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T-1315-22

2023 FC 535

The Prince Edward Island Potato Board (*Applicant*)

v.

The Minister of Agriculture and Agri-Food and **the Canadian Food Inspection Agency** (*Respondents*)

INDEXED AS: PRINCE EDWARD ISLAND POTATO BOARD V. CANADA (AGRICULTURE AND AGRI-FOOD)

Federal Court, Southcott J.—Charlottetown, March 23; Ottawa, April 13, 2023.

Agriculture — Application for judicial review of related decisions by respondents restricting movement of seed potatoes from Prince Edward Island (P.E.I.) to rest of Canada, United States (U.S.) — Potato wart (PW) regulated as quarantine pest in Canada — First detected on P.E.I. in 2000 — U.S. Department of Agriculture Animal and Plant Health Inspection Service (APHIS) issued Federal Order to reduce risk of PW spreading from P.E.I. to U.S. — Canadian Food Inspection Agency (CFIA) implemented its Phytosanitary Export Certification Program — PW detected in unregulated fields in October 2020 — APHIS asked CFIA to voluntarily suspend export certification of P.E.I. seed potatoes, potatoes for consumption destined for U.S., to prohibit movement of any P.E.I. seed potatoes to rest of Canada, until after 2021 investigation complete — As result, movement of all seed potatoes originating from P.E.I. to U.S. suspended (First Suspension) — In November 2021, First Suspension expanded to include table stock, processing potatoes (Second Suspension) — Ministerial Order issued declaring P.E.I. as "a place infested with potato wart", prohibiting movement of P.E.I. seed potatoes from P.E.I. without written authorization from inspector — In February 2022, CFIA issued Notice to Industry setting out conditions under which inspectors would issue written authorizations to allow movement of P.E.I. seed potatoes in accordance with Ministerial Order (Domestic Movement Requirements) — In April 2022, APHIS issued new Federal Order prohibiting importation of field-grown seed potatoes from P.E.I. into U.S., allowing importation of potatoes for consumption meeting specified conditions — Applicant challenged First Suspension, Second Suspension, Ministerial Order, Domestic Movement Requirements — Main issues whether First Suspension, Second Suspension reviewable decisions; if reviewable, whether Court should decline to consider Suspensions due to mootness; if reviewable and not moot, whether *First Suspension, Second Suspension reasonable; whether Ministerial Order, Domestic Movement Requirements reasonable — With respect to whether Suspensions reviewable decisions, bulletins issued in connection thereto, CFIA's communications with its inspectors not reading as informational guidance — Rather, reading as communication of decisions, already made by CFIA, to suspend export certification — Applicant's arguments challenging Suspensions not focused on their wisdom or whether CFIA made appropriate political or policy decisions — Rather, applicant submitting that Suspensions were made without legal authority, based on irrelevant considerations — Suspensions*

thus reviewable decisions — As to mootness, adversarial context clearly present in case at hand — Discretion to adjudicate parties' arguments surrounding CFIA's legal authority for Suspensions exercised herein, as these arguments largely independent of particular factual context in which CFIA suspends export certification — No legal authority identified for Suspensions — However, because this determination representing discretionary adjudication of moot issue, determination not giving rise to any relief — Was Ministerial Order reasonable? — Trade considerations that influenced decision to issue Ministerial Order not irrelevant to decision — CFIA's mandate, Minister of Agriculture and Agri-Food's sphere of responsibility clearly extending to protection of Canadian economic interests — Protection of such interests cannot be characterized as improper purpose or irrelevant consideration — Existence of relevant economic considerations not itself sufficient to support issuance of Ministerial Order under Plant Protection Act, s. 15(3) — Exercise of authority conferred by s. 15(3) must be supported by reasonable suspicion, grounded in objective facts, that the pest is in the place declared as infested — Memorandum to Minister culminated with recommendation that Minister issue proposed Ministerial Order — Applicant's challenge of reasonableness of Ministerial Order amounted to request that Court reweigh particular evidence that was before Minister — Memorandum's reference to need to act quickly to control spread of PW must be read in conjunction with other briefing documents — Expression of concerns in briefing package transparent, intelligible, represent justification for conclusion that there were objectively discernible facts supporting reasonable suspicion of presence of PW — Applicant's arguments did not undermine reasonableness of decision to issue Ministerial Order — No basis to conclude that ongoing operation of Domestic Movement Requirements unreasonable — Duty of procedural fairness in relation to Ministerial Order satisfied herein — Application dismissed.

STATUTES AND REGULATIONS CITED

Canadian Food Inspection Agency Act, S.C. 1997, c. 6, ss. 4(1), 11.

Federal Courts Rules, SOR/98-106, r. 302.

Natural Products Marketing Act, R.S.P.E.I. 1988, c. N-3, Part II.

Plant Protection Act, S.C. 1990, c. 22, ss. 2, 11, 12, 15, 47(1)(h), 55(3).

Plant Protection Regulations, SOR/95-212, ss. 2 "infested", 55.

Potato Marketing Plan Regulations, P.E.I. Reg. EC173/90.

Seeds Act, R.S.C., 1985, c. S-8.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Democracy Watch v. Canada (Attorney General)*, 2023 FC 31, [2023] 2 F.C.R. 206; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699.

DISTINGUISHED:

Cropvise Inc. v. Canadian Food Inspection Agency, 2016 NBQB 186, affd 2018 NBCA 28, 48 C.C.L.T. (4th) 35.

CONSIDERED:

Canadian Pacific Railway Company v. Canada (Transportation Agency), 2021 FCA 69; *David Suzuki Foundation v. Canada (Health)*, 2018 FC 380, 16 C.E.L.R. (4th) 216; *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R.

(4th) 737; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006; *Forget v. Canada (Transport)*, 2017 FC 620; *Apotex Inc. v. Canada (Health)*, 2015 FC 1161, 11 Admin. L.R. (6th) 225, [2016] 2 F.C.R. D-3, affd 2018 FCA 147, 157 C.P.R. (4th) 289.

REFERRED TO:

McCarthy v. Whitefish Lake First Nation #128, 2023 FC 220, 524 C.R.R. (2d) 103; *Jette v. New Brunswick Legal Aid Services Commission*, 2019 NBQB 320, 72 Admin. L.R. (6th) 291; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Adams v. Borrel*, 2008 NBCA 62, 336 N.B.R. (2d) 223; *Andrews v. Public Service Alliance of Canada*, 2022 FCA 159, 2023 C.L.L.C. 220-017; *Miel Labonté Inc. v. Canada (Attorney General)*, 2006 FC 195, 289 F.T.R. 43, [2006] 4 F.C.R. D-37; *Friends of Point Pleasant Park v. Canada (Attorney General)*, 2000 CanLII 16708, 198 F.T.R. 20 (F.C.T.D.); *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189.

AUTHORS CITED

Canadian Food Inspection Agency, Notice to Industry, “Interim suspension of certification of all potatoes originating from Prince Edward Island to the United States and new import requirement for used farm equipment” (November 21, 2021).

Canadian Food Inspection Agency, Notice to Industry, “Temporary suspension of seed potato certification of seed potatoes originating from Prince Edward Island to the United States” (November 2, 2021).

Canadian Food Inspection Agency, “Potato Wart Domestic Long-Term Management Plan” (March 9, 2009).

Canadian Food Inspection Agency, *Potato wart order* (November 21, 2021), online: <https://inspection.canada.ca/en/plant-health/invasive-species/domestic-plant-protection-measures/potato-wart-order>.

United Nations, Food and Agriculture Organization. *International Standards for Phytosanitary Measures*, “ISPM 10: Requirements for the Establishment of Pest Free Places of Production and Pest Free Production Sites”, Rome (1999).

APPLICATION for judicial review of a series of related decisions by the respondents restricting the movement of seed potatoes from Prince Edward Island to the rest of Canada and the United States. Application dismissed.

APPEARANCES

Duncan C. Boswell and *John J. Wilson* for applicant.

Sarah Drodge and *W. Dean Smith, K.C.*, for respondents.

SOLICITORS OF RECORD

Gowling WLG Canada LLP, Toronto, for applicant.

Deputy Attorney General of Canada for respondents.

The following are the reasons for judgment and judgment rendered in English by

SOUTHCOTT J:

I. Overview

[1] This Judgment and Reasons address an application for judicial review of a series of related decisions of the Respondents, commencing in November 2021, restricting the movement of seed potatoes from Prince Edward Island (P.E.I.) to the rest of Canada and the United States (U.S.).

[2] As explained in more detail below, this application is dismissed, because the decisions under review are either moot or reasonable, within the meaning of the governing jurisprudence, and were made with the required procedural fairness.

II. Background

A. *The Parties*

[3] The Applicant, the Prince Edward Island Potato Board, is a body corporate established under the *Potato Marketing Plan Regulations*, P.E.I. Reg. EC173/90 (PMP Regulations), and a "commodity board" within the meaning of Part II of the *Natural Products Marketing Act*, R.S.P.E.I. 1988, c. N-3. It acts as the custodian of the potato industry in the Province of P.E.I., representing approximately 175 potato producers across the Province, all of whom are regulated under the PMP Regulations.

[4] The Applicant is composed of 12 executive members who are active potato producers in the Province, equally representing each of the industry's three major sectors: seed potatoes (planted to grow more potato plants), table stock potatoes (intended for immediate sale and human consumption), and processing potatoes (intended for further processing into other products before being sold for human consumption). The Applicant is itself also a seed potato producer, as it owns and operates the Fox Island Elite Potato Seed Farm.

[5] The Respondent, the Canadian Food Inspection Agency of Canada (CFIA), is Canada's national plant regulator, created under the *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6 (CFIA Act). Under subsection 11(1) of the CFIA Act, CFIA is responsible for the administration and enforcement of, among other statutes, the *Plant Protection Act*, S.C. 1990, c. 22 (Act). The purpose of the 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 and eradicating quarantine pests in Canada (at section 2).

[6] The other Respondent, the Minister of Agriculture and Agri-Food (Minister), is the federal minister responsible for CFIA, pursuant to powers granted by the Act, the CFIA Act, and regulations enacted thereunder.

B. *Potato Wart Pest*

[7] Potato wart (PW), one of the most serious potato pests in the world, has been regulated as a quarantine pest in Canada for over a century (currently under the Act and the *Plant Protection Regulations*, SOR/95-212 (Regulations) made thereunder). Although it poses no threat to human health, animal health, or food safety, PW reduces potato yield and makes potatoes unmarketable.

