Federal Court  Cour fédérale

Date: 20231024

Docket: T-2293-12

Citation: 2023 FC 1415

Ottawa, Ontario, October 24, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

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

Plaintiffs (Respondents)

and

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

Defendants (Applicants)

ORDER AND REASONS

[1] The trial of this class action is set down to commence on November 6, 2023, and run to December 8, 2023, in Edmonton, Alberta. The Plaintiffs bring this motion seeking an order granting them leave, pursuant to Rule 41(1)(b) of the *Federal Courts Rules*, SOR/98-106 [*FC Rules*], to compel the attendance at trial of four witnesses. The Plaintiffs also seek an order

declaring, pursuant to Rule 4 of the *FC Rules*, that Rule 53.07 of the *Ontario Rules of Civil Procedure*, O Reg 575/07, s 6(1) [*Ontario Rules*] apply to the issuance of subpoenas and the cross-examination of adverse witnesses in this proceeding; declaring that the four witnesses are adverse in interest to the Plaintiffs; and, granting the Plaintiffs leave to cross-examine the witnesses at the trial of this action.

Overview

[2] This action was commenced on December 28, 2012, and was certified as a class action by Order of this Court on February 17, 2017. The three representative Plaintiffs are commercial beekeepers who the Plaintiffs advise are located in Alberta, Manitoba and British Columbia. The class is comprised of approximately 1400 commercial beekeepers who each keep or have kept more than 50 colonies of bees at a time since December 31, 2006 [Class]. The Plaintiffs, on their own behalf and on behalf of all of the members of the Class, claim that they suffered damages as a result of the negligence of the Defendants, Canada Food Inspection Agency [CFIA] and the federal department of Agriculture and Agri-Food [Agriculture Canada], in imposing or enforcing a prohibition on, or denying import permits for, the importation into Canada of live honeybee packages from the continental United States [US] after 2006 to the present day.

Background

[3] Commercial beekeepers in Canada annually suffer overwinter (and other) bee losses and, as a result, they must replace bee colonies every year. One method of doing so is to import bees. This importation can take the form of “packages,” consisting of a queen bee and thousands of

worker bees sufficient to form a viable colony, or of “queens,” being a queen bee with a small number of attendant bees sufficient to keep the queen alive during transportation.

[4] In 1987, Canada closed the Canada-United States border to the importation of both packages and queens as an emergency response to the discovery of varroa mite in certain beekeeping regions in the US. From 1987 to 2006, Canada continued the prohibition on honeybee imports from the US (with the exception of imports from the State of Hawaii, starting in 1991) by means of orders and regulations. The last of this series of regulations, the *Honeybee Importation Prohibition Regulations, 2004*, SOR/2004-136 [*HIPR 2004*], permitted the importation of queens from the US but continued the prohibition against the importation of packages. *HIPR 2004* expired, without renewal, on December 31, 2006. There have been no orders, regulations, or legislation enacted in *HIPR 2004*’s place.

[5] Prior to enacting *HIPR 2004*, CIFA conducted a risk assessment [2003 Risk Assessment]. Based on the findings of the 2003 Risk Assessment, CFIA lifted the import prohibition against queens, but not packages (see: *Paradis Honey Ltd v Canada*, 2017 FC 199 at paras 10-15).

[6] CFIA conducted a second risk assessment in 2013 [2013 Risk Assessment] but maintained its prohibition on the importation of bee packages.

[7] A third risk assessment was conducted by CFIA in 2023 [2023 Risk Assessment].

[8] With respect to this class action, by Order dated August 15, 2023, this Court determined that the common issues to be determined at the common issues trial are:

a. Whether any or all of the Defendants owed the 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.

b. Whether any or all of the Defendants breached the requisite standard of care.

c. Whether or not recoverable loss or damages ensued as a result.

d. Whether ss 3, 8, or 10 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 grant any or all of the Defendants statutory immunity or otherwise limit the Defendants' liability.

e. Whether s 50.1 of the *Heath of Animals Act*, SC 1990, c 21 applies to limit the liability of CFIA for any actions or omissions after February 27, 2015.

(Section 50.1 of the *Health of Animals Act* provides a defense of good faith with respect to the exercise of powers or the performance of duties or functions under the *Act*).

[9] The Plaintiffs' claim asserts that the Defendants breached their duty of care by, among other things, not conducting or obtaining a current risk assessment with respect to the importation of packages of honeybees from the US; basing the decisions on such importation prohibition on outdated and inaccurate information; and not monitoring, researching,

investigating, assessing or consulting with respect to the necessity of not allowing such importation.

The Witnesses the Plaintiffs Propose to Subpoena

[10] The Plaintiffs propose to subpoena and cross-examine the following four witnesses [Proposed Witnesses]:

a. The Honourable Minister Marie-Claude Bibeau, the Minister of National Revenue and a Member of Parliament. Prior to June 2023, she was the Minister of Agriculture and Agri-Food.

b. Mr. Chris Forbes, the Deputy Minister of Finance. Mr. Forbes was the Deputy Minister of Environment and Climate Change from February 20, 2023, to September 2023, and the Deputy Minister of Agriculture and Agri-Food between May 2017 and February 20, 2023.

c. Ms. Stefanie Beck, the Deputy Minister of Agriculture and Agri-Food. She was appointed to this position on February 20, 2023. Previously, Ms. Beck was the Associate Deputy Minister of National Defence.

d. Dr. Harpreet Kochhar, the President of the CFIA. Dr. Kochhar was appointed to this position on February 27, 2023. Prior to this appointment, Dr. Kochhar was the President of the Public Health Agency of Canada. From 2008 to 2017, Dr. Kochhar was a Director or the Executive Director with the CFIA.

Issues

[11] There are two issues to be addressed in this motion:

i. Should the Court grant the Plaintiffs leave, pursuant to Rule 41(4), to have subpoenas issued with respect to the Proposed Witnesses?

ii. Should the Proposed Witnesses be declared adverse witnesses in advance of trial, permitting their cross-examination by the Plaintiffs?

Legislation

Federal Courts Rules

> Rule 4
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> 4. Matters not provided for - On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.
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> Rule 41
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> 41. (1) Subpoena for witness – Subject to subsection (3), on receipt of a written request, the Administrator shall issue, in Form 41, a subpoena for the attendance of a witness or the production of a document or other material in a proceeding.
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> …..
>
> (4) Where leave required - No subpoena shall be issued without leave of the Court
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> > ….
> >
> > (b) to compel the appearance of a witness who resides more than 800 km from the place where the witness will be required to attend under the subpoena;
>
> …

Federal Courts Act, RSC 1985, c F-7

> 53(1) Taking of evidence - The evidence of any witness may by order of the Federal Court of Appeal or the Federal Court be taken, subject to any rule or order that may relate to the matter, on commission, on examination or by affidavit.
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> (2) Evidence that would not otherwise be admissible is admissible, in the discretion of the Federal Court of Appeal or the Federal Court and subject to any rule that may relate to the matter, if it would be admissible in a similar matter in a superior court of a province in accordance with the law in force in any province, even though it is not admissible under section 40 of the *Canada Evidence Act*.

