Federal Court of Appeal | Cour d'appel fédérale

Date: 20150408

Docket: A-169-14

Citation: 2015 FCA 89

CORAM: **NADON J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

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

Appellants

and

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

Respondents

Heard at Edmonton, Alberta, on November 3, 2014.

Judgment delivered at Ottawa, Ontario, on April 8, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.
CONCURRED IN BY: NADON J.A.
DISSENTING REASONS BY: PELLETIER J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A. (Dissenting Reasons)

I. INTRODUCTION

[1] This appeal arises from a proposed class action by a group of commercial beekeepers (the Beekeepers), who rely on the importation of honeybees to replace colonies lost due to winter-kill and other factors. The subject matter of the litigation is the ban on importation of honey bees from the United States which has been in force in one form or another since the 1980s. The Beekeepers' complaint is that since 2007, the respondents have adopted a policy of blanket prohibition on the importation of bee "packages", a term which will be explained below. While many of the Beekeepers allegations would, if proved, give them an administrative law remedy, they have sued in negligence, alleging that the respondents owe them a duty of care, have breached the associated standard of care and have caused them damage.

[2] Counsel for the respondents, Her Majesty the Queen, the Minister of Agriculture and Agri-food (the Minister) and the Canadian Food Inspection Agency (the Agency) (collectively the respondents) moved to have the Beekeepers' action struck out as disclosing no reasonable cause of action. That motion was granted and the action was dismissed with costs, with reasons reported as *Paradis Honey Ltd. v. Canada (Attorney General)*, 2014 FC 215 (Reasons).

[3] For the reasons that follow, I would allow the appeal in part, and set aside the Federal Court Judge's order as to costs. I would confirm the dismissal of the Beekeepers' statement of claim.

II. THE FACTUAL MATRIX

[4] Canada's winter climate being what it is, beekeepers have always suffered losses of colonies over the winter, losses which have to be made up by the importation of new bees. According to the Beekeepers, this can take one of two forms: either as a "package", a cereal-box-sized container holding a small colony (including a queen) or as a "queen", a match-box-sized container holding a queen bee and a few attendant bees. Not surprisingly, it appears that, it is more efficient to replace an existing colony with another (*i.e.* a package). Replacing a colony with a queen requires more inputs and carries more risk on the way to establishing a productive colony.

[5] The *Health of Animals Act*, S.C. 1990, c. 21 (the *Act*) and its predecessor legislation have, at all material times, governed the importation of animals, including bees, into Canada. Section 14 of the *Act* provides as follows:

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.	14. Le ministre peut, par règlement, interdire l'importation d'animaux ou de choses soit sur tout ou partie du territoire canadien, soit à certains points d'entrée seulement; l'interdiction, qui peut être générale ou viser uniquement des provenances précises, est en vigueur le temps qu'il juge nécessaire pour prévenir l'introduction ou la propagation au Canada d'une maladie ou d'une substance toxique.

[6] In the absence of specific regulations, importation of animals is managed by way of ministerial permits issued under section 160 of the Health of Animals Regulations, C.R.C. 296 (the Regulations):

160. (1) Any application for a permit or licence required under these Regulations shall be in a form approved by the Minister.	160. (1) La demande d'un permis ou d'une licence qu'exige le présent règlement est présentée selon une formule approuvée par le ministre.
(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 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.	(1.1) Le ministre peut, sous réserve de l'alinéa 37(1)b) de la Loi canadienne sur l'évaluation environnementale, délivrer tout permis ou licence exigé par le présent règlement s'il est d'avis que l'activité visée par le permis ou la licence n'entraînera pas ou qu'il est peu probable qu'elle entraîne, autant qu'il sache, l'introduction ou la propagation au Canada de vecteurs, de maladies ou de substances toxiques.

[7] Between the late 1980s and December 31, 2006, the Minister made a series of regulations prohibiting the importation of honeybees into Canada from the continental United States for various periods of time. The prohibitions were designed to prevent the spread into Canada of the tracheal mite bee pest which, according to the Regulatory Impact Analysis Statements (RIASs) issued concurrently with the regulations, threatened disastrous effects on Canada's beekeeping industry.

[8] The last such regulation was the *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136 (*HIPR 2004*). Subsection 1(1) of the *HIPR 2004* continued the prohibition on the importation of honeybees into Canada from the continental United States, as of the coming into

force of the regulation until December 31, 2006. Subsection 1(2) provided that the prohibition in subsection 1(1) did not apply to the importation of a honeybee queen with its attendant bees from the United States pursuant to a permit issued under section 160 of the *Regulations*. The result was that the prohibition on importation of "packages" was continued until the end of 2006, while the importation of "queens" was allowed pursuant to permits issued under the authority of section 160 of the *Regulations*.

[9] The kernel of the litigation underlying this appeal is the fact that once the *HIPR 2004* expired at the end of 2006, it was not replaced. The importation of "queens" continued to be allowed pursuant to permits issued under section 160 of the *Regulations* but, instead of promulgating a new regulation dealing with the importation of "packages", the Minister simply adopted a policy that no permits would be issued for the importation of "packages". The Statement of Claim alleges that this policy was communicated to the industry and, in the words of the statement of claim, "constitutes a de facto ministerial order or directive for which there is no lawful authority": see Appeal Book (A.B.) at page 63.

[10] The Beekeepers plead that the purpose of the original restrictions on importation was to protect and promote the economic interests of the Canadian bee industry and Canadian beekeepers by insulating them from the risk of disease associated with the importation of bees from the United States. They say that the respondents owed them a duty of care with respect to the importation of bees from the United States, a duty which arose from the statutory scheme itself and from various interactions between the respondents and representatives of the

beekeeping industry, as particularized at paragraph 26 of both the statement of claim and the proposed amended statement of claim. In summary, this duty of care arose from:

– The statutory scheme itself,

– The respondents' representations to the beekeeping industry that they were acting in the industry's interest,

– The respondents' knowledge of the hardship to certain beekeepers and beekeeping region resulting from the prohibition on importation of bees from the United States,

– The respondents' consultation and cooperation with the beekeeping industry on bee import policy.

[11] The statement of claim particularizes the content of the respondents' duty of care (*i.e.* the standard of care) and sets out the ways in which standard of care was breached. The members of the proposed class allege that they have suffered loss and damage as a result of the respondents' negligence and seek damages in the amount of $200,000,000. See the A.B. at pp. 59-67.

[12] A Federal Court Judge (sometimes referred to simply as the Judge) was appointed to manage the Beekeepers proposed class action. The Beekeepers' motion for certification was served and filed on or about September 12, 2013. In November 2013, the respondents served and filed their motion to strike out the Beekeepers' action. The Notice of Motion alleged that the Beekeepers were not in such a close and direct relationship of proximity with the respondents so as to give rise to a private duty of care.

[13] In response, the Beekeepers filed a motion record including a memorandum of fact and law to which they attached a proposed amended statement of claim, in order to illustrate that any lack of particularity alleged by the respondents could be remedied by amendment. When the respondents took the position that it was too late for the Beekeepers to amend their claim, the latter wrote to the case management judge to make clear that they were not seeking to amend their claim, indicating that "the Proposed Amended Statement of Claim was provided for illustrative purposes and that there is no motion before the Court at this time to amend the Statement of Claim.": A.B. at p. 210.

III. THE DECISION UNDER APPEAL

[14] After setting out in considerable detail the parties' arguments, the Judge set out the test on a motion to strike out a statement of claim for failing to disclose a cause of action. He noted that the Court should take the facts pleaded as true, unless they are manifestly incapable of being proven, and should strike out a statement of claim only if it is plain and obvious that those facts disclose no cause of action.

[15] The Judge then turned to the proposed amended statement of claim. Relying on Rule 75 of the *Federal Courts Rules*, SOR/98-106, the Judge held that the Beekeepers could not amend their statement of claim without leave. Furthermore, since the matter was case-managed, it was incumbent on the Beekeepers to advise the Court of their intention to amend their pleadings.

[16] The Judge found that the facts pleaded in the amended statement of claim were well known to the Beekeepers prior to the case management conference at which the date for the

hearing of the respondents' motion to strike was fixed. Having reviewed the amendments, the Judge was not satisfied that they cured the deficiency with respect to the issue of proximity between the Beekeepers and the respondents. Relying on *Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, the Judge held that the Beekeepers should have been more forthright about their intention to amend their claim. In the result, the Judge struck the amended paragraphs of the Beekeepers statement of claim as well as any other paragraph which referred to the proposed amendments.

[17] The Judge then considered whether it was plain and obvious that the Beekeepers' claim of negligence based on lack of lawful authority would fail. The Judge found that the *Act* and the *Regulations* provided the Minister with express authority to make decisions about the importation of regulated animals, including honeybees, into Canada. He found that the facts pleaded by the Beekeepers could not establish liability since it is settled law that a breach of statutory duty is not, in and of itself, negligence: *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551 at paragraph 9.

[18] The Judge then turned to the test for the existence of a duty of care as set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) (*Anns*). He noted the parties' agreement that the starting point in the analysis is to determine whether a duty of care has been recognized in similar cases. After reviewing the case law put before him by the parties, the Judge concluded that there was no case which established a private law duty of care in similar circumstances.

[19] The Judge then proceeded to apply the first leg of the *Anns* test, namely, whether the facts pleaded "revealed the existence of a relationship that is sufficiently close to create a duty on the [respondents] to take reasonable measures to protect the [Beekeepers] from foreseeable economic losses": Reasons at paragraph 95.

[20] The question was therefore whether there was sufficient proximity between the Beekeepers and the respondents to give rise to a duty of care. The Judge noted that the Beekeepers based their allegation of a duty of care on the statutory scheme itself, as well as on the nature of the interaction between the respondents and the beekeeping industry.

[21] After reviewing specific provisions of the *Act* and the *Regulations*, the Judge agreed with the respondents' position that the legislative scheme is "aimed primarily at entrusting the [Agency] with broad regulatory authority to protect animal health for the public good…": Reasons at paragraph 102-103. This broad purpose excludes any private duty of care to protect the economic interests of those who rely on imported animals in their commercial activity.

[22] The Judge rejected the Beekeepers contention that the statutory purpose could be found in the RIASs which accompanied the issuance of the regulations over the years. While acknowledging that these statements had been accepted as an aid in construing the regulations with which they were associated, the Judge rejected the notion that they "established the intent and purpose of the governing statute": Reasons at paragraph 107.

[23] The Judge concluded his analysis on this leg of the *Anns* test by quoting from the Supreme Court's decision in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (*Imperial Tobacco*) at paragraph 50, to the effect that he failed 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": Reasons at paragraph 109. As a result, the Judge rejected the claim of proximity based on the statutory scheme.

[24] I am in full agreement with the Judge's analysis on this leg of the test and propose to say no more about it.

[25] The Judge then examined the question of whether the course of conduct between the respondents and the beekeeping industry could give rise to sufficient proximity to support a *prima facie* duty of care. He noted the absence of a statutory obligation to consult the industry which led him to comment that the fact that consultations took place did not alter the purpose of the *Act*.

[26] The Judge noted the Beekeepers' argument that the RIASs, particularly the one issued in conjunction with the *HIPR 2004*, discussed "costs and measures to alleviate the impact [of the import ban] on the industry and that concerns related to the public at large were barely mentioned": Reasons at paragraph 111. On the other hand, the Judge underlined that the Beekeepers' allegations of interaction with the industry were based on consultations surrounding the need to prolong the ban on importation and were very general. In particular, the Judge noted

that the Beekeepers did not plead that they had applied for and were refused a permit for the importation of packages. He concluded that the Beekeepers pleadings did not establish a sufficient degree of proximity arising from their interaction with the respondents to give rise to a duty of care.

[27] By way of abundant caution, the Judge continued his analysis and considered the second leg of the *Anns* test, namely whether there were any overriding policy considerations which would negate any *prima facie* duty of care found to exist under the first leg of the test.

[28] The Judge agreed with the respondents' contention that the finding of a duty of care would expose them to indeterminate liability. Given that the Beekeepers are but one of many participants in the agricultural sector, a finding of a duty of care would open the door to claims by the other participants in that sector, putting the respondents in an untenable position, that of indeterminate liability, particularly in a case such as this where the claim was for pure economic loss.

[29] The Judge went on to characterize the Minister's decision to refuse import permits as a true policy decision, relying on *dicta* from *Imperial Tobacco*, cited above. He found that the ban on the importation of packages represented "a course of action based on a balancing of public policy considerations, such as social and economic considerations": Reasons at paragraph 118.

[30] These two intermediate conclusions supported the Judge's ultimate conclusion that there were policy reasons which would negate any *prima facie* duty of care, had one been found to exist under the first leg of the *Anns* test.

[31] The Judge considered the Beekeepers' allegations that the Minister had improperly delegated his discretion to a third party, which he rejected as deficient, since it was not pleaded that someone other than the Minister adopted the policy in question.

[32] The Judge also rejected the Beekeepers' allegations of improper relationships between the respondents and the Canadian Honey Council.

[33] In the end result, the Judge concluded that, even when the Beekeepers' proposed amendments were considered, no reasonable cause of action was made out.

[34] On the issue of costs, the Judge relied on the authority *of Pearson v. Canada*, 2008 FC 1367, and found that since the action had not yet been certified as a class action, Rule 334.39 did not apply. Rule 334.39 precludes the making of an order for costs against "any party to a motion for certification of a proceeding as a class proceeding" with certain exceptions, none of which are relevant to these proceedings.

IV. ISSUES

[35] The issues raised by this appeal are the following:

1. What is the standard of review for our review of the Judge's decision?

2. Is it plain and obvious that the Beekeeper's claim in negligence is bound to fail?
3. Assuming that they are successful, are the respondents entitled to costs?

V. THE STANDARD OF REVIEW

[36] The parties are agreed that a judge's decision to strike a claim is discretionary; it should not be disturbed in the absence of an error of law, a misapprehension as to the facts, a failure to give appropriate weight to all relevant factors or an obvious injustice: *Bauer Hockey Corp. v. Sport Maska Inc.*, 2014 FCA 158 at paragraph 12; *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 at paragraph 15. However, even where the judge has erred in the exercise of discretion, the appellants are not entitled to succeed unless they are able to show that a proper exercise of that discretion would lead to a different result.

[37] The test for striking out a statement of claim for failing to disclose a reasonable cause of action is whether it is "plain and obvious" that the claim must fail. A claim must not be struck simply because it is complex, or because the plaintiff puts forward a novel cause of action:

> [a]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.
>
> *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at page 980

[38] Since the Judge correctly identified the test, the question before this Court is whether he applied it properly.

VI. IS IT PLAIN AND OBVIOUS THAT THE BEEKEEPERS' CLAIM IN NEGLIGENCE IS BOUND TO FAIL?

[39] Having regard to my colleague's comments in his reasons as to the construction of pleadings, it is perhaps appropriate to summarize the Beekeepers' pleadings, if only to put my reasons in context. After setting out the relevant facts in paragraphs 2 to 23, the Beekeepers plead, at paragraph 24, that they rely upon the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which provides for the liability of the Crown in tort in the common law provinces

[40] In paragraph 25, the Beekeepers identify the stated purpose of the legislation, including the *Regulations*. Paragraph 26 begins "The Defendants owed a duty of care to the Plaintiffs…". This is followed by subparagraphs a) to f) which set out the facts from which this duty of care arose. The proposed amendments to the Beekeepers statement of claim set out 16 new paragraphs containing further particulars as to the basis of the duty of care.

[41] Paragraph 27 of the statement of claim itemizes the elements of the duty of care which I take to be a statement of the standard of care the respondents owed to the Beekeepers. Subparagraphs a) to j) set out the particulars of the standard of care.

[42] Paragraph 28 of the statement of claim then alleges that the respondents breached their duty of care by doing the various acts which are itemized in subparagraphs a) to j). In paragraph 29, the Beekeepers plead that the respondents knew or ought to have known that their negligence "and the improper continuation of the Prohibition [on importation]" would cause them loss and damage.

[43] Paragraph 30 sets out the particulars of the loss and damage suffered by the Beekeepers.

[44] In the introductory paragraphs of the statement of claim, the Beekeepers pleaded that they claimed damages as a result of the respondents "acting without lawful authority" in prohibiting the importation of honeybee packages after the expiry of *HIPR 2004*. In their proposed amendments to the statement of claim, the Beekeepers abandoned their claim for damages based on the respondents' lack of lawful authority.

[45] The Beekeepers chose to sue the respondents in negligence. The fact that the pleadings allege facts which, if proved, would give rise to administrative law remedies does not, in and of itself, establish negligence: *Holland*, cited above, at paragraph 9. The Beekeepers appear to have recognized this when they proposed to delete from their statement of claim the head of damages arising from the respondents' lack of lawful authority to do what they did.

[46] In my view, despite the various administrative law issues which the facts pleaded by the Beekeepers raise, this appeal is solely concerned with whether or not their pleadings disclose a reasonable cause of action in negligence.

[47] As noted above, the law on the liability of public authorities in negligence is determined by the test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (*Anns*), adopted by the Supreme Court of Canada in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, and explained in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. This law was most recently canvassed in *Imperial Tobacco*, cited above.

[48] The *Anns* test is a two part test: (1) do the facts disclose a *prima facie* duty of care, that is, a relationship of proximity which makes it just and reasonable to impose an obligation to take reasonable care to prevent foreseeable harm; and (2) are there policy reasons why this *prima facie* duty of care should not be recognized.

[49] I would point out that there are two formulations in the jurisprudence, indeed within *Imperial Tobacco* itself, as to the first leg of the *Anns* test. At paragraph 39 of *Imperial Tobacco*, the Supreme Court frames the test as "whether the facts disclose a relationship of sufficient proximity in which failure to take reasonable care might foreseeably cause cause harm or loss to the plaintiff." Further on, at paragraph 41, the Court says:

> 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.

[50] The reference to "just and reasonable" underlines that there is a policy element in the first leg of the test, a fact which the Court recognized in *Cooper v. Hobart*:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At [page551] the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? 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.
>
> *Cooper v. Hobart* at paragraph 30

[51] The point of this observation is to underline that proximity cannot simply be treated as an aspect of foreseeability in the sense that it addresses the question: was the defendant so situated relative to the plaintiff that it was foreseeable that the latter might be harmed by the former's conduct? Proximity is to be seen as a limitation on foreseeability. As the Supreme Court pointed out in *Imperial Tobacco*, at paragraph 41, "[n]ot every foreseeable outcome will attract a commensurate duty of care." The proximity requirement seeks to identify within the universe of all relationships in which the acts of one party might injure another, those relationships in which it is just and reasonable to impose a duty of care to avoid that foreseeable harm.

[52] My conclusion is that the articulation of the proximity found at paragraph 41 of *Imperial Tobacco* is a fuller expression of the test than is the articulation found in paragraph 39, which I take to be a shorthand expression of the test.

[53] The question in this case is whether there was a sufficient degree of proximity between the Beekeepers and the respondents to give rise to a duty of care. Proximity may arise from the statutory scheme itself or it may arise from the interactions between the parties. I have already indicated that I see no error in the Judge's conclusion that there is no relationship of proximity, and no corresponding *prima facie* duty of care, arising from the statutory scheme.

[54] These reasons deal with the issue of proximity arising from the course of conduct between the parties. In addressing that question, we may look at "expectations, representations, reliance, and the property or other interests involved"; there is no single unifying characteristic: *Cooper v. Hobart* at paragraphs 34-35.

[55] This case is similar to *Imperial Tobacco* in that it involves the decisions of a regulatory authority. It is different in the sense that the Beekeepers are not, per se, the regulated entity. They are one group, among others, who may be affected by the regulators' decisions. Other affected groups include agricultural producers who rely upon pollination of their crops by honeybees, as well as processors who use those agricultural products as an input for their products. That said, the difference is admittedly one of degree and not one of kind.

[56] The conduct which gave rise to a relationship of proximity in *Imperial Tobacco* was Canada's departure from its role as regulator and its assumption of that of "designer, developer, promoter and licensor of tobacco strains": see *Imperial Tobacco* at paragraph 54.

[57] What facts have the Beekeepers pleaded which could give rise to a relationship of proximity with the respondents? The statement of claim recites the history of the ban on importation of honeybees from the continental United States. At paragraph 20 and following of the statement of claim they note that, with the expiry of *HIPR-2004*, the respondent adopted a policy of banning the importation of honey bee packages from the United States, without conducting a risk assessment.

[58] The Beekeepers identify representations made to the Canadian beekeeping industry to the effect that the respondents regulated bee imports for the purpose of protecting the beekeeping industry, that the restrictions on importation would be maintained only so long as the risk to the honeybee population existed, that the respondents would continuously monitor the situation to determine when the restrictions could be lifted. These representations were made in the RIASs

which accompanied each exercise of the regulatory power. The Beekeepers do not plead that they relied on these representations.

[59] The Beekeepers also plead that the respondents' actions were aimed at fostering and protecting the viability of the beekeeping industry, and that the respondents knew of the economic hardship suffered by certain beekeepers and beekeeping regions as a result of the restrictions on importation. In addition, the Beekeepers also plead that the respondents originally consulted and cooperated with the Canadian Honey Council, provincial beekeeping associations, individual beekeepers and other stakeholders. After 2006, the respondents consulted exclusively with the Canadian Honey Council which it knew or ought to have known was dominated by a faction which had an economic interest in maintaining the restriction on importation of honey bees.

[60] As I read the statement of claim, these are the facts pleaded by the Beekeepers which could give rise to a relationship of proximity. They plead other facts, specifically the particulars of the actions which caused them harm. It is important to recognize that an analysis of proximity based on a course of conduct cannot rest on the very conduct which is alleged to have caused damage to the plaintiff. Such an analysis would make existence of the *prima facie* duty of care a function of the occurrence of damage. At that point, the *Anns* test becomes a tautology. It is the relationship of proximity which imposes on the defendant the obligation not to do that which has caused harm to the plaintiff. As a result, the plaintiff must be able to establish proximity without reference to the acts which it claims caused it harm.

[61] It is clear from these facts that the respondents acted in their capacity as regulators and did so in consultation with the beekeeping industry. They did not assume a role outside their regulatory role, though it is alleged in the rest of the statement of claim that they discharged their regulatory responsibilities badly. This distinguishes this case from *Imperial Tobacco* where the relationship of proximity was found to exist by reason of the additional non-regulatory roles adopted by Canada's officials. *Imperial Tobacco* is not the only template for proximity based on a course of conduct but, at the very least, it can be said that these facts do not fit that template.

[62] I have difficulty conceiving how these facts could constitute a course of conduct giving rise to a relationship of proximity. Statutory authority is given to public authorities so that they can act in the public interest. When they do so, private interests may suffer. That private loss cannot be the basis of a relationship of proximity. To find that it did would be to find that, where a relationship of proximity is not created by a statutory scheme, it can be created by actions taken to give effect to the statutory scheme. As the relationship of proximity cannot rest upon the conduct causing the harm, such a conclusion is illogical.

[63] In the same vein, one must be cautious about treating representations made in the course of exercising a regulatory power as a basis for a relationship of proximity, particularly when reliance on those representations is not pleaded. In this case, Judge found that the protection of the economic interests of the Beekeepers was not the object of the statutory scheme. I agree with that conclusion. As a result, statements made in the RIASs go no further than providing a context for the respondents' actions.

[64] As for the question of the respondents' relationship with the Canadian Honey Council, one presumes that the respondents dealt with this organization because it is or was the beekeeping industry's national industry organization. It is a rare organization whose members' interests are all perfectly aligned. There are always rump groups within and without national organizations who claim that their interests are not being properly represented. If the fact that the government chooses a national organization as its privileged interlocutor is taken to create a relationship of proximity, governments would be disinclined to consult, a trend which ought not to be encouraged.

[65] My colleague raises the issue of bad faith on the part of the respondents. The Beekeepers did not specifically plead bad faith. I do not believe that facts which they did plead lend themselves to that characterization. The Beekeepers plead that the respondents knew that the Canadian Honey Council was dominated by a faction that had an economic interest in maintaining the prohibition on importation. They also plead that the respondents at some point ceased to consult with anyone other than the Canadian Honey Council. But they do not plead that the respondents acted with a view to advancing the faction's interests, or that they misrepresented their motives.