[8] PW is caused by a soil-borne parasitic fungus, *Synchytrium endobioticum*, which infects potato plants. Its life cycle includes both a dormant stage, during which it exists as resting microscopic spores waiting for a host plant to be planted close enough to stimulate germination, and an active stage during which it completes reproductive cycles in the host plant, causing characteristic masses or galls. PW can remain dormant in soil for more than 40 years.

[9] PW is not an airborne fungus that can easily travel significant distances from its place of origin. Rather, spores can be transferred from one field to another of any distance away only by human-mediated pathways, such as transfer of soil on seed potatoes or on unwashed vehicles or equipment. In Canada, PW has been found only in Newfoundland and Labrador and on P.E.I.

C. *Potato Wart Domestic Long-Term Management Plan*

[10] PW can be detected in one of two ways: either by visual inspection of potato tubers or by laboratory testing of soil samples. PW was first detected on P.E.I. in October 2000. Since that detection, CFIA has adopted measures to monitor and control the spread of PW. The principal measures in place in the time period leading to the decisions challenged in this application are set out in a document called the Potato Wart Domestic Long-Term Management Plan, last updated on March 9, 2009 (Management Plan or Plan).

[11] In support of this application, the Applicant filed an affidavit sworn by its General Manager, Mr. Greg Donald, which provides an explanation of the operation of the Management Plan. The Plan categorizes potato-producing fields on P.E.I. based on their relationship to PW detection and sets out different restrictions and surveillance activities depending on the category of field. It applies only to fields in which PW has actually been detected and those associated fields that, by proximity or history with a PW-positive field, have a risk of PW presence based on the biology of the pest and documented means of spread. The Plan currently applies to approximately 11 percent of the 350,000 acres of P.E.I.'s potato fields.

[12] Where it applies, the Management Plan assigns potato fields one of the following classifications, indicating the confirmed presence of PW or risk of same:

A. Category A, also known as Index Fields, in which PW has been detected;

B. Category B, also known as Adjacent Fields, which are fields next to Index Fields that are not separated by a physical barrier of more than 15 meters in width;

C. Category C, also known as Primary Contact Fields, which are fields that may have had soil, potatoes or potato waste transferred to them from an Index Field or may have had common equipment moved to them directly after use in an Index Field;

D. Category D, also known as Other Contact Fields, which are fields where common equipment has been shared with an Index Field, but after use in a Primary Contact Field; and

E. Category E, sometimes called New Fields, which are not related to a detection, but rather are fields entering their first year of potato production that were not previously surveyed for PW.

[13] For each of these categories, the Management Plan provides corresponding surveillance protocols and/or restrictions on the movement and treatment of potatoes, plants, soil, machinery, and other articles. Under the Plan, seed potatoes (and the soil in which they are transported) originating from Category A, B, or C fields cannot be moved or sold as seed potatoes.

[14] Seed potatoes from Category D fields are not immediately subject to movement restrictions under the Management Plan. Provided the applicable surveillance and testing requirements are met after a Category D field's first crop, those seed potatoes can be moved domestically within Canada. The Plan further provides that, if a Category D field's second crop similarly meets those requirements, as well as U.S. requirements as set out in the 2015 U.S. Federal Order (which will be explained below), those seed potatoes can be exported to the US.

[15] Category E fields are visually inspected by CFIA for PW after the first harvest and, if no PW is found, they are not subject to any movement restrictions and are not further regulated by the Management Plan.

[16] In this application, the parties use the term "Regulated Fields" to refer to Category A, B, C, and D fields as well as Category E fields until their first harvest, and the term "Unregulated Fields" to refer to all other potato fields on P.E.I. I will adopt this nomenclature for purposes of these Reasons.

D. *Potato Wart Detections on P.E.I.*

[17] PW was first detected on P.E.I. in a single field in October 2000. Since then (as of July 29, 2022), it has been detected in additional fields, totalling 35 fields overall representing approximately 0.4 percent of the total approximately 350,000 acres of potato fields on P.E.I. Together with these 35 Index Fields, there are a total of 1,322 other fields also being regulated under the Management Plan because of their documented connection to the Index Fields. These 1,357 fields together total an area of 40,616 acres or approximately 11 percent of P.E.I.'s total potato field acreage. The remaining approximately 88 percent of P.E.I.'s potato production land, which is not regulated by the Plan, represents approximately 8,600 fields.

[18] Details of the PW detections on P.E.I. are as follows:

A. PW was first detected on P.E.I. in a 77-acre field in October 2000;

B. In the fall of 2002, PW was detected in two separate cases linked to the initial detection in 2000;

C. In 2004, PW was detected in four fields associated with one of the 2002 detections;

D. In 2007, a further PW detection was confirmed in a single 45-acre field related to one of the 2002 detections;

E. In September 2012, CFIA confirmed the detection of PW in three separate fields, two of which were not linked to a previous detection;

F. In 2013 and 2014, there were three further detections of PW on 86 acres of land linked to one of the 2012 detections;

G. In August 2014, a producer detected PW in a single 14.1 hectare field that was unrelated to any previous detections, following which CFIA's investigations confirmed four additional detections in fields that were newly designated Category C and Category D fields as a result of the August 2014 detection;

H. In 2016 and 2018, there were two additional detections of PW, both of which were linked to previous detections;

I. In October 2020, CFIA confirmed detections of PW (in soil samples from two fields on one farm totaling approximately 50 acres) that were unrelated to any previous detections;

J. On October 1 and 14, 2021, CFIA confirmed the detection of PW in two separate processing potato fields on two separate farms, following the producers submitting a suspect potato to CFIA for testing. These fields, totaling approximately 331 acres, were both associated with fields in which there had been previous detections; and

K. As a result of the October 2021 detections, in accordance with the Management Plan, CFIA began testing the affected and associated fields (2021 Investigation). To date, the 2021 Investigation resulted in two further PW detections:

    a. On February 10, 2022, PW was detected in a field on a processing farm that had recently begun growing seed potatoes. This field was a Category D field as a result of the October 2021 detections; and

    b. On July 21, 2022, PW was detected on a field adjacent to one of the October 2021 detections.

CFIA expects to complete its testing under the 2021 Investigation in 2023.

E. *2015 U.S. Federal Order*

[19] Following the cluster of new PW detections on P.E.I. commencing in 2014 as described above, the U.S. Department of Agriculture Animal and Plant Health Inspection Service (APHIS), which is the CFIA's American counterpart, issued a Federal Order to reduce the risk of PW spreading from P.E.I. to the U.S. (2015 U.S. Federal Order).

[20] APHIS issues an order of this sort when it considers it necessary to take action to protect U.S. agriculture or prevent the entry and establishment of a pest or disease into the United States. The 2015 U.S. Federal Order required that Unregulated Fields undergo soil testing for PW and be declared free of PW before seed potatoes from those fields could be imported into the U.S.

[21] To comply with the 2015 U.S. Federal Order, CFIA implemented its Phytosanitary Export Certification Program. Under this program, CFIA conducts verification of seed potato status, verification that the land on which potatoes were grown is not regulated for *Synchytrium endobioticum*, field soil sampling, monitoring of regulated areas, issuance of quarantine notices and movement certificates, tuber inspection, and shipment certification.

F. *2020 and 2021 Potato Wart Detections*

[22] Following the detection of PW in two Unregulated Fields in October 2020 as described above, APHIS asked CFIA to suspend export certification of seed potatoes from P.E.I. while investigations could be conducted. CFIA agreed to this request, suspending export certification of seed potatoes from November 2020 until March 2021, when APHIS agreed that seed potato exports from P.E.I. could resume.

[23] Following the October 2021 detections described above, CFIA notified APHIS of the detections. Subsequent communications between these regulators will be canvassed in more detail later in these Reasons. However, in summary, APHIS asked CFIA to voluntarily suspend export certification of P.E.I. seed potatoes and potatoes for consumption destined for the U.S., and to prohibit the movement of any P.E.I. seed potatoes to the rest of Canada, until after the 2021 Investigation was complete. APHIS indicated that failure to take these measures would result in amendments to the 2015 U.S. Federal Order that would ban the importation of all Canadian potatoes to the U.S.

[24] As a result, on November 2, 2021, CFIA issued a document entitled “Notice to Industry – Temporary suspension of seed potato certification of seed potatoes originating from Prince Edward Island to the United States”, which advised that the movement of all seed potatoes originating from P.E.I. to the U.S. had been suspended as of November 1, 2021 (First Suspension).

[25] On November 21, 2021, CFIA issued a second document, entitled “Notice to Industry – Interim suspension of certification of all potatoes originating from Prince Edward Island to the United States and new import requirements for used farm equipment”, which expanded the First Suspension to include not only seed potatoes but also table stock and processing potatoes, effective as of 11:00 p.m. EST that day (Second Suspension).

[26] On November 21, 2021, the Minister also issued a Ministerial Order, pursuant to subsection 15(3) of the Act, declaring the entire Province of P.E.I. as “a place infested with potato wart” and, among other things, prohibiting the movement of P.E.I. seed potatoes from P.E.I. without written authorization from an inspector (Ministerial Order). The Ministerial Order remains in effect.

[27] On February 22, 2022, CFIA issued a Notice to Industry setting out the conditions under which inspectors would issue written authorizations to allow the movement of P.E.I. seed potatoes from P.E.I. in accordance with the Ministerial Order, referred to as the P.E.I. Seed Potato Domestic Movement Requirements and Recommended Risk Mitigation Measures (Domestic Movement Requirements or Requirements). The Domestic Movement Requirements are still in place.

[28] On April 1, 2022, APHIS issued a new Federal Order (2022 U.S. Federal Order) amending the import requirements for P.E.I. potatoes for human consumption. Effective as of that date, the 2022 U.S. Federal Order prohibits the importation of field-grown seed potatoes from P.E.I. into the United States and allows the importation of potatoes for consumption that meet specified conditions.

[29] In this application for judicial review, the Applicant challenges, as a series of related and ongoing decisions, the First Suspension, Second Suspension, Ministerial Order, and Domestic Movement Requirements.

III. Issues and Standard of Review

[30] Based on the parties' respective submissions, I conclude that this application raises the following issues for the Court's determination:

A. Should the Court grant an Order under Rule 302 of the *Federal Courts Rules*, SOR/98-106, allowing the Applicant to seek judicial review of more than one decision?

B. Are the First Suspension and Second Suspension reviewable decisions?

C. If reviewable, should the Court decline to consider the First Suspension and Second Suspension due to mootness?

D. If reviewable and not moot, were the First Suspension and Second Suspension reasonable (and is their ongoing operation reasonable)?

E. Was the Ministerial Order reasonable (and is its ongoing operation reasonable)?

F. Were the Domestic Movement Requirements reasonable (and is their ongoing operation reasonable)?

G. Was the Applicant denied procedural fairness with respect to the First Suspension, Second Suspension, and Ministerial Order?

[31] As reflected in the above articulation of the issues, the parties agree (and I concur) that each of the substantive issues listed above, except for the last which concerns procedural fairness, is reviewable on the standard of reasonableness (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*)). I note that, in their respective proposed lists of issues, both parties draw a distinction between the lawfulness and the reasonableness of the Decisions under review. My list of issues above eliminates that distinction as conceptually artificial. In my view, the arguments surrounding lawfulness simply represent one basis for challenging the reasonableness of the decisions, as administrative decisions made without legal authority are necessarily unreasonable (see *McCarthy v. Whitefish Lake First Nation #128*, 2023 FC 220, 524 C.R.R. (2d) 103, at paragraph 83; *Jette v. New Brunswick Legal Aid Services Commission*, 2019 NBQB 320, 72 Admin. L.R. (6th) 291, at paragraph 90.

[32] The parties also agree (and I concur) on the approach to the procedural fairness issue. Such issues are subject to judicial scrutiny to ensure that a fair and just process

was followed, an exercise best reflected in the correctness standard even though, strictly speaking, no standard of review is being applied (see *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 (*Canadian Pacific Railway*), at paragraphs 46–47).

IV. Analysis

A. *Should the Court grant an Order under Rule 302 of the* Federal Courts Rules*, SOR/98-106, allowing the Applicant to seek judicial review of more than one decision?*

[33] I will address this issue summarily, as the parties agree that a Rule 302 Order is appropriate. This Rule provides that, unless the Court otherwise orders, an application for judicial review shall be limited to a single order in respect of which relief is sought. However, as contemplated in *David Suzuki Foundation v. Canada (Health)*, 2018 FC 380, 16 C.E.L.R. (4th) 216, at paragraphs 166 and 173, continuing acts or decisions may be reviewed together without offending Rule 302, where the similarities are such that doing so would be consistent with the policy of ensuring an expeditious and focused process for challenging administrative action.

[34] Although the Applicant is challenging distinct decisions made by different decision makers (CFIA and the Minister), the Respondents acknowledge (and I agree) that these challenges relate to the same basic issue, namely the regulatory response to the PW situation in P.E.I., and that requiring separate applications for judicial review would represent a waste of time and judicial resources. As such, my Order will grant the required relief under Rule 302.

B. *Are the First Suspension and Second Suspension reviewable decisions?*

[35] This issue arises because the Respondents argue that the First Suspension and Second Suspension (together, Suspensions) are not decisions or other matters of the sort that are subject to judicial review. There are two components to the Respondents' position:

A. First, the Respondents submit that the Applicant has mischaracterized the Suspensions as decisions by CFIA prohibiting the export of seed potatoes. The Respondents take the position that they did not prohibit the export of seed potatoes but rather notified industry and CFIA's inspectors that, in light of messaging received from the U.S., CFIA could no longer certify seed potato exports to the U.S. under the Regulations;

B. Second, the Respondents submit that, even if the Suspensions can be characterized as decisions, they are not justiciable because they cross the boundary from the legal to the political. The Respondents explain that the Suspensions followed a series of discussions between Canada and the U.S. and that Canadian officials ultimately determined that it was prudent to suspend export certification of P.E.I. potatoes, as requested by the U.S., to avoid a new U.S. Federal Order that might impact the entire Canadian potato industry.

[36] In support of the first component of their position, the Respondents refer the Court to section 55 of the Regulations, which creates the requirement for a Canadian

Phytosanitary Certificate, issued by a CFIA inspector, in connection with the export from Canada of any thing for which such a certificate is required by the phytosanitary certification authorities in the destination country. Under subsection 55(3), an inspector may issue such a certificate only if the inspector believes on reasonable grounds that the thing to be exported conforms with the laws of the importing country respecting phytosanitary import requirements.

[37] The Respondents argue that if the import requirements of a destination country change or the importing country is no longer prepared to accept certain potatoes, CFIA must respect that position and can no longer certify such potatoes for export. They take the position that the Suspensions are not decisions on CFIA's part, but rather represent an acknowledgement of the state of affairs resulting from U.S. decision making. In the Respondents' submission, the documents best capturing the Suspensions are not CFIA's Notices to Industry, but rather its notices to its inspectors that seed potatoes could no longer be certified for export to the U.S.

[38] The Respondents' Record in this application includes an affidavit affirmed by Mr. David Bailey, the Acting Executive Director of the Plant Health Biosecurity Directorate and the Chief Plant Health Officer with CFIA. In connection with the First Suspension, Mr. Bailey's affidavit attaches what he describes as a guidance bulletin, dated November 2, 2021, sent to CFIA's inspectorate (November 2 Bulletin). He explains that the substance of this document represents advice to CFIA's inspectors that the Notice to Industry had been sent to the seed potato industry regarding the suspension of seed potato certification for export to the U.S. The November 2 Bulletin incorporates the text of the Notice to Industry related to the First Suspension.

[39] The Certified Tribunal Record includes a document dated November 22, 2021, which appears to be a similar internal CFIA communication that, among other things, states that to address additional phytosanitary concerns raised by the U.S, the First Suspension has been expanded to include table stock potatoes and potatoes for processing that originate from P.E.I. to the U.S. as of November 21, 2021 (November 21 Bulletin). This document further states that the suspension of certification of all potatoes originating from P.E.I. to the U.S. will remain in effect until further notice.

[40] As previously noted, subsection 55(3) of the Act tasks CFIA inspectors with issuing phytosanitary certificates if the inspector believes on reasonable grounds that the thing to be exported conforms with the laws of the importing country respecting phytosanitary import requirements. Against that backdrop, the Respondents submit that, pursuant to CFIA's responsibility for the administration and enforcement of the Act (see CFIA Act, section 11), it routinely provides inspectors with guidance on the phytosanitary import requirements of relevant countries. While I accept that providing guidance to its inspectorate on foreign import requirements would be consistent with CFIA's mandate, I have difficulty concluding that CFIA's communications with its inspectorate in the case at hand fall within this characterization.

[41] The November 2 Bulletin issued in connection with the First Suspension states that the movement of seed potatoes originating from P.E.I. to the U.S. has been suspended. Similarly, the November 21 Bulletin issued in connection with the Second Suspension notes that the certification of shipments of seed potatoes originating from P.E.I. to the U.S. was suspended on November 1 and states that the suspension has been expanded to include table stock potatoes and potatoes for processing. CFIA's

communications with its inspectors, in connection with both Suspensions, do not read as informational guidance, i.e. providing them with information on foreign import requirements to assist them in making decisions under subsection 55(3) of the Act. Rather, as the Applicant submits, they read as the communication of decisions, already made by CFIA, to suspend export certification.

[42] Turning to the Respondents' second position, surrounding the justiciability of the Suspensions, I accept their argument that there was a political element to these decisions. Both parties characterize the Suspensions in this manner. Indeed, one of the Applicant's principal arguments in challenging the reasonableness of the Suspensions is the assertion that they were issued solely to accede to repeated trade-related threats by the US, which (particularly in the absence of a concurrent change in U.S. law) the Applicant submits was an irrelevant consideration. The Respondents dispute that the U.S. trade context was an irrelevant consideration, but they acknowledge that Canadian officials determined it was prudent to suspend export certification, as requested by the U.S., to avoid a new U.S. Federal Order that might impact the entire Canadian potato industry. Indeed, they argue that it was precisely this political element to the Suspensions that makes them non-justiciable.

[43] The Respondents refer the Court to the explanation of the principal of justiciability in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737, at paragraph 62:

> Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.

[44] In *Democracy Watch v. Canada (Attorney General)*, 2023 FC 31, [2023] 2 F.C.R. 206 (*Democracy Watch*), at paragraph 73, this Court identified a number of considerations that can inform a justiciability analysis:

> In considering the appropriateness of judicial involvement in particular matters, Canadian courts have considered questions such as the following: (a) whether the case has a sufficient legal component that it can be resolved by the application of a legal standard (see *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297, at page 545); (b) whether the case is argued solely in the hypothetical and abstract sense (see *Page v. Mulcair*, 2013 FC 402, *sub nom. Canada (Parliamentary Budget Officer) v. Canada (Leader of the Opposition)*, [2014] 4 F.C.R. 297, at paragraphs 60–62); (c) whether the Court is being asked to express its opinion on the wisdom of governmental action (see *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 (*Operation Dismantle*), at page 472); (d) whether there are moral or political dimensions to the case that are inappropriate for the Court to decide (see *Operation Dismantle*, at page 465); (e) whether the relief sought impinges upon policy-making responsibilities of other branches of government (see *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 123 O.R. (3d) 161 (*Tanudjaja*), at paragraphs 33–34); and (f) whether the relief sought would have any practical effect (see *Tanudjaja*, at paragraph 34).

[45] The Applicant's arguments challenging the Suspensions are not focused on their wisdom or whether CFIA made appropriate political or policy decisions. Rather, the Applicant submits that the Suspensions were made without legal authority and based on irrelevant considerations. As in *Democracy Watch* (at paragraph 76), such

determinations involve the application of a legal standard. As for whether the Court is being asked to address arguments advanced solely in the hypothetical or abstract sense, or whether addressing the Applicant's arguments would have any practical effect, I will further consider comparable principles when considering the Respondents' mootness argument. However, for purposes of the justiciability analysis, I observe that the Applicants' arguments are raised in the context of a concrete and ongoing dispute surrounding the regulatory response to the PW situation in P.E.I. I find the Suspensions to be reviewable decisions.

[46] In so concluding, I have considered the Respondents' reliance on *Cropvise Inc. v. Canadian Food Inspection Agency*, 2016 NBQB 186 (*Cropvise*), affd 2018 NBCA 28, 48 C.C.L.T. (4th) 35, in which the Court of Queen's Bench of New Brunswick (as it was then called) declined to recognize a duty of care surrounding CFIA's decision as to how to engage with Venezuelan officials over a dispute involving the export of potatoes. The Court held that such a decision represented the outcome of a balancing of economic, social and political considerations by CFIA and other Canadian government authorities, in the conduct of diplomat relations with the Venezuelan state, and was therefore based on public policy considerations that could not support a cause of action (at paragraph 110).

[47] Leaving aside the fact that *Cropvise* involved an action for damages, not an application for judicial review, the analysis in that case is distinguishable from that required in the case at hand which, as explained above, does not involve consideration of the wisdom of steps taken in the conduct of diplomatic relations but rather whether certain decisions were authorized by law and based on relevant considerations.

C. *If reviewable, should the Court decline to consider the First Suspension and Second Suspension due to mootness?*

[48] Unlike the suspension of export certification following the October 2020 PW detection, there has been no formal notification to the industry that the Suspensions have been withdrawn. However, at the hearing of this application, the Respondents' counsel confirmed that the Respondents regard the Suspensions as no longer being in effect, explaining that it was not thought to be necessary to provide formal notification of this, because the Suspensions were superseded in effect by the 2022 U.S. Federal Order.

[49] Based on this confirmation by the Respondents' counsel, the Applicant's counsel acknowledged that its challenges of the Suspensions are therefore moot. However, the Applicant takes the position that the Court should nevertheless exercise its discretion to adjudicate the Applicant's arguments, at least in relation to the legal authority for the Suspensions.

[50] The Applicant's position is based on the principles explained in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, as summarized in *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195 (*Democracy Watch FCA*), at paragraphs 10 and 13. If the Court concludes that a proceeding is indeed moot, in that no live controversy remains that affects or may affect the rights of the parties, a second question arises: whether the Court should nonetheless exercise its discretion to hear and decide the matter. Three factors bear on the Court's decision whether to exercise this discretion: (a) the presence or absence of an adversarial context; (b) the

appropriateness of applying scarce judicial resources; and (c) the Court's sensitivity to its role relative to that of the legislative branch of government.

[51] Clearly the adversarial context is present in the case at hand, as the parties have fully briefed and argued their respective positions surrounding the reasonableness of the Suspensions.

[52] Judicial resources have already been expended in preparing for and hearing this application, including in relation to these arguments. The additional expenditure of resources associated with adjudication is not significant. This factor also includes, where applicable, consideration of whether the case presents a recurring issue, but one that is of short duration or otherwise evasive of judicial review (see *Democracy Watch FCA*, at paragraph 14). The Applicant argues compellingly that the Suspensions are not the first time that CFIA has made decisions of this nature, as a similar suspension of export certification was issued following the October 2020 PW detection. Also, as in the case at hand, such suspensions may be of short duration and therefore evasive of judicial review due to mootness, when they are overtaken by other regulatory events.

[53] The third factor requires that the Court exercise its discretion to adjudicate moot proceedings both prudently and cautiously, as the primary task of the judiciary within the Canadian constitutional separation of powers is to resolve real disputes (see *Democracy Watch FCA*, at paragraph 14).

[54] My decision is to exercise my discretion to adjudicate the parties' arguments surrounding CFIA's legal authority for the Suspensions, as these arguments are largely independent of the particular factual context in which CFIA suspends export certification. The arguments surrounding whether the Suspensions were based on irrelevant considerations, and the parties' procedural fairness arguments, are far more dependent on factual context and, taking into account both the second and third factors, I decline to exercise my discretion to adjudicate those arguments.

D. *If reviewable and not moot, were the First Suspension and Second Suspension reasonable (and is their ongoing operation reasonable)?*

[55] As explained immediately above, under this issue I will adjudicate only the question of whether the Suspensions were authorized by law.

[56] The Applicant argues that, unlike the Ministerial Order that will be addressed later in these Reasons, neither of the Suspensions was memorialized in an official decision document. Rather, each Suspension was announced by CFIA via a Notice to Industry, and neither such Notice identifies any grant of authority for the relevant Suspension. The Applicant submits that the rest of the record before the Court, including the affidavits filed by the Respondents, are similarly devoid of any reference to such authority. The Applicant asserts that nothing in the Act, the CFIA Act, regulations made thereunder, or any other statute that CFIA has jurisdiction to administer authorizes it to issue a blanket prohibition of potato export from an entire province to a particular country.

[57] CFIA's response to this argument is largely as canvassed earlier in these Reasons, in connection with the question whether the Suspensions represent decisions or other justiciable matters. It submits that it routinely provides inspectors with guidance

on the phytosanitary import requirements of relevant countries, pursuant to CFIA's responsibility for the administration and enforcement of the Act (see CFIA Act, section 11). In adjudicating the justiciability issue, I analysed CFIA's arguments as to how to characterize its administrative actions. The same analysis is dispositive of the legal authority question.

[58] As previously explained, I accept that providing guidance to its inspectorate on foreign import requirements would be consistent with CFIA's mandate, but I find that CFIA's communications with its inspectorate in the case at hand do not fall within this characterization. Under subsection 55(3) of the Act, it is CFIA's inspectors who have the authority to issue phytosanitary certificates, and an individual inspector can only issue such a certificate if they believe on reasonable grounds that the thing to be exported conforms with the laws of the importing country respecting phytosanitary import requirements. The Respondents have identified no legal authority for CFIA itself to make the determination as to whether export certificates will be issued, or to prohibit export, on a blanket basis or otherwise.

[59] Based on the governing legislation as currently enacted, and the manner in which the Notices to Industry and related communications to the CFIA inspectorate are framed in the case at hand, I agree with the Applicant's position that the Respondents have identified no legal authority for the Suspensions.

[60] Because this determination represents a discretionary adjudication of an issue that is now moot, it will not give rise to any relief in my Order.

E. *Was the Ministerial Order reasonable (and is its ongoing operation reasonable)?*

(1) Authority for Ministerial Order

[61] The Applicant advances a number of arguments in support of its position that the Ministerial Order was unreasonable. While I will explain these arguments in greater detail below, the Applicant argues principally that there was no evidentiary basis on which the Minister could form a reasonable suspicion that the entire Province of P.E.I. was "a place infested with potato wart", as required by the Regulations in order for the Minister to make the declaration to that effect contained in the Ministerial Order. Related thereto, the Applicant also argues that the Ministerial Order was issued based on an irrelevant consideration or for an improper purpose, i.e., to effect a commitment that CFIA had made to the U.S. in response to a trade threat, rather than based on the presence of PW on P.E.I. as required by the Regulations.

[62] Foundational to the Ministerial Order is the declaration therein 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". It is common ground between the parties that the Minister made this declaration under the power conferred by subsection 15(3) of the Act, which provides that the Minister may, by order, declare any place to be infested that is not already the subject of a declaration under section 11 or 12 (which sections empower inspectors to make declarations of infestation).

[63] The Applicant notes that section 2 of the Regulations defines the term "infested" as follows:

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*)

[64] Neither of the parties has identified any judicial consideration of this definition. However, relying on the phrase "reasonably suspect" employed in the definition, the Applicant argues that the definition incorporates the standard of reasonable suspicion that has been applied and interpreted in other contexts. For instance, in *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paragraphs 26 to 27, the Supreme Court of Canada described this standard as follows:

> Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown*, Binnie J. provided the following definition of reasonable suspicion, at para. 75:
>
> > The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.
>
> Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard. (Applicant's emphasis.)

[65] The Applicant also notes the explanation by the Federal Court of Appeal in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paragraph 97, that fanciful musings, speculations or hunches do not meet the standard of reasonable grounds to suspect. Rather, as this Court stated in *Forget v. Canada (Transport)*, 2017 FC 620, at paragraph 48, the existence of objective and ascertainable facts is essential to support reasonable suspicions.

[66] Against this jurisprudential backdrop, the Applicant takes the position that the Court must assess whether the evidence demonstrates that the Minister had before her objectively discernible facts from which she could form a reasonable suspicion of the presence of PW so as to authorize issuance of the Ministerial Order.

[67] The Applicant acknowledges that the Regulations' definition of "infested" could capture the Regulated fields. While the Category A fields (or Index Fields) are the only fields in which PW has been confirmed to be present, the Applicant accepts that, by virtue of documented proximity or potential for human-mediated spread, the Category B, C, and D fields could also potentially ground a reasonable suspicion of PW's presence. However, the Applicant asserts that the evidence demonstrates the Minister had no

objectively discernible facts before her from which she could form a reasonable suspicion that PW is present on any of the Unregulated Fields.

[68] The Respondents do not take issue with the Applicant's reliance on the Regulations' definition of "infested" or the jurisprudence upon which it relies to explain the relevant standard. The Respondents agree that a reasonable suspicion must be grounded in objective facts, but they take the position that this standard was met on the evidence before the Minister.

[69] Before proceeding further, I note that the definition of "infested", upon which the parties' arguments rely, is found in the Regulations, not in the Act itself. Neither party has advanced any analysis supporting the application of the Regulations' definition to the use of the term "infested" in the Act. Moreover, conscious that reasonableness review is concerned with the reasoning of the administrative decision maker (see *Vavilov*, at paragraphs 83–87), I observe that neither the Ministerial Order nor the record before the Minister reveals any such analysis by the Minister.

[70] That said, I also note that paragraph 47(1)(h) of the Act authorizes the making of regulations for carrying out the purposes and provisions of the Act and prescribing anything that is to be prescribed under the Act, including regulations respecting the declaration under sections 11, 12 and 15 of places that are infested. In the absence of relevant analysis in the record or argument of the parties, I will not engage in further statutory interpretation involving these sections. However, as the parties are agreed on the application of the regulatory definition of "infested" and the resulting application of the reasonable suspicion standard, I will adopt that agreement for purposes of my analysis of the reasonableness of the Ministerial Order.

[71] Adjudication of the Applicant's arguments challenging the Ministerial Order involves principally an assessment of the evidence before the Minister that might support the required reasonable suspicion, so as to consider whether the Ministerial Order withstands reasonableness review within the meaning explained in *Vavilov*. However, before turning to that evidentiary assessment, I will first address the Applicant's argument that the Ministerial Order was issued based on an irrelevant consideration or for an improper purpose, related to what the Applicant describes as trade threats made by U.S. officials.

(2) Whether the Ministerial Order was issued based on an irrelevant consideration or for an improper purpose

[72] Similar to the explanation earlier in these Reasons in connection with the Suspensions, it is common ground between the parties that the Respondents' interest in avoiding a new U.S. Federal Order influenced the decision to issue the Ministerial Order. This conclusion is also clear from the record before the Court. For instance, in a Risk Management Document dated November 19, 2021 (RMD), which formed part of CFIA's briefing package to the Minister in support of the proposed Ministerial Order, the Executive Summary includes the following paragraph:

> With each new detection since 2014, the confidence in the CFIA's ability to manage PW in PEI has been challenged and criticized by the United States (US). This led to the U.S. publishing a Federal Order to restrict import of seed, table stock and processing potatoes originating from PEI in 2015. The U.S, [sic] has indicated that it is

> considering additional risk mitigation measures to respond to the three PW detections in the past year by amending their Federal Order, prohibiting PEI seed potatoes. They have requested a suspension of seed, table stock and processing potato exports from PEI until the investigations have been completed.

[73] The Applicant relies on the principle explained in *Apotex Inc. v. Canada (Health)*, 2015 FC 1161, 11 Admin. L.R. (6th) 225, [2016] 2 F.C.R. D-3, at paragraph 96 (affd 2018 FCA 147, 157 C.P.R. (4th) 289), that discretionary decisions are constrained by the confines of the enabling legislation and must be exercised in accordance with the rule of law, such that it is *ultra vires* for a minister to make a decision for a purpose other than that for which the power was granted by the legislature (see also *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at pages 140 and 143).

[74] The Applicant submits that the Regulations constrain the issuance of a subsection 15(3) declaration to only two circumstances: (a) actual presence of the pest on the place declared; or (b) sufficient exposure of a place to a pest to ground a reasonable suspicion of the pests' presence. The Applicant takes the position that the Minister was therefore acting *ultra vires*, and necessarily unreasonably, in issuing the Ministerial Order to give effect to CFIA's commitment made to the U.S. made in response to its trade threat.

[75] In support of its argument, the Applicant also relies on internal CFIA documents called ICP Situation Reports, which documented developments following the October 2021 PW detections (Situation Report). The Situation Report for October 29 and 30, 2021, includes the following entry following a meeting held between CFIA and APHIS on October 29:

> The US requested that the CFIA immediately implement a suspension of certification of export seed potatoes from PEI and to suspend shipments of PEI seed potatoes to other provinces. The CFIA will complete these actions as soon as possible, although the mechanism to stop seed potato shipments from PEI to other provinces is less clear. It may require a temporary revocation of the seed potato status of PEI seed potatoes. (Applicant's emphasis.)

[76] The Applicant observes that the Situation Report for November 9, 2021, similarly reflects that as of that date authorities were still being explored to address APHIS' request regarding restrictions on movement of P.E.I. potatoes to other parts of Canada. In the Applicant's submission, CFIA had put the proverbial cart before the horse, by committing Canada to a course of action for which it had no scientific basis and for which it had not yet identified legal authority.

[77] As noted above, I will shortly turn to the assessment of the evidence before the Minister, including the scientific evidence, to assess its support for the reasonable suspicion required under subsection 15(3) of the Act. However, the immediate question is whether the influence of the trade considerations reflected in the record translate into a conclusion that the Ministerial Order was issued for an improper purpose or based on an irrelevant consideration and is therefore unreasonable.

[78] I am not convinced that the trade considerations that admittedly influenced the decision to issue the Ministerial Order were irrelevant to the decision. The Minister is responsible for and has the overall direction of CFIA (see CFIA Act, subsection 4(1)), and CFIA is responsible for the administration and enforcement of the Act (see CFIA

Act, subsection 11(1)). The purpose of the 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 and eradicating quarantine pests in Canada (see the Act, section 2). Previous authorities have recognized this statutory purpose (see *Cropvise*, at paragraph 78, citing *Adams v. Borrel*, 2008 NBCA 62, 336 N.B.R. (2d) 223, at paragraphs 5 and 44). As such, CFIA's mandate and the Minister's sphere of responsibility clearly extend to the protection of Canadian economic interests, in so far as they may be affected by either the exportation or spread of pests, and the protection of such interests cannot be characterized as an improper purpose or an irrelevant consideration.

[79] All that said, the existence of relevant economic considerations is clearly not itself sufficient to support issuance of a Ministerial Order under subsection 15(3) of the Act. The authority conferred by that provision is permissive, and economic considerations of the sort raised in the trade-related discussions with the U.S. in the fall of 2021 represent a consideration relevant to the exercise of that authority. However, the subsection 15(3) authority cannot be exercised unless the requirements of that subsection are met. That is, consistent with both parties' positions, the exercise of that authority must be supported by a reasonable suspicion, grounded in objective facts, that the pest is in the place declared as infested.

[80] Before turning to assessing the reasonableness of the Ministerial Order from that perspective, I note that I have considered but am not persuaded by the Applicant's arguments (explained above) surrounding the Respondents' exploration of available legal authority, which ultimately resulted in issuance of the Ministerial Order. As I have found CFIA's concern about the implications of the 2021 PW detections for U.S. trade to be a relevant consideration, I find nothing unreasonable in CFIA first identifying the need to address that concern and then focusing upon the legal authority available to it to implement a solution.

[81] Also, while I appreciate that the Situation Report for October 29 and 30, 2021, reflects an intention on the part of CFIA to accede to U.S. demands before the relevant legal authority was identified, this does not particularly assist the Applicant's argument, as the authority and decision to issue the Ministerial Order is that of the Minister, not that of CFIA.

(3) Whether the evidence before the Minister supports issuance of the Ministerial Order

(a) *Nature of reasonableness review*

[82] Turning to the parties' arguments surrounding the reasonableness of the decision to issue the Ministerial Order, as informed by the evidence in the record before the Minister, I pause first to observe some general principles related to reasonableness review as explained by *Vavilov*.

[83] As the Applicant emphasizes, reasonableness review aims to fulfil the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law (see *Vavilov*, at paragraph 82). Administrative decision makers are required to adopt a culture of justification (see *Vavilov*, at paragraph 14), such that a reviewing court can develop an understanding of the decision maker's reasoning

process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks 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 bear on the decision (see *Vavilov*, at paragraph 99).

[84] In the case at hand, the parties' submissions focus on the legal constraints represented by subsection 15(3) of the Act, the provision on which the issuance of the Ministerial Order is based, the related regulatory definition of "infested", and the resulting application of the reasonable suspicion standard. In keeping with the required culture of justification, the Court's assessment of whether the Ministerial Order is reasonable in the context of those legal constraints must focus upon the decision's underlying rationale (see *Vavilov*, at paragraph 15), as informed by the record before the Court.

[85] The Ministerial Order itself does not contain an analysis of the question whether the requirements of section 15(3) of the Act are satisfied. However, I understand the parties to agree that, to develop an understanding of the reasoning underlying the decision and thereby assess its reasonableness, the Court should have recourse to the briefing package that CFIA placed before the Minister on November 19, 2021, in support of the issuance of the Ministerial Order. The parties' submissions focus principally upon three documents that formed part of this briefing package:

A. a draft Plant Health Risk Assessment (often referred to as a Pest Risk Assessment (PRA)) finalized on November 18, 2021 (although still labelled as a draft), prepared by the Plant Health Risk Assessment Unit of CFIA's Plant Health Science Division (Science Branch). Mr. Bailey's affidavit describes the role of a PRA as providing the scientific basis upon which policy and program decisions can be made;

B. the RMD (Risk Management Decision), prepared by the Policy and Programs Branch of CFIA (Policy Branch), which Mr. Bailey describes as setting out the pest risk management decision-making process for a particular issue; and

C. a Memorandum to the Minister (Memorandum), which culminates with a recommendation that the Minister issue the proposed Ministerial Order.

My analysis will similarly focus upon these documents.

(b) *Applicant's position*

[86] In support of its position that the evidence before the Minister did not set out objectively discernible facts from which she could form a reasonable suspicion of the presence of PW throughout P.E.I., the Applicant has provided considerable background on the history of detection and management of PW on P.E.I. Significant events in this history include the following:

A. Following the first detection of PW on P.E.I. in October 2000, CFIA developed and implemented a three-year operational work plan, pursuant to which it visually inspected every potato field on P.E.I. and collected and tested soil

samples for PW from every seed lot in the Province. Any fields in which PW was identified were quarantined;

B. Between 2001 and 2008, CFIA conducted surveillance activities on close to 99 percent of all P.E.I.'s potato fields;

C. In 2009, based on the baseline data accumulated through the above initiatives, CFIA implemented the Management Plan, as described earlier in these Reasons;

D. Between 2001 and 2011, all additional detections of PW on P.E.I. were in fields that were in some manner associated with the 2000 detection. However, in 2012, P.E.I. experienced the first detections that were not linked with previous detections. This occurred again in 2014. The 2014 detection was also the first detection in a seed potato field (which represents a particular risk because of the inherent intention that seed potatoes be replanted in other fields).

E. As a result of the 2014 detection, the U.S. issued the 2015 U.S. Federal Order, as described earlier in these Reasons, which resulted in the implementation of CFIA's Phytosanitary Export Certification Program;

F. In October 2020, CFIA confirmed detections of PW in two fields, on a potato seed farm, that were unrelated to any previous detections. After these detections, CFIA began to rethink its approach to management of PW on P.E.I., and in January 2021 its Policy Branch initiated the preparation of the PRA by the Science Branch. The Policy Branch also asked the Science Branch to prepare, in a shorter timeframe, a document answering particular questions to provide information on the probability of establishment and spread of PW;

G. The response to this latter request, entitled "Biological Information - Science Advice on the Probability of Establishment and Probability of Spread of Synchytrium Endobioticum (Potato Wart)", was provided on May 31, 2021 (Biological Information);

H. On October 1 and 14, 2021, CFIA confirmed the PW detections that gave rise to the regulatory initiatives that are the subject of this application for judicial review. These detections were on two separate processing potato fields on two separate farms, resulting from the producers submitting a suspect potato to CFIA for testing. Both fields were associated with fields in which there had been previous detections.

