Federal Court  Cour fédérale

Date: 20140305

Docket: T-2293-12

Citation: 2014 FC 215

Ottawa, Ontario, March 5, 2014

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

PARADIS HONEY LTD.,
HONEY BEE ENTERPRISES LTD. AND
ROCKLANE APIARIES LTD.

Plaintiffs
(Respondents)

and

THE ATTORNEY GENERAL OF CANADA

Defendant
(Applicant)

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Defendant has brought a motion pursuant to Rules 369 and 221(1)*a*) of the *Federal Courts Rules*, SOR/98-106 [the *FCR*] for an order striking the statement of claim, in its entirety, without leave to amend, on grounds that it discloses no reasonable cause of action.

[2] At the onset the Court has changed the style of cause, as the Plaintiffs' claim is based on section 23 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

[3] The Defendant submits that the claim is deficient in that:

a) It advances a tort claim based on an alleged breach of statute which is a tort not known at law;

b) The claim is framed as one of direct liability against the Crown; it does not identify a Crown servant; and

c) The facts do not give rise to a private law duty of care.

[4] The Plaintiffs' statement of claim seeks to obtain damages based on:

1) The Defendant's 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 December 31, 2006 to the present day, thereby breaching his duty of care; and

2) The Defendant's acting without lawful authority by imposing a prohibition on, and denying import permits for, the importation into Canada of live honeybee packages from the continental United States after December 31, 2006 to the present day and abdicating his authority to an improper third party to make decisions on improper considerations.

II. The facts

[5] The import of live bees into Canada from the US was restricted in the late 1980s due to concerns about the presence of mites and other pests on such bees. From that time on until 2004, imports from the US of live bees (whether of a queen honeybee or a package of honeybees) were prohibited by the *Honeybee Prohibition Order*, 1987, SOR/87-607 and successor orders that were enacted pursuant to subsection 20(1) of the *Animal Disease and Protection Regulations*, CRC c 296 [the *ADPR*], as well as the *Honeybee Prohibition Regulations*, 1991, SOR/92-24 and its successor regulations, enacted pursuant to section 14 of the *Health of Animals Act*, SC 1990, c 21 [the *HAA*].

[6] These restrictions were based on risk assessments conducted by the Canadian Food Inspection Agency [the CFIA]. The CFIA is responsible for the administration and enforcement of the *HAA* (see the *Canadian Food Inspection Agency Act*, SC 1997, c 6, subsection 4(1) [*CFIAA*]). The last risk assessment and industry consultation regarding the risks of disease or toxic substances resulting from allowing the importation of live bees from the US was conducted in 2003. At that time, the prohibition on live bee imports from the US was continued by the *Honeybee Importation Prohibition Regulations*, 2004, SOR/2004-136 [the *HIPR-2004*], enacted pursuant to section 14 of the *HAA*, subject to an exception which allowed the Minister to issue an import permit to import queens.

[7] The Minister's authority to issue a permit arises pursuant to section 64 of the *HAA* and sections 12 and subsection 160(1.1) of the *Health of Animals Regulation*s, CRC, c 296 [the *HAR*]. Subsection 160(1.1) of the *HAR* specifies that if the Minister is satisfied that the issuance of the

permit "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", he may grant it.

[8] Between 2004 and 2006 the Minister exercised his discretion under subsection 160(1.1) of the *HAR* to grant such permits for the importation of queens from the US, however the importation of packages of honeybees remained subject to the prohibition. The prohibition under *HIPR-2004* expired on December 31, 2006 and has not been renewed by Regulation or formal Ministerial Order or Directive. Notwithstanding the expiry of the *HIPR-2004* prohibition, the Defendant has continued to enforce a complete prohibition on the import of honeybee packages from the US, but has continued to grant permits for the importation of US queens pursuant to subsection 160(1.1) of the *HAR*.

[9] The Plaintiffs allege that after the prohibition lapsed, imports of US packaged honeybees became subject to the same administrative scheme (sections 12 and 160 of the *HAR*) that governed US queen bee imports and live animal imports in general, but that the Defendant imposed a *de facto* prohibition notwithstanding this change (see the Plaintiffs' Statement of Claim of December 28, 2012, page 7). The Plaintiffs argue that by prohibiting and denying them an opportunity to obtain permits for the importation of US honeybee packages the Defendant has breached his duty of care and acted without lawful authority.

III. Points in issue

A. Is it plain and obvious that the Plaintiffs' claim for acting without lawful authority is bound to fail?

B. Is it plain and obvious that Plaintiffs' claim in negligence is bound to fail? and

C. Should costs be awarded?

IV. Parties' position

A. The Defendant's position

[10] The Defendant, in his reply representations, claims that the Plaintiffs cannot amend their statement of claim because the pleadings have been closed since February 8, 2013, when they filed their statement of defence (see Rule 202 of the *FCR*). The Defendant argues that the Plaintiffs' proposed amended statement of claim is improper and should be struck or wholly disregarded, as should any paragraphs referring to it in the Plaintiffs' response written representations (see the Defendant's reply to motion record at page 3, para 10). The Defendant bases his position on Rules 200 and 202 of the *FCR* that Plaintiffs could not amend as of right; they are required to seek leave of this Court by way of motion.

[11] The Defendant argues that the Plaintiffs, having failed to bring forward a motion to amend their pleadings, cannot purport to do so by tendering the Proposed Amended Claim in response to the Defendant's motion to strike. Furthermore, the Defendant submits that the Plaintiffs are estopped from amending because the proceeding is case managed and the issue of scheduling

interlocutory motions addressed by the parties at the case management conference on October 1, 2013. Moreover, the Defendant claims that the Plaintiffs have admitted that the proposed amendments are not new matters of which they had just become aware (see Defendant's reply to motion record at page 4, para 12).

[12] The Defendant contends that the Plaintiffs are attempting to tender an amended claim after receiving the full benefit of the Defendant's argument on his motion. The Defendant also submits that Rule 75(2) of the *FCR* provides that no amendment is to be allowed during a hearing and argues that since the motion is in writing, the parties are in a hearing. The Defendant submits that the Federal Court has rejected attempts to file amended pleadings in response to motions to strike without leave to amend and held that no steps can be taken that could affect the rights of a moving party. The Defendant relies on the Direction of a prothonotary which cited *Bruce v John Northway & Sons Ltd*, [1962] OWN 150. The Defendant also notes that the Plaintiffs relied on *Los Angeles Salad Company Inc v Canadian Food Inspection Agency et al*, 2013 BCCA 34 [*Los Angeles Salad Company*], but this case could be distinguished because a formal application for leave to amend had been made.

[13] As to Plaintiffs' reference to *Simon v Canada*, 2011 FCA 6 at paragraph 14 [*Simon*] and *Collins v Canada*, 2011 FCA 140 at paragraph 26 [*Collins*], the Defendant argues that the pleadings in those cases had not been closed. The defendants had not filed their statement of defence prior to bringing their motions to strike; therefore, in both cases, they were entitled to amend as of right. Finally, the Defendant argues that the cases relied upon by the Plaintiffs do not appear to have been

under case management where the parties would have committed to expressly address the issue of all interlocutory motions to be heard prior or concurrently with the Plaintiffs' certification motion.

[14] The Defendant also emphasizes that contrary to the Plaintiffs' submission, he did not receive the proposed amended statement of claim on September 25, 2013. Rather, it was first seen on November 29, 2013, when he received the Plaintiffs' motion record in response to his motion to strike without leave to amend.

[15] In the alternative, the Defendant submits that the Plaintiffs' pleading in negligence is not cured by the amended statement of claim because the proper statutory construction and interpretation of the *HAA* and *HAR* do not create a private law duty of care to the individual Plaintiffs. The duties owed by the CFIA are to the public as a whole and not to any specific members of the public and the proposed amendments cannot alter this statutory intent.

i. Claim for acting without lawful authority

[16] The Defendant submits that this claim is bound to fail because there has been statutory authority to prohibit or refuse to grant a permit for the importation of US honeybee packages since January 1, 2007 to the present day. The *HAA* and the *HAR* expressly confer authority on the CFIA to make decisions on whether a "regulated animal" can be imported to Canada. The Defendant submits that this legislation generally prohibits the importation of animals unless certain conditions are met.

[17] The Defendant asserts that even if the Plaintiffs' claim that the CFIA acted without lawful authority was construed as an allegation that the CFIA failed to act in accordance with the authorizing act and regulations, this would amount to a claim of breach of statutory duty and such a claim is not a cause of action recognized in law (see *Holland v Saskatchewan*, 2008 SCC 42 at paras 7-9 and 11 [*Holland*]). He also states that the civil consequences of breach of statute are subsumed under the law of negligence (*R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at para 37 [*Saskatchewan Wheat Pool*]) and this aspect of the Plaintiffs' claim is addressed in the context of the duty of care analysis.

ii. Claim in negligence

[18] The Defendant submits that the *HAA* and *HAR* do not impose on the CFIA a *prima facie* duty of care to protect the Plaintiffs from economic loss when performing its statutory duties and exercising its statutory powers related to the importation of animals into Canada. The Defendant claims that the public purpose of the legislative scheme to protect animal health is inconsistent with a private law duty to protect the private economic and commercial interests of any individual. Moreover, the Defendant argues that the conduct alleged in the claim does not rise to the level or type of interaction for which courts have found the existence of a close and direct relationship between the regulator and the claimant. Finally, the Defendant submits that these are core government policy decisions and the prospect of indeterminate liability would negate even a *prima facie* duty of care, if such a duty exists.

[19] The Defendant outlines the analysis for determining government liability in negligence as follows. The starting point is to determine whether there are analogous categories of cases in which such a duty has been identified (see *Childs v Desormeaux*, 2006 SCC 18 at para 15 [*Childs*]). If the facts amount to a claim within a category that has previously been identified by the jurisprudence, a duty of care is established and it is unnecessary to continue the analysis. If no analogous cases exist, the question is whether a new duty of care should be recognized in the circumstances based on a two stage test to establish liability in tort, as set out in *Anns v Merton London Borough Council*, [1978] AC 728 [*Anns*].

The test

[20] The first stage is to ask whether the facts disclose a sufficiently close and direct relationship between the parties, such that it is just and reasonable to obligate one party to take reasonable care to prevent foreseeable loss or harm to the other party. These foreseeable losses must be grounded in a sufficiently close, direct or proximate relationship (see *R v Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para 41 [*Imperial Tobacco*] and *Cooper v Hobart*, 2001 SCC 79 at para 32 [*Cooper*]). In *Imperial Tobacco*, it was clarified that proximity may be established either through a statutory intent or through a series of specific interactions between the regulator and the claimant, or where it is based both on interactions between the parties and the government's statutory duties. The Court stated, in paragraphs 44-46, that:

> "**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
>
> **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".

If such proximity is found there is a *prima facie* duty of care.

[21] When a *prima facie* duty of care is found, the second stage is to verify whether there are any countervailing policy considerations that would negate that duty (see *Childs*, cited above at para 13 and *Imperial Tobacco*, cited above at para 39).

Analogous cases

[22] The Defendant submits that no analogous cases have previously recognized that the government owes a private law duty of care to be mindful of an individual's private economic interests when making a core policy decision to prohibit the importation of animals into Canada under the *HAA* and *HAR*. Neither have there been analogous cases recognizing that the CFIA owes such a duty when deciding whether or not to grant permits for the importation of animals under this legislation.

[23] Instead, the Defendant relies on the *Berg v Saskatchewan*, 2003 SKQB 456 [*Berg*] decision, which determined that there was no proximity, in circumstances that he claims are similar to the present matter. In this decision, import permits for elks were refused based on concerns that they would result in the introduction of disease in Saskatchewan pursuant to the *Wildlife Act*, 1997, SS 1997, c W-13.11 (now repealed) [the *Wildlife Act 1997*]. The Plaintiffs, in that case, alleged that the ban was negligent because made without verifying the factual circumstances and the absence of reasonable grounds for believing that the animals were or could be infected with disease. The Court concluded that the economic interests of a small group of people who may have been impacted by the operation of the *Wildlife Act 1997* must be subordinated to the greater purpose of that act which benefits the public as a whole. It also stated that the statute was not concerned with the economic impact of the permit system (see *Berg* cited above at para 76). The Defendant submits that this case is persuasive given the similarity of the allegations and the legislative schemes.

[24] The Defendant also relies on the *River Valley Poultry Farm Ltd v Canada (Attorney General)*, 2009 ONCA 326 [*River Valley*] case, in which the Ontario Court of Appeal reviewed the purpose and intent of the *HAA* and found that it did not create a private law duty of care to protect the plaintiff producer's economic interests (see *River Valley* at paras 66-83).

[25] The Defendant distinguishes the *Adams v Borrel*, 2008 NBCA 62 [*Adams*] and *Sauer v Canada (Attorney General)*, 2007 ONCA 454 [*Sauer*] cases, cited by the Plaintiffs which found either that the government owed a private law duty of care or that it was not plain and obvious that there was no duty of care, based on the legislative schemes at issue. The Defendant argues that the legislative schemes, the impugned actions and the relationship between the regulator and the claimants are not analogous to those alleged in the case at bar. In *Adams*, the Court determined that the scheme was intended to protect a limited class of producers, rather than to protect the public at large (see *Adams* at para 44). In *Sauer*, the impugned action was the failure to have taken appropriate measures to prevent the transmission of an outbreak of disease in the plaintiffs' cattle through contaminated feed.

[26] Because no courts have recognized a duty of care in a case analogous to this claim, the Defendant submits that it is necessary to consider the two part test established in *Anns*, cited above.

Application of the *Anns* test to the facts at issue

a) Step one: proximity

1) Statutory intent

[27] The Defendant claims that there are no allegations that fall outside the regulator's role and therefore if proximity exists it must arise from the governing statutes (*Imperial Tobacco*, cited above at para 49 and *Cooper*, cited above, at para 43).

[28] The Defendant argues that the *HAA* and *HAR* impose on the CFIA only duties to the public as a whole when carrying out or exercising its regulatory functions and authority. Concluding that Parliament intended there be a duty to safeguard the economic interests of individuals who wish to use imported animals in their commercial ventures would run counter to Parliament's intention to entrust the CFIA with broad regulatory authority to protect animal health for the public good.

[29] The Defendant submits that the material time in the claim is from 2007 to the date the claim was filed and therefore only the construction and interpretation of the *HAA* and *HAR* after 2007 need be addressed.

[30] The construction of the statutory scheme is central to the question of whether or not there is sufficient proximity between the parties. The Defendant refers to the *Nielson v Kamloops (City)*, [1984] 2 SCR 2 case in which it was stated that economic losses are recoverable only if, as a matter of statutory interpretation, it is the type of loss the statute intended to guard against (see pages 27 and 28 of the decision).

[31] The Defendant alleges that the *HAA* imposes obligations and prohibitions on persons in situations where animals are known or suspected of being infected with disease and grants authority to the regulator to take measures to remedy or mitigate concerns with public safety, life, health, property or the environment (see *HAA*, cited above, sections 22-28). The Defendant claims that the general provisions of the *HAA* and *HAR* are directed to the mandate of protecting animal health. As to the specific provisions regulating the importation of honeybee packages found in the *HAA*, *HAR* and *Import Reference Document*, the Defendant submits that they do not disclose a legislative intent to create a private law duty of care.

