

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241104

Docket: A-135-23

Citation: 2024 FCA 180

**CORAM: STRATAS J.A.
GLEASON J.A.
HECKMAN J.A.**

BETWEEN:

THE PRINCE EDWARD ISLAND POTATO BOARD

Appellant

and

**THE MINISTER OF AGRICULTURE AND AGRI-FOOD and
THE CANADIAN FOOD INSPECTION AGENCY**

Respondents

Heard by online video conference hosted by the Registry on February 7, 2024.

Judgment delivered at Ottawa, Ontario, on November 4, 2024.

REASONS FOR JUDGMENT BY:

HECKMAN J.A.

CONCURRED IN BY:

**STRATAS J.A.
GLEASON J.A.**

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REASONS FOR JUDGMENT

HECKMAN J.A.

I. Overview

[1] The Prince Edward Island Potato Board [Appellant] appeals a judgment of the Federal Court (*per* Southcott J.) dismissing its judicial review of an Order issued by the Minister of Agriculture and Agri-Food [Minister] under section 15(3) of the *Plant Protection Act*, SC 1990,

c 22, declaring the entire province of Prince Edward Island [PEI] as “a place infested with potato wart” and prohibiting the movement of PEI seed potatoes from PEI without written authorization from an inspector [Ministerial Order].

[2] The Appellant argues that the Minister’s decision to issue the Ministerial Order was unreasonable for two reasons. First, there was insufficient evidence to establish that PEI was “infested” with potato wart, as that term is defined in the statutory framework governing the issuance of such orders. Second, the decision was motivated by “an irrelevant or improper purpose”: to avoid the impacts on Canada’s international potato exports that could result from a failure to issue the Ministerial Order.

[3] For the reasons that follow, I am of the view that the Minister’s decision was reasonable and that this appeal should be dismissed.

II. Facts

[4] The Federal Court outlined in detail the parties, the events, and the circumstances relating to this case: *Prince Edward Island Potato Board v. Canada (Agriculture and Agri-Food)*, 2023 FC 535, 2023 CarswellNat 1049 at paras. 3-29 [FC Decision]. In this section, I summarize the context relevant to this appeal, drawing principally from the FC Decision and the documents prepared by the Canadian Food Inspection Agency [CFIA] for consideration by the Minister in deciding whether to issue the Ministerial Order. I describe these documents more fully later in these reasons.

A. *The PEI potato market*

[5] Potato farming is an integral part of PEI's economy, culture and way of life. An economic impact analysis published by that province—part of the record on this appeal—highlights key facts and figures that demonstrate the importance of this industry to PEI, Canada and its international trading partners: Prince Edward Island, Strategic Policy and Evaluation Division, Department of Agriculture and Land, *The Prince Edward Island Potato Sector: An Economic Impact Analysis* (Charlottetown, PEI: 2020) [the Analysis].

[6] In 2019, PEI was Canada's largest producer of potatoes (by weight) at 24%, followed closely by Manitoba and Alberta. According to 2016 data, Prince County, PEI's westernmost county, was PEI's top potato-producing county (62% of PEI potatoes), compared to Queens and Kings Counties (22% and 16%, respectively).

[7] The vast majority of PEI's potatoes and potato products are exported to other provinces or abroad. Between 2009 and 2018, PEI's potatoes represented, on average, approximately 23% of Canada's total international potato exports (a share worth approximately \$311 million), second only to Manitoba (26%, \$351 million). In this period, 84% of PEI's total international potato exports went to the United States.

[8] There are three types of potatoes, based on the potato's use once it is grown: 1) processing potatoes (transformed into products like French fries, wedges, and hash browns), 2) table stock potatoes (sold on the market), and 3) seed potatoes (used as seeds for the following

year's potato crop). PEI potatoes are used mostly for processing (60%), followed by table stock (25%), and finally seed (15%). Most (80%) of PEI-grown seed potatoes are used locally.

Between 2009 and 2018, processed potatoes represented on average the largest share of PEI's potato exports (78%) compared to table stock potatoes (20%) and seed potatoes (2%). In a memorandum to senior CFIA officials regarding the proposed suspension of PEI seed potato exports to the US, CFIA staff noted that such shipments were valued in 2019 at just over \$3 million, approximately 7% of the total value of Canadian seed potatoes exported to the US (valued at over \$34 million).

B. *Potato wart*

[9] Potato wart disease [potato wart or PW] is caused by *Synchytrium endobioticum* [SE], a fungal pathogen which infects potato tubers, developing inside the cells of the host plant and causing wart-like symptoms on the tubers. Transmitted through spores contained in contaminated soil, manure, potatoes and equipment, SE spores can remain viable in soil without a host (as a resting spore) for over 40 years, making its detection and containment more difficult. It is viewed as one of the most serious potato pests because it can be spread very easily. Although not dangerous to humans or animals, PW is regulated as a quarantine pest in Canada because it reduces potato yield and makes the affected potatoes unmarketable.

[10] PW has been reported in many countries throughout the world, including most European countries, but has not been detected in the US. In Canada, it is present in PEI and Newfoundland

and Labrador (NL). NL, where PW is widespread geographically but at low levels of incidence, is entirely regulated for the pest to prevent its spread outside the province.

[11] PW was first detected in PEI in a single field in October 2000. Since then, it has been detected in over 30 fields in the province. Tracing conducted on contaminated fields have linked these detections back to four different clusters of contaminated fields. The existence of four clusters means that PW has been detected in a field which the CFIA could not link to a previously contaminated field on four occasions: in 2000 (the first detection) and in 2012, 2014, and 2020. Most detections were made in Queens and Prince Counties; when this appeal was heard, there had only been one detection in Kings County (in February 2015). The fields in which PW was detected represent approximately 0.4% of the approximately 350,000 acres of potato fields in PEI. This information is reflected in a map of the infested fields produced by CFIA and appended to these reasons.

C. *Potato wart mitigation measures*

[12] Since PW was first detected in PEI, CFIA has adopted mitigation measures to monitor, control and prevent its spread from the province, including general phytosanitary measures and official PW control measures. I describe each of these in turn.

(1) General phytosanitary measures

[13] Five general phytosanitary measures mitigate the risk of spread of PW.

[14] First, seed potatoes grown in Canada must adhere to the Canadian Seed Potato Certification Program. Seed potato crops entered into this program are inspected for potato pests to determine whether they meet regulatory standards. CFIA conducts crop inspections in the field and post-harvest tuber inspections for each domestic and export shipment.

[15] Second, potatoes exported to the US from fields in PEI that are not regulated through official PW control measures (unregulated fields), including table stock, bulk and seed potatoes, are subject to the Phytosanitary Export Certification Program. This program requires field soil sampling and tuber inspection as well as other measures, including verification of seed potato status and that the land on which the potatoes were grown is not regulated for SE. It was implemented by CFIA to comply with a 2015 Federal Order issued by the US Department of Agriculture Animal and Plant Health Inspection Service (APHIS), following a cluster of PW detections on PEI, to reduce the risk of PW spreading from PEI to the US [2015 US Federal Order].

[16] Third, potato processing facilities that handle regulated (potentially infested) material for processing must adhere to compliance agreements, written documents that outline operational procedures approved by CFIA. The treatments required at processing facilities eliminate the viability of resting spores and prevent the release of SE into the environment.

[17] Fourth, the *Safe Food for Canadians Regulations*, SOR/2018-108 require that fresh potatoes grown in Canada and destined for consumption as food undergo several inspections

when they are shipped inter-provincially or exported. These visual inspections may detect more severe SE infections but are less likely to detect potatoes with minor wart symptoms.

[18] Fifth, table stock potatoes shipped domestically from unregulated fields must meet regulatory standards outlining the tolerance for soil and caked dirt for each grade of potatoes grown in an unregulated field. Most potatoes shipped domestically are washed and sprout inhibitors are commonly used on potatoes that are stored.

