



TORT LIABILITY FOR PUBLIC AUTHORITIES: A PUBLIC LAW APPROACH

International Municipal Lawyers Association
Annual Conference
San Diego, California
September 30, 2016

**Barry Weintraub
Rueters LLP
Toronto**

The Thirty Second Overview

- ★ 2015 case *Paradis Honey Ltd. v. Canada* set out ground-breaking new approach to liability of public authorities
- ★ Traditional approach follows standard negligence principles with limited immunity for core policy decisions
- ★ New approach suggests using judicial review principles to determine liability of public authorities

Stay and Learn More: The Outline

- ★ Facts of Paradis case re Judicial Review Approach to gov't liability
- ★ Traditional Negligence Approach of last 40 years
- ★ Problems with Negligence Approach
- ★ Does Judicial Review approach solve problems?

Case that caused the buzz

- ★ New approach arises out of obiter remarks of a leading Canadian authority on administrative law, Justice David Stratas of Federal Court of Appeal
- ★ Case: *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, dealing with permits for importation of bees

Paradis Honey Ltd. v. Canada 2015 FCA 89

- ✱ Minister of Agriculture has discretionary power to grant licenses or permits to import bees.
- ✱ Group of Commercial Beekeepers alleged negligence by Agriculture Canada in exercising power to grant licenses or permits to import bees.

Text of Discretionary Power

- ★ “The Minister may...issue a permit or license...where the Minister is satisfied that, to the best of the Minister’s knowledge and belief, the activity for which the permit or licence is issued would not, or would not be likely to, result in the introduction into Canada, or spread within Canada, of a vector, disease or toxic substance.”



Building Wall to Keep 'Em Out

- ✦ Rather than deciding on a case by case basis, Agriculture Canada developed a rule of keeping out certain types of bees
- ✦ Beekeepers' bees were among the species of outlawed bees.

Fact Checking

- ✱ Beekeepers: No basis for excluding our bees.
- ✱ Beekeepers alleged Minister applied blanket rule without regard to empirical data on relevant diseases associated with bees.
- ✱ “You acted negligently and in bad faith”
- ✱ Beekeepers sued for damages

The Result

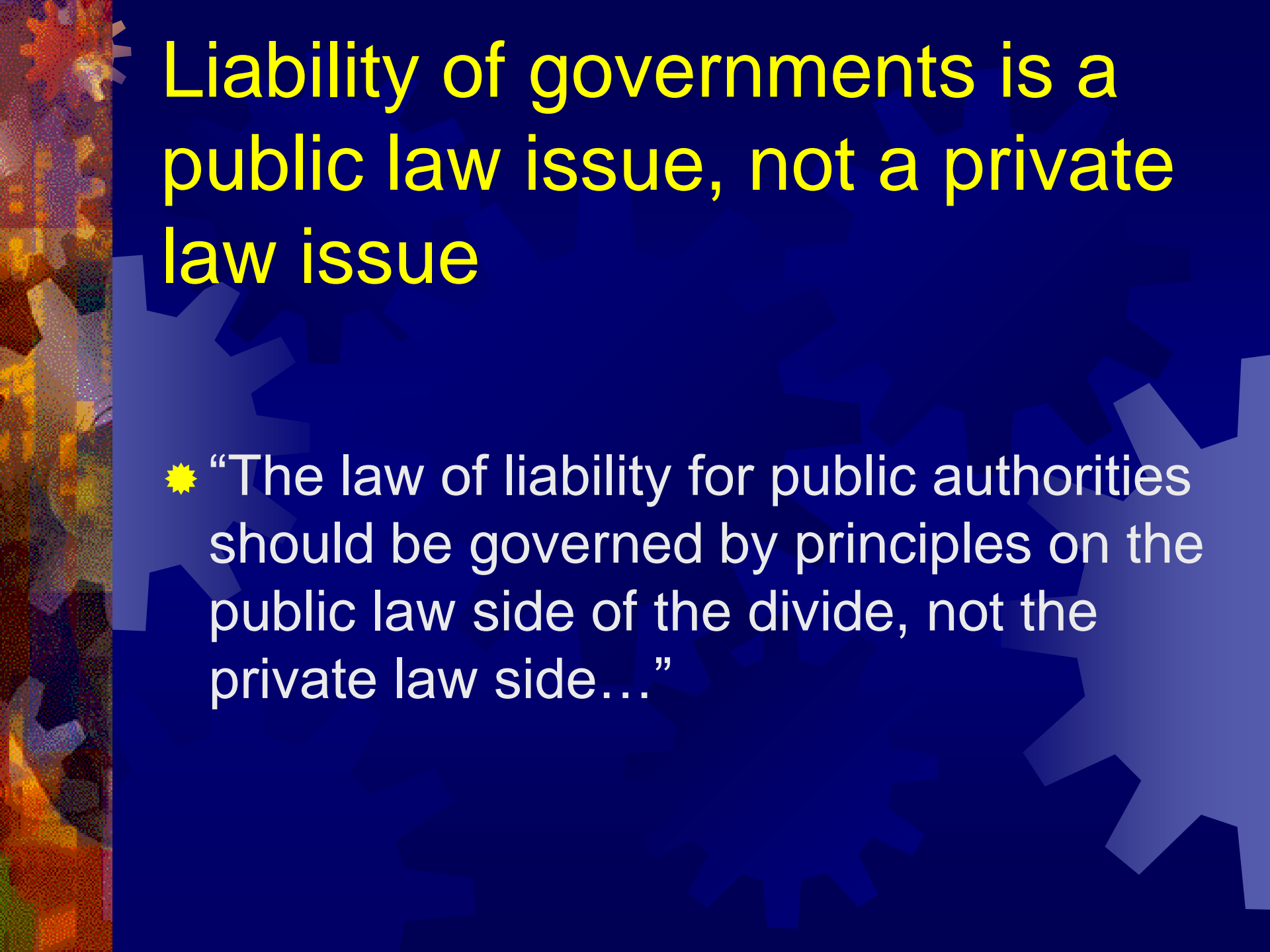
- ✦ Justice Stratas went through negligence analysis; agreed Minister negligent:
 - ✦ Duty owed to beekeepers
 - ✦ Minister fell short of standard of care
 - ✦ Damages caused by carelessness.
- ✦ Result: Damage\$

The Obiter Remarks

- ✦ After disposing of case, Justice Stratas used occasion to criticize application of traditional negligence analyses to questions of liability of public authorities and outlined a new approach

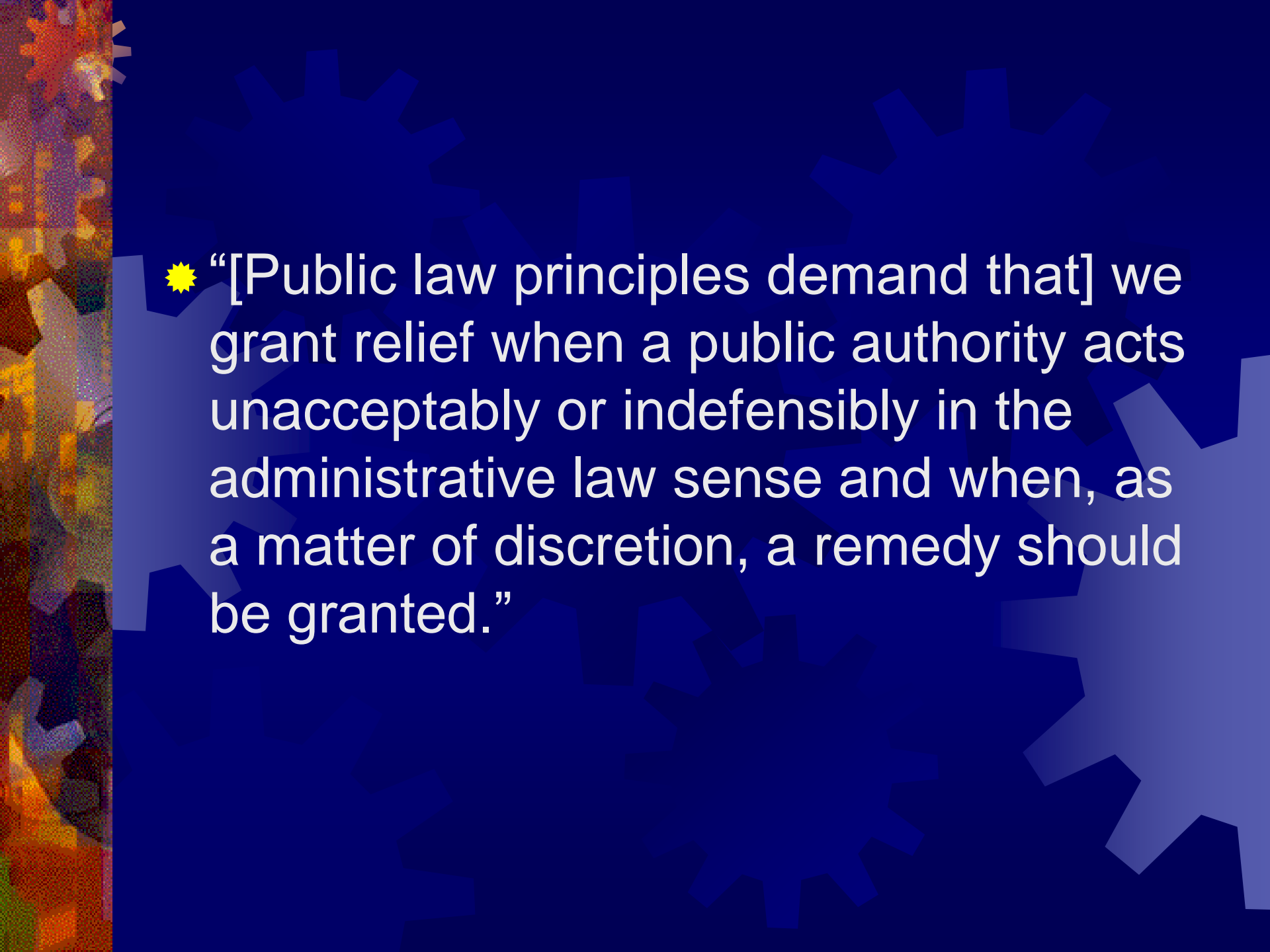
Using Screwdriver to Turn Bolt

- ✦ Justice Stratas said private law of negligence should not be applied to cases dealing with potential liability of public authorities.
- ✦ Likening it to using a screwdriver to turn a bolt, Justice Stratas said public law principles should apply.



Liability of governments is a public law issue, not a private law issue

- ★ “The law of liability for public authorities should be governed by principles on the public law side of the divide, not the private law side...”



★ “[Public law principles demand that] we grant relief when a public authority acts unacceptably or indefensibly in the administrative law sense and when, as a matter of discretion, a remedy should be granted.”

Where Minister Went Wrong

- ✦ From administrative law point of view, blanket rule adopted by Agriculture Canada was a fettering of discretion.
- ✦ Procedure followed in coming up with the blanket rule was flawed. No adequate science.

Status of Public Law Approach

- ✱ Justice Stratas grounded decision both on traditional negligence analysis and new public law approach
- ✱ Criticizes negligence approach but still uses it to decide case. Clearly says public law approach is a better alternative but still applies negligence analysis.
- ✱ Remains to be seen whether public law approach will be adopted and negligence abandoned for assessing public liability. In meantime, we may be in a situation where both sets of analyses are used. That would produce an incoherent result.

The ABC's of Negligence: Duty of Care, Breach & Causation of Damages

- ✱ Original negligence principle is that where duty of care arises, defendant must meet standard of care reasonably expected in circumstances. If breach causes damage to plaintiff, defendant liable.
- ✱ Three liability filters: Duty, Breach, Causation

Erosion of Duty of Care Filter

- ✱ Negligence law arose in old days before big government, in simpler times when people didn't interact as often.
- ✱ More modern view understands individuals interact with others and therefore owe broader duties of care.
- ✱ Since *Donoghue v. Stevenson* (1932), neighbour principle is recognized

Foreseeability

- ✱ Courts applied a foreseeability analysis: no award of damages where particular harm was not reasonably foreseeable.
- ✱ Where damage is foreseeable, duty to take reasonable care to avoid harm.
- ✱ What is reasonable care depends on extent of foreseen harm
- ✱ Application of foreseeability very broad.

