Federal Court  Cour fédérale

Date: 20220429

Docket: T-1597-21

Citation: 2022 FC 625

Ottawa, Ontario, April 29, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

POTATOES NEW BRUNSWICK AND RICHARD ALLAN

Applicants

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Canadian Food Inspection Agency [CFIA] to carry out a national potato wart survey [the Survey] pursuant to the *Plant Protection Act*, SC 1990, c 22 [*PPA* or *Act*] and *Plant Protection Regulations*, SOR/95-212 [PPR] The Survey is part of a reform of the CFIA's surveillance program following the

discovery of potato wart on Prince Edward Island in 2020, and the much earlier discovery of potato wart in Newfoundland and Labrador.

[2] The Applicant Potatoes New Brunswick is a non-profit organization created through legislation of both Canada and New Brunswick: *Farm Products Marketing Act*, RSNB 1973, c F-6.1; *Agricultural Products Marketing Act*, RSC 1970, c A-7; and *New Brunswick Potato Order*, SOR/80-726. Potatoes New Brunswick collaborates with industry partners to advocate for the industry needs of potato producers in New Brunswick.

[3] The Applicant, Richard Allan, is a member of Potatoes New Brunswick. He grows seed potatoes with Gailen Allan on Green Brook Farms located in Glassville, New Brunswick. Richard Allan has been involved in growing seed potatoes for 45 years.

[4] The Respondent, CFIA, is a federal agency which in the context of this proceeding acts under the authority of the *PPA* and *PPR*. CFIA has been managing potato wart pest in NL since its inception, and in PEI since 2020.

II. Facts

A. *Background*

[5] Potato wart (*Synchytrium endobioticum*) [PW] is a fungus that attacks potatoes, causing a visible wart-like tissue on the surface of the tuber. The fungus produces spores which can

germinate and cause new infections. The presence of spores on tubers and in the soil may spread through movement on crops, soil or equipment; such spores may last for 30 years in the soil.

[6] The parties agree potato wart is a “pest” for the purposes of the *PPA* and *PPR*.

[7] Potato wart is also a “quarantine pest”, because of the fact it may establish itself and result in significant negative economic effects. Potato wart leads to severe yield reductions, and make the land unsuitable for potato production for a long time. It also negatively impacts trade of other commodities—other root crops, plants—associated with the affected soil.

[8] Once potato wart has been introduced into a field, it takes many years for the population of affected potatoes to grow to a size that allows the disease to be visibly observed on an attacked crop.

[9] Soil sampling has therefore emerged as the new standard to test for potato wart, with Canadian trade partners like the United States making the change.

[10] Potato wart has not been detected in New Brunswick. However, potato wart was detected in Newfoundland and Labrador [NL] and Prince Edward Island [PEI], most recently in 2020 in PEI. Potato growing areas in these two provinces are now under regulatory control (the PW Domestic Long-Term Management Plan) to ensure no further spread of the disease. These controls are implemented under the *PPA* and related regulations.

[11] In October 2020, CFIA detected potato wart in PEI. This prompted the CFIA to conduct a review of its potato wart surveillance program, used to verify areas are free of potato wart. The PEI 2020 discovery was a “new find” in previously pest-free potato seed farms. Potato seed farms are high risk due to their capacity to spread potato wart. The CFIA concluded the need for a more robust surveillance approach and for an increase in soil sampling outside of areas already regulated for potato wart.

[12] The majority of interprovincial trade in seed potatoes from PEI occurs with eastern provinces. New Brunswick is the largest importer, receiving 59.6% of the seed potatoes from PEI that are traded inter-provincially, followed by Ontario (29.2%), Nova Scotia (5.2%), and Quebec (4.1%).

[13] The United States is Canada’s main seed potato market.

[14] In 2021, after completing the review driven by the discovery of potato wart in previously potato wart free seed potato farms in PEI, CFIA decided to implement a national survey in relation to the potato wart. The result was the creation of the 2021 National PW Survey. The 2021 National PW Survey was designed to confirm freedom from potato wart in non-regulated areas of Canada. A national survey for potato wart was last conducted in Canada in the 1990s. Since then, surveillance has been limited to NL and PEI.

[15] The National PW Survey includes CFIA inspectors taking and testing soil samples from selected fields used for seed potato production across Canada, including New Brunswick.

[16] This Survey is done at no cost to the seed potato growers.

[17] Prior to its implementation, CFIA discussed the need for a national potato wart survey with industry representatives, issuing an Industry Notice on July 9, 2021.

[18] A number of industry representatives supported a national survey to protect seed potato and potato exports to the US.

[19] However, the Applicants, Potatoes New Brunswick was generally opposed to a national survey, as was the Applicant Richard Allan.

[20] CFIA prepared an Interim Guidance document for the Survey's 2021 implementation in response to anticipated resistance from growers.

B. *Events leading to the application*

[21] On September 28, 2021, the CFIA issued a "Notice to Seed Potato Growers". It advised potato and seed potato producers and others that the 2021 National PW Survey would take place in the fall of 2021.

[22] On October 1, 2021, the CFIA sent a letter to those producers, including the Applicant Mr. Allan, whose seed potato fields were selected for sampling.

[23] In his Affidavit, Mr. Allan stated he never consented to the 2021 National PW Survey. He was never asked by the CFIA if potato wart had been found on any of the seed potatoes grown on his farm, nor is he aware of such exposure on the seed potatoes or soil on his farm, including in his most recent harvest.

[24] The Applicant's Memorandum states the CFIA "proceeded to unilaterally conduct the Survey on farms associated with the Applicants, including unauthorized entry onto these farms, and removing soil samples." I note there is no other evidence the 2021 National PW Survey took place in New Brunswick or to what extent.

[25] The Applicants started this application for judicial review October 20, 2021.

III. Decision under review

A. *Notice to Seed Potato Growers*

[26] The September 28, 2021, Notice to Seed Potato Growers advised the Applicants that the 2021 National PW Survey would be carried out in fall of 2021. It advised the purpose of the Survey will "confirm whether areas of Canada where PW has not been detected remain free from this quarantine pest."

[27] The Notice further explained the nature of potato wart and its history in Canada. As it was found in PEI and NL, farms in both provinces are now under CFIA management to contain the spread of potato wart. Controls include movement certificates, quarantine controls, and

mandatory soil samples. The Notice also advised that potato wart had been detected in certain PEI fields over the past 20 years, most recently in 2020. Considering the above, the Notice to Seed Potato Growers advised: "The National PW Survey is required to enhance the national surveillance program and to further verify that other areas of Canada are free from this quarantine pest. By demonstrating that Canada is committed to preventing and managing the spread of PW, the National Survey will strengthen domestic and international confidence in the Canadian seed potato system and reduce the risk of trade disruptions."

[28] CFIA's Notice to Seed Potato Growers further described what the Survey entails:

> […] The national survey will include taking soil samples from fields used for seed potato production, including potatoes for domestic use. A number of fields will be selected in each of the seed potato growing regions in Canada, except for Newfoundland and Labrador which is already regulated for PW. For the portion of the survey conducted where PW has been known to occur, the survey will be conducted independently of export and investigation sampling programs.
>
> A maximum of 1000 soil samples will be collected in the 2021 national potato wart survey. The number of samples that will be collected per province is based on the proportion of hectares of seed potatoes planted and the proportion of seed potatoes imported from provinces with PW during the 10 previous years.

[29] The CFIA Notice cited its governing statute and regulation, including section 25 of the *PPA* and section 16 of the *PPR.* CFIA advised growers that the law authorizes CFIA inspectors to conduct the Survey, and that owners or persons in charge of farms were responsible for assisting inspectors in carrying out their duties under the *Act*. The CFIA reminded growers obstructing an inspector from carrying out their lawful duties may result in regulatory enforcement action.

B. *Letter to Richard Allan*

[30] In CFIA's letter of October 1, 2021 to Richard Allan, its inspector described the purpose and rationale for the 2021 National PW Survey: "This survey will confirm whether areas of Canada where PW has not been detected remain free from this pest. The activity is part of CFIA's overall mandate to protect Canada's plant resource base. It will strengthen domestic and international confidence in the Canadian seed potato system and reduce the risk of trade disruptions as well as the risk of mandatory PW soil testing for seed potato export."

[31] The letter then explained "[o]ne or more fields have been selected from [Richard Allan's] seed potato farm unit for this survey."

[32] The letter contained a Q&A document and the Notice to Seed Potato Growers. The Q&A provided more information on potato wart, its detection, identification and management, and CFIA regulation. Specific Q&As included:

> **7. Why does CFIA regulate PW?**
>
> In Canada, potato wart is a quarantine pest, which means it can establish itself and have significant negative economic effects. Potato Wart can cause severe yield reductions, which can make land unsuitable for potato production for a long period of time as the spores can live up to 30 years. Additionally, if PW is present, it can impact the trade of other commodities associated with soil, such as other root crops or other plants that will be replanted.
>
> **8. Why does CFIA do so much soil sampling for PW, especially in some provinces?**
>
> In Canada and many other countries, PW is a quarantine pest. The CFIA is therefore required to put controls in place that reduce the risks of spreading PW both domestically and internationally. CFIA

> conducts many inspections and soil tests to provide confidence that areas are considered free from PW.

[33] The CFIA Inspector referred Richard Allan to the local CFIA Office for questions about the sampling procedure.

IV. Issues

[34] The issues in this application are whether the CFIA's Decision to initiate the 2021 National PW Survey was reasonable, and whether the *PPA* and or *PPR* infringe section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11[*Charter*].

V. Standard of Review

A. *Reasonableness*

[35] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required of a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48).

> The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[36] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

> [Emphasis added]

[37] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[38] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

VI. Analysis

A. *Reasonableness*

(1) *PPA* and *PPR*

[39] The Respondent primarily relies on paragraphs 25(1)(a), (c) and (e) of the *PPA* and subsection 16(1) of the *PPR* as authorizing legislation for the 2021 National PW Survey. Subsection 25(1) of the *PPA* states:

Inspection	**Pouvoirs de visite**
25(1) For the purpose of detecting pests or for a purpose related to verifying compliance or preventing non-compliance with this Act, an inspector may	**25 (1)** Afin de vérifier l'existence de parasites ou à toute fin liée à la vérification du respect ou à la prévention du non-respect de la présente loi, l'inspecteur peut:
(a) subject to section 26 [which requires a warrant or consent to enter a dwelling place and is not applicable in this case, ed.], at any reasonable time, enter and inspect any place, or stop any conveyance, in which the inspector believes on reasonable grounds there is any thing in respect of which this Act or the regulations apply;	**a)** sous réserve de l'article 26, procéder, à toute heure convenable, à la visite de tout lieu — et à cette fin, à l'immobilisation d'un véhicule — où se trouvent, à son avis, des choses visées par la présente loi ou les règlements;
(b) open any receptacle, baggage, package, cage or other thing that the inspector believes on reasonable grounds contains any thing in	**b)** ouvrir tout contenant — bagages, récipient, cage, emballage ou autre — qui, à son avis, contient de telles choses;

respect of which this Act or the regulations apply	
(c) examine any thing in respect of which this Act or the regulations apply and take samples of it;	**c)** examiner celles-ci et procéder sur elles à des prélèvements;
(d) require any person to produce for inspection or copying, in whole or in part, any record or other document that the inspector believes on reasonable grounds contains any information relevant to the administration of this Act or the regulations; and	**d)** exiger la communication, pour examen ou reproduction totale ou partielle, de tout document renfermant, à son avis, des renseignements utiles à l'application de la présente loi ou des règlements;
(e) conduct any tests or analyses or take any measurements.	**e)** faire des tests et des analyses et prendre des mesures.
	L'avis de l'inspecteur doit être fondé sur des motifs raisonnables.
[Emphasis added]	[Je souligne]

[40] Subsection 16(1) of the *PPR* provides:

16 (1) An inspector may conduct an investigation or survey of a place or any thing in that place in order to detect pests or biological obstacles to the control of pests and to identify areas in which a pest or biological obstacle to the control of a pest is or could be found.	**16 (1)** L'inspecteur peut mener une enquête ou une étude dans un lieu ou à l'égard de toute chose qui s'y trouve afin de détecter les parasites ou les obstacles biologiques à la lutte antiparasitaire et de délimiter les périmètres où les parasites ou les obstacles biologiques sont ou peuvent être présents.

[41] The Applicants submit CFIA did not comply with the *PPA* and is therefore conducting an unlawful search and seizure. The Applicants submit the following interpretations should apply to subsection 25(1) of the *PPA*; my comments follow each:

- "Thing" has a narrow definition. Parliament could have specified "plant" (i.e. "plant or other thing") but did not do so. This is indicative of a narrower category of "things" that may be inspected. Court comment: as will be seen, I reject this analysis and find the definition of "thing" reasonably extends to potatoes as plants, the soil in which they may grow, and potato wart in any of its forms through its life cycle—an agreed pest.

- An overbroad reading of "things" leads to an absurd result. The CFIA would have a complete and unfettered right of inspection as any "thing" could theoretically harbour a "pest". Court comment: I need not decide the parameters of "thing" in this case. Suffice it to say that "thing" reasonably extends to potatoes as plants, the soil in which they may grow, and potato wart in any of its forms through its life cycle.

- An overall reading of the *PPA* and *PPR* indicates the instruments are not focused on plants, but on pests. The CFIA's powers, rights, duties and responsibilities under the *PPA* are only triggered when there are reasonable grounds to believe a pest is present on the premises, not a plant. Court comment: I do not accept this argument as may be seen from the two previous comments.

[42] The Respondent disagrees, and submits subsection 25(1) grants broader powers to CFIA inspectors than the Applicant allows. Section 3 of the *PPA* defines "thing" as "includes a plant and a pest", meaning the definition is not exhaustive. In this case, the "things" to which the *Act* applies are a potato and the pest potato wart in any of its forms through its life cycle including spores. The *PPA* grants corollary power to enter into a place to ensure no pest exists in that place. Therefore, inspectors may rely on subsection 25(1) to enter into places for the sole

purpose of delimiting a pest-free area. There is no legislative requirement to obtain consent, approval, or a warrant to enter any place that is not a dwelling place.

[43] In my respectful view, it was reasonably open to the CFIA to interpret subsection 25(1) in the manner it did, so long as the interpretation is consistent with the provision's text, context and purpose, see *Vavilov* at para 120; *Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 40 [*Safe Food Matters*]; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 42 [*Mason*] [per Stratas JA, Rennie JA and MacTavish JA concurring], leave to appeal to SCC granted, no. 39855 (2022-03-03).

[44] The Federal Court of Appeal says the following in *Mason*:

> [16] *Hillier* [*Hillier v Canada (Attorney General)*, 2019 FCA 44, ed.] begins by reminding reviewing courts of three basic things they should appreciate when conducting reasonableness review. First, in many cases, administrators may have a range of interpretations of legislation open to them based on the text, context and purpose of the legislation. Second, in particular cases, administrators may have a better appreciation of that range than courts because of their specialization and expertise. And, third, the legislation—the law on the books that reviewing courts must follow—gives administrators the responsibility to interpret the legislation, not reviewing courts.
>
> [17] For these reasons, *Hillier* tells reviewing courts to conduct themselves in a way that gives administrators the space the legislator intends them to have, yet still hold them accountable. Reviewing courts can do this by conducting a preliminary analysis of the text, context and purpose of the legislation just to understand the lay of the land before they examine the administrators' reasons. But the lay of the land is as far as they should go. They should not make any definitive judgments and conclusions themselves. That would take them down the road of creating their own yardstick and measuring the administrator's interpretation to make sure it fits.
>
> [18] Instead, *Hillier* recommends (at para. 16) that a reviewing court should "focus on the administrator's interpretation, noting

> what the administrator invokes in support of it and what the parties raise for or against it", trying to understand where the administrator was coming from and why it ruled the way it did: *Hillier* at para. 16.
>
> [19] Under this approach, the reviewing court does not act in an "external" way, *i.e.*, "arrive at a definitive conclusion about the best way to read the statutory provision under review before considering how the administrator's interpretation matched up with [the] preferred reading". Rather, as Professor Daly has observed, the reviewing court acts in an "internal" way, *i.e.*, "a relatively cursory examination of the provision at issue, with a view to analyzing the robustness of the [administrator's] interpretation". See Paul Daly, "Waiting for Godot: Canadian Administrative Law in 2019" (online: https://canlii.ca/t/t23p at 11).

[45] Perfection is not the standard and the interpretation of administrative actors such as the CFIA may not look like those of a lawyer or judge, see *Mason* at para 39; *Safe Food Matters* at para 40. However, the decision maker must grapple with the issue of the legislation before it and explain why its decision is within legislative constraints, see *Safe Food Matters* at paras 40-41. In my respectful view, these requirements have been met by the CFIA.

[46] The thrust of the Applicant's submissions are that this Court on judicial review should arrive at a different interpretation of the relevant statutory and regulatory provisions from that of the CFIA. But on judicial review this Court is not to proceed with its own statutory interpretation of the *PPA* and or *PPR*, see *Safe Food Matters* at para 39. What the Court must do instead is to discern the decision maker's interpretation from the record and determine whether this interpretation was reasonable. If the decision maker failed to respect the legislation, it may result in reversal, see *Safe Food Matters* at para 44; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras 33, 35.

[47] In this case, the CFIA unambiguously stated it was conducting the 2021 National PW Survey to "confirm whether areas of Canada where PW has not been detected remain free from this quarantine pest." The September 28, 2021 notice stated the Survey will include taking soil samples from fields used for seed potato production. In my respectful view, the "thing" contemplated by paragraphs 25(1)(a) and (c) and reasonably applied by CFIA may be a seed potato or potato or soil in a seed potato or potato field in addition to the potato wart pest in any of its forms through its life cycle including spores.

[48] In this connection, and contrary to the Applicants' submission, I note "thing" is broadly defined by section 3 of the *PPA*: "thing includes a plant and a pest". The word "including" is a term of extension which enlarges the meaning of "thing", see *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029 at 1041. In summary, "thing" reasonably extends to seed potatoes as plants, the soil in which they may grow, and potato wart in any of its forms through its life cycle.

[49] With respect, a broad reading of "thing" does not reasonably yield an absurd result. Reading the provision and the entirety of the *PPA*, an inspector does not have a "complete and unfettered right of inspection" simply from the existence of a plant or pest. An inspector is not authorized to conduct a survey or inspection on a whim. An inspector is only authorized to enter if they believe on reasonable grounds there is any thing in respect of which the *PPA* or *PPR* apply. Both reasonable grounds and applicability to the statute are necessary to trigger the authority. In addition, section 26 limits an inspector's ability to enter a dwelling place. Whether the CFIA had reasonable grounds to conduct the Survey is discussed in the next section.

[50] In my respectful view, it was reasonable for the CFIA to rely on subsection 25(1) to conduct the 2021 National PW Survey to determine if an area remains pest-free. This is reasonably in line with the purpose of *PPA*, under section 2:

> The purpose of this Act is to protect plant life and the agricultural and forestry sectors of the Canadian economy by preventing the importation, exportation and spread of pests and by controlling or eradicating pests in Canada.

[51] This statutory purpose does not restrict the focus of the *Act* to only pests, as submitted by the Applicants. Ultimately, the *Act* mandates the protection of plant life such as seed potatoes in this case, including by preventing, controlling and eradicating pests such as the potato wart in all its forms from spore to potatoes.

[52] In my respectful view, the legislative purposes of protection of plant life including seed potatoes and the prevention, control and eradication of potato wart may reasonably be seen as having a rational connection to the inspection, investigation and inquiry inherent in conducting the 2021 National PW Survey, noting the Survey is designed to confirm whether particular seed potato and potato growing areas are free of potato wart or not. Indeed, the CFIA inspector elaborated a similar statement in his letter to Mr. Allan.

[53] I should add that surveillance is stated to be a core activity and essential in plant protection according to the *International Standard for Phytosanitary Measures* issued by the Food and Agriculture Organization of the United Nations under the International Plant Protection Convention.

[54] In light of this assessment, I have concluded the CFIA acted reasonably in its reliance on subsection 25(1) for its legal authority to conduct the 2021 National PW Survey. CFIA's interpretation of the legislation including subsection 16(1) of the *PPR* is reasonable and consistent with the *PPA*'s and the *PPR's* text, context and purpose.

(2) Reasonable Grounds

[55] The Applicants submit that no reasonable grounds exist to believe a pest, in this case potato wart, could be present in Richard Allan's farm or other farms in New Brunswick. The Applicants submit the CFIA is engaging in bald speculation in conducting the Survey.

[56] The Respondent submits the CFIA has met the test for reasonable grounds as stated in *Miel Labonté Inc v Canada (Attorney General)*, 2006 FC 195 [*Miel*], approving *Friends of Point Pleasant Park v Canada (Attorney General)*, (2000), 36 C.E.L.R. (N.S.) 253, 198 F.T.R. 20 (F.C.T.D.) [*Friends of Point Pleasant Park*], and as discussed later, conforms with the Supreme Court of Canada's decision on search and seizure in the administrative context set out in *Comité Paritaire de l'industrie de la Chemise v Potash*, [1994] 2 SCR 406.

[57] In *Miel* at paragraph 44, Justice Noël of this Court accepted the test for "reasonable grounds" considered in *Friends of Point Pleasant Park*: "Reasonable grounds" means 'some evidence . . . must exist to support the decision'". Justice Noël then applied the test to CFIA's authority to make decisions, albeit under a different legislation than the *PPA*. This test is also applicable in the case at bar.

[58] Assessing the record as a whole, ample evidence exists to support the CFIA's decision to conduct the 2021 National PW Survey. The supporting evidence highlights the difficulty of pinpointing a source for the spread of potato wart in PEI and the need to confirm the pest is actually contained in regulated areas. In addition, the evidence emphasizes the general shift towards soil sampling as the standard surveillance technique for potato wart, and Canada's need to adapt accordingly.

[59] Specifically, CFIA's *National Potato Wart Survey 2021-2022 Risk Management Document* outlined the context driving the CFIA's reasonable need to conduct the Survey in non-regulated areas. The documents explained how in the absence of phytosanitary controls, the spread of potato wart from affected areas was likely through the movement of seed potatoes and soil associated with seed potatoes. Considering the rate of detection of potato wart in PEI in the last 20 years, the source for a number of the detections has not yet been identified. However, this document indicated two scenarios are most likely: a low-level, undetected infestation in PEI or infestation spreading from known infestations through unknown pathways. Human-mediated spread is unlikely. The document also outlined the CFIA has other evidence potato wart is contained to regulated areas, but a national survey would strengthen this position.

[60] The underlying concern to ensure potato wart has not spread from PEI is also evident in the CFIA's selection criteria for the survey. New Brunswick growers including Richard Allan who met the following criteria were prioritized for soil sampling in CFIA's *Potato Wart 2021-2022 Survey Protocol* and the *National PW Survey 2021-Selection criteria for collection of samples in the NB Region*:

- Seed potato fields on farms that have a history of sourcing seed potatoes from PEI, including farms who have fields under investigation for PW; and/or
- Seed potato fields where susceptible varieties or varieties where the susceptibility to PW is unknown have been grown this year.

[61] In addition, *Appendix A to the Interim Guidance - National Potato Wart Survey Implementation* outlines CFIA's rationale for the National PW Survey. The recent detections of PW in 2014 and 2020 in PEI caused CFIA to question the rigour of its surveillance program. CFIA determined there has been a shift to soil sampling as the standard technique for detecting potato wart; Canada's main seed potato market, the United States, has criticized Canada's delay in adapting to soil sampling; this has disrupted trade and Canada's international trade obligations; and having additional dates will mitigate some of the risk of future trade disruptions.

[62] I should note these determinations by CFIA were not in dispute.

[63] The Respondent also submits, and I agree, that CFIA's relative expertise is a further relevant consideration in conducting reasonableness review, see *Vavilov* at paras 31, 93. CFIA has demonstrated on the record that its decision to conduct the National PW Survey was made by bringing its institutional expertise and experience to bear.

[64] Overall in my view the CFIA had reasonable grounds including a rational connection between the purposes of the legislation and the objectives of the 2021 National PW Survey, to embark on the Survey.

B. *Section 8 of the Charter*

[65] The Applicants submit CFIA's broad powers of inspection under the *PPA* infringe their rights under section 8 of the *Charter*. They note they had not agreed to a diminished privacy interest in their premises simply due to the regulation of potato farming. They submit *PPA* authorizes overbroad powers without judicial oversight and ostensibly without a reasonable basis to suspect the required soil samples have the potato wart pest. And they allege that seizure of farm soil is highly intrusive even if it is a non-bodily sample.

[66] The Respondent submits section 8 of the *Charter* is a personal right which protects people, not places. CFIA submits there is a "rational connection" between the purpose and objectives of the *PPA* and the CFIA's Survey, there are limits on the inspector through subsection 26(1), and there is an assumption seed potato producers agreed to accept the rules of their regulated activity.

[67] With respect, I agree with CFIA. I acknowledge the Supreme Court of Canada has determined regulatory powers of inspection constitute a search within the meaning of section 8 of the *Charter*, see *Comité Paritaire de l'industrie de la Chemise v Potash*, [1994] 2 SCR 406 at pp. 417 and 441 [*Comité Paritaire*].

[68] However, it is also the case that the Supreme Court of Canada has explicitly held the section 8 guarantees set out in *Hunter et al. v Southam Inc*, [1984] 2 SCR 145 are "impossible" to apply in the regulatory context. Regulatory context is the context of the search authorized by

the Survey in the case at bar. In a regulatory context, the underlying purpose of inspection is to ensure that a regulatory statute is being complied with, see *Comité Paritaire* at p. 421.

[69] Moreover, in the regulatory context as here, regulatory inspections may be assessed on a spectrum of reasonableness, assessing factors such as the context of the inspections, the extent of the expectation of privacy, the intrusiveness of the inspections, and whether there are restrictions imposed on the inspections, see *Mandziak v Animal Protection Services of Saskatchewan*, 2022 SKQB 75 at para 107 [*Mandziak*].

[70] Similar case law, including cases cited and analyzed by both parties, *Motz v Saskatchewan Egg Producers*, 2001 SKQB 565 [*Motz*] and *Bertram S Miller Ltd v R*, [1986] 3 FC 291 (CA) [*Bertram*], have set out indicia of a reasonable and proportional power of inspection.

[71] In *Motz*, with which I am in substantial agreement, a number of relevant authorities are gathered up and discussed. In addition, *Motz* sets out some necessary indicia including the presence of a "rational connection" between the purpose and objectives of the act and the inspection, restrictions on the inspection power, and the claimant's decision to engage in a regulated activity:

> [12] In his decision in the *Comité Paritaire* case Mr. Justice LaForest said this at p. 421:
>
> > It is thus impossible, without further qualification, to apply the strict guarantees set out in *Hunter v. Southam Inc., supra*, which were developed in a very different context. The underlying purpose of inspection is to ensure that a regulatory statute is being complied with. It is often accompanied by an

> information aspect designed to promote the interests of those on whose behalf the statute was enacted. The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. While regulatory statues incidentally provide for offences, they are enacted primarily to encourage compliance. It may be that in the course of inspections those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection. The same is true when the enforcement is prompted by a complaint. Such a situation is obviously at variance with the routine nature of an inspection. However, a complaint system is often provided for by the legislature itself as it is a practical means not only of checking whether contraventions of the legislation have occurred but also of deterring them.

Madam Justice L'Heureux-Dubé, who was of a like opinion, put it this way at p. 444:

> The rules in *Hunter v. Southam Inc., supra,* requiring a system of prior authorization based on the existence of reasonable and probable grounds, simply do not apply to administrative inspections, like those at issue here, in the case of a regulated industrial sector. The ACAD is regulatory legislation providing for administrative inspections in a regulated industrial sector, subject to a decree . . . .

She later went on, commencing at p. 452, to state that there is no requirement for a warrant to conduct a regulatory investigation:

> For the inspectors to have to obtain a warrant, as in a criminal matter, would require them to have reasonable and probable grounds to believe that an offence against the ACAD had been committed. The very reason the inspectors have been granted powers of inspection is to determine whether an offence has been committed. According to the rules laid down in *Hunter v. Southam Inc.*, a warrant could never be issued in such circumstances. It can thus be seen that, in pragmatic terms, the rule in

> *Hunter v. Southam Inc.* must necessarily be inapplicable to administrative inspections in a regulated industrial sector, like those at issue in the present appeal. Those rules simply constitute here "too high a threshold" (Thomson Newspapers, supra, at p. 595 (per L'Heureux-Dubé J.))
>
> . . .
>
> ...Additionally, the rules in *Hunter v. Southam Inc.* cannot be applied to administrative inspections in a regulatory industry. Accordingly, there was no need for the inspectors to obtain a warrant prior to entry into the respondent's premises.

[13] Against that background one must look at the section itself to determine whether the powers of investigation are reasonable having regard to the proprietor's reasonable expectation of privacy. See the *Comité Paritaire* case at p. 441 where Madam Justice L'Heureux-Dubé J. says this:

> In accordance with the terms of s. 8 of the *Charter*, the second stage of this analysis is to determine whether the powers of search and seizure conferred on the inspectors by the ACAD are unreasonable having regard to an employer's reasonable expectation of privacy. I would note, at the outset, that while employers may claim to have certain expectations of privacy against regulatory control, such as the control whose constitutionality is at issue here, these expectations are limited.

[14] On behalf of the plaintiff it was argued that s. 29(2) was too broad and because of that it was unreasonable. Accordingly, it was unconstitutional as contravening s. 8 of the *Charter* and any inspection carried out pursuant to s. 29(2) was unlawful. Reliance was placed largely upon the decision in *Hunter et al.v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145 where ss. 10(1) and 10(3) of the *Combines Investigation Act*, R.S.C., 1970, C. c-23 were declared unconstitutional. In my opinion, the two subsections are distinguishable from the one before me. The power conferred was very sweeping in its scope and related to many things. It was very intrusive and was not in any way restricted as to what premises could be entered.

[15] It is otherwise in respect to s. 29(2) of *The Agri-Food Act*. There is a rational connection between the purpose and objectives

> of the Act on the one hand and the inspection, investigation or inquiry on the other hand. The appointed person cannot act on a whim, but must be engaged in administering and enforcing the legislation.
>
> [16] That person cannot enter a private dwelling without a warrant. While the section speaks of "any place or premises" by necessary implication that is restricted to premises in which the regulated activity is carried on. Thus one is concerned only with business or commercial premises and in most instances it will be outbuildings on farms.
>
> [17] The section further restricts the authority of the appointed person. If there is belief that an offence has been committed, then a warrant must be obtained. Thus, where there may be a higher expectation of privacy, judicial approval is required in advance of any search.
>
> [18] Finally, it must be remembered that the plaintiff made the decision to engage in the regulated activity. He knew the rules and must be assumed to have accepted them. This being so, his expectation of privacy in regard to his business operation must be relatively low.
>
> [Emphasis added]

[72] I note the foregoing or extracts thereof are similarly elaborated upon in *Comité Paritaire* at pp. 449-450; *Mandziak* at paras 105-110; *X (Re)*, 2017 FC 1047 at paras 123, 236; and *A Lawyer v The Law Society of British Columbia*, 2021 BCSC 914 at paras 152-157. In *Bertram*, indicia included the nature of the property or things seized, character of the premises where the search and seizure may normally be expected to be carried out, and the legitimate interests and expectations of the public at large and the person subject to the search, see para 114.

[73] In my respectful view, the Applicant has a lowered reasonable expectation of privacy. The purpose of the *PPA* is the protection of plants such as seed and other potatoes from pests including the potato wart. The 2021 National PW Survey, and the inspector’s ability to enter the

farm and inspect the soil in fields and outbuildings but excluding dwelling places, are in my view reasonably necessary to fulfill this purpose. As mentioned above, surveillance by means of soil sampling is necessary to detect spores that may take years to manifest into warts which can be seen on tubers. Potato wart spores – the very early stage in the life cycle of the potato wart pest - are not detectable by visual inspection; they are microscopic and detectable only by soil samples. Without the ability to enter land and take soil for sampling, the CFIA would not be able to fulfill its mandate and legislative purpose and objective. See also *R v Miller*, 2015 ABPC 237 at paras 28-29, 33; *Mandziak* at para 108.

[74] Notably, as was the case in *Motz*, there are restrictions on CFIA's inspection powers under subsection 26(1). An inspector may not enter a dwelling place except with the consent of the occupant of the dwelling place or under authority of a warrant. I also note an inspector must establish reasonable grounds to commence their inspection under para 25(1)(a) of the *PPA*, a finding which may be reviewed by this Court on judicial review - as is taking place in this case. Therefore in my view there is a "rational connection" between the objectives and purposes of the *PPA* and the authority conferred on inspector in conducting the 2021 National PW Survey. See *Mandziak* at para 109 and *Motz* at paras 15-17.

[75] In addition, per *Bertram*, the nature of the things searched, which may be potatoes or soil or if any the potato wart pest in any of its forms including spores, are for the most part outdoors and open to public view. They are plant material, soil or pests "in which there can be no legitimate expectation of privacy", see *Bertram* at para 114. There may be no search of dwelling houses, although as *Motz* notes and paras 25(1)(a) and (c) provide, outbuilding may be inspected

and samples of soil taken therefrom. Notably, because the potato wart pest is in the soil, the pest may spread through the movement of potato crops or equipment such as found in out buildings.

[76] I also note that the Applicants choose to engage in a regulated activity namely growing seed potatoes for sale domestically and internationally. By growing seed potatoes on their farms, they agreed to abide by the regulatory schemes ensuring the protection and safe production of seed potatoes. Compliance with the *PPA* and *PPR* are part of those relevant regulatory schemes. The expectation of privacy regarding their business operation also for this reason, is relatively low. See *Motz* at para 18, *R v Diep*, 2005 ABCA 54 at para 13.

[77] With respect, I also note CFIA's mandate and the *PPA*'s purpose are in the public interest. Early detection and prevention of potato wart and the concomitant prevention of costly international and intraprovincial trade disruption, are in my view reasonably considered to be in the public interest. It is also reasonably in the interests of potato and seed potato farmers themselves to ensure they produce healthy and marketable crops thereby maintaining their livelihoods. These interests in combination with the other factors outweigh any privacy interest under section 8 of the *Charter* in this context, see *Bertram* at para 115.

[78] I therefore conclude in the regulatory context of the *PPA* and *PPR*, that rights guaranteed by section 8 of the *Charter* are not infringed by the 2021 National PW Survey.

VII. Conclusion

[79] The Applicants have not shown CFIA's decision was unreasonable, or that it infringed rights or freedoms guaranteed by section 8 of the *Charter*. In my view, the Decision is transparent, intelligible and justified based on the facts and constraining law, as required by *Vavilov*. Therefore, this application for judicial review must be dismissed.

VIII. Costs

[80] The parties agree, as do I, that $7,500.00 is a reasonable all-inclusive award of costs payable to the successful party, and I will so order in favour of the Respondent.

JUDGMENT in T-1597-21

THIS COURT'S JUDGMENT is that:

1 This application for judicial review is dismissed.

2 The Applicants shall pay to the Respondent its costs in the all-inclusive amount of $7,500.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1597-21
STYLE OF CAUSE:	POTATOES NEW BRUNSWICK AND RICHARD ALLAN v CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	APRIL 14, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	APRIL 29, 2022

APPEARANCES:

Rodney J. Gillis, Q.C.	FOR THE APPLICANTS
Kaitlin P. Stephens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gilbert McGloan Gillis Barristers & Solicitors Saint John, New Brunswick	FOR THE APPLICANTS
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT