

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260904

Docket: A-70-25

Citation: 2026 FCA 150

**CORAM: DE MONTIGNY C.J.
MONAGHAN J.A.
HECKMAN J.A.**

BETWEEN:

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

Appellants

and

**HIS MAJESTY THE KING AS REPRESENTED BY THE
MINISTER OF AGRICULTURE AND AGRI-FOOD and THE
CANADIAN FOOD INSPECTION AGENCY**

Respondents

Heard at Toronto, Ontario, on June 4, 2026.
Judgment delivered at Ottawa, Ontario, on September 4, 2026.

REASONS FOR JUDGMENT BY:

DE MONTIGNY C.J.

CONCURRED IN BY:

**MONAGHAN J.A.
HECKMAN J.A.**

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REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] This is an appeal from a decision of the Federal Court (*per* Strickland J.) dismissing the class action for negligence brought by the appellants (*Paradis Honey v. Canada (Agriculture and Agri-Food)*, 2024 FC 1921 (Decision)). Their claim was that the Canadian Food Inspection Agency (CFIA) had breached its private law duty of care by prohibiting the importation of live

honeybee packages from the continental United States (US) after 2006, thereby causing them economic harm. The appellants claim the FC erred in concluding there was no private law duty of care owed by the CFIA.

[2] This case is not without significance, not only for the immediate parties but also in the wider context of the duty of care owed by regulatory agencies to those who are directly impacted by their decisions.

[3] Having carefully reviewed the record and considered the arguments put forward by the parties, I am of the view that the Federal Court did not err and properly found that the CFIA, at least in the particular circumstances of this case, did not owe a private law duty of care to the appellants in carrying out its public functions because of a lack of factual proximity. The Trial Judge also based her decision on the terms of the underlying statute and on policy considerations; because her findings on these issues were not strictly speaking necessary to support her overall conclusion, I shall say as little as possible on these issues.

[4] The appellants also challenge the Federal Court's findings on the absence of recoverable loss or damages resulting from the CFIA's alleged negligence. Considering the absence of a private law duty of care, it is unnecessary to address this ground of appeal.

I. FACTS

[5] This class action was initially commenced by a statement of claim filed on December 28, 2012 (subsequently amended on January 5, 2016 prior to certification, and on April 6, 2017 following certification). The appellants are commercial beekeepers seeking to be compensated for the alleged economic losses they suffered due to a prohibition on the importation of honeybee packages from the US, which has been in place in different forms since the 1980s. The three representatives in this class action are Paradis Honey Ltd., Honeybee Enterprises Ltd., and Rocklake Apiaries Ltd.

[6] Because beekeepers suffer significant annual losses to their hives due to cold winter temperatures, they resort to a variety of measures to manage their operations, including the importation of new bees. This can be done through the importation of “packages”, which consist of a container holding a small colony (including a queen), or of a queen with a few attendant bees. The appellants allege that the most efficient and least costly way to replace a colony is the first option.

[7] Pursuant to the *Health of Animals Act*, S.C. 1990, c. 21 (Act) and its predecessor legislation, the Minister may make regulations prohibiting or regulating the importation of any animal into Canada as the Minister considers necessary to prevent any vector, disease or toxic substance from being introduced into Canada. In the absence of specific regulations, the importation of animals is dealt with by way of ministerial permits issued under section 160 of the *Health of Animals Regulations*, C.R.C., c. 296 (Regulations). Such a permit may be issued where

the Minister is satisfied that the activity for which the permit is issued would not, or would not likely, result in the introduction into or spread within Canada of a vector, disease or toxic substance.

[8] Starting in 1986, the Minister made a series of regulations and orders prohibiting the importation of honeybees into Canada from the US, in reaction to the threat of varroa mites decimating US bee colonies. In 2004, this blanket prohibition was amended by the *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136 (HIPR), which allowed for the import of queen bees with its attendant bees, but not “packages” from the US.

[9] In 2006, these regulations expired and were not renewed (Decision at paras. 191-194). Despite this lapse in regulation, Canada has since maintained a *de facto* ban on the importation of honeybee packages from the US by refusing all import permits requested under the Regulations. Permits for the importation of honeybee queens, on the other hand, have continued to be issued regularly.

[10] Throughout the decades, the CFIA has conducted several risk assessments to evaluate the maintenance of the prohibition on the importation of honeybees from the US, notably in 1994, 2003 and 2013. In each case, the CFIA made the decision to maintain a prohibition on bee package imports from the US, although the 2003 risk assessment led to the conditions for allowing queen imports.

[11] One major difference between these three risk assessments is the extent to which risk mitigation measures were considered. There is no issue between the parties that the 1994 risk assessment did take into account risk mitigation measures. As for the 2003 risk assessment, the Trial Judge came to the conclusion that mitigation measures to reduce the risk of various hazards for US honeybee queens were considered by the CFIA, but that a similar conclusion could not be reached for US honeybee packages (Decision at para. 860). Finally, the Trial Judge determined that risk mitigation measures were investigated in the 2013 risk assessment, and this finding is not challenged on appeal. Accordingly, the temporal scope of this appeal is limited to facts occurring before the finalization of the 2013 risk assessment.

[12] On November 8, 2013, the respondents brought a motion to strike the appellants' statement of claim on the basis that they did not owe a private law duty of care to the proposed class of commercial beekeepers. While the Federal Court granted the motion, a majority of this Court dismissed it on appeal, finding that it was not plain and obvious that the claims for negligence and bad faith would fail on the facts as pleaded (*Paradis Honey Ltd. v. Canada (Attorney General)*, 2014 FC 215, rev'd 2015 FCA 89 [*Paradis FCA*], leave to appeal to SCC refused, 36471 (October 29, 2015)).

[13] As a result of this Court's decision, the Federal Court certified this class action, defining the class as "[a]ll persons in Canada who keep or have kept more than 50 bee colonies at a time for commercial purposes since December 31, 2006" (Class). It also certified nine common issues (*Paradis Honey Ltd. v. Canada*, 2017 FC 199 (Certification Decision) at paras. 33, 37, 70 and 89).

[14] Shortly before the trial, at the request of the appellants and with the consent of the respondents, common issue #1 was amended and the common issues were reduced to 5 points.

The final list of common issues reads as follows:

1. Whether any or all of the Defendants owed the proposed Class a duty of care to not be negligent in the maintenance or enforcement of the *de facto* prohibition, including a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments [amendment underlined].
2. Whether any or all of the Defendants breached the requisite standard of care.
3. Whether or not recoverable loss or damages ensued as a result.
4. Whether sections 3, 8, or 10 of the *Crown Liability and Proceedings Act* grant any or all of the Defendants statutory immunity or otherwise limit the Defendants' liability.
5. Whether section 50.1 of the Act applies to limit the liability of CFIA for any actions or omissions after February 27, 2015.

II. THE COMMON ISSUES TRIAL

[15] I take the liberty to summarize at length the findings of the Federal Court, as I find myself in broad agreement with its reasoning and its conclusions. The appellants do not disagree with the Trial Judge's exposition of the law on the duty of care owed by government officials and in particular by regulatory agencies, and my reasons will therefore focus on the alleged errors in the application of the law in the particular context of this case.

[16] On the first common issue, the Federal Court first set out the framework of the legal analysis required to determine whether the respondents owed a duty of care to the appellants, and then made its determination on the basis of its findings of fact based on the evidence presented by the parties.