Proximity

- Courts have also required a degree of proximity between the plaintiff and defendant.
- But, easy to find proximity
- Specific interactions create necessary proximity.
- Statutory schemes can give rise to necessary proximity.

Frantic Need to Limit Liability

- ✱ Neighbour principle very broad in its application
- ✱ Courts, eager to limit liability, have tried various methods to try to do so.
- ✱ Some judges admit explicit policy objective
 - ✱ Cardozo J.A.: Avoid “liability in an indeterminate amount for an indeterminate time to an indeterminate class”

Absence of Principle = Confusion

- ✱ Floodgates arguments are results-driven, reverse-engineered applications of pre-determined biases.
- ✱ No real basis in principle.
- ✱ Many conflicting decisions because different judges have different views of where to draw the line. Some judges more conservative than others.

Municipalities Are Convenient Targets

- ✦ For those looking to spread losses, the deep pockets of municipalities make them popular targets.
- ✦ Ability to raise resources theoretically unlimited: taxpayer resistance an ineffective cap.
- ✦ Liability of municipalities has grown

Kamloops v. Neilson (1984)

- ★ If municipality makes decision to exercise a power, it has a duty at operational level to use due care in giving effect to it.
- ★ Case involved inspection of foundation.
- ★ Duty of care as applied to a municipality is no real limitation. Municipalities exist to take care of needs of citizens, so duty of care easily met.



Applying Negligence Analysis to Public Authorities doesn't work

- ★ “Does it make sense to speak of public authorities having to consider their ‘neighbours’ when they regularly affect thousands, tens of thousands or millions at a time?”

Stratas, J.A. in *Paradis Honey Ltd. v. Canada*

Standard of Care for Public Authorities Also Unclear

- ✦ What is appropriate standard of care for public authorities?
- ✦ Difficult to establish, since different public authorities have different circumstances. Even where two municipalities may seem similar, they often make different but equally legitimate policy choices.

US Response: Qualified Immunity

- ★ US courts recognized that public authorities were in unique situation, and developed qualified immunity:
- ★ Officials performing discretionary functions shielded from civil liability if their conduct does not violate clearly established statutory or constitutional rights a reasonable person would know of.

Canadian court response re public authority liability

- ★ Canadian courts have invited explicit consideration of factors limiting scope of gov't duty, class of persons to whom duty owed and damages to which it gives rise.
- ★ follows English lead in *Anns v. Merton London Borough Council*
- ★ *Imperial Tobacco 2011*: No liability for “core policy decisions” if made rationally and in good faith.

What is “Core Policy”

- ✦ Difficult to distinguish core policy from operational decisions.
- ✦ All actions involve policy decisions of one sort or another, especially on how much to spend.
- ✦ The vaguer the “core policy”, the more important is the decision-making that gets thrust into operational decisions.

Imperial Tobacco also departs from pure negligence analysis


- ★ SCC in Imperial Tobacco said no negligence liability if core policy decisions made in good faith and if rational.
- ★ Bad faith is not the same as negligent. Whole concept of negligence is you don't have to be acting in bad faith to be liable; carelessness is sufficient.
- ★ SCC is really moving in direction administrative law analyses of deference and a focus on how powers are exercised, similar to Paradis Honey, but SCC continues to use negligence framework.

Paradis Honey: don't use private law tools for public law issues

- ★ The approach of using administrative law tools of judicial review for assessing governmental liability is an attractive one.
- ★ Governments are different from private actors, and different considerations should apply. Every government's constitutional foundation is in an electoral mandate, distinguishing them from private actors.
- ★ While everyone is equal under the law, and there should be a level playing field for all, the reality is we do apply different standards in judicial review of gov't decisions. Why not apply the same standard for liability?

What does the future hold?

- ✦ The approach laid out in *Paradis Honey* makes more sense than the old negligence analysis.
- ✦ But, unless it replaces the negligence analysis rather than supplementing it, it may make the issue even more confused.
- ✦ Consideration of the issue by other appellate courts and Supreme Court of Canada is needed.



Barry Weintraub
Rueters LLP
Toronto

Barry.Weintraub@RuetersLLP.com

416-597-5402

www.RuetersLLP.com