(2) The potato wart domestic long-term management plan

[19] Following the first detection of PW in PEI in 2000, a management plan was devised to set out minimum requirements for soil testing, surveillance and trace-back activities for regulated land associated with new detections [the Management Plan].

[20] The Management Plan creates a “restricted area” in response to detections of PW in order to prevent spread from known infested fields and from fields that present a risk for PW. It sets out five categories of fields based on their relationship to fields on which PW was detected and imposes category-specific restrictions on activities that may be conducted on fields within each category. The categories are the following:

- a) Index (Category A) fields include fields that have a positive detection of PW.

- b) Adjacent (Category B) fields include agricultural land and residential properties bordering Index fields that are not separated by a major highway, watercourse, forested area or non-agricultural area of more than 15 metres width.
- c) Primary Contact (Category C) fields include any land where equipment was moved directly after use in an Index field, or where propagative host material produced in Index fields was used for planting.
- d) Other Contact (Category D) fields include fields that share common equipment with the Index field that was not moved there directly following its use in the Index field.
- e) New Fields Entering Potato Production (Category E) include fields that have not had potato production or surveillance for PW since 2000 but meet other criteria such as use as a homestead with potential for potatoes grown in a home garden prior to 2000.

[21] The Management Plan applies the strictest restrictions to Index, Adjacent and Primary Contact fields (categories A, B and C). Seed potatoes may not be produced there. Movement of soil from these fields is prohibited or restricted. Equipment and vehicles must be cleaned and disinfected before they are allowed to leave these fields. Restrictions may be changed on these fields depending on soil analysis results and surveillance of susceptible crops over many years.

However, as of the date of the issuance of the Ministerial Order, no regulated field had ever been fully released from regulation.

[22] There are no similar restrictions for Other Contact fields (Category D), New Fields Entering Potato Production (Category E) or unregulated fields. Accordingly, the mitigation measures that reduce risk in Category D fields are mainly a result of general phytosanitary measures. For example, Category D fields are ineligible for domestic seed potato movement through the Seed Potato Certification Program or for export through the Phytosanitary Export Program. However, where the first surveillance of susceptible crop grown under conducive conditions does not result in the detection of PW, there are no restrictions on the potato end use domestically or for table stock and processing potatoes to the US. Where a second surveillance fails to detect PW, the land is considered PW free and seed production is eligible for export to the US.

[23] New Fields Entering Potato Production (Category E) are not subject to immediate restrictions. Following a successful post-harvest field inspection and tuber inspection, these fields become part of the PW-free area.

[24] Unregulated fields, which are found to have no history of connection to an Index field, are subject to no restrictions. Potatoes, including seed potatoes, can be produced in unregulated fields. However, they are subject to general phytosanitary measures. Seed potatoes must adhere to the Canadian Seed Potato Certification Program. Potatoes from unregulated fields exported to the US are also subject to the Phytosanitary Export Certification Program.

D. *Limitations of potato wart mitigation measures*

[25] CFIA uses two methods to confirm the presence of SE, the fungal pathogen that causes PW: soil analysis and tuber analysis. However, it is very difficult to detect low-level infestations of SE by means of soil sampling and the visual inspection of tubers. CFIA has therefore recognized that these methods of detection present important limitations.

[26] In soil analysis, CFIA inspectors collect soil samples from potato fields on grids of a size that depends on the field category. Samples are sieved, weighed, centrifuged and examined under microscopes to detect resting spores. However, resting spores are unevenly distributed in the soil in infested fields, reflecting gall production and the deterioration of wart tissue into smaller clumps of resting spores. Their sporadic distribution presents a challenge for established soil sampling and analysis methods, particularly when the level of inoculum is low.

[27] In tuber analysis, CFIA inspectors conduct visual inspections of tubers in the field or at harvest. It may take multiple years of planting a susceptible potato crop before visual symptoms are observed in the field, depending on the initial level of inoculum in the soil. One challenge in detecting PW is that it presents a variable expression of symptoms ranging from tubers fully covered by warts and those where warts are barely noticeable. The timing of visual surveillance can also affect the ability to detect PW; warts that are present at harvest may be barely noticeable or in some cases not noticeable at all. Accordingly, while visual inspections may detect more severe infections, they are less likely to detect a potato with only minor wart symptoms.

Moreover, visual inspections occur on fully graded potatoes rather than cull piles, reducing the chance of finding a symptomatic tuber.

[28] The briefing package submitted to the Minister by the CFIA to support her decision-making included a Pest Risk Assessment, an evergreen document prepared according to international guidelines under the *International Plant Protection Convention*, a multilateral treaty that provides a framework and develops standards for the harmonized use of measures to prevent and control the introduction and spread of pests, and to protect plant resources: 6 December 1951, Can TS 1953 No 16 (entered into force 3 April 1952, accession by Canada 10 July 1953, as amended in 1979 and 1997, amendments acceded to by Canada in 1991 and 2005 respectively) [IPPC].

[29] The Pest Risk Assessment summarized the available information on SE, including the probability of its entry, establishment and spread and the resulting potential economic and environmental consequences. It found that the potential risk of human-mediated spread of PW was “greatly reduced for all pathways” within the context of the mitigation measures in place under the Management Plan and export certification. It also concluded that, based on the detection data it had collected since 2000, the relative risk of spread via Category D fields was low, even though the absolute risk was higher than Category B fields because of the higher overall number of Category D fields compared to other categories.

[30] However, the CFIA recognized in the Pest Risk Assessment that the detection limits inherent in soil analysis and visual inspections posed a challenge to these mitigation measures. It expressed a clear reservation with regards to the potential risk of spread from Category D fields, noting that there was no notice of restrictions to prohibit the movement of soil or to require cleaning and disinfection of equipment and vehicles moving from these fields to unregulated fields. In its view, there remained “some uncertainty around the efficacy of visual inspection and soil sampling for detecting [SE].” It concluded that “given the limits of detection of soil and visual tuber inspections, a Category D field could be harbouring a sub-detectable population of PW spores that could be spread out of that field by those human-mediated activities which are only restricted in Category A, B or C fields.”

[31] The CFIA submitted to the Minister a Risk Management Document, also prepared according to IPPC guidelines, which summarized the findings of the Pest Risk Assessment and recorded the pest management risk process for the potential spread of PW within and from PEI. The Risk Management Document observed that there was evidence supporting a finding that visual detection and soil sampling were insufficient to quickly detect low-level populations of SE. It concluded that in the absence of restrictions on the movement of soil from Category D fields to unregulated fields or requirements for disinfecting machinery or vehicles moving from Category D fields to unregulated fields, where SE is at sub-detectable levels, possibly for several years, the Management Plan allows SE to be displaced through human-mediated activities to unregulated fields. This risk of spread is exacerbated by the fact that potato farming operations in PEI are complex and involve considerable numbers of leased and rented fields.

E. *The 2020 and 2021 detections leading to the Ministerial Order*

[32] In 2020, soil sampling conducted by CFIA revealed the presence of resting SE spores in an unregulated field. The sampling was conducted as part of the Phytosanitary Export Certification Program required for PEI potatoes destined for export to the US from unregulated fields. Significantly, the resting spores were detected in soil from seed farms. Seed potatoes present the highest risk of spread of PW because they are placed in soil and the resting spores have immediate access to host tissue. This unregulated field would not have been subject to soil surveillance under the Management Plan.

[33] In 2021, potato growers brought to CFIA tubers, heavily infested by PW, harvested in two Category D fields. These fields had been subject to soil sampling and visual surveillance for several years which had not resulted in the detection of SE or PW. The 2021 detections impacted 350 fields, increasing the number of fields requiring soil detection by 23% and raising the restricted area in PEI by 10%.