[87] With the benefit of this history, the documents referenced therein, and other documents in the record, the Applicant highlights the following data, which I do not understand the Respondents to contest:

A. Prior to implementation of the Management Plan in 2009, 99 percent of P.E.I.'s potato fields were surveyed for PW;

B. Soil testing and surveillance are key components of the Management Plan. Between 2010 and 2019, 67,221 soil samples were collected and tested from 3054 Regulated Fields under the Plan;

C. Surveillance activities are also conducted under the Phytosanitary Export Certification Program, including as required by the 2015 U.S. Federal Order. Between 2015 and 2019, 4900 soil samples were collected and tested from 375 Unregulated Fields to certify their PW-free status to importing countries;

D. There are currently 1,357 Regulated Fields to which the Management Plan applies, representing a total of 40,616 acres or 11 percent of the 350,000 acres of potato fields in the Province;

E. Of the 1,357 Regulated Fields, only 35 are Index Fields (i.e., Category A fields), in which PW has actually been detected. Those 35 fields total 1,663 acres or approximately 0.4 percent of the Province's total potato field acreage. The other 1,322 Regulated Fields (i.e., Category B, C, and D fields) are those having a regulated association with the Index Fields;

[88] The Applicant also places particular emphasis upon the contents of the Biological Information document. That document explains the variety of regulatory controls in place as of May 2021, from both general phytosanitary measures and measures specific to PW, that serve to prevent the spread of PW from Regulated Fields in P.E.I. These measures include the following:

A. the Canadian Seed Potato Certification Program, conducted by CFIA under the *Seeds Act*, R.S.C., 1985, c. S-8, which includes crop inspections in the field, post-harvest tuber inspections, and subsequent certification for both domestic and export shipments;

B. Phytosanitary Export Certification, as required by the 2015 U.S. Federal Order, which includes CFIA verifying that potatoes to be exported to the U.S. were not grown in Regulated Fields and conducting field soil sampling; and

C. additional import requirements and compliance agreements applicable to potato processing facilities.

[89] One of the questions the Science Branch was asked to answer in the Biological Information document was how effective these then current regulatory controls and mitigation measures were in preventing human-mediated spread of PW within Canada. In relying on that document, the Applicant emphasizes in particular its Appendix 4, bearing the title "Summary of Associated Risks and Current Mitigation Measures for Regulated Fields". In the section of the Biological Information document that discusses the Management Plan, it refers to Appendix 4 as including a summary of the associated risks and mitigation measures for each Regulated Field category. The Applicant draws the Court's attention to the fact that, for each of Categories A to D, in a column of Appendix 4 headed "Effectiveness of current measures mitigating the associated risks", it contains statements (made at least in part in the context of human-mediated spread) to the effect that current measures appear to appropriately mitigate the risk of spread.

[90] To similar effect, the Conclusion in the PRA states that, within the context of the Management Plan and export certification, the potential risk of human-mediated spread from regulated areas in P.E.I. is greatly reduced for all pathways. The Conclusion also states that the rate of detection of PW in P.E.I. has not accelerated over the past 20 years. The Applicant also notes that, when discussing the spread of PW within P.E.I.

from 2000 to 2020, the PRA states that, because it can take many years of monitoring and testing to detect the presence of PW in fields that have been regulated as an adjacent, primary contact or other contact field, new findings of PW within the regulated area do not necessarily indicate that the measures in place are ineffective at mitigating spread.

[91] The Applicant argues that the Management Plan has been remarkably effective at detecting and containing the spread of PW. It notes Mr. Donald's evidence that there have not been any detections of PW attributable to P.E.I. potatoes in any markets outside P.E.I. The Applicant submits that the October 2021 detections were not unexpected, as these detections were in Regulated Fields, and any such field has a documented risk of exposure to PW. Overall, the Applicant asserts, based on the history of PW on P.E.I. and the evidence contained in the work of the Science Branch, that the Minister had no objectively discernible facts before her from which she could form a reasonable suspicion that PW was present on any of the Unregulated Fields.

[92] The Applicant also finds support for its position in its counsel's cross-examination of Mr. Bailey, citing the following questions and answers:

> Q. But the only area that you have any evidence to even suspect potato wart on are the regulated fields, right?
>
> A. I would say that at this point you are correct, but there are many experts that feel that there is likely a low prevalence in the island of potato wart, if not some more extreme views feel that it may be endemic to the island.
>
> …
>
> Q. And you will agree with me that on the remaining 88% of the acreage in PEI, the remaining … roughly 8,300 fields in PEI, there is no evidence of any potato wart present on those fields, right?
>
> A. If I follow your math correctly, then I would say yes, you are correct. But I don't want to make a decision based on, sort of, your off-the-cuff math. But the statement is relatively correct.
>
> …
>
> Q. So, again, they are called non-regulated because CFIA has no evidence that there has been any contact, or reason to suspect that potato wart would be on those fields, right?
>
> A. That is right, but we have not done extensive surveying of those fields to know that for sure.
>
> …
>
> Q. Yes, you agreed with the Science … your Science unit's analysis and conclusion that the current risk mitigation measures were adequate to prevent the spread of potato wart, right?
>
> A. That is correct.
>
> …

Q. Yes, I said the Science department, and you agreed with it, as you have said to me a couple of times here, said that the current regulatory measures were effective at preventing the spread of potato wart, right?

A. That is correct.

Q. So, the only thing that changes at this time is the risk and appetite of the U.S., right?

A. And our risk tolerance is changing as well. If you are referring to the United States, certainly theirs is at a much heightened level, much more heightened level than ours.

(c) *Respondents' position*

[93] The Respondents dispute the Applicant's characterization of the Management Plan as having been "remarkably effective" at containing PW. They argue that, since the initial detection and throughout the time the Plan has been in place, the number of PW detections and the area of implicated land have grown considerably, including detections in every county in P.E.I. Relying on an affidavit affirmed by Ms. Cheryl Corbett, the National Manager of the Plant Health Risk Assessment unit in CFIA's Science Branch, the Respondents note that the area of land regulated under the Management Plan as of August 8, 2022, has grown to 40,616 acres, compared to 7,836 acres in 2009 when the Plan was adopted. Ms. Corbett notes that the October 2021 detections alone increased the regulated area by 10 percent and the number of fields requiring soil sampling by 23 percent.

[94] The Respondents also dispute the Applicant's position that the October 2021 detections should not have been regarded as particularly alarming because they were on Regulated Fields where there is a documented risk of exposure to PW. Mr. Bailey explains that the fact these detections occurred in Category D fields was concerning to CFIA (and APHIS), precisely because they had undergone multiple years of surveillance under the Management Plan and were therefore thought to pose a lower risk of PW transmission. The October 2021 detections did not result from surveillance under the Plan but rather from growers submitting suspect potatoes to CFIA.

[95] Mr. Bailey explains that, following the 2021 detections, CFIA expedited its review of the management of PW that had been initiated after the October 2020 detection. This resulted in the preparation of the PRA and RMD by CFIA staff. Although it did not include data surrounding the October 2021 detections, the Respondents emphasize in particular the following information provided in the PRA:

A. The highest risk pathway for the spread of PW is the planting of infected potato tubers (i.e., seed potatoes);

B. The Management Plan does not impose any requirements for cleaning and disinfection of equipment or vehicles from a Category D field; and

C. The potential economic and trade implications of PW are high, as a single detection can have devastating and far-reaching consequences.

[96] Referencing the RMD, the Respondents highlight the following paragraph in its Executive Summary:

> Following the 2020 and 2021 detections, the CFIA undertook a detailed review of the management of PW and science to update its pest risk assessment. This work identified areas of program limitations and recommended improvements; the scope of the regulated area must increase to address limitations of detection and the seed potato pathway must be further controlled to ensure PW does not spread beyond the province.

[97] Although it canvassed several pest risk management options, ultimately the RMD recommended the use of the Ministerial Order as a means of acting quickly to mitigate the risk of spread of PW from P.E.I. The Memorandum that accompanied the PRA and RMD also identified more than one regulatory option but recommended the use of the Ministerial Order.

(d) *Analysis of Reasonableness of Ministerial Order*

[98] As a starting point in analysing the reasonableness of the Ministerial Order, it is important to repeat that such analysis must be conducted based on the evidence that was before the Minister when the decision was made. As such, there are limits to the usefulness of the evidence of the parties' respective deponents, both in their affidavits and in their cross-examinations, other than of course to the extent they append to their affidavits documentation that was before the Minister. Neither party has challenged the admissibility of the other's affidavits, and I accept that such evidence can be admissible to the Court as background information to assist it in understanding the facts and issues on which the application is based. However, in the absence of a similar evidentiary foundation in the record before the Minister, such evidence cannot form the basis for a conclusion as to the reasonableness of the decision under review.

[99] By way of example, I noted above the Respondents' reference to Mr. Bailey's explanation that the fact the October 2021 detections occurred in Category D fields was concerning to CFIA (and APHIS), precisely because they had undergone multiple years of surveillance under the Management Plan and were therefore thought to pose a lower risk of PW transmission. The Court cannot rely on reasoning offered by Mr. Bailey in his affidavit evidence in assessing the reasonableness of the Ministerial Order. However, the Respondents' submissions also emphasized the following passage in the PRA, which forms the final paragraph under the heading "Risk Rating for Probability of Spread" and subheading "Human-Mediated Spread Potential" in the PRA's Conclusion:

> The management plan does not provide clear guidance on requirements for Category D fields for processing and table stock 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 tour 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.

[100] I read this passage as explaining the same concern as identified in Mr. Bailey's affidavit, which the Respondents submit supports the reasonableness of the Ministerial Order. This reasoning forms part of the record before the Minister, and I will return to it later in my analysis.

[101] As noted above, the Applicant also relies substantially on Mr. Bailey's evidence, as it argues that its counsel obtained admissions from Mr. Bailey in cross-examination that undermine the Respondents' position that the Minister was presented with objectively discernible facts from which she could form a reasonable suspicion of the presence of PW throughout P.E.I. Again, Mr. Bailey's cross-examination was not before the Minister when she made the decision to issue the Ministerial Order. As such, it is difficult to understand how that evidence can influence substantively the Court's assessment of the reasonableness of the decision within the meaning prescribed by *Vavilov*.