Canada Evidence Act, RSC 1985, c C-5 [CEA]

> 9 (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.
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> (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.
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> 40 In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.

Plaintiffs' Position

[12] The Plaintiffs are of the view that, although the Defendants intend to call some 17 "lay witnesses" at trial, none of these holds or held an executive-level position with CFIA or Agriculture Canada. According to the Plaintiffs, each of the Proposed Witnesses had responsibility, oversight and decision-making authority over operations that are central to the factual issues raised in this litigation and have relevant and material evidence necessary to the determination of the common issues. In particular, that each of the Proposed Witnesses will have evidence relevant to the 2022 decision to request submissions on comparative US-Canada honeybee health and the decision to undertake the 2023 Risk Assessment even though the Defendants' prior internal position was that a new risk assessment was not supported and would be unlikely to change importation restrictions. The Plaintiffs submit that the Defendants' witness list includes only individuals who contributed to the formulation of the CFIA's internal positions on these matters. They contend that the Court will need evidence from individuals who possessed decision-making authority and who can provide insight into Agriculture Canada's decision-making and other factors beyond CFIA's internal processes "in order to understand the full context of contemporaneous decision-making and to weigh and evaluate the historical and ongoing actions and omissions at issue properly."

[13] Essentially, the Plaintiffs are of the view that the Defendants have not provided any documents that state that the 2023 Risk Assessment was justified. Rather, the internal CFIA documents, which were largely prepared by the Defendants' proposed witnesses, maintained the position that a revised risk assessment was unnecessary and would not change the status for US

bee package imports. The Plaintiffs view this as a substantial gap in the evidentiary record and point to various documentation that they feel demonstrates the involvement of each of the Proposed Witnesses in that decision-making process and otherwise. In support of this motion, the Plaintiffs have filed the affidavit of Jamie Shilton, affirmed on September 20, 2023 [Shilton Affidavit]. Mr. Shilton is a lawyer with the firm Koskie Minsky LLP, which, together with Waddell Phillips PC, are counsel for the Plaintiffs in this class action.

[14] The Plaintiffs also assert that the acts and omissions of CFIA and Agriculture Canada leadership will be under scrutiny in this action, rendering the Proposed Witnesses necessarily adverse in interest to the Plaintiffs. Further, that all of the Proposed Witnesses owe duties of loyalty to the federal government and Canada, which renders them categorically adverse in interest to the Plaintiffs. Therefore, restricting the Plaintiffs to asking non-leading questions will impede the orderly fact-finding process at trial and prejudice the Plaintiffs' ability to elicit evidence. The Plaintiffs submit that the Court ought to apply Ontario Rule 53.07 and declare the Proposed Witnesses adverse in interest in advance of trial. Doing so, and permitting the Plaintiffs to cross-examine the Proposed Witnesses from the outset, will do away with the need to use up limited Court time for hostile witness motions and, therefore, would be the most practical and expeditious way to obtain their evidence.

[15] Alternatively, that the Court may apply s 40 of the CEA to reach the same conclusion.

[16] In the further alternative, in their written submission, the Plaintiffs asserted that if the Court does not apply *FC Rule* 4 but does apply s 40 of the CEA and concludes that the

proceedings are taken in Alberta, the Court may still rely on s 53(2) of the *Federal Courts Act* to apply the *Ontario Rules* with respect to the summonsing and cross-examination of adverse parties. However, when appearing before me, counsel for the Plaintiffs advised that they were abandoning their s 53(2) argument. Accordingly, I will not address it below.

[17] The Plaintiffs also assert that application of the *Alberta Rules of Court,* Alta Reg 124/2010 [*Alberta Rules*] would be inappropriate and would impede the fact-finding function of the trial.

Defendants' Position

[18] The Defendants assert that parliamentary privilege applies to Minister Bibeau such that she should not be compelled to testify. Further, that the evidence of each of the Proposed Witnesses is not relevant and significant to the issues the Court must decide. In that regard, the Defendants submit that the Plaintiffs have not met their onus of establishing that the Proposed Witnesses are likely to give relevant evidence. Rather, the requested subpoenas are a fishing expedition as demonstrated by the breadth of the proposed areas of examination and the documents requested by the Plaintiffs in the subpoenas. Further, the evidence of each of the Proposed Witnesses would be primarily derived from briefings ultimately sourced in materials provided by the Defendants' intended witnesses. The Defendants submit that leave to subpoena the Proposed Witnesses should be denied. In support of that position, the Defendants have submitted the affidavit of Dr. Connie Rajzman, Senior Veterinary Officer, International Programs Directorate in International Affairs, CFIA, sworn on September 29, 2023 [Rajzman

Affidavit], and the affidavit of Rosemary DaSilva-Kassian, paralegal with the Department of Justice, sworn on September 29, 2023 [DaSilva-Kassian Affidavit].

[19] In the alternative, if the Court does grant leave for the issuance of the requested subpoenas, then the Defendants submit that the Court should decline to grant leave to cross-examine the Proposed Witnesses. There is no rule in the *FC Rules*, the *Alberta Rules* or the CEA that would allow the Plaintiffs to cross-examine these witnesses at large, and the *Ontario Rules* are not applicable. As to s 53(2) of the *FC Rules*, this Court should decline to apply this provision to allow the Plaintiffs to apply the *Ontario Rules*. Section 53(2) addresses the admissibility of evidence, not the procedure for obtaining or introducing evidence at trial. It has no relevance to declaring a witness adverse in advance of the trial.

Analysis

[20] As stated in *Zündel (Re)*, 2004 FC 798 [*Zündel*], in the context of quashing a subpoena:

> [5] The case law on subpoenas shows that there are two main considerations which apply to a motion to quash a subpoena: 1) Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify?; (e.g. *Samson Indian Nation and Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2003 FC 975 (CanLII), [2003] F.C.J. No. 1238); 2) Is the evidence from the witnesses subpoenaed relevant and significant in regard to the issues the Court must decide? (e.g. *Jaballah (Re)*, 2001 FCT 1287 (CanLII), [2001] F.C.J. No. 1748; *Merck & Co. v. Apotex Inc.*, [1998] F.C.J. No. 294)
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> [6] Privilege will apply for example in the case of Parliamentary immunity while Parliament is in session (*Samson Indian Band*, *supra*), or in the case of solicitor-client privilege, although an attorney acting in a managerial capacity may well be called upon to testify (*Zarzour v. Canada*, [2001] F.C.J. No. 123).