[34] CFIA notified APHIS of the new detections. APHIS asked CFIA to voluntarily suspend export certification of PEI seed potatoes and potatoes for consumption destined for the US and to prohibit the movement of PEI seed potatoes to the rest of Canada until investigations into the 2021 detections were complete. APHIS warned that, if CFIA failed to act, the 2015 Federal Order would be amended to ban the importation of all Canadian potatoes to the US.

[35] CFIA took the following regulatory actions:

- a) A temporary suspension of seed potato certification of seed potatoes originating from PEI to the US (November 2, 2021) [First Suspension];
- b) An interim suspension of certification of all potatoes (including seed, table stock and processing potatoes) originating from PEI to the US (November 21, 2021) [Second Suspension];
- c) The Ministerial Order declaring the province of PEI to be a place infested with PW and prohibiting the movement of PEI seed potatoes from PEI without written authorization from an inspector (November 21, 2021); and
- d) The PEI Seed Potato Domestic Movement Requirements and Recommended Risk Mitigation Measures [Domestic Movement Requirements] setting out the conditions under which inspectors would issue written authorizations under the Ministerial Order (February 22, 2022).

[36] In 2022, APHIS issued a new Federal Order prohibiting the importation of field-grown seed potatoes from PEI into the US and allowing the importation of potatoes for consumption under specific conditions.

[37] As of 2022, a CFIA investigation of fields associated with the new Index fields resulting from the 2021 PW detections revealed the presence of PW on a Category D field and a field adjacent to one of the 2021 detections: FC Decision at para. 18.

[38] The Appellant sought judicial review of the First and Second Suspensions, the Ministerial Order and the Domestic Movement Requirements.

III. Statutory Context

[39] The Minister's authority to issue the Ministerial Order is constrained by provisions of the Act and of the *Plant Protection Regulations*, SOR/95-212 [Regulations] promulgated by the Governor in Council under subsection 47(1) of the Act to carry out the purposes and provisions of the Act. Both the Act and Regulations enable the Minister and the CFIA (the Respondents), to carry out Canada's responsibilities under the IPPC.

[40] Section 2 of the Act sets out its purpose:

Purpose of the Act

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.

Objet

2 La présente loi vise à assurer la protection de la vie végétale et des secteurs agricole et forestier de l'économie canadienne en empêchant l'importation, l'exportation et la propagation de parasites au Canada et en y assurant la défense contre ceux-ci ou leur élimination.

[41] Sections 11 to 18 of the Act pertain to “Infested Places”. Sections 11 and 12 set out the powers of inspectors (persons designated pursuant to section 21 of the Act) to declare that certain places are infested. An inspector may declare infested a place where the inspector suspects or determines the place is infested with the pest and is of the opinion the pest could spread to any other land, building or place. The inspector may declare that the land, building or place to which, in their opinion, the pest could spread, is also infested.

[42] A place declared to be infested under subsections 11(1) and 12(1) constitutes an infested place only once the declaration is delivered to the occupier or owner of the land, building or place mentioned in the declaration: subsections 11(2), 12(2) and section 14. There is no such requirement for a place declared to be infested by ministerial order under subsection 15(3).

[43] Subsection 13(1) provides that where the inspector is of the opinion that immediate action is required to control the pest, a declaration under sections 11 or 12 may prohibit or restrict the movement of persons or things within, into or out of the infested place for the purpose of controlling the pest.

[44] Subsection 15(2) sets out the authority of the Minister to revoke an inspector’s declaration, under sections 11 and 12, that a place is infested, while subsection 15(3) defines the authority of the Minister to declare that a place is infested:

Powers of Minister

15 (3) The Minister may, by order,

Pouvoirs du ministre

15 (3) Le ministre peut, par arrêté, déclarer infesté un lieu qui ne l’a pas

- | | |
|--|---|
| <p>(a) declare any place to be infested that is not already the subject of a declaration under section 11 or 12;</p> | <p>déjà été par l'inspecteur; il peut aussi, de la même manière, soit délimiter le périmètre de tout lieu déclaré infesté et ultérieurement le modifier, soit</p> |
| <p>(b) determine and subsequently vary the area of any place that is declared infested;</p> | <p>prolonger la période fixée par l'inspecteur en application du paragraphe 13(1), soit encore</p> |
| <p>(c) extend the period of any prohibition or restriction declared by an inspector under subsection 13(1);</p> | <p>interdire ou restreindre l'entrée, la sortie ou la circulation de personnes ou de choses dans ce lieu ou, malgré le présent article ou l'article 6, l'autoriser.</p> |
| <p>(d) prohibit or restrict the movement of persons and things within, into or out of any place that is declared infested; and</p> | |
| <p>(e) permit any movement of persons and things within, into or out of a place that would otherwise be prohibited by this section or section 6.</p> | |

[45] Section 16 governs how an infested place may be described in declarations under sections 11 or 12 or subsection 15(3):

<i>Description of area of infested place</i>	<i>Périmètre</i>
<p>16 In a declaration under section 11 or 12 or subsection 15(3), the area of an infested place may be described by reference to a map or plan deposited and publicly available at a place specified in the declaration, or by reference to any farm, county, district, municipality, province or any part thereof.</p>	<p>16 Le périmètre du lieu déclaré infesté au titre des articles 11 ou 12 ou du paragraphe 15(3) peut être délimité par référence à soit une carte ou un plan accessible au public en quelque lieu déterminé, soit tout ou partie de fermes, comtés, zones, municipalités ou provinces.</p>

[46] While the Act does not define the term “infested”, a definition is provided by section 2 of the Regulations:

Interpretation

2 In these Regulations,

...

infested means that a pest is present in or on a thing or place or that the thing or place is so exposed to a pest that one can reasonably suspect that the pest is in or on the thing or place; (*infesté*) (*parasité*)

Définitions

2 Les définitions qui suivent s’appliquent au présent règlement.

[...]

infesté Se dit de la présence d’un parasite sur ou dans un lieu ou de l’exposition telle d’un lieu à un parasite qu’il est raisonnable d’y soupçonner la présence du parasite. (*infested*)

[47] Paragraph 16(2)(a) of the Regulations speaks to the authority of an inspector or the Minister to describe areas in which a pest is or could be found in terms similar to those used by section 16 of the Act:

Investigation or Survey of a Thing or Place

...

16 (2) Where, as a result of an investigation or a survey conducted by any inspector or any other person, the Minister or an inspector has reasonable grounds to believe that a pest or biological obstacle to the control of a pest has been detected and an area in which the pest or biological obstacle is or could be found has been identified,

Enquête ou étude d’un lieu ou d’une chose

[...]

16 (2) Lorsque, par suite d’une enquête ou d’une étude menée par l’inspecteur ou toute autre personne, le ministre ou l’inspecteur a des motifs raisonnables de croire qu’un parasite ou un obstacle biologique à la lutte antiparasitaire est détecté et que le périmètre où le parasite ou l’obstacle biologique est ou peut être présent est identifié :

(a) the Minister or any inspector may describe the area by reference to a map or plan that is publicly available, or by reference to any farm, county, district, municipality, province or any part thereof;

a) le ministre ou l'inspecteur peut délimiter le périmètre par renvoi soit à une carte ou à un plan accessible au public, soit à tout ou partie d'une ferme, d'un comté, d'une zone, d'une municipalité ou d'une province;

...

[...]

IV. Decision of the Federal Court

[48] On April 13, 2023, the Federal Court dismissed the Appellant's application for judicial review. On this appeal, the Appellant takes issue only with the Federal Court's finding that the Ministerial Order was reasonable. Accordingly, I focus exclusively on the Federal Court's treatment of the reasonableness of the Ministerial Order.

[49] The Appellant launched a two-pronged attack of the reasonableness of the Minister's decision to issue the Ministerial Order. First, it claimed that in the absence of evidence before the Minister sufficient to establish that the entire province of PEI was infested with PW, the Minister did not have the authority to issue an order under section 15(3) of the Act. Second, the Appellant argued that the Ministerial Order was unreasonable because the Minister issued it to address "threats" by US authorities to restrict trade in Canadian potatoes with the US. In the Appellant's view, the Respondents' concern about international trade was an irrelevant consideration; in exercising her power under subsection 15(3), the Minister should have focused solely on whether PEI was "infested".

A. *Insufficient evidence supporting an infestation*

[50] Before the Federal Court and on this appeal, the parties agreed that the term “infested” in section 15(3) of the Act takes its meaning from the definition set out at section 2 of the Regulations, which imports the application of the reasonable suspicion standard. Before this Court, the Appellant submitted that this follows from paragraph 15(2)(b) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which states that an interpretation section contained in an enactment, defined in subsection 2(1) of that Act as including an act or regulation or any portion thereof, is to be read and construed “as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.” The Federal Court adopted the parties’ agreement as the basis for its analysis of the reasonableness of the Ministerial Order.

[51] The Appellant argued before the Federal Court that while the regulated fields could be described as “infested” under the Regulations, there were no objectively discernible facts before the Minister from which she could form a reasonable suspicion that PW was present on any of the unregulated fields.

[52] Noting that the Ministerial Order itself did not contain reasoning articulating whether the evidence before the Minister established a reasonable suspicion that PW was present in unregulated fields, the Federal Court examined the record before the Minister. It found that the record showed that CFIA had identified a pathway for the transmission of PW to unregulated fields that was not prevented by existing regulatory measures. In its view, this and other concerns laid out by CFIA in its submissions to the Minister furnished a transparent and intelligible

justification for a conclusion that there were objectively discernible facts supporting a reasonable suspicion of the presence of PW in unregulated fields: FC Decision at paras. 112-113.

[53] The Federal Court found that the arguments raised by the Appellant did not undermine the reasonableness of the Minister's decision to issue the Ministerial Order. In particular, it held that:

- a) The evidence of Mr. David Bailey, Acting Executive Director of the Plant Health and Biosecurity Directorate and the Chief Plant Health Officer with CFIA, in cross-examination on an affidavit filed by the Respondents on the judicial review application, did not support the Appellant's position that there was no scientific basis on which to declare PEI infested with PW. Moreover, this evidence was not before the Minister when she decided to issue the Ministerial Order and therefore of doubtful relevance to the Court's assessment of the reasonableness of that decision.
- b) The Appellant's attempt to emphasize certain portions of CFIA documents that were before the Minister and that supported its view that there was insufficient evidence establishing that PEI was infested, amounted to an invitation for the Court to re-weigh the evidence rather than assess whether the Minister's decision was justified in light of the legal and factual constraints that bore upon it.
- c) CFIA's statement that it could not "rule out that PW is present in other fields in PEI," while not capturing the reasonable suspicion standard applicable under

subsection 15(3) of the Act, was not intended to articulate the applicable test but served to reinforce CFIA's concern that its surveillance and management methods had proven to be insufficient. Accordingly, this statement did not, in itself, render the decision unreasonable.

B. *Trade or economic considerations are irrelevant or indicate an improper purpose*

[54] The Federal Court found, and the parties agreed, that the Respondents' interest in avoiding a new US Federal Order and the accompanying negative trade and economic repercussions influenced the decision to issue the Ministerial Order. However, in the Court's view, this did not make the decision unreasonable. The authority to issue an order that a place is infested under subsection 15(3) could be exercised only where the evidence supported a reasonable suspicion, grounded in objective facts, that the pest was in the place declared as infested. Where this condition was met, and given the permissive nature of the Minister's authority under subsection 15(3), it was open to the Minister, in exercising her authority, to consider the economic repercussions raised following the 2021 detections. These were relevant because one of the purposes of the Act is to protect the agricultural sector of the Canadian economy by preventing the exportation or spread of pests.

V. The Role of this Court on this Appeal

[55] On an appeal from a judgment of the Federal Court on an application for judicial review of an administrative decision, this Court decides whether the Federal Court identified the

appropriate standard of review and applied it properly. Our role in this case is to step into the shoes of the Federal Court and to focus on the Ministerial Order: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 426 D.L.R. (4th) 585 at para. 10.

[56] The Federal Court correctly selected the reasonableness standard to review the Ministerial Order. Where, as in this case, there is no legislated standard of review or statutory right of appeal, an administrative decision is presumptively reviewed on the reasonableness standard. Moreover, the parties did not raise any issues that could be characterized as falling within a category of question for which the rule of law requires the application of a correctness standard of review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 16-17.

[57] The focus of reasonableness review is on the decision actually made by the decision maker, including the reasoning process and the outcome: *Vavilov* at para. 83. 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.

[58] In circumstances where no formal reasons are provided, such as when the Minister issues an order under subsection 15(3) of the Act, a reviewing court “must look to the record as a whole to understand the decision” and, in doing so, “will often uncover a clear rationale for the decision”: *Vavilov* at para. 137. Where no reasons are provided and neither the record nor the

larger context sheds light on the basis for the decision, “the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable,” an analysis that inevitably focuses on the outcome rather than on the reasoning process: *Vavilov* at para. 138.

[59] As noted by the Federal Court, the Ministerial Order does not itself contain an analysis of the question whether the requirements of subsection 15(3) of the Act are satisfied: FC Decision at para. 85. Where the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, the reviewing court may still be able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable: *Vavilov* at para. 123; *Safe Food Matters Inc. v. Canada (Attorney General)*, 2022 FCA 19, [2022] F.C.J. No. 96 at para. 41.

[60] To assess the reasonableness of the Ministerial Order, the Federal Court examined the record that was before the Minister when she issued it. It focused on a briefing package prepared by CFIA which included:

- a) a memorandum from the president of CFIA [Memorandum] that provided a summary of relevant facts and considerations relating to the regulation of SE and PW, a review of possible regulatory options in the face of new detections of SE and a recommendation that the Minister issue the Ministerial Order attached to the Memorandum;

- b) the Pest Risk Assessment, prepared by CFIA, that provided the scientific basis for CFIA's overall management of the risk associated with PW; and
- c) the Risk Management Document that summarized the Pest Risk Assessment and recorded the pest management risk process for the potential spread of PW within and from PEI.

[61] The terms of the Ministerial Order indicate that the Minister was of the view that she had the statutory authority to issue an order under subsection 15(3) of the Act declaring that “the province of Prince Edward Island which is comprised of the counties of Kings, Queens, and Prince is a place infested with potato wart (*Synchytrium endobioticum*).”

[62] This Court must decide whether the Ministerial Order was reasonable by examining it in light of the relevant constellation of law and facts which act as constraints on the Minister: *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101, 445 D.L.R. (4th) 448 at paras. 51, 84 [*Whistler*], citing *Vavilov* at paras 105, 138. However, in doing so, this Court must refrain from embarking on its own interpretation of the relevant statutory or regulatory provisions, a task reserved for the Minister.

VI. Analysis

[63] The Appellant challenges the Ministerial Order on two grounds. First, it argues that the Minister's decision that she had the authority to issue the Ministerial Order was unreasonable in light of the statutory framework that governs the issuance of an order under subsection 15(3) of

the Act and the evidence placed before her. Second, it argues that in deciding to issue the Ministerial Order, the Minister was driven by a desire to avoid US actions that could jeopardize the ability of the Canadian potato industry to engage in international trade. Accordingly, the appellant submits, the Minister's decision, which should have focused on whether PEI was infested by PW, as required by the Act, must be set aside because it was made for "an irrelevant or improper purpose". I address each of these arguments in turn.

A. *The Ministerial Order was reasonable*

[64] The Federal Court found a transparent and intelligible justification for the conclusion that there were objectively discernible facts supporting a reasonable suspicion that PW was present in unregulated fields in PEI in the following passage of the Pest Risk Assessment [the key passage] which I reproduce in full:

The management plan does not provide clear guidance on requirements for Category D fields for processing and tablestock potato tubers and associated soil, bulk soil and soil associated with movement of equipment/vehicles. While surveillance is required for the first susceptible variety grown, there is no notice of restriction placed on Category D fields to prohibit the movement of soil or to require cleaning and disinfection of equipment and vehicles from these fields. As a result, the mitigation measures that reduce risk in category D fields are mainly a result of general phytosanitary measures (e.g. ineligibility for domestic seed potato movement through the Seed Potato Certification Program; ineligibility for export through the Phytosanitary Export Program), rather than specific restrictions for those fields that are listed in the management plan. Given the high overall number of Category D fields, any additional measures imposed within Category D would impact a large number of fields. However, given the limits of detection of soil and visual tuber inspections, a Category D field could be harbouring a sub-detectable population of PW spores that could be spread out of that field by those human-mediated activities which are only restricted in Category A, B or C fields.

[65] Noting the concerns expressed by the Science Branch about the risks arising from the manner in which the Management Plan regulated Category D fields, the Federal Court found the expression of these concerns, particularly as set out in the Pest Risk Assessment,

...to be transparent and intelligible and to represent justification for a conclusion that there are objectively discernible facts supporting a reasonable suspicion of the presence of PW. I appreciate these are not facts that point to the presence of PW in any particular field or fields. Rather, the Science Branch identifies a pathway for transmission of PW to fields on PEI outside the Regulated Fields, which pathway was not prevented by existing regulatory measures. Based on this reasoning, I find no reviewable error in the decision to issue the Ministerial Order.

[FC Decision at para. 113.]

[66] Characterizing this pathway to transmission as a “speculative concern”, the Appellant claims that it was not open to the Minister, under the reasonable suspicion standard, to rely on it absent underlying facts grounding a reasonable suspicion of the presence of, or exposure to, PW in all the unregulated fields.

[67] Before turning to the question of whether it was open for the Minister, in light of the evidence before her, to conclude that she had the authority to issue the Ministerial Order based on unregulated fields being so exposed to PW that she could reasonably suspect that PW was present there, I address the Respondents’ argument that the primary ground for the Minister’s authority under the definition of “infested” is that PW is actually present in each of PEI’s three counties.

(1) The Ministerial Order is reasonable in light of the presence of PW on PEI

[68] The Appellant submits that to justify a declaration that the entire province of PEI is infested with PW, the legislative and regulatory framework requires evidence that each and every unregulated field in PEI either contains PW or is so exposed to PW that one can reasonably suspect that PW is in that field.

[69] However, the Appellant did not identify any provision in the Act or Regulations that requires that an infestation be established on a field-by-field basis. Indeed, the definition of “infested” uses the word “place” which, on its face, can be interpreted as extending to physical environments of various dimensions. Section 16 of the Act, which governs the description of the area of an infested place in a declaration under subsection 15(3), uses language that lends itself to this broader interpretation: “the area of an infested place may be described by reference to a map or plan deposited and publicly available at a place specified in the declaration, or by reference to any farm, county, district, municipality, province or part thereof” [emphasis added]. This language, repeated in paragraph 16(2)(a) of the Regulations, is of a breadth that could reasonably be interpreted as allowing the infested “place” to be defined narrowly and precisely—down to part of an individual farm—or more broadly, including an entire province.

[70] Moreover, paragraph 15(3)(b) of the Act, which states that “[t]he Minister may, by order, ... determine *and subsequently vary* the area of any place that is declared infested” [emphasis added], indicates that the Minister is not confined to her initial determination of the boundaries of the place that she declares to be infested. The flexibility apparently introduced by this

provision could allow for adjustments to the area of a place as required to effectively regulate a pest given the available information on the prevailing circumstances as these evolve over time.

[71] The statutory language used by Parliament to describe the Minister's authority under subsection 15(3) of the Act is one of the contextual factors that dictate the limits and contours of the space within which she may act: *Vavilov* at para. 90. The use of broad, open-ended or highly qualitative language such as "place" contemplates that the Minister is to have greater flexibility in interpreting the meaning of such language: *Vavilov* at para. 110.

[72] The Respondents argue that, given the language of the Act and Regulations, and considering the evidence before the Minister that PW was present in all three counties of PEI, the Minister's decision that she had the authority to declare the province of PEI—the "place"—to be infested with PW was reasonable. I agree. In my view, the Minister's decision was open to her given the legal and factual context within which she was constrained to act.

[73] The Appellant's proposed interpretation of the statutory framework makes the Minister's authority to issue an order under paragraph 15(3)(a) contingent on proof of the presence of PW or of sufficient exposure to PW in every field subject to the order. In my view, unlike the interpretation urged by the Respondents, the Appellant's proposed interpretation could lead to an outcome incompatible with the applicable legal and factual context.

[74] According to the Appellant, unregulated fields cannot be subject to a ministerial order. Only regulated fields can come within the definition of "infested", either because the presence of

PW has been confirmed (in Index fields) or there is a reasonable suspicion of its presence on other regulated fields given their relationship to the Index fields and the existence of accepted pathways for transmission between Index fields and Category B, C and D fields.

[75] The Appellant argues that there is no basis to declare every potato field in PEI to be infested with PW since the pest has only ever been detected in 0.4% of these fields. But under its proposed interpretation of the regulatory framework, the Minister could never make an order under subsection 15(3) in respect of any unregulated field, whether PW had been detected on 0.4% or even on 99% of the fields in PEI. A ministerial order regulating the entire province for PW could be possible only when PW had spread to such an extent that all fields in PEI were regulated under the PW management plan, either because they were Index fields or regulated fields associated to Index fields.

[76] The evidentiary record before the Minister reveals that since the first detection of PW in PEI in 2000, new detections have occurred on a regular basis, sometimes in regulated fields and sometimes in unregulated fields, with each new detection resulting in an increase in the number of regulated fields requiring CFIA monitoring. Indeed, CFIA modelling predicts the continued spread of PW in PEI.

[77] This trend has led to continued, and on occasion, substantial increases in the restricted area on PEI made up of the regulated fields. According to the Risk Management Document, prepared by CFIA to aid the Minister in her decision, the current approach to regulation through

the PW management plan has not prevented the low-level spread of PW in PEI. It has limited PW population growth in infested fields, but only *after* the detection has occurred.

[78] As counsel for the Respondents observed in oral argument, under the Appellant's interpretation of the Minister's authority under s. 15(3), the Minister cannot use ministerial orders to achieve a proactive approach to control and prevent the spread of PW. A ministerial order could apply further restrictions only in the face of new detections and only with regards to fields determined to be associated with these detections. The Minister would be limited to implementing the PW management plan, a reactive approach to pest regulation that, in CFIA's opinion, has proven to be ineffective at preventing the spread of PW in PEI. Such an outcome does not appear to be consistent with the Act's protective and preventive purpose.

[79] The legal context within which this Court must assess the reasonableness of the Minister's interpretation of her authority to issue an order under subsection 15(3) of the Act also includes the broad language used by Parliament to describe the purpose of the Act. Purpose statements give direction on how the substantive provisions of legislation should be interpreted: *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, 481 DLR (4th) 581 at paras. 129-130 [CCR]; *Canadian National Railway Company v. Moffatt*, 2001 FCA 327, [2002] 2 FC 249 at para. 27; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022) at 447.

[80] Section 2 of the Act states that it aims "to protect ... the agricultural and forestry sectors of the Canadian economy by preventing the ... exportation and spread of pests...." It is difficult

to reconcile this protective and preventive purpose with the Appellant's claim that paragraph 15(3)(a) of the Act could reasonably be interpreted as preventing the Minister from employing proactive approaches to the regulation of pests, and instead limiting her to reactive approaches, such as that pursued through the PW management plan.

[81] The Minister's decision that PEI was infested with PW, and that she had the authority to reduce the risk of spread of this pest by imposing mitigation measures controlling the movement of soil, vehicles and potatoes over a broad area covering the entire province, was justified. It was consistent with the factual context, including the certified presence of PW in the three counties making up that province, and with the applicable legal context, including the broad meaning of "place" allowed by the Act and the protective and preventive language chosen by Parliament to describe the Act's purpose.

[82] During oral arguments, counsel for the Respondents was asked whether, under the interpretation of subsection 15(3) of the Act urged on this Court by the Respondents, the Minister could declare an entire province to be infested after only a single detection of PW. It was common ground between the parties that a ministerial order declaring a place to be infested with PW could not be made under subsection 15(3) of the Act unless the regulatory definition of "infested" was met by evidence that PW was either present in the place or that the place was so exposed that one could reasonably suspect that the pest was in the place. In other words, the definition of "infested" requires a connection between the place declared to be infested in the ministerial order and the presence of the pest.

[83] In that context, counsel for the Respondents acknowledged that it would be more difficult to defend the reasonableness of a ministerial order declaring an entire province to be infested with PW after only a single detection of the pest in one location in the province. However, a reviewing court must assess the reasonableness of a ministerial order based on the entire factual matrix before the Minister. In the case at bar, the Ministerial Order was issued following the detection of PW in PEI's three counties on 35 occasions since 2000, the identification of hundreds of regulated fields associated with these Index fields, the detection of PW on Category D and unregulated fields and the realization by CFIA that its current surveillance regime suffered from serious limitations.

[84] I conclude that, in light of the legal and factual context that constrained the Minister's exercise of her statutory authority under subsection 15(3), her decision to declare that the province of PEI was infested with PW was reasonable, because it fell within the "limits and contours of the space" in which she could act and the types of solutions she could adopt: *Vavilov* at para. 90.

[85] As I discuss in the next section, the Minister's decision would be reasonable even under the Appellant's proposed approach to the interpretation of "infested", which views the infested "place" through the narrow lens of individual fields.

- (2) The Ministerial Order is reasonable because the evidence supports a conclusion that PEI is so exposed to PW that one can reasonably suspect PW is present there

[86] The Appellant characterizes the key passage in CFIA’s Pest Risk Assessment as expressing a “speculative concern” that Category D fields “could” be harbouring a sub-detectable population of PW spores that “could” be spread out of these fields by human-mediated activities restricted in Category A, B and C fields.

[87] This putative “pathway to transmission”, the Appellant argues, does not rest on objectively discernible facts but is simply a series of speculative assumptions that: 1) sub-detectable populations of PW spores might exist; 2) they might be present on certain Category D fields; and 3) those populations might be spread “out of that field” by human-mediated activities. The speculative concern amounts, in its view, to “no more than fanciful musing or a hunch, neither of which can ground a reasonable suspicion.” According to the Appellant:

As the Application Judge himself observed, the Speculative Concern did not provide facts pointing to the presence of PW “in any particular field or fields.” He therefore failed to apply the applicable test for reasonable suspicion. There was no evidence of PW on the Category D fields. There was no evidence of any human-mediated activities from the Category D fields to every other potato field in PEI. The Minister had no objective facts before her supporting a reasonable suspicion of the presence of PW on any of the Unregulated Fields. The Application Judge erred in concluding otherwise.

[88] I disagree. The evidence described in the Pest Risk Assessment and in the Risk Management Document—including information and analysis regarding the 2020 detection of SE spores in soil sampled in an unregulated field used to grow seed potatoes and the 2021 discovery of tubers heavily infested with PW in Category D fields—sufficiently justified the Minister’s

decision that PEI was infested with PW, giving her the authority to make an order under subsection 15(3) of the Act.

[89] I first examine the standard of reasonable suspicion that the Appellant argues must be met to establish infestation in fields for which there is no evidence of the presence of PW. Second, I explain how the totality of the circumstances in this case, including evidence of a pathway for the spread of PW from Category D fields to unregulated fields, supports the Minister's conclusion that PEI, including its unregulated fields, is infested with PW.

- (a) *In the context of the Act, the reasonable suspicion standard asks whether, based on objectively discernable facts, a pest is possibly present in a place*

[90] Section 2 of the Regulations states that a place is “infested” if either a pest is present in the place, or the place is so exposed to a pest that one can reasonably suspect that the pest is in the place.

[91] The parties did not identify any judicial consideration of the definition of “infested”. However, the Appellant argued that the definition incorporates the standard of reasonable suspicion defined and applied by the Supreme Court of Canada in *R v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 [*Chehil*]. Under this standard, a reasonable suspicion must be based on “objectively discernible facts”: *Chehil* at para. 3. The Respondents took no issue with the Appellant's formulation of the applicable standard. Like the Federal Court, in the absence of any express analysis of the definition of “infested” by the Minister, I adopt the parties' agreement on this standard in assessing the reasonableness of her decision. As the Supreme Court noted in

Vavilov at para. 111, citing the “reasonable grounds to suspect” standard as an example, “where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard.”

[92] The Supreme Court noted in *Chehil* that, in the criminal law context, while both the “reasonable grounds to suspect” and the “reasonable and probable grounds to believe” standards have to be grounded in objective facts, “reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime”: *Chehil* at para 27. The fact that reasonable suspicion dealt with possibilities, rather than probabilities, necessarily meant that “in some cases the police will reasonably suspect that innocent people are involved in crime”: *Chehil* at para. 28.

[93] In *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 at para. 97 [*Farwaha*], this Court addressed the “reasonable grounds to suspect” standard in the context of a Minister’s power to revoke a dock worker’s security clearance where there were reasonable grounds to suspect, among others, his membership in or association with terrorist or criminal organizations:

While fanciful musings, speculations or hunches do not meet the standard of “reasonable grounds to suspect”, the “totality of the circumstances” and inferences drawn therefrom, including information supplied by others, apparent circumstances and associations among individuals can. To satisfy the “reasonable grounds to suspect” standard, verifiable and reliable proof connecting an individual to an incident—proof of the sort required to secure a conviction or even a search warrant—is not necessary.

[94] By analogy to the criminal law context in *Chehil*, where police may reasonably suspect of criminal activities people who turn out to be innocent, the application of the “reasonable suspicion” standard in the plant protection context means that in some cases, the Minister may reasonably suspect that a pest is in a place where it turns out not to be. Therefore, in order to declare that all fields in PEI are infested with PW, the Minister did not need to have before her objective facts establishing that the pest is *present* or even *probably present* in each and every field. Objective facts that establish that the pest is *possibly present* in each and every field were sufficient.

- (b) *A finding that the totality of the circumstances meet the statutory standard and support the conclusion that PEI is “infested” was open to the Minister*

[95] As I noted in the previous section, the regulatory definition of “infested” requires a connection between the place declared as infested and the presence of the pest. The Appellant conceded that regulated fields could be declared to be infested because, “by virtue of documented proximity or potential for human-mediated spread,” the Category B, C, and D fields could potentially ground a reasonable suspicion of the presence of PW: FC Decision at para. 67. However, it maintained that the Minister had no objectively discernible facts before her from which she could form a reasonable suspicion that PW is present on any unregulated field.

[96] The Appellant’s concession was appropriate: the objectively discernible facts grounding the reasonable suspicion of the presence of PW in a regulated field include the proximity of the regulated fields to an Index field or the potential for human mediated spread to that field.

[97] When PW is detected in a field, CFIA conducts trace-back and trace-forward investigations in order to determine the source of the PW and to identify regulated fields based on potential pathways for the movement of PW from the newly discovered Index field.

[98] Category B fields border Index fields that are not separated by a major highway, watercourse, forested area or non-agricultural area of more than 15 metres width. According to the Pest Risk Assessment, the dispersal of spores through irrigation run-off, flooding or wind-borne soil particles is a pathway for the spread of PW from Index fields to Adjacent fields. Such movement is due to the proximity of Category A to Category B fields and is unlikely to occur beyond Adjacent fields.

[99] Category C fields include land where equipment was moved directly after use in an Index field or where propagative host material (e.g. seed potatoes) produced in an Index field was used for planting. The pathway for spread of PW from Index fields to Primary contact fields is the use in Category C fields of seed potatoes produced in Category A fields or the direct movement of soil and/or equipment from these fields to the Category C fields.

[100] Category D fields share common equipment with an Index field that was not moved to those “Other Contact” fields directly following its use in the Category A fields. The pathway for spread of PW from Index fields to Other Contact fields is therefore the indirect movement of soil or equipment to Category D fields from Category A fields.

[101] In most cases of new detections of PW, trace-back activities reveal a linkage between the new Index field and a previous Index field and the presence of PW on the new Index field can be explained by the pathways for spread described in the preceding paragraphs. In such cases, the new Index field is determined to have been either a Category B, C, or D field connected by these pathways to a previous Index field.

[102] However, in three instances since the initial detection of PW in 2000, CFIA investigations have revealed no linkages between the new Index field and previous detections. In such cases, the presence of PW could be explained either by its human-mediated spread from regulated fields or by the arrival and previously undetected presence of resting spores predating the first PW detection in 2000. In the first scenario, since the movement of soil and machinery bearing soil from Category A, B and C fields is restricted, the PW spores would likely originate in Category D fields, for which there are no such restrictions, and in which there may be a sub-detectable population of PW spores.

[103] By acknowledging that Category B, C and D fields could be captured in the definition of “infested”, the Appellant recognizes that, by virtue of the pathway identified by CFIA for the transmission of PW spores from an Index field into these regulated fields, there are objective, discernible facts before the Minister from which she could reasonably suspect the presence of PW in the regulated fields. This does not mean that all or even any of these regulated fields harbour PW spores. Under the *Chehil* standard accepted by the parties, the Minister does not need to provide evidence of the presence of PW spores in the regulated fields or proof that it is more likely than not that PW spores are present there. She only needs to establish that the totality

of the circumstances, and inferences drawn therefrom, including the existence of a pathway for the transmission of PW spores to the regulated fields, supports a finding that these fields are so exposed to PW that there is a reasonable possibility that PW is present there.

[104] In the Pest Risk Assessment, CFIA identified a potential pathway for the human-mediated spread of PW spores from Category D fields to unregulated fields. The Appellant argues that there is insufficient evidence supporting the existence of this pathway, because it is based on several speculative assumptions.

[105] The Appellant argues that it is speculative to suggest that sub-detectable populations of PW spores might exist or that they might be present on certain Category D fields. However, it was open to the Minister to reach the opposite conclusion in the face of the 2021 detections of PW in two Category D fields used to grow processing potatoes. As CFIA pointed out in its Risk Management Document, PW was only detected when growers brought forward heavily infested tubers. Although the Category D fields found to be infested had been subject to soil sampling and visual surveillance for several years, the presence of PW was not detected by these activities. It was open to the Minister to consider the 2021 detections to be evidence supporting the existence of sub-detectable populations of PW spores in Category D fields.

[106] It is important to note that the 2021 detections established that sub-detectable populations of PW spores were present in the Category D fields. They may not have established the presence of PW on all or any other specific Category D fields, but that is not the test under the *Chehil* standard. The question is whether there are objectively discernible facts that support the possible

presence of sub-detectable populations of PW spores in Category D fields. The Appellant has conceded that Regulated fields, including Category D fields, could meet the definition of “infested”. The Appellant concedes that there are objectively discernible facts supporting a reasonable suspicion that PW is present in Category D fields in PEI. In light of the 2021 discovery that two Category D fields had harboured sub-detectable populations of PW spores, it was therefore open to the Minister to conclude that it would be reasonable to suspect that other Category D fields in the province harbour sub-detectable populations of PW spores. It is no answer to claim, as the Appellant does, that there was “no evidence of PW on the Category D fields” since, when PW was found in a Category D field, CFIA immediately reclassified that field as a Category A field.

[107] The Appellant also argues that it is speculative to assume that sub-detectable populations of PW spores might be spread out of Category D fields by human-mediated activities. In my view, the following five considerations show that it was open to the Minister, on the evidence before her, to conclude that the totality of the circumstances and inferences drawn therefrom supported the possibility of spread of PW spores from Category D fields to unregulated fields.

[108] First, there are no restrictions in place preventing the movement of soil or of equipment bearing soil from Category D fields to other fields, unlike for Category A, B or C fields.

[109] Second, as reinforced in the Risk Management Document and Memorandum, potato farming operations in PEI are complex. They span county lines and involve considerable amounts of purchased, leased and rented fields. The practice of potato farming makes it

challenging for CFIA to determine who has care and control of regulated fields year-over-year, and to provide notice of applicable restrictions to current users. This evidence speaks to the reasonable possibility that soil or machinery bearing soil are being moved between Category D fields and unregulated fields.

[110] Third, in assessing the risk of spread from Category D fields, CFIA observed that the high overall number of Category D fields must be taken into account. There are more Category D fields than all other Regulated fields (A, B and C) combined and their number increases with each detection. The 2021 detections alone increased the restricted area under the Management Plan by 10% and the number of fields requiring soil sampling by 23%.

[111] Fourth, in its Risk Management Document, the CFIA observed that its modelling projections for Index fields suggested that the spread of PW will continue and the number of hectares will increase over time.

[112] Finally, in 2020, soil tests detected the presence in unregulated fields of resting spores with no known linkages to previous Index fields. As noted previously, the presence of PW in these unregulated fields could be explained by the spread of spores from regulated fields through human-mediated activities. In that scenario, it must be recalled that movement of soil and machinery bearing soil from Category A, B and C fields is restricted, but that such restrictions are not imposed on Category D fields. This does not prove that the PW spores found in the unregulated fields in 2020 spread from a Category D field. However, particularly in light of the evidence regarding the lack of restrictions on Category D fields, the complex nature of cultural

farming practices throughout PEI, with different farmers leasing or renting different fields year-over-year across multiple counties, and the growing number of Category D fields, the detection of spores on unregulated fields supports the Minister's finding that these fields are so exposed to the pest that it is reasonable to suspect the pest is present there.

[113] Even assuming that the PW detected in unregulated fields with no known connections to previously known index fields was not spread there through human-mediated activities, its detection in these fields would have resulted from the presence of PW spores at low levels predating the first detection of PW in PEI in 2000. The discoveries of such fields in 2012, 2014 and, most recently, 2020, also constitute objectively discernable facts on which the Minister could form a reasonable suspicion that PW is present in unregulated fields on PEI.

[114] Therefore, I conclude that the totality of the circumstances disclosed by the evidence and the concerns expressed by CFIA in its submissions to the Minister cannot reasonably be dismissed as "fanciful musings, speculations, or hunches" as the Appellant suggests. They support the Minister's conclusion that, according to the statutory regime prescribed by the Act, PEI is a place infested with PW and the Ministerial Order was authorized by subsection 15(3) of the Act.

