

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F I L E	15-May-2023
D Agata Klich	
TORONTO, ON	1

Court File No

FEDERAL COURT OF APPEAL**BETWEEN:****THE PRINCE EDWARD ISLAND POTATO BOARD****Appellant**

and

**THE MINISTER OF AGRICULTURE AND AGRI-FOOD AND
THE CANADIAN FOOD INSPECTION AGENCY****Respondents****NOTICE OF APPEAL**

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: 15-MAY-2023

Issued by: Todd Desanti
(Registry Officer)

Address of local office: 180 Queen Street West
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Toronto, On M5V 3L6

TO:

The Minister of Agriculture and Agri-Food
c/o The Department of Justice Canada
Atlantic Regional Office
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National Litigation Sector

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AND TO:

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Order of Southcott J. (“**the Application Judge**”) in Federal Court File No. T-1315-22, dated April 13, 2023, in which the Applicant was granted leave under Rule 302 to seek judicial review of more than one decision, the Applicant’s application for judicial review was dismissed, and no costs were awarded.

THE APPELLANT ASKS that the Federal Court of Appeal:

- i. Set aside the portion of the Application Judge’s Order dismissing the application for judicial review;
- ii. Declare that the order of the Respondent, the Minister of Agriculture and Agri-food (“**the Minister**”), dated November 21, 2021 and made pursuant to section 15(3) of the *Plant Protection Act* (“**the Ministerial Order**”), was *ultra vires* and/or unreasonable;
- iii. Declare that the February 22, 2022 decision of the Respondent, the Canadian Food Inspection Agency (“**the CFIA**”), to issue the 2022 PEI Seed Potato Domestic Movement Requirements and Recommended Risk Mitigation Measures (“**the Domestic Movement Requirements**”) was *ultra vires* and/or unreasonable;
- iv. Set aside the Ministerial Order and the Domestic Movement Requirements; and
- v. Grant the Appellant’s costs in this Court and the Court below.

THE GROUNDS OF APPEAL are as follows:

1. The Application Judge erred in his interpretation of section 15(3) of the *Plant Protection Act* (“**PPA**”). Although the Application Judge properly held in paragraph 79 that “the exercise of [section 15(3)] authority must be supported by a reasonable suspicion, grounded in objective facts, that the pest is in the place declared as infested” he subsequently made the following errors:
 - a) The Application Judge failed to hold that the only considerations relevant to a section 15(3) declaration are objectively discernable facts pointing to the reasonable suspicion of the presence of the pest in the place being declared “infested”; and
 - b) The Application Judge failed to hold that the larger purposes of the *PPA*, such as trade considerations, were irrelevant to a declaration of infestation under section 15(3).
2. Given those errors, the Application Judge made several errors in the course of concluding that the Ministerial Order was reasonable:
 - a) The Application Judge erred in failing to find that the Respondents had improperly reversed the onus under section 15(3) by requiring a demonstration of the *non-presence* of potato wart (“**PW**”) in the Unregulated Fields;
 - b) At para 113, the Application Judge erred by applying the wrong test for reasonable suspicion of the presence of PW in the Unregulated Fields. Rather than finding “objectively discernable facts” to support such a suspicion, the Application Judge instead found that the “expression” of the

Science Branch's "concerns" represented justification to conclude there were such facts, particularly in the absence of any "facts that point to the presence of PW in any particular field or fields";

- c) At para 116, the Application Judge erred by conflating statements about the efficacy of the current measures for preventing the spread of PW with the requirement to find objectively discernable facts to suspect that PW was actually in or on the Unregulated Fields;
 - d) At paragraph 79, the Application Judge erred in concluding that trade considerations were relevant to the declaration of infestation under section 15(3).
3. The Application Judge correctly acknowledged, at paragraph 119, that the Domestic Movement Requirements take their regulatory authority from the Ministerial Order. As such, if the Ministerial Order is set aside, the Domestic Movement Requirements must also be set aside.
4. The Appellant intends to rely on the following:
- a) Section 27 of the *Federal Courts Act*, RSC 1985 c F-7 and Part 6 of the Federal Courts Rules, SOR/98-106, as applicable;
 - b) Sections 2, 11, 15, 16, and 47 of the *Plant Protection Act* SC 1990, c 22;
 - c) Section 2 and Part III of the Plant Protection Regulations, SOR/95-212;
- and

d) Any other provisions which Counsel may advise.

May 15, 2023

A handwritten signature in black ink, appearing to be 'Duncan C. Boswell', written over a horizontal line.

Duncan C. Boswell
Mark Ledwell
John J. Wilson

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