[66] Bad faith is generally taken to refer to deliberate conduct. I am aware of the Supreme Court's decision in *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17 (*Finney*), in which the issue was whether the Barreau could rely on the immunity granted to it by statute so long as it was acting in good faith. The Supreme Court held that bad faith "must be given a broader meaning that encompasses serious carelessness or recklessness": see *Finney*, at p.38-39.

I would suggest that the Supreme Court decided that case on a wider ground than was necessary. The issue before it was the absence of good faith; persons who act recklessly may not be acting in good faith but they are not necessarily acting in bad faith. In any event, the Beekeepers did not plead recklessness or gross negligence.

[67] To the extent that bad faith is used to anchor a claim in negligence, it suffers from the same defect as other acts which cause harm, namely they cannot be the basis for a finding of proximity.

[68] The source of the difficulty in dealing with this claim is that while it is framed as an action in negligence, all of the particulars of negligence are acts for which a remedy is available in administrative law. Taking the pleadings at face value, the Beekeepers have been the victims of abusive administrative action. Had they sought judicial review of those abusive actions in a timely fashion, they could have limited, if not prevented, the losses of which they now seek to recover in their negligence action. This is not a case in which the Beekeepers were victims of misconduct for which there is or was no other recourse. There was a readily available remedy which they chose not to exercise. In my view, it is not just and reasonable to impose a prima facie duty of care in negligence when the injury complained of could have been limited or prevented entirely by the exercise of a readily available remedy.

[69] One could argue that the better course would be to find a duty of care but to take the availability of another remedy into account under the heading of mitigation. With respect, this reasoning is more appropriate to a case where the alternative remedy offers only a partial

solution. Where, as here, a prompt application for judicial review on an expedited basis could have prevented or radically minimized the losses which are being claimed, I believe that the better policy is to require plaintiffs to exercise the rights they already have rather than finding new remedies.

[70] To the extent that this case concerns the boundary between public law and private remedies, I would say, despite my colleague's thoughtful analysis, that the distinction is now firmly entrenched in our law. Though the sentiments expressed by Iacobucci J. in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (*Fraser River*) may seem quaint in light of recent developments, I believe they remain relevant and worthy of consideration:

> Fraser River has also argued that to relax the doctrine of privity of contract in the circumstances of this appeal would be to introduce a significant change to the law that is better left to the legislature. As was noted in *London Drugs*, *supra*, privity of contract is an established doctrine of contract law, and should not be lightly discarded through the process of judicial decree. Wholesale abolition of the doctrine would result in complex repercussions that exceed the ability of the courts to anticipate and address. It is by now a well-established principle that courts will not undertake judicial reform of this magnitude, recognizing instead that the legislature is better placed to appreciate and accommodate the economic and policy issues involved in introducing sweeping legal reforms.
>
> *Fraser River*, cited above, at paragraph 43

[71] In summary, I find that the Beekeepers have not shown that there was a relationship of proximity between them and the respondents such that a *prima facie* duty of care arose. That being the case, I do not need to address the second leg of the *Anns* test.

[72] As a result, I agree with the Judge's disposition of the application to strike out the statement of claim.

VII. ARE THE RESPONDENTS ENTITLED TO COSTS?

[73] This statement of claim in this matter relates to a proposed class action. On the authority of *Pearson v. Canada*, cited above, the Judge held that the respondents were entitled to costs because the action had not yet been certified as a class proceeding.

[74] It is unfortunate that this Court's decision in *Campbell v. Canada (Attorney General)*, 2012 FCA 45, was not brought to the Judge's attention. In that case, this Court held that the immunity from costs provided for in Rule 334.39(1) of the *Federal Courts Rule's* SOR/98-106, applied from the time the motion for certification is served on the defendants because that is the point in time at which the plaintiffs become a "party to a motion for certification of a proceeding as a class proceeding". In this case, the motion for certification was served before the motion to strike was served or heard. As a result, the Beekeepers (*i.e.* the plaintiffs in the action) are entitled to the immunity from costs contemplated by Rule 334.39(1). To the extent that it might be argued that the plaintiffs lost that immunity because of the submission of their proposed amended statement of claim, it appears that the Judge misconstrued the Beekeepers' intentions.

[75] As a result, I would allow the appeal in part and vary the judgment of the Federal Court to remove the award of costs in favour of the respondents. In all other respects, I would dismiss the appeal without costs.

"J.D. Denis Pelletier"

J.A.

STRATAS J.A.

[76] I agree with my colleague's account of the relevant background to this appeal and the facts. I agree with him that, on a motion to strike, all allegations in the claim must be taken as true and that the claim is to be struck only where it is plain and obvious the claim will fail. Further, I agree with his observation in paragraph 68, above, that if we take the allegations as true, the beekeepers have been victims of abusive administrative action on the part of the respondents (Canada).

[77] The Federal Court and my colleague conclude that it is plain and obvious that the beekeepers' claim for damages must fail. I disagree. In my view, taking the allegations in the claim as true, the claim cannot be struck. In my view, the facts as pleaded support a claim in negligence and bad faith. Were it necessary, I would also conclude that the facts pleaded support a claim for monetary relief in public law.

A. The claim for negligence and bad faith

(1) Identifying the alleged conduct of Canada that is the subject of the claim

[78] The first step is to identify the conduct attacked in the claim. Here, two documents are relevant: the statement of claim and a proposed amended statement of claim. The latter particularizes some of the conduct alleged in the former.

[79] The Federal Court viewed the proposed amended statement of claim as an improper attempt to amend the statement of claim after Canada had moved to strike it. Despite that, the Federal Court considered the conduct set out in both documents: Federal Court's reasons at paragraph 84.

[80] In this Court, the beekeepers say that delivering a proposed amended statement of claim was proper. I agree. The beekeepers did not move to amend their claim. Instead, they delivered it to show that certain problems raised by Canada – for example, a lack of particularity in the allegations – could be overcome. This is proper and accepted practice: *Collins v. Canada*, 2011 FCA 140; 418 N.R. 23. The proposed amended statement of claim is properly before us and sheds light on some of Canada's alleged conduct.

(2) The alleged conduct

[81] 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.

[82] The *Honeybee Importation Prohibition Regulations, 2004*, S.O.R./2004-136 prohibited the importation of packages of honeybees from the United States. At the end of 2006, those regulations expired according to their terms. Canada did not enact new regulations extending or re-establishing the prohibition. Rather, Canada implemented and enforced a blanket guideline –

not a law – that did the same thing that the expired regulations did. The blanket guideline prohibited the importation of packages of honeybees from the United States.

[83] Resting alongside this blanket guideline, however, is section 160 of the *Health of Animals Regulations*, C.R.C., c. 96. Under that section, the beekeepers can apply for importation permits on a case-by-case basis. They are entitled to receive permits and import honeybees where the importation "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."

[84] In short, section 160 conditionally allows imports. But, say the beekeepers, the bureaucrats have created and enforced a guideline that unconditionally prevents the beekeepers from accessing section 160 under any circumstances. The beekeepers' claim basically asserts that the bureaucrats have no right to trump the law expressed in section 160 that permits imports in certain circumstances.

[85] As my colleague suggests, the facts the beekeepers allege could prompt an award of administrative law remedies against the guideline:

- The guideline is tantamount to a regulation that should have been passed as a regulation: see, *e.g.*, *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104; 121 D.L.R. (4th) 79 (C.A.).

- The guideline imposes an absolute prohibition against importation and, thus, conflicts with the law on the books, section 160 of the *Health of Animals Regulations*, above.

- The guideline is unreasonable within the meaning of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, as it is not supported by any scientific evidence of a risk of harm due to importation. The last risk assessment was several years out of date.

- A faction of commercial beekeepers, acting for their own financial advantage, captured the bureaucracy and induced it to make the guideline; thus, the guideline was enacted for an improper purpose: see, *e.g.*, *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1977), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (C.A.); *Doctors Hospital v. Minister of Health et al.* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.).

(3) The Federal Court's decision

[86] The Federal Court struck the beekeepers' claim on the ground that it was plain and obvious it could not succeed. In my view, the Federal Court erred on some of the issues before it and should not have struck the pleading.

[87] First, in my view, the Federal Court erred in dealing with the beekeepers' allegation that Canada pursued an improper purpose or acted in bad faith in creating and implementing the blanket guideline. The Federal Court weighed the allegation and summarily rejected it out of hand, saying it is "not…convincing": Federal Court's reasons at paragraph 119. This offends the principle that on a motion to strike, allegations must be taken as true unless they are "manifestly incapable of being proven": *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paragraph 22. True, the allegations in the original statement of claim are not well-particularized, but Canada pleaded to them, waiving whatever rights it had to object on that basis. Here, the allegations, as particularized in the proposed amended statement of claim, can be proven through evidence obtained from discovery, access to information requests and trial proceedings. And these allegations can succeed in law. Damages may be had against those who acted in bad faith or followed an improper purpose: see, *e.g.*, *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689; *Chaput v. Romain*, [1955] S.C.R. 834, 1 D.L.R. (2d) 241; *Gershman v. Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 D.L.R. (3d) 114, [1976] 4 W.W.R. 406 (Man. C.A.); *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9 (Crown attorneys, as public officials, pursuing an improper purpose). Further, while, as we shall see, a claim of negligence can be barred for policy reasons, that bar does not apply where the conduct is "irrational" or "taken in bad faith": see *Imperial Tobacco*, above at paragraphs 74 and 90.

[88] The Federal Court next considered whether the beekeepers' claim could succeed in negligence. In particular, it examined whether Canada owed the beekeepers a duty of care. Following the well-established approach, it asked itself two questions:

(1) Do the facts pleaded give rise to a relationship of proximity in which Canada's failure to take reasonable care might foreseeably cause loss or harm to the beekeepers?

(2) Are there policy reasons why a duty of care should not be recognized?

(*Imperial Tobacco*, above at paragraph 39, citing *Anns v. Merton London Borough Council*, [1977] UKHL 4, [1978] A.C. 728, adopted and reformulated in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 and *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.)

[89] On the first question, the Federal Court accepted that, on the facts pleaded, the claim should not be struck for want of proximity: Federal Court's reasons at paragraph 114. On this point, the Federal Court did not err.

[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.

[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.

[92] As mentioned above, the second question for determining whether a duty of care is present asks whether there is a policy bar. The Federal Court said there was one. In its view, the blanket guideline implemented Canada's important public duty to protect Canadians' health and safety. Recognizing a duty of care – in effect requiring Canada to have regard to the beekeepers' interests – would conflict with that public duty: Federal Court's reasons at paragraph 92. Accordingly, the Federal Court held that Canada must be completely immunized from suit: Federal Court's reasons at paragraph 103. In reaching this result, the Federal Court interpreted and applied *Imperial Tobacco*, above, and relied heavily upon it.

[93] I do not agree that a policy bar dooms the beekeepers' claim to certain failure. Further, I do not agree with the Federal Court's interpretation and application of *Imperial Tobacco*. These points deserve closer examination.

(4) The policy bar and *Imperial Tobacco*

[94] Taking 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.

[95] As mentioned above, the beekeepers' claim focuses on their inability to import honeybees from the United States under section 160 of the *Health of Animals Regulations*, above. Section 160 says that permits "shall" be granted on a case-by-case basis where the importation will not bring a "vector, disease or toxic substance" to Canada. In other words, the public policy established by the law on the books favours importation in appropriate circumstances. According to the beekeepers, those circumstances existed, and importation should have been allowed. Thus, in this case, there is no inconsistency between the existence of a private law duty of care to the beekeepers and the public duty Canada owed. This case is on all fours with *Hill*, above, where the Supreme Court found (at paragraphs 36-41) that the imposition upon the police of a private duty of care to an individual suspect in the circumstances of the case before it was consistent with the broader public duty upon the police to investigate criminal activity effectively and fairly.

[96] The Federal Court suggested that the old regulations, the *Honeybee Importation Prohibition Regulations, 2004*, above were aimed at protecting Canadians' health and safety and support a broad public interest policy bar in this case: Federal Court's reasons at paragraph 106. The Federal Court 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 blanket guideline: Federal Court's reasons at paragraph 106.

[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.

[98] In support of its conclusion that the beekeepers' claim was subject to a policy bar and should be struck, the Federal Court held that recognizing a duty of care "could have" a chilling effect on Canada's performance of its duties: Federal Court's reasons at paragraph 92. Here, again I disagree. In law, this standard – "could have" – sets the bar far too low. One can always speculate that recognizing a duty of care could have a chilling effect. Such a low standard would immunize government from liability in every case of bureaucratic ineptitude, no matter how substandard or damaging the misconduct may be. No court anywhere has set the bar that low.

[99] In any event, if the beekeepers recover damages, I cannot see any regulator, including the Minister, being chilled from exercising jurisdiction in any way. The Minister is being sued for improperly refusing to consider section 160 applications. If the beekeepers succeed, the Minister will then freely decide whether permits should be granted on the basis of the facts and the scientific evidence. In any judicial review, the Minister's factually-suffused, scientifically-based decision will be just as difficult to set aside as before.

[100] Both in this Court and below, Canada invokes the possibility of indeterminate liability as support for a policy bar. Here, there is no such possibility. The class of claimant is limited and the circumstances alleged to give rise to liability are most uncommon.

[101] As well, certain factors serve to cap the damages claim. In the assessment of damages at trial, the judge will consider what would have happened had the Minister acted properly, *i.e.*, what would have happened in a "but for" world where the blanket guideline did not exist. In that "but for" world, the beekeepers would have had to apply for permits under section 160 of the *Health of Animals Regulations*, above. If permits would not have been available under that section anyway – for example, because at all material times there was a risk of disease and harm arising from importation of bees from the United States – the beekeepers will not be entitled to damages. This shows that the important purpose of protecting the public, relied upon by the Federal Court and my colleague as a policy bar, can still have an appropriate voice in the assessment of damages, perhaps even reducing them to nil. But at this preliminary stage, it cannot be said the "plain and obvious" threshold for striking out the claim has been met.

[102] I turn now to *Imperial Tobacco*, above, a case relied upon by the Federal Court to find that the beekeepers' claim is subject to a policy bar under the second branch of the duty of care test.

[103] In *Imperial Tobacco*, the Supreme Court states that if a duty of care "would conflict with the state's general public duty established by the statute," the court "may" not find one: at paragraph 45. That sentence appears in a section that suggests broadly that "expressions of government policy" are exempted from liability for damages: at paragraph 62. The Supreme Court also speaks of matters of "core policy" that are protected from suit: at paragraph 90. The Federal Court regard some or all of these statements as clear propositions preventing recognition of a duty of care upon Canada to the beekeepers.

[104] I disagree. I do not accept that *Imperial Tobacco* establishes any hard-and-fast rule that decisions made under a general public duty, government policy or core policy are protected from a negligence claim.

[105] The statement in paragraph 45 of *Imperial Tobacco* about a "general public duty" contains the word "may," a qualifier. Unfortunately, the Supreme Court is silent about when that qualifier applies. Further, the Supreme Court does not define what qualifies as a "general public duty." Nor does it define the meaning of "expressions of government policy" in paragraph 62. We are left to fend for ourselves.

[106] As for "core policy" matters that are protected from suit, the Supreme Court offers this definition (at paragraph 90):

> "[C]ore 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. [This]…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.

[107] In the first sentence of this paragraph, we are told that "decisions…based on public policy considerations" are immune. But most decisions are based on public policy considerations; indeed, all considerations to be taken into account by decision-makers under legislation are public policy considerations.

[108] Also in the first sentence, we are told that examples – not exhaustive – of public policy considerations are "economic, social and political factors." But that covers just about everything on the legislative books in the area of regulation. Read literally, the first sentence immunizes a broad zone of bureaucratic activity quite contrary to fundamental principles of accountability in public law, and many decided cases too, including many from the Supreme Court: see the discussion in *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paragraphs 313-314.

[109] But the first sentence does not stand alone. Four follow. They whittle the definition down essentially to nothing, telling us immunity may or may not apply, and any certainty is "likely

chimerical." What should be immunized from liability is said to be "readily identifiable," but no criteria for identification are supplied. Again, we are left to fend for ourselves.

[110] I conclude that *Imperial Tobacco* does not stand for any clear proposition that dooms the beekeepers' claim to failure. If anything, *Imperial Tobacco* leaves us more uncertain than ever as to when the policy bar will apply.

[111] Therefore, for the foregoing reasons, I conclude that it is not plain and obvious that the claim for negligence and bad faith will fail. The beekeepers' claim should be allowed to continue.

B. The public law claim

[112] Given my views on the viability of the beekeepers' claim in negligence and bad faith, I need not go further. But all of us seem to agree that the allegations in the claim, taken as true, could trigger an award of administrative law remedies, or more generally public law remedies. Might a monetary award based on public law principles be one of those remedies? For the benefit of future cases, this warrants examination.

(1) Construing pleadings

[113] A statement of claim must contain allegations of material facts sufficient to support a viable cause of action: *Federal Courts Rules*, S.O.R./ 98-106, Rule 174. Plaintiffs need not plead

the particular legal label associated with a cause of action: Rule 175; see also *Cahoon v. Franks*, [1967] S.C.R. 455 at pages 458-459. Similarly, plaintiffs who choose to use a particular legal label are not struck out just because they chose the wrong label: *Sivak v. Canada*, 2012 FC 272, 406 F.T.R. 115 at paragraph 20; *J2 Global Communications Inc. v. Protus IP Solutions Inc.*, 2008 FC 759, 330 F.T.R. 176 at paragraphs 33-36; *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2004 FC 1672, [2005] 4 F.C.R. 110 at paragraph 54.

[114] Instead, on a motion to strike, we must focus on whether the allegations of material facts in the claim, construed generously, give rise to a cause of action: *Conohan v. Cooperators*, 2002 FCA 60, [2002] 3 F.C. 421 at paragraph 15. This means any cause of action: *Imperial Tobacco*, above at paragraph 21; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at pages 979-80, 74 D.L.R. (4th) 321; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at pages 486-87, 18 D.L.R. (4th) 481. Sometimes the pleading gives rise to more than one cause of action. It all depends on the substance of the pleading, not the labels. As Lord Denning M.R. explained in *In re Vandervell's Trusts (No. 2)*, [1974] Ch. 269 at pages 321-22 (C.A.):

> It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to what he has stated. He can present, in argument, any legal consequence of which the facts present.

[115] In their statement of claim, the beekeepers do use the legal label "negligence." They have not used specific words claiming monetary relief in public law. But, read generously, the allegations of material facts in the statement of claim (as supplemented by the proposed amended statement of claim) support that very thing. In substance, the beekeepers allege they are victims of abusive administrative action warranting monetary relief. Getting past the legal label and the

technical form of the pleading, the real issue before us is the viability of a claim for monetary relief in public law.

(2) Novel claims and motions to strike

[116] A claim for monetary relief in public law is novel. In assessing whether a novel claim can survive a motion to strike, we must remember that the common law is in a continual state of responsible, incremental evolution: *R. v. Salituro*, [1991] 3 S.C.R. 654 at pages 665-70, 131 N.R. 161. While our Constitution is a "living tree capable of growth and expansion within its natural limits" (see *Edwards v. Canada (Attorney General)*, [1929] UKPC 86, [1930] A.C. 124), the common law – and particularly public law – is not a petrified forest. A novel claim should not be struck just because it is novel. See *Imperial Tobacco*, above at paragraph 21, *Hunt*, above at pages 979-80 and *Operation Dismantle*, above at pages 486-87. However, as was said in *Salituro*, above, and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, 176 D.L.R. (4th) 257 at paragraph 42, judge-made reform to judge-made law has its limits.

[117] When courts consider a novel claim, they must keep in mind a line. On one side of the line is a claim founded upon a responsible, incremental extension of legal doctrine achieved through accepted pathways of legal reasoning. On the other is a claim divorced from doctrine, spun from settled preconceptions, ideological visions or freestanding opinions about what is just, appropriate and right. The former is the stuff of legal contestation and the courts; the latter is the stuff of public debate and the politicians we elect.

[118] In my view, monetary relief based on public law principles qualifies as the sort of novel claim that should not be struck on a motion to strike. It falls on the appropriate side of the line. As we shall see, it is a responsible, incremental change to the common law founded upon legal doctrine and achieved through accepted pathways of legal reasoning. It does not throw into doubt the outcomes of previous cases, but rather offers better explanations for them, leading us to a more understandable, more coherent law of liability for public authorities.

(3) Assessing the existing law, and seeing a better way forward

[119] One afternoon in a small, quiet café in Paisley, Scotland, Francis Minghella served May Donoghue a bottle of ginger beer with a decomposed snail in it. So said a claim for damages, at the time so novel it was met by a motion to strike: *Donoghue v. Stevenson*, [1932] UKHL 100, [1932] A.C. 562. Upon the dismissal of that motion, a body of law was born. For the last eighty-three years, that body of law, with some modifications, has governed the liability of all private parties – and all public authorities too, even giant, complex ones that today serve millions.

[120] The difference between private parties and public authorities matters not. For reasons never explained, Canadian courts have followed the same analytical framework for each: we examine the duty of care, standard of care, remoteness, proximity, foreseeability, causation and damages.

[121] To make this analytical framework suitable for determining the liability of public authorities, courts have tried gamely to adapt it. And then, dissatisfied with the adaptations, they have adapted the adaptations, and then have adapted them even more, to no good end.

[122] Specifically, courts adapted the analytical framework for negligence by inserting a double-barrelled test into it: *Anns*, above, imported into Canadian law with some adaptations in *Kamloops*, above; and see my reasons at paragraph 88, above. Under this test, proximity, not foreseeability, gained prominence, with freestanding policy considerations playing a significant role in shielding public authorities from liability.

[123] Further adaptations took place a little while later: *Cooper*, above; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562. These adaptations upon earlier adaptations have led to a number of cases whose outcomes are hard to reconcile: to name a few, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Hill*, above; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132; see also Freya Kristjansen and Stephen Moreau, "Regulatory Negligence and Administrative Law" (2012) 25 C.J.A.L.P. 103 at page 127 (many cases are "contradictory" and "in a state of lamentable confusion").

[124] Courts have also tried to adapt the analytical framework for negligence by distinguishing between policy matters and operational matters, the former non-actionable, the latter actionable. At first, the Supreme Court embraced this distinction wholeheartedly and unconditionally: *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, 112 D.L.R. (4th) 1; *Swinamer*

v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445, 112 D.L.R. (4th) 18; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, 153 D.L.R. (4th) 594. But after decades of enforcing this distinction and adapting it, the Supreme Court has now concluded that it is unworkable as a legal test: *Imperial Tobacco*, above at paragraphs 78 and 86.

[125] And now we have *Imperial Tobacco*, a decision that, as we have seen, provides little tangible direction. It has spawned a fresh wave of academic criticism: see, *e.g.*, Paul Daly, "The Policy/Operational Distinction – A View from Administrative Law", in Matthew Harrington, ed., *Compensation and the Common Law* (Toronto: LexisNexis) [forthcoming in 2015] ("the concept of [core policy]…immune from liability…threatens to wreak further confusion"); Bruce Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified" (2014) 92 Can. Bar Rev. 211 at pages 214 and 216-217 (using the presence or absence of policy to bar recovery is "inherently uncertain," "incapable of identifying a predictable or correct decision…" and "a slippery exercise at best").

[126] Today, despite the best efforts of the Supreme Court and other courts, the doctrine governing the liability of public authorities remains chaotic and uncertain, with no end in sight. How come?

[127] At the root of the existing approach is something that makes no sense. In cases involving public authorities, we have been using an analytical framework built for private parties, not public authorities. We have been using private law tools to solve public law problems. So to speak, we have been using a screwdriver to turn a bolt.

[128] Public authorities are different from private parties in so many ways. Among other things, they carry out mandatory obligations imposed by statutes, invariably advantaging some while disadvantaging others. As for the duty of care, does it make sense to speak of public authorities having to consider their "neighbours"– the animating principle of *Donoghue v. Stevenson* – when they regularly affect thousands, tens of thousands or even millions at a time? As for the standard of care, how can one discern an "industry practice" that would inform a standard of care given public authorities' wide variation in mandates, resources and circumstances? Even if these questions are satisfactorily answered, others remain. For example, the defence of consent – a defence that keeps the liability of many private parties in check – is often impractical or impossible for public authorities. And, unlike private parties, many other less drastic tools exist to redress public authorities' misbehaviour, including *certiorari* and *mandamus*.

[129] As well, the current law of liability for public authorities – the provenance and essence of which is private law – sits as an anomaly within the common law. By and large, our common law recognizes the differences between private and public spheres and applies different rules to them. Private matters are governed by private law and are addressed by private law remedies; public matters are governed by public law and are addressed by public law remedies. This has become a fundamental organizing principle: *Dunsmuir*, above; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504; *Air Canada v. Toronto Port Authority*, 2011 FCA 347; [2013] 3 F.C. 605.

[130] This anomaly should now end. The law of liability for public authorities should be governed by principles on the public law side of the divide, not the private law side. A number now seem to agree: see, *e.g.*, United Kingdom Law Commission, *Consultation Paper No. 187, Administrative Redress: Public Bodies and the Citizen* (London: The Law Commission, 2010); Peter Cane, "Remedies Available in Judicial Review Proceedings" in D. Feldman, ed. *English Public Law* (Oxford: Oxford University Press, 2004) 915 at page 949.

[131] This idea is not so novel. In the past, on multiple occasions, the Supreme Court has suggested public authorities could be liable when they act "without legal justification," a concept that seems to echo public law principle, not private law torts: *Conseil des Ports Nationaux v. Langelier et al.*, [1969] S.C.R. 60 at page 75, 2 D.L.R. (3d) 81; *Roman Corp. v. Hudson's Bay Oil & Gas Co.*, [1973] S.C.R. 820 at page 831, 36 D.L.R. (3d) 413. And in two cases – one more than a half century ago, the other a century ago – the Supreme Court awarded monetary relief for improper public law decision-making on the basis of public law principles existing at that time. In *McGillivray v. Kimber* (1915), 52 S.C.R. 146, 26 D.L.R. 164, the Supreme Court granted monetary relief and, in so doing, did not invoke negligence principles or any other nominate cause of action in private law. And in *Roncarelli*, above, the Supreme Court (per Justice Rand at page 142) granted monetary relief, relying not only on negligence (then article 1053 of the Civil Code of Québec) but also on "the principles of the underlying public law."

[132] What are the principles of the underlying public law? Today, they are found primarily in administrative law, in particular the law of judicial review. Broadly speaking, we grant relief when a public authority acts unacceptably or indefensibly in the administrative law sense and

when, as a matter of discretion, a remedy should be granted. These two components – unacceptability or indefensibility in the administrative law sense and the exercise of remedial discretion – supply a useful framework for analyzing when monetary relief may be had in an action in public law against a public authority. This framework explains the outcome in cases like *Roncarelli* and *McGillivray*, both above, as well as negligence cases like *Hill*, *Syl Apps*, *Fullowka*, all above, and others mentioned below.

[133] I turn now to the first part of this framework, unacceptability or indefensibility in the administrative law sense.

[134] In Canada, public decisions, when judicially reviewed, are often subject to reasonableness review. This means that the decision must be within a range of acceptability or defensibility on the facts and the law: *Dunsmuir*, above at paragraph 47. If the decision is within that range, it stands and the Court does not proceed to any consideration of remedy. On the other hand, when a decision is outside of the range, *i.e.*, is unacceptable and indefensible within the meaning of the authorities, we proceed to the remedial stage of judicial review.

[135] The range of acceptability and defensibility in the administrative law sense or, put another way, the margin of appreciation we afford to a public authority, can be narrow or wide depending on the nature of the question and the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at

paragraphs 37-41; and see the guiding principles and non-exhaustive list of factors that can affect the margin of appreciation in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 at paragraphs 90-99 and *Pham v Secretary of State for the Home Department*, [2015] UKSC 19 at paragraph 107.

[136] On the one hand, where the decision is clear-cut or constrained by judge-made law or clear statutory standards, the margin of appreciation is narrow: see, *e.g.*, *McLean*, above; *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N.R. 201; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C. 203; *Canada (Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228, 464 N.R. 112. In such cases, the Court is more likely to reach the remedial stage. On the other hand, where the decision is suffused with subjective judgment calls, policy considerations and regulatory experience or is a matter uniquely within the ken of the executive, the margin of appreciation will be broader: see, *e.g.*, *Farwaha*, above; *Rotherham Metropolitan Borough Council v. Secretary of State for Business Innovation and Skills*, 2015 UKSC 6. In such cases, the Court is less likely to reach the remedial stage.

[137] Indeed, where a decision is thoroughly suffused by facts, policies, discretions, subjective appreciations and expertise, the margin of appreciation may be so wide that, absent bad faith, it is hard to see how the remedial stage could ever be reached: see, *e.g.*, *Catalyst*, above; *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *Rotherham*, above. The rejection of certain claims for negligent decision-making or conduct may well be explained in this way: see, *e.g.*, *Alberta v. Elder Advocates of Alberta Society*, 2011

SCC 24, [2011] 2 S.C.R. 261; *Enterprises Sibeca Inc. v. Frelighsburg*, 2004 SCC 61, [2004] 3 S.C.R. 304 at paragraphs 23 and 39; *Williams v. Ontario*, 2009 ONCA 378, 95 O.R. (3d) 401; *Eliopoulos Estate v. Ontario (Minister of Health and Long Term Care)* (2006), 82 O.R. (3d) 321, 276 D.L.R. (4th) 411 (C.A.); *A.L. v. Ontario (Minister of Community and Social Services)* (2006), 83 O.R. (3d) 512, 274 D.L.R. (4th) 431 (C.A.). Perhaps when the Supreme Court in *Imperial Tobacco* speaks of core policy matters for which damages cannot be had, these are the sorts of cases it has in mind. That concept, though, is best understood using public law tools, not private law negligence.

[138] In an application for judicial review, remedies are discretionary: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1. Courts inform their remedial discretion by examining the acceptability and defensibility of the decision, the circumstances surrounding it, its effects, and the public law values that would be furthered by the remedy in the particular practical circumstances of the case: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 at paragraphs 15-21; and see the enumeration of public law values in *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at paragraph 30, citing Paul Daly, "Administrative Law: A Values-Based Approach" in Mark Elliott and Jason Varuhas, eds., *Process and Substance in Public Law Adjudication* (forthcoming, Hart: Oxford, 2015).

[139] This framework – the unacceptability or indefensibility in the administrative law sense of the public authority's conduct and the court's exercise of remedial discretion – should govern whether monetary relief in public law may be had by way of action.

[140] Nothing in law obstructs this. In particular, the traditional rules of Crown immunity and the *Crown Liability and Proceedings Act*, R.S.C. 1985, c C-50 and its predecessors have not prevented the granting of monetary relief in public law in cases like *Roncarelli* and *McGillivray*, both above. The jurisdiction of courts to grant public law relief is rooted in their constitutionally-based administrative law jurisdiction to relieve against improper public action: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1. Were it necessary to examine the *Crown Liability and Proceedings Act*, in my view a public authority against whom monetary relief is awarded on public law principles must be regarded as having committed a "fault" (in Quebec) or a "tort" (in the rest of Canada) within the meaning of paragraphs 3(*a*)(i) and 3(*b*)(i) of the Act. The word "tort" cannot be read as including only named torts in private law such as negligence but instead must extend to any legally-recognized fault, otherwise Quebec and the rest of Canada would have a different liability rule. Preventing different liability rules within Canada was the point of the amendments made to these provisions by the *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4.

[141] I wish to add more about the discretion to grant monetary relief in public law.

[142] In public law, monetary relief has never been automatic upon a finding that governmental action is invalid or, using modern, post-*Dunsmuir* administrative law language, outside the range

of acceptability or defensibility: *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, 22 D.L.R. (3d) 470; *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551 at paragraph 9. "Invalidity is not the test of fault and it should not be the test of liability": K.C. Davis, *Administrative Law Treatise* (1958), vol. 3 (St. Paul, MN: West Publishing, 1958) at page 487. There must be additional circumstances to support an exercise of discretion in favour of monetary relief.

[143] The compensatory objective of monetary relief must be kept front of mind. So, in some cases, the quashing of a decision or the enjoining or prohibition of conduct will suffice and monetary relief will neither be necessary nor appropriate. In other cases, quashing, prohibiting or enjoining can prevent future harm and go some way to redress past harm, reducing or eliminating the need for monetary relief. In still others, such as cases like *McGillivray* and *Roncarelli*, both above, only monetary relief can accomplish the compensatory objective.

[144] As well, the quality of the public authority's conduct must be considered. This is because orders for monetary relief are mandatory orders against public authorities requiring them to compensate plaintiffs. And in public law, mandatory orders can be made against public authorities only to fulfil a clear duty, redress significant maladministration, or vindicate public law values: see, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93 at paragraph 14; *D'Errico*, above at paragraphs 15-21.

[145] The decided cases seem to reflect this. It is striking how often courts have awarded monetary relief against public authorities where they have not fulfilled a clear and specific duty to act – *i.e.*, where, using the language of public law, the failure to act was unacceptable or indefensible in the administrative law sense and there are circumstances of specific undertakings, specific reliance or known vulnerability of specific persons that trigger or underscore an affirmative duty to act: see Norman Siebrasse, "Liability of Public Authorities and Duties of Affirmative Action" (2007), 57 U.N.B.L.J. 84 and cases citied therein. As for addressing maladministration or vindicating public law values, it is striking how often it is said that monetary recovery in some categories of cases requires abuses of power, exercises of bad faith, pursuits of improper purposes, or conduct that is "clearly wrong," "reckless," "irrational," "inexplicable and incomprehensible," or a "fundamental breakdown of the orderly exercise of authority": see, *e.g.*, *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405 at paragraph 78; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17 at paragraph 39; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 at paragraph 43; *Enterprises Sibeca Inc.*, above at paragraph 23; *Imperial Tobacco*, above at paragraphs 74 and 90; see also the authorities cited in paragraph 87 of my reasons, above; and see also the illuminating discussion in David Mullan, "*Roncarelli v. Duplessis* and Damages for Abuse of Power", (2010) 55 McGill L.J. 587 at pages 604-610. Maladministration and conduct offensive to public law values can take many forms; these are just particular illustrations.

[146] The considerations governing the discretion to award remedies in a judicial review, set out in paragraph 138 of my reasons, above, apply equally to the granting of monetary relief in public law. Among other things, one must assess the circumstances surrounding the public

authority's conduct, its effects, and whether the granting of monetary relief would be consistent with public law values: see *Wilson* and Daly, both above; see also much of the discussion in the Charter damages case of *Ward*, above. Concerns about public authorities being saddled with indeterminate liability and being left free, not chilled, from exercising their legislative mandates are well-supported by some of these public law values. In appropriate cases, those concerns must form part of the exercise of remedial discretion.

(4) The case at bar

[147] My colleague suggests – and I agree – that had the beekeepers attacked Canada's conduct in this case by way of judicial review and had they proven their allegations, they would have succeeded on the grounds set out in paragraph 85 of my reasons, above. At least, that is how it appears from the allegations in the statement of claim and proposed amended statement of claim before the Court, allegations that we must take as true. Therefore, the question before us is whether it is plain and obvious that a court would exercise its discretion against giving the beekeepers monetary relief.

[148] It is not plain and obvious. Taking the allegations in the claim as proven, Canada's officials took it upon themselves to create and enforce an unauthorized, scientifically unsupported blanket policy preventing the beekeepers from exercising their legal right to apply for importation permits on a case-by-case basis under section 160 of the *Health of Animals Regulations*, above. This gives rise to a number of grounds for finding unacceptability and indefensibility: see paragraph 85 of my reasons, above. As alleged, Canada's conduct has a

flavour of maladministration associated with it, something that can prompt an exercise of discretion in favour of monetary relief. The additional element of bad faith, pleaded here (see paragraph 87 of my reasons, above), buttresses that conclusion. As pleaded, the interactions between Canada and the beekeepers suggest that monetary relief may be required to fulfil a clear and specific duty to act. I also rely on much of the discussion in paragraphs 98-101 of my reasons, above, concerning the absence of a chilling effect on administrative decision-makers and indeterminate liability.

[149] Canada pleads in its defence that monetary relief is unavailable or should be denied. But for it to succeed on these points, evidence will have to be adduced. On this motion to strike, no such evidence is before us and so a number of issues do not yet arise for determination:

- If the policy is declared invalid, the Court will have to calculate damages based on what would happen in the "but for" world. In that world, the beekeepers would have been able to apply for importation permits under section 160. The Minister would have had a broad margin of appreciation under that section, based on facts, policy and the need to protect against disease and other harm, indeed likely one so broad that only bad faith would render a decision unreasonable. For practical purposes, if it turns out that the Minister would have had evidence at that time supporting a denial of the permits, then any decision to refuse permits would be upheld as reasonable. This would eliminate any claim for monetary relief.

- Might the beekeepers have mitigated almost all of their losses by bringing an application for judicial review seeking to quash the policy as soon as it was enacted? In this motion to strike, we have no evidence nor can we assume that the beekeepers could have brought or would have been able to bring a judicial review right away. Even if that were so and even if they were successful in quashing the policy, quashing alone would not be an adequate remedy. Unaddressed would be the financial loss caused by the policy from the time it was first enforced through to the time the Federal Court, this Court or the Supreme Court quashed it – possibly a period of years.

- Might there be benign, scientifically-based explanations for the officials' conduct and their creation and enforcement of the policy?

[150] In its submissions before the Federal Court and to some extent in this Court, Canada objects to the beekeepers' claim based on civil procedure. In my view, it is not plain and obvious that a civil procedure objection lies.

[151] Before us, Canada alluded to the beekeepers' failure to bring an application for judicial review attacking the policy, as has my colleague. But the beekeepers could only seek monetary relief by way of action, not judicial review, and that is how they have proceeded: *Al-Mhamad v. Canada (Radio-Television and Telecommunications Commission)*, 2003 FCA 45, 120 A.C.W.S. (3d) 351. The statement of claim does not explicitly seek remedies such as injunction, certiorari, prohibition, mandamus, quo warranto and declaration that can only be sought by way of judicial

review: *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 18(3). Accordingly, the extendable 30-day limitation period for some of those remedies does not apply here: *Ibid.*, subsection 18.1(2). Had the beekeepers wanted to seek both subsection 18(3) relief against the decisions and damages for those decisions, they could have done so following the procedure described in *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C. 476 at paragraphs 45-50. But they did not. They seek only a monetary remedy and have properly proceeded by way of action.

[152] Since we are dealing with an action, section 39 of the *Federal Courts Act*, above supplies the applicable limitation period, though failure to formally invalidate the decisions at an early stage can significantly reduce the level of recovery depending on the state of the evidence before the Court (see paragraph 149 of my reasons, above). In some circumstances, an action might be considered a collateral attack against decisions made, though the Supreme Court seems prepared in some undefined circumstances to relax the doctrine of collateral attack in the case of actions against public authorities: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; and see also, *e.g.*, *Roncarelli* and *Gershman*, both above, both successful suits for damages suffered as a result of invalid decision-making. Finally, while Canada mentioned collateral attack briefly in argument in response to this Court's questioning, Canada has not asserted that objection by way of motion and so we have not had the benefit of full argument on the matter.

[153] Canada also expresses concerns about the degree of particularity in the beekeepers' statement of claim. It is well-established that bald allegations of bad faith, misbehaviour or

malice cannot stand. They must be particularized to a certain extent: *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198; 335 D.L.R. (4th) 312; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301 at paragraphs 34-39. This essential requirement helps to prevent fictional claims and weak claims destined to die. In this case, however, Canada has filed a statement of defence and, in so doing, has waived any objection it might have had. It is too late for Canada to complain about the statement of claim. But if the beekeepers move to amend their statement of claim, Canada remains free to oppose or otherwise react to the amendments on any admissible ground.

C. Proposed disposition

[154] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Federal Court and dismiss the motion to strike. Rule 334.39(1) provides that "no costs may be awarded against any party…to an appeal arising from a class proceeding" unless the conditions in Rules 334.39(1)(*a*), (*b*) or (*c*) are present. Those conditions are not present and so, as my colleague has also proposed, I would make no order as to costs.

"David Stratas"

J.A.

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-169-14
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE SCOTT DATED MARCH 5, 2014, NO. T-2293-12	
STYLE OF CAUSE:	PARADIS HONEY LTD., HONEYBEE ENTERPRISES LTD. AND ROCKLAKE APIARIES LTD. v. HER MAJESTY THE QUEEN, THE MINISTER OF AGRICULTURE AND AGRI-FOOD AND THE CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	NOVEMBER 3, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A.
DISSENTING REASONS BY:	PELLETIER J.A.
DATED:	APRIL 8, 2015

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