[32] For example, section 14 of the *HAA* provides that the Minister may make regulations prohibiting the importation of any animal into Canada for the purpose of preventing a disease from being introduced into or spread within the Country. Section 12 of the *HAR* enacts a general prohibition on the importation of regulated animals unless certain conditions are met, such as obtaining a permit. These provisions state:

Section 14 of the *HAA*:

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

Section 12 of the *HAR*:

> "**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".

Subsection 160(1.1) of the *HAR*, during the applicable period, provides for an exception to prohibitions on imports and reads as follows:

> "**160.** (1.1) The Minister may, subject to paragraph 37(1)(b) of the *Canadian Environmental Assessment Act*, issue a permit or licence required under these Regulations if the Minister is satisfied that, to the best of the Minister's knowledge and belief, the activity for which the permit or licence is issued would not, or would not be likely to, result in the introduction into Canada, the introduction into another country from Canada or the spread within Canada, of a vector, disease or toxic substance".

[33] The Defendant submits that if the Minister or the CFIA are not satisfied to the best of their knowledge and belief, they are not authorized to issue a permit to import animals into Canada since Parliament gave broad discretion to the Minister in order to give effect to a public duty to protect animal health in Canada. Public duties of this nature are not aimed at protecting private interests of specific individuals and do not give rise to a private law duty of care (see *Wellington v Ontario*, 2011 ONCA 274 at para 44). The Defendant rejects the Plaintiffs' argument that the *HAR* require the decision to issue or not to issue a permit be based on formal risk assessments conducted by the CFIA. The Defendant submits that the *HAA* and *HAR* do not contain provisions requiring risk assessments on the importation of regulated animals nor do they restrict or prescribe the kind of information upon which the Minister's or the CFIA's "knowledge and belief" is to be based. The Defendant also notes that subsection 160(1.1) of the *HAR* does not direct the Minister or the CFIA to consider the private or commercial or economic interests of individual industry participants when exercising this discretion, nor do the *HAA* or *HAR* in general.

[34] According to the Defendant, the *HAA* contemplates that individual industry participants may suffer economic loss as a result of the enforcement of or the duty to comply with the statutes and provides for statutory compensation in certain cases. The Defendant argues that it is clear, from this compensation scheme, that there is no legislative intent to create a private law duty of care.

[35] The Defendant also relies on section 50 of the *HAA* which provides for immunity and limits the Crown's liability for loss or damage suffered by persons as a result of complying with their obligations under the *HAA* and *HAR*. This statutory immunity was referred to in *River Valley*, cited above, and the Court concluded that when read together with the legislative purpose of the *HAA*, it showed an absence of proximity (see para 83). In that decision, the Court also distinguished the *Adams* case, cited above, which had found a *prima facie* duty of care to potato producers. The Court concluded that contrary to the *Plant Protection Act*, SC 1990, c 22, the *HAA* showed no legislative purpose to protect the interests of individual farmers (see para 81).

[36] Referring to allegations of law in paragraph 25 of the Plaintiffs' statement of claim, as to what the stated purpose of the restrictions on importations of bees has been, the Defendant submits that the Court is not obliged to assume that these allegations are true in a motion to strike. He also notes that there is no indication in the legislative scheme of an intention to protect the economic interests of the industry. Even if it were accepted that the purpose of the legislative scheme is to protect the economic interests of the Canadian beekeeping industry, the Defendant argues that the policy choice as to how to protect these interests is via the power to not allow possibly diseased animals to be imported rather than to allow possibly diseased animals to be imported into the Country. And even if this proposition was broadly construed as serving the economic interests of

the Canadian beekeeping industry, this does not disclose a legislative intent to protect the private economic interests of individual industry participants like the Plaintiffs (see *River Valley*, cited above, at paras 66-73 and *Berg*, cited above, at paras 76-77).

[37] The Defendant, in his reply, further refutes the Plaintiffs' submission that the legislative scheme is primarily concerned with the industry's economic interests. Noting that not all insects are regulated under the *HAA*, the Defendant underlines that honeybees are, because they generate a product for human consumption, but equally because of their potential impact on human health and the whole of the agricultural sector. The regulator must balance diverging interest in performing its functions and the primary interest is the public concern for the health of animals and the prevention of animal diseases in Canada.

[38] As to the Plaintiffs' reliance on the regulatory impact analysis statements [RIASs], which the Defendant qualifies as exclusive reliance, the Defendant submits that these RIASs are associated with specific regulations which were no longer in force during the material time of the Plaintiffs' complaint. The relevant period being January 1, 2007 to December 28, 2012, the Defendant argues that the RIASs are irrelevant as they were not applicable during the period. Moreover, although courts have received RIASs in the context of statutory construction, the Defendant emphasizes that the delegated legislation has to be interpreted in a manner consistent with the overall purpose and intent of the governing statute, in this case the *HAA* (see *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at para 38 [*Bristol-Myers*]).

[39] The Defendant underlines that the RIASs relied on by the Plaintiffs do not support their argument that the purpose of the *HAA* and *HAR* is the protection of the economic interests of the industry. The Defendant claims that they disclose a public interest which goes well beyond the beekeeping industry and refers to the RIASs of December 12, 1991 in which it is stated that the regulations control the importation of animals into Canada to prevent the introduction of diseases.

2) Interactions between the parties

[40] Referring to the *Imperial Tobacco* case, cited above, the Defendant submits it is the basis for the principle that governing statutes are relevant to the analysis of the interaction between the parties (see para 45). The Defendant argues that no specific interactions between the CFIA and the Plaintiffs were alleged in the claim and furthermore, no allegation was made that any of the Plaintiffs even applied for a permit to import bee packages from the US. The only interactions enumerated in the Claim were with the "industry", such as consultations and annual reviews of the health of Canadian bees. Defendant concludes that such interactions do not create a close and direct relationship with the Plaintiffs and points to the *Imperial Tobacco* case that establishes that the test of proximity requires specific interactions that show that the regulator "[…] through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care" (see para 45).

[41] The Defendant also relies on the *Taylor v Canada (Attorney General)*, 2012 ONCA 479 case, at paragraphs 94-95 and 97, which found that the prevailing jurisprudence applies a detailed analysis of proximity instead of a single conclusory observation such as in the *Sauer* case, cited

above. In the *Sauer* case, the numerous "public representations" declaring the intention to protect cattle farmers was sufficient to conclude that it was not plain and obvious that the claim of a *prima facie* duty of care would not succeed. However, subsequent cases such as *Imperial Tobacco* and *Attis v Canada (Ministry of Health)*, 2008 ONCA 660 [*Attis*] addressed the requirement in detail. In *Attis*, the Ontario Court of Appeal distinguished actions of government regulators in the interest of the public good and other instances where it directly interacted with specific, identifiable individuals (see para 65). When regulatory control over a product was enforced through a policy for the benefit of the public, it was concluded that there was no close and direct relationship with individual participants even though that policy might have impacts on some individuals.

[42] In sum, it is the Defendant's position that the Claim is insufficient to establish a close and direct relationship between the CFIA and the individual commercial beekeepers.

b) Step two: policy considerations

[43] The Defendant submits that if a *prima facie* duty of care is found, such a duty is negated for broader policy reasons. The Defendant alleges that two countervailing policy reasons negate any such duty: 1) the risk of indeterminate liability; and 2) the immunity of government's core policy decisions.

1) Indeterminate liability

[44] Finding that the CFIA owes a duty of care to protect the Plaintiffs' private economic interests would expose it to indeterminate liability to an indeterminate class of people (*Cooper*, cited

above, at para 37 and *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997], 3 SCR 1210 at para 62 [*Bow Valley Husky*]). The Defendant submits that there must be a principled basis to apply the duty of care to some and not to others and no such principled basis exists in this case. The Defendant notes that if such a duty of care was recognized, the CFIA could also be found to owe a similar duty of care to others, involved in other industries. In the *Attis* case, cited above, it was determined that the spectre of indeterminate liability negated the imposition of government liability. Since the *HAA* and *HAR* do not solely affect the Canadian beekeeping industry and the regime is not confined to regulating the importation of one kind of animal, the Defendant has no control over the number or kind of individuals or industries that have an interest in importing a variety of animals into Canada for commercial or other purposes, and therefore has no control over the nature and extent of the losses that could be claimed.

[45] In his reply, the Defendant submits that the Plaintiffs, in their proposed amended claim, state that there are other factions in the industry that have divergent interests in the importation ban which is different from their interest (see paragraph 26 d.1 of the Proposed Amended Claim). The Defendant submits that by doing so, the Plaintiffs are actually supporting his argument that the recognition of a private law duty of care to protect the private economic interests of every participant in the industry would create an untenable conflict of duties and would come at the expense of animal health. The Defendant refers to *Bow Valley Husky*, paragraph 64, in which the Supreme Court stated:

> "There must be something which, for policy reasons, permits the court to say this category of person can recover and that category cannot, something which justified the line being drawn at one point rather than another".

[46] The Defendant argues that no such principled basis is disclosed in the Plaintiffs' proposed amended claim or otherwise.

[47] The Defendant refutes the Plaintiffs' submission that the Minister does not have any discretion to refuse import permits if he is satisfied that the conditions in subsection 160(1.1) of the *HAR*, as amended in 2012, have been met. The Defendant argues that these allegations amount to a claim of breach of statutory duty. He also submits that these allegations would need to be pursued through judicial review and refers to *Holland* and *Saskatchewan Wheat Pool* cited above.

2) Immunity

[48] According to the Defendant, the Plaintiffs' claim challenges pure policy decisions which are immune from claims based on liability. Decisions of a political, social or economic nature do not give rise to a private law duty of care (see *A.O Farms Inc v Canada*, [2000] FCJ No 1771 [*A.O Farms*]). The Defendant refers to the *Berg* case, cited above, where the Court concluded that the complete ban imposed constituted a policy decision not giving rise to a duty of care (see para 78). Since the decision was general and not directed at a particular person and based on a broad consideration of public policy rather than facts pertaining to the individual, it was considered to have a legislative function (see *Berg*, cited above, at para 76).

[49] In his reply, the Defendant refutes the Plaintiffs' allegation that the Crown's regulatory decisions were not made in good faith. The Defendant notes that such allegations amount to a claim of misfeasance in public office or abuse of public office and the public officer allegedly responsible

needs to be identified. The Defendant submits that the failure to identify the officer is fatal to the claim and relies on *St. John's Port Authority v Adventure Tours Inc*, 2011 FCA 198 and *Collins* cited by the Plaintiffs at paragraph 33.

[50] The Defendant responds to the Plaintiffs' claim that the regulator refused to update its honeybee pest information without the approval of the Canadian Honey Council [CHC]. The Plaintiffs allege that the CHC is dominated by certain commercial beekeeping factions at their exclusion (see paragraphs 26 c.(vi), 26 d.1 and 26 d.2 of the Proposed Amended Claim). The Defendant relies on *A.O Farms*, cited above, in which this Court stated that the government owes a duty to the public, but it is to the public collectively. Therefore, the remedy for someone who thinks that the duty has not been fulfilled is not before the courts but rather at the polls (see *A.O Farms* at para 11).

B. The Plaintiffs' position

[51] The Plaintiffs rely on sections 3 and 23 of the *Crown Liability and Proceedings Act*, cited above, as the basis for their claim in negligence. They submit that the Defendant owed them a duty of care with respect to restrictions he imposed on the importation of honeybees from the US which he breached on or after January 1, 2007 and continues to do so since then. They argue that the Defendant refuses to consider or make any decisions concerning applications for US packaged honeybee imports, imposing a *de facto* honeybee package prohibition. They also allege that Defendant knew or ought to have known that his negligence and the improper continuation of the prohibition would cause losses and damages to the Plaintiffs who relied on package imports to

sustain and grow their beekeeping operations and business (see the Plaintiffs' Statement of Claim of December 28, 2012, para 29).

[52] The Plaintiffs argue that if the Court decides to strike a pleading, it must determine whether said pleading may be cured by granting leave to the responding party to amend the pleadings (see *Simon*, cited above, at para 14). Leave to amend must be given unless the defect cannot be cured by amendment (see *Collins*, cited above, at para 26).

i. Claim for acting without lawful authority

[53] In their amended statement of claim, the Plaintiffs removed their allegations that the Defendant acted without lawful authority.

ii. Claim in negligence

Analogous cases

[54] The Plaintiffs submit that there are analogous categories of cases in which a duty of care has been identified. They rely on the *Adams* case, cited above, at paragraphs 43 to 44 in which the New Brunswick Court of Appeal concluded that the Federal Crown owed a *prima facie* duty of care to New Brunswick potato farmers based on the *Plant Protection Act*. They claim that the RIASs express an equivalent legislative intent; therefore it should suffice to establish a duty of care.

[55] The Plaintiffs refer to the *Sauer* case, cited above, in which public representations were made by the Crown with regards to protecting the economic interests of Ontario cattle farmers thereby establishing a *prima facie* duty of care. They submit that in the present case, the representations made by the Crown and its conduct provides a stronger basis for concluding that the Crown owed them such a duty. They also refute the Defendant's argument claiming that the Court of Appeal in *Taylor,* cited above, appears to have retreated from *Sauer*. They argue that the Court did not overrule *Sauer,* but rather clarified that it does not accept the proposition that the Crown's duty of care can be based "entirely on a regulator's public acknowledgment of its public duties to those affected by its actions". However, the Court found that they can form part of the "factual matrix" (see *Taylor* at paras 94 to 97).

[56] The Plaintiffs also respond to the Defendant's allegation that their relationship with the Crown was more akin to that between the parties in *Berg*, *River Valley* and *Los Angeles Salad Company*. They argue that all three cases are negligent inspection cases which involve substantially different considerations. The Court, in these cases, found that the regulator had an overarching duty which conflicted with a duty to protect the economic interests of the producers being inspected (see *Berg* at para 76; *River Valley* at para 67; *Los Angeles Salad Company* at para 55). The Plaintiffs argue that in the present instance, the stated purpose of the statutory scheme and the interactions between the parties demonstrate that the Defendant's duty in regulating honeybee imports was the protection of commercial beekeepers' interests. This duty was, at times, superseded by the interest of the commercial beekeeping industry as a whole, but that "any interest of the public in factors relating to the bees are secondary in nature" (see Plaintiffs' motion record at page 22).

[57] The Plaintiffs also submit that there is no statutory immunity provision that protects the Defendant from refusing or failing to implement his own statutory scheme, or acting for improper purposes outside of the statutory scheme. They conclude that even if the Court found that the *HAA* and *HAR* impose a general duty to act in the public interest; this would not conflict with the duty to regulate honeybee imports in the interests of commercial beekeepers and the industry.

[58] The Plaintiffs submit that there are cases in which a duty of care was found on the basis of similar relationships but also acknowledge that the case law is diverse and therefore it may not fall in a settled category (see the Plaintiffs' motion record at para 30). Consequently, they proceed to the two-step *Anns* test in order to demonstrate that a *prima facie* duty of care can be established and that there are no valid policy reasons to negate this duty.

Application of the *Anns* test to the facts at issue

a) Step one: proximity

1) Statutory intent

[59] The Plaintiffs submit that an RIAS was published concurrently with an amendment of the *HAR* and it is apparent from these documents that the purpose of the *HAA* and *HAR* is the protection of the economic interests of commercial beekeepers and the industry (see *Health of Animals Regulations, amendment* & RIAS, *Canada Gazette Part II*, Vol. 126, No.1 at 71, Plaintiffs' Authorities, tab 1). The Plaintiffs argue that RIASs are indicators of legislative intent and rely on

Bayer Inc v Canada (Attorney General) (1999), 166 FTR 160 at paragraph 7 [*Bayer*] for that proposition.

[60] Plaintiffs equally refer to other RIASs, among which the RIAS that accompanied the 1986 regulatory prohibition on US honeybee imports in which it was stated that "[…] the survival of the whole industry is at stake […]". They claim that there is no mention of the general public (see *Bee Prohibition Order*, 1986 amendment at 314-315, Plaintiffs' Authorities, tab 3). According to the Plaintiffs, the RIASs repeatedly recognize that the purpose of the *HAA* and *HAR* is to prevent the introduction of diseases which could have significant effects, including economic ones, on the agricultural industry (see Plaintiffs' Authorities, tabs 8 to 12).

[61] Based on their reference to the RIAS, they submit that the purpose of the statutory scheme, with respect to honeybee imports, was to protect the survival and economic well-being of the commercial beekeeping industry.

[62] The Plaintiffs refer to regulations enacted by the Defendant and claim that it was stated therein that the US bee importation situation would be assessed on an annual basis. This regular assessment was to ensure that the continuing ban was appropriate.

[63] The Plaintiffs submit that the legislative scheme establishes a relationship of proximity between the parties.

2) Interactions between the parties

[64] The Plaintiffs claim that it is apparent, from their pleadings and the RIASs, that the Defendant cooperated and consulted with commercial beekeepers, on an ongoing basis, to justify his import policy before December 31, 2006. The Plaintiffs allege that the close and direct relationship with the industry continued beyond that date. They also submit that the Defendant delegated his authority to certain factions of commercial beekeepers, allegedly allowing them to dictate the operation of the US importation scheme. Plaintiffs conclude that this relationship with a faction of the industry points to a "close and direct" relationship of proximity and establishes a *prima facie* duty of care. They argue that it is an element of both the duty and the breach that they allege (see Plaintiffs' motion record, page 18, para 50).

b) Step two: policy considerations

[65] The Plaintiffs note that the primary concern, at this stage, is whether the duty of care sought to be imposed would result in the government being liable for a policy decision from which it is generally immune (*Cooper*, cited above at paras 37 and 38). However, the decision must be "neither irrational nor taken in bad faith" (*Imperial Tobacco*, cited above, at para 76 and *Roncarelli v Duplessis*, [1959] SCR 121 at 140).

[66] They also rely on *Brown v British Columbia*, [1994] 1 SCR 420 [*Brown*] which clarified the distinction between mere operational decisions and true policy decisions. True policy decisions "[…] will usually be dictated by financial, economic, social and political factors or constraints" (see

Brown at page 441). Whereas operational decisions primarily cover "the performance or carrying out of a policy" (see *Brown* at page 441). They also rely on this case because it was determined that inaction, for an improper reason or for no reason at all, cannot be a policy decision taken in good faith. The Supreme Court stated, at page 436, that:

> "Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care".

[67] The Plaintiffs argue that in the present case, the applicable statutory scheme after December 31, 2006 was not concerned with the making of policy but rather with the actual implementation of a policy. They claim that by enacting orders and regulations that resulted in the bee package prohibition, it is arguable that the Minister engaged in policy decision-making. The Minister had to balance economic, social and political considerations of beekeeper groups in relation to the commercial beekeeping industry as a whole. However, after the prohibition lapsed, the applications for import permits from individual commercial beekeepers were considered on a case by case basis pursuant to sections 12 and 160 of the *HAR*.

[68] The Plaintiffs submit that because the decisions were made on a case by case basis they could not be characterized as "core policy decisions" that are immune from action. They also argue that the statutory conditions set out in subsection 160(1.1) of the *HAR* do not contemplate any balancing of economic social and political considerations because the Minister was authorized (and later required) to grant import permits if satisfied that the conditions set out in that section were met.

[69] The Plaintiffs respond to the Defendant's claim that they were policy decisions because they involved the use of discretion, as demonstrated by the presence of the word "may" in subsection 160(1.1) until the regulatory amendment in December 2012. They rely on *Imperial Tobacco* in which the Supreme Court ruled that discretionary decision-making does not in itself qualify the decision as core policy (see *Imperial Tobacco* at paras 84 and 88).

[70] The Plaintiffs also argue that should the Defendant's actions after December 31, 2006 be characterized as policy-making, then that exercise was improper because the Defendant abdicated his discretion to the industry who dictated the availability of US packaged honeybees for its own purposes, which were outside of the statutory scheme. They claim that a faction of the commercial beekeeping industry was given the power to determine when to approve the lifting of the prohibition by updating their risk assessments and that said faction refused to provide approvals for reasons of its own (see the Plaintiffs' motion record at page 8, para 15).

[71] The Plaintiffs refer to the *Sauer* case, cited above and to *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 [*Pinkerton's*] and argue that the Court held that a *prima facie* duty of care is not negated by a regulator's general duty to regulate in the public interest, by speculative or potential conflict, nor by the fact that there must be weighing and balancing of competing interests (see *Pinkerton's* at paras 72 to 73).

[72] They argue that they do not challenge the Defendant's authority to make decisions under subsection 160(1.1) of the *HAR* on the basis of risk of animal disease, rather they challenge the Defendant's failure or refusal to make such decisions (see Plaintiffs' motion record at para 91).

[73] The Plaintiffs also submit that the duty of care sought to be imposed to individual commercial beekeepers would not conflict with the Defendant's duty to the industry as a whole to prevent animal disease. In fact, it would not conflict with any other overarching duty because the Defendant's primary duty is to regulate in the interests of both commercial beekeepers and the industry and any duty to the public is secondary and would not involve competing considerations.

1) Indeterminate liability

[74] The Plaintiffs submit that no indeterminate liability arises from finding that the Defendant owed a duty of care, because the parties would be limited to commercial beekeepers only. The risk of a duty to the public at large does not arise. They claim that their situation is akin to that of the potato farmers in *Adams*, which was a limited class of potential plaintiffs and not the public at large (see *Adams* at para 45).

[75] They also refer to *Pinkerton's* in which the Supreme Court explained that the principle of indeterminate liability is closely related to the question of proximity. The question is whether the alleged relationship giving rise to a duty involves special factors such that the duty of care would not result in indeterminate liability (see *Pinkerton's* at para 70). The Plaintiffs allege that in the present case special factors such as the case-by-case nature of the import scheme, the Defendant's representations of his regulation in the economic interests of the beekeepers and his ongoing interactions with them limits the liability of the Defendant. In fact, it would be limited to those to

whom the Defendant made such representations and with whom he had interactions, in this case, commercial beekeepers.

[76] The Plaintiffs refute the Defendant's argument suggesting that indeterminate liability arises in a claim for pure economic loss. They rely on *Pinkerton's* to argue that a claim for economic loss does not automatically give rise to a risk of indeterminate liability (see *Pinkerton's* at para 70). They submit that the Defendant knew the class with whom he was dealing and the specific nature of the losses suffered by the people subject to their negligent action or inaction.