[17] The two-stage test to find whether a duty of care arises in negligence law was first developed by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728 [Anns] and subsequently clarified in the Canadian context by the Supreme Court in *Cooper v. Hobart*, 2001 SCC 79 [Cooper]. This *Anns/Cooper* test, as it is now referred to, has been subsequently applied in cases such as *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 [Rankin] and *Nelson (City) v. Marchi*, 2021 SCC 41 [Marchi], and summarized in the following way by the Federal Court at paragraph 233:

- whether the harm was a reasonably foreseeable consequence of the defendants' conduct and whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff [...]
- whether there are residual policy concerns outside the parties' relationship that should negate the prima facie duty of care [...]

[18] As noted by the Federal Court, this two-stage test is only applied where the duty of care is novel. Where the facts fall within a category of cases in which a duty of care has previously been established, the requisite close and direct relationship will be satisfied, and any residual policy concerns will already have been taken into account (*Marchi* at para. 19; *Rankin* at para. 18; *Cooper* at para. 39).

[19] In the case at bar, the appellants argued that the respondents owed them two distinct duties of care, those being 1) not to be negligent in the maintenance or enforcement of a *de facto* prohibition on the importation of honeybee packages; and 2) to identify risk mitigation options in the 2003 and 2013 risk assessments. Despite having ultimately concluded that these duties are not discrete and that the latter is encompassed by the former, the Federal Court nevertheless

addressed each of these duties separately for the purpose of determining whether they were novel.

[20] On the first one, the Federal Court found that the enforcement and maintenance of a *de facto* prohibition on the importation of US honeybee packages were distinguishable from the inspection or enforcement of regulatory safety cases suggested by the appellants, such as *Just v. British Columbia*, [1989] 2 S.C.R. 1228 [*Just*] and *Fullock v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 [*Fullock*]. The Federal Court opined that this case is more similar to three cases that dealt with a purported duty of care owed by the CFIA in assessing and determining a course of action in response to a novel threat (*Flying E Ranch Ltd. v. Attorney General of Canada*, 2022 ONSC 601, aff'd 2024 ONCA 72, leave to appeal to SCC refused, 41195 (October 10, 2024) [*Flying E Ranch*]; *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, leave to appeal to SCC refused, 33223 (November 5, 2009) [*River Valley*]; *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2011 BCSC 779, aff'd 2013 BCCA 34). In each of these cases, the courts rejected (implicitly or explicitly) the argument that the alleged duties owed fell within or were analogous to the inspection category.

[21] As for the second duty, there was no debate between the parties that it was a novel duty and that a full *Anns/Cooper* analysis was required.

[22] The Federal Court also found that foreseeability had been established, since the CFIA was aware that the prohibition on the importation of US honeybee packages could potentially hurt commercial beekeepers as a result of the increased cost of importing packages from other

countries or of keeping colonies of honeybees alive through the winter (overwintering). In any event, the Federal Court agreed with the respondents that proximity was the critical factor at the first stage of the *Anns/Cooper* test.

[23] Before turning to proximity, the Federal Court addressed an argument made by the appellants to the effect that this Court, in its previous ruling, had already decided that the duty of care in this matter is neither negated nor foreclosed by statute. The Federal Court stressed that the matter before this Court in 2015 was a motion to strike that was based only on the pleadings. Accordingly, the Federal Court held that, in *Paradis FCA*, this Court found that the allegations as pleaded were sufficient to substantiate a claim of proximity, but did not find that the legislation did or did not negate the alleged duty of care in the specific circumstances of this case.

[24] The Federal Court then considered the legislative scheme to determine whether it gave rise to, explicitly or by necessary implication, or foreclosed a finding of proximity. In this matter, the relevant legislative scheme is comprised of the Act and Regulations. The Federal Court quoted extensively from cases such as *R. v. Imperial Tobacco Canada Limited*, 2011 SCC 42 [*Imperial Tobacco*], *Taylor v. Canada (Attorney General)*, 2012 ONCA 479 [*Taylor*] and *Wu v. Vancouver (City)*, 2019 BCCA 23 [*Wu*], from which it can be gleaned that legislative schemes aimed at the public good (like regulating an industry) or imposing public duties preclude or weigh strongly against a private law duty of care to the individuals affected by such schemes. This will be the case, more particularly, where a private law duty would conflict with the public authority's duty to the public.

[25] The Federal Court then relied on *River Valley* and *Flying E Ranche* to support its finding that the Act has broad public purposes and that its overarching purpose is protecting the health of animals and of the public. It also relied on the statute's long title (an act "respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals"), and added that neither the Act nor the Regulations contain anything suggesting that one of their purposes is to protect the economic interests of individual farmers. As such, the Federal Court found that the Act forecloses any other duty of care, and that the recognition of such a duty would conflict with the CFIA's overarching statutory or public duty.

[26] In arriving at that conclusion, the Federal Court noted that the appellants failed to address the legislative scheme *per se*, and relied instead on the Regulatory Impact Analysis Statements (RIAS(s)) with respect to the proposed amendments to regulations concerning the prohibition of the importation of US honeybee packages prior to 2006. According to the appellants, these RIASs supported their view that the purpose of the importation provisions of the Act and the Regulations was the protection of the economic interests of the industry. Yet, a RIAS is an analysis of the expected impact of a regulatory initiative; it can assist interpretation but cannot override clear statutory language. Moreover, the Federal Court emphasized that the relevant regulations expired long ago, and therefore the related RIASs could have only limited or questionable interpretive value. In any event, the Federal Court was of the view that the RIASs, when considered in the aggregate, reflect the primary purpose of the Act which is to prevent the introduction or spread of animal diseases in Canada, with the dual objectives of protecting human health and the overall well-being of the Canadian livestock industry, rather than to protect

the economic interests of individual beekeepers. As such, they were not representations to the appellants or interactions sufficient to ground a private law duty of care.

[27] As for the second alleged duty (i.e., to consider mitigation measures), the Federal Court relied on the decision of the Supreme Court in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paragraphs 70-73, for the proposition that in the absence of a statutory obligation to conduct risk assessments, the necessary relationship of proximity between the respondents and the appellants had not been established.

[28] The Federal Court then turned to the specific interactions between the government, the CFIA and the appellants, with a view to determining whether the government and the CFIA, through their conduct and interactions with the appellants, had entered into a special relationship of proximity with the appellants sufficient to give rise to a discrete duty of care to complete risk assessments including risk mitigation measures. The Federal Court emphasized that this analysis was done in the alternative, in case it erred in finding that the legislative scheme forecloses the possibility of imposing a private law duty of care on the respondents.

[29] The Federal Court then proceeded with a detailed review of the evidence put forward by the parties as to the communications they had over the years and as to the context in which these communications took place (Decision at paras. 343 to 510), taking into consideration the CFIA's role as a regulator. Ultimately, the Federal Court found that these communications did not exceed what would be the normal range of interactions between a regulator and the regulated industry, and therefore did not give rise to a special relationship between the CFIA and the

appellants, distinct from and more direct than the relationship between the regulator and the broader public affected by the regulator's work. To the contrary, the Federal Court found that the "relevant interactions or communications respecting the prohibition on the importation of US honeybees were in furtherance of the CFIA's regulatory function to protect animal health and were inherent in the exercise of that public law duty" (Decision at para. 532). This is true not only of the interactions between the appellants, as representatives of the Class, and the CFIA, but also of the interactions between the Canadian Honey Council, which represents all Canadian beekeepers, and the CFIA. The Federal Court further found that the appellants had not established any reliance on or any expectations arising from the CFIA's interactions with class members or, more generally, with beekeepers or beekeeping industry associations, that would support the existence of a private law duty of care.

[30] The Federal Court therefore concluded not only that the legislative scheme does not give rise to, and implicitly forecloses, a private law duty of care, but also that, in any event, the appellants had failed to establish proximity between the Class and the respondents. On that basis alone, the Federal Court did not need to go any further, since the appellants' claim could not succeed without a duty of care. It nevertheless addressed the second stage of the *Anns/Cooper* test out of an abundance of caution.