[102] Moreover, I am not convinced that Mr. Bailey's evidence supports the position that the Applicant argues it does, i.e. that there was no scientific basis on which to declare the Province infested with PW or to prohibit the movement of P.E.I. seed potatoes to the rest of Canada. While Mr. Bailey agrees with the Applicant's counsel's proposition that there is no evidence to support a suspicion of the presence of PW on Unregulated Fields, he qualifies his testimony by noting that CFIA has not done extensive surveying of Unregulated Fields to know that for sure. I read his answers as related to data confirming PW detections, not as disagreeing with the evidence of the Science Branch in the PRA as to the potential for the lack of restrictions on Category D fields to result in the spread of PW through human-mediated activities.

[103] Similarly, when Mr. Bailey expressed agreement with the Science Branch's conclusion that the current regulatory measures were effective at preventing the spread of PW, he qualified that testimony by explaining that CFIA's risk tolerance was changing. Indeed, when the Applicant's counsel posed this question, he noted that Mr. Bailey had answered it previously. From reviewing the transcript of Mr. Bailey's cross-examination, it appears that the earlier questions surrounded whether Mr. Bailey agreed with the opinions expressed by the Science Branch in Appendix 4 of the Biological Information document dating to May 2021. In addition to noting that the document upon which he was being questioned indicated that it had been superseded, Mr. Bailey explained his understanding that the risk mitigation was considered to be sufficient "at the time". His evidence in relation to the opinion expressed in Appendix 4, about Category 4 fields in particular, reads as follows:

> Q. Okay. And finally, for the category D fields, the current measures appear to appropriately mitigate the risk of spread for the high risk pathways, which were the seed potato tubers and associated soil, right?
>
> A. Yes. Now, there may be a caveat in here that because we found it in the D fields, that it changes some of the risk assessment in D fields, and that may be what is different here.

[104] Again, I do not read Mr. Bailey's cross-examination as disagreeing with the evidence of the Science Branch in the PRA as to the risk of spread of PW from Category D fields.

[105] In support of its position that the issuance of the Ministerial Order was unreasonable, the Applicant asserts that the opinions expressed by the Science Branch in the Biological Information document, and its related conclusions, were not incorporated into the PRA or placed before the Minister. However, as Mr. Bailey noted in his cross-examination testimony, the Biological Information document bears a watermark reading “Superseded by request 2021-051”, which I understand to be a reference to the PRA. This is consistent with Ms. Corbett’s explanation in her affidavit as to the intention that information in the Biological Information document related to the establishment and spread of PW be integrated into the PRA.

[106] While Appendix 4 is not included in the PRA, the opinions expressed in the Conclusion sections of both the Biological Information document in the PRA appear consistent, although the PRA adds the statement 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 that are only restricted in Category A, B or C fields. To the extent it is the Applicant’s position that the Minister was deprived of relevant information that militated against issuance of the Industrial Order, I find no merit to that position.

[107] In challenging the reasonableness of the Ministerial Order, the Applicant also relies on statements made in the PRA itself, to the following effect;

A. The soil sampling required through the Phytosanitary Export Certification Program complements domestic soil sampling related to the Management Plan. By increasing the total number of soil samples and number of fields sampled, this increases the confidence that PW is absent in Unregulated Fields and the confidence in early detection in any fields that have a low density of spores;

B. Unregulated Fields, which have no history of connection to an Index Field, represent a risk significantly lower than Regulated Fields;

C. It can take many years of monitoring and testing to detect the presence of PW in fields that have been regulated as an adjacent or primary contact or other contact field. Therefore, new findings of PW within the regulated area do not necessarily indicate that the measures in place are ineffective at mitigating spread;

D. Given the current mitigation measures in place to prevent the domestic spread of PW, the human-mediated potential spread of this pathogen is low;

E. Within the context of the Management Plan and export certification, the potential risk of human-mediated spread from regulated areas in P.E.I. is greatly reduced for all pathways. The rate of detection of PW on P.E.I. has remained fairly consistent over the past 20 years, with very few detections that have no linkages to a previous Index Field.

[108] The difficulty with the Applicant’s position is that it amounts to a request that the Court reweigh particular evidence that was before the Minister. However, this is not the Court’s role in judicial review of administrative decision-making (see *Vavilov*, at paragraph 125; *Andrews v. Public Service Alliance of Canada*, 2022 FCA 159, 2023 C.L.L.C. 220-017, at paragraph 29). Rather, as canvassed earlier in these Reasons, the

Court's task is to assess whether the decision is justified, transparent and intelligible in the context of the legal and factual constraints that bear upon the decision.

[109] As previously noted, the Ministerial Order itself does not contain reasoning underlying a reasonable suspicion of the presence of PW in Unregulated Fields, and the parties agree that the Court should have recourse to the record before the Minister in an effort to understand and assess such reasoning. The Applicant refers in particular to the following paragraph of the Memorandum:

> Due to the impact of this pest, the size of the land where PW has been detected and the need to act quickly to control the human-assisted movement of the pest, a [Ministerial Order] is the recommended option.

[110] The Applicant accepts that the impact of PW is severe. However, it argues that the suggestion that the size of the land where PW has been detected supports the issuance of the Ministerial Order is a mischaracterization of the facts, as such land represents only 0.4 percent of the total approximately 350,000 acres of potato fields on P.E.I. The Applicant also disputes that there is a need to act quickly to control the human-assisted movement of PW.

[111] While I appreciate that the briefing package placed before the Minister culminates with the Memorandum, it is a six-page document that is clearly summary in nature and cannot be read without further reference to the larger briefing package including the PRA and RMD. In relation to the size of the land where PW has been detected, the PRA contains the figure to which the Applicant refers, i.e., that such land makes up approximately 0.4 percent of P.E.I. potato production land. Accordingly, this information was before the Minister. The RMD states that each new detection dramatically increases the resources required to regulate larger restricted areas and testing of soil samples to maintain market access. It also explains that the October 2021 detections increased the restricted area by 10 percent and the number of fields requiring soil sampling by 23 percent. Considering the briefing package as a whole, I cannot conclude that the Memorandum's reference to land size represents mischaracterized or misleading information.

[112] Similarly, the Memorandum's reference to the need to act quickly to control the human-mediated spread of PW must be read in conjunction with the other briefing documents. In particular, I return to the paragraph quoted above from the PRA's Conclusion section under the heading "Risk Rating for Probability of Spread" and subheading "Human-Mediated Spread Potential". It is clear from that paragraph that the Science Branch was expressing concern about risks arising from the manner in which the Management Plan regulated Category D fields. As Category D fields were subject to surveillance activities but not restrictions that would prevent the movement of soil or soil on equipment and vehicles, and given that the effectiveness of surveillance activities is subject to the limits of detection of soil and visual inspections, the Science Branch concluded that Category D fields could be harbouring and spreading PW to other fields through human-mediated activities. The RMD in turn describes the PW situation as time sensitive and raises concern that delays can allow PW to continue to spread. In the context of the concerns raised in the PRA and RMD, I find no basis to take issue with the Memorandum's reference to the need to act quickly.

[113] I find the expression of these concerns, particularly as set out by the Science Branch in the PRA, 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 P.E.I. 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.

[114] In arriving at this conclusion, I am conscious of an additional argument advanced by the Applicant in its oral reply submissions at the hearing of this application, to the effect that language in the RMD represents the wrong test for determining whether it was available to the Minister to issue the Ministerial Order. The Applicant observes that, in the introductory section under the heading "Risk management considerations", the RMD contains the following paragraph:

> Notwithstanding the current activities, over the past 21 years, potato wart has continued to be detected in new fields within PEI. Following the analysis of the PW Management Plan against seed farm detections in 2014 and 2020, and the ongoing 2021 investigation, the CFIA cannot rule out that PW is present in other fields in PEI and, as a result, additional fields that have been exposed to potato wart through production practices. The CFIA therefore cannot, at present, confirm that each county in PEI is still maintained as a pest free area as described in ISPM [International Standards for Phytosanitary Measures] 4, or for an area of low pest prevalence as described in ISP[M] 22. PW has been detected in all three counties in PEI and each county has multiple fields regulated as a high risk for potato wart. Even the least implicated county, Kings, has one infested field and more than 25 fields that require restrictions, monitoring and surveillance for decades. (Applicant's emphasis.)

[115] As the test under subsection 15(3) of the Act for issuance of a Ministerial Order is a reasonable suspicion of the presence of PW, the Applicant argues that, in referencing CFIA's inability to rule out the presence of PW, the above paragraph employs the wrong test.

[116] I accept that the "cannot rule out" language does not accurately capture the reasonable suspicion standard applicable under subsection 15(3). However, as explained in *Vavilov* (at paragraph 102), "[r]easonableness review is not a 'line-by-line treasure hunt for error'". Elsewhere in the RMD, in analysing the risk management option of issuing the Ministerial Order, it expresses the conclusion that the current surveillance and management methods have proven to be insufficient, such that proceeding with the status quo is no longer considered effective in preventing the spread of PW. This conclusion is consistent with the concern expressed in the PRA that Category D fields could be harbouring and spreading PW to other fields through human-mediated activities. I read the language in the RMD highlighted by the Applicant as another articulation of this concern, not as intended to articulate the applicable test.

[117] In conclusion on this issue, I find that the Applicant's arguments do not undermine the reasonableness of the decision to issue the Ministerial Order. I note that this issue, as articulated by the Applicant, includes whether the ongoing operation of the Ministerial Order is reasonable. The Applicant has not cited any authority for the Court to review the ongoing effect of an administrative decision after it is made, as distinct for instance from reviewing a discrete decision not to reconsider a previous decision

following a request to do so or some other triggering event. Moreover, I understand from the record before the Court that the 2021 Investigation has not yet been completed. I find no basis to conclude that the ongoing operation of the Ministerial Order is unreasonable.

F. *Were the Domestic Movement Requirements reasonable (and is their ongoing operation reasonable)?*

[118] Subsection 3(1) of the Ministerial Order prohibits the movement of a "regulated thing", including seed potatoes, out of the "infested place" unless previously authorized by a CFIA inspector. The Domestic Movement Requirements, issued on February 22, 2022, provide the conditions under which an inspector can provide such authorization. The Applicant therefore submits that the Requirements take their regulatory authority from the Ministerial Order and, if the Ministerial Order is not authorized by law or is unreasonable, the Requirements must similarly be set aside.