[77] The Plaintiffs conclude by stating that the onus is on the Defendant to establish that it is plain and obvious that the *prima facie* duty of care is negated by a policy consideration and if he fails to do so the Court should not look further (see *Sauer*, cited above, at para 63).

2) Immunity

[78] The Plaintiffs' arguments related to the issue of immunity were stated in paragraphs 66 to 74 of this order. They claim that no such statutory provisions exist and that the decisions were not policy decisions, nor taken in good faith.

V. Analysis

The Test on a motion to strike

[79] The parties agree that on a motion to strike, the Court must assume that the facts pleaded are true and the plaintiff will be able to prove its allegations, unless they are manifestly incapable of being proven (see *Imperial Tobacco*, cited above, at paras 17 and 22-24)

[80] A claim will be struck only if it is **plain and obvious** that the pleading discloses no reasonable cause of action. "Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial" (see *Imperial Tobacco*, cited above, at para 17). This Court should therefore grant the motion only if it is satisfied beyond a doubt that the statement of claim "[…] is certain to fail because it contains a 'radical defect'" (see *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 15). Finally, it is also important to underline that the Court does not need to consider what future evidence might or might not demonstrate (see *Imperial Tobacco* at para 23).

[81] The Court will grant the Defendant's motion for the following reasons.

The amended statement of claim

[82] The Court must firstly deal with the Plaintiffs' amended statement of claim filed with their motion record in response to the motion to strike. Rule 75 of the *FCR* is clear; the Plaintiffs should have proceeded with a motion seeking the Court's permission to amend as the Defendant had already filed his statement of defence on February 8, 2013. The case being specially managed, it was incumbent on the Plaintiffs to advise the Court of their intention to amend their pleadings. During the case management conference held on October 1, 2013, which led to the Court setting a

timetable for the filing of the Defendant's motion based on both parties' representations, the Plaintiffs never mentioned their intention to amend their statement of claim.
Since the case was being specially managed, upon being served with the Defendant's motion to strike, the Plaintiffs could still have asked the Court to amend the time table in order to comply with the court rules and file a motion to amend.

[83] In *Canderel Ltd v Canada*, [1994] 1 FC 3, the Court of Appeal decided that an amendment, when leave is sought, should be allowed at any stage of an action, for determining the real questions in controversy. However, the amendments should not result in an injustice to the other party which will not be adequately compensated by an award of costs. As the Court reviewed the amended statement of claim, it is clear that all the amendments purport to facts that were well known to the Plaintiffs prior to October 1, 2013. The Court, having reviewed the proposed amendments, is not convinced that they cure the fundamental deficiency in the claim and establish proximity even if they were allowed. Furthermore, the Plaintiffs should have been forthright as stated in *Bristol-Myers Squibb Co. v Apotex Inc*, 2011 FCA 34, at paragraph 28. Consequently, the Court strikes paragraphs 5, 14, 15, 16, 23, 24, 25, 49, 50 and 72 to 86 of the Plaintiffs' response submissions.

[84] Although the Court considers that the amendments must be struck out, it will nonetheless consider the arguments therein to ensure that notwithstanding their rejection, the Plaintiffs' claim would still be dismissed.

A. Is it plain and obvious that the Plaintiffs' claim for acting without lawful authority is bound to fail?

[85] The Plaintiffs contend that the Defendant acted without lawful authority and breached his duty of care owed to commercial beekeepers between January 1, 2007 and December 28, 2012 by refusing or failing to make any good faith decisions on applications to import packaged honeybees from the United States. The Court must look to the authority under which the Defendant acted to determine, firstly, whether there is an enabling statute and, secondly, the extent of the duty, if any, owed to the Plaintiffs.

[86] The relevant statutory authorities are section 14 of the *HAA*, subsection 4(1) of the *CFIAA* and sections 12 and subsection 160(1.1) of the *HAR*. It is clear from these sections that the CFIA had express authority to make decisions related to the importation of regulated animals in Canada including packaged honeybees. The facts pleaded by the Plaintiffs in support of their claim, even if proven, cannot lead to a successful claim because it is settled law that a breach of statutory duty does not constitute negligence (see *Holland*, cited above at paras 7-9 and 11). Potential tort liability for the Federal Crown pursuant to section 3 of the *Crown Liability and Proceedings Act*, cited above, is dependent upon a tort committed by a servant of the Crown. However, the Plaintiffs' claim is framed as one of direct liability against the Crown; therefore it does not disclose a reasonable cause of action.

[87] Furthermore, the Court notes that the Plaintiffs, in their amended statement of claim, removed their allegations that the Defendant acted without lawful authority.

B. Is it plain and obvious that Plaintiffs' claim in negligence is bound to fail?

[88] In their statement of claim, at paragraphs 24 to 28, the Plaintiffs allege:

> "**24.** The Plaintiff relies upon the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, especially ss.3 and 23.
>
> **25.** The stated purpose of restrictions on the importation of bees from the United States, whether by regulation or exercise of Ministerial discretion, is and has been to promote the health and interests of the Canadian bee industry and Canadian beekeepers by protecting them from risks associated with the importation of bees from the United States. Similarly, the stated purpose of the exception from the Prohibition for queens contained in *HIPR-2004* was to assist the Canadian bee industry and Canadian beekeepers by providing access to an enhanced supply of queens to allow them to replenish bee stocks after winter losses. Consistent with this stated purpose the Crown engaged in consultation with the industry respecting its proposed restrictions.
>
> **26.** The Defendants owed a duty of care to the Plaintiffs and the Class with respect to restrictions on the importation of honeybees from the United States, which duty of care arose from, *inter alia*:
>
> a. The implied and express purpose of the *HAA* and the Regulations including the *HAR* and *HIPR-2004* to regulate bee imports for the good and the economic interests of Canadian beekeepers and the Canadian beekeeping industry;
>
> b. The Crown's repeated representations to the Canadian beekeeping industry that it regulated bee imports for the purpose of protecting the beekeeping industry and in particular the economic viability of the beekeeping industry;
>
> c. The Crown's actions regarding the importation of live bees from the US, including the Prohibition and the partial relaxation of the Prohibition by HIPR-2004, which were mainly aimed at fostering and protecting the viability of the beekeeping industry;
>
> d. The Crown's knowledge of the economic hardship suffered by certain beekeepers and beekeeping regions as a result of the continuation of the Prohibition;
>
> e. The Crown's actions to alleviate the economic hardship suffered by certain beekeepers and beekeeping regions by measures such as

partially relaxing the prohibition on the importation of queens from the US in 2004;

f. The Crown's extensive consultation with the beekeeping industry and beekeepers on US bee import policy;

g. Other factors that may prove relevant.

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

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

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

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

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

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

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

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

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

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

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

> c. Representing to the Plaintiffs and the Class that all applications for import permits for US packages would not be considered or would be automatically denied;
>
> d. Basing its decisions to maintain the Prohibition on outdated and inaccurate information including the 2003 Risk Assessment;
>
> e. Failing to conduct timely monitoring, research, investigation, assessment or consultation with respect to the ongoing necessity for the Prohibition;
>
> f. Failing to conduct and obtain a current Risk Assessment with respect to the importation of bee packages from the US;
>
> g. Misusing or failing to exercise ministerial responsibility and discretion under the *HAA* and *HAR* with respect to permitting or denying the import of bee packages from the US;
>
> h. Abdicating its responsibilities to conduct proper and timely risk assessment and exercise its independent judgment with respect to permitting or denying the import of bee packages from the US."

Analogous cases

[89] The parties agree that the starting point is to determine whether there exists similar cases where the duty of care has been recognized (see *Imperial Tobacco*, cited above, at para 37).

Plaintiffs acknowledge, at paragraph 30 of their memorandum, that:

> "While there are cases that find a duty of care on the basis of a relationship similar to that alleged in this case, the case law is diverse and it is doubtful that the alleged relationship in this case falls within a 'settled' category either establishing or negating the duty of care".

They consequently argue that the matter can only be settled at trial.

[90] While it is true that no cases have determined that the *HAA* and *HAR* impose on the CFIA a private law duty of care to be mindful of the economic effects of decisions to grant or refuse import permits, there are nonetheless cases that are analogous, though based on different statutes and regulatory schemes.

[91] The Court having reviewed the case of *Berg*, cited by the Defendant, agrees that though not identical, the *Wildlife Act 1997* does embody provisions and, more importantly, an intent that offers important similarities with the *HAA* and *HAR*. This case is therefore relevant to the present case though not totally persuasive. Both acts (the *HAR* and *Wildlife Act 1997*) restrict the importation of animals to prevent existing species already in the territory from being infected with diseases. Permits are required, in both instances, before animals can be imported. Equally of note is the stated purpose of the legislation which, in both cases, aims to protect existing animals in the territory, primarily for the public good.

[92] The Court considers the main finding in *River Valley* noteworthy. The Saskatchewan Court of Appeal considered the legislative purpose of the *HAA*, together with the provisions for statutory compensation and statutory immunity and found that this showed an absence of proximity (see *River Valley* at para 83). As to the *Los Angeles Salad Company* case, the Court finds that the British Columbia Court of Appeal's conclusion can be transposed to the present case. The Court of Appeal determined that recognizing a private law duty of care to food sellers would conflict with the purpose of protecting the health of Canadians by preventing the sale of contaminated food. The Court of Appeal, at paragraph 55, stated that:

> "It would put food inspectors in the untenable position of having to balance the paramount interests of the public with private interests of

> food sellers and would thereby have a chilling effect on the proper performance of their duties".

Similarly, recognizing a private law duty of care to the Plaintiffs would also put the CFIA in the untenable position of having to balance the paramount interests of the public (preventing the import of honeybees which could potentially be infected with disease) with private interests of commercial beekeepers, and could have a chilling effect on the proper performance of its duties. The Court agrees with the Defendant that honeybees generate a product for human consumption and protecting them is important because of their potential impact on the whole of the agricultural sector and for human health concerns.

[93] The Court also agrees with the Defendant that the cases of *Adams* and *Sauer* can be distinguished from the present case inasmuch as the regulatory scheme was significantly different. In *Adams*, the New Brunswick Court of Appeal found a statutory obligation to protect a limited class of producers (see *Adams* at para 44). The Court also notes a relevant paragraph in the *River Valley* case, in which it was concluded that contrary to the *Plant Protection Act* (the basis of the claim in *Adams*), the *HAA* showed no legislative purpose to protect the interests of individual farmers (see *River Valley*, at para 80). As to *Sauer*, Canada had publicly assumed a duty to ensure the safety of cattle feed. In neither case was the question of Canada's duty to the broader public at issue.

[94] In sum, there are no court decisions that have determined the existence of a private law duty of care in circumstances similar to the present claim; consequently the Court needs to apply the two part *Anns* test.

Application of the *Anns* test to the facts at issue

Part 1: Do the facts, as pleaded by the Plaintiffs, reveal the existence of a relationship that is sufficiently close to create a duty on the Defendant to take reasonable measures to protect the Plaintiffs from foreseeable economic losses?

[95] The Supreme Court in *Imperial Tobacco*, cited above, clearly laid out the applicable principle to establish proximity and, hence, a duty of care. This proximity can be found in some instances from a statute. More often than not however, a relationship of proximity arises from the conduct of the government and its interactions with a claimant that is such to create a special relationship sufficient to establish the required proximity for the existence of a duty of care. As explained by the Court, the governing statutes are nonetheless important since there may be provisions therein that negate the possibility because of the existence of a duty to the public at large (see *Imperial Tobacco* at paras 41 to 49).

[96] In the present case, the Plaintiffs argue that the Defendant's *prima facie* duty of care is apparent from the statutory scheme alone or based on the statute and the interactions that existed between them and the government. Consequently, the Court must firstly turn to the statute to see if its scheme and provisions create such a *prima facie* duty of care.

[97] To begin, the title of the *HAA* 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" which does not reveal any duty to a specific group but rather aims to protect the public and

the animal population at large. Section 33 of the *HAA* relates to the powers of the CFIA and states that "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 this Act, except the powers mentioned in section 27".

[98] Sections 5 to 21 of the *HAA* impose obligations and prohibitions on persons when animals are known or suspected of being infected. They aim the control of diseases and toxic substances. Sections 14 to 18 relate to the importation of animals and animal products or byproducts. Finally, sections 22 to 28 give the Minister the authority to take measures to remedy or mitigate concerns "[…] with public safety to remedy any dangerous condition or mitigate any danger to life, health, property or the environment that results, or may reasonably be expected to result, from the existence of a disease or toxic substance in a control area" (see subsection 27 (2) *HAA*, during the applicable period).

[99] Subsection 27(3) of the *HAA*, during the applicable period, provides that:

> "The Minister may make regulations for the purposes of controlling or eliminating diseases or toxic substances in a control area and of preventing their spread, including regulations
>
> (a) prohibiting or regulating the movement of persons, animals or things, including conveyances, within, into or out of a control area;
>
> (b) providing for the establishment of zones within a control area and varying measures of control for each zone; and
>
> (c) authorizing the disposal or treatment of animals or other things that are or have been in a control area".

[100] Finally, section 14 of the *HAA* allows the Minister to make regulations prohibiting the importation of animals into Canada.

[101] As to the *HAR*, section 12 enacts a general prohibition on the importation of regulated animals unless certain conditions are met and section 10 defines regulated animals as:

> "'Regulated animal' means a hatching egg, turtle, tortoise, bird, honeybee or mammal, […]".

[102] Both parties acknowledge, in their written representations, that the *HAA* and *HAR* authorize the Defendant to regulate the importation of US packaged honeybees. Where they differ is on the intent of the statute. The Defendant asserts that the legislative scheme is aimed primarily at entrusting the CFIA with broad regulatory authority to protect animal health for the public good and excludes any duty to safeguard the economic interests of individuals who want to use imported animals in the exploitation of their commercial ventures.

[103] The Court agrees. It is apparent from these general provisions that the objective is to protect animal health and public safety. The Minister is entrusted with the authority to take measures in order to remedy or mitigate any danger to life, health, property or the environment. Therefore, the Minister's duty is to the people of Canada as a whole, not to individual industry participants like the Plaintiffs. To recognize a private duty of care to the beekeeping industry and its economic interests would conflict with that purpose.

[104] The Plaintiffs take the position that the orders and regulations enacted prior to 2007 and their RIASs clearly establish a duty of care since it is stated that they aim to "protect the economic

interest of the industry". They refer to the following regulations in support of their position and claim that there is little thought for the general public:

> -*Honeybee Prohibition Order*, 1988 & RIAS at 355-356 (see the Plaintiffs' Authorities, Tab 5);
> -*Honeybee Prohibition Order*, 1990 & RIAS at 331-332 (see the Plaintiffs' Authorities, Tab 6);
> -*Honeybee Prohibition Order*, 1991 & RIAS at 71-74 (see the Plaintiffs' Authorities, Tab 7).

[105] The Plaintiffs' amendments rely on several other honeybee importation prohibition regulations and their RIASs which they claim have stated that the purpose of these regulations is to prevent the introduction of disease which could seriously affect or have a significant economic effect on Canada's agricultural industry (see the Plaintiffs' motion record at p 16, para 44).

[106] The Defendant takes the position that since the claim aims his actions or inactions after 2007, these regulations were not applicable and are therefore irrelevant. The Court disagrees with the Defendant's position. The decision not to issue permits for the importation of honeybee packages, after 2007, had, amongst its considerations, decisions taken prior to 2007. These decisions were based on the determination that the health of Canadian bees needed to be protected because US bees were potential carriers of disease. The Court finds these regulations relevant, as they form part of the legislative history of the general scheme surrounding the importation of honeybees.

[107] The Court agrees with the Defendant that RIASs have been received by Courts in the context of statutory construction. They do not, however, establish the purpose and intent of the governing statute. These statements accompany regulations in order to provide information as to

their purpose and effect but do not form part of them. They are used as an aid in the interpretation of regulatory provisions (see *Bristol-Myers*, cited above, at para 156 and *Bayer*, cited above, at para 7) and as alleged by the Defendant, it is necessary to read the words of the regulations in the whole context of the authorizing statute (see *Bristol-Myers* at para 38).

[108] The Court notes that the RIASs accompanying the 1996, 1998, 2000 and 2004 regulations clearly indicate that: "The *Health of Animals Act* controls 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 animal agricultural industry". These statements reinforce the general objective of the *HAA*, which is the public interest, as a whole, and not protecting the economic interest of the beekeeping industry.

[109] The Court "[…] fails to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals" (see *Imperial Tobacco* at para 50). Consequently, it cannot find proximity based on statutory intent and must consider whether interactions between the parties create a special relationship sufficient to establish proximity.

[110] It is obvious to the Court, further to a review of the *HAA*, that it does not contain any provisions creating the obligation to consult industry. The fact that consultations took place does not alter the primary duty that is the protection of animal health in Canada and public safety. Industry representations were taken into consideration but this fact does not alter the main purpose of the Act either.

[111] The Plaintiffs argue that the regulations and consultations created a *prima facie* duty of care towards them since the eight page RIAS accompanying the 2004 honeybee importation regulations discussed at length costs and measures to alleviate the impact on the industry, and that concerns related to the public at large were barely mentioned. They also assert that since industry consultations continued after December 31, 2006, the Defendant's conduct, namely these numerous interactions with the industry, created a relationship of proximity.

[112] The Supreme Court in *Imperial Tobacco* stated, at paragraph 47, that:

> "[…] where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis".

It was also determined that there had to be a direct relationship between Canada and the Plaintiffs, in that case consumers of light cigarettes. The Supreme Court found that the relationship between the parties was limited to Canada's statements to the general public and there were no specific interactions between the two. It concluded that consequently, a finding of proximity in that relationship had to arise from the governing statutes (see *Imperial Tobacco* at para 49).

[113] In *Berg*, cited above, at paragraph 75, it was held that:

> "[…] there was no relationship at all between these plaintiffs and the defendants. These plaintiffs did not even attempt to apply for a permit to import their elk, let alone be denied a permit. […] The

> defendants, in these circumstances, cannot be held to have a duty to a group of people it was not aware existed".

[114] The Court, in the present instance, having taken into consideration the allegations in the Plaintiffs' proposed amended statement of claim, notes that the Plaintiffs' allegations of interaction with the industry are purely based on the consultations that took place in assessing the need to prolong or not the prohibition and are very general. These alleged interactions were not with the individual Plaintiffs. As in *Berg*, the Plaintiffs did not attempt to apply for a permit to import honeybee packages, let alone denied a permit. The Court does not consider that there were interactions between the parties that created a special relationship sufficient to establish proximity. However, the Court believes it is preferable to apply the second stage of the *Anns* test, as it is not convinced that this allegation of proximity is certain to fail.

Part two: Is the *prima facie* duty of care negated by overriding policy considerations as defined by the Supreme Court in *Imperial Tobacco*?

[115] The Court agrees with the Defendant that finding that the Plaintiffs were owed a duty of care to protect the economic interests of Plaintiffs would lead to an exposure of indeterminate liability.

[116] The question in determining whether there is a risk of indeterminate liability is whether there are sufficient special factors that arise out of the relationship between the parties so that indeterminate liability is not the result of imposing a duty of care (see *Pinkerton's*, cited above, at para 70). The Court must be able to draw the line between those to whom the duty is owed and those to whom it is not (see *Bow Valley Husky*, cited above, at para 64). The *HAA* and *HAR* apply to

the vast majority of players in the agricultural industry, as animals are frequently imported in order to refine genetics, to increase productivity and to improve performance. The Court acknowledges that the number of participants in the agricultural sector that could possibly entertain claims, as a result of the Act, is indeterminate and surely diverse and conflicting within segments of the same agricultural sector, as in the present case. Consequently, this fact alone negates any duty of care because it places the Defendant in an untenable position, that of indeterminate liability. The Court also notes that when claims are for pure economic loss, the risk of indeterminate liability is enhanced (see *Imperial Tobacco*, cited above, at para 100).

[117] The Court finds that the decision, as described by the Plaintiffs, not to grant import permits for packaged honeybees after December 31, 2006, is a true policy decision for the following reasons. The test to determine whether a decision represents a core policy decision was elaborated in *Imperial Tobacco*, cited above, at paragraph 90:

> "[…] '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".

The Court also acknowledges in paragraph 90 that:

> "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".

[118] In the present instance, the impugned decision to "enforce a complete prohibition on the import of bee packages" from the US represents a course or principle of action based on a balancing of public policy considerations, such as social and economic considerations. This prohibition has been imposed since the 1980s and is permitted by section 12 of the *HAR* which prohibits the import of regulated animals, unless a permit is issued by the Minister.

[119] The Court does not consider the Plaintiffs' arguments on Defendant's alleged bad faith convincing. Furthermore, the Plaintiffs did not identify a Crown servant; therefore their claim cannot amount to a claim of misfeasance in public office or abuse of public office. Absent such a tort, the claim does not disclose a reasonable cause of action. The policy decision was developed out of concern for the health and security of Canadians and the health of honeybees. As they were matters of government policy, the Plaintiffs' claims for negligence are certain to fail and must be struck out.

[120] The Plaintiffs have also argued that the Defendant abdicated his discretion to an improper third party. Having reviewed the statement of claim including the intended amendments thereto and since there is no specific allegation that the Defendant was not the one who took the decision to prohibit import permits for honeybee packages, the Plaintiffs' argument related to the Minister delegating his authority to a third party must be rejected.

[121] In sum, having assumed that the facts pleaded are true and that Plaintiffs are able to prove their allegations, the Court having considered the claim in negligence and applied the *Anns* test taking into account all the allegations in the statement of claim and proposed amended statement,

comes to the conclusion that the Defendant's motion must be granted as the Plaintiffs' pleadings do not disclose any reasonable cause of action.

Costs

[122] The Plaintiffs argue that no costs should be awarded against them on the basis that Rule 334.39 of the FCR specifies that no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding. In *Pearson v Canada*, 2008 FC 1367, at paragraph 52, the Federal Court determined that a motion to strike a statement of claim, brought before the action had been certified, does not engage the class action rules and, in particular, the provision of Rule 334.39.

[123] The Court therefore dismisses the claim with costs against the Plaintiffs.

ORDER

THIS COURT ORDERS that

1. The Defendant's motion is granted;

2. The statement of claim is struck in its entirety without leave to amend; and

3. The Plaintiffs shall bear the costs.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2293-12
STYLE OF CAUSE:	PARADIS HONEY LTD., HONEY BEE ENTERPRISES LTD. AND ROCKLANE APIARIES LTD. v THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR ORDER AND ORDER: SCOTT J.

DATED: MARCH 5, 2014

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