[31] As previously mentioned, once foreseeability and proximity have been established, the court must ask itself whether there are residual policy considerations unrelated to the relationship between the parties, that may negate the imposition of a duty of care. As stated in *Cooper* at paragraph 37, these considerations are concerned with "the effect of recognizing a duty of care

on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?”

[32] To answer that question, the Federal Court first identified the precise duty captured by common issue #1. Despite the appellants’ closing submissions, it found that the duty was not the narrow, discrete duty to identify risk mitigation options in the risk assessments, but the broader duty not to be negligent in maintaining or enforcing the *de facto* prohibition. In the Federal Court’s view, identifying mitigation measures in the risk assessments was only one example of conduct relevant to the standard of care. It reached that conclusion based on the appellants’ pleadings, the wording of common issue #1 (“including a duty to identify risk mitigation options”), the appellants’ opening submissions, and the evidence adduced at trial.

[33] The Federal Court then considered whether the government decision challenged by the appellants was a policy or an operational decision, thereby applying the distinction between these two types of decisions drawn by the Supreme Court in cases such as *Cooper* at paragraph 38 and *Marchi* at paragraph 39. As explained by the Federal Court, the rationale for shielding core policy decisions from liability in negligence is to ensure that the judiciary does not overstep its proper role and does not second-guess the legislature on policy matters that are not based on objective considerations but involve weighing competing economic, social and political considerations. The Federal Court acknowledged that distinguishing between these two kinds of

decisions is fraught with difficulties, and relied on the four factors developed in *Marchi* to make its determination.

[34] Before applying the four *Marchi* factors, the Federal Court clarified that the respondents' decision not to enact a new regulation when the HIPR lapsed in 2006 and to rely instead on the Act and the Regulations was clearly a policy decision and, as such, immune from review. The *Marchi* factors therefore applied only to the decision-making process that led to the continued maintenance and enforcement of the *de facto* prohibition after that initial decision.

[35] The first *Marchi* factor focuses on the level and responsibilities of the decision-maker, according to which the higher the level of the decision-maker or the closer they are to an elected official, the more likely this factor will raise separation of powers concerns. Equally relevant will be the nature of the job's responsibilities, and whether it entails assessing and balancing public policy considerations or, conversely, mere implementation. In the case at bar, the Federal Court carefully reviewed the evidence and found that the scientists and veterinarians involved in the decision-making around the maintenance and enforcement of the import prohibition held senior-level positions within the CFIA and that the decision to conduct risk assessments was made in light of broad policies with a view to protect honeybee health. The Federal Court nevertheless acknowledged the decision-making also included, peripherally, economic considerations, to the extent that maintaining the prohibition protected the whole of the beekeeping industry against the consequences of the spread of disease, while recognizing that such a course of action also had the potential to harm those commercial beekeepers who preferred to destroy all of their bees each fall and purchase new US bee packages every spring.

[36] In the end, the Federal Court opined that the first *Marchi* factor does not strongly favour policy immunity; while the decisions made involved only limited consideration of economic, social and political considerations, the CFIA was not simply implementing operational decisions.

[37] The second *Marchi* factor involves the decision-making process. The more that process is deliberative in nature, requires debate, calls for input from different levels of authority and is intended to have broad application and be prospective in nature, the more it will point to a core policy decision. After having reviewed the evidence, the Federal Court found that the process by which the decisions were made and the actions were taken weighed in favour of policy immunity, particularly respecting the decision not to assess each permit application on a case-by-case basis and the timing of updates to the risk assessments. While the risk assessments themselves were based on science, they were nevertheless only one part of the course of conduct and decision-making process.

[38] The third *Marchi* factor, which relates to budgetary considerations, was not considered to weigh in favour of policy immunity. Pursuant to that factor, government decisions that have department-wide implications will be classified as policy decisions, whereas day-to-day budgetary decisions of individual employees will more likely be categorized as operational decisions. According to the Federal Court, the evidence did not directly address budgetary allotments, and therefore did not weigh in favour of policy immunity.

[39] The fourth and final *Marchi* factor concerns the basis on which the decisions were made. A decision that results from the weighing of competing interests and requires the exercise of

value judgment is more likely to engage separation of powers concerns than one based on objective criteria. The Federal Court accepted that the decisions concerning the monitoring of bee health and the updating of risk assessments were made essentially in light of the scientific knowledge available and did not strongly demonstrate a balancing of competing interests. It nevertheless found that determining when the science is such that a new risk assessment is warranted, and deciding to assess permit applications against the import conditions as found online rather than on a case-by-case basis, are value judgments. For that reason, the Federal Court was satisfied that this fourth factor carried “some positive weight” in favour of policy immunity.

[40] In conclusion, the Federal Court found that, when weighed together, the *Marchi* factors supported the conclusion that the ongoing consideration of whether to maintain the prohibition on the importation of US honeybee packages was a policy decision. The Federal Court was reinforced in that conclusion by its assessment that the maintenance and enforcement of a *de facto* prohibition formed part of a broader decision-making program directed at preserving animal health, and that such a program fell within the CFIA’s executive branch functions and was therefore properly immune from review.

[41] The Federal Court then turned to other residual policy considerations that could negate a duty of care. One of those considerations is indeterminacy. The concern here, as stated by Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) at p. 444 (cited by the Supreme Court in *Fullowka* at paragraph 70), is to avoid imposing “liability in an indeterminate amount for an indeterminate time to an indeterminate class”. After noting that the same

regulatory regime applied to all imported animals, and not just honeybees, the Federal Court concluded that if a duty of care was owed to the Class to consider permit applications on a case-by-case basis, the CFIA would then owe the same duty to all importers of regulated animals. The same would be true if a failure to consider risk mitigation when conducting a risk assessment amounted to negligent conduct. Such conclusion would give rise to indeterminate liability to all other importers of all animals under the regulatory regime where a prohibition results in an economic loss for them. This factor therefore favoured negating any *prima facie* duty of care.

[42] The second policy consideration assessed by the Federal Court was the potential chilling effect that recognizing a duty of care could have on government consultation with stakeholders. The Federal Court agreed with the respondents that consultation is important for good governance, and that if proximity and a resulting duty of care could arise from communications and consultations undertaken in furtherance of a regulator's functions, such consultations could be chilled. The Federal Court further found that this concern was more than speculative, and that there was a real potential for adverse consequences if the government were exposed to liability as a result of its efforts to consult and involve the industry.

[43] The third policy consideration examined by the Federal Court is the conflict between the CFIA's duty to the public to protect animal and public health and the asserted private law duty of care. Although addressed at the proximity stage, that conflict is also relevant at the residual policy concerns stage. At this later stage, the preoccupation does not relate to the factors arising from the particular relationship between the parties, but to the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally (*Cooper* at para. 37

and *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 [*Syl Apps*] at para. 32). Here, the conflict is not just theoretical or speculative but real, to the extent that the interests of regulated parties and the public interest in protecting the health of people and animals will not always align.

[44] Summarizing its findings with respect to residual policy concerns, the Federal Court wrote at paragraph 689:

In this case, I find the conflict between the duty proposed (to maintain or enforce the prohibition ban in a manner that protects the economic interests of the Plaintiffs) and an overarching public duty (to protect animal health) poses a real potential for negative policy consequences. In my view, this is compelling and determinative at both stages of the *Anns/Cooper* test. As the ONCA held in *River Valley*, the potential for conflict if CFIA must be mindful not only of the health of animals and the public, but the economic interests of individual farmers (or, in the present case, the commercial beekeepers who comprise the Class) is an overriding policy consideration that negates a private duty of care. However, even if this policy concern alone was not sufficient to find that an imposition of the duty of care “not to be negligent in the maintenance or enforcement of the *de facto* prohibition” would be “unwise” and should not be effected, considering and weighing it together with the indeterminacy and chilling effect concerns addressed above (and the fact that the claim concerns pure economic loss) would tip the scale in that regard.

[45] As for the alleged duty to identify risk mitigation options in the 2003 and 2013 risk assessments, the Federal Court found that the same policy concerns would negate that duty if, contrary to its earlier conclusion, it was determined to be a discrete duty and the decision were found to be operational in nature.

[46] As a result, the Federal Court found that proximity was not established at the first stage of the test respecting the relationship between the CFIA and the Class, and that in any event, were any duty of care found, it would be negated by policy considerations.

[47] I need not summarize the Federal Court’s analysis of common issues #2, #3, #4, and #5. Its findings on common issues #2, #4 and #5 are not challenged before us. While common issue #3 is the second issue on this appeal, it will be apparent from what follows that it is unnecessary to address it.

III. ISSUES

[48] The only issues on this appeal, therefore, are the following:

- a) Did the Federal Court err in determining that no duty of care was owed to the Class, and in deciding common issue #1 in favour of the respondents?
- b) Did the Federal Court err in finding that the appellants did not show that recoverable loss or damages ensued from the CFIA’s alleged negligence, and in deciding common issue #3 in favour of the respondents?

IV. ANALYSIS

- A. *Did the Federal Court err in determining that no duty of care was owed to the Class, and in deciding common issue #1 in favour of the respondents?*

[49] It is well established that whether a defendant owed a duty of care to a plaintiff is a question of law, to be assessed on a correctness standard: *Marchi* at para. 71; *1688782 Ontario Inc. v. Maple Leaf Foods*, 2020 SCC 35 at para. 24; *Rankin* at para. 19. As A.M. Linden et al. wrote in *Canadian Tort Law*, 10th ed., Toronto, LexisNexis Canada, 2015 at §9.57, duty in tort law is “a general notion describing a class or type of case, not a particular fact situation”.

Therefore, both proximity of any given relationship and reasonable foreseeability of injury raise questions of law. That being said, findings of fact underlying the determination of a duty of care are entitled to deference. “[W]hether those facts meet the legal test of core policy immunity and, by extension, whether a duty of care arises, is a question of law and must be correct” (*Marchi* at para. 71).

[50] The appellants advanced four arguments in support of their position that the Federal Court erred in finding no duty of care owed to the Class:

- (1) the Federal Court incorrectly identified the alleged duty of care;
- (2) the Federal Court erred in finding that the legislative scheme foreclosed a duty of care;
- (3) the Federal Court erred in finding that there was no proximity giving rise to a duty of care in the interactions and communications between the CFIA and the Class; and
- (4) the Federal Court erred in finding that the decision-making surrounding the maintenance or enforcement of the *de facto* prohibition on the importation of US honeybee packages was a matter of policy, or that residual policy concerns would in any event negate any private duty owed to commercial beekeepers.

[51] I will address arguments 1 to 3. Considering that none is successful, it is unnecessary to address the fourth ground.

(1) Did the Federal Court correctly identify the alleged duty of care?

[52] The appellants' first submission with respect to the alleged error committed by the Federal Court in deciding common issue #1 is that the Trial Judge recast the duty alleged by the appellants and substituted a generalized, indeterminate duty of care for the narrow duty that had been certified, namely whether the respondents owed a duty to identify risk mitigation options in the risk assessments. According to the appellants, that error infected the entirety of the decision and led to erroneous legal conclusions on proximity and policy immunity, based on irrelevant jurisprudence.

[53] The Trial Judge correctly identified the alleged duty of care. The Trial Judge identified the appellants' varying formulations over the course of the case, from their Statement of Claim to their closing arguments (Decision at paras. 542-553). Ultimately, the Trial Judge correctly relied on the duty of care as framed in common issue #1 of the Certification Decision and as subsequently amended on consent. Although her analysis proceeded on that certified and amended duty of care, she also addressed the appellants' other formulations out of an abundance of caution. There is no error.

[54] There is no doubt that trial judges are not empowered to reframe the common issues on their own initiative, and without submissions from the parties: Rules 334.17 and 334.19 of the *Federal Courts Rules*, SOR/98-106; *1250264 Ontario Inc v. Pet Valu Canada Inc.*, 2016 ONCA 24 at paras. 46-52. Contrary to what the appellants allege, however, this is not what the Trial Judge did.

[55] The Trial Judge started by citing the first common issue as drafted in the Certification Decision, which read as follows: “Whether any or all of the Defendants owed the proposed Class a duty of care to not be negligent in the maintenance or enforcement of the *de facto* prohibition”. As she noted, the common issues were amended shortly before the trial, at the request of the appellants and with the consent of the respondents, and the words “including a duty to identify risk mitigation options in the 2003 and 2013 Risk Assessments” were added to the first common issue.

[56] On the face of it, the word “including” is an illustration of a broader category, and not a mere reformulation of the preceding phrase or an attempt to circumscribe its broad scope. At the hearing, counsel for the appellants argued that the amendment was meant to particularize the precise conduct at stake, in conformity with the admonition in *Marchi* that the decision or conduct at issue be described with precision. In my view, this is more accurately described as an attempt by the appellants to rewrite the duty of care as alleged in the amended common issue, and the Federal Court did not err in finding that the duty to identify risk mitigation options in the 2003 and 2013 risk assessments was encompassed by the broader duty to not be negligent in the maintenance or enforcement of the *de facto* prohibition.

[57] I am also of the view that the Federal Court could appropriately refer to the pleadings to inform its interpretation of the common issues. While the pleadings cannot define relevance for the purpose of discovery, as found in *Trillium v. General Motors of Canada et al*, 2012 ONSC 5960 at paragraph 16, they can be considered to delineate more precisely the duty of care where the appellants question the definition or scope of the duty of care as defined in a certified

common issue. Considering the position taken by the appellants, the fact that the duty to identify risk mitigation options is nowhere to be found in the underlying pleadings was certainly a relevant consideration in determining whether the duty to identify risk mitigations in the 2003 and 2013 risk assessments could be a discrete duty of care.

[58] The appellants also take issue with the Trial Judge's "generalized descriptions" of indeterminate duties of care that were not certified nor alleged or argued. They give a few examples in a 1290-paragraph decision where the Federal Court loosely referred to the economic interests of the Class, of the commercial beekeepers or of the honeybee industry. Yet the Trial Judge can hardly be faulted for having done so, as it is clear that this case is ultimately about the Class's alleged economic loss. The appellants themselves acknowledge as much in their own submissions, both at trial (see paragraphs 317 and 402, where the Federal Court refers to their claim that the Act and the Regulations are aimed at the protection of the economic interests of the industry) and before us (see paragraph 16 of their memorandum of fact and law, where they assert that they tendered considerable evidence to show that the respondents' representatives would be mindful of the Class's economic interests).

[59] In any event, I am satisfied that the Trial Judge did not recast the duty of care but rather took it as it had been certified and subsequently amended. She quoted more than once the duty of care as drafted in common issue #1 and frequently described it as it was framed by the Certification Decision and amended on consent (Decision at paras. 3, 30, 542, 556, 563, 568, 574-575, 585, 689, 698 and 733). On its face, that duty was broad and was not limited to the duty

to consider risk mitigation options in the risk assessments, as the appellants would now want us to believe.

[60] It appears that the appellants first argued in their opening submissions that there were two discrete duties of care owed by the respondents to the Class, but later focused solely on the second alleged duty to identify risk mitigation options in the 2003 and 2013 risk assessments (Decision at paras. 250-251). They now claim that this tactical choice should have limited the Federal Court's analysis, and that it was an error for the Federal Court to consider the broader duty of care. Once again, such an interpretation would fly in the face of the wording of common issue #1, where the identification of mitigation measures in the risk assessment is more properly characterized as an example of conduct that would inform the standard of care and is certainly not the entirety of the duty alleged.

[61] It would also be at odds with a number of allegations made by the appellants in their Amended Amended Statement of Claim, where the respondents are said to have breached their duty of care on the grounds that they based their decisions to maintain the prohibition on outdated and inaccurate information; refused to update information without the approval of the Canadian Honey Council, which was itself allegedly dominated by a faction not acting in the best interests of the commercial beekeeping industry; failed to conduct or obtain a current risk assessment; and misused or failed to exercise ministerial responsibility and discretion with respect to permitting or denying the importation of US honeybee packages. All of these grounds extend beyond the narrow duty to identify risk mitigation options. To the extent that the duty alleged must be tied to the negligent conduct alleged (*Marchi* at para. 76), the respondents'

alleged deficient conduct is more closely aligned with, and best understood in, the broader context of an overarching duty not to be negligent in the maintenance or enforcement of the *de facto* prohibition.

[62] I am therefore in full agreement with the Trial Judge where she stated at paragraph 563 of the Decision:

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

[63] Before concluding on this question, a few words need to be said on the previous decision of this Court in 2015. The appellants argue that the duty of care owed by the respondents was identified in that case as the duty to respect the beekeepers' interest, "at least to the extent of making rational, evidence-based decisions" (*Paradis FCA* at para. 90). This Court's characterization of the duty of care is clearly not binding on us.

[64] First of all, that characterization of the duty of care in 2015 was made in the context of a motion to strike. As this Court acknowledged at paragraph 81, it did not finally rule or make any final determination on the issues that were before it, and took the allegations as if they were true. Since the identification of the duty of care is heavily dependent on the factual matrix underlying

the appellants' allegations of negligence, the way it was framed in that proceeding must accordingly be taken with caution.

[65] More importantly, that decision obviously predated the certification of this action, and therefore there were no common issues before this Court in 2015. Following that decision, the action was certified, common issues were identified, and common issue #1 was amended shortly before the trial to add the second part starting with "including...". As a result, neither the Claim nor common issue #1 asserted the duty of care in the manner it was asserted in 2015, and this Court's prior decision is therefore of little guidance in identifying the alleged duty of care.

- (2) Did the Federal Court err in finding that the legislative scheme foreclosed a duty of care?

[66] The appellants submit that in its 2015 decision, this Court determined that the Act and the Regulation did not foreclose a finding of proximity and the imposition of a duty of care. They also claim that, in any event, the Federal Court erred in finding that the Act implicitly forecloses a private law duty of care owed to the Class, resulting from a conflict between a duty to properly conduct a risk assessment and overarching statutory purposes.

[67] In my view, it is not strictly necessary to address these issues. Even if the legislation is not determinative for either of the reasons advanced by the appellants, the Court must still examine the specific interactions between the governmental actors and the appellants to determine whether a sufficiently close and direct relationship has been established to ground a duty of care (*Imperial Tobacco* at paras. 43-46 and 50; *Aylmer Meat Packers Inc. v. Ontario*,

2022 ONCA 579 at para. 49). For that reason, I will confine myself at this stage of the analysis to a few observations about this Court’s decision in *Paradis FCA* and on the legislative scheme.

[68] As explained below, policy conflicts between the alleged duty of care and the overarching statutory purposes of the legislative scheme must be addressed at the second stage of the *Anns/Cooper* test, rather than at the first stage, where the Trial Judge also considered them. That being said, I agree with the substance of the Trial Judge’s analysis and with her conclusion that such a conflict exists here, and that there can therefore be no duty of care owed by the CFIA to the Class.

(a) *This Court’s decision on the motion to strike in Paradis FCA*

[69] First of all, I disagree with the appellants that this Court made a narrow finding of law in its 2015 decision in *Paradis FCA* to the effect that “the statutory regime at issue in this claim did not foreclose or negate a finding of proximity” (Memorandum of the appellants at para. 36). In my view, this would be an unwarranted extrapolation of that decision. Once again, that ruling was made in the context of a motion to strike, where the allegations in the statement of claim are taken as true. Moreover, the standard applied is not the same as at the trial stage, and a statement of claim will not be struck unless it is “plain and obvious” that it discloses no reasonable cause of action.

[70] A careful reading of paragraph 90 of that decision makes it abundantly clear that the finding that the legislation did not foreclose proximity was premised on the conduct and interactions between the parties as pleaded. It is worth quoting this paragraph in full:

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, 31 B.L.R. (4th) 20.

[71] At trial, the facts alleged by the plaintiff are not taken as proven but assessed against the evidence adduced by the parties. Furthermore, the statement of claim has been amended twice since the 2015 decision. The specific conduct and interactions supporting proximity and the alleged duty of care are therefore not the same, and it is therefore in a different context that we must determine if the legislation forecloses a finding of proximity. In other words, it is one thing to say broadly and generally that the Act does not foreclose a duty to respect the beekeepers’ economic interests, or that the imposition of a private duty of care to beekeepers is not inconsistent with the broader public duty to the public good. It is quite another thing to say specifically that there is no conflict between that public duty and a reframed alleged duty not to

be negligent in the maintenance or enforcement of a *de facto* prohibition on the importation of honeybee packages.

[72] I find further support for that conclusion in the absence, in this Court's 2015 decision, of any discussion of the interpretation to be given to the Act and the Regulations, or of their rationale or purpose. Had this Court intended to make a finding of law with respect to the legislative scheme at issue, or to reach a definitive conclusion as to the scope of the public duty to protect the health of people and animals enshrined in the Act and the nature of the private law duties it bars, it would most certainly have analyzed the scope, purpose, or intent of the legislation and addressed the decision of the Ontario Court of Appeal in *River Valley* which held (at paragraph 66) that the Act disclosed an intention to exclude a private law duty of care.

[73] For those reasons, I am in full agreement with the Trial Judge when she stated:

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

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

(Emphasis in original)

(b) *The conflict between the alleged duty of care and the overarching statutory purposes of the Act and the Regulations*

[74] The appellants further argue that the Trial Judge erred in finding a conflict between the proposed duty of care and the overarching purposes of the legislative scheme. They agree with the Trial Judge that a conflict will arise where the imposition of a duty of care would prevent the government representatives from effectively discharging their statutory duties. However, they claim that she came to the conclusion that such a conflict exists here only because she recast the proposed duty (to identify risk mitigation options in the risk assessments) into what they called an “amorphously framed duty respecting economic interests”. When viewed in this light, they add there can be no conflict between the duty to conduct a proper risk assessment taking into consideration mitigation options, and the statutory regime’s overarching purpose to protect and promote human and animal health. On this last point, the appellants argue that the Trial Judge erred in relying on *River Valley* and *Flying E Rancho* because the duties alleged in those cases were not analogous to the duty alleged in the present case.

[75] As discussed above, I do not think that the Trial Judge misunderstood or erroneously described the alleged private duty of care, and on that basis alone the appellants’ argument collapses.

[76] As for the Trial Judge’s reliance on *River Valley* and *Flying E Rancho*, it was not misplaced or incorrect. Contrary to the appellants’ view, the duties alleged in those cases bore many similarities with the alleged duty of care in this case. Both of these cases involved the CFIA as a regulator, where senior officials had to assess and determine a course of action in

response to a threat in constant flux and about which much was unknown. As such, the Trial Judge was correct to say that they are much closer to the situation in the case at bar than the inspection or enforcement of regulatory safety cases cited by the appellants.