> [7] As to determining whether the evidence to be presented will be useful to the trial judge, courts will be reluctant to prevent parties from calling the evidence the parties feel they need, but courts generally will not allow fishing expeditions. Thus, if one party moves to quash the subpoena, it must show the lack of relevance or significance of the evidence the party that has issued the subpoena intends to produce. Obviously, the judge who decides whether or not to quash the subpoena is not deciding on the weight to be given to such evidence, which is to be determined by the trier of fact (*Stevens v. Canada (Attorney General),* [2004] F.C.J. No. 98).
>
> [8] In *R. v. Harris*, 1994 CanLII 2986 (ON CA), [1994] O.J. No. 1875 (Ont. C.A.), the Ontario Court of Appeal ruled that it was not sufficient for the party calling the witness to simply state that the witness might have material evidence; rather, the party had to establish that it was likely that the witness would give material evidence. In that case, the Court weighed the respective affidavits of the parties: on the one hand, the affidavit was that of the secretary of the legal firm that was representing the accused who had subpoenaed Crown counsel, who stated that she had been told that the evidence would be relevant to the alleged good faith of the police officers; on the other, the affidavit of the witness subpoenaed was that he had no material evidence to give. The first affidavit was pure hearsay and highly speculative, and thus the subpoena was quashed.
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> [9] In *Nelson v Canada (Minister of Customs and Revenue Agency)*, [2001] F.C.J. No. 1220, Mr. Nelson sought to subpoena a number of ministers, including the Prime Minister, in his action against the Minister of the Customs and Revenue Agency. The motion was dismissed because there was no evidence from the supporting material that any of these persons had been in any way involved in the events giving rise to the action.
>
> [10] Thus the criterion is one of relevance and materiality of the evidence to be provided by the prospective witness.

[21] While *Zündel* was concerned with the quashing an issued subpoena, the criteria it identifies in that regard has also been applied to motions seeking to have subpoenas issued (*Zündel* at para 9, citing *Nelson v Canada (Minister of Customs and Revenue Agency)*, [2001]

FCJ No 1220 [*Nelson*]; *Samson Indian Nation and Band v Canada (Minister of Indian Affairs and Northern Development)*, 2003 FC 975 [*Samson*]).

[22] I will address this test with respect to each of the Proposed Witnesses.

i. Minister Bibeau

[23] The Plaintiffs assert, referencing specified exhibits to the Shilton Affidavit, that the evidence demonstrates that Minister Bibeau, who was the Minister of Agriculture between March 1, 2019, and July 26, 2023, was "actively working on issues facing the beekeeping industry" and had considerable direct involvement with border issues. Further, that the Minister responded to industry inquiries herself and expressed "personal knowledge" of Agriculture Canada and CFIA activities. Further, that the Minister informed the Alberta Beekeepers Commission that an emergency exception in 2020 would not be granted. The Plaintiffs state that they intend to question Minister Bibeau on the factors relied on in denying the beekeepers' request, as well as the scope of her oversight of Agriculture Canada and CFIA activities during the import ban. They submit that this is relevant to the question of whether the Defendants complied with the alleged common law duty of care not to unreasonably injure the Class members' economic interests as well as to the statutory good faith defence.

[24] The Plaintiffs state that they also intend to question Minister Bibeau about which risk assessment is being referred to in her letter advising that there would be no exemption or derogation for the import of honeybee packages from Northern California, given that the 2013 Risk Assessment did not assess that prospect and the 2023 Risk Assessment had not yet been

undertaken. The Plaintiffs submit that this is relevant to the good faith defence asserted by the Defendants.

[25] The Defendants submit that parliamentary privilege applies to Minister Bibeau and therefore she should not be compelled to testify.

[26] The Defendants also submit that the Plaintiffs have failed to demonstrate that any of the four Proposed Witnesses, including the Minister, are likely to give relevant evidence. The evidence of each of the Proposed Witnesses would be primarily derived from briefings ultimately sourced in material provided by Canada's intended witnesses. The Shilton Affidavit divorces snippets of correspondence and briefings from their context and addresses areas of contention beyond that permitted by Rule 82 (use of a solicitor's affidavit). Further, many of the documents attached to the Shilton Affidavit are drafts attached to email exchanges disclosed by Canada between Canada's intended witnesses, and that context informs whose knowledge they reflect. The Shilton Affidavit also contains inadmissible gloss and argument, which should be disregarded.

[27] The Defendants submit that the four areas of questioning identified at paragraph 22 of the Shilton Affidavit are within the knowledge of Canada's intended witnesses, and they set out examples which they submit illustrate this.

[28] I will first address the claim of parliamentary privilege, which, in my view is determinative with respect to the subpoenaing of Minister Bibeau.

[29] The DaSilva-Kassian Affidavit indicates, based on supporting exhibits, that the current Parliamentary session, the first session of the 44th Parliament, commenced on November 23, 2021. The House of Commons returned from summer recess on September 18, 2023, and will sit from November 6-10, 2023, and from November 20-December 15, 2023.

[30] Thus, the session will continue through the trial of this matter with the exception of November 13-17.

[31] As the Defendants submit, in *Samson*, leave was sought, as in this case, under Rule 41(4)(b) for the Administrator to issue subpoenas for the appearance of the then Prime Minister and a Minister, both of whom resided more than 800 km from the place they would be required to attend under the subpoena. Leave was denied. In *Samson*, the basis for parliamentary privilege is addressed at length. There, the Court concluded that parliamentary privilege exists and has existed historically, and that it "persists for the duration of a session," whether Parliament is actually sitting or not (para 43). The privilege extends beyond a session, to include 14 days before a session convenes and 14 days after a session ends (para 45).

[32] When appearing before me, the Plaintiffs did not contest that privilege applies in this case, including during the period of adjournment. Rather, they pointed to *Ontario (Premier) v Canada (Commissioner of the Public Order Emergency Commission)*, 2022 FC 1513 [*Ontario (Premier)*] to suggest, as I understood it, that while privilege would give Minister Bibeau a lawful excuse not to comply with the subpoena, it does not prevent the subpoena from being

issued. According to the Plaintiffs, to decline to issue the subpoena would turn the privilege from a shield to a sword.

[33] I am not persuaded that *Ontario (Premier)* assists the Plaintiffs. There, the Premier of Ontario and a Minister in the Ontario Government brought an urgent motion to stay two summonses issued by the Commissioner of the Public Order Emergency Commission [Commission].