[119] While I find no flaw in this argument, I have determined the Ministerial Order to be reasonable, and the Domestic Movement Requirements are therefore not impugned. However, the Applicant also raises specific arguments surrounding the Record of Decision (ROD) and accompanying Memorandum to the President of CFIA dated February 15, 2022 (Memo), which were prepared in support of the issuance of the Domestic Movement Requirements.

[120] In addressing the criteria that should be used for the evaluation of case-by-case requests for the movement of seed potatoes out of P.E.I., the ROD canvases three options and recommends Option B, involving the application of criteria based on what is described in the Memo as an international standard, "ISPM 10: Requirements for the Establishment of Pest Free Places of Production and Pest Free Production Sites" (ISPM 10). The ROD recommends against adopting another option (Option C), which would authorize all movement of seed potatoes from non-restricted areas of P.E.I. (i.e., Unregulated Fields). The Applicant notes that, in arriving at its recommendations, the ROD makes the following statements about Options B and C, which the Applicant argues to be erroneous or misleading:

> Option C … Does not align with the risk identified in CFIA's Plant Health Assessment for Potato Wart 2021-051 (Nov 2021)
>
> …
>
> Option C … Does not address concerns related to the risks associated with seed movement
>
> …
>
> Option B … Aligns with the risk identified in the CFIA's Plant Health Assessment for Potato Wart 2021-051 (Nov 2021)

[121] The Applicant submits that these negative comments about Option C, and the positive comment about Option B, are contrary to the Science Branch's conclusions that the risk associated with Unregulated Fields is significantly lower than for Regulated Fields and that current mitigation measures appear to appropriately mitigate the risk of spread. I have addressed the Applicant's arguments related to this evidence in my above analysis of the reasonableness of the Ministerial Order and, for the same

reasons, find that these arguments do not undermine the reasonableness of the Domestic Movement Requirements.

[122] The Applicant also notes the statement, in the Summary portion of the Memo, that seed potatoes are considered a high-risk pathway for the movement and establishment of PW as per the PRA. The Applicant argues that this statement misrepresents the conclusions of the Science Branch, which stated in the PRA that seed potatoes are a high-risk pathway for spreading PW only in the absence of mitigation measures. However, as explained in my analysis of the Applicant's arguments surrounding Ministerial Order, the PRA also raises concerns about the effectiveness of the mitigation measures that apply to Category D fields. Again, I find that this argument does not undermine the reasonableness of the Domestic Movement Requirements. Nor is there any basis to conclude that the ongoing operation of the Requirements is unreasonable.

G. *Was the Applicant denied procedural fairness with respect to the First Suspension, Second Suspension, and Ministerial Order?*

[123] The Applicant asserts that it was owed (and denied) the common law duty of procedural fairness in connection with the Respondents' decision-making. As explained earlier in these Reasons, based on the outcome of the mootness analysis, I will consider the parties' procedural fairness arguments only in relation to the Ministerial Order.

(1) Scope of duty of procedural fairness

[124] The Applicant refers the Court to the explanation in *Canadian Pacific Railway*, at paragraphs 54–56 that a court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the factors identified in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (*Baker*). The ultimate question for the Court is whether the Applicant knew the case to meet and had a full and fair chance to respond.

[125] The Respondents do not dispute these principles or their application to the case at hand. However, they argue that the *Baker* factors suggest that the degree of procedural fairness owed to the Applicant in this case was minimal. Referencing the factors prescribed by *Baker*, the Respondents submit the following:

A. Nature of decision being made and process followed in making it—The more a decision-making process resembles judicial decision-making, the more likely procedural protections closer to a trial model will be required (see *Baker*, at paragraph 23). In the case at hand, the impugned decision was not made following an adversarial or adjudicative process, and the decision did not target the Applicant specifically. Rather, it was a decision of general application pursuant to the Respondent's statutory mandate with respect to the management of pests. The decision was also made on an urgent basis in response to rapidly changing circumstances, lessening the degree of procedural fairness required (see *Miel Labonté Inc. v. Canada (Attorney General)*, 2006 FC 195, 289 F.T.R. 43, [2006] 4 F.C.R. D-37, at paragraph 70);

B. Nature of statutory scheme—The purpose of the 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 (see the Act, at section 2). No procedural duties are specified by the legislation with respect to decisions of the nature involved in this case. The Act affords CFIA a high degree of discretion with respect to the appropriate management of pests, which supports a lower degree of procedural fairness (see *Friends of Point Pleasant Park v. Canada (Attorney General)*, 2000 CanLII 16708, 198 F.T.R. 20 (F.C.T.D.), at paragraph 37);

C. Importance of decision to individuals affected—While the Applicant is impacted by potato pest risk management decisions, it is not a party to the impugned decision;

D. Legitimate expectations of person challenging the decision—CFIA did not create any legitimate expectations by making assurances about the process it would follow and did not guarantee any particular outcome to the Applicant. At most, CFIA committed to meeting with the Applicant regularly to keep it informed;

E. Choices of procedure made by the agency itself—As Canada's national plant health regulator, CFIA was best suited to determine what procedures were appropriate in the circumstances. At most, the duty of fairness in this case required that parties likely to be impacted by the decision were notified in advance of the decision and given an opportunity to be heard where time constraints allowed.

[126] The Applicant has not made submissions in response to these arguments by the Respondents. I accept these arguments and find that the applicable duty of procedural fairness is at the lower end of the spectrum.

(2) Analysis of whether duty of procedural fairness was met

[127] The Applicant submits that it was denied even the most basic level of procedural fairness, as it was advised of the Ministerial Order via a telephone call from the Minister at approximately 8:45 p.m. AST on November 21, 2021, the day the Ministerial Order went into effect. As such, the Applicant argues that it was given no meaningful notice or opportunity to respond. It also argues that any such notice or opportunity would have been meaningless, as CFIA had taken the underlying decision to prohibit the domestic movement of seed potatoes over three weeks earlier on October 29, 2021.

[128] I understand the latter submission to be a reference to the fact that the Situation Report for October 29 and 30, 2021, reflects an intention on the part of CFIA to accede to demands advanced by the US. However, as explained earlier in these Reasons in analysing another of the Applicant's arguments based on this document, the authority and decision to issue the Ministerial Order was that of the Minister, not that of CFIA. I therefore disagree that any notice or opportunity afforded to the Applicant prior to issuance of the Ministerial Order on November 21, 2021, would have been meaningless.

[129] As to whether the Applicant was afforded such notice or opportunity, the Respondents dispute the Applicant's assertion that it was first advised of the Ministerial Order on the day it was issued (November 21, 2021). In support of their position, the Respondents submit the following:

A. Situation Reports for October 26 and 28, 2021, reflect that, following the October 2021 detections, CFIA established a regular series of meetings with the Canadian industry, the Applicant, and the Province, including an October 25, 2021, meeting with the Applicant and the Province, the purpose of which was to provide an update on the status of the investigation and to discuss market access concerns;

B. Mr. Bailey's affidavit states that during a meeting with the Applicant on November 16, 2021, CFIA raised the possibility of a Ministerial Order. This possibility was further discussed with the Applicant on November 18 and 19, 2021; and

C. Mr. Bailey's affidavit also states that on November 16, 2021, CFIA sent an email to various members of the Applicant, attaching the Biological Information document and the draft RMD. Ms. Corbett's affidavit states that CFIA also shared the draft PRA with the Applicant on November 18, 2021.

[130] I explained earlier in these Reasons that, when a court is assessing the reasonableness of an administrative decision, that review must be conducted based on the evidence that was before the decision maker. However, when analysing a procedural fairness argument, other evidence is admissible to assist the Court in understanding the process that was followed and thereby assessing whether the requisite fairness was afforded (see *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189, at paragraphs 13–14 and 25). As such, the affidavit evidence of Mr. Bailey and Ms. Corbett is admissible for this purpose.

[131] The Applicant has not provided any evidence or argument in reply to the Respondents' evidence and submissions surrounding communications with the Applicant in the period leading to the issuance of the Ministerial Order. I accept the Respondents' evidence and find that those communications satisfy the applicable duty of procedural fairness in relation to the Ministerial Order.

V. Conclusion and Costs

[132] The effect of the above analyses is that the Court's Order will dismiss the Applicant's application for judicial review. As previously explained, while some of the Applicant's arguments in relation to the Suspensions were successful, such determinations involved adjudication of an issue that is now moot and will therefore not give rise to any relief in the Order.

[133] Each of the parties claims costs in the event of its success in this application. At the hearing, counsel advised that they would make an effort to agree on quantification of costs, to be awarded to the successful party, and inform the Court of same through post-hearing written submissions. The parties were not able to reach such agreement, and each provided its own written submissions on how the Court should address costs.

[134] In addition to arguments on quantification, those submissions focused significantly on whether the Respondents' acknowledgement at the hearing, that the Suspensions are no longer in effect, should affect the Court's disposition of costs. The Applicant argues that this acknowledgement should militate against the Respondents in the Court's costs determination, as it represented a different position than the Respondents were previously taking in this litigation, resulting in significant resources having been expended by the Applicant unnecessarily in challenging the Suspensions. The Respondents disagree with this characterization of their position, arguing that it had always been their position that the Suspensions were no longer in effect and that it was the Applicant's decision to include those decisions in their application that unnecessarily complicated the matter.

[135] I have considered these arguments and find that the outcome of the issues surrounding the Suspensions should affect the disposition of costs, although not particularly in the manner that either of the parties suggests.

[136] While the Court has dismissed this application, the parties have met with divided success on the various procedural and substantive issues that have been determined. The Respondents have prevailed in their arguments related to the Ministerial Order and Domestic Movement Requirements, but the arguments related to the First Suspension and Second Suspension have been decided principally in favour of the Applicant. Although I found the Suspensions to be moot, I exercised my discretion to adjudicate the dispute surrounding their legal authority and, but for their mootness, the Applicant's challenges to the Suspensions would have resulted in divided success in the outcome of the application. It is therefore my decision, in the exercise of the Court's discretion, that each party should bear its own costs.

JUDGMENT in T-1315-22

THIS COURT'S JUDGMENT is that:

1. The Applicant is granted leave under Rule 302 to seek judicial review of more than one decision.

2. The Applicant's application for judicial review is dismissed.

3. No costs are awarded on this application.