[77] It is by now well established that statutes with broad public purposes (such as protecting animal and human health) will rarely give rise to coexistent private duties of care to a particular segment of the population. On the contrary, they have often been interpreted as denying the possibility to ground private law duties arising out of interactions that are inherent or essential to a mandate, especially in a regulatory context.

[78] This principle was most helpfully elaborated by the Supreme Court in *Imperial Tobacco*. In that case, the highest court set out three scenarios where the applicable legislation plays a role in determining if a government actor owes a *prima facie* duty of care. In the first case, the statute itself will create the proximity sufficient to give rise to the duty of care. In the second, the duty of care will arise from interactions between the claimant and the government, as long as it is not negated by the statute. And in the third, proximity will be based on both the statute and the interactions between the parties. On the first scenario, the Supreme Court had this to say:

[44] The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public

duty, this may constitute a compelling policy reason for refusing to find proximity” [...]

See also *Taylor* at paragraphs 76-79 and *Wu* at paragraphs 54-58.

[79] On the basis of these authorities, the Federal Court did not err in concluding that the legislative scheme does not create a private law duty of care between the respondents and the appellants. As the Ontario Court of Appeal found in *River Valley*, and as the Ontario Superior Court of Justice found in *Flying E Ranche*, the purpose of the Act is clear from its text, its long title (“An Act respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals”), and its compensation scheme: it is to enable the Crown to protect the health of people and animals. It does not, expressly or by implication, aim to protect the economic interests of individual farmers.

[80] In *River Valley*, the issue was whether the CFIA and Health Canada owed a private duty of care to an egg producer that alleged it had suffered economic loss as a result of their actions. More specifically, the appellant claimed that the respondents had negligently investigated whether its flock was infected with salmonella. Although testing eventually showed that only part of the flock was infected, the appellant argued that it suffered economic losses because the testing took too long, forcing it to destroy the entire flock. After a lengthy analysis of the legislative scheme and the relevant jurisprudence, the Ontario Court of Appeal concluded that the CFIA did not owe the appellant a *prima facie* duty of care. The Ontario Court of Appeal then considered an overriding policy consideration that also negated a private duty of care: the potential for conflict if the CFIA were required to be mindful not only of animal and public

health, but also of the economic interests of individual farmers (albeit in the analysis of the second step of the *Anns/Cooper* test), at paragraph 86:

In some instances, and this case is perhaps a good example, the potential for conflict between the economic interests of an individual farmer and the public interest does exist. The conflict may arise over the extent of the testing necessary to determine whether an animal is diseased. In this case, initial testing of River Valley's barn 4 showed no DT104 in any of the samples. With those negative test results in hand and having regard to its own economic interests, River Valley may well have fairly claimed that it should have been able to market its eggs. However, CFIA, with the benefit of Health Canada's expertise, took a more cautious approach in the public interest and insisted on further testing at the point where the hens were about to lay their eggs. CFIA fairly claimed that this further testing was needed to be fully satisfied that the [page21] [sic] flock in barn 4 was not contaminated. Undoubtedly, other kinds of conflict may arise if CFIA inspectors have to worry about the economic interests of individual farmers as well as their obligation to the public to protect human and animal health.

[81] In *Flying E Ranch*, a similar finding was made in the context of a class action brought on behalf of all Canadian farmers who raised cattle in 2003, alleging that the CFIA had negligently failed to prohibit the importation of cattle feed and cattle to prevent the spread of bovine spongiform encephalopathy (BSE). The only difference between that case and the present one is that, in *Flying E Ranch*, the industry alleged that the CFIA had negligently permitted importation, whereas here the appellants claim that the CFIA negligently failed to permit importation. Interestingly, the plaintiff in that case did not argue that proximity arose from the Act, possibly in recognition of the Ontario Court of Appeal's decision in *River Valley*, and relied instead on the *Feeds Act*, R.S.C., 1985, c. F-9 and the *Animal Disease and Protection Act*, R.S.C., 1985, c. A-13. The Ontario Superior Court nevertheless found that there was nothing in those two statutes, just as there was nothing in the Act, to suggest that one of their purposes was to protect the interests of individual farmers; accordingly, they did not create a duty of care owed to cattle producers.

[82] On the basis of these persuasive authorities and, more generally, the jurisprudence concerning private duties of care in the context of statutes aimed at protecting or advancing the public good, I reach the same conclusion as the Trial Judge: neither the Act nor the Regulations suggest that one of their purposes is to protect the economic interests of individual beekeepers. They therefore do not, expressly or by implication, create a private law duty of care between the respondents and the appellants.

(c) *Implicit foreclosure and general policy considerations*

[83] The Federal Court went further than finding that the legislation did not create a duty of care, and found that the legislative scheme “implicitly forecloses” such a duty, presumably because it would conflict with the CFIA’s overarching statutory or public duty (Decision at para. 329). In my view, that analysis is better left to the second stage of the *Anns/Cooper* test.

[84] I say this because there is jurisprudence supporting the notions that statutes can create proximity – explicitly and implicitly – as well as explicitly foreclose it (*Imperial Tobacco* at paras. 44 and 47; *Syl Apps* at paras. 27 and 29; *Just* at p. 1244). On the other hand, I am not aware of any Supreme Court decision to the effect that a statute can implicitly foreclose proximity. While some decisions seem to suggest that a legislative scheme could implicitly preclude a private law duty of care, such references were generally made in passing, without the issue being squarely argued or decided, and often in cases where the facts did not require the court to determine whether proximity had been implicitly foreclosed by statute or regulations. The notable exception is paragraphs 77 to 79 of *Taylor*, where the Ontario Court of Appeal

addressed the point more directly, although again in passing as the facts of the case did not require more. In my view, however, *Taylor* should not be taken as establishing a general rule that courts may find proximity implicitly foreclosed by statute. The cases cited at these paragraphs of *Taylor* do not, for the most part, support that proposition. They rely on express statutory language either to infer the existence of proximity rather than foreclose it, to clarify the interests that the regulator must prioritize or to confirm the regulator's immunity. Courts have not gone so far as to say that a statute can implicitly foreclose a private law duty of care. And there is good reason for that.

[85] At the first stage of the *Anns/Cooper* analysis, the issue to be determined is whether there is a *prima facie* duty of care. At that juncture, only the policy factors relating to the relationship between the parties can be taken into consideration. They can be relevant to determine if there is proximity or if an existing proximity category should be extended to a new situation. It is only at the second step of the *Anns/Cooper* analysis that questions of policy, in the general sense of the word, will be factored in. In my view, these two steps must be kept separate and apart, to ensure that residual policy considerations of a general nature do not creep into the analysis of proximity and are not confused with other kinds of factors more closely linked to the relationships between the parties. Otherwise, there is considerable risk of falling into the analysis of residual policy considerations at the first stage of the test. This risk is well exemplified by *Taylor*. Where the Ontario Court of Appeal listed considerations that may assist in identifying the implicit preclusion of a private law duty, it included legislation that “impose[s] duties on the regulator that conflict with a private law duty of care to an individual” (*Taylor* at para. 78). This

consideration more closely aligns with the second step of the *Anns/Cooper* analysis than the first step.

[86] The other reason why these two steps must remain distinct is that, at the second stage, the state bears the onus of demonstrating that the alleged novel duty of care would conflict with broader policy considerations or an overwhelming public duty and, therefore, that no duty of care should be found (*Imperial Tobacco* at para. 44; *Fullowka* at para. 39; *River Valley* at paras. 33-34).

