson re-calculated damages for four alternative values of this decision variable ranging from 50% to 10%. The resulting reductions in damages for each of these changes were large (50% - $40.3 million; 35% - $63.2 million; 20% - $84.4 million; 10% - $97.7 million). On cross-examination, Dr. Nickerson confirmed that he had not done a re-calculation using alternate values higher than 80% or less than 5%.

Honey production

[1187] With respect to determining the loss attributable to the value of forgone honey that would have been produced but for the importation prohibition, one of the values assumed by Dr. Sumner was that 95% of winter losses would be replaced with imported colonies (packages).

[1188] Dr. Winston's report states that this figure was clearly incorrect. Even during the heyday of package importation, only about half of Canadian colonies were established each spring from packages, with the other half overwintered. Splitting colonies in the spring to make up winter losses was common for beekeepers who overwintered pre-1987. While some beekeepers who overwintered might prefer to make up losses with packages, some with splits, Dr. Winston was not aware of any studies or information that would support Dr. Sumner's 95% prediction. Given the success of current beekeeping management systems that depend on splitting colonies in spring or summer, his view was that it was reasonable to assume that some or even many beekeepers would prefer to continue with that system.

(ii) Analysis on Productivity

[1189] As a starting point, I note that a focus of Dr. Nickerson's report is the assumptions utilized by Dr. Sumner, in that they are not based on hard data, and the sensitivity of his model.

[1190] Dr. Nickerson testified that Dr. Sumner's model is very large and complicated. It has fourteen parameters, another fifteen variables and 1600 different arithmetic or mathematical expressions that go into a total. Built into the model is a dependence on a number of parameters (such as the ones described above). The model and the outcomes from it are extremely sensitive to changes in those parameters. For many of those parameters, Dr. Sumner had to come up with a figure on his own, as there was no data available.

[1191] Dr. Nickerson takes issue with Dr. Sumner's figures because certain of the numbers used in the model are not based on concrete data. This is of particular concern because the model is so

sensitive to changes in parameters. Dr. Sumner's own sensitivity numbers took the productivity numbers and changed them by 2.5% and 3%. At 2.5 %, his damages number changes by close to 50%. A 10.5% change would result in a change in the damages down to zero on one end and up to $570 million on the other end.

[1192] I accept Dr. Nickerson's view that any assumptions based on the information from the survey conducted by Dr. Sumner must be considered unreliable.

[1193] I also accept, and as Dr. Sumner acknowledged, that in the absence of data, Dr. Sumner relied on assumptions based on his best judgment. This appears to have been informed by a conversation or two with the Plaintiff beekeepers, US beekeepers over the years and informal information such as bee magazine articles.

[1194] I accept that Dr. Sumner's model was highly sensitive to the parameters that he selected, some of which were based on his assumptions.

[1195] These factors together bring into question the accuracy and reliability of Dr. Sumner's figures.

[1196] However, the Defendants assert that Dr. Sumner's conclusions are of limited probative value on the relative productivity of US packaged bees because his various assumptions with respect to productivity, and a number of other costs, are not based on admissible evidence that is before the Court.

[1197] In my view, while the evidence establishes that Dr. Sumner's productivity parameters (the percentages he assigned, as discussed above) are not based on data from studies that would support those figures, it is agreed by all of the experts that this data simply does not exist. In the result, Dr. Sumner selected figures that he thought were reasonable. Dr. Nickerson utilized alternative figures that, in his view, were reasonable. In the result, with respect to productivity,

the damages estimate generated by Dr. Sumner involves some significant uncertainty given the lack of data and the sensitivity of his model. This affects the probative value or weight to be given to those figures. This may well have negatively impacted any subsequent damages assessment, but I am not persuaded that the productivity figures are of no probative value with respect to causation.

[1198] Further, the fact that some of the assumptions as to productivity may be unsupported by published data does not demonstrate that there was no loss. For example, on cross-examination counsel for the Defendants asked Dr. Sumner whether, if a split produced an amount of honey similar to that produced by a normal production colony, the number calculated for the loss by this model would be negative. Dr. Sumner stated that subject to every other number in the spreadsheet remaining the same, then yes. If splits were actually better than anything else that could be done, other than having a full hive, then that was exactly what the spreadsheet would show. Counsel for the Defendants acknowledged that this was perhaps a somewhat extreme example. Counsel then asked Dr. Sumner whether, if the US package productivity figure were changed in his model from his 85% to 56%, there would be no loss. Dr. Sumner agreed that this would be the calculation. If every other parameter in the model stayed the same and if US packages were less productive than the alternative, then the loss would be $1 million.

[1199] As I stated at the time, this simply demonstrates a theoretical change (not based on data) that theoretically could show that there was no loss. In my view, by this exercise the Defendants were essentially picking a figure out of a hat to insert into the model to demonstrate that – based on that figure – the model would calculate no loss. The problem with this is that the Defendants do not provide any basis for the replacement number. Accordingly, the exercise is meaningless.

[1200] I acknowledge that the Defendants' view is that if Dr. Sumner's parameters are based only on his assumptions and not on data, then they may not be accurate (or they may be "incorrect to some degree"), and, therefore, there are concerns with him providing evidence on whether or not there was a loss. But simply challenging the assumptions upon which relative productivity parameters are based does not establish that there was no loss. Dr. Nickerson's

report, for example, demonstrates that if Dr. Sumner's assumption that 80% of the anticipated winter loss would be culled in the fall were reduced (he recalculated using four parameters, the lowest being 10%), this would result in a reduction of damages. Dr. Nickerson's report does not demonstrate that there would be no damages with respect to any of the productivity assumptions. He candidly stated that he did not know what the productivity numbers were and that he did not believe that Dr. Sumner did, either.

(iii) Price

[1201] The Defendants argue that Dr. Sumner took no account of the economic benefits of not allowing the entry or spread of diseases or pests in Canada, which they say affects the existence of a price differential between US packages and those from other sources. Dr. Nickerson testified that doing an economic assessment of the benefit of avoiding the risks associated with importation would have reduced the damages, if there were indeed benefits. While this may be so, the Defendants do not suggest that if the cost of losing colonies to diseases, pests and vectors were factored into the calculation, this would negate – in whole or with respect to the price differential – the damages asserted by the Plaintiffs.

[1202] Similarly, the Defendants submit that Dr. Nickerson disagreed with Dr. Sumner's view that the price of US packages would not rise very much if packages could be imported. Instead, he was of the view that the volume of packages Dr. Sumner suggested would be imported would cause demand pressure and increased prices and that markups by middlemen, transportation costs and any certification process in the US would also increase the prices. In his report, Dr. Nickerson appears to accept Dr. Sumner's reference to research suggesting that the supply of US packages is very elastic. Dr. Nickerson states that even if the long-run supply of packages is very elastic, it was plausible that there would be at least a moderate increase in package prices in the short run. Accordingly, he re-estimated Dr. Sumner's damages under the assumption that, following the elimination of the importation ban and a large increase in the demand for US packages, package prices would have increased by 10% in the first year, 5% in the second, 2% in the third and then returned to the prices used by Dr. Sumner. This adjustment would cause Dr. Sumner's estimated damages to be reduced by $3.1 million (from $257,280,341). Dr. Sumner, in

his reply report, stated that in economic terms, “short run” refers to a situation where demand increases suddenly and unexpectedly so that suppliers have little time to adjust to a new situation. However, he explained that there is no “short-run” supply response applicable to the calculation of damages in this case. This is because a fourteen-year period during which there has been an import restriction is compared to the counterfactual scenario in which the ban was not in place. The question is comparing two long periods, with and without an import ban. Accordingly, the applicable supply response is elastic, as is built into his calculations.