[34] The applicants challenged the summonses on the ground that the Ontario Legislative Assembly was then in session, and, as elected officials, they benefited from the parliamentary privilege of testimonial immunity. They alleged that the summonses were issued without jurisdiction and should be quashed. They sought a stay of the summonses until the underlying application could be determined on its merits.

[35] The respondents took the position that the application of the parliamentary privilege of testimonial immunity to a commission of inquiry is not established in law. They maintained that the privilege was not intended to be used to impede the course of justice, and is regularly waived.

[36] Justice Fothergill found that the summonses issued by the Commission to the applicants were valid. However, so long as the Ontario Legislative Assembly remained in session, the applicants could resist the summonses by asserting parliamentary privilege, and the Commission could not take steps to enforce their attendance and compel them to give evidence.

[37] Thus, in *Ontario (Premier)*, the issue was whether the summonses issued by the Commissioner should be stayed pending the Court's determination of the underlying application to quash the summonses for lack of jurisdiction. To make that determination, the Court applied the well-established conjunctive test for injunctive relief (*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]), being whether there was a serious question to be tried, whether the applicants would suffer irreparable harm if the stay were refused and which of the parties would suffer greater harm from the granting or refusal of the stay pending a decision on the merits.

[38] There, in the context of determining if a serious issue arose (which was assessed on an elevated standard given that the decision on the stay motion would amount to a final disposition of the underlying application for judicial review, as the Commissioner would have to issue his report prior to the resolution of the application, rendering it moot), Justice Fothergill stated:

> [38] Parliamentary privilege refers to the sum of the privileges, immunities and powers that are necessary for members of the Senate, the House of Commons and provincial legislative assemblies to fulfill their legislative duties (*Canada (House of Commons) v Vaid*, 2005 SCC 30 [*Vaid*] at para 29). Testimonial immunity is an established category of Parliamentary privilege that all Members of Parliament can assert while the legislature is in session and for 40 days before and afterward (*Telezone Inc v Canada (Attorney General)*, 69 OR (3d) 161 (ONCA) [*Telezone*] at paras 29-33).
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> [39] The role of the Court in an application for judicial review is limited to determining the existence of the privilege (*Samson Indian Nation and Band v Canada*, 2003 FC 975 [*Samson*] at para 13). Courts may not review the exercise of a necessary parliamentary privilege; that is the role of the legislature. As the Supreme Court of Canada held in *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 [*Chagnon*], legislative assemblies are accountable only to the electorate (*per* Karakatsanis J. at para 24):

> When tethered to its purposes, parliamentary privilege is an important part of the public law of Canada (see *Vaid*, at para. 29(3)). The insulation from external review that privilege provides is a key component of our constitutional structure and the law that governs it. Judicial review of the exercise of parliamentary privilege, even for Charter compliance, would effectively nullify the necessary immunity this doctrine is meant to afford the legislature (*New Brunswick Broadcasting*, at pp. 350 and 382-84; *Vaid*, at para. 29(9)). However, while legislative assemblies are not accountable to the courts for the ways in which they exercise their parliamentary privileges, they remain accountable to the electorate (*Chaplin*, at p. 164).

[40] The Respondents do not contest the existence of the parliamentary privilege of testimonial immunity. Nor do they deny that the Ontario Legislative Assembly is currently in session, and will remain in session beyond the date on which the Commissioner concludes his evidentiary hearings. The only dispute between the parties is whether the privilege may be invoked to resist a summons issued by a commission of inquiry, as opposed to one issued by a court or other tribunal.

……

[50] The same cannot be said of the parliamentary privilege of testimonial immunity. The established "categories" of parliamentary privilege include immunity of members of legislative assemblies from subpoenas during a parliamentary session (*Vaid* at para 29(1), citing *Telezone*; *Ainsworth*; *Samson*). Such general categories have historically been considered to be justified by the exigencies of parliamentary work.

[51] The parliamentary privilege of testimonial immunity is not limited to safeguarding parliamentarians from vexatious litigation, but extends to civil proceedings generally (*e.g.*, *Telezone*; *Ainsworth*; *Samson*), as well as criminal, administrative and military matters (*Ainsworth* at para 134, citing Maingot, *Parliamentary Privilege in Canada*, Butterworths, 1983 at 131). Like commissions of inquiry, criminal proceedings are presumptively conducted in the public interest.

[52] As the Supreme Court of Canada explained in *Vaid*, once a category of privilege is established, proof of necessity is no longer required (at para 29(9)):

> Proof of necessity is required only to establish the existence and scope of a category of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the exercise of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: "Each specific instance of the exercise of a privilege need not be shown to be necessary" [citations omitted].
>
> [53] If a parliamentary privilege is determined to exist, it must be extended to every proceeding. This includes commissions of inquiry (*Gagliano* at paras 67, 80, citing *Prebble v Television New Zealand Ltd*, [1995] 1 AC 321 (PC); *Hamilton v Al Fayed*, [2000] 2 All ER 224 (HL). The Ontario Legislative Assembly is the sole judge of the occasion and manner of the exercise and the privilege by the Premier and the Minister, and this is not reviewable by the courts. The specific instances of the exercise of the privilege need not be shown to be necessary.

[39] Justice Fothergill concluded that the applicants had established that the parliamentary privilege of testimonial immunity could be invoked and that it provided the Premier and Minister with a lawful excuse not to comply with the summonses issued by the Commissioner (para 57).

[40] In this matter, the Plaintiffs seize on paragraph 58 of the decision, where Justice Fothergill stated that he was not persuaded that the summonses themselves were invalid, or that they were issued "without jurisdiction, pursuant to an error of law, and must be quashed," as alleged in the Notice of Application. He found that to accept this assertion would be to turn parliamentary privilege from a shield into a sword, contrary to parliamentary intent (*Canada (House of Commons) v Vaid*, 2002 FCA 473 at para 65; rev'd on other grounds, 2005 SCC 30). He found that the Commissioner had the jurisdiction to issue the summonses. Further, that the

matters in respect of which the Premier and Minister had been called to testify were within the scope of the Commissioner's mandate, and it appeared that both witnesses may have valuable evidence to offer. And, at the time the summonses were issued, the Premier and Minister had not definitively stated they would claim immunity by invoking parliamentary privilege. It remained open to the Premier and Minister to waive parliamentary privilege and testify as scheduled.

[41] In short, Justice Fothergill found that parliamentary privilege existed, that the Commission had the jurisdiction to issue the summonses and that the summonses were valid. However, they could not be enforced so long as the Premier and Minister continued to resist them by asserting parliamentary privilege.