[87] There is no clear indication in the legislative scheme of the Act that it forecloses a private law duty either to protect the economic interests of individual honeybee keepers or to consider mitigation measures. It was therefore incumbent on the Federal Court to assess whether proximity could be established through the conduct of the parties before addressing the residual policy considerations, as it ultimately did. As we have seen in *Imperial Tobacco*, when the statute itself does not create (expressly or by necessary implication) a private relationship of proximity giving rise to a *prima facie* duty of care, proximity can arise from specific interactions between government officials and a claimant. It is only if a relationship of proximity (through the statute, as a result of interactions between the parties or both) seems to emerge that residual policy considerations will have to be considered. As stated in *Syl Apps* at paragraph 28:

Where an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity (*Cooper*, at para. 44; *Edwards*, at para. 6). Such a conflict exists where the imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties. In *Cooper*, for example, a duty to individual investors on the part of the Registrar of Mortgage Brokers was rejected because it was found to “potentially conflict with the Registrar’s overarching duty to the public” (para. 44). Similarly, in *Edwards* a private law duty of care on the

part of the Law Society to the victim of a dishonest lawyer was rejected at the proximity stage since “[d]ecisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties” (para. 14). In both cases, the serious negative policy consequences of these conflicting duties were found to justify denying a finding of proximity.

[88] With this caveat, I conclude that the Trial Judge did not err in her analysis of the legislative scheme. Neither the Act nor the Regulations gives rise to a private law duty of care to protect the Class’s economic interests with respect to the importation of US honeybee packages or to consider mitigation measures.

[89] I will now turn to the appellants’ next submission, which is precisely directed to the assessment of the interactions, communications, discussions and meetings between the respondents and members of the Class.

- (3) Did the Federal Court err in finding that the communications and interactions between the CFIA and the Class do not demonstrate a close and direct relationship giving rise to a private law duty of care?

[90] The appellants argue that the Trial Judge erred in her approach to proximity, and that her analysis is premised on the notion that regulators can never have a duty of care, which in turn led her to wrongly determine that all the interactions with Class members were simply part of the respondents’ ordinary statutory mandate. They also contend that cases against public regulators have been decided both ways, some imposing liability against public regulators and others not. In that vein, they also claim that the Trial Judge relied on cases that had only superficial relevance

to the case at bar and where the duties asserted were not remotely analogous to the duties contemplated here.

[91] The appellants further suggest that the Trial Judge failed to compare the CFIA's relationship with the Class and the public at large which would have shown that the former was more direct or more distinct than the latter. They rely for that proposition on trial evidence that, in their view, confirmed a "broad, lengthy and dense record of interactions between the respondents and the Class over some two decades which ought to have supported a proximity finding" (Memorandum of the appellants at para. 56). Finally, they allege (much as they did before the Federal Court) that proximity also arises from statements in various risk assessments showing that the beekeepers were the very class of individuals which these risk assessments and the import prohibition were intended to affect.

[92] Having carefully reviewed the 198 paragraphs devoted to that issue in the reasons of the Trial Judge, I am unable to agree with the appellants' submissions. On the contrary, I find that the discussion of that issue is thorough, well supported by the record and firmly based on a flawless application of the relevant legal principles as expounded by the Supreme Court and various other courts at both the appellate and trial level.

[93] It was clearly not an error for the Trial Judge to start her analysis on the basis that the CFIA is a regulator. In such a context, mere consultation between the regulator and the regulated industry will obviously not be sufficient to establish proximity. As stated in *Flying E Range* at paragraph 614, quoted by the Trial Judge at paragraph 512 of the Decision:

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

[94] This is not to say that regulators will never have a duty of care towards members of the regulated industry and will never be liable for damages. Each case will turn on its own facts. That being said, the jurisprudence involving regulatory agencies suggests that one of the factors to be considered is whether the facts point to a relationship with the regulated industry that is more direct than the relationship between the regulator and other members of the public who might be affected by the exercise of those regulatory powers. This is precisely what the Trial Judge endeavoured to find out (Decision at paras. 404 and 408), and it is entirely consistent with the decisions of the Ontario Court of Appeal in *Taylor* at paragraph 80 and of the British Columbia Court of Appeal in *Wu* at paragraph 65.

[95] The Trial Judge then looked at the numerous interactions and communications between the CFIA and the appellants and found that they did not demonstrate an unusual or close and direct relationship outside the regulatory sphere. She looked, in particular, at the CFIA's solicitation of responses to proposed regulatory changes, at communications relating to applications for permits to import honeybees, at the attendance or participation in industry meetings, and at communications with national industry representatives.

[96] In particular, the evidence reviewed by the Federal Court showed that the interactions between the Class and the CFIA were generally initiated by communications from the appellants

(Decision at paras. 343-401 and 522). When reviewing these communications, the Federal Court identified whether the CFIA had responded to the communication, and whether these responses, if any, were outside the scope of the CFIA's duty as a regulator and referred to risk mitigation. In most cases, there was no evidence of a response from the CFIA (Decision at paras. 345, 349, 352, 354, 393 and 394), or the CFIA responded by providing generic information on its mandate or regulatory framework, or on how to submit information and requests to the CFIA (for example, Decision at paras. 348, 350, 356, 358, 365, 372, 374, 376, 380 and 390). Where witnesses claimed that the CFIA had undertaken to take specific actions or to conduct a risk mitigation assessment, the Federal Court ruled that their testimony was not credible nor supported by the evidence (for example, Decision at paras. 360, 398 and 399). These conclusions of fact on the evidence are not under appeal. As found by the Trial Judge, such responses from a regulator to communications from members of the public cannot establish reliance or expectations that would give rise to a private law duty of care (Decision at para. 532). She came to that conclusion while consistently setting out the test spelled out in *Taylor* and applied in *Wu*, i.e., whether the facts demonstrate a relationship that is distinct from and more direct than the relationship between the regulator and those who are affected by the regulator's work (for example, Decision at paras. 341, 408, 478, 513 and 528-529).

[97] The case law relied upon by the appellants in furtherance of their claim that cases against public regulators fall on both sides of the ledger are not really helpful. They refer to *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2 [*Kamloops*]; *Just; Fullowka; Swanson Estate v. Canada*, [1992] 1 F.C. 408 [*Swanson*] and *Brewer Bros. v. Canada*, [1992] 1 F.C. 25 [*Brewer Bros*].

[98] I would note, first of all, that these cases (except for *Fullowka*) all predate the more recent jurisprudence of the Supreme Court with respect to the duty of care and the notion of proximity in the context of the state assuming regulatory functions in the interest of the public good, such as *Cooper*, *Imperial Tobacco*, *Syl Apps* and *Marchi*.

[99] Moreover, these cases are concerned for the most part (except *Brewer Bros*) with inspection schemes rather than with regulation for broad policy purposes. In *Fullowka*, for example, one of the issues was whether the security firm and the Government of the Northwest Territories were liable for negligence for failing to prevent the murders of miners during a bitter strike resulting from the planting of explosive devices in the mine by striking workers. Applying the *Anns/Cooper* test, the Supreme Court found that the relationship between the murdered miners and the government (as well as the security firm) met the requirements of foreseeability and proximity such that a *prima facie* duty of care existed.

[100] The Supreme Court came to that conclusion after having analyzed the regulatory scheme put in place in the *Mining Safety Act*, R.S.N.W.T. 1988, c. M-13 pursuant to which the onus is on the mine owners, management and workers themselves to observe safety regulations. The Court accepted that the role of the inspectors was essentially to see that these persons were doing so, but nevertheless came to the conclusion that their relationship with the miners was analogous to, and indeed “considerably closer and more direct” than, the relationship between the clients of a lawyer or of a mortgage broker and the Law Society or the Registrar of Mortgage Brokers (*Cooper and Edwards v. Law Society of Upper Canada*, 2001 SCC 80 [*Edwards*]). The Court was of that view because the persons to whom the inspectors owe a duty (those working in the

mine) were a much smaller and discrete group than was the case in *Cooper* and *Edwards*, because the mining inspectors had much more direct and personal dealings with the deceased miners than the Law Society or the Registrar had with the clients of the lawyer or mortgage broker, and because the inspectors' statutory duties related directly to the conduct of the miners themselves. Interestingly, the Court was of the view that there was a close parallel between the situation in *Fullock* and other building inspection cases that it had already decided, such as *Kamloops* referred to by the appellants.

[101] Another line of inspection cases relates to the duty owed to road users by public authorities to keep roads reasonably safe. In *Marchi*, the Supreme Court describes how *Just* provided “an opportunity to apply the full two-stage duty of care framework to a case involving personal injury on a public road” and found that “users of a highway are in a sufficiently proximate relationship to the province because in creating public highways, the province creates a physical risk to which road users are invited” (*Marchi* at para. 21 referring to *Just* at p. 1236). That principle was reiterated in *Cooper* at para. 36, *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, and *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420. In all of these cases, the common thread is that a public authority has undertaken to maintain a public road or sidewalk to which the public is invited, and the plaintiff alleges they suffered personal injury as a result of the public authority's failure to maintain the road or sidewalk in a reasonably safe condition.

[102] This Court similarly found that inspectors working for the Department of Transportation and who are charged with the duty of maintaining the security of air transportation and enforcing

the regulations with respect to airlines, aircraft and pilots owe a duty of care to passengers and are liable for negligence (*Swanson*).

[103] All of these cases dealt with the inspection or enforcement of safety regulations, and can easily be distinguished from the case at bar and the other cases relied upon by the Trial Judge (*River Valley* and *Flying E Ranche*) that involved similar claims that the CFIA and its employees had breached their duty of care in fulfilling their mandate to protect animal and human health. In the first type of cases, the government (or its servants) will likely have more direct and extended interactions with a discrete group of people, with a view to ensuring that the legislated standards and requirements are effectively adhered to and enforced. In those instances, the proximity inquiry will focus on factors which show that the relationship between the plaintiff and the defendant is sufficiently close and direct to give rise to a legal duty of care, considering such factors as expectations, representations, reliance and the property or other interests involved.

[104] When the state sets out to pursue broad public policy objectives, the interactions between government officials and various stakeholders, including the regulated industry, must be viewed through a different prism. The purpose of those interactions is not to enforce a particular set of predetermined requirements, but rather to ensure that the contemplated measures will best achieve the legislative objective and will not produce unexpected or unforeseen adverse consequences for the public at large. Consultation allows the government to obtain the information and stakeholder input necessary to act in the public interest. That different perspective will naturally result in interactions with those likely to be affected by the decisions to be made that differ in nature, duration, scope and frequency. It is for that very reason that mere

consultations between a regulator and a regulated industry will not establish proximity. As noted above, such consultations are inherent in the exercise of the CFIA's public duty. So long as they do not go beyond what is to be expected in the fulfilment of that duty, they will not give rise to the special relationship required to establish proximity.

[105] Finally, the appellants allege, as they did before the Federal Court, that proximity arises from statements in various RIAs. They argue that the beekeepers were the very class of persons whom the risk assessments and import prohibition were intended to affect, and that various statements to that effect in those risk assessments demonstrate that the overriding purpose of the statutory scheme was not to promote the interests of the public at large, but rather to protect the survival and economic well-being of the commercial beekeeping industry. On that basis, they submit that proximity was established.

[106] In my view, the Federal Court conclusively dealt with that argument and properly rejected it. First of all, it noted that the appellants led no evidence or testimony from the respondents to support their assertion with respect to the goal of the Act and the Regulations, and relied only on the RIAs. It then carefully reviewed the RIAs referred to by the appellants, quoted from a number of them, and concluded that they did not support the alleged duty of care; they rather confirmed that the primary purpose of the Act is the prevention of the introduction or the spread of animal diseases in Canada, which could have negative consequences on human health and/or on the economic well-being of the Canadian livestock industry. The appellants have not shown how the Trial Judge erred in reaching this conclusion.

[107] More importantly, a RIAS is an analysis of the expected impact of the regulatory initiative. It is meant to explain the main elements of the regulatory proposal, to describe the alternatives considered, and to summarize the consultations that have been carried out. While they may serve as an interpretative tool of the regulations they accompany, as noted by the Federal Court, they are not meant to override or change the clear language of those regulations and have never been given that effect. This understanding of a RIAS is consistent with past jurisprudence of this Court and of the Federal Court (*Teva Canada Ltd. v. Sanofi-Aventis Canada Inc.*, 2014 FCA 67 at para. 77; *Ijaz v. Canada (Citizenship and Immigration)*, 2015 FC 67 at para. 43; *ViiV Healthcare ULC v. Canada (Health)*, 2020 FC 756 at para. 24).

[108] Finally, the Trial Judge was right to highlight that HIPR expired on December 30, 2006. As such, the RIAS that accompanied an expired regulation is of limited interpretative value with respect to the purpose of the Act and the Regulations and cannot serve as the basis for a relationship of proximity. As this Court stated in *Paradis FCA* at paragraph 97, once a regulation has expired, any public policies and public duties underlying that regulation will also be expired. What is true of a regulation is also true, *a fortiori*, of the RIAS that goes with it.

[109] For all of the above reasons, I am therefore of the opinion that the Federal Court did not err in finding that the interactions between the CFIA and the appellants did not result in the required level of proximity to support a duty of care.

[110] Having so found, it is unnecessary to determine whether the Trial Judge was correct in finding that the decision-making surrounding the maintenance or enforcement of the *de facto*

prohibition on the importation of US honeybee packages was a matter of policy, or that residual policy concerns would in any event negate any private duty owed to commercial beekeepers. As the Trial Judge stated in her reasons, she addressed the second stage of the *Anns/Cooper* test only out of an abundance of caution, in the event that she had erred in finding that the parties' interactions did not ground a *prima facie* duty of care. Since I have concluded that she did not err in finding that the appellants failed to establish proximity between the Class and the respondents, and therefore failed at the first stage of the *Anns/Cooper* test, it is unnecessary to proceed to the second stage. In these circumstances, I consider it preferable to refrain from expressing any views beyond what is necessary to dispose of this appeal.

- B. *Did the Federal Court err in finding that the appellants did not show that recoverable loss or damages ensued from the CFIA's alleged negligence, and in deciding common issue #3 in favour of the respondents?*

[111] Considering the absence of a private law duty of care, it is unnecessary to address this ground of appeal.

V. CONCLUSION

[112] I would dismiss this appeal. Given section 334.19 of the *Federal Courts Rules*, and the respondents not having requested costs, I would not award costs against the appellants.

“Yves de Montigny”
Chief Justice

“I agree.
K.A. Siobhan Monaghan J.A.”

“I agree.
Gerald Heckman J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	PARADIS HONEY LTD., HONEYBEE ENTERPRISES LTD., and ROCKLAKE APIARIES LTD. v. HIS MAJESTY THE KING AS REPRESENTED BY THE MINISTER OF AGRICULTURE AND AGRI- FOOD and THE CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 4, 2026
REASONS FOR JUDGMENT BY:	DE MONTIGNY C.J.
CONCURRED IN BY:	MONAGHAN J.A. HECKMAN J.A.
DATED:	SEPTEMBER 4, 2026

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