[1203] In my view, even if Dr. Nickerson’s figures on price (and transportation) were preferred, this only establishes that the damages that the Plaintiffs claim they incurred with respect to price differential is reduced, not eliminated.

[1204] As a final point before leaving this issue, although I am satisfied based on my analysis of the expert evidence that the Plaintiffs have established that the inability to import US packages would have resulted in economic loss (had there been a duty of care and had the prohibition on the importation of US honeybee packages been causative, which I have found was not the case), the economic loss is also demonstrated by the testimony of the Representative Plaintiffs and Mr. Ash. These beekeepers provided evidence of the costs they have incurred related to their current management models that they say they would not have incurred had they had access to US packages

(e) Conclusion on the economic loss evidence

[1205] In conclusion on this point, I find that Dr. Sumner’s assumptions with respect to comparative productivity and price may be problematic, as is the sensitivity of his model. However, Dr. Nickerson’s re-estimation of those damages using values that he views as reasonable does not demonstrate that there was no loss. Accordingly, the Plaintiffs have established, on a balance of probabilities, that the inability to import US honeybee packages resulted in economic loss. If the matter were to have proceeded to the second stage of trial for the assessment of damages, the reliability or probative value of Dr. Sumner’s report, in whole, would

be considered in making that assessment. However, given my findings above that the Plaintiffs have failed to establish that the Defendants owed them a private law duty if care or that but for the Defendants' negligence, they would have been permitted to import US honeybee packages, this finding as to productivity and prices and resultant economic loss is of no consequence.

(f) Non-compliance with OIE obligations

[1206] As addressed above, the Defendants' position is that the SPS Agreement was unenforceable between CFIA and the Plaintiffs. I have found that the SPS Agreement is not legally binding as between the Plaintiffs and CFIA (at paragraph 732).

[1207] In the alternative, and in terms of causation, the Defendants submit that even if CFIA was not in compliance with OIE obligations, this would not invalidate the Risk Assessments. In the result, causation would not be established because, even if the Defendants were negligent respecting the Risk Assessments, those Risk Assessments would not have been invalid, and the import prohibition, which was enforced based on the Risk Assessments, would still have been in place during the Class period. Therefore, the Defendants' negligence would not be a necessary cause of the Plaintiffs' loss, as the Plaintiffs would not have had access to US packages even if the Defendants breached the SPS Agreement.

[1208] I have found above at paragraph 761 that the consequences of breaching the SPS Agreement do not include the possibility of invalidating the Risk Assessments. This further supports that the Plaintiffs have not established that, but for the alleged breach, the import prohibition would not have been in place and they would not have incurred the alleged damages.

Common Issue # 4: Whether sections 3, 8, or 10 of the *CLPA* grant any or all of the Defendants statutory immunity or otherwise limit the Defendants' liability

A. Preliminary Point – non-reliance on s 8

[1209] As a preliminary point, in their closing oral submissions, counsel for the Defendants advised that the Defendants are not relying on s 8 of the *CLPA*. Accordingly, these reasons will not address that section.

B. Analysis - Sections 3 and 10

Sections 3 and 10 of the *CLPA* state as follows:

> **3** The Crown is liable for the damages for which, if it were a person, it would be liable
>
> **(a)** in the Province of Quebec, in respect of
>
> > **(i)** the damage caused by the fault of a servant of the Crown, or
> >
> > **(ii)** the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and
>
> **(b)** in any other province, in respect of
>
> > **(i)** a tort committed by a servant of the Crown, or
> >
> > **(ii)** a breach of duty attaching to the ownership, occupation, possession or control of property.
>
> **Liability for acts of servants**
>
> **10** No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

[1210] The Plaintiffs' position is that ss 3 and 10 of the *CLPA* create the right of the Class to sue the Crown in negligence and to hold it vicariously liable for the acts of its employees and agents. The Crown can only be held liable if one of its servants acted tortiously, citing *Ingredia SA v Canada*, 2010 FCA 176 at para 36 [*Ingredia*]. The Plaintiffs say that this action is a claim in negligence against the Minister, and their agent, CFIA. Sections 3 and 10 of the *CLPA* serve to

establish the statutory basis upon which the Plaintiffs are granted the right to sue the Crown; they do not create statutory immunity.

[1211] The Defendants, referencing s 3(b)(i) and s 10 of the *CLPA*, say that Canada is not directly or independently liable, but only vicariously liable for the acts of its servants. The Defendants say that personal liability on the part of a Crown servant is required, and that institutional fault does not exist, citing *Doan v Canada*, 2023 FC 968 [*Doan*] at paras 81-91. The Defendants argue that, although the Plaintiffs' written submissions make reference to many CFIA employees, the analysis of whether there is a breach is not specific to any of them, but rather to CFIA as a whole. This is insufficient, as personal liability of a Crown servant is a precondition to Crown liability.

[1212] I do not understand the parties to disagree about the meaning and purpose of ss 3 and 10 of the *CLPA*. They agree that this is clearly set out by the Federal Court of Appeal in *Ingredia*:

> [36] Paragraphs 3(a)(i) and 3(b)(i) and section 10 of the CLPA are clear. They provide that the Crown may be held vicariously liable for damages if a claimant can demonstrate that his or her damages result from, in the province of Quebec, a fault of a servant of the Crown or, in any other province, from a tort committed by a servant of the Crown. Further, section 10 of the CLPA provides that the Crown cannot be held liable from [*sic*] an act or omission of its servants unless the act or omission complained of would "have given rise to a cause of action for liability against that servant or the servant's personal representative or succession". Consequently, the Crown can only be held liable where there is liability of [*sic*] the part of one of its servants.

[1213] Stated otherwise, "the vicarious liability spoken of in the context of the *Crown Liability and Proceedings Act* is a statutory vicarious liability; it is an exception to the Crown immunity from tort claims that existed at common law" (*Davidson v Canada (Attorney General)*, 2015 ONSC 8008 at para 49). I agree that ss 3 and 10 of the *CLPA* serve to establish the statutory basis upon which the Plaintiffs are granted the right to sue the Crown.

[1214] However, based on *Doan*, the Defendants take the view that the Plaintiffs are alleging direct or institutional negligence, rather than vicarious liability for negligence, in which case there would be no basis for Crown liability under the *CLPA*.