[42] Here, unlike *Ontario (Premier)*, the Plaintiffs do not contend that there is a lack of jurisdiction to issue the subpoenas. Nor do they assert that parliamentary privilege does not exist or apply. Rather, the argument appears to be that, in this case, leave should be granted and the subpoenas should be issued, and then the Minister would be entitled to rely on parliamentary privilege in declining to testify.

[43] In my view, this argument effectively amounts to form over substance. Were I to grant leave to issue the subpoena to the Minister, Canada would be forced to bring a motion seeking to quash the subpoena on the basis of parliamentary privilege. Given that the Defendants have already asserted that privilege is available to the Minister, that I have found privilege to exist and, there is no evidence that the Minister intends to waive parliamentary privilege, this approach would accomplish nothing, as the Minister would be successful in resisting the

subpoena and declining to testify – so long as Parliament is in session. Further, as discussed above, in *Samson*, the Court declined to issue subpoenas under Rule 41(4), which would have compelled the then Prime Minster and a Minster to give testimony, on the basis that Parliament was then in session.

[44] As to the sword and shield argument, while not developed by the Plaintiffs, this appears to stem from *Canada (House of Commons) v Vaid*, 2022 FCA 473, where, in its concluding paragraph, the Federal Court of Appeal stated that it did not believe that parliamentary privilege "was intended to be used as a sword to curtail parliamentary employees' human rights." This is not a similar circumstance.

[45] Given the above, I decline to grant leave to issue a subpoena to compel the attendance of Minister Bibeau to testify at the trial of this action on the basis that parliamentary privilege exists and applies so long as Parliament is in session.

[46] Accordingly, it is not necessary for me to address the relevance of Minister Bibeau's evidence (*Samson* at para 56). However, I would observe that, based on the evidence before me in the motion materials and the Rajzman Affidavit, it appears highly likely that the Defendants' intended witnesses will be able to speak to most, if not all, of the matters identified by the Plaintiffs, as their input informed the Minister's communications and decisions. Thus, her testimony is not "truly necessary."

The Other Proposed Witnesses

[47] Before addressing this matter, I will address one preliminary point.

[48] In this matter, the Plaintiffs have completed all of their discoveries, presumably conducted in accordance with the *FC Rules*. Document disclosure is also complete. Further, all of the Proposed Witnesses are or were employees of the Defendants; as such, they are not third parties whose documents and intended evidence is unknown to the Plaintiffs. However, the subpoenas as proposed by the Plaintiffs are broadly stated, as are their intended areas of questioning. The proposed subpoenas require each of the Proposed Witnesses (other than the Minister, for whom a subpoena has not been prepared) to attend and to bring with them and produce at the hearing:

Any and all documents in their power, possession and control pertaining to:

i. the decision not to enact further regulations pursuant to the *Health of Animals Act* for the prohibition on the importation of honeybee packages from the United States after December 31, 2006;

ii. the refusal to assess applications for import permits for honeybee packages from the United States pursuant to section 160 (1.0) of the *Health of Animals Regulations* after December 31, 2006;

iii. the direction not to consider risk mitigation options during the course of preparation of the 2003 and 2013 Honeybee Risk Assessments; and

iv. without limiting the generality of the foregoing, any policies, directions, communications or other documents relevant to these subject matter areas.

[49] All three proposed subpoenas are the same.

[50] The Defendants submit that over 25,000 pages of disclosure documents have been provided to the Plaintiffs and that it is unnecessary, unreasonable and overly broad to now require the Defendants to review and organize those documents to respond to the subpoenas for each of these three witnesses. Further, that the Plaintiffs' statements of areas on which they seek to examine these witnesses is also exceptionally broad and, in some cases, there is no temporal connection between the intended examination and the witnesses' connection with the Defendants. For example, Minister Bibeau was not the Minister of Agriculture and Agri-Food at the time of either of the prior risk assessments, nor when the regulations prohibiting the importation of honeybees expired. Neither Mr. Forbes nor Ms. Beck were the Deputy Minister at those times. The Defendants submit that there is also no evidence that Dr. Kochhar was involved with either the 2003 Risk Assessment or the expiration of the previous regulations. Given this, the Defendants assert that the subpoenas are a fishing expedition, and leave to subpoena the Proposed Witnesses should be denied.

[51] When appearing before me, the Plaintiffs advised that they were prepared to amend the requested subpoenas and to narrow the issues. Specifically, the requested subpoenas would be amended to indicate that the Proposed Witnesses would not be required to provide any documents; that they would not be examined beyond the temporal limits of their employment

with the Defendants; and that any examination would involve a narrow subject matter pertaining only to their decision-making processes.

[52] In my view, this narrowing of the subpoenas and intended areas of questioning would largely alleviate the fishing expedition concerns of the Defendants.

[53] This leaves the question of whether the remaining Proposed Witnesses can provide relevant and material evidence.

Plaintiffs' Position

Deputy Minister Beck

[54] The Plaintiffs submit that the 2023 decision to complete a new risk assessment of importing honeybee packages was undertaken since Ms. Beck was appointed Deputy Minister of Agriculture and Agri-Foods on February 23, 2023. Referring to specified exhibits to the Shilton Affidavit, they submit that, in 2022, Ms. Beck discussed the import prohibition and CFIA's risk assessment process with the Alberta Deputy Minister of Agriculture and Irrigation [Alberta Deputy Minister] and, following a subsequent meeting with the Alberta Deputy Minister, sent him an email advising that she would inform President Kochhar of the discussion and of the Alberta Deputy Minister's continued interest in the progress of the file. The Plaintiffs state that weeks after that meeting, CFIA President Kochhar decided to approve a new risk assessment. The Plaintiffs state that they intend to question Deputy Minister Beck on the nature of those discussions and the extent to which the relevant decision-makers were responsive to economic

concerns raised on behalf of commercial beekeepers. These matters, say the Plaintiffs, are relevant to the question of whether the Defendants complied with the alleged common law duty of care not to unreasonably injure the Class members' economic interests as well as to the statutory good faith defence asserted by the Defendants.

Deputy Minister Forbes

[55] As to Deputy Minister Forbes, he was Deputy Minister of Agriculture and Agri-Food between 2017 and February 20, 2023, and Associate Deputy Minister between 2015 and 2016. The Plaintiffs assert that this timeframe included the time of the COVID-19 pandemic, during which the beekeeping industry was in crisis, but the CFIA nevertheless declined to consider emergency exemptions or undertake a new risk assessment on the basis that it saw no scientific evidence to support that it would be safe to open the borders. Further, that Deputy Minister Forbes had an ongoing relationship with commercial beekeepers and his provincial counterparts and served as Chair of Agriculture Canada's Industry-Governments Honey Bee Sustainability Working Group. Like Deputy Minister Beck, the Plaintiffs intend to question Deputy Minister Forbes on the nature of his discussions with the Alberta Deputy Minster and the extent to which the relevant decision-makers were responsive to economic concerns raised on behalf of commercial beekeepers.

Dr. Harpreet Kochhar

[56] The Plaintiffs assert that Dr. Kochhar was involved in the 2013 Risk Assessment and, more significantly, as President of CFIA, directed that entity to undertake a new risk assessment

despite the Defendants' prior position that the conclusions of a new assessment would be unlikely to differ from the conclusion of the 2013 Risk Assessment. The Plaintiffs claim that the Defendants have not produced any information or documents that Dr. Kochhar relied upon to support the decision to undertake the 2023 Risk Assessment and intend to examine him "to provide essential context to this and other decisions made by the Defendants throughout the Class Period." They assert that these matters are relevant to both the question of whether the Defendants complied with the alleged common law duty of care not to unreasonably injure Class members' economic interests as well as the statutory good faith defence asserted by the Defendants.

Defendants' Position

[57] The Defendants submit that Canada's intended witnesses are also knowledgeable with respect to the exchanges between the Alberta Deputy Minister, Deputy Minister Forbes and Deputy Minister Beck. Further, that certain of the Shilton Affidavit exhibits are merely part of a larger series of briefings to the Deputy Ministers and correspondence with the Alberta Deputy Minister. Other exhibits of the Shilton Affidavit address correspondence between Deputy Ministers Beck and Forbes and the Alberta Deputy Minister, and Canada's intended witnesses are the primary source for the information found in those documents. The intended witnesses developed briefings for the Deputy Ministers; revised the annotated agenda for a meeting for Deputy Minister Forbes, which included speaking points on honeybees; drafted or revised letters to the Alberta Deputy Minister; and had their work incorporated into additional briefing materials for Deputy Minister Beck. The Defendants point to the documentation that they indicate supports this position.

Determination

[58] The Rajzman Affidavit indicates that Dr. Rajzman and a number of other CFIA employees will be witnesses at the trial, including Dr. Nancy Rheault and Dr. Caroline Dubé. The Rajzman Affidavit explains the positions and roles of these employees, and others, with respect to honeybee importation and health. She indicates that while Dr. Kochhar was her executive director and led the Directorate, she was the person primarily responsible for the honeybee importation file. While she briefed him and consulted him with respect to decisions, she was the primary source of information for him with respect to the 2023 Risk Assessment and possible risk mitigations. Since his appointment as President of the CFIA, she has provided information to brief him with respect to the importation of honeybees. She contributed to drafts of scenario notes and other documents.

[59] She also explains her contribution, and those of others, to the preparation and review of deputy minister correspondence, briefings and briefing notes, including correspondence to the Alberta Deputy Minister. She addresses each of the exhibits to the Shilton Affidavit and places these in context with other documents, by reference to exhibits to her affidavit, to demonstrate the contribution of herself and others to the development of the exhibits to the Shilton Affidavit.

[60] I accept that Dr. Rajzman and others who are intended witnesses of the Defendants are very knowledgeable about, and were the sources of much if not all of, the information that informed correspondence and other documentation referred to by the Plaintiffs.

[61] However, I am reluctant to refuse to grant leave to issue the requested subpoenas with respect to Deputy Ministers Beck and Forbes and President Kochhar when it is possible that they will have relevant and material evidence that may not be available from the Defendants' other intended witnesses, regardless of the latter's knowledge and expertise. In particular, with respect to their own decision-making and, in particular, the decision to conduct the 2023 Risk Assessment. I am also influenced by the fact that the Plaintiffs have agreed to narrow the scope of the requested subpoenas, which, as noted above, will serve to remove the fishing expedition concern of the Defendants.

[62] Accordingly, I will order that the Plaintiffs revise the proposed subpoenas for Deputy Ministers Beck and Forbes and President Kochhar to conform with their submissions made before me and will grant leave permitting the Administrator to issue the so-amended subpoenas.

Should the Proposed Witnesses be declared adverse witnesses in advance of trial, permitting their cross-examination by the Plaintiffs?

[63] The Plaintiffs assert that the Proposed Witnesses are necessarily adverse in interest to the Plaintiffs. Accordingly, the Court should apply *Ontario Rule* 53.07 and declare the Proposed Witnesses as such in advance of trial. The Plaintiffs assert that the *FC Rules* are silent with respect to the declaring of witnesses to be adverse. Accordingly, that Rule 4 and s 40 of the CEA permit the Court to apply provincial rules of evidence and procedure to federal proceedings with respect to matters about which federal statues are silent. Under both of these provisions, the Court can apply Ontario Rule 53.07.

[64] The Defendants take the position that the Ontario Rules are not applicable. Rather, that the motion should only be considered under s 40 of the CEA, which deals with the provincial laws of evidence in federal proceedings.

[65] In that regard, they refer to *Anderson v Canada (Attorney General)*, 1997 CanLII 17645 (FC) [*Anderson*]. That was a motion by the plaintiffs seeking an order enabling them to cross-examine their own witness as an adverse party under Rule 53.07 of Manitoba's *Court of Queen's Bench Rules*, Man Reg 553/88 [*Manitoba Rules*]. In *Anderson*, the Court noted that there is no *FC Rule* allowing a party to call an adverse party as a witness and cross-examine that witness. However, ss 9 and 10 of the CEA do address the question of adverse witnesses in a more limited way. Because the subject matter of those proceedings most particularly related to Manitoba, the plaintiffs had sought to rely upon Rule 5 of the *FC Rules*, the gap rule (now Rule 4), to invoke Manitoba Rule 53.07. The Court noted that, in *Farmer Construction Ltd v R*, (1983) 48 NR 315, a similar issue arose, and the Court found the comments there were applicable to the matter before it. Specifically, the statement that:

> If we had had to deal with the merits of this appeal, we would not have referred to Rule 5 of the *Federal Court Rules* but rather to s. 37 (now section 40) of the *Canada Evidence Act* pursuant to which the rules of evidence applicable in British Columbia, including those contained in the Rules of the Supreme Court of that province, were applicable to the trial of this action subject, however, to the *Canada Evidence Act* and other Acts of Canada. As Rule 40 of the British Columbia Rules is certainly not entirely compatible with s. 9 of the *Canada Evidence Act*, we would have said that the rules of evidence contained in Rule 40 apply to the trial of this action to the extent to which they do not conflict with s. 9 of the *Canada Evidence Act*.

[66] The Court in *Anderson* went on to find that although the evidence in question was being taken in Alberta for the convenience of the witness who lived in Alberta, the proceedings were commenced in Manitoba and would be continued in Manitoba. Although the question was not beyond doubt, the Court accepted the matter as a Manitoba proceeding. As such, it was satisfied that Rule 53.07 of the *Manitoba Rules* is part of the laws of evidence of Manitoba and, to the extent to which it did not conflict with s 9 of the CEA, was applicable to the subject proceedings.

[67] Rule 4 provides that, on motion, the Court may provide for any procedural matter not provided for in the *FC Rules* or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject matter of the proceeding most closely relates.

[68] Section 40 of the CEA provides that in all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to the *CEA* and other Acts of Parliament, apply to those proceedings. It is not apparent to me that *FC Rule* 4, the gap rule, applies given the existence and application of s 40 of the CEA. The Plaintiffs point to no authorities contrary to *Anderson.*

[69] As to s 40 of the CEA, the Plaintiffs assert that case law has interpreted “in the province in which those proceedings are taken” as not strictly referring to the province in which a proceeding was filed. Further, that in this matter there is no special connection to Edmonton, where the action was filed. They assert that this matter is a national class action and the Court

should have regard to matters of substance – such as where the causes of action arose and the subject matter of the proceeding – rather than "incidental" matters such as where the action was commenced or the location where the Court happens to be sitting. To the extent that the causes of action in this national class action are from any one province, and to the extent that the subject matter of the proceeding relates to any one province, they submit that that province is Ontario.

[70] As noted above, in *Anderson*, the Court noted that the subject proceedings were commenced in Manitoba and would be continued in Manitoba. It accepted that the matter was a Manitoba proceeding and that Manitoba Rule 53.07 was applicable, to the extent that it did not conflict with s 9 of the CEA.

[71] In *Tepper v Attorney General of Canada*, 2020 FC 1046, the plaintiff submitted that, in the absence of an *FC Rule* concerning the declaration of a witness as adverse, pursuant to s 40 of the CEA, the laws of evidence in force in the province of Ontario, where the action was taken and was being pursued, had application. There, the defendant did not take issue with the general applicability of Ontario Rule 53.07 to the action (paras 2, 4).

[72] In *Ewert v Canada*, 2023 FC 1054 [*Ewert*], Justice McHaffie held as follows:

> [41] I note the Crown argues that article 2849 of the *Civil Code of Québec* applies by virtue of section 40 of the *Canada Evidence Act*, RSC 1985, c C-5. Section 40 provides that in proceedings over which Parliament has authority, the applicable laws of evidence are those "in force in the province in which those proceedings are taken" [emphasis added] (in the French version of the statute, "qui sont en vigueur dans la province où ces procédures sont exercées" [emphasis added]).
>
> [42] Having reviewed the limited jurisprudence on the application of section 40 of the *Canada Evidence Act* to proceedings in this

> Court, there is in my view some uncertainty as to whether these proceedings "are taken" in Quebec. In various cases, federal courts have referred to the location of commencement, pursuance, and/or trial as being where proceedings are "taken": see, e.g., *Anderson v Canada (Attorney General)*, 1997 CanLII 17645 (FC); *Desroches v The Queen*, 2013 TCC 81 at para 33; Canada (Citizenship and Immigration) v Halindintwali, 2015 FC 390 at para 96; *Tepper v Canada (Attorney General)*, 2020 FC 1046 at para 2; *Porto Seguro Companhia de Seguros Gerais v Belcan SA*, 1996 CanLII 4040 (FCA), [1996] 2 FC 751 (CA) at para 8, rev'd on other grounds, 1997 CanLII 308 (SCC), [1997] 3 SCR 1278; *South Yukon Forest Corporation v Canada*, 2010 FC 495 at paras 1–4, 40–41, rev'd on other grounds, 2012 FCA 165, leave to appeal ref'd, 2012 CanLII 76981 (SCC).
>
> [43] In the present case, the action was commenced in Vancouver, the causes of action arose in Quebec, and the trial was held at a sitting of the Court in Montreal (by videoconference), with the parties in Quebec. I question whether the applicable rules of evidence should be determined solely by the location of the Registry Office where the originating document was issued. In the present case, I am satisfied that the laws of evidence of Quebec should apply, as proposed by the Minister, while noting that none of my conclusions would differ if the British Columbia laws of evidence applied.

[73] And, in *Fromfroid SA v 1048547 Ontario Inc*, 2023 FC 925, at paragraph 12, Justice Grammond noted that the action brought by Fromfroid was based on the *Patent Act*. He found, given that the facts mainly occurred in Ontario, that that province's law applied if private law concepts were needed to complete the provisions of the *Patent Act* (citing the *Interpretation Act*, RSC 1985, c I-21, s 8.1). However, since the trial took place in Quebec, Quebec civil law applied on a suppletive basis with respect to evidence (citing s 40 of the CEA).

[74] In my view, contrary to the Plaintiffs' assertion, these cases, including *Ewert* and *Anderson*, do not demonstrate a practical and flexible approach to the interpretation of s 40 of the CEA. Rather, the primary determinative factors are where the matter was commenced and where

the trial was, or will be, held. This, of course, is reflective of the wording of s 40 of the CEA that, in all proceedings over which Parliament has legislative authority, "the laws of evidence in force in the province in which those proceedings are taken," subject to the CEA and other Acts of Parliament, apply to those proceedings.

[75] Here, the action was commenced in Edmonton. The Plaintiffs assert that this was because, when the matter was commenced over 10 years ago, Edmonton was where the Plaintiffs' original counsel were located, but that current counsel is not so situated.

[76] Be that as it may, Alberta is the province within which the action was commenced. Further, current counsel has not applied to move the trial to another location, and it will proceed in Edmonton on November 6, 2023. In my view, in this matter, these factors determine for the purposes of s 40 of the CEA that "the laws of evidence in force in the province in which those proceedings are taken" are the laws of Alberta and not Ontario.

[77] The Plaintiffs also submit, however, that the subject matter of this proceeding is national in scope, and the class applies to commercial beekeepers across Canada. But, to the extent that the Plaintiffs' and Class members' claims can be said to relate most closely to one province, the Plaintiffs hold that that province is Ontario, where the decision-making that is the subject of the action occurred, as demonstrated by the fact that most of the Defendants' witnesses are located there. Further, that while a large proportion of commercial honey production does occur in Alberta, the provinces with the largest number of beekeepers, and therefore the largest number of Class members, are Ontario and British Columbia.

[78] The Defendants note that none of the cases cited have considered the number of class members in a particular province as a method for determining the province to which the action is most clearly connected. And, in any event, it does not follow that the largest number of class members must be in Ontario and British Columbia just because those provinces have the largest number of beekeepers. This is because the Class only includes those beekeepers with more than 50 colonies. Thus, more beekeepers in a province does not mean that there are more beekeepers with 50 or more colonies in that province. Moreover, the assertion should be disregarded, as it is based only on the unsupported affidavit evidence of counsel for the Plaintiffs.

[79] I note that none of the cases cited by the parties support that in a national-scope class action, "the laws of evidence in force in the province in which those proceedings are taken" as set out in s 40 of the CEA should be determined by identifying the province with the greatest number of class members. And, on its face, it is difficult to accept that the submission is in keeping with that provision. The parties point to no class jurisprudence or class action rules that address this issue.

[80] Ultimately, I agree with the Defendants that, based on the jurisprudence of this Court, Alberta is where this proceeding is taken for the purposes of s 40 of the CEA. Therefore, to the extent that they do not conflict with s 9 of the CEA or the Rules, the Court may apply the Alberta laws of evidence to supplement the *FC Rules*.

[81] However, the Plaintiffs do not wish to apply the laws of evidence of Alberta. They submit that in determining which provincial laws of evidence apply to this proceeding, the Court

should have regard to the "balances of procedural fairness struck in different provinces," as well as the overall fact-finding functions of trial. They submit that the absence of an Alberta rule permitting a party to summons and cross-examine an adverse party is balanced with other rules that provide broader rights of pre-trial discovery. Unlike the procedure in this Court (or in Ontario), in Alberta a party is not limited to examining for discovery only one representative of a corporation or institution, but can examine multiple persons who are adverse in interest. At trial, they can file the transcripts of the depositions of such adverse persons in support of their case, and this evidence can be used by the questioning party at trial. According to the Plaintiffs, these rules generally offset the need for rules such as Ontario Rule 53.07. The Plaintiffs submit that the Proposed Witnesses fall within the categories of persons whom the Plaintiffs would have been able to examine for discovery under the Alberta rules and that it would be "improper and unfair" to apply one aspect of Alberta's rules – absent the right to summons and cross-examine an adverse party at trial – in circumstances where the Plaintiffs have not had the benefit of the much broader Alberta discovery system.

[82] The Defendants submit that the balance of procedural fairness struck in different provincial rules of procedure and evidence is not a consideration under s 40 of the CEA. Further, the approach taken by the Plaintiffs would effectively apply the *Ontario Rules* to any proceedings in this Court where a federal government decision-maker in Ottawa is involved, despite there being no provision in the *FC Rules* like Ontario Rule 53.07.

[83] I agree with the Defendants that what the Plaintiffs coin as "the balance of procedural fairness" struck in different provinces is not a consideration in the application of s 40 of the

CEA. Further, the Plaintiffs chose to file and pursue their action in this Court, knowing that the *FC Rules* therefore have application. Moreover, what the Plaintiffs propose is, essentially, the cherry picking of evidentiary rules to find and apply the rules that they deem most favourable to them. This approach is fraught with difficulties. Nor do I agree with the Plaintiffs that applying the *Alberta Rules* is "inappropriate" or would impede the fact-finding function of the trial. When the Plaintiffs subpoena and call the Proposed Witnesses (other than the Minister), they will be able to examine them directly, if not cross-examine them as adverse witnesses. Their evidence will therefore be before the Court.

[84] In conclusion, I find that, pursuant to s 40 of the CEA, the *Alberta Rules* apply, and Ontario Rule 53.07 has no application in these circumstances. Accordingly, the Plaintiffs' motion to have the Proposed Witnesses declared adverse is denied.

Conclusion

[85] That part of the Plaintiffs' motion seeking an order granting them leave, pursuant to Rule 41(1)(b), to have a subpoena issued compelling Minister Bibeau to give evidence at trial is denied on the basis of the existence of parliamentary privilege, as set out above.

[86] That part of the Plaintiffs' motion seeking an order granting them leave to compel the attendance at trial of Deputy Minister Beck, Deputy Minister Forbes and President Kochhar is granted subject to the Plaintiffs submitting for issuance revised subpoenas confirming that no documents are required; that the witnesses will not be examined beyond the temporal limits of

their employment with the Defendants; and, that any examination will be limited to the narrow subject matter of their decision-making processes.

[87] That part of the Plaintiffs' motion seeking a declaration that the Proposed Witnesses be declared adverse and examined as such is denied.

[88] Of course, it remains open to the Defendants and the Plaintiffs to reach an agreement that the Defendants will call as their own witnesses Deputy Minister Beck, Deputy Minister Forbes and President Kochhar, on the narrowed terms proposed by the Plaintiffs during the hearing of this motion, which would negate the need for the subpoenas and reduce the time required to examine and cross-examine those witnesses.

ORDER IN T-2293-12

THIS COURT ORDERS that the Plaintiffs' motion is granted in part. Specifically:

1. The Plaintiffs are granted leave, pursuant to Rule 41(1)(b), to have subpoenas issued by the Administrator compelling Deputy Minister Beck, Deputy Minister Forbes and President Harpreet Kochhar to give evidence at trial, subject to the Plaintiffs revising the proposed subpoenas to indicate that the witnesses are not required to provide any documents, that the witnesses will not be examined beyond the temporal limits of their employment with the Defendants and that the witnesses will be examined only with respect to their decision-making;

2. That part of the Plaintiffs' motion seeking an order granting them leave, pursuant to Rule 41(1)(b), to have a subpoena issued compelling Minister Bibeau to give evidence at trial is dimissed; and

3. That part of the Plaintiffs' motion seeking an order declaring that Rule 53.07 of the *Ontario Rules of Civil Procedure* applies to the issuance of subpoenas and the cross-examination of adverse witnesses in this proceeding, declaring that the four proposed witnesses are adverse in interest to the Plaintiffs and granting the Plaintiffs leave to cross-examine the witnesses at the trial of this action is dismissed.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2293-12
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:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	OCTOBER 4, 2023
ORDER AND REASONS:	STRICKLAND J.
DATED:	OCTOBER 24, 2023

APPEARANCES:

Jamie Shilton	FOR THE PLAINTIFFS
Tina Yang Jonathan Schachter	FOR THE PLAINTIFFS
Neil Goodridge Alexandra Warkentin Cailen Brust	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Koskie Minsky LLP Barristers & Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
Waddell Phillips LLP Toronto, Ontario	FOR THE PLAINTIFFS

Attorney General of Canada Toronto, Ontario Toronto, Ontario	FOR THE DEFENDANTS