[115] In summary, I find that there were at least two ways in which the Minister could have reasonably concluded that she had the authority to issue the Ministerial Order. First, there was evidence that PW was present in PEI, and that that "place" was infested as a result. Second, based on the totality of the circumstances and inferences drawn therefrom, it was open to the

Minister to conclude that PEI, including the unregulated fields, was so exposed to PW that it was reasonable to suspect that PW was present there. As a result, the Appellant's claim that the Ministerial Order was unreasonable because the evidence was insufficient to meet the statutory standard for its issuance, cannot succeed.

B. *The Minister's consideration of trade impacts did not render the Ministerial Order unreasonable*

[116] The Appellant also argues that the Minister's decision to issue the Ministerial Order was driven by the Respondents' interest in avoiding a new US Federal Order that could negatively impact the entire Canadian potato industry. In its view, such economic considerations were irrelevant to the exercise of the Minister's authority under subsection 15(3) of the Act, which should hinge solely on whether PEI was "infested" according to the terms of the Act and Regulations. Consequently, the Appellant submits, the Ministerial Order should be set aside because it was made for "an irrelevant or improper purpose".

[117] Before this Court, the parties agreed that a ministerial order could not be justified on trade concerns alone and, in the absence of evidence that could satisfy the statutory requirements that PEI is infested with PW, the Ministerial Order would be unreasonable. However, once the statutory requirement that the place be infested is met, and given the permissive nature of the discretionary authority set out in subsection 15(3) of the Act, it was open to the Minister to take trade concerns into account in deciding whether to issue an order or pursue instead the other options laid out by CFIA in its Memorandum and Risk Management Document.

[118] I have found that the Minister's decision that PEI is infested with PW and that subsection 15(3) of the Act gave her the authority to issue the Ministerial Order is reasonable. Since the issuance of a ministerial order was supported by the terms of the Act, it was open to the Minister to consider trade concerns in deciding whether to exercise her discretion to issue the Ministerial Order. The scope of discretionary powers conferred by statute is informed by the purposes and objects reflected in the purpose statements contained in the statute, which are the first, most direct and authoritative evidence of the legislative purpose: Sullivan at 270; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, 1989 CanLII 49 at pp. 1028-29; *CCR* at para. 130. As noted by the Federal Court, one of the statutory purposes set out in section 2 of the Act is to protect the agricultural sector of Canada's economy by preventing the exportation and spread of pests. The adoption of phytosanitary measures to prevent the spread of PW from PEI, consistent with Canada's international obligations, is therefore linked to and, indeed, aimed at mitigating threats to the ability of Canada's potato industry to engage in international trade.

[119] Accordingly, the Appellant's argument that the Ministerial Order should be set aside because it was based on an irrelevant consideration or made for an improper purpose fails.

[120] Since the Appellant has not established that the Ministerial Order should be set aside, its submission that the Domestic Movement Regulations, which take their authority from the Ministerial Order, should be set aside also fails.

[121] I would dismiss the appeal with costs.

“Gerald Heckman”

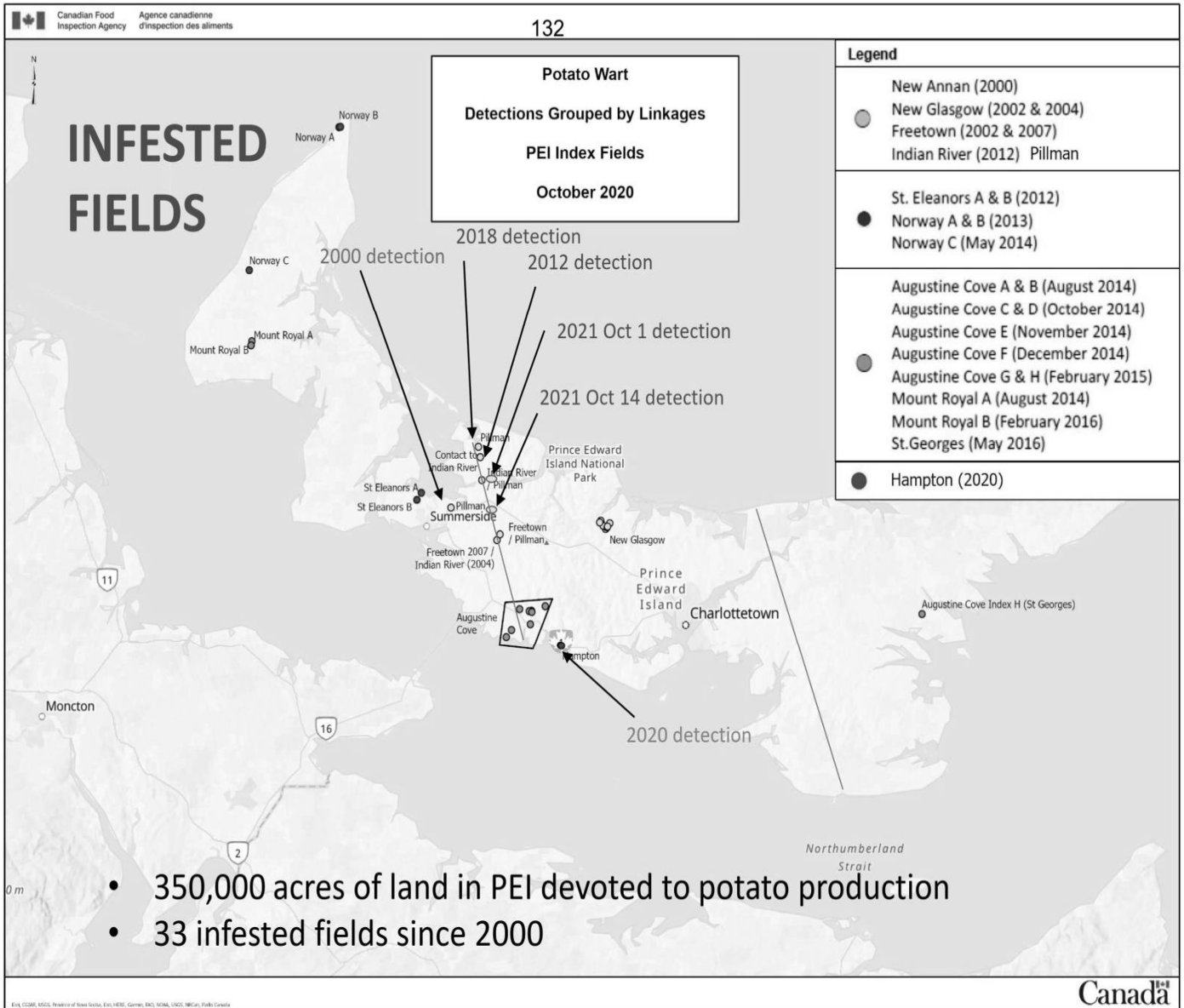
J.A.

“I agree.
David Stratas J.A.”

“I agree.
Mary J.L. Gleason J.A.”

APPENDIX

Potato Wart Detections Grouped by Linkages – PEI Index Fields – October 2020



FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED APRIL 13, 2023,
CITATION NO. 2023 FC 535 (DOCKET NO. T-1315-22)**

DOCKET: A-135-23

STYLE OF CAUSE: THE PRINCE EDWARD ISLAND
POTATO BOARD v. THE
MINISTER OF AGRICULTURE
AND AGRI-FOOD *et al.*

PLACE OF HEARING: HEARD BY ONLINE VIDEO
CONFERENCE HOSTED BY
THE REGISTRY

DATE OF HEARING: FEBRUARY 7, 2024

REASONS FOR JUDGMENT BY: HECKMAN J.A.

CONCURRED IN BY: STRATAS J.A.
GLEASON J.A.

DATED: NOVEMBER 4, 2024

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