[1215] *Doan* was a motion to certify a class action against the Royal Canadian Mounted Police [RCMP]. The motion was dismissed. In addressing ss 3 and 10 of the *CLPA*, this Court stated:

> [83] The Supreme Court of Canada has unequivocally confirmed that the personal liability of a Crown servant is a precondition, while institutional fault or liability for actions of the Crown itself does not exist (*Hinse* at paras 91-92; *Merchant* at para 40). Per the clear language of the statute, the pleadings must disclose that a servant of the Crown committed a fault/tort.

[1216] The Court in *Doan* noted that the pleadings in that case clearly claimed the RCMP's liability and made no claims in regards to its servants, agents or officers. Ms. Doan had also confirmed unequivocally that her allegation of fault/tort was based on institutional faults committed on a systemic basis by the RCMP and was irrespective of whether any particular RCMP member committed a fault. Ms. Doan had argued that institutional faults committed on a systemic basis by the RCMP may engage the vicarious liability of the Crown under the *CLPA*, and that it was consequently not plain and obvious that her claims against the Crown as construed could not succeed. However, the Court did not agree:

> [87] I disagree with Ms. Doan. As mentioned above, the Supreme Court of Canada has clearly confirmed that the personal liability of a Crown servant is a precondition and that institutional fault or liability for the actions of the Crown itself does not exist (*Hinse* at paras 91-92). The express statutory language of the *Crown Liability Act* makes it clear that Crown liability must be grounded in the personal liability of one or more Crown servants. The case law confirms that the RCMP is not itself a legal entity capable of being sued as an institution (*Davidson v Canada (Attorney General)*, 2015 ONSC 8008 at paras 25, 57-77 [*Davidson*]; *Hinse* at para 92).
>
> [88] The decisions cited by Ms. Doan do not assert otherwise. On the contrary, they indicate that the Court has certified class actions in instances where the plaintiff sought the liability of the Crown for the wrongdoings of RCMP's agents, servants and employees or

> again RCMP designated doctors, rather than the liability of the RCMP as an institution (see e.g., *Greenwood* at paras 185-187; *Corriveau* at paras 25 29; *Nasogaluak* at paras 30, 41). The fact that there might have existed or that the parties may have raised an element of systemic liability in the context of these decisions did not distract the courts from the clear language of the statute. While it is true that it is not always necessary to identify the particular individuals for whose fault the Crown would be vicariously liable, this does not mean that the Crown, or in this case, the RCMP as an institution, can be directly liable (*Davidson* at para 76).

[1217] In this matter, in paragraph 7 of the Amended Amended Statement of Claim, the Plaintiffs identify CFIA as an agency of the federal crown established by the *CFIA Act* and responsible for the administration and enforcement of the *HA Act* and *HA Regulations.* In paragraph 24, they also state that they are relying on the *CLPA*, "especially ss. 3 and 23." I note that s 23(1) of the *CLPA* states that proceedings against the Crown (defined as Her Majesty in Right of Canada) may be taken in the name of the Attorney General of Canada or, in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be taken in the name of the agent, in the name of that agency. In paragraph 3 of the Amended Third Amended Statement of Defence, the Defendants admit paragraph 7 of the Amended Amended Statement of Claim.

[1218] Pursuant to s 3 of the *CFIA Act*, CFIA is established as a corporate body entitled to exercise powers "only as an agent of Her Majesty in Right of Canada." Its powers as an agency include entering into contracts, and s 15 states, "Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Agency, whether in its own name or in the name of Her Majesty in right of Canada, may be brought or taken by or against the Agency in the name of the Agency in any court that would have jurisdiction if the Agency were not an agent of Her Majesty."

[1219] Section 2 of the *CLPA* defines "servant" as including "agent." Section 3(b)(i) of the *CLPA* makes the Crown liable for the damages for which, if it were a person, it would be liable

in respect of a tort committed by a "servant" of the Crown. Given that CFIA is an "agent," it falls within the definition of "servant" under the *CLPA*, and, therefore, the Crown is vicariously liable for any negligence of CFIA pursuant to s 3(b)(i).

[1220] As to *Doan*, in that case the entity at issue was the RCMP, which the Court found was not a legal entity capable of being sued as an institution. This is unlike the circumstance before me, where CFIA is an agent of the Crown that is capable of being sued as such.

[1221] Further, and significantly, Ms. Doan's allegations were based on institutional faults committed on a systemic basis by the RCMP irrespective of whether any particular RCMP member committed a fault. The Court ultimately concluded that the causes of action against the RCMP that depended on the *CLPA* had no chance of success because they did not disclose a fault/tort committed by a servant, officer or agent of the RCMP, but rather argued that such a claim was not necessary to engage the liability of the RCMP as an institution. This is distinguishable from the circumstances in the matter before me. Here, CFIA is an agent of the Crown, and therefore it is a servant of the Crown, for which the Crown is liable for any damages in respect of a tort committed by it as a servant of the Crown.

[1222] While the Plaintiffs do not allege that specific individual employees of CFIA committed tortious acts for which they would be liable in their personal capacity (nor do they allege institutional or systemic negligence), as found in *Doan*, it is not always necessary to identify the particular individuals for whose fault the Crown would be vicariously liable.

[1223] As an aside, I note that other cases such as *Los Angeles Salad* and *Flying E Ranche* did not seek to establish Crown liability based on the negligence of individually named CFIA employees.

[1224] For the reasons above, I find that CFIA is a servant of the Crown as defined by the *CLPA*, and the Crown is vicariously liable for its negligence.

Common Issue #5: Whether section 50.1 of the *HA Act* applies to limit the liability of CFIA for any actions or omissions after February 27, 2015?

A. Legal backdrop

[1225] Section 50.1 of the *HA Act*, which came into force on February 27, 2015, states as follows:

> **50.1** No person who exercises powers or performs duties or functions under this Act is liable in respect of anything done or omitted to be done in good faith in the exercise of those powers or the performance of those duties or functions.

[1226] The parties were unable to point the Court to any jurisprudence that specifically considered s 50.1 of the *HA Act*. Unsurprisingly, nor is there an explicit test for "good faith" or "bad faith." Accordingly, it is necessary to consider case law that addresses similar limitation of liability provisions in order to ascertain the applicable principles pertaining to good and bad faith.

[1227] In my view, the jurisprudence establishes that:

- The onus is on the Plaintiffs to show that the Defendants acted in bad faith (see, for example, *Entreprises Sibeca Inc v Frelighsburg (Municipality),* 2004 SCC 61 [*Entreprises Sibeca*] at paras 32, 35 and 39, where the Supreme Court of Canada found it was an error of law to place the burden of proving its own good faith on the defending municipality and that by doing so the trial judge acted in disregard of the applicable legal principles; *Sir v Prince Albert SPCA*, 2021 SKPC 8 at para 66; *Valastro v London (City)*, 2017 ONSC 773 at para 51).

- Good faith includes consideration of the state of mind of the involved public official. As stated in *Chaput v Romain et al,* [1955] SCR 834 at 856-857 [*Chaput*], which considered a good faith provision of the *Magistrate's Privilege Act*, RSQ 1941, c 18, at pages 856-7:

  > S. 7 of the Quebec statute makes it clear that it is subject to the same construction. It provides that the

> protection which the statute provides is limited to cases where the officer has exceeded his powers or jurisdiction and has acted clearly contrary to law, but acted "in good faith in the execution of his duty."
>
> What is required in order to bring a defendant within the terms of such a statute as this is a *bona fide* belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did. This rule was laid down in *Hermann* v. *Seneschal*.
>
> The contrast is with an act of such a nature that it is wholly wide of any statutory or public duty, i.e., wholly unauthorized and where there exists no colour for supposing that it could have been an authorized one. In such case there can be no question of good faith or honest motive.
>
> …
>
> The same considerations govern the expression "good faith" in s. 7: it defines the state of mind in executing a duty: the officer must have acted in "good faith", i.e., believing in facts which, if true, would have justified what he did (at p 859).

- Good faith also includes acting in accordance with the purpose of the relevant statute. In *Roncarelli v Duplessis*, [1959] SCR 121 (SCC) at 143 [*Roncarelli*], the Supreme Court of Canada, in the context of “good faith” on the part of public officials, stated that this:

> …means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

- Bad faith includes serious carelessness or recklessness. In *Finney v Barreau du Quebec*, 2004 SCC 36 at para 39 [*Finney*], the *Professional Code*, RSQ, c C-26 [*Professional Code*], included

> an immunity provision, s 193, which prohibited prosecution for acts engaged in "in good faith in the performance of their duties" or their functions as professional orders (the Barreau du Quebec being a professional order). There the Supreme Court of Canada held:
>
> > 39 These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised….

[1228] In *Entreprises Sibeca*, the Supreme Court of Canada quoted paragraph 39 of *Finney*, above, and held that:

> 26 Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it.

[1229] As noted by the Defendants, considerations in determining the absence of good faith or the presence of bad faith were summarized in *Holland v Saskatchewan*, 2017 SKQB 172

[*Holland 2017*] at para 53, citing *Deren v SaskPower and Saskatchewan Watershed Authority*, 2015 SKQB 366 at para 157 [*Deren*], as follows:

a) an intention to do harm;

b) a lack of a *bona fide* belief in facts that, if true, would stand as justification for the defendants' behaviour;

c) dishonesty of intention;

d) knowledge of circumstances which ought to put the defendant with that knowledge on inquiry;

e) behaviour that is so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that it was demonstrated in good faith.

B. Parties' positions

i. Plaintiffs' position

[1230] The Plaintiffs say that s 50.1 of the *HA Act* only shelters CFIA from liability for its good faith conduct in administering that Act. However, CFIA intentionally and continuously exceeded its jurisdiction; intentionally failed to consider mitigation measures that might bring any legitimate risks within its accepted level of risk; intentionally misrepresented to the Minister and stakeholders the ability to mitigate legitimate risks; and, exceeded its jurisdiction by taking direction from the CHC on whether to allow import permits.

[1231] The Plaintiffs say that in order for the Defendants to benefit from the immunity from liability provided by s 50.1, the Court must find that the Defendants acted in good faith and also that their conduct was within the jurisdiction of the CFIA. The Plaintiffs repeat their arguments made with respect to Common Issue #2 to argue that much of CFIA's conduct exceeded its statutory mandate.

[1232] According to the Plaintiffs, the same facts that would ground a claim based on misfeasance in public office would also support a finding of bad faith sufficient to negate the s

50.1 limitation of liability. The Plaintiffs assert that these are "analogous forms of misconduct" and can inform the Court on whether CFIA acted in bad faith. The Plaintiffs say that, therefore, CFIA's conduct that was deliberate and unlawful and that it knew was likely to cause harm to the Class is bad faith (referencing *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 23-28 [*Odhavji Estate*]).

[1233] The Plaintiffs list the following as examples of the Defendants' bad faith, or at least serious carelessness and recklessness:

a) In February 2003, Dr. Jamieson admitted to Dr. James that AHB was not a vector, disease, or toxic substance, and was thus outside of CFIA's statutory authority. He nevertheless directed Dr. James to include AHB as a hazard in the 2003 Risk Assessment because "AHB is a concern & I presume a hazard." The CFIA continued to rely on this purported risk in maintaining the prohibition following the 2013 Risk Assessment through to the present, despite it being outside the purview of the Act. It was bad faith for CFIA to rely on AHB as a basis for prohibiting US packages despite knowing that it had no lawful authority to do so.

b) The CFIA knew that it had to fulfill all the steps of a risk analysis before it could erect trade barriers, yet it did not do so in 2013/14 and it continued to rely on the 2013 Risk Assessment to reject all package permit applications thereafter, relying on the findings of the incomplete Risk Assessment. This was reckless and a continuation of the bad faith position of the CFIA that no US packages would be allowed into Canada. The position was plainly articulated by Dr. Jamieson in his directions to Dr. James in respect of the 2003 Risk Assessment, and did not falter thereafter.

c) The CFIA also misrepresented to the Minister (who is charged with making decisions about import permits under the Act) that there was no possible mitigation measures that could apply to US packages, when, in fact, mitigation had not been considered at all.

d) CFIA has improperly delegated its decision-making to CHC by establishing a condition precedent that the CHC must agree to the import of US packages. Predicating decisions on the views or desires of an advocacy group is not a science-based evaluation of the risks associated with the import of US packages after considering actual mitigation measures that could be applied. This improper refusal to properly exercise its decision-making authority effectively ensured that there would be no re-evaluation of the import prohibition, given the structural biases in CHC…. Again, this was bad faith conduct, or at least seriously careless conduct which was clearly inconsistent with CFIA's duties as a regulator.

[1234] I note Schedule B to the Plaintiffs' closing submissions refer to other documents from the Joint Book of Documents that the Plaintiffs say illustrate bad faith on the part of CFIA. I have reviewed these, but I will focus my analysis on the evidence identified by the Plaintiffs in the body of their written submissions in support of the examples laid out above. The additional references do not alter my determinations that follow.

[1235] The Plaintiffs assert that the Court must refer to CFIA's statutory authority to assess whether it has acted in good faith since s 50.1 was enacted. Further, that any acts taken by CFIA that exceed the scope of its authority and that CFIA knew would cause harm "are not actions taken in good faith and they are misfeasance in public office." The Plaintiffs submit that the Defendants' conduct is analogous to conduct that has been found to be misfeasance in public office (citing *Castrillo v Workplace Safety and Insurance Board*, 2017 ONCA 121 [*Castrillo*]).

ii. Defendants' position

[1236] The Defendants submit that CFIA employees have not been negligent and have not acted in bad faith. Rather, the evidence demonstrates that CFIA acted in good faith and in accordance with the purpose of the *HA Act*: to protect animals and the general public from the introduction and spread of pests and diseases.

[1237] The Defendants submit that every public servant acted in good faith throughout the matters at issue in this action. They list a number of examples that they say demonstrate this good faith:

a) Dr. Rajzman's evidence shows her continuing attention to honeybee matters, including through her attendance at CAPA meetings, attendance at honeybee health group meetings and forums, consultations with subject matter experts on various issues, responses to disease and pest incursions, consideration of sources of honeybee stock and interactions with competent authorities. However, there was a lack of information to support a change in honeybee health that might justify a new risk assessment and consideration of risk management measures;

b) The Call for Information in July 2022 demonstrates a good faith effort to seek information that might support committing resources to completing a new risk assessment for the importation of US honeybee packages;

c) Dr. Dubé exhibited good faith in her 2021 actions, specifically in her review of all previous risk assessments and in her consideration of a honeybee health working group, which reflect her efforts to understand honeybee health risk analysis;

d) Dr. Kochhar's June 2023 decision to conduct a new risk assessment was based on the CFIA risk assessment unit's review of the information arising from the Call for Information and his briefing by CFIA officials;

e) Dr. Kochhar testified that he was briefed on inputs that were received in response to the Call for Information and that the science branch was still reviewing the information received. He was presented with information about stakeholder interests, in terms of the complete landscape of the options. A new risk assessment was recommended, and he decided to conduct one. He testified that the most important information in his decision-making was the availability of new scientific evidence. The Defendants emphasize that Dr. Kochhar's evidence was that there was no predetermined outcome for the risk assessment.

[1238] The Defendants submit that the Plaintiffs have not proven on a balance of probabilities that there has been any conduct of CFIA officials consistent with any rubrics of bad faith. They say that CFIA officials made reasonable, informed decisions, given the entire context of inputs.

[1239] Further, that the simple act of bad faith is not independently actionable (citing *Elder Advocates* at para 78). Although the Plaintiffs refer to case law indicating that bad faith is an essential element of misfeasance in public office (*Conway v The Law Society of Upper Canada*, 2016 ONCA 72 at paras 20-21 [*Conway*]), that cause of action was not pleaded in this case. The Defendants, for their part, rely on *Conway* at paragraph 22 to state that mere negligence in the good faith performance of one's duties is not enough to establish liability.

C. Preliminary points

i. Role of bad faith

[1240] In this matter, s 50.1, the limitation of liability provision, is pleaded as a defence. This means that for the period after February 27, 2015, the Plaintiffs must establish on the balance of probabilities not only that the Defendants were negligent, and that this negligence caused the damages claimed by the Plaintiffs, but also that the Defendants engaged in conduct and decision-making in bad faith. Put otherwise, after February 27, 2015, mere negligence is not enough to ground the Defendants' liability because negligent conduct undertaken in good faith is immune from liability. The Plaintiffs must "overcome" s 50.1 in order for the Defendants to be found liable (*Holland* at para 49).

ii. Misfeasance in public office has no application

[1241] As the Defendants point out, bad faith is not a stand-alone cause of action. In *Elder Advocates*, which concerned a motion to strike, the Supreme Court of Canada held:

> [78] The law does not recognize a stand-alone action for bad faith. As the certification judge noted, at para. 408, the bad faith exercise of discretion by a government authority is properly a ground for judicial review of administrative action. In tort, it is an element of misfeasance in public office and, in employment law, relevant to the manner of dismissal. The simple fact of bad faith is not independently actionable.
>
> [79] At the hearing, counsel for the plaintiffs sought to argue that we should read the plea of bad faith as disclosing the tort of misfeasance in public office: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. Notwithstanding the difficulty of raising this interpretation of the pleadings for the first time in response during oral hearing, I do not see how this claim is sustainable at law: The facts necessary to support such an allegation cannot be extricated from the pleas of negligence and fiduciary duty, and a court is not obliged to divine causes of action apart from those deliberately pleaded and argued by a party. Misfeasance in a public office was not raised before the courts below, and I would not now accede to this submission.

[1242] It is also of note that in *Odhavji Estate*, which also concerned a motion to strike a statement of claim, the Supreme Court described the tort of misfeasance in public office as arising in one of two ways, which Iacobucci J. referred to as Category A and Category B:

"Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff" (*Odhavji Estate* at para 22).

[1243] Here, the Plaintiffs' submission appears to be an effort to fit their claim into Category B, as they state:

> Any acts taken by the CFIA that exceed the scope of its authority and which the CFIA knew would cause harm are not actions taken in good faith and they are misfeasance in public office. The CFIA knew that the erection of the trade barrier to US packages was economically harmful to the Class who were forced to import packages from overseas. In the period in question, since December 2015, the industry has continued to suffer higher than average overwinter losses, reaching a record high in 2022. The CFIA also acknowledged the industry was in crisis in 2020, and declined to consider emergency exemption measures to allow package imports from the US.

[1244] However, like *Elder Advocates*, misfeasance in public office was not pleaded in this case and, to the extent that the Plaintiffs now attempt to assert that cause of action, I decline to consider it.

[1245] Further, while the Plaintiffs assert that misfeasance in public office and bad faith are "analogous forms of misconduct" and that the same facts that would ground one would equally ground the other, this would not seem to be supported by *Elder Advocates*.

[1246] Based on their view that bad faith and misfeasance in public office are analogous, the Plaintiffs say that "CFIA's conduct which was deliberate and unlawful and that it knew was likely to cause harm to the Class is bad faith." However, the test for misfeasance in public office is not the test for bad faith. In *Odhavji Estate*, the Supreme Court described misfeasance in public office as an intentional tort distinguished by (1) deliberate, unlawful conduct in the exercise of public functions, and (2) awareness that the conduct is unlawful and likely to injure

the plaintiff. The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff establishes the required nexus between the parties. A plaintiff must also prove the requirements common to all torts, specifically, that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[1247] Paragraph 28 of *Odhavji Estate* explains the relationship of misfeasance in public office to bad faith:

> 28 As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort [of misfeasance in public office]. The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[1248] Thus, in the tort of misfeasance in public office, the bad faith element of the tort is connected to the defendant's knowledge that their conduct was unlawful. However, knowledge of harm alone will not found bad faith.

[1249] Here, although the Plaintiffs have not pleaded misfeasance, in effect they seek to apply the test for that tort to support their claim of bad faith. The result is that they have considered factors in their bad faith analysis that are relevant to misfeasance, but not necessarily to bad faith on its own, particularly knowledge of harm. While the Plaintiffs appear to frame CFIA's knowledge of harm to the Plaintiffs as integral to the determination of bad faith, even in the context of the tort of misfeasance in public office, knowledge of harm is itself an insufficient basis on which to conclude that a public officer has acted in bad faith (*Odhavji Estate* at para 28). Nor does the case law cited above that addresses bad faith include such a requirement. Thus,

to the extent the Plaintiffs' submissions on bad faith refer to the Defendants' knowledge of harm, they conflate the test for misfeasance with the analysis of bad faith.

iii. Purpose of legislation

[1250] As the Supreme Court stated in *Roncarelli*, good faith on the part of public officials "means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and alien purpose…" (at para 143).

[1251] I have discussed in detail above (paragraphs 300-329) the purpose of the *HA Act* and the *HA Regulations* and have found that the legislative intent is to protect animal and human health. It is not to protect the economic interests of commercial beekeepers or any other group. I have also found that in this matter CFIA knew that the prohibition of the importation of US honeybee packages would be economically detrimental to some of those beekeepers who chose to kill their honeybees each fall and replace their stock with packages each spring. However, in the course of their duties, regulators often make decisions that have an unfavourable impact on one segment of the regulated population; this does not mean that the decision was unreasonable, negligent or taken in bad faith.

[1252] Here, unlike *Roncarelli*, there was no improper intent or alien purpose. In *Roncarelli*, the evidence established that the Quebec Liquor Commission [QLC], at the instigation of a third party, Maurice Duplessis, the Attorney General and Premier of the Province of Quebec, revoked the liquor license of a restaurant owner as punishment for the fact that he had posted bonds for the release of arrested members of the Witnesses of Jehovah. The Supreme Court found that Duplessis was not acting in the exercise of any of his official powers and that he had no authority to direct the QLC to cancel the permit under the *Alcoholic Liquor Act*, the intent and purpose of which placed complete control over liquor traffic in the hands of an independent commission. The cancellation by the QLC, at the direction of a third party, was not a proper and valid exercise of the powers conferred on it by the legislation.

[1253] The Court held that while public regulation includes discretion, this discretion is not absolute and untrammeled. It must be exercised within the purpose of the statute: “to deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred” (*Roncarelli* at para 141). Further, it found that the actions in this context amounted to malice. Thus, in *Roncarelli*, the conduct at issue was outside the purpose of the legislation, was malicious and was engaged in for an improper purpose – the punishment of the plaintiff.

[1254] *Castrillo*, relied upon by the Plaintiffs, concerned a motion to strike the statement of claim as disclosing no cause of action. As such, the facts were taken to be true. The ONCA held that the pleading of the "improper purpose," being an attempt to cut costs, was adequate to avoid the striking of that portion of the claim. This was because there was a line of authority supporting the proposition that a public authority cannot use its spending power in a manner inconsistent with its mandate. The ONCA made no findings on the merits of that position.

[1255] In this matter, the Plaintiffs do not identify an improper purpose beyond generally alleging, in the Amended Amended Statement of Claim, that the Defendants breached their duty of care by “[d]enying import permits for U.S. packages for improper purposes contrary to the statutory scheme” (at para 28(i)). However, it is not apparent from the evidence elicited at trial or from the Plaintiffs’ submissions what that alleged improper purpose was.

[1256] The Plaintiffs do assert that proof of serious carelessness or recklessness is sufficient to vitiate any immunity. This is so. However, establishing bad faith through serious carelessness or recklessness requires a “fundamental breakdown of the orderly exercise of authority… The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised” (*Finney* at para 39).

[1257] In *Finney*, the respondent launched an action against the Barreau du Quebec for breach of its obligations to protect the public based on its handling of complaints against a lawyer, Mr.

Belhassen. The Barreau sought to rely on an immunity provision found in s 193 of the *Professional Code*, which precluded prosecution for acts done in good faith in the performance of the Barreau's duties. The Supreme Court found that the *Professional Code* set out the essential purpose for which professional orders, such as the Barreau, are created. The primary objective of those orders is not to provide services to their members but to protect the public. The Supreme Court confirmed that the Barreau could not claim the benefit of the good faith immunity clause. On the facts of that case, the Barreau's lack of diligence, indifference, inaction and negligence in an urgent situation in which a practising lawyer represented a real danger to the public precluded it from claiming the immunity conferred by s 193. The "very serious carelessness" displayed by the Barreau amounted to bad faith (at para 42). The Court found, "Exceptional though the case may have been, the conduct of the Barreau in this matter was not up to the standards imposed by its fundamental mandate, which is to protect the public. The virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence" (at para 45). Thus, in *Finney*, the purpose of the grant of authority was the standard against which the conduct was measured.

[1258] In my view, and as discussed above, CFIA's mandate arises from the purpose of the *HA Act* and *HA Regulations*, which is to protect animal and human health (not the economic interests of the Class or of other agricultural sectors). The evidence in whole does not establish that CFIA acted in a manner that was seriously careless or reckless in exercising its responsibilities in that regard.

D. Specific bad faith allegations

[1259] I will now deal with the specific assertions of the Plaintiffs.

i. Statutory authority to consider AHB in the Risk Assessments

[1260] As I addressed above, at the commencement of trial the Plaintiffs provided the Court with correspondence, the stipulations, in which they advised the Defendants that the Plaintiffs'

argument regarding the duty of care in relation to the Risk Assessments relates solely to whether there was a duty of care to identify and assess risk mitigation options in those Risk Assessments. To the extent that the evidence of Canada's witnesses "relates to the adequacy of those two risk assessments in any other respect (i.e. in identifying relevant risks), such evidence is not relevant to the common issues." The Plaintiffs accordingly stipulated that they and the Class take no position on the findings that are contained within the Risk Assessments, and challenge and impugn only what they are missing and what was omitted from them; and that the content of the Risk Assessments is not at issue, except with respect to their failure to identify risk mitigation options, which, it is alleged, breached the standard of care.

[1261] I appreciate that in this context the Plaintiffs are asserting that AHB is not a vector, disease or toxic substance as required by s 160 of the *HA Regulations* and, therefore, that CFIA acted beyond its jurisdiction in relying on AHB as a basis for prohibiting importation of US honeybee packages. Nevertheless, I have some difficulty in accepting that the Plaintiffs, on one hand, stipulated that the content of the Risk Assessments – which includes the identification of the hazards assessed – was not at issue (and therefore that the Defendants need not focus the presentation of their evidence at trial on this point) and, on the other had, assert that the identification of AHB as a hazard is evidence of bad faith. On the former, I also again note the Plaintiffs themselves indicated at trial that Dr. Zagmutt's evidence concerning hazard identification was not in play in light of their stipulations. In my view, given their stipulations, it is not open to the Plaintiffs to make this bad faith argument, and this finding is determinative.

[1262] Nevertheless, I will address this argument, in the alternative, for the purposes of this analysis.

[1263] In support of their bad faith assertion, the Plaintiffs refer to a February 28, 2003, email from Dr. Jamieson to Dr. James. This email states that it seeks to provide clarification relative to AHB. In that regard, it states that the *HA Act* and *HA Regulations* permit CFIA to regulate the import of diseases, vectors and toxic substances and, as AHB is none of those, CFIA has no authority to regulate it under that legislation. However, that AHB is something that CFIA does

not want to import and that perhaps Dr. James could refer to it as a variety of *Apis mellifera*, the importation of which could/should be subject to restrictions under Environment Canada legislation. Dr. Jamieson stated that he had asked Alan Goldrosen to look into this. By reply email, Dr. James stated that, per Dr. Jamieson's comments, all sections on AHB had been removed from the Risk Assessment. Dr. Jamieson responded stating that AHB "is a concern & I presume a hazard. However, it is not a hazard controllable under our legislation." Dr. Jamieson stated that he believed that the Minister may have an onus under the *Canadian Environmental Protection Act* [*CEPA*] to have import provisions relative to AHB. Therefore, he was not asking that Dr. James remove AHB from the risk assessment. He thought it would be appropriate to include it and make reference to CFIA's obligations under *CEPA*, depending on what Alan Goldrosen advised. Dr. Jamieson stated that Dr. James was not wrong to consider AHB. It would have been more helpful if, prior to his requesting a risk assessment as per page 5 of the assessment, Dr. Jamieson had gotten clarification of the obligations of CFIA under *CEPA* or the *CEAA* (*Canadian Environmental Assessment Act*).

[1264] Dr. James put AHB back into the 2003 Risk Assessment.

[1265] In closing oral submissions, the Plaintiffs also referred to an email exchange between Dr. Snow and Dr. Nasr commencing in August 2011, a document included in the Joint Book of Documents but which was not put to Dr. Snow or Dr. Nasr at trial. In this email exchange, Dr. Snow informs Dr. Nasr that a colleague of hers had now determined that CFIA did not have the legislative mandate under the *HA Act* to regulate invasive species such as AHB. Dr. Nasr asked why CFIA considered this issue as an invasive species to be handled by Environment Canada, as his understanding was that *Apis mellifera* is regulated under the *HA Act* and that Africanized bees are a subspecies of *Apis mellifera*. Dr. Snow replied that CFIA can act to control diseases in honeybees, and it can control import for the purpose of controlling disease in animals and people. However, she stated that the *HA Act* did not give CFIA a mandate to control the import of an animal to prevent the introduction of new genetics – which is what Dr. Nasr wanted CFIA to do with AHB. CFIA could prevent AHB's entry if AHB was a risk for introducing a disease to animals or humans, but the health hazard referred to was not a disease. This differed from Asian

honeybees, where genetics were not the only issue, as CFIA was also concerned that they may introduce disease that would affect Canadian honeybees.

[1266] Dr. Nasr also stated that AHB would significantly impact human health through stinging incidents, which was the main issue in areas where they were then established. He asked if it would be appropriate for CFIA to address the issue as a health hazard to the public at large. Dr. Snow responded that Health Canada can request implementation of import conditions relating to AHB, since it is a human health hazard, and that CFIA had done so before for other issues. Similarly, import conditions could be put in place on behalf of Environment Canada. Dr. Snow stated that she would try to find a contact at Health Canada to see if this was something that could be considered, and that CFIA was not certain under whose purview stinging incidents would fall.

[1267] The 2013 Risk Assessment, which was completed after this email exchange, makes the following comments explaining the reasoning behind the inclusion of AHB:

- Although AHB is not reported in Canada, it is considered a biological hazard for the bee industry in Canada with economic impacts and represents a public health concern;
- Because it exhibits highly defensive behaviour, AHB presents a threat to public and animal health as well as to the Canadian beekeeping industry because of the significant impact on productivity and potential trade issue with live honey bee material. The introduction of AHB into Canada may necessitate changes to some established management practices;
- Given that AHB is distributed in most of the southern states, has never been detected in Canada, is named under the provincial legislation in most Canadian provinces, and represents a threat to public and animal health with economic consequences for the honey bee industry, AHB is considered a hazard.

[1268] How CFIA ultimately reached this conclusion is not apparent from the evidence before me.

[1269] In that regard, I also note that in closing oral submissions, the Defendants said, “it may well be that there was not a statutory basis on which to consider Africanized honeybees, but breach of statute does not give rise to a cause of action.”

[1270] In any event, to establish bad faith, CFIA must not only have exceeded its powers or jurisdiction; it must also have acted in a manner “wholly wide of any statutory or public duty.” That is, the act must be unauthorized, and there must exist “no colour for supposing that it could have been [authorized].” While I am of the view that CFIA knew that it was at least likely that it lacked legislative authority to regulate the importation of US honeybees as a vector, disease or toxic substance, its view that AHB could be categorized as a hazard was not wholly without rationale, as demonstrated by the section of the 2013 Risk Assessment set out above. Its consideration of AHB as such was in the context of human and animal health, which falls within the purview of the purpose of the *HA Act* and the *HA Regulations*. I find that, ultimately, this is not a situation like *Roncarelli*, where the evidence established improper intent or alien purpose. Here the subject emails do not establish an improper purpose. Nor is there a fundamental breakdown of the exercise of public authority, and the inclusion of AHB as a hazard is not “inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised” (*Finney* at para 39).

[1271] Accordingly, I am not persuaded that the Plaintiffs have established bad faith on the basis that CFIA considered AHB as a hazard in the Risk Assessments.

[1272] That said, even if the Plaintiffs’ stipulations do not remove hazard identification from consideration in this action in terms of bad faith (which I have found that they do), and even if I am wrong in my conclusion that the inclusion of AHB as a hazard did not amount to bad faith, there were still three other hazards considered in the Risk Assessments. While the Plaintiffs in their closing submissions also assert that the inclusion of SHB as a hazard exceeded CFIA’s statutory mandate, as it is not a vector, disease or toxic substance, they offer no evidence to support that SHB was included in bad faith. Further, none of the expert witnesses suggested that SHB was improperly included as a hazard and, as discussed, it is an OIE Listed disease and is

included in the Immediately Notifiable Diseases list that is Schedule VII to the *HA Regulations*. Accordingly, in my view, a bad faith finding concerning the inclusion of AHB as a hazard in the Risk Assessments, alone, would not be fatal to the Plaintiffs' reliance on the s 50.1 defence.

ii. Risk mitigation – 2013 Risk Assessment

[1273] The Plaintiffs assert that the 2013 Risk Assessment was incomplete because risk mitigation measures were not considered and that CFIA continued to rely on the incomplete Risk Assessment to reject all import permit applications for US honeybee packages. They assert that this was reckless and a continuation of a bad faith position by CFIA that no US honeybee packages would be allowed into Canada, as articulated by Dr. Jamieson in respect of the 2003 Risk Assessment.

[1274] I have found above, at paragraphs 864-870, that Dr. Rajzman reached out to the Provincial Apiculturists, and, based on their responses and CFIA internal discussions, reasonably determined that mitigation options were not available with respect to the 2013 Risk Assessment. Given this finding, the Plaintiffs' allegation of bad faith is not established. Indeed, Dr. Rajzman's reason for seeking quick responses from the Provincial Apiculturists was that, if mitigation was available, imports could be allowed in time to salvage that year's honeybee season. This is indicative of good faith.

[1275] The Plaintiffs also attribute bad faith to Dr. Jamieson's statement in the Risk Assessment Request (found in the 2003 Risk Assessment) that "[t]he absence of honeybee disease surveillance and control programs in the US and the very mobile nature of US migratory beekeepers make it impossible for the US Department of Agriculture to provide meaningful health certification for the export of honeybees to Canada." The Plaintiffs say that this comment was not true and its falsity became clear with the regulation allowing the import of queens from the US that met certification conditions in 2004. Further, that Dr. Jamieson's statement was accepted as true by Dr. James for the purposes of her risk assessment.

[1276] However, on cross-examination, Dr. James testified that this was simply background information provided by a risk manager, which is not accepted as fact by risk assessors, who instead conduct their own inquiries. As to the Plaintiffs' assertion that this statement was proven to be untrue, this is premised on the Plaintiffs' position that because the importation of US queens was permitted if they met certain conditions, including certification, the same conditions could have been applied to US honeybee packages. However, I have found above that the Plaintiffs have not established that the mitigation measures applicable to US queen importation, namely zoning, certification and inspection, would have been available and effective mitigation measures with respect to the importation of US honeybee packages.

[1277] This is all to say that there is no merit to the Plaintiffs' claim that CFIA acted in bad faith respecting the mitigation measures and the 2013 Risk Assessment. The evidence instead supports that CFIA reasonably believed that mitigation was not available.

iii. Misrepresentation

[1278] At paragraphs 864-869 and 873 above, I have dealt with the Plaintiffs' assertion that, by way of a Memorandum to the Minister, Risk Assessment on Importation of Honey Bee Packages From the United States, CFIA misrepresented to the Minister that no mitigation measures were available with respect to the importation of US honeybee packages. The Memorandum accurately states that the final 2013 Risk Assessment was sent to all CVOs and Provincial Apiculturists to determine if risk mitigating measures could be put in place to allow the safe importation of packaged honeybees from the US. It accurately states that eight out of nine of the Provincial Apiculturists determined that mitigating measures were unavailable at that time but that they wished to keep discussions open.

[1279] As there was no misrepresentation of the responses from the Provincial Apiculturists, there was no bad faith.

iv. CFIA delegation to CHC

[1280] I have addressed this allegation at paragraph 526 above and have found that CFIA did not delegate its decision-making authority to CHC. Accordingly, the assertion of bad faith based on same cannot succeed.

E. Conclusion – bad faith

[1281] For the reasons above, I find that s 50.1 of the *HA Act* applies to limit the liability of CFIA for any actions or omissions after February 27, 2015.

[1282] I would add, more generally, that viewed in whole, the evidence does not establish that CFIA – even if it were negligent in its continuation of the import ban – was acting in bad faith. The prohibition of the importation of US honeybee packages was, at its core, founded on a lack of scientific information – at various junctures – supporting that importing US honeybee packages would not, or would not be likely to, result in the introduction into or spread within Canada of a vector, disease or toxic substance.

PART V – Conclusion Overall

[1283] In conclusion, I have made the following determinations.

[1284] On the first common issue, the Defendants do not owe a duty of care to the Plaintiffs. The alleged private duty is foreclosed by the relevant legislation, the *HA Act* and *HA Regulations*, the purpose of which is to protect human and animal health. In any case, the interactions between the Plaintiffs and CFIA that are said to ground the duty of care do not do so, as they do not exceed the proper role of a regulator. Even if proximity had been found at the first stage of the *Anns/Cooper* analysis, the decision-making around the maintenance and enforcement of the import prohibition is policy, and policy immunity would apply. Further, indeterminate liability,

the chilling effect on government consultations and, in particular, the potential conflict between the public duty and the proposed private duty would serve to negate the duty of care.

[1285] Although my finding on the first common issue was determinative, in the event that I had erred, I also considered the other four common issues.

[1286] Respecting the second common issue, the Defendants met the standard of care of a reasonable regulator in similar circumstances with respect to the 2013 Risk Assessment, but they failed to do so with respect to the 2003 Risk Assessment. In particular, there is a lack of evidence supporting that CFIA turned its mind to possible mitigation measures when the 2003 Risk Assessment was complete, while there was such evidence with respect to the 2013 Risk Assessment.

[1287] As to the third common issue, to establish causation, the Plaintiffs would have to show both that, but for the Defendants' negligence, they would have been able to import US packages and that US packages were cheaper and/or more productive than other management options. I found that the Plaintiffs were able to establish the latter, but not the former. Therefore, they failed to establish that the Defendants' negligence caused the alleged economic loss.

[1288] On the fourth issue, I determined that CFIA is a servant of the Crown as defined by the *CLPA*, and the Crown is vicariously liable for its negligence.

[1289] On the fifth issue, I found that the Defendants were acting in good faith such that the s 50.1 immunity clause applies to limit their liability after February 27, 2015.

Costs

[1290] Pursuant to Rule 334.39(1), costs will not be awarded against any party in a class action proceeding unless certain specified circumstances are established. In this case, the Defendants have advised that they are not seeking an award of costs. Accordingly, no costs will be awarded.

JUDGMENT IN T-2293-12

THIS COURT'S JUDGMENT is that the class action is dismissed, there is no award of costs.

"Cecily Y. Strickland"
Judge

ANNEX A

Table of Abbreviations

A	
AAFC	Agriculture and Agri-Food Canada
AFB	American Foulbrood
AHPD, or risk managers	Animal Health and Production Division
AHRA, or the risk assessors	Animal Health Risk Assessment Unit
AIRS	Automated Import Reference System
AHB	Africanized Honeybees
AHPD	Animal Health and Production Division
AHRA	Animal Health Risk Assessment
ALOR	Acceptable Level of Risk
AAPA	American Association of Professional Apiculturists
APHIS	US Animal and Plant Health Inspection Service
B	
BCSC	British Columbia Supreme Court
BSE	Bovine Spongiform Encephalopathy
C	

CAO	Complaints and Appeals Office
CAPA	Canadian Association of Professional Apiculturists
CCVO	Council of Chief Veterinary Officers
CFIA	Canadian Food Inspection Agency
CLPA	*Crown Liability and Proceedings Act*
CVO	Chief Veterinary Officer
D	
DEFRA	Department of Environment, Food and Rural Affairs
DWV-C	Deformed Wing Virus C
E	
EFB	European Foulbrood
F	
G	
GDR	Guidance Document Repository
H	
I	
IAB	International Affairs Branch
M	
MAFRD	Manitoba Agriculture, Food and Rural Initiatives
O	

OIE	International Office of Epizootics
ONSC	Ontario Superior Court of Justice
OTC	Oxytetracycline
P	
PCR-DNA	Protocol Mitochondrial / Mitochondrial Polymerase Chain Reaction-DNA
R	
rAFB	Resistant American Foul Brood
RIAS	Regulatory Impact Analysis Statement
rVar	Resistant Varroa Mite
S	
SBPV	Slow Bee Paralysis Virus
SHB	Small Hive Beetle
SPS	Sanitary and Phytosanitary Measures
U	
USDA-APHIS	United States Department of Agriculture Animal and Plant Health Inspection Services
W	
WHOA Code (formerly known as OIE Code)	World Organization for Animal Health Terrestrial Animal Health Code
WTO	World Trade Organization

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	EDMONTON, ALBERTA
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DATED:	NOVEMBER